

# HEEDING THE LESSONS OF HISTORY: THE NEED FOR MANDATORY RECORDING OF POLICE INTERROGATIONS TO ACCURATELY ASSESS THE RELIABILITY AND VOLUNTARINESS OF CONFESSIONS

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## I. INTRODUCTION

Calls to electronically record interrogations are almost as old as the technology itself. For more than seventy years, reformers from all ranks, including some from law enforcement, have seen recording requirements as a way to eliminate secrecy in the stationhouse.<sup>1</sup> Despite these many calls, to date only two courts—the state supreme courts of Alaska<sup>2</sup> and Minnesota<sup>3</sup>—and two state legislatures—those of Illinois<sup>4</sup> and Maine<sup>5</sup>—have imposed such requirements.

In the post-DNA age, however, and particularly in the past decade, as the number of wrongful convictions based on false confessions has continued to climb, concerns about the reliability of confession evidence have led to a renewed push for recording requirements.<sup>6</sup> And for the first time, this much-needed reform appears to be gaining traction, not only among courts and legislatures, but among police and prosecutors.

In this Article, we will revisit the history of efforts in this country to

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1. See, e.g., CHARLES O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 153 (4th ed. 1976) (recognizing that the recorded voice is "[o]bviously" the best evidence of what occurred during an interview because "[t]he words themselves are there; the tones and inflection provide the true meaning; the author of the statement is identifiable"); Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 233, 240-43 (1977) (discussing the need for objective recording of confession proceedings); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1014, 1017-18 (1934) (discussing how concern with the "third-degree methods" used by magistrates who interrogated suspects out of the public eye prompted Pound to demand that a method be established to "tak[e] down the evidence so as to guarantee accuracy"); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21, 44 (1961) (noting that the absence of an electronic recording "makes disputes inevitable about the conduct of the police and, sometimes, about what the prisoner has actually said").

2. *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985).

3. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

4. In July 2003, Governor Rod Blagojevich signed into law House Bill 223, which will require, beginning in July 2005, that Illinois law enforcement officers electronically record all custodial interrogations of suspects in homicide cases. H.B. 0223, 93d Gen. Assemb., Reg. Sess. (Ill. 2003).

5. L.D. 891, 121st Leg., 1st Reg. Sess. (Me. 2004).

6. See, e.g., Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 751 (1997) (stating that wrongful convictions based on false confessions will "needlessly continue" without electronic recording of confessions because it is difficult to "analyze interrogation and confession transcripts, and sort them correctly into two piles, true and false").

require electronic recording of interrogations. We hope to give new life to the voices of these reformers, particularly those from the pre-*Miranda* era, so that they will resonate in the modern day struggle to eliminate secrecy in the interrogation process. Part II of this Article will highlight the voices of several of these reformers and the three main concerns that have animated their calls for recording: (1) reducing the risk of false confessions by eliminating abusive police interrogation practices, (2) improving the administration of justice by enabling factfinders to make accurate assessments of the voluntariness and trustworthiness of confession evidence, and (3) bettering the relationship between police officers and the communities they serve. Part III will summarize the role that the United States Supreme Court has played in perpetuating secrecy in the interrogation process. Finally, Part IV will assess the damage that has been caused by the failure to listen to the voices of these reformers, damage that could have been avoided if we had been better listeners. In our conclusion, we look to the future with optimism that the day will finally come when recording interrogations is standard police practice in the United States.

## II. VOICES FROM THE PAST

One of the earliest groups to recognize the value that neutral, contemporaneously made records could have in the law enforcement context was the National Commission on Law Observance and Enforcement (the Wickersham Commission). In its *Report of Lawlessness in Law Enforcement*, published in 1931, the Commission expressed its disapproval of the “third degree” tactics being used by police in interrogation rooms.<sup>7</sup> These practices, including all “methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime,”<sup>8</sup> were considered unacceptable for many reasons, including: increased potential for false confessions; less effective administration of criminal justice, both by law enforcers and in the court system; and damaged relations between police and the public.<sup>9</sup> However, the Commission admitted that, because of the secretive nature of third degree tactics, their use was widespread.<sup>10</sup> One of the primary recommendations the Commission gave on how to bring about reform was

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7. WICKERSHAM COMM’N, WICKERSHAM COMMISSION REPORTS: NO. 11: REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3 (Patterson Smith 1968) (1931).

8. *Id.*

9. *Id.* at 181-92.

10. *Id.* at 4.

to make records during the interrogation of exactly what occurred.<sup>11</sup> This record would “furnish a foundation of dependable information,”<sup>12</sup> and enable the community, including the press, to “know, when, how, and to what extent” abuses were occurring during interrogations.<sup>13</sup> Making interrogations a matter of public record would also act as a check against denials of the abuse by police.<sup>14</sup>

While this first call for the mandatory creation of neutral records was not heeded, the justifications for such a procedure have not changed. Indeed, in the over seventy years since the Commission’s report was published, these same reasons—preventing false confessions, increasing the effective administration of criminal justice, and improving relationships between the police and the public—have consistently served as a foundation for the arguments laid out by the numerous legal scholars and law enforcement officials who have advocated for a rule requiring electronic recordings to be made during all custodial interrogations.

#### A. Preventing False Confessions

Scholars have long argued that confessions given in secret are too likely to lack the requisite voluntariness and reliability to be admissible in court. One year after the Commission’s report was published, Edwin Borchard, in *Convicting the Innocent*, his classic study of wrongful convictions, directly addressed how electronic records of interrogations ensured such voluntariness and reliability.<sup>15</sup> Borchard asserted that the physical and psychological tactics used by police during interrogations

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11. *Id.* at 192.

12. *Id.*

13. *Id.* at 191. Many of the leading scholars of the day believed that the best way to eliminate the third degree was to get suspects out of the hands of the police as soon as possible by requiring that police officers, immediately upon arresting a suspect, bring that suspect to a magistrate to be interrogated. *See, e.g., id.* at 5; Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1228-31 (1932); Pound, *supra* note 1, at 1017; *see also* Yale Kamisar, *Kauper’s “Judicial Examination of the Accused” Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 15 n.3 (1974) (citing other scholars calling for judicial interrogations). In response to concerns that magistrates might abuse their power by exerting undue pressure or by asking improper questions of suspects, Paul Kauper argued that it was necessary to maintain a “complete record” of the interrogation to keep such abuses in check. Kauper, *supra*, at 1248.

14. Kauper, *supra* note 13, at 1248.

15. EDWIN BORCHARD, *CONVICTING THE INNOCENT* 371 (1932) (suggesting that only those statements of an accused that were made in the presence of adequate safeguards should be admissible).

“subject[] accused persons to far more brutal and intolerable ordeals than any obligation to tell the truth in open court.”<sup>16</sup> Such ordeals often led suspects to give in to the demands of the police, forcing them to make incriminating statements.<sup>17</sup> The fact that such confessions both violated the suspect’s right against self-incrimination and lacked sufficient reliability, yet were admissible in court, concerned Borchard.<sup>18</sup> The solution he devised was to make “phonographic records [of interrogations], which shall alone be introducible as evidence of the prisoner’s statements.”<sup>19</sup> Such a contemporaneously made record would provide factfinders with an understanding of the circumstances under which the confession was made, thus ensuring that the defendant’s rights had been respected.

Borchard was not alone in his early skepticism of police conduct in the interrogation room. Roscoe Pound, in 1934, expressed a similar wariness of interrogations conducted out of the public eye, calling for the “substitut[ion of] a lawful and safeguarded proceeding for [the current] unlawful and unguarded one.”<sup>20</sup> Like Borchard, Pound believed that a method must be established to take “down the evidence so as to guarantee accuracy,” which would then allow the court to understand what occurred during the interrogation.<sup>21</sup>

Tactics in the interrogation room involving physical abuse were banned after the Supreme Court’s holding in *Brown v. Mississippi*<sup>22</sup> in 1936.<sup>23</sup> However, the demise of the physical aspects of the third degree did not bring an end to coercive police practices; police officers simply relied to a greater extent on sophisticated psychological tactics to obtain confessions.<sup>24</sup> Even the Wickersham Commission recognized that these psychological methods—including suggestion, deception, and the veiled use of threats and promises of leniency—contained coercive factors that could

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16. *Id.*

17. *See id.* (referring to several instances in which “a species of third degree or undue influence produced ‘confessions’ from the accused”).

18. *See id.* at 370-71 (stating that a suspect “deserves the fullest consideration before action is taken to repeal the privilege” against self-incrimination and that police sometimes use duress “to exact ‘confessions’” knowing the privilege could be used, thereby violating the suspect’s privilege against self-incrimination and exacting an unreliable confession).

19. *Id.*

20. Pound, *supra* note 1, at 1018.

21. *Id.* at 1017.

22. *Brown v. Mississippi*, 297 U.S. 278 (1936).

23. *Id.* at 286-87.

24. *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

lead to false confessions.<sup>25</sup>

In the 1980s and '90s, research by Saul Kassin, Richard Ofshe, and Richard Leo has confirmed that the common psychological interrogation techniques can erode a suspect's resistance to the point that even an innocent person will "conclude that confession is both a rational choice and his best option."<sup>26</sup> Leo and Ofshe concluded in their study that electronic recordings of interrogations are the only viable way to combat the power that these confessions have in the courtroom because they allow factfinders, prosecutors, and experts the ability to determine for themselves the reliability of the confession.<sup>27</sup> Only by understanding the circumstances under which the statement was made and viewing the suspect's "post-admission narrative of the crime," can those in the courtroom understand the extent of the defendant's actual culpability.<sup>28</sup>

### B. *Increasing the Effective Administration of Justice*

The Wickersham Commission expressed concern that confessions, especially those made during unmonitored police interrogations, resulted in less incentive for detectives and prosecutors to seek out corroborating evidence because the confession alone, in most cases, is sufficiently persuasive evidence for a judge and jury to convict.<sup>29</sup> As a consequence, courts were forced to rely heavily on swearing contests between the officers

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25. See WICKERSHAM COMM'N, *supra* note 7, at 4 (discussing police use of various psychological tactics).

26. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 195 (1997).

27. *Id.* at 239.

28. *Id.* Even Paul Cassell, who has disputed the extent of the false confession problem and criticized Ofshe and Leo's work, *e.g.*, Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1125-32 (1997) [hereinafter Cassell, *Balanced Approaches*], recognizes the need to record interrogations in order for courts to make accurate and reliable determinations of voluntariness, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486-89 (1996) [hereinafter Cassell, *Miranda's Social Costs*]. For recent discussions on how videotaping can assist in determinations on the voluntariness and reliability of confessions, see Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 339-45 (2001); Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1191-92.

29. See WICKERSHAM COMM'N, *supra* note 7, at 187 ("The third degree accustoms police and prosecutors to proving their case out of the prisoner's mouth.").

and suspects to determine the reliability of the confession. The primary question of whether the suspect was guilty was too often being overshadowed and complicated by disputes over whose version of what occurred in the interrogation room was more credible.<sup>30</sup> Later, legal scholars and courts recognized that relying on conflicting testimonial accounts is problematic for a variety of reasons and ultimately results in confusion and wasted court time and resources.

Charles O'Hara, a former criminal investigator, encouraged the use of electronic recordings in the interrogation room as a way to assist law enforcement officials.<sup>31</sup> In his well-known police investigation manual, *Fundamentals of Criminal Investigation*, which was written in 1954, O'Hara praised electronic recordings of interrogations as the most accurate and least intrusive way to keep records of what occurred during the interview.<sup>32</sup> Unlike relying on memory, which is unreliable, on written notes, which disrupt the flow of the interview and are incomplete, or on a stenographer, who intrudes on the privacy of the interrogation, taped records capture everything that was said without chilling the suspect's decision to confess.<sup>33</sup> According to O'Hara, an accurate account of a suspect's confession actually proved invaluable in helping police get suspects to voluntarily confess. After extensive questioning, suspects' "elaborate alibis and excuses" tend to change; confronting the suspect with an earlier recording containing inconsistencies and contradictions, O'Hara had found, usually brought the suspect "to appreciate the futility of deception" and voluntarily confess.<sup>34</sup> Such records also aid police in nabbing guilty accomplices, who are often induced to confess after actually hearing their coconspirators implicate them.<sup>35</sup> And in the courtroom, just as recorded interrogations can protect suspects, they can also protect officers; a recording is integral for when a suspect recants his confession, refuses to formally confess at all, or falsely claims he was subjected to police abuse.<sup>36</sup>

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30. See *id.* at 189 (stating that the third degree shifted the focus from the issue of guilt to the issue of maltreatment).

31. O'HARA, *supra* note 1, at 152-58.

32. *Id.* at 152-53.

33. *Id.*

34. *Id.* at 155.

35. *Id.* at 156.

36. See *id.* at 155 ("If the [suspect] later refuses to make a formal confession or changes his 'story,' the recording can serve as evidence."). For more recent discussion of the ways that videotaping benefits law enforcement officials, see WILLIAM A. GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES 106-54 (1992); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. &

The dangers and problems associated with courts relying solely on swearing matches were articulated by Yale Kamisar in 1977, in his article, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*.<sup>37</sup> Kamisar compared a court's dependence on testimonial evidence to determine what occurred during an interrogation with hearing a case on appeal by depending on nothing "but each lawyer's own recollection and interpretation of the critical events at trial."<sup>38</sup> Using the *Brewer* case to prove his point, Kamisar illustrated how the conflicting testimony that one officer gave the two times he was on the stand sent the court into disarray.<sup>39</sup> Unable to rely on the officer's testimony as "the gospel truth," as is routinely done, the ultimate record was pervaded with "gaps, inconsistencies, and confusion."<sup>40</sup> Yet, according to Kamisar, "[i]n all likelihood the use of a recording device, a tiny administrative and financial burden, would have spared the state the need to contest the admissibility of Williams's disclosures in five courts for eight years."<sup>41</sup>

Both the American Law Institute and the National Conference of Commissioners on Uniform State Laws have recognized the inevitability of disputed testimony in cases involving confessions made during interrogations, whether caused by untruthful witnesses or the inherent tendency for people to have "different recollections or interpretations of the events which transpired."<sup>42</sup> Therefore, since the mid-1970s, these manuals have viewed taping interrogations as "critical" to the "protective scheme" of the criminal procedural process.<sup>43</sup> For over thirty years, the guidelines in both manuals have required that, whenever a person is in custody, "[t]he information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device whenever feasible and in any case where questioning occurs at a place of detention."<sup>44</sup>

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CRIMINOLOGY 621, 683 (1996).

37. Kamisar, *supra* note 1.

38. *Id.* at 242.

39. *Id.* at 233-35.

40. *Id.* at 240.

41. *Id.* at 238.

42. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 cmt., at 346 (1975); *see also* UNIF. RULES OF CRIMINAL PROCEDURE § 243 (Proposed Final Draft 1974) (setting forth the proper procedure for questioning an individual regarding an offense).

43. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 42, § 130.4 cmt., at 346.

44. UNIF. R. OF CRIM. P. § 243. More recent scholars have taken note of the benefits that videotaped interrogations can have in the courtroom. *See, e.g.*, Cassell, *Miranda's Social Costs*, *supra* note 28, at 488 ("[S]ome of the most detailed assessments



Two state supreme courts have also formally recognized the problems inherent in relying on testimony regarding the circumstances of the interrogation. Both the Alaska and Minnesota Supreme Courts found that electronic records of what occurred during an interrogation were the only way for factfinders to reliably determine the circumstances surrounding a confession, and the courts therefore created mandatory electronic recording requirements.

In 1985, in *Stephan v. State*,<sup>45</sup> the Alaska Supreme Court held that recording interrogations was necessary as a due process right under the Alaska Constitution.<sup>46</sup> Such a record allows the suspect to present a more complete defense by providing “an objective means for him to corroborate his testimony concerning the circumstances of the confession.”<sup>47</sup> The rule also allows the courts to avoid the frustration of relying on human memory, which is always incomplete and subjective.<sup>48</sup>

In 1994, in *State v. Scales*,<sup>49</sup> the Minnesota Supreme Court followed Alaska’s lead and recognized the necessity of recording interrogations for many of the same reasons.<sup>50</sup> Admitting that, currently, “the trial and appella[te] courts consistently credit the recollections of police officers regarding the events that take place in an unrecorded interview,”<sup>51</sup> the court relied on its “supervisory power to insure the fair administration of justice,” to create a rule requiring electronic recordings to be made during

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of voluntariness have come in cases of recorded interrogations, which permitted judges to parse implicit promises and threats made to obtain an admission. Recording also allows a review of police overbearing that might not be revealed in dry testimony.”); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1, 45 (1970) (“[T]ape recording the entire interrogation session might resolve the problems of selective recordation or inaccurate reconstruction of the events occurring in the interrogation room.”); Thomas Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, CBA REC., Apr. 2003, at 30, 31-32 (“[Q]uestioning of suspects in a law enforcement facility can easily be videotaped, so that there need be no later swearing match about what was said and done—it’s all on tape.”); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confession*, 32 HARV. C.R.-C.L. L. REV. 105, 154-55 (1997) (noting that such tapes will “enable courts, possibly with the aid of expert testimony, to make more informed judgments as to whether interrogation methods used in a particular case are likely to lead to false confessions”).

45. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

46. *Id.* at 1159.

47. *Id.* at 1161.

48. *Id.*

49. *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

50. *Id.* at 592.

51. *Id.* at 591.

all custodial interrogations.<sup>52</sup> The creation of this type of accurate and objective record was the only way for the defendant to sufficiently “challenge misleading or false testimony.”<sup>53</sup>

*C. Improved Relations Between Police and the Public*

The Wickersham Commission’s belief—that by showing the public what occurs inside the interrogation room, including “when, how, and to what extent . . . abuses are [being] perpetrated,” the community can demand that higher standards be met<sup>54</sup>—has been reinforced by later legal scholars. In 1961, Bernard Weisberg argued that recording interrogations would greatly improve interrogation techniques by making courts and legislatures aware of the methods that police actually use during these secret interviews.<sup>55</sup> Such knowledge would empower these bodies to become more informed about current problematic tactics, and then to clarify and develop more specific rules regarding proper police behavior, in turn giving police clearer guidance on where the line for acceptable behavior is drawn.<sup>56</sup> Allowing tape recorders and cameras to be used in police stations would also force police to keep their own behavior in check.<sup>57</sup> This would guard against both “obvious abuses” and the well-intentioned officer, not “any more brutal than the rest of us,” who finds that his “natural indignation at crimes of violence, his position of relative sophistication and control over the prisoner, the absence of disinterested observation and, above all, the frustration of suspended judgment all lead him to justify the use of means which would be rejected if exposed to public scrutiny.”<sup>58</sup> Public trust of the police would also increase, because the public would know that police are no longer scared to expose their actions.<sup>59</sup>

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52. *Id.* at 592.

53. *Id.* at 591.

54. WICKERSHAM COMM’N, *supra* note 7, at 191.

55. Weisberg, *supra* note 1, at 46.

56. *Id.*

57. *See id.* at 45 (stating that making a record would enable a factual discussion about actual interrogation proceedings, which would help to control police abuse by showcasing their behavior).

58. *Id.*

59. *Id.* at 46.

### III. THE ROLE OF THE UNITED STATES SUPREME COURT IN EXTENDING THE REIGN OF SECRECY IN THE INTERROGATION ROOM

In 1961, Bernard Weisberg and Fred E. Inbau, a Northwestern University law professor who reformed police practices in the wake of the Wickersham Commission report by training officers to use psychological interrogation methods instead of the third degree,<sup>60</sup> squared off in a debate on police interrogation in the pages of the *Journal of Criminal Law, Criminology & Police Science*.<sup>61</sup> In many ways, this debate not only framed the United States Supreme Court's brief period of heightened concern with psychological interrogation, but also framed the struggle to require recording of police interrogations for the next forty years.

To Inbau, interrogation was a practical necessity because many crimes could not be solved without it.<sup>62</sup> He argued that the key to a successful interrogation was privacy because it is a necessary precondition to a confession, and without it, suspects would be less likely to confess.<sup>63</sup> Opening the interrogation process to public scrutiny—for example, by allowing an attorney to sit in with a suspect or by requiring prompt delivery of suspects to magistrates for questioning—would cripple the ability of police to obtain confessions.<sup>64</sup> To Inbau, such outside interference was unnecessary. Under his analysis, if cities paid police officers higher salaries and gave them better training, police officers could police themselves and minimize the use of abusive interrogation practices.<sup>65</sup> Under Inbau's scheme, “the real interest that should be exhibited by the legislatures and the courts is with reference to the protection of the innocent [suspects] from the hazards of tactics and techniques that are apt to produce confessions of guilt or other false information.”<sup>66</sup>

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60. See Michael J. Saks et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 688 (2001) (stating that “[a]fter the revolution brought about by the Wickersham Commission,” psychological interrogation techniques “pioneered by Fred Inbau” were used by police, “and [his] methods are still taught today”).

61. See generally Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 16 (1961); Weisberg, *supra* note 1.

62. Inbau, *supra* note 61, at 16 (discussing the need for interrogations, especially in criminal investigations when there is no physical evidence).

63. *Id.* at 17-18.

64. *Id.* at 18-19.

65. *Id.* at 20.

66. *Id.* Of course, Inbau presumed that the psychological interrogation tactics he was teaching would not produce false confessions—meaning that courts and legislatures would not interfere with his work.

Weisberg, as General Counsel of the Illinois Division of the American Civil Liberties Union, had recently coauthored a report on the Chicago Police Department's practice of holding witnesses and suspects for days on end and subjecting them to lengthy incommunicado interrogations.<sup>67</sup> Weisberg was skeptical of police officers' ability to regulate their own behavior in the interrogation room and doubted the courts' and legislators' ability to determine which tactics produced false confessions when interrogations were conducted in secret.<sup>68</sup> He conceded that there was value to police conducting interrogations in private, but accused Inbau of confusing privacy with secrecy.<sup>69</sup> "It is secrecy, not privacy," wrote Weisberg, "which accounts for the absence of a reliable record of interrogation proceedings in a police station."<sup>70</sup> Secrecy "creates the risk of abuses," "makes the rules about coercion vague and difficult to apply," and "inhibits the development of clear rules to govern police interrogation and which contributes to public distrust of the police."<sup>71</sup> Weisberg, however, offered a solution that would maintain privacy but eliminate secrecy. He suggested a rule requiring police to record the entire interrogation of suspects from start to finish and allowing them to do so surreptitiously.<sup>72</sup>

For a brief shining moment, Weisberg's vision of the dangers of incommunicado interrogation caught the attention of the United States Supreme Court. In an amicus brief in *Escobedo v. Illinois*,<sup>73</sup> Weisberg aimed to give the Court an accurate picture of the coercive pressures faced by suspects in the age of the psychological interrogation.<sup>74</sup> Because interrogations were not recorded, however, he could not give the Justices a front row seat to Escobedo's interrogation.<sup>75</sup> To take the Court inside the interrogation room, Weisberg quoted liberally from the most widely used police interrogation training manuals of the day, including those of O'Hara and Inbau.<sup>76</sup> Although the Court did not rely on the manuals in

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67. ILL. DIV. ACLU, SECRET DETENTION BY THE CHICAGO POLICE (1959).

68. Weisberg, *supra* note 1, at 46.

69. *Id.* at 44-45.

70. *Id.* at 44.

71. *Id.*

72. *Id.*

73. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

74. Brief of Amici Curiae ACLU at 4-9, *Escobedo v. Illinois*, 378 U.S. 478 (1964) (No. 615).

75. *Id.* at 4.

76. *Id.* at 5-9 (citing, *inter alia*, FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'HARA, *supra* note 1).

*Escobedo*,<sup>77</sup> Weisberg's strategy would hit its mark two years later in *Miranda v. Arizona*.<sup>78</sup>

However, in 1965, before the Supreme Court decided *Miranda* in 1966, Yale Kamisar, perhaps sensing that the Court was inclined to view *Miranda*-like warnings as sufficient protection against police coercion, echoed Weisberg's call for electronic recording of interrogations as a necessary safeguard to protect suspects' constitutional rights.<sup>79</sup> Kamisar opined that such *Miranda*-like warnings would not necessarily provide adequate protection for suspects against the coercive influences at work in police interrogations.<sup>80</sup> Pointing to a study finding that the way a warning is administered greatly affects whether a person waives his or her rights, Kamisar expressed skepticism at how a pre-interrogation warning would be given.<sup>81</sup> He feared that a warning, when given "in the backroom of a police station" out of the public eye, would not help many suspects because police will frame the warning in such a way as to minimize its effectiveness.<sup>82</sup> The only way to be sure that a warning was given fairly and properly was to make an electronic recording of the interrogation, which can determine "who said *exactly what, precisely how*."<sup>83</sup> Only when they are monitored and enforced do a citizen's rights actually have value, and such taping provides this supervision.<sup>84</sup>

In 1966, the United States Supreme Court issued its landmark *Miranda* decision.<sup>85</sup> Relying on the police interrogation manuals first presented to the Court by Weisberg in *Escobedo*,<sup>86</sup> the *Miranda* Court

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77. See generally *Escobedo v. Illinois*, 378 U.S. 478.

78. *Miranda v. Arizona*, 384 U.S. 436 (1966).

79. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME* 1 (A.E. Dick Howard ed., 1965).

80. *Id.* at 81.

81. See *id.* at 83-84 (discussing surveys of indigent defendants choosing to waive their right to counsel).

82. *Id.* at 84.

83. *Id.* at 86-87.

84. For more recent discussions regarding the social benefits of videotaping interrogations, see Albert W. Alschuler, *Constraint and Confession*, 74 *DENV. U. L. REV.* 957, 977 (1997); Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millenium*, 34 *J. MARSHALL L. REV.* 637, 706-07 (2001).

85. *Miranda v. Arizona*, 384 U.S. 436 (1966).

86. *Id.* at 449-54 (citing, *inter alia*, *INBAU & REID*, *supra* note 76; O'HARA, *supra* note 1).

railed against the “evils” of incommunicado interrogation<sup>87</sup> and the “inherently compelling pressures” that the modern psychological interrogation brought to bear on the suspect.<sup>88</sup> In order to protect a suspect from being compelled to incriminate himself, the Court required police officers to administer to suspects the now familiar *Miranda* warnings.<sup>89</sup>

In *Miranda*, the Court also recognized that the secrecy surrounding police interrogation “results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”<sup>90</sup> Yet, as Kamisar had warned,<sup>91</sup> the *Miranda* warnings did nothing to close this “knowledge gap.”<sup>92</sup> The net result, as Kamisar has recently written, is that today, nearly forty years after *Miranda* was decided, “we know little more about actual police interrogation practices than we did at the time of *Miranda*.”<sup>93</sup>

*Miranda* proved to be the high water mark of the Court’s concern with incommunicado interrogation and the use of psychological interrogation tactics.<sup>94</sup> While Weisberg, Kamisar, and the reformers who

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87. *Id.* at 456, 466.

88. *Id.* at 467.

89. *See id.* at 478-79 (“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”).

90. *Id.* at 448.

91. *See supra* notes 79-83 and accompanying text.

92. As Kamisar predicted, the protections offered by the *Miranda* warnings proved to be illusory. In practice, they have proven to be no more than a speedbump for police seeking to obtain a confession. The overwhelming majority of suspects waive their *Miranda* warnings and agree to speak with the police. Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1246 (2001).

93. Yale Kamisar, *Limit Police Secrecy*, NAT’L L.J., June 9, 2003, at 43. In 1974, only eight years after *Miranda* was decided, Kamisar saw the failure of the *Miranda* Court to require that police electronically record the warnings, the waiver, and the subsequent interrogation, as a major weakness of the decision. Kamisar, *supra* note 13, at 29.

94. Twenty years after *Miranda*, the extent of the Court’s lack of concern with incommunicado interrogations was aptly described by Justice Stevens in his dissenting opinion in *Moran v. Burbine*:

The Court reasons that a State has a compelling interest, not simply in custodial interrogation, but in lawyer-free, incommunicado custodial interrogation. Such incommunicado interrogation is so important that a

preceded them won the battle in *Miranda* by getting the Court to take a peek inside the interrogation room, they lost the war to end secrecy in the interrogation room. This continued secrecy has come at a great cost. Secrecy in the interrogation process has meant that the three main concerns of the reformers have not been addressed. As a result, judges and juries have failed to recognize false confessions, courts have failed to detect involuntary confessions, and the relationship between police officers and the public has become unnecessarily strained.

#### IV. WE REAP WHAT WE SOW: THE PROBLEM OF FALSE AND COERCED CONFESSIONS IN THE POST-DNA AGE IS A RESULT OF THE FAILURE TO HEED THE REFORMERS' CALLS

The earliest advocates for recording interrogations saw secrecy as the context in which third-degree tactics were allowed to flourish.<sup>95</sup> Because third-degree tactics increased the chances of false confessions, requiring that interrogations be recorded was seen as a safeguard against false confessions.<sup>96</sup> Although preventing false confessions was a concern of recording advocates in the heyday of the third degree, it was not the primary concern of O'Hara, Weisberg, and Kamisar—the second generation of recording advocates.<sup>97</sup> Nor have false confessions been a

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lawyer may be given false information that prevents her presence and representation; it is so important that police may refuse to inform a suspect of his attorney's communications and immediate availability. This conclusion flies in the face of this Court's repeated expressions of deep concern about incommunicado questioning. Until today, incommunicado questioning has been viewed with the strictest scrutiny by this Court; today, incommunicado questioning is embraced as a societal goal of the highest order that justifies police deception of the shabbiest kind.

*Moran v. Burbine*, 475 U.S. 412, 437-39 (1986) (Stevens, J., dissenting) (footnotes omitted).

95. See WICKERSHAM COMM'N, *supra* note 7, at 12 ("The third degree is a secret and illegal practice.").

96. *Id.* at 5, 181-87; BORCHARD, *supra* note 15, at 370-71.

97. The words "false confession" are only mentioned by O'Hara in a single sentence in his chapters on admissions, confessions, and interrogation—a sentence in which he writes that "[t]rickery and deception may be used if they are not of such a nature as to be likely to lead the subject into a false confession." O'HARA, *supra* note 1, at 150. In his seminal article, Weisberg quarreled with Professor Inbau's claim that none of his psychological methods was likely to induce false confessions and suggested that the extent to which police pressure "could lead some persons to confess, although innocent," is a question worth researching. Weisberg, *supra* note 1, at 35. Although I have not reviewed all of Kamisar's voluminous writings on the subject of interrogations and confessions, it is fair to say that he has been far more concerned with the question

major concern of the courts in the era of the psychological interrogation,<sup>98</sup> perhaps because the courts accepted what Richard Leo has called the great “*myth of the psychological interrogation*”—that psychological interrogation techniques do not produce false confessions.<sup>99</sup> In the post-DNA age, however, the problem of false confessions can no longer be ignored. It is now beyond dispute that the use of psychological interrogation practices, with alarming frequency, has contributed to many false confessions.<sup>100</sup> According to data compiled by the Innocence Project at Benjamin N. Cardozo School of Law, of the first 142 DNA exonerations of wrongfully

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of what constitutes an involuntary or coerced confession throughout his distinguished career. See, e.g., Yale Kamisar, *On the “Fruits” of Miranda Violation, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995); Yale Kamisar, *What is An “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963); see also Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

98. In *Miranda*, the Court recognized expressly that psychological interrogation techniques, short of torture, can lead some suspects to falsely confess. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”). Shortly before *Miranda* was decided, in 1964, a nineteen-year-old black youth named George Whitmore Jr., confessed to the brutal murder and rape of two young white women, Janice Wylie and Emily Hoffer, in their New York City apartment. SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* 113-14 (2004). In late January 1965, on the eve of *Miranda*, prosecutors charged a white ex-convict named Richard Robles with the murders after Robles confessed to the crimes and physical evidence appeared to corroborate his confession. *Id.* at 114. In a footnote, the *Miranda* Court cited the Whitmore case as evidence that “interrogation procedures may even give rise to a false confession.” *Miranda v. Arizona*, 384 U.S. at 456 n.24; see Corinna Barrett Lain, *Countermajoritarian Hero or Zero?: Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1408 n.240 (2004) (highlighting the importance of the Whitmore case to the Warren Court’s jurisprudence). Since *Miranda*, the Court remained largely silent about the problem of false confessions until its 2002 decision in *Atkins v. Virginia*, holding that it is no longer constitutional to execute the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Atkins*, again in a footnote, the Court noted the increasing number of death row exonerations, at least one of which included a “mentally retarded person who unwittingly confessed to a crime that he did not commit.” *Id.* at 320 n.25.

99. Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36, 37 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

100. See White, *supra* note 44, at 108 (stating that empirical evidence sheds doubt on the conclusion that interrogation techniques will not produce false confessions); see also Leo, *supra* note 99, at 36-37 (describing how fifteen individuals exonerated by DNA evidence originally confessed to the crime).



convicted persons, thirty-five—or nearly twenty-five percent—have involved false confessions.<sup>101</sup> Moreover, Professor Richard Leo and Steven Drizin have documented 125 “proven false confessions” between the years of 1971 and 2002, with thirty-one percent of them occurring within in the last five years (1998-2003) and fifty-five percent occurring in the last ten years (1993-2003).<sup>102</sup>

What is especially scary about the false confessions that have surfaced in the post-DNA age is that the overwhelming majority of them involve false confessions to murders, often murders that involve sexual assaults—precisely the kinds of murders in which prosecutors seek death sentences.<sup>103</sup> According to the Innocence Project, of the first 123 DNA exonerations, thirty-seven involved murder cases.<sup>104</sup> Of these thirty-seven, two thirds involved false confessions.<sup>105</sup> Of Drizin and Leo’s 125 false confessions, eighty-one percent of the false confessions occurred in murder cases.<sup>106</sup> The prevalence of false confessions in murder cases is directly related to the use of psychological interrogation tactics. Murder cases put tremendous pressure on the police to solve the crime, and this, in turn, leads the police to put tremendous pressure on suspects in the interrogation room in order to get a confession.<sup>107</sup> If police officers are required to record interrogations of suspects, at least in homicide cases, officers may refrain from using the most extreme forms of psychological coercion to obtain confessions. This should reduce the potential for false confessions and the consequent risk that an innocent man will be put to death on the basis of a false confession.<sup>108</sup> This was precisely the thinking

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101. Telephone Interview with Sara Tofte, Policy Analyst, Innocence Project (Feb. 16, 2004); see INNOCENCE PROJECT, CASE PROFILES, at <http://www.innocenceproject.org/case/index.php> (last visited May 21, 2004) (stating that thirty-three of 123 “exonerations involve[d] false confessions or admissions”).

102. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 932 (2004).

103. See Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 702 (2000) (noting how rape-murders are disproportionately represented, in comparison to other death-eligible crimes, on death row).

104. INNOCENCE PROJECT, *supra* note 101.

105. *Id.*

106. Drizin & Leo, *supra* note 102, at 946.

107. *Id.*

108. Recording police interrogations is not a panacea to the problem of false confessions; it will not weed out all false confessions before they become wrongful convictions. As Leo and Ofshe have stated, false confessions can often be identified by comparing a suspect’s postadmission narrative of the crime with the objectively knowable facts of the crime. Richard A. Leo & Richard J. Ofshe, *The Consequences of*

that led Governor George Ryan's Capital Case Commission in Illinois to recommend that police be required to videotape interrogations in all homicide cases.<sup>109</sup>

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*False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438 (1998). If the narrative fits the facts of the crime, the confession may be true. *Id.* If it does not fit, the confession is probably false. *Id.* The problem with the "fit" standard is that many of the critical facts about the crime—those that only the true perpetrator would have known—are often inadvertently or unintentionally supplied to the suspect by police officers during the interrogation, while others may have been gleaned by a suspect from conversations with third parties or from the news media. Recording interrogations can solve the former problem by demonstrating that these facts were supplied by police officers, but it cannot address the latter.

109. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 24-28 (Apr. 15, 2002), available at [http://www.state.il.us/defender/report/complete\\_report.pdf](http://www.state.il.us/defender/report/complete_report.pdf). The convictions of several persons were tainted by false confession evidence. *Id.* at 24. For example, Ronald Jones, Gary Gauger, Rolando Cruz, and Alejandro Hernandez each gave, or was said to have given, false statements implicating himself in a murder he did not commit. *Id.* at 46 n.15. Dennis Williams and Verneal Jimerson (and their codefendants, Kenneth Adams and Willie Rainge, who were not sentenced to death) were convicted, based in part on the false and coerced confession of Paula Gray, a mentally retarded teenager who herself was wrongfully convicted of being an accomplice to the double murder. CTR. ON WRONGFUL CONVICTIONS, THE DENNIS WILLIAMS STORY, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/DennisWilliams.htm> (last modified Jan. 7, 2004); CTR. ON WRONGFUL CONVICTIONS, PAULA GRAY CONFESSED TO A ROLE IN A CRIME SHE KNEW NOTHING ABOUT, SENDING HERSELF AND FOUR INNOCENT MEN TO PRISON, TWO OF THEM TO DEATH ROW, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Gray.htm> (last modified Jan. 22, 2003). Joseph Burrows was sentenced to death on the basis of the false confession of his codefendant Ralph Frye, who was also wrongfully convicted of the murder that put Burrows on death row. CTR. ON WRONGFUL CONVICTIONS, PERJURED TESTIMONY BY THE ACTUAL KILLER PUT JOSEPH BURROWS ON DEATH ROW, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Burrows.htm> (last modified Jan. 21, 2003). In the waning days of his tenure, Governor Ryan also pardoned four other men off of death row—Aaron Patterson, Leroy Orange, Madison Hopley, and Stanley Howard—who had confessed after being tortured by police officers in Chicago's infamous "Area Two" police headquarters. Locke E. Bowman & Randolph N. Stone, *Burge Investigation Needs Ratcheting Up*, CHI. TRIB., Apr. 22, 2003, at 17, available at 2003 WL 19204443. All told, eleven of the seventeen cases of men who were freed from death row were tainted by false and coerced confessions. See CTR. ON WRONGFUL CONVICTIONS, ILLINOIS DEATH PENALTY EXONERATIONS, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Illinois.htm> (providing links to the stories of the seventeen men released from death row in Illinois).

Focusing too much attention on false confessions masks a far bigger threat to the criminal justice system—the prevalence of coerced confessions. In many of the false confession cases, trial and appellate court judges both found the confessions to be voluntary.<sup>110</sup> Similarly, in all of the cases in which false confessions have led to wrongful convictions, judges and juries—when presented with evidence relating to the interrogation—found the resulting confessions to be reliable evidence of guilt.<sup>111</sup> One of the most stunning findings of research into wrongful convictions is that defendants who falsely confessed, recanted, and took their cases to trial, were convicted by juries nearly four out of every five times.<sup>112</sup>

How could judges and juries have been so mistaken with respect to their findings of voluntariness and reliability in these false confession cases? Part of the reason lies with the fact that jurors understandably have a hard time believing that any innocent person would confess to a crime he did not commit.<sup>113</sup> This is why confession evidence is so potent, even if false.<sup>114</sup> But even if jurors were able to understand that suspects can be manipulated into making false confessions, they would still be likely to convict innocent defendants who have confessed.<sup>115</sup> The answer here lies in the “knowledge gap” about police interrogation practices.

In its voluntariness jurisprudence, the United States Supreme Court has instructed lower courts to assess voluntariness by evaluating police

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110. For example, in the infamous Central Park jogger case, in which five teenage boys confessed falsely to the beating and sexual assault of a female jogger in Central Park in 1989, all of the boys unsuccessfully argued that their confessions had been coerced by police, and in at least three of these cases, their confessions were held to be voluntary on appeal. See, e.g., *People v. Salaam*, 629 N.E.2d 371 (N.Y. 1993); *People v. Wise*, 612 N.Y.S.2d 117 (App. Div. 1994); *People v. McCray*, 604 N.Y.S.2d 93 (App. Div. 1993). For a detailed description of the Central Park jogger case, see Drizin & Leo, *supra* note 102, at 891-901.

111. See, e.g., Leo & Ofshe, *supra* note 108, at 485-91 (listing numerous cases in which false confessions were relied upon to convict).

112. See, e.g., Drizin & Leo, *supra* note 102, at 960 (finding that eighty-one percent of false confessors who challenged confessions at trial were convicted); see also Leo & Ofshe, *supra* note 108, at 482 (finding that seventy-three percent of false confessors who went to trial were convicted).

113. John B. Wefing, *Wishful Thinking by Ronald J. Tabak: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861, 884 (2001).

114. See Leo & Ofshe, *supra* note 108, at 494 (stating that a jury is more likely to convict with a false confession, even if exculpatory evidence is presented); see also Wefing, *supra* note 113, at 887 (“[C]onfessions are very compelling pieces of evidence.”).

115. Leo & Ofshe, *supra* note 108, at 493-94.

interrogation methods and their effect on a particular suspect and by looking at the totality of the circumstances.<sup>116</sup> Because most interrogations are not recorded, however, judges must rely on credibility contests between police officers and the suspects for information about the “totality of the circumstances.”<sup>117</sup> In practice, this means that judges and juries almost always side with the police.<sup>118</sup> The net result is that the police have largely been able to define the totality of the circumstances by controlling the historical facts that are used by courts to determine if a confession is voluntary. In effect, the courts have ceded to the police their job of demarcating the line between acceptable coercion and unacceptable coercion, allowing the police to become “judge[s] of [their] own cause.”<sup>119</sup> As long as the interrogation narrative is dictated by the police, courts and juries will be bound to make mistakes, not because police officers are prone to lie (although some do), but, as Kamisar noted, because human memory is frail and infected with bias.<sup>120</sup>

Finally, failing to record police interrogations may no longer be a luxury that police officers can afford. We live in a video age, an age when satellites can track our every movement and when cameras are in our banks, in our stores, on our roads, and in our homes. Most of the citizens

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116. See *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (“The due process test takes into consideration ‘the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’”) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (additional citations omitted); see also Kamisar, *supra* note 97, at 945 (“[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned . . . .”) (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)).

117. See Leo & Ofshe, *supra* note 108, at 495 (stating that the police officer’s version of events is often found to be more credible than the defendant’s).

118. *Id.*

119. See Kamisar, *supra* note 1, at 243 (quoting Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 242 (1950)). Chris Slobogin and others have argued that in the nearly four decades since *Miranda*, only one historical fact of the interrogation process has really mattered—whether a suspect was read his *Miranda* warnings and whether the suspect waived them. Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 310 n.7 (2003) (citations omitted). For all intents and purposes, once a court determines that the suspect voluntarily waived his *Miranda* rights, the confession will be deemed admissible regardless of the police tactics that ensue. *Id.*

120. See Kamisar, *supra* note 93, at 43 (“It is not because a peace officer is more dishonest than the rest of us that we should demand an objective recording of the critical custodial events. Rather, it is because we are entitled to assume that the police are no less human—and equally inclined to reconstruct and interpret past events in a favorable light—that we should not permit them to be the judges of their own cause.”).

who make up the jury pool either have or will soon have video or digital cameras of their own. In this context, it is becoming increasingly difficult for jurors to accept the assertions of police officers that they did not tape interrogations because it was not their policy to do so.<sup>121</sup> In the post-DNA age, when every wrongful conviction is front-page news, and police officers and prosecutors are being asked to explain what went wrong in each of these cases, police officers may have to start recording interrogations as a matter of self-preservation. Their failure to do so will, as the reformers suggested, breed distrust in their methods and cause a strain in their relations with the public.

#### V. LOOKING FORWARD: IS THE DAY WHEN POLICE ROUTINELY RECORD INTERROGATIONS ON THE HORIZON?

Progress, if measured by the number of states that require police officers to record interrogations, has been glacial over the past seventy years. But there is cause for optimism that recording interrogations may soon become the rule, rather than the exception. Several states, following Governor Ryan's lead in Illinois, have created commissions to examine the death penalty, and at least two, the Arizona Capital Case Commission<sup>122</sup> and the Connecticut Commission on the Death Penalty,<sup>123</sup> have already endorsed a recording requirement. The Actual Innocence Commission, created by the North Carolina Supreme Court, is now developing standards for videotaping police interrogations.<sup>124</sup> In addition, as this Article was

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121. See Angela Rozas & Joshua Howes, *2 Juries Dubious over Confession Tapes' Merits; They Wanted Interrogations Included*, CHI. TRIB., Aug. 17, 2003, at 1, available at 2003 WL 62150249 (reporting that in the wake of extensive news coverage about Illinois's new law requiring police to record interrogations homicide cases, the Cook County State's Attorney lost two murder cases within a week, in part, because jurors did not trust the videotaped confession of the defendant and wanted a tape of the entire interrogation that preceded the confession).

122. CAPITAL CASE COMM'N, OFFICE OF THE ATTORNEY GEN., STATE OF ARIZ., FINAL REPORT 15 (Dec. 31, 2002), available at <http://www.attorneygeneral.state.az.us/CCC/Capital%20Case%20Commission%20-%20Final%20Report.pdf>.

123. COMM'N ON THE DEATH PENALTY, STATE OF CONN., STUDY PURSUANT TO PUBLIC ACT NO. 01-151 OF THE IMPOSITION OF THE DEATH PENALTY IN CONNECTICUT 61 (Jan. 8, 2003), available at [http://www.opm.state.ct.us/pdpd1/CDP/DCP\\_Final\\_Report-Jan2003.doc](http://www.opm.state.ct.us/pdpd1/CDP/DCP_Final_Report-Jan2003.doc); see also Editorial, *Videotape Homicide Confessions*, HARTFORD COURANT, Aug. 4, 2003, at A6, available at 2003 WL 59294938 (arguing that confessions should be videotaped).

124. Matthew Eisley, *Better ID Sought in Criminal Inquiries*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 13, 2003, at B1, available at 2003 WL 3479169 ("The commission's next task will be to develop standards for videotaping police

being finished, the American Bar Association unanimously accepted a resolution urging law enforcement agencies around the country to videotape interrogations of criminal suspects.<sup>125</sup> Illinois's enactment of a law requiring interrogations has already prompted similar bills to be introduced in state legislatures around the country, and others will no doubt follow suit.<sup>126</sup> The New Jersey Supreme Court recently held that

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interrogations . . .").

125. Susan Saulny, *National Law Group Endorses Videotaping of Interrogations*, N.Y. TIMES, Feb. 10, 2004, at B4. The official ABA policy, as approved, is as follows:

RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial interrogations.

FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, to provide necessary funding, and to provide appropriate remedies for non-compliance.

CRIMINAL JUSTICE SECTION, N.Y. COUNTY LAWYERS' ASS'N, AM. B. ASS'N, REPORT TO THE HOUSE OF DELEGATES (Feb. 2004), *available at* <http://www.abanet.org/leadership/2004/recommendations/8a.pdf>.

126. See, e.g., A.B. 161, 2003 Gen. Assemb., 2003-2004 Reg. Sess. (Cal. 2003) (encouraging law enforcement officials to videotape the interrogations of individuals accused of a felony); S.B. 526, 2003 Gen. Assemb., Jan. Sess. (Conn. 2003) (requiring that interrogations of persons under investigation for certain investigations be videotaped); S.B. 523, 2003 Leg., Reg. Sess. (La. 2003) (requiring electronic recording of custodial interrogations); S.P. 286, 121st Leg., 1st Reg. Sess. (Me. 2003) (requiring videotaping); H.B. 387, 417th Gen. Assemb., 2003 Reg. Sess. (Md. 2003) (requiring electronic recording of custodial interrogations under certain circumstances); H.B. 749, 183d Gen. Ct., 2003 Reg. Sess. (Mass. 2003) (requiring electronic recording for statement admissibility); S.B. 231, 92d Gen. Assemb., 1st Reg. Sess. (Mo. 2003) (mandating electronic recordings concerning suspects in certain felonies); L.B. 614, 98th Leg., 1st Reg. Sess. (Neb. 2003) (requiring the electronic recording of all custodial interrogations and questionings); A.B. 5162, 226th Assemb., Ann. Leg. Sess. (N.Y. 2003) (stating that under New York criminal procedure, a suspect's oral or written statements will be presumed to be inadmissible in felony cases unless an electronic recording is made); H.B. 2079, 72d Leg. Assemb., 2003 Reg. Sess. (Or. 2003) (conditioning the admissibility of a criminal defendant's statement made during an interrogation on whether an electronic recording was made of the entire investigation); H.B. 5293, 2003 Gen. Assemb., 2003-2004 Leg. Sess. (R.I. 2003) (mandating the electronic recording of an accused's statement during custodial interrogations); S.B. 343, 103d Gen. Assemb., 2003-2004 Reg. Sess. (Tenn. 2003) (providing that custodial

“[t]he proverbial ‘time has arrived’ for this Court to evaluate fully the protections that electronic recordation affords to both the State and to criminal defendants.”<sup>127</sup> Although the court refused to require recording as a matter of due process, the court held that the issue of recording interrogations was a matter within its supervisory authority and vowed to create a committee to study and make recommendations on the issue of electronic recordation of statements.<sup>128</sup> The Massachusetts Supreme Court is preparing to examine the issue,<sup>129</sup> and the Wisconsin Supreme Court has agreed to review the question.<sup>130</sup>

Although these developments in the courts and the legislatures are encouraging, the most promising news is that there is a growing movement among law enforcement agencies around the country to record interrogations.<sup>131</sup> Aside from the enlightened views on recording expressed by Charles O’Hara, over the past seventy years, the idea of recording police interrogations has been anathema to many in law enforcement. Yet there are encouraging signs that police opposition is thawing, in large part due to the pressure applied to police departments in the wake of false confessions.

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interrogations given at places of detention must be recorded electronically in order to be admissible); H.B. 2813, 58th Leg., 2d Sess. (Wash. 2003) (creating a pilot project for the recording of custodial interrogations).

127. *State v. Cook*, 847 A.2d 530, 546-47 (N.J. 2004).

128. *Id.* at 547.

129. *See* SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASS., SJC-09155, AMICUS ANNOUNCEMENT (Dec. 15, 2003), *available at* [http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/9155amicus\\_digiambattista.html](http://www.state.ma.us/courts/courtsandjudges/courts/supremejudicialcourt/9155amicus_digiambattista.html) (soliciting amicus briefs for *Commonwealth v. DiGiambattista*, in which one of the issues is “[w]hether the court should require that a custodial interrogation of an accused, at least at a place of detention, be electronically recorded before a statement made by the accused as a result of the interrogation may be admitted in evidence”) (citing *Commonwealth v. Groome*, 755 N.E.2d 1224, 1239 n.26 (Mass. 2001)).

130. *See In re C.J.*, 674 N.W.2d 607, 616 (Wis. Ct. App. 2003) (declining to impose a recording requirement for juvenile interrogations, but urging the Wisconsin Supreme Court to “tackle the false confession issue” and to “find safeguards that will balance necessary police interrogation techniques to ferret out the guilty against the need to offer adequate constitutional protections to the innocent”), *petition for review granted*, No. 02-3423 (Wis. Mar. 23, 2004).

131. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1262 (2002) (stating that an increasing number of police departments in America have at least experimented with routine interrogation videotaping with the “overwhelming majority [finding] the costs negligible and the benefits considerable”).

In April 2001, for example, a series in the *Washington Post* highlighting several false confessions obtained by Prince George's County, Maryland police officers led County Attorney Jack Johnson to insist that all interrogations in serious felonies be tape-recorded.<sup>132</sup> After a year of contemplation, the Prince George's County, Maryland Police Department agreed to start taping.<sup>133</sup> The same series may have prompted the District of Columbia City Council to require that interrogations conducted by the Metropolitan Police Department be electronically recorded.<sup>134</sup> A similar exposé in the *Miami Herald* in December 2002 spotlighted a problem of false confessions obtained by the Broward County Sheriff's Office.<sup>135</sup> The series led Broward County State's Attorney Michael Satz to recommend that local police officers start taping interrogations.<sup>136</sup> First, Fort Lauderdale's Police Department announced plans to start taping interrogations,<sup>137</sup> and shortly thereafter, Broward County Sheriff Ken Jenne, whose department had just days before opposed taping, shifted gears and announced that his department would begin taping all interrogations in the most serious felonies.<sup>138</sup> A few days later, Miami Police Chief John Timoney announced that his officers would follow

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132. See April Witt, *Pr. George's Police to Videotape Interviews: Interrogation Tactics Have Been Criticized*, WASH. POST, Feb. 1, 2002, at B1 (describing the need for taping interrogations and the benefits of such recordings); see also April Witt & Paul Schwartzman, *Pr. George's Prosecutor Acts to Check Police Tactics*, WASH. POST, June 7, 2001, at B1 (describing the circumstances resulting in false confessions).

133. Witt, *supra* note 132, at B5.

134. D.C. CODE ANN. § 5-133.20 (Supp. 2003).

135. The *Miami Herald* series entitled *Spotlight on False Confessions* ran on page one for three days. Wanda DeMarzo & Daniel de Vise, *Experts: Tape Police Interrogations*, MIAMI HERALD, Dec. 24, 2002, at 1A, available at 2002 WL 104560985 [hereinafter DeMarzo & de Vise, *Experts*]; Wanda DeMarzo & Daniel de Vise, *Police Ignored Glaring Defects in Murder Cases*, MIAMI HERALD, Dec. 23, 2002, at 1A, available at 2002 WL 104560925 [hereinafter DeMarzo & de Vise, *Police*]; Wanda DeMarzo & Daniel de Vise, *Review Finds Grave Flaws in Broward Murder Cases*, MIAMI HERALD, Dec. 22, 2002, at 1A, available at 2002 WL 104560859 [hereinafter DeMarzo & de Vise, *Review*]; Wanda DeMarzo & Daniel de Vise, *Zealous Grilling by Police Tainted 38 Murder Cases*, MIAMI HERALD, Dec. 22, 2002, at 1A, available at 2002 WL 104560718 [hereinafter DeMarzo & de Vise, *Zealous*].

136. DeMarzo & de Vise, *Experts*, *supra* note 135 ("The Miramar Police Department recently began audiotaping suspects' words from the time they enter the interrogation room, because of Satz's recommendation.").

137. Wanda DeMarzo & Daniel de Vise, *Ft. Lauderdale to Videotape All Homicide Interrogations*, MIAMI HERALD, Feb. 1, 2003, at 1A, available at 2003 WL 2573774.

138. Paula McMahon & Ardy Friedberg, *Sheriff to Tape Felony Inquiries*, S. FLA. SUN SENTINEL, Feb. 11, 2003, at 1A, available at 2003 WL 11555119.



Broward's lead and institute a taping policy.<sup>139</sup> Similar coverage of questionable interrogation practices by the *San Antonio Express-News* led police officers there to do an about-face with regard to their position on recording.<sup>140</sup> These big cities and counties joined Tulsa,<sup>141</sup> Denver,<sup>142</sup> San Diego,<sup>143</sup> and dozens of other smaller police departments that have been taping interrogations for years.<sup>144</sup>

Perhaps the best example of how false confessions led law enforcement agencies to lift their opposition to taping confessions is in Illinois, particularly in Chicago. In Chicago, a series of high-profile false confession cases spurred calls for a statewide bill to mandate taping of interrogations.<sup>145</sup> These calls grew to a fevered pitch after the *Chicago Tribune* published a series on false confessions in December 2001.<sup>146</sup> In

139. Wanda DeMarzo & Daniel de Vise, *Miami Police Plan to Videotape Interrogations*, MIAMI HERALD, Feb. 13, 2002, at 1B, available at 2003 WL 13342381.

140. Ihosvani Rodriguez, *San Antonio Cops Plan to Tape Grillings; Decision on Felony Interrogations Is a Dramatic Departure from Current Policy*, SAN ANTONIO EXPRESS-NEWS, Aug. 16, 2003, at A1, available at 2003 WL 58417458.

141. See Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1 (stating that at least 2,400 police departments around the country are audiotaping or videotaping interrogations).

142. See Steve Chapman, *Who's Afraid of Videotaped Confessions?*, CHI. TRIB., Sept. 13, 1998, at 19, available at 1998 WL 2895289 (stating that videotaping has been in use for nearly two decades).

143. See Judy Peres & Abdon M. Pallasch, *Confession Debate: To Tape or Not? City Bucks National Trend of Recording Police Interviews*, CHI. TRIB., Aug. 20, 1998, at 1, available at 1998 WL 2887418 ("San Diego police . . . videotape everything from the moment the suspect is read his Miranda rights—even though they are not required by law to do so.").

144. A 1992 report to the National Institute of Justice found that over one third of the nation's law enforcement agencies serving areas with populations of 250,000 or more videotaped at least some confessions. GELLER, *supra* note 36, at 54; see also Cathy Young, *Miranda Morass*, REASON, Apr. 2000, available at <http://www.reason.com/0004/fe.cy.miranda.shtml> (stating that at least 2,400 police departments audiotape or videotape confessions and interrogations).

145. Drizin & Colgan, *supra* note 28, at 339.

146. Ken Armstrong et al., *Coercive and Illegal Tactics Torpedo Scores of Cook County Murder Cases*, CHI. TRIB., Dec. 16, 2002, at 1, available at 2001 WL 30802598 [hereinafter Armstrong et al., *Coercive*]; Ken Armstrong et al., *Illegal Arrests Yield False Confessions*, CHI. TRIB., Dec. 17, 2002, at 11, available at 2001 WL 30802890 [hereinafter Armstrong et al., *Illegal*]; Ken Armstrong et al., *Officers Ignore Laws Set up to Guard Kids; Detectives Grill Minors Without Juvenile Officers, Parents Present*, CHI. TRIB., Dec. 18, 2001, at 1, available at 2001 WL 30803197 [hereinafter Armstrong et al., *Officers*]; Steve Mills et al., *When Jail Is No Alibi in Murders; New Evidence Undercuts State Case*, CHI. TRIB., Dec. 19, 2001, at 1, available at 2001 WL 30803625; Maurice Possley et al., *Veteran Detective's Murder Cases Unravel; Some Statements Cop*

response to the Ryan Harris case, a case in which Chicago police officers obtained a false confession from an eight-year-old boy and used the confession to charge the boy and his seven-year-old friend with the murder of an eleven-year-old girl, Cook County State's Attorney Richard Devine instituted a program in which his prosecutors and Chicago police obtained homicide suspects' confessions on videotape.<sup>147</sup>

The flaws of taping only the final confession became evident, however, in December 2001, when the first videotaped false confession surfaced in the murder case of Corethian Bell.<sup>148</sup> After fifty hours of interrogation by Chicago police officers, Bell confessed on videotape to the murder and sexual assault of his own mother.<sup>149</sup> When DNA test results exonerated Bell and implicated another man who had a history of sexually assaulting women in Bell's neighborhood, Cook County prosecutors were forced to drop charges against Bell and agree to his release.<sup>150</sup> The Bell case finally led Cook County State's Attorney Devine to endorse a bill that would require all Illinois police officers to tape custodial interrogations of suspects in homicide cases.<sup>151</sup> With the support of the Cook County State's Attorney, the bill passed the Illinois Senate by a vote of fifty-eight to zero, and the Illinois House by a vote of 109 to seven.<sup>152</sup> With such overwhelming legislative support, Governor Blagojevich, a former prosecutor, was hard-pressed to veto the bill, even though he had opposed videotaping interrogations during his run for governor, supporting the taping only of confessions because of his fear that a policy of taping interrogations would make it more difficult for police officers to obtain

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*Has Extracted Stand out for Way They Fall Through*, CHI. TRIB., Dec. 17, 2002, at 1, available at 2001 WL 30802883.

147. Lorraine Forte, *Cops Prepare to Videotape Confessions*, CHI. SUN-TIMES, Oct. 2, 1998, at 1, available at 1998 WL 5601347; Flynn McRoberts & Judy Peres, *Homicide Suspects May Go to Videotape: Confessions on Camera Planned in Aftermath of Ryan Harris Case*, CHI. TRIB., Oct. 2, 1998, at 1, available at 1998 WL 2901795.

148. Armstrong et al., *Coercive*, *supra* note 146.

149. *Id.*

150. Kirsten Scharnberg & Steve Mills, *DNA Voids Murder Confession*, CHI. TRIB., Jan. 5, 2002, at 1, available at 2002 WL 2609097.

151. See Tim Novak & Gary Wisby, *Police to Go Ahead with Video Plan*, CHI. SUN-TIMES, Apr. 23, 1999, at 16, available at 1999 WL 6535754 (referencing Devine's plan to tape homicide confessions).

152. Christi Parsons & Kate McCann, *Taped Confessions Bill Passes Governor Says He Will Sign Measure Requiring Record in Homicide Interrogations*, CHI. TRIB., May 9, 2003, at 1, available at 2003 WL 20235186.

confessions from suspects.<sup>153</sup> He acknowledged his change of heart when he signed the bill into law, citing the fact that he became persuaded that taping interrogations would “help us make sure that the evidence we have is more reliable and more accurate, and therefore, give us a better chance of doing justice.”<sup>154</sup> Blagojevich also predicted that now that Illinois is the first state to pass a taping requirement into law, “other states can’t be far behind.”<sup>155</sup>

## VI. CONCLUSION

It is far too early to declare a victory in the war to end police secrecy in the interrogation room. Recording advocates may be winning some battles, but there is still much terrain to be covered before recording becomes standard police practice. The FBI still does not record interrogations as a matter of policy,<sup>156</sup> and many major urban police departments, including New York City,<sup>157</sup> Philadelphia,<sup>158</sup> and Detroit<sup>159</sup> are

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153. See *id.* (quoting Blagojevich as saying he “‘had reservations about videotaping interrogations without the participation of law enforcement’”).

154. *The Tavis Smiley Show* (NPR radio broadcast, July 22, 2003), available at 2003 WL 7629369.

155. *Id.* Whether other states will follow suit may depend, in large part, on garnering support for this reform from prosecutors and former prosecutors. One positive sign in this regard is that a growing number of prosecutors have been lending their support for taping. Hennepin County, Minnesota’s District Attorney Amy Klobuchar has long been a supporter of taping interrogations. Her editorial in the *Washington Post* telling prosecutors and police that based on her eight years of experience with Minnesota’s taping requirement, they had nothing to fear and much to gain by supporting taping was cited often in the Illinois campaign. Amy Klobuchar, *Eye on Interrogations: How Videotaping Serves the Cause of Justice*, WASH. POST, June 10, 2002, at A21. Similarly, the support of former federal prosecutors Thomas P. Sullivan and Scott Turow was key to Illinois’s success. Thomas P. Sullivan & Scott Turow, *Taping Interrogations: A Much-Needed Reform*, CHI. TRIB., May 6, 2003, at 23, available at 2003 WL 20234170. Furthermore, Jack Johnson pressured Prince George’s County Police Department into adopting its taping policy, just as Broward County Attorney Michael Satz led Fort Lauderdale’s Police Department and the Broward County Sheriff’s Department to adopt a taping interrogations program. Wanda J. DeMarzo & Daniel de Vise, *Murder Cases Get a Backup on Video—Broward Advances in Documentation*, MIAMI HERALD, Feb. 12, 2003, at B1, available at 2003 WL 13342321.

156. Michael Higgins, *Taping Police Interrogations May End the Lies With . . . Irrefutable Evidence*, A.B.A. J., May 1998, at 18 (noting that the FBI is known as an agency that “‘routinely does not tape interrogations’”).

157. Manhattan’s District Attorney, Robert M. Morgenthau, was a pioneer in the use of videotaping to memorialize confessions. After New York Police Department detectives had secured confessions from suspects, Mr. Morgenthau’s

still resisting recording requirements. One thing, however, is certain: We can no longer afford to ignore the voices of those who have advocated for an end to secrecy in the police interrogation process. If we do, we will be forced to endure numerous false confessions, unreliable and inaccurate assessments of confession evidence, and a resulting distrust of police and loss of faith in the justice system.

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district attorneys would attempt to get the suspects to repeat their confessions on videotape. See Joyce Purnick, *Confession TV Is Legal; Is It Right?*, N.Y. TIMES, Aug. 24, 2000, at B1, available at 2000 WL 25572324 (quoting Morgenthau as saying “videotaped confessions are the most significant development prior to DNA”). In a *Wall Street Journal* article written at the time of the Central Park jogger case, Mr. Morgenthau called videotaping the “most significant advance in law enforcement in 20 years.” L. Gordon Crovitz, *Jogger Case Shows Confession Is Good for More Than the Soul*, WALL ST. J., Aug. 22, 1990, at A9. Taping only the final confession, and not the entire interrogation that precedes it, does little to protect against police coercion or false confessions. Nothing demonstrates this more than the recent Central Park jogger case fiasco in which four videotaped confessions and one oral confession of five teenagers to the rape and assault of the female jogger were proven false by DNA evidence. Curtis Stephen, *Record Time: Documenting Police Interrogations on Video Protects Defendants and Helps Prosecutors Win Cases, Too. In Many Cities, It's the Law. To New York Cops, It's Anathema—Which Is Why the Central Park Jogger Debacle Won't Be the Last*, CITY LIMITS MONTHLY, Nov. 2003, available at

<http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=1055>.

158. Philadelphia, like Manhattan, tapes only the final confession, and not the preceding interrogation. Adrienne Drell, *Procedure Falls Short, Legal Experts Caution*, CHI. SUN-TIMES, Oct. 2, 1998, at 2, available at 1998 WL 5601361.

159. The Detroit Police Department is now being overseen by the Justice Department, due in part to abuses by the department in the interrogations of suspects and witnesses. M.L. Elrick & Ben Schmitt, *U.S. Plans to Oversee Detroit Cops: Costly Changes May Be Required*, DETROIT FREE PRESS, June 11, 2003, available at 2003 WL 57245805. Despite Justice Department oversight, a false confession case that cost the Department \$800,000, Jack Kresnak, *Detroit Is to Pay \$800,000 over False Confession*, DETROIT FREE PRESS, Aug. 5, 2003, available at 2003 WL 57249687, and new allegations of abuse in another confession case, Anne Mullen, *Confessions and Recantations: A Teen Who Fingered His Friend in His Mother's Murder Says His Statements Were Coerced*, METRO TIMES (Detroit, Mich.), Jan. 21, 2004, available at <http://www.metrotimes.com/editorial/story.asp?id=5865>, the Detroit Police Department still does not tape interrogations or confessions. Kresnak, *supra*.