

After 20 hours of questioning over two days, Christopher Ochoa falsely confessed to murder and implicated his friend, Richard Danziger, in the process. Both men spent 12 years in prison for a crime they did not commit.

Electronic Recording of Custodial Interrogations

A Policy Review

A complete record of the interrogation could have spared them both.

Introduction	2
Recommendations & Solutions.....	3
The Science of False Confessions ..	5
Benefits & Costs	7
Profiles of Injustice	9
Snapshots of Success	15
Voices of Support	18
Questions & Answers	19
Statistics	20
A Model Policy.....	22
Literature	24

INTRODUCTION

A powerful and ubiquitous tool

Electronic recording of custodial interrogations has emerged as a powerful innovation and fact-finding tool for the criminal justice system. A central objective of the criminal justice system is to accurately ascertain the facts surrounding criminal offenses in order to correctly identify perpetrators so that they may be punished. The virtue of electronic recording of custodial interrogations, and its strength as a public policy, lies not only in its ability to help guard against false confessions, but also in its ability to develop the strongest evidence possible to help convict the guilty.

The most compelling arguments for recording custodial interrogations come from detectives and prosecutors who have experience working under a recording policy and enthusiastically embrace the practice. A number of states, including Maine, Minnesota, Illinois, and Alaska, as well as the District of Columbia, have statewide policies requiring electronic recording of custodial interrogations in certain types of cases. What's more, to date, more than 450 police departments in 50 states have independently adopted the policy.¹

Some liken creating an objective record of the interrogation to the use of DNA evidence. In some cases, DNA will provide compelling evidence of guilt, and in others it can exonerate the innocent. Likewise, an electronic recording of an interrogation provides an objective record of a critical phase in the investigation of a crime — tangible evidence that can be carefully reviewed for inconsistencies or to evaluate the suspect's demeanor and appreciate the context in which a statement is provided.

In courtrooms, the electronic recording helps protect officers from false claims of abuse or coercion. Many prosecutors also support the policy, because a recorded interrogation and confession is powerful incriminating evidence at trial, leading to more guilty pleas and verdicts.

Equally important to its role as a law enforcement tool, an objective record of the interrogation serves the system as a whole by allowing triers-of-fact to accurately assess the credibility and voluntariness of confessions, thus helping to prevent wrongful convictions. This is especially important considering the overwhelming weight that confessions carry at trial. Confessions are often the most powerful evidence against the defendant, and can even overcome other

exculpatory evidence. Juries will sometimes convict based on a confession alone; therefore, special care must be taken to ensure accuracy.

The development of DNA technology and the subsequent exonerations of nearly 200 innocent people have opened a window into the errors in the criminal justice system that can lead to wrongful convictions. Given the documented cases of false confessions leading to miscarriages of justice in the United States, and given the research indicating that false confessions occur with alarming frequency, it becomes imperative that we develop policies that

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enhance the fact-finding power of the criminal justice system through procedures designed to present the best quality of evidence possible in the courtroom. Implementation of electronic recording of custodial interrogations incurs minimal costs, especially when compared to the astronomical costs of wrongful convictions. It is simply sound policy.

Additionally, electronic recording of interrogations makes it more likely that time and resources can be spent on finding the actual perpetrator, rather than prematurely closing an investigation based on an unreliable statement. This saves taxpayers' time and money, and can even save lives by allowing police to apprehend and prosecute the true perpetrator and prevent further victimization of the community.

Given the power of an electronic recording, and the benefits to the entire criminal justice system, it is somewhat surprising that more law enforcement agencies have not availed themselves of this powerful and ubiquitous tool. While the policy has gained some traction in individual police departments, state-mandated recording policies have been slow to follow. A number of common misconceptions about electron-

ic recording continue to contribute to the reluctance on the part of some policymakers and practitioners to implement or advocate for a mandatory policy.

This policy review has been designed to facilitate communication among local law enforcement agencies, policymakers, practitioners, and others by extrapolating on the documented benefits of electronic recording and dispelling some of the common misconceptions about the costs of implementation. By presenting many of the successful methods employed in local jurisdictions, we hope to create a dialogue around recommendations that will enhance the quality of evidence relied upon in criminal trials, as well as public confidence in our system of justice.

As education on the inherent benefits of electron-

ic recording continues, the momentum for procedural reforms also continues to build. In 2004-2005, state legislators in 25 states introduced legislation seeking to mandate the recording of custodial interrogations. In addition, editorial boards and criminal justice commissions across the country continue to hail electronic recording of interrogations as good policy for law enforcement.

Ultimately, no changes can completely eliminate the risk of error in criminal cases, but the changes recommended here are pragmatic strategies with a track record of success. Increasingly, comparisons between the relatively low costs of implementing these reforms and the substantial benefits are leading more jurisdictions to modernize interrogation procedures.

RECOMMENDATIONS & SOLUTIONS

Record entire custodial interrogation in felony cases

Many law enforcement personnel, scientists, legal scholars, and policymakers agree — in order to reap the benefits that electronic recording affords police, prosecutors, suspects, and the system as a whole, the entire custodial interrogation must be recorded in felony cases. Recording should begin at and include the delivery of the suspect’s Miranda rights and continue, unaltered and uninterrupted, until the end of the interview. The New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations calls this “stem-to-stern” recording and writes, “Requiring stem-to-stern recordation is consistent with what other states have done and is essential if the benefits attendant to electronic recordation are to be fully realized.”²

This requirement benefits law enforcement in that questions as to whether Miranda warnings were given will be avoided, thus avoiding extensive pretrial hearings as to whether or not suspects received their Miranda rights and “swearing contests” wherein detectives and suspects offer vastly different accounts of what transpired during an interrogation. Recording the entire interrogation also benefits judges by ending disputes over what took place during the interrogation, greatly reducing motions to suppress defendant statements. When there are

questions concerning the reliability and voluntariness of a defendant’s statement, courts have historically judged the admissibility of the statement by considering the “totality of the circumstances” surrounding the statement.³ Only by reviewing the entire interrogation, from start to finish, can judges and juries accurately assess the circumstances surrounding a confession.⁴

AUDIO OR VIDEO

Most state statutes and court rulings that require electronic recording of interrogations do not specify the method, i.e. audio or video. While video recording devices are preferable in order to capture a full and accurate account of the circumstances surrounding a confession for judges and juries, some departments have expressed concern about the costs of implementation. Audio recording is an acceptable alternative that can be implemented at negligible cost.

It should be left to the discretion of the agency to choose the system that best fits its needs and resources, ranging from hand-held audio tape recorders to more sophisticated digital video set-ups in interrogation rooms. Many inexpensive solutions can effectively deliver the benefits of the policy.

In departments that record, experience has shown that those departments that started with audio recording chose to transition to video recording over time.⁵

SCOPE

The types of offenses for which interrogations must be recorded varies from state to state. For example, Minnesota requires electronic recording of interrogations for all offenses while Illinois only requires the procedure for homicides.

Though state practices vary, recording in all cases involving serious felonies promises the greatest benefits to law enforcement.

It is especially urgent to record interrogations involving juvenile suspects and those whom authorities have reason to believe are mentally retarded or mentally ill. These populations are particularly vulnerable to interrogation tactics and significantly more likely to falsely confess.

Regardless, the parameters should be clearly defined so that law enforcement officers know immediately whether recording is required in a given case.

EXCEPTIONS

Effective recording policies include reasonable exceptions to the recording requirement, so as not to place an undue burden on law enforcement and to allow for the admission of voluntary statements that were not recorded for valid reasons. For example, a suspect's statement should be admissible if officers made a good faith effort to record but were unable to do so because of equipment malfunction or power outage. Additionally, spontaneous statements made by the defendant, or made during routine processing of the defendant, may be admissible in court because they were made outside the context of an interrogation. Statements made by a suspect who refuses to speak if recorded might also be deemed admissible as long as the refusal itself is recorded.

States that have recording policies generally include exceptions such as these. In states where recording is mandated by the court, such as in Alaska and Minnesota, subsequent case law has provided for exceptions.⁶ State courts have upheld the admissibility

of statements made in the context of equipment malfunction, for example. Illinois, a state with legislation requiring electronic recording, explicitly includes all of these exceptions in the statute.⁷

CASES OF FAILURE TO RECORD

States that currently record vary in terms of remedies available when no electronic recording is made of an interrogation and when the circumstances do not fall within reasonable exceptions. The Alaska and Minnesota supreme courts ruled that the remedy for an unexcused failure to record should be exclusion of the statement at trial.⁸

The Illinois statute contains a similar provision, creating a “presumption of inadmissibility,” which can be overcome by a preponderance of the evidence that the statement was made voluntarily. In Massachusetts, the state supreme court ruled that when an interrogation including a state-

ment or confession is not recorded, the defendant is entitled, upon request, to a jury instruction specifying the need to view the unrecorded statement with caution.⁹

Although jury instructions can serve as an added safeguard in addition to other available remedies, the effectiveness of jury instructions is compromised by the widely held but false belief of most jurors that a person would not confess to a crime she did not commit short of physical abuse or torture. The counter-intuitive reality of false confessions limits the effectiveness of jury instructions in appropriately weighing unrecorded statements.

For these reasons, a presumption of inadmissibility of an unrecorded statement is the preferable policy. Nonetheless, it is important for the court to evaluate unrecorded interrogations and confessions on a case-by-case basis, allowing officers and prosecutors ample opportunity to demonstrate valid reasons for not recording the interrogation, and allowing the court to consider the circumstances of the confession.

If there is no presumption of inadmissibility, or in addition to the presumption of inadmissibility, the state should at the very least require that the court issue instructions to the jury that unrecorded statements should be viewed with caution.

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ISSUE OF CONSENT

Whether or not a suspect should be informed that she is being recorded depends on the state’s “eavesdropping law,” which may or may not allow for suspects to be recorded without their knowledge and consent. Ongoing surveys of the more than 450 police departments that currently record demonstrate that even if suspects know they are being recorded, it makes no difference in obtaining their cooperation.¹⁰

Wisconsin’s recording statute states, “A law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation is not required to inform the subject of the interrogation that the officer or agent is making an audio or audio and visual recording of the interrogation.”¹¹

Despite the evidence that disclosure of recording

does not inhibit effective interrogations, many agencies prefer the option of inconspicuous recording devices in interrogation rooms, and statutes can be tailored to accommodate this preference.

HANDLING AND PRESERVATION OF ELECTRONIC EVIDENCE

Electronic recording policies should include provisions to ensure electronic evidence is handled and preserved properly, and to prevent loss or premature destruction. Recordings need to be clearly identified and catalogued by law enforcement personnel.

Most importantly, the recording must be preserved until all appeals, including post-conviction and *habeas* proceedings, are final or until federal or state statutes of limitations bar prosecution.

THE SCIENCE OF FALSE CONFESSIONS

Demanding changes in electronic recording of custodial interrogations

The idea that someone would falsely confess to serious crimes seems counterintuitive to many people. However, false confessions are a well-documented reality and have resulted in wrongful convictions and the incarceration of innocent people. To fully appreciate the importance of a full and accurate record of an interrogation, it is important to understand how and why innocent suspects sometimes falsely confess.

THE INTERROGATION

In 1936, the United States Supreme Court ruled that confessions obtained through physical abuse violate due process and are inadmissible in court.¹² However, it is well within the law for police to use a variety of psychological techniques to induce suspects to confess, including lying to suspects about incriminating evidence in police possession, and using rough language, aggressive and accusatory questioning, and isolation to create an environment conducive to extracting confessions from suspects.

Even the Supreme Court has recognized the inherently stressful environment of a custodial interrogation, ruling that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement

obtained from [a] defendant can truly be the product of his free choice.”¹³

Modern interrogation techniques are professional and psychologically-oriented. The gold standard for American interrogation methodology is known as the “Reid technique,” which is used by most law enforcement agencies in North America and includes themes of isolation, confrontation, and minimization.¹⁴

Isolation is often achieved in a special interrogation room designed to increase anxiety in the suspect, and thus increase the desire to do what is needed to escape. Confrontation occurs when the suspect is accused of the crime, presented with real or pretend evidence, and blocked from denial. Minimization is a technique whereby the interrogator sympathetically suggests that the crime was morally justified.

While these techniques have been proven to lead the guilty to confess, they can sometimes lead the innocent to confess falsely. As the founders of the Reid Technique noted, “[t]here is no question that interrogations have resulted in confessions from innocent suspects.”¹⁵

TYPES OF FALSE CONFESSIONS

Psychologists have identified three types of false confessions demonstrated in the documented cases of

innocent people, often of normal intelligence and capacity, confessing to crimes they did not commit.

Compliant false confessions occur when a suspect confesses in order to escape an aversive interrogation, avoid an explicit or implied threat, or gain a promised or implied reward. *Internalized* false confessions occur when an innocent suspect comes to believe she has committed the crime, often resulting from exhaustion and confusion in the wake of a lengthy interrogation. *Voluntary* false confessions are self-incriminating statements offered without any external pressure.¹⁶

WHY DO INNOCENT PEOPLE CONFESS?

Decades of psychological research has demonstrated how aggressive, and traditionally effective, interrogation techniques, when paired with certain personality characteristics, can lead to false confessions. The advent of DNA technology, which has contributed to the growing number of documented cases of innocent people confessing to serious crimes, is beginning to poke holes in the commonly-held belief that innocent people do not confess to crimes they did not commit. Public perception is beginning to catch up with the science.

Psychologist Saul Kassin has shown that innocent people are susceptible to confessing because their very innocence works against them. For example, innocent people are particularly likely to waive their right to counsel at the beginning of the interrogation, for fear of looking guilty, or because they feel they have nothing to hide.

Kassin tested this hypothesis in a controlled laboratory setting — a setting that allows experimental psychologists to isolate and manipulate certain variables for the purposes of studying behavior — in which 72 participants were apprehended for investigation of a mock theft of \$100. Those who were innocent of the theft were substantially more likely to waive their rights than the guilty: only 36 percent of the guilty participants waived their rights while 81 percent of innocent participants did so.¹⁷

Kassin's research suggests that "Miranda warnings may not adequately protect the citizens who need it most — those accused of crimes they did not commit."¹⁸ On the contrary, because of their vigorous denials, innocent suspects can unwittingly trigger highly confrontational interrogation techniques.

PSYCHOLOGICAL FACTORS

Controlled experiments have proven that the use of false evidence against a suspect in an interrogation (i.e., an officer tells a suspect that a witness saw the suspect commit the crime), though a common and effective interrogation technique, increases the risk that innocent people confess to acts they did not commit.

For example, in a 1996 study, subjects were instructed to type on a keyboard but told not to press a certain key. At one point, participants were accused of hitting the prohibited key, causing the administrator's computer to crash, and asked to sign a written confession.

Incredibly, though all participants were innocent, and all initially denied the charge, eventually 48 percent signed a confession. What's more, when participants were falsely told that there was a witness who saw them hit the forbidden key, the rate of false confession increased to 94 percent.¹⁹

The length of an interrogation is also an important factor in the psychology of false confessions. Laboratory tests have shown that fatigue, sleep deprivation, and isolation can influence and impair complex decision-making abilities.²⁰ While most police interrogations last for less than two hours,²¹ a recent analysis of 125 proven false confessions where interrogation times were available (approximately one-third) showed that the average interrogation in these cases lasted over 16 hours.²²

VULNERABLE POPULATIONS

A wealth of research has indicated that certain types of suspects are also more susceptible to police pressure and thus more likely to falsely confess to crimes they did not commit. A study of 340 exonerations found that juveniles, the mentally-retarded, or those suffering from mental illness were much more likely to have falsely confessed to the crimes for which they were accused and later acquitted.²³ This is due to their diminished or undeveloped mental capacities, and their tendencies to be intimidated by and acquiesce to authority figures.

The vulnerability of juveniles has also been illustrated in laboratory settings. Researchers presented subjects ages 12 to 26 with false evidence in the form of a falsified computer printout showing they had pressed a computer key they were told not to touch. All subjects were innocent and asked to sign a written confession. The results highlighted the special vulnerability of youth: confession rates were 59 percent

among young adults (ages 18-26), but jumped to 72 percent among 15- and 16-year-olds, and as high as 78 percent among 12- and 13-year-old subjects.²⁴

In addition, psychologist Peter Conti suggests a much wider population of people who are susceptible to an officer's suggestions of culpability, such as suspects with poor memory, anxiety, low intelligence, and deflated self-esteem.²⁵

POWER OF CONFESSIONS

A confession can be the most powerful evidence at trial, and can overwhelm evidence pointing to the defendant's innocence. Mock jury studies — studies in which live audiences of mock jurors are recruited from

appropriate jury pools and asked to deliberate on key issues — have shown that confessions carry more weight than eyewitness and character testimony and that juries do not discount confessions even when it is logically and legally appropriate to do so, i.e., when they are specifically told to discount an involuntary confession.²⁶ Tests have also shown more generally that it is difficult for police, attorneys, judges, and juries to distinguish false confessions from true confessions.²⁷

Given the particular weight that confessions carry in the courtroom, it is essential that the science inform the interrogation process not just in a manner that helps convict the guilty, but also in such a way as to protect the innocent.

BENEFITS & COSTS

Investing in a fair and accurate criminal justice system

“Savings that result from recording custodial interrogations far outweigh the costs . . . Experienced officers from all parts of the country agreed that electronically recording full custodial interviews during investigations of serious crimes works to the benefit of all concerned — suspects, police, prosecutors, juries, courts, and the interest of fairness and accuracy in the criminal justice system.”²⁸

— Former U.S. Attorney **Thomas P. Sullivan**

BENEFITS TO LAW ENFORCEMENT AND PROSECUTORS

Some argue that “[t]he greatest beneficiaries of a mandatory video recording rule are not criminal suspects and defense attorneys, but police and prosecutors.”²⁹ A National Institute of Justice survey found that nearly every police department that had videotaped interrogations found the policy useful. The police departments also reported that recording increased the quality and quantity of incriminating evidence available at trial.³⁰ Additionally, recording allows officers to concentrate on the suspect's answers and demeanor, instead of focusing on scribbling copious notes.³¹ The recording can be reviewed later to observe the suspect's responses, and to detect inconsistencies. Recorded interrogations also provide an excellent tool for training new officers in proper and effective interrogation techniques.

Moreover, an objective record of the interrogation protects officers from false claims of abuse or coercion. Motions to suppress the confession become rare or nonexistent, and ongoing surveys of law enforcement personnel in jurisdictions that record reveal enthusiastic support for the practice.³²

Taping also benefits prosecutors in that “for guilty suspects, a taped interrogation and confession may encourage them to enter a plea bargain.”³³ Recorded confessions of suspects greatly strengthen prosecutors' cases, and often lead to more guilty pleas. For these reasons, state prosecutors in jurisdictions that currently record are outspoken supporters of the practice.³⁴

BENEFITS TO INNOCENT SUSPECTS

A comprehensive electronic record of interrogations helps prevent wrongful convictions stemming from false confessions by providing courts with the information necessary to accurately assess whether a defendant's statement is reliable and voluntary. Additionally, an electronic record allows law enforcement and prosecutors to review the interrogation later, to observe the suspect's demeanor and watch for inconsistencies. This allows for a more informed decision about whether to charge a suspect on the basis of a statement, thus helping to prevent the prosecution of an innocent individual. The uniquely incriminating

influence of a confession at trial makes it particularly important to safeguard innocent defendants from wrongful convictions based on false confessions.

BENEFITS TO THE CRIMINAL JUSTICE SYSTEM

By preventing wrongful convictions, electronic recording of custodial interrogations benefits the criminal justice system as a whole by increasing reliability and efficiency. Fewer wrongful convictions helps increase public confidence in the system. Recording also leads to greater efficiency, in that an objective record of the interrogation would reduce the need for and duration of pre-trial hearings on suppression of confessions, as there would be a clear and comprehensive record for the judge or jury to review. This saves attorney, judge, and court personnel time and expense.

Moreover, recording interrogations eliminates “swearing contests” before and during trial, wherein detectives and suspects offer vastly different accounts of what transpired during an interrogation — i.e., a defendant swears he was coerced, and a detective swears the interrogation was conducted legally. An objective record would be available for the judge or jury to see in order to assess the voluntariness of any subsequent confession.

“American courts historically have taken a ‘totality of the circumstances’ approach to judging voluntariness and admissibility,” so an objective record of the circumstances surrounding a confession is critical.³⁵ An electronic recording of the interrogation benefits triers-of-fact in terms of assessing the voluntariness of a confession, as well as in evaluating aggravating or mitigating factors for sentencing purposes, such as whether a guilty suspect was mentally compromised or showed remorse.

BENEFITS TO PUBLIC SAFETY

Perhaps most importantly, recording helps develop the strongest evidence possible to convict the guilty, placing solid confessions beyond reproach. Because recording is a powerful tool in preventing the prosecution and conviction of the innocent, it ensures available resources will be used to capture the actual perpetrator before more people are victimized. For example, in the Central Park Jogger case, while five innocent juveniles were being charged with the crime as a result of their false confessions, the actual perpetrator was free to rape four other women. In another case, the false confession and subsequent wrongful conviction of Jerry Frank Townsend, who was later exonerated by DNA testing, allowed the

real killer to remain free to kill two more young girls. As one author noted, “Ensuring that prosecutors bring the right person to trial not only saves taxpayers’ time and money, in some instances, it may even save lives.”³⁶

COSTS OF RECORDING

Electronically recording custodial interrogations would entail relatively small monetary costs: the main costs would include training of law enforcement personnel, purchase and maintenance of recording equipment, and preservation of electronic evidence. Most costs come at the front-end of the endeavor and diminish once equipment is in place and training is completed. In surveys of the more than 450 police and sheriff’s departments that record, no officers have reported that the costs were prohibitive enough to warrant abandoning the practice.³⁷ In addition, police departments can receive funding from federal, state, and local resources to offset start-up costs. For example, in order to implement Wisconsin’s new recording requirement, the state Office of Justice Assistance distributed approximately \$650,000 to departments for the purchase of recording equipment.³⁸

COSTS OF FAILING TO RECORD

In terms of monetary costs, wrongful convictions can result in civil lawsuits, costing governments hundreds of thousands of dollars — sometimes millions. In a recent wrongful conviction lawsuit settlement, Michigan taxpayers shelled out \$4 million to the family of Eddie Joe Lloyd. Lloyd was a mentally-ill resident of a psychiatric facility who falsely confessed to rape and murder and spent 17 years in prison before being exonerated by DNA evidence.³⁹

The very real human cost to a wrongfully convicted defendant cannot be underestimated. The stigma of criminal accusation, especially to a serious crime such as rape or murder, damage to personal and professional reputation, loss of income, job or career, deprivation of liberty, violence suffered in prison, emotional and financial toll on the family—these costs demand that all reasonable precautions be taken to prevent wrongful convictions.

The benefits of recording custodial interrogations and the consequences of not doing so far outweigh the costs to the state resulting from recording policies. It is incumbent upon us to do all we can to enhance the accuracy and integrity of our criminal justice system.

PROFILES OF INJUSTICE

Evidence of a broken criminal justice system

Christopher Ochoa & Richard Danziger's Story

Christopher Ochoa falsely confessed and pled guilty to the 1988 murder of a young Texas woman and implicated his friend, Richard Danziger. By the time of their exoneration, both men had spent 12 years behind bars. Beaten severely in prison, Danziger suffered permanent brain damage, leaving him unable to care for himself.

On October 24, 1988, Nancy DePriest was raped and murdered at the Pizza Hut where she worked in Austin, Texas. Police turned their attention to other Pizza Hut employees, thinking that the assailant had used a master key to enter the building because there was no sign of forced entry. Twenty-year old Christopher Ochoa worked at a nearby Pizza Hut with his roommate, Richard Danziger, and was brought in for questioning on November 11, 1988.

THE FALSE CONFESSION

Ochoa initially denied involvement in the crime, but after 20 hours of questioning over two days, he eventually confessed and also implicated Danziger. Ochoa later stated that he was threatened with the death penalty during the interrogation. Ochoa also stated that he had requested a lawyer but was told he was not entitled to one until he was charged with a crime. The state offered him a life sentence instead of the death penalty if he agreed to testify against Danziger, which he subsequently did, and on May 5, 1989, Ochoa pled guilty to first degree felony murder.

On January 23, 1990, Danziger's case went to trial, and Ochoa testified against him, stating that Danziger had committed the rape. Prosecutors also introduced the results of a microscopic hair comparison, which found a pubic hair at the scene to be consistent with Danziger's pubic hair. Danziger maintained his innocence but was convicted of aggravated sexual assault and received a life sentence.

ACTUAL PERPETRATOR COMES FORWARD

In 1996, Achim Marino, in prison for robbery and sexual assault with three life sentences, sent letters to police, the District Attorney's office, and then-

Governor George W. Bush stating that he had experienced a religious conversion in prison, which required him to confess to all of his crimes. In a four-page handwritten letter to the Governor, Marino stated that he alone had raped and murdered DePriest, having gained entry to the building by posing as a repairman. Marino wrote, "I am 100 percent responsible. I am responsible for the death, the robbery, rape and murder of Miss DePriest. Those poor men were basically arrested for a crime I did."

Marino also provided information on where the murder weapon, a bank bag taken from the scene, and handcuffs used on the victim could be found. He stated in his letter, "You are legally and morally obligated to contact Danziger and Ochoa's attorneys."⁴⁰ The attorneys were not contacted, and Marino received no response from the Governor's office.

After receiving one of Marino's letters in 1996, police investigators found the handcuffs and money bag stored at the house of Marino's parents, and ballistics tests verified that the pistol found on Marino when he was arrested for his 1988 crimes was also the weapon used to kill Nancy DePriest.

Police attempted to find a link between Ochoa, Danziger and Marino, still believing Ochoa and Danziger to be guilty, but an extensive investigation revealed no connections between the three.

THE EXONERATIONS

In 1998, police received another letter from Marino, and went to visit Ochoa in prison. Ochoa, still fearful of police, continued to assert that he and Danziger had committed the crime. Nonetheless, new information about the fact that another man had confessed to the crime, as well as information regarding DNA exonerations in other cases, gave Ochoa hope that he could prove his innocence; thus, Ochoa wrote to the Wisconsin Innocence Project, describing his situation.

Recognizing the evidence of innocence and the possibility for exoneration through DNA testing, the Wisconsin Innocence Project took on his case and wrote Texas authorities. The district attorney decided to take a closer look at the case, and collected DNA samples from Marino in August 2000.

In late 2000, the Texas Department of Public Safety Crime Laboratory and an independent labora-

tory in California conducted DNA testing of semen evidence taken from the victim, which conclusively excluded both Ochoa and Danziger as the sources of the semen, and implicated Marino. Additionally, though testimony presented at trial suggested the pubic hair found at the scene was consistent with Danziger's, mitochondrial DNA testing of the hair in December 2000 conclusively excluded Danziger as the source.

In 2001, the Texas Court of Criminal Appeals overturned the convictions of both men, and in 2002, the trial court dismissed the indictments against them. District Court Judge Bob Perkins stated, "Applicant has suffered a fundamental miscarriage of justice . . . The above findings of fact remove all doubt, not just a reasonable doubt, that Christopher Ochoa and Richard Danziger are actually innocent."⁴¹

Since his release, Ochoa earned a college degree and completed law school. He is now a practicing attorney in Wisconsin. In 2006, he and the victim's mother, who actively supported the release of both

Ochoa and Danziger, testified before the California Commission on the Fair Administration of Justice, advocating for electronic recording of custodial interrogations.

Keith A. Findley, a University of Wisconsin law professor and co-director of the University of Wisconsin Law School's Innocence Project said, "Cases like this reveal in very dramatic terms that this does happen — not just with people who are mentally ill or of limited intelligence or otherwise vulnerable, such as children. It happens with mentally healthy, intelligent people like Chris Ochoa."⁴²

COSTS TO TAXPAYERS AND DEFENDANTS

Both Ochoa and Danziger filed civil suits, and the Austin City Council settled with both. Ochoa received \$5.3 million, and Danziger received \$9 million from the city and \$1 million from the county. In prison, Danziger sustained permanent brain damage as a result of a violent prison assault, rendering him unable to care for himself without help.

The Central Park Jogger Five

After lengthy, unrecorded interrogations, five juveniles in New York City confessed to participating in the 1989 rape and assault of a Central Park jogger. Several years later, the true perpetrator, a notorious rapist, came forward and provided accurate details of the crime and crime scene. His guilt was confirmed by DNA testing, and the convictions of the five boys were vacated in 2002.

On April 19, 1989, a 29-year-old Caucasian female jogger was attacked in New York City's Central Park shortly after 9:00 p.m. She was dragged into a ravine, raped and sodomized, and beaten so severely that she lost nearly 80 percent of her blood. She survived, but was completely amnesic regarding the attack.

That night, several large groups of teenage boys were in the park, some of whom were harassing cyclists and throwing rocks at joggers and taxicabs. A few of the boys were involved in more serious behavior, beating up a man eating dinner in the park, and attempting to rob a jogger. Two police officers

responded to complaints about the mayhem and took several juveniles into custody.

Around 1:30 am that night, the young woman was found by two men walking a footpath in the park. She was barely alive. Although the police had initially detained the boys in reference to the assaults and harassment of joggers and cyclists, because the woman was found near the location where the boys were causing trouble, the police suspected that some of the boys may have been responsible for the vicious attack on the female jogger.

FIVE FALSE CONFESSIONS

Throughout the night and into the next day, detectives individually interrogated the juveniles already in custody, including Raymond Santana and Kevin Richardson, both 14. During the interrogations, some of the juveniles named other boys as accomplices, and police subsequently detained Antron McRay, 15; Yusef Salaam, 15; and Kharey Wise, 16. Ultimately, police were able to obtain confessions to the attack on the Central Park Jogger from five of the boys. Four of the boys' final confessions were videotaped. The interrogations themselves were not.

What happened during the interrogations became a highly disputed matter before and during trial. The boys and their parents claimed that the interrogations were coercive, alleging that officers were overly aggressive, slapping, yelling, and cursing at the boys. Several boys said they were told they were being questioned only as witnesses and would be released if they confessed. In fact, all of the boys immediately recanted their confessions upon arrest, once they realized they were not being released, but formally charged with the crime. The police officers denied using coercive tactics, and the defendants' pre-trial motions to suppress their confessions were denied.

The boys' confessions contained serious inaccuracies. For example, Kharey Wise stated that the jogger's clothes had been cut off and the jogger cut with a knife. In fact, the victim's clothes were not cut, and she sustained no knife wounds. Kevin Richardson said that her bra had been ripped off when, in fact, she was found with her bra still on and her t-shirt tied around her head. None of the defendants accurately described where the attack on the jogger took place.

Despite the mistakes, the presentation of the confession evidence was compelling in the courtroom, and in 1990, all five defendants were convicted of participating in the assault and rape of the jogger and were sentenced to between five and 15 years.

ACTUAL ATTACKER STEPS FORWARD

In February 2002, the New York County District Attorney's Office was notified that an inmate had come forward claiming that he and he alone had attacked and raped the Central Park jogger. A convict named Matias Reyes came forward and provided a notarized confession. Reyes had been one of the city's most notorious rapists, terrorizing the Upper East Side in 1989. He was serving a sentence of over 33 years in prison for three rape/robberies, one rape/murder, and one robbery, all committed in 1989.

Reyes' DNA matched that found at the crime scene: he was the sole source of semen found on the victim's sock and from a cervical swab taken from the victim. He also matched a pubic hair found on the sock. After receiving the preliminary DNA results from the FBI crime lab, the District Attorney's office retained a private laboratory to test the evidence. The private laboratory found that Reyes was the source of the DNA to a factor of one in 6,000,000,000 people.

In addition, Reyes lived next to the park, and was found to have committed another assault and rape in Central Park two days before the jogger attack.

Later that year, Reyes gave a nationally-televised interview, providing a detailed and correct description of the assault and crime scene. He accurately described what the victim was wearing and said that he used a heavy branch to attack her, which was consistent and explanatory of medical and crime scene evidence.

ical and crime scene evidence.

The Manhattan District Attorney's Office reopened the case, finding after an exhaustive 11-month investigation that there was no evidence of any connections between the boys and Reyes. That fall, the boys' defense lawyers learned of the exculpatory DNA evidence and filed motions to vacate the convictions.

Psychologist Saul Kassin was asked to review the case in the fall of 2002 for *ABC News*. He concluded, "Risk factors for coercion did exist in this case. The boys were 14 to 16 years old, making them more compliant than the average adult. At the time of their videotaped statements, the defendants had been in custody and interrogated on and off for 14 to 30 hours. Most interrogations last an hour or two; law enforcement manuals caution against pushing too much further."

He also found that the juveniles were asked suggestive questions about the attack, such as when a prosecutor asked Kevin Richardson, "Don't you remember somebody using a brick or a stone?" Additionally, Kassin found that Kharey Wise was

"At the time of their videotaped statements, the defendants had been in custody and interrogated on and off for 14 to 30 hours. Most interrogations last an hour or two; law enforcement manuals caution against pushing too much further."

taken to the crime scene and shown pictures of the victim before his videotaped statement. Moreover, when Kharey Wise and Kevin Richardson were taken to the park and separately asked to point to the attack site, they pointed in different directions.⁴³

THE EXONERATIONS

As the reinvestigation continued, additional exculpatory evidence was also uncovered. At trial, prosecutors stated that “hair consistent with the jogger’s” was found on Kevin Richardson’s clothes; however, highly-developed DNA testing, unavailable at the time of trial, concluded that the hair was not suitable for comparison. Additionally, prosecutors argued that a rock found near the crime scene was the murder weapon, but blood and hair found on the rock were shown not to have been the jogger’s.

As the exculpatory evidence emerged, the District Attorney, Robert M. Morgenthau, decided to endorse the defense motion to vacate the boys’ convictions and on December 19, 2002, the convictions were vacated in the New York Supreme Court.

Prosecutors conceded, “Ultimately, there proved to be no physical or forensic evidence recovered at the scene from the person or effects of the victim which connected the defendants to the attack on the jogger” and that their case against the juveniles “rested almost entirely on the statements made by the defendants.”

The court also noted the incriminatory weight of the confessions, stating, “Given the imperfection of the evidence before the jury, it is clear that the defendants’ statements played a crucial role in the jury’s verdict as to all convictions. These confessions were the quintessential evidence in the prosecution of the defendants.”⁴⁴

Gary Gauger’s Story

In 1994, Gary Gauger was wrongfully convicted and sentenced to death for the murder of his parents on their Illinois farm. No physical evidence linked Gary to the crime, but after an all-night interrogation, he made unrecorded statements that authorities claimed constituted a confession. In 1996, his conviction was overturned, and the true perpetrators were convicted in federal court a year later. Gary was granted a full pardon in 2002.

In 1993, Ruth and Morris Gauger were murdered on their farm in McHenry County, Illinois. Their son Gary, 40, found his father’s body on April 9, 1993 and called police, who then discovered his mother’s body also on the premises. Gary’s mother and father had both been slashed across the neck with a knife.

THE INTERROGATION

Gary was taken into custody and interrogated for 18 hours, through the night, before making statements that police and prosecutors took to be a confession. The interrogation and his statements were not recorded, and officers made no contemporaneous record of them. Absent an objective record of the interrogation, the case turned into a swearing contest between Gary and the officers.

Gary said he had not confessed but had made hypothetical statements after officers convinced him that he might have committed the murders during an alcoholic blackout. He said officers convinced him to speculate about how he might have committed the crime, telling him he had failed a polygraph test and that clothes covered in blood had been found in his room. In fact, neither was true — there were no bloody clothes found, and the polygraph examiner said that he could not get a reading because of Gary’s exhaustion.

Officers also showed him pictures of how his mother’s throat had been slit. At that point, Gary said he would try to tell them how he “would have” murdered his parents even though he didn’t recall having done so. Gary refused to sign a written confession because he said he had “absolutely no memory of any of this.” The interrogation ended when Gary asked for a lawyer because he was worried that if his statements “were taken out of context it might be considered a confession.”⁴⁵ However, at the pretrial hearings, officers testified that he had confessed to the crime and his statements were ruled admissible in court.

THE TRIAL

At trial, officers Beverley Hendle and Eugene Lowery based their testimony of his confession from their own notes about the interview and did not include any testimony that Gary’s statements were

made in a hypothetical context. The prosecution also sponsored testimony from a jailhouse informant named Raymond Wagner, a twice-convicted felon who claimed that Gary had admitted to killing his parents. An exhaustive 10-day search of the farm yielded no physical evidence linking Gary to the crime.

On October 21, 1993, a jury took three hours to return a guilty verdict, and Gary was subsequently sentenced to death on January 11, 1994. Nine months later, the sentence was reduced to two sentences of life imprisonment without the possibility of parole.

THE APPEAL

Gary and his attorneys appealed his conviction, and in 1996, the Second District Illinois Appellate Court unanimously reversed the decision and remanded the case for a new trial. The court found that the trial judge should have suppressed Gary's alleged confession, which was the result of an arrest made without probable cause. Because the confession was the most powerful evidence against Gary, State's Attorney Gary Pack was forced to drop the charges and release him, but he still claimed Gary was likely guilty of the crime. Gary was released on home monitoring on August 2, 1996.

THE EXONERATION

In June 1997, two members of a notorious motorcycle gang known as the 'Outlaws' were indicted for the murder of the Gaugers, among other crimes. During their trial, the prosecution presented tape recordings of one of the Outlaws confessing to the murders to another member of the gang.

For the preceding year, federal agents had been using an informant in the gang to collect information on the gang's illegal activities. Wearing a wire, the informant recorded gang members discussing the murder of the Gaugers. Gang member Randy Miller was heard saying, "There's nobody that knows about that. I'm not worried about that . . . There's not one bit of my evidence there. I had stuff on, I kept my hair [expletive] clean . . . there's no physical evidence from me there, there's none."

It was later discovered that the gang had tried to rob the Gaugers because they were known in the community for not trusting banks and for keeping large amounts of cash at the house. Miller and another gang member named James Schneider were convicted in federal court of racketeering offenses in which the two murders were among the predicate acts.

The prosecution in Gary's case had been given evidence of Miller and Schneider's involvement in the murder in November 1995, nine months before his release, but had decided not to share it with Gary's counsel, deeming that it was not material, exculpatory, or sufficiently reliable. In December 2002, the Governor of Illinois granted Gary a full pardon based on innocence.

Gary remarried upon his release, but his time in prison made him less able to emotionally relate to others. His wife Sue said, "He chooses not to feel anything. It is not easy on a marriage. But he is still an incredibly gentle and kind man. Some days he's completely silent. Or he doesn't want to leave the house at all."⁴⁶

Earl Washington's Story

In 1984, a Virginia jury convicted a mentally-retarded man of rape and murder and sentenced him to death based almost entirely on a false confession elicited after two days of interrogation. In October 2000, after DNA testing had provided unassailable proof of his innocence, Washington received a full pardon, and in 2006, a federal jury awarded him \$2.25 million in damages.

On June 4, 1982, a 19-year-old mother of three was raped and stabbed in her home in Culpepper, Virginia. She told police that she had

been raped by a black man acting alone before succumbing to her wounds later that afternoon. Almost a year after the murder, the investigation had failed to lead to an arrest.

THE INVESTIGATION & FALSE CONFESSIONS

On May 21, 1983, 22-year-old Earl Washington Jr. was taken into custody on unrelated charges in another county. According to police, during that time, he confessed to the Culpepper murder. Washington was taken into custody because he had broken into the home of an elderly woman when, surprised to find her at home, he hit her over the head with a chair and stole a pistol from the house. Upon returning to his home, the gun acci-

dentally discharged, hitting his brother in the foot. Washington fled to the woods, where he was eventually apprehended.

Washington, a mentally retarded African-American male with an IQ in the bottom two percent of the population, functions at the level of a ten-year-old child. Held in custody for two days, and interrogated off and on by several officers, Washington confessed to five different crimes, including three separate rapes. While the first four confessions were rejected by Virginia authorities as unreliable because of inconsistencies with the crimes, after the fourth confession, police asked Washington if he had committed the Culpepper murder, at which point he nodded his head and began to cry.

Washington's confession and description of the murder contained several important errors. For example, Washington said the victim was black when she was, in fact, white. He also said he had stabbed the victim "once or twice" — she was stabbed 38 times. Lastly, he said no one else was in the apartment when, in fact, two of the victim's children were present. While Washington's confession was being typed up, officers drove him to the victim's apartment complex three times to see if he could identify the scene of the crime. When asked to point out the crime scene, Washington pointed in the opposite direction of the victim's apartment. Only when an officer pointed to the victim's apartment and asked directly, "Is that the one?" was Washington able to identify the correct apartment.⁴⁷

The U.S. Fourth Circuit Court of Appeals later ruled, "The circumstances under which the statements were elicited by police interrogations were such as to raise at least colorable questions of the voluntariness and intelligence with which they were given."⁴⁸ The court found that his confession was the result of a process of interrogation over a period of two days, and came as responses to specific questions rather than as a volunteered narrative. The court also noted the errors in Washington's confession. During state *habeas* proceedings, an expert testified as to Washington's extreme suggestibility, saying he was "easily led," eager to please, and deferential to authority.

THE TRIAL & APPEALS

The only evidence against Washington at trial included his confession and his alleged statement during interrogations that a shirt from the crime scene was his. At trial, Washington denied owning the shirt, and his sister testified that she washed all his clothes and the shirt did not belong to him.

In fact, semen stains on a blanket found at the crime scene were tested by the Commonwealth's Bureau of Forensic Science before trial, and the tests demonstrated that the depositor of the semen had blood type A whereas Washington had blood type O, indicating he could not have been the source of the

semen. While this evidence was given to Washington's counsel, it was not presented to the jury at trial. Washington was convicted on January 20, 1984 and sentenced to death on March 20, 1984.

In May 1985, Washington pled guilty to burglary and malicious wounding for the incident at the elderly woman's house and received two sentences of 15 years to run consecutively. His murder conviction was affirmed by the Virginia Supreme Court later

that year, and the U.S. Supreme Court denied his appeal in 1985.

In August 1985, Washington came within nine days of execution before a fellow death-row inmate described his plight to a member of a New York City law firm, which decided to take his case *pro bono*. The firm filed a state *habeas* petition, and Washington received a stay of execution.

As appellate courts considered Washington's case, the officers who interrogated him expressed concern about the evidence against him. In May 1993, officers Curtis Reese Wilmore and Harlan Lee Hart, who had interrogated Washington before his confession, told Assistant Attorney General John H. McLees, Jr. that they "had been troubled for years that Washington's sentence was based only on his own confession without any corroborating physical evidence . . . especially in light of Washington's limited mental abilities."⁴⁹

The court found that his confession was the result of a process of interrogation over a period of two days, and came as responses to specific questions rather than as a volunteered narrative.

THE EXONERATION

In October 1993, DNA testing on semen evidence recovered from the victim by the Virginia Division of Forensic Science indicated that Washington could not have been the source of the semen. Then-governor Douglas Wilder issued a conditional pardon, commuting Washington's death sentence to life imprisonment; however, the governor did not grant Washington an absolute pardon based on innocence, citing Washington's confession as evidence of guilt.

In 2000, additional testing on the semen evidence on the blanket from the crime scene conclusively excluded Washington as a contributor of the semen and then-Governor James Gilmore granted Washington an absolute pardon on October 2, 2000 for the capital murder conviction.

Washington stayed in custody for the burglary and malicious wounding convictions even though the Virginia Department of Corrections determined that he would have been eligible for parole on these charges on January 25, 1989. The Department of Corrections declared his mandatory release date to be February 12, 2001 and on that day, he was released from prison to parole supervision.

In 2004, further tests of the DNA evidence in the Culpepper murder implicated Kenneth Tinsley, a convicted rapist already in custody, in the crime for which Washington was convicted.

In 2006, a federal jury awarded Washington \$2.25 million in damages. The ruling was appealed, and the case is now pending in the Fourth U.S. Circuit Court of Appeals.

SNAPSHOTS OF SUCCESS

If it works in these states and jurisdictions, why not the rest of the country?

States and individual police departments that have adopted recording policies have concluded that the policies strengthen law enforcement and help ensure the highest quality evidence possible in criminal cases. In some areas, recording policies were initially met with skepticism, but ongoing surveys of the more than 450 departments that record illustrate widespread support for the practice.

There are three ways in which policies requiring electronic recording of custodial interrogations can be adopted — through court mandate, legislation, or individual police department policy. While all three methods have yielded success, implementation through legislation is preferable because it ensures uniformity and comprehensive guidance on such important questions as when and where recordings are required, any possible exceptions, and the consequences of failing to record. Court mandates, on the other hand, may leave many of the details unaddressed, requiring extensive litigation to sort out important questions involved in implementation. Legislation can also address issues of funding and training. In short, by ensuring clarity and uniformity on the parameters of the policy, legislation simplifies the work of law enforcement personnel and the courts.

ALASKA

Alaska's recording policy is an example of the judiciary exercising its power to improve the criminal justice system by mandating the electronic recording of custodial interrogations in all felony and domestic violence cases. The court held, as a requirement of due process under the state constitution, an electronic recording of custodial interrogations is required when feasible for confessions to be admissible at trial. The court reasoned that a recording requirement would provide a more accurate record of the interrogation and therefore reduce the number of disputes before and during trial concerning Miranda warnings and the voluntariness of Miranda waivers. The court concluded that recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against incrimination and, ultimately his right to a fair trial."⁵⁰ The ruling also provided appropriate exceptions: confessions may be admissible at trial even if the preceding interrogation is not recorded if the suspect agrees to speak only if he is not recorded or if there is a power or equipment failure. Subsequent cases in Alaska courts have upheld the admissibility of statements made under these circumstances. Alaska

has now required police to record interrogations for over 20 years.

Although a number of detectives were skeptical when the ruling was first announced, recording has now become routine throughout the state. A spokesperson from the Anchorage Police Department said, “Recordings protect our ability to do our jobs. They have proven beneficial to law enforcement, and ease public concern about how our officers treat people who are in police custody.”⁵¹

MINNESOTA

Similar to Alaska, the Minnesota Supreme Court held that custodial interrogations must be recorded when feasible.⁵² The court ruled that statements may be suppressed if officers fail to record the interrogation, and exceptions will be decided on a case-by-case basis. However, Minnesota courts have since upheld the admissibility of statements where no recording was made because of equipment malfunction or other reasonable mistakes. Minnesota’s recording requirement extends to all criminal cases. Police and prosecutors have reported positive experiences with the policy over the last 12 years, finding that all involved in the criminal justice system benefit from recording. A Hennepin County Attorney, for example, said, “For police, a videotaped interrogation protects against unwarranted claims that a suspect’s confession was coerced or his constitutional rights violated. For prosecutors, it provides irrefutable evidence that we can use with a jury in the courtroom. For suspects, it ensures that their rights are protected in the interrogation process.”⁵³

NEW JERSEY

New Jersey began recording interrogations in homicide cases in January 2006 in response to a ruling from the state supreme court, and in 2005, the court accepted the recommendations of the Supreme Court Special Committee on Recordation of Custodial Interrogations.⁵⁴ The ruling allows for audio or video recording and requires recording from the reading of the Miranda warning until the end of the interview. Suspects do not have to be told they are being recorded. If a statement is not recorded, the court will determine if it is admissible at trial and may issue a warning to the jury to regard unrecorded statements with caution. State Attorney General Peter Harvey said, “This

approach is consistent with modern law enforcement techniques. It is helpful for both sides because everything that is said, and the manner in which it was said, is accurately captured on tape.”⁵⁵ Calls to county and municipal law enforcement found that officers seem to agree that recording interrogations “is proving to be no sweat.”⁵⁶ The mandate has since expanded to apply to all first, second, and third degree felonies, effective in January 2007. In many New Jersey police departments, recording has become second nature — some had already started recording in all felony cases. Roxbury Police Chief Mark J. Noll said the expansion “should be seamless.”⁵⁷

ILLINOIS

In 2003, Illinois became the first state to adopt legislation requiring that custodial interrogations be electronically recorded. Illinois adopted the policy based on the recommendations of the Governor’s Commission on Capital Punishment, which assembled in response to the exoneration of 13 inmates from Illinois’ death row. The Illinois statute requires recording interrogations in all homicide cases.⁵⁸

Illinois police departments have had success with the policy, and the DuPage County Sheriff’s Office policy statement states: “Electronic recording of suspect interviews in major crime investigations protects both the suspect and interviewing officers against subsequent assertions of statement distortion, coercion, misconduct or misrepresentation. It can serve as a valuable tool to the criminal justice system, assisting the Court in the seeking of the truth.”

NEW MEXICO

New Mexico passed legislation in 2005 requiring that custodial interrogations be recorded in their entirety, using audio or video equipment, in felony investigations. The requirement took effect on January 1, 2006, and provides exceptions for good cause, such as equipment malfunction or a suspect’s refusal to be recorded.⁵⁹ A representative from the Hobbs Police Department said, “I find it hard to believe that all police do not record in investigations of serious felonies.”⁶⁰

MAINE

In 2004, Maine adopted legislation requiring that law enforcement agencies develop and adopt

procedures to record suspect interrogations in investigations of serious crimes. The Board of Trustees of the Maine Criminal Justice Academy adopted minimum standards in January of 2005, and the Maine Chiefs of Police adopted a model policy the next month, which is used by local law enforcement agencies to develop local policies. The model policy states: “This agency recognizes the importance of recording custodial interrogations related to serious crimes when they are conducted in a place of detention. A recorded custodial interrogation creates compelling evidence. A recording aids law enforcement efforts by confirming the content and the voluntariness of a confession, particularly when a person changes her testimony or claims falsely that her constitutional rights were violated. Confessions are important in that they often lead to convictions in cases that would otherwise be difficult to prosecute. Recording custodial interrogations is an important safeguard, and helps to protect the person’s right to counsel, the right against self-incrimination and, ultimately, the right to a fair trial. Finally, a recording of a custodial interrogation undeniably assists the trier of fact in ascertaining the truth.”⁶¹

WISCONSIN

On January 1, 2007, Wisconsin’s new recording statute took effect.⁶² Wisconsin has been recording interrogations of juvenile suspects for the past year but will now use audio or video technology to record custodial interrogations of adults in felony cases. The statute includes the provision that the suspects need not be informed they are being recorded. It also states exceptions to the rule, including cases where the suspect refuses to cooperate if recorded, or the statement was made spontaneously, and for cases involving equipment malfunction. If a statement is not recorded and does not fall into one of these categories, it is still admissible in court; however, at the request of the defendant, the jury may be instructed that it is state policy to record custodial interrogations, and that they may consider the absence of a recording in evaluating the statement.

This policy change stems from recommendations made by a state task force created to study the causes of wrongful convictions, and the change has garnered the support of some prosecutors. Dane County

District Attorney Brian Blanchard, for example, said prosecutors will want to avoid the jury instruction, and “Overall, [recording is] going to be good. What we want is the truth.”⁶³ Shawano County District Attorney Greg Parker also supports the practice, saying “juries will be better informed. The whole justice system will be better served. In a lot of cases it might protect the officers.”⁶⁴ Pierce County District Attorney John O’Boyle said, “I love the idea to be honest with you. It plays out literally on the big screen. You can show the jury this is what was said, this is the body language and the body language sometimes speaks volumes.”⁶⁵

Additionally, the state Office of Justice Assistance has distributed approximately \$650,000 to Wisconsin police agencies for the purpose of purchasing equipment to comply with the new law.

450 INDIVIDUAL DEPARTMENTS IN 50 STATES

A 1993 National Institute of Justice study found that many police and sheriff’s departments have videotaped interrogations on their own, and the vast majority found the practice useful.⁶⁶ To date, more than 450 police and sheriff’s departments across the country have independently adopted recording procedures, and they report uniformly positive experiences.⁶⁷ For example, a representative from the Salt Lake City, Utah Police Department said that since the department has been videotaping interrogations, there have been no complaints about voluntariness or coercion. A spokesman from the Corpus Christi, Texas Police Department said, “Officers have found that they especially like the recording process because it is much faster and easier for them to simply record a suspect’s interview, rather than the old method of interviewing the suspect, writing down his version of events, having the writing typed up and having the typing signed by the suspect. Simply recording everything means when the interview is over, the suspect’s confession is recorded for posterity without all the other paperwork.”⁶⁸ The Broward County, Florida Sheriff’s Office began recording in 2003. A supervisor reports, “We are recording all interrogations/interviews and are continuing to have great success. Our detectives have made the transition very well and are satisfied with the result. They have found their confession rates have not been compromised.”⁶⁹

VOICES OF SUPPORT

“[I]t has become clear that videotaped interrogations have strengthened the ability of police and prosecutors to secure convictions against the guilty. At the same time, they have helped protect the rights of suspects by ensuring the integrity of the criminal justice process . . . Police and prosecutors have little to fear from a requirement to videotape all interrogations. Recording not only protects the innocent, it helps convict the guilty and sustain the public’s faith in our criminal justice system.”⁷⁰

Amy Klobuchar

Hennepin County, Minnesota chief prosecutor,
recently elected to United States Senate
Washington Post, June 10, 2002

“In Santa Clara County, we have found that recording statements made by suspects in serious felonies has helped the police by protecting them from unfounded accusations of abuse, has benefited the public by assuring that convictions and confessions are solid and trustworthy, has helped the courts by reducing the number of contested motions, has helped prosecutors by improving the quality of evidence, and has helped the taxpayers by reducing the funds spent on needless litigation. This is an excellent and common-sense criminal justice reform.”⁷¹

David Angel

Deputy District Attorney, Santa Clara County, California
Interview, January 8, 2007

“This reform in interviewing and interrogation practices suggests that the overall benefit of electronic recording in custodial cases is not only feasible, but may have an overall benefit to the criminal justice system.”⁷²

John Reid & Associates, Inc.

2003 survey of officers who record in Alaska and Minnesota

“Taping interviews is the only way to wipe away any doubt about what happens in that interview room. It protects my investigators, the suspects, and the integrity of the evidence.”⁷³

Sheriff John E. Zaruba

DuPage County, IL
Chicago Tribune, June 29, 1999

“Unfortunately, people have come to believe the worst of the police. It is incumbent on those of us who are interested in bringing back faith in the system to do things that show the integrity of what police and prosecutors do to build a case. We should welcome the opportunity to show the system and show that it is fair.”⁷⁴

John McCarthy

Montgomery County, MD, Deputy State’s Attorney
(recently elected as State’s Attorney)
Washington Post, February 12, 2002

“I would describe [videotaping] as a big improvement. We’re spending a lot less on pre-trial motions. It just narrows the issues.”⁷⁵

Judge Clark Erickson

Kankakee County, IL
Chicago Tribune, April 21, 2002

“This is marvelous. Every detective can go into a room and not worry someone is going to make false accusations. Unequivocally, we can prove to the public the integrity we maintain. It’s proof positive for us.”⁷⁶

Deputy Chief Michael Chasen

Chicago Police Department
Associated Press, July 17, 2005

“To me, videotaping is in the same category as DNA evidence. It will send some people away for a long time to places they don’t want to go, and it will free other people. It’s a powerful truth-finding tool.”⁷⁷

William Geller

Former Associate Director,
Police Executive Research Forum
“True Confessions,” The Atlantic Monthly, 2002

“[Recording] really does insure the jury has an accurate picture of what the suspect said, and how he or she said it. Jurors want unfiltered reality, and getting an audio tape or video tape of what the defendant said right after the crime happens is really important to them.”⁷⁸

Susan Gaertner

Ramsey, MN County Attorney
Grand Forks Herald, July 24, 2006

QUESTIONS & ANSWERS

Won't recording interrogations deter confessions, making it harder to prosecute the guilty?

Officers who have not tried recording will sometimes express concern that suspects will “clam up” if the interrogation is recorded. However, ongoing surveys of the more than 450 police departments that currently record demonstrate that even if suspects know they are being recorded, it makes no difference in obtaining their cooperation. Additionally, in a National Institute of Justice survey, police agencies reported that recording had little effect on the suspect’s propensity to confess and increased the quantity and quality of incriminating evidence at trial.

In fact, jurisdictions that mandate recording of interrogations have seen increased numbers of guilty verdicts and guilty pleas.⁷⁹ Studies have shown that recordings have no impact on the likelihood of confession and that recording does not interfere with the officer’s use of standard interrogation techniques.⁸⁰

This has been reflected in the experiences of departments that record. A spokesman from the Omaha, Nebraska Police Department said, “[Recording] works great due to the fact that you do not have to write anything down, which can make the suspect nervous and clam up . . . they clam up more when you write a lot of notes during the interview.”⁸¹ In other words, recording interrogations does not allow for confessions to be lost or the guilty to go free.

Won't juries react badly to the interrogation strategies they view on tape, such as rough language, psychological ploys, and accusatory or aggressive questioning?

In Illinois, where recording custodial interrogations is required by statute, a circuit court judge observed that juries are savvy about police strategies, partly due to the popularity of television shows such as *Law & Order* and *NYPD Blue*.⁸² Juries will understand police procedures and interrogation techniques if they are explained in court. The public understands the adversarial nature of interrogations and wants law enforcement to use appropriate tactics in order to catch criminals.

Is it true that false confessions are extremely rare?

The DNA revolution has revealed that false confessions occur more often than one might think. While it is hard to quantify how many false confessions have actually been elicited from innocent suspects, research indicates that they have contributed to 15-25 percent of wrongful convictions.⁸³

What if the suspect refuses to speak if the interview is recorded?

Jurisdictions that record find that most suspects agree to be taped.⁸⁴ However, some states that record provide exceptions to the recording requirement, such as when a suspect refuses to speak if the interview is recorded. In that case, only the defendant’s refusal should be recorded, at which point the equipment may be turned off and the interview may proceed the “old-fashioned” way, with officers taking hand-written notes.

It should also be noted that most states’ eavesdropping laws allow for suspects to be recorded without their knowledge or consent. States that require two-party consent for recording can write provisions into statutes authorizing officers to record without the suspect’s knowledge.

What about cases of equipment malfunction?

States can and should provide exceptions to the recording requirement, allowing for confessions to be admissible in court if a legitimate problem occurred with the recording equipment. Several states have policies that contain this provision, including Alaska and Minnesota.

Won't the costs of recording equipment be prohibitive, especially for smaller police departments?

The costs of video recording equipment have decreased substantially as the equipment has become more and more ubiquitous. While some larger departments have opted for high-end digital recording systems at significant expense, such elaborate set-ups are not necessary to implement the policy effectively. In fact, most of the benefits of recording interrogations can be accomplished with inexpensive audio recording devices available at minimal cost.

The more than 450 departments that currently record vary from bigger departments in large cities, to smaller departments in rural areas. In surveys of these departments, few officers have mentioned cost as a problem. They recognize the substantial savings recording affords the department, especially in terms of protection from false claims of coercion and abuse. The costs incurred are weighted heavily on the front end and include buying and installing recording equipment as well as training officers on how to use it. However, police officers who currently record recognize and value the long-term savings resulting from the policy.

Police departments can receive funding from national, state, and local resources. In 2002, the National Institute of Justice allotted over \$178 million to develop police technology and provide grants to local law enforcement agencies. In the spring of 2006, the state Office of Justice Assistance handed out approxi-

mately \$650,000 to Wisconsin police departments for the purchase of recording equipment in order to comply with the state's new recording statute.⁸⁵

The costs associated with recording interrogations are miniscule compared to the monetary costs of wrongful convictions.

For example, police in Kankakee, Illinois equipped an interrogation room with video equipment for \$5000.⁸⁶ In comparison, Cook County, Illinois paid \$38.5 million for the wrongful convictions of the Ford Heights Four, in which a group of men were convicted based upon the incriminating false confession of a 17-year-old borderline mentally retarded woman.⁸⁷

Finally, false allegations of police misconduct are a huge drain on the system. Recording suspect interviews reduces the hours police officers waste in the courtroom facing false allegations of abuse, and allows police to spend more time on the streets doing their jobs.

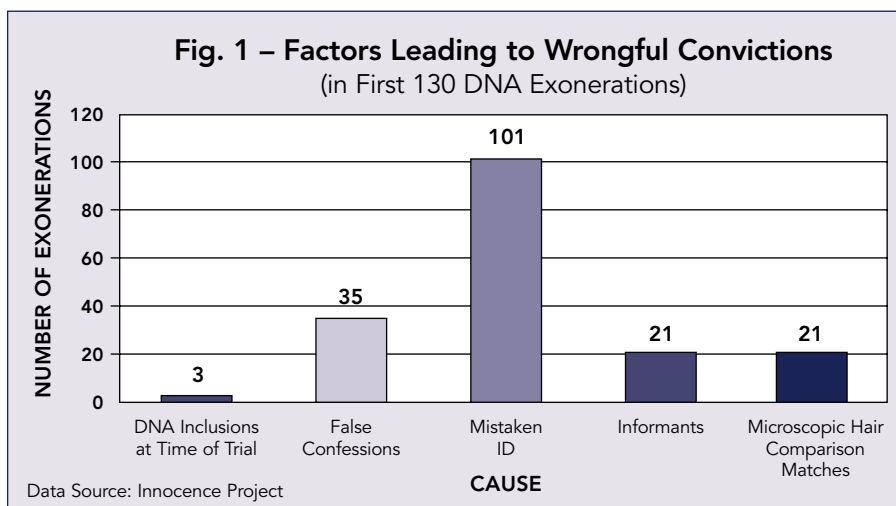
STATISTICS

The Innocence Project found that false confessions occurred in a little over 25 percent of the first 130 DNA exonerations (see Figure 1). To date, nearly 200 wrongly convicted prisoners have been exonerated and released as a result of exculpatory DNA evidence. Of those, approximately 25 percent involve defendants who falsely confessed, pled guilty or made incriminating statements to authorities.⁸⁸

While the majority of police interrogations last less than two hours, a recent analysis of 125 proven false confessions showed that of the cases in which interrogation times were known (slightly more than one-third), 16 percent lasted less than six hours; 34 percent between six and twelve hours; 39 percent between twelve and twenty-four hours; seven percent between twenty-four to forty-eight hours; two percent between

forty-eight and seventy-two hours; and two percent between seventy-two and ninety-six hours (see Figure 5).⁸⁹ The Reid Technique, the gold standard for American interrogation methodology used by most law enforcement agencies in North America, notes that three to four hours is usually sufficient to complete an interrogation.⁹⁰

In a study of 340 exonerations in the United States from 1989 to 2003, 15 percent of the defendants confessed to crimes they did not commit — including rape, murder

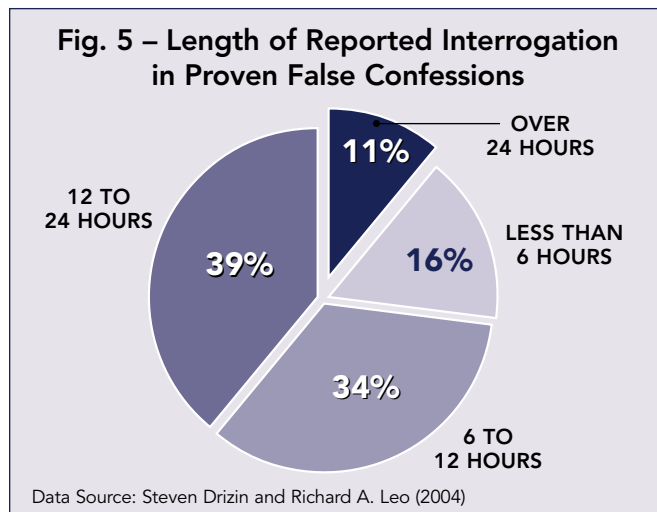
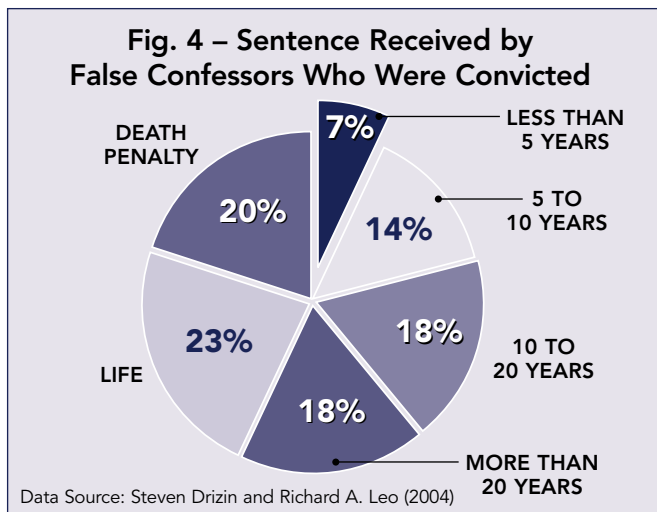
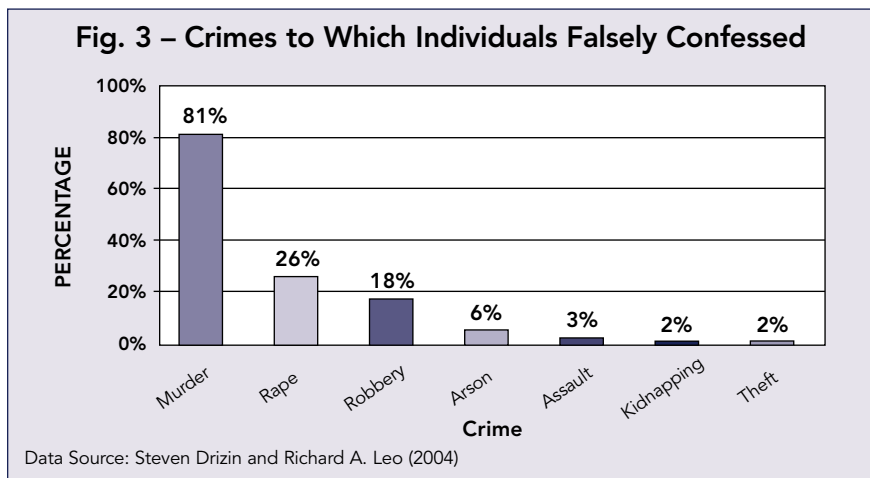
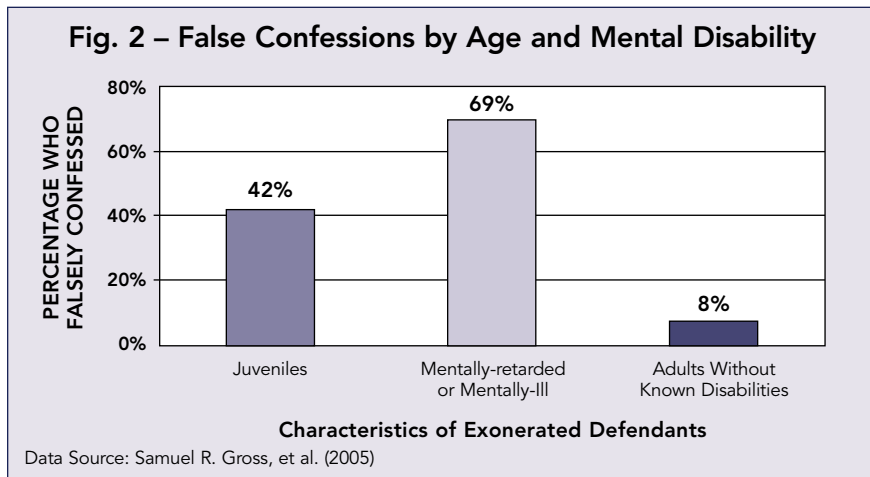


and larceny — with the number increasing to 20 percent in only murder cases.⁹¹ In fact, in another study involving 125 interrogation-induced false confession cases, murder cases made up 81 percent of the total

number of crimes to which defendants falsely confessed (see Figure 3, note that some individuals confessed to multiple crimes).⁹² As noted in the study, “Not surprisingly, false confessions tend to be concentrated in the most serious and high profile cases, lending credence to the argument that false confessions — as well as wrongful convictions based on false confessions — are more likely to occur in the most serious cases because there is more pressure on police to solve such cases.”⁹³

In the later study involving 340 exonerations that occurred in the United States between 1989 and 2003, 33 of the exonerated defendants were juveniles, of which 42 percent falsely confessed; and twenty-six of the exonerated defendants were mentally retarded, of which 69 percent falsely confessed (see Figure 2).⁹⁴

Researchers conducted an analysis of 37 innocent defendants who confessed and then chose to take their cases to trial (and whose confessions were later shown to be false). Of those 37 false confessors, 81 percent ultimately received convictions.⁹⁵ What’s more, researchers found that approximately 20 percent of the false confessors who were convicted were also sentenced to death (see Figure 4).⁹⁶



A MODEL POLICY

MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

This model statute was developed and created by Thomas P. Sullivan, Partner, Jenner & Block LLP.⁹⁷

Be it enacted by [insert name of legislature]:

Section 1. Definitions.

- (a) “Custodial Interrogation” means an interview which occurs while a person is in custody in a Place of Detention, involving a law enforcement officer’s questioning that is reasonably likely to elicit incriminating responses.
- (b) “Place of Detention” means a jail, police or sheriff’s station, holding cell, correctional or detention facility, or other place where persons are held in connection with juvenile or criminal charges.⁹⁸
- (c) “Electronic Recording” or “Electronically Recorded” means an audio, video or digital recording that is an authentic, accurate, unaltered record of a Custodial Interrogation, beginning with a law enforcement officer’s advice of the person’s constitutional rights and ending when the interview has completely finished.
- (d) “Statement” means an oral, written, sign language or nonverbal communication.

Section 2. Recordings Required. All Statements made by a person during a Custodial Interrogation relating to a crime described in the following sections of the [insert jurisdiction] Criminal and Juvenile Codes shall be Electronically Recorded: [insert section numbers].

Section 3. Presumption of Inadmissibility. Except as provided in Sections 4 and 5, all Statements made by a person during a Custodial Interrogation that is not Electronically Recorded, and all Statements made thereafter by the person during Custodial Interrogations, including but not limited to Statements that are Electronically Recorded, shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person.

Section 4. Overcoming the Presumption of Inadmissibility. The presumption of inadmissibility of Statements provided in Section 3 may be overcome, and Statements that were not Electronically Recorded may be admitted into evidence in a juvenile or criminal proceeding brought against the person, if the court finds:

- (a) That the Statements are admissible under applicable rules of evidence; and
- (b) That the Statements are proven [insert applicable burden of proof] to have been made voluntarily, and are reliable; and
- (c) That, if feasible to do so, law enforcement personnel made a contemporaneous record of the reason for not making an Electronic Recording of the Statements; and
- (d) That it is proven [insert applicable burden of proof] that one or more of the following circumstances existed at the time of the Custodial Interrogation:
 - (i) The questions put by law enforcement personnel, and the person’s responsive Statements, were a part of the routine processing or “booking” of the person; or
 - (ii) Before or during a Custodial Interrogation, the person agreed to respond to the officer’s ques-

- tions only if his or her Statements were not Electronically Recorded; or
- (iii) The law enforcement officers in good faith failed to make an Electronic Recording of the Custodial Interrogation because the officers inadvertently failed to operate the recording equipment properly, or without the officers' knowledge the recording equipment malfunctioned or stopped operating; or
 - (iv) The Custodial Interrogation took place in another jurisdiction and was conducted by officials of that jurisdiction in compliance with the law of that jurisdiction; or
 - (v) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the making of an Electronic Recording would jeopardize the safety of the person, a law enforcement officer, another person, or the identity of a confidential informant; or
 - (vi) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the crime for which the person was taken into custody, or was being investigated or questioned, was not among those listed in Section 2; or
 - (vii) Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation.

Section 5. Exceptions. Statements, whether or not Electronically Recorded, which are admissible under applicable rules of evidence, and are proven [insert applicable burden of proof] to have been made by the person voluntarily, and are reliable, may be admitted into evidence in a juvenile or criminal proceeding brought against the person if the court finds:

- (a) The Statements are offered as evidence solely to impeach or rebut the person's testimony, and not as substantive evidence; or
- (b) The Custodial Interrogation occurred before a grand jury or court; or
- (c) The person agreed to participate in a Custodial Interrogation after having consulted with his or her lawyer.

Section 6. Handling and Preservation of Electronic Recordings.

- (a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by law enforcement personnel.
- (b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the Electronic Recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.
- (c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the related Electronic Recording shall be preserved by law enforcement personnel until all applicable statutes of limitations bar prosecution of the person.

Section 7. Effective Date: This Act shall take effect on [insert date].

LITERATURE

SUGGESTED READINGS

The following materials are essential reading for individuals interested in electronic recording of custodial interrogations.

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ENDNOTES

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The Justice Project is comprised of two nonpartisan organizations dedicated to fighting injustice and to creating a more humane and just world. The Justice Project, Inc., which lobbies for reform, and The Justice Project Education Fund, which increases public awareness of needed reforms, work together on the Campaign for Criminal Justice Reform to reaffirm America's core commitment to fairness and accuracy by designing and implementing national and state-based campaigns to advance reforms that address significant flaws in the American criminal justice system, with particular focus on the capital punishment system.

This report is made possible primarily through a grant from The Pew Charitable Trusts to The Justice Project Education Fund. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the Trusts. For additional information, questions or comments, please contact our offices at (202) 638-5855, or email info@thejusticeproject.org.

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