

“THAN THAT ONE INNOCENT SUFFER”: EVALUATING STATE
SAFEGUARDS AGAINST WRONGFUL CONVICTIONS

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ABSTRACT

This article collects and describes the legislative and other binding policy directives in effect in each of the fifty states that function as safeguards in the following areas against the arrest, prosecution, and conviction of innocent persons: (1) eyewitness identification; (2) forensics; (3) interrogation and confessions; (4) informant testimony; and (5) forming an Innocence Commission. It then assesses the individual states' measures of commitment to Blackstone's expressed intolerance for allowing the innocent to suffer, evaluating their respective efforts against a checklist of prescribed reforms.

I. INTRODUCTION

In the mid-eighteenth century, William Blackstone famously stated that “it is better that ten guilty persons escape than that one innocent suffer.”¹ Today, approximately two hundred and fifty years later, Blackstone's 10-to-1 ratio is often revisited, as represented by this special volume.² The United States and other

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¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

² See, e.g., Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 175–76 (1997).

nations are currently experiencing an Age of Innocence. The number of identified, innocent persons who were wrongfully convicted of crimes continues to increase. At the time of this writing, the Innocence Project has identified two hundred and seventy-two men and women who have been exonerated in this country since 1989 by post-conviction DNA evidence.³ The Innocence Project only takes on cases in which DNA evidence is available for testing, estimated to represent just ten percent of criminal convictions.⁴ In addition, more than ninety percent of the exonerations reported by the Innocence Project involve defendants who chose to stand trial.⁵ In contrast, more than ninety percent of convictions nationally are the result of guilty pleas.⁶ It is notoriously difficult to “right” a “wrong” guilty plea.⁷ For these reasons and many others, scholars studying wrongful convictions posit that the number of identified innocents is the mere tip of the iceberg.⁸ Although the precise size of the iceberg is contentiously debated,⁹ there are compelling reasons to believe it is large enough to sink the Titanic.

Blackstone’s stated ratio, and the balancing of interests it envisions, remains as compelling today as when it was first articulated. It is easy to give lip service to the principle that innocent persons should not be punished for crimes they did not commit, even at the cost of guilty parties occasionally going free—whether the precise trade-off is one to ten, one to a hundred, or

³ INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited June 17, 2011).

⁴ INNOCENCE PROJECT, 200 EXONERATED: TOO MANY WRONGFULLY CONVICTED 42 (2007), http://www.innocenceproject.org/200/ip_200.pdf.

⁵ *When the Innocent Plead Guilty*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Feb. 5, 2011).

⁶ Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979).

⁷ See Kirke D. Weaver, *A Change of Heart or a Change of Law? Withdrawing a Guilty Plea under Federal Rule of Criminal Procedure 32(e)*, 92 J. CRIM. L. & CRIMINOLOGY 273, 274–75 (2002).

⁸ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 996 (2004); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005); Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, in INTERROGATIONS AND CONFESSIONS: CURRENT RESEARCH, PRACTICE AND POLICY 86, 91 (G.D. Lassiter & C. Meissner eds., 2010).

⁹ See *Kansas v. Marsh*, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (quoting a New York Times article by professor Joshua Marquis, which stated that the “[criminal justice] error rate [is] .027 percent—or, to put it another way, a success rate of 99.973 percent”); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 761–763 (2007) (calculating an error rate for capital rape-murder’s in the 1980s of 3.3–5%).

simply one too “many”¹⁰—in light of the mounting evidence regarding the incidence of wrongful convictions. There should be no less hesitation in converting the stated principle into policy, embodied by meaningful criminal justice reforms designed to protect the innocent against wrongful conviction. Yet, in practice, the states have largely shirked responsibility in enacting safeguards against wrongful convictions that have long been identified and are readily available. Ironically, the Blackstone ratio is, for the most part irrelevant, to the states’ general lassitude in enacting meaningful reforms because, with scant exception, the proposed reforms would entail no trade-offs whatsoever; they would simultaneously guard against the innocent being convicted *and* help ensure that the guilty do not go free.

Our purpose here is a simple one, but to our knowledge, one that heretofore has not been accomplished. We comprehensively describe and analyze current state policy initiatives in several areas relevant to the prevention of wrongful convictions. In doing so, we note how many and which states have enacted reform measures, when those policies were adopted, and describe the content of those reforms. In the appendix, we report the performance of the individual states on a checklist of enacted reforms.

We focus on five areas of importance to wrongful convictions. Four areas concern the prevention of investigation and trial errors: eyewitness misidentifications; forensic science oversight; police interrogations and false confessions; and the use of criminal informants. One area is more general: the establishment of Innocence Commissions. Two of these areas—eyewitness misidentifications and false confessions—have been well researched; indeed, much of the research predates the exoneration explosion that began in the late 1980s. These two topics have been the focus of scientific consensus papers endorsed by the American Psychology-Law Society.¹¹ The other two specific areas—forensic science oversight and the use of informants—have received less research attention but nevertheless have been focal points of suggested policy changes. For each of the five areas addressed, we

¹⁰ See Volokh, *supra* note 2.

¹¹ See generally Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998) (discussing problems with eyewitness identification); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations: Looking Ahead*, 34 LAW & HUM. BEHAV. 49 (2010) (discussing coerced confessions).

describe the issue then examine the recommendations that have been introduced either by researchers or policymakers, and review enacted state policies. In Section VII, we analyze how current state policies do and do not conform to recommended reform measures, and we offer suggestions about future reform efforts and future research directions. We end with brief concluding observations.

We note some initial caveats. Although many states have enacted no reform measures in any of the areas we address, others have policies that predate the era of DNA-based exonerations, and others still have established policies in direct response to exonerations that have occurred within their jurisdiction. Of importance, we cannot provide insight into how the policies that exist are implemented and enforced. In addition, our focus is solely on the state level. It is known, for example, that police interrogations are recorded in more than 600 local and county jurisdictions yet only 19 states have some level of statewide recording requirement.¹² Finally, several other factors are commonly connected to wrongful convictions that we do not consider, including prosecutorial misconduct, ineffective assistance of counsel, post-conviction access to DNA-testing, and compensation for exonerated individuals.¹³ Examining how states do and do not address those issues will be important next steps to gaining a comprehensive understanding of wrongful conviction policies.

II. EYEWITNESS IDENTIFICATION

A. *The Issue*

Evidence suggests that mistaken eyewitness identification is the leading cause of wrongful convictions.¹⁴ This finding is not new, dating at least as far back as 1932 and the work of Edwin Borchard. In his groundbreaking book, *Convicting the Innocent*, Borchard reported that identification errors were present in just under half of

¹² Thomas P. Sullivan et al., *The Case for Recording Police Interrogations*, 34 LITIG. 30, 33 (2008).

¹³ Of seven 'priority areas' listed by the Innocence Project, we include four. See *Fix the System: Priority Issues*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Priority-Issues.php> (last visited Feb. 5, 2011); *Understand the Causes*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Feb. 5, 2011).

¹⁴ *Eyewitness Identification Reform: Fact Sheet*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited Feb. 5, 2011); Wells et al., *supra* note 11, at 605.

the sixty-five cases of wrongful conviction that he examined.¹⁵ More recent studies have echoed Borchard’s finding. Samuel Gross and his colleagues found erroneous eyewitness identifications in 219 of the 340 (64%) wrongful convictions they identified as having occurred between 1989 and 2003, including almost 90% of the rape cases.¹⁶ Misidentifications contributed to the convictions in approximately three-fourths (76%) of the first 250 DNA exonerations,¹⁷ and about one-half of death row exonerations.¹⁸

In addition to being the most common factor contributing to wrongful convictions, mistaken eyewitness identification is among the most extensively researched topics. Psychologists have studied many aspects of the process of perception, retention, and retrieval of information that can affect the reliability of identifications, including the varying capabilities of different types of witnesses,¹⁹ factors that influence memory,²⁰ and the effects of post-identification events on eyewitness confidence and accuracy.²¹ In the late 1990s, the American Psychology-Law Division of the American Psychological Association assembled a subcommittee to conduct an extensive review of the scientific evidence related to best practices and procedures for identifications and to offer corresponding recommendations.²² Among the themes highlighted by that subcommittee were that the procedures employed can influence the likelihood of witnesses’ making their identifications based on “relative judgments” (i.e., which of the displayed suspects looks most similar to the perpetrator) as opposed to an “absolute judgment” (i.e., whether any of the displayed suspects matches the

¹⁵ EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* xiii (Leonard W. Levy ed., Da Capo Press 1970) (1932).

¹⁶ Gross et al., *supra* note 8, at 542. Gross and colleagues’ sample contained 340 total cases, including 121 rapes and 205 homicides. *Id.* Eyewitness misidentifications were present in 102 of the homicide cases (49%) and 107 of the rape cases (88%). *Id.*

¹⁷ INNOCENCE PROJECT, *250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 22* (2010), available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf.

¹⁸ *Causes of Wrongful Convictions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/causes-wrongful-convictions> (last visited Feb. 5, 2011) (of the first 118 death row exonerations, eyewitness error was a contributing cause in 45 of the cases (38%)).

¹⁹ See, e.g., *CHILDREN’S EYEWITNESS MEMORY* (Stephen J. Ceci et al. eds., 1987); Harmon Hosch, *Individual Differences in Personality and Eyewitness Identification*, in *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* 328 (David Frank Ross et al. eds., 1994).

²⁰ See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

²¹ See, e.g., Sven-Ake Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 *PSYCHOL. BULL.* 284 (1992).

²² Wells et al., *supra* note 11, at 603.

witnesses' recollection of the perpetrator); how a useful analogy can be drawn between identifications and experimental procedures; and that witnesses' confidence in their identifications is malleable in response to feedback and other cues received during or after the identification procedures.²³

Research evidence suggests that when witnesses view a lineup or photo spread in which all of the suspects are displayed simultaneously, they have a tendency to identify the person who in their estimation looks *most like* the culprit. This process is known as making a relative judgment.²⁴ The threat to reliability, of course, is that the true culprit may not be present.²⁵ As Wells and his colleagues have pointed out, "there will always be someone who looks more like the culprit than [the others]."²⁶ Reliance on simultaneous presentations may increase the likelihood of erroneous positive identifications in the absence of the true culprit.²⁷ The tendency of witnesses to make a relative identification judgment may be exacerbated if they assume that the perpetrator is in the lineup and feel as though they are expected to make a positive identification.²⁸

Research has also helped to shed light on the relationship between the accuracy of an identification and the degree of confidence a witness expresses in his or her choice. This issue is important not only because of the Supreme Court's reliance on a witness's confidence as one of the factors governing the admissibility of contested identifications²⁹ but also because fact-finders tend to place greater value on identifications made by witnesses who are confident in their opinions. Researchers have examined several aspects of witness confidence.³⁰ Studies have found that identifications made by witnesses who are highly confident in their decisions are somewhat more likely to be accurate than those made by less confident witnesses, although the strength

²³ *Id.* at 614.

²⁴ R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 558 (1985).

²⁵ *Id.*

²⁶ Wells et al., *supra* note 11, at 613–14; *see generally* Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835 (1993) (discussing an experimental test of the relative judgment process).

²⁷ Lindsay & Wells, *supra* note 24, at 562; Wells et al., *supra* note 11, at 12.

²⁸ *Eyewitness Identification Reform*, *supra* note 14.

²⁹ *See* Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

³⁰ For a complete review, *see generally* Wells et al., *supra* note 11.

of this relationship is rather modest.³¹ Importantly, however, the level of confidence a witness expresses in his or her identification during testimony at trial can have a large impact on the jury’s interpretation of that evidence.³² Studies have consistently reported that mock jurors are likely to judge identifications as more reliable when witnesses express confidence in them while testifying.³³

This finding is especially important because levels of confidence can change over time and are susceptible to influences that witnesses may not even consciously appreciate. “Confidence malleability refers to the tendency [of a witness] to become more (or less) confident in his or her identification” because of occurrences that take place following an initial identification.³⁴ Although changes in confidence can result from faulty memory,³⁵ they also can be caused by other factors, such as post-identification questioning,³⁶ post-identification feedback,³⁷ and pre-trial briefing.³⁸ The lack of a cautionary instruction advising the witness that the true culprit may or may not be present can cause some witnesses to feel as though they *must* make an identification because they believe the suspect *must* be included in the lineup.³⁹

³¹ *Id.* at 15. For a meta-analysis of thirty-five studies examining the relationship between post-identification confidence and accuracy, see Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691 (1987).

³² Wells et al. *supra* note 11, at 15–16.

³³ See, e.g., Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185 (1990).

³⁴ Wells et al., *supra* note 11, at 19.

³⁵ See generally Michael R. Leippe, *Effect of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 LAW & HUM. BEHAV. 261 (1980) (discussing the possible correlation between accuracy and certainty of eyewitness identifications).

³⁶ Wells et al., *supra* note 11, at 19; Reid Hastie et al., *Eyewitness Testimony: The Dangers of Guessing*, 19 JURIMETRICS J. 1, 8 (1978) (finding that witnesses who were repeatedly questioned became more confident in the accuracy of their identification reports).

³⁷ Witnesses who received confirming feedback expressed significantly more confidence in their false identifications than those receiving disconfirming feedback or no feedback at all. See Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 366–68 (1998).

³⁸ Witnesses who were briefed about the types of questions they might face during cross-examination were more confident about their decisions and were believed more by jurors, even though their identifications were no more accurate than non-briefed witnesses. Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688, 690–91 (1981).

³⁹ *Eyewitness Identification Reform*, *supra* note 14.

Professor Gary Wells, a leading expert on eyewitness identifications, has defined “system variables” as “variables that are (or potentially can be) under the direct control of the criminal justice system.”⁴⁰ These variables include such matters as the specific identification procedures used, instructions given, the personnel involved, and recording procedures.⁴¹ Importantly, these system variables are not necessarily independent of “estimator variables” which are attributes of the individual witness or the circumstances surrounding the crime or observed event that are fixed, and not subject to intervention or control.⁴² For example, some have argued that witness confidence appropriately can be considered a system variable, although it traditionally has been treated simply as an estimator variable.⁴³ As discussed, the confidence a witness has in his or her identification can be affected by post-identification occurrences, some of which may be under the direct control of the criminal justice system. Thus, for example, statements or feedback provided to witnesses by lineup administrators can directly influence witnesses’ degrees of confidence in their identifications.⁴⁴ Because such feedback, and the actors who provide it, can be regulated by the criminal justice system, witness confidence, to some degree, also can be susceptible to systemic control.⁴⁵

As the research on eyewitness identification and the factors that influence its reliability has increased, experts have offered several suggestions for practices that may help prevent misidentifications. In the following section, we discuss those recommendations.

B. Recommendations

The Supreme Court has addressed issues concerning suggestive eyewitness identification procedures in several cases. In *Manson v. Brathwaite*, the Court announced a two-pronged test governing the admissibility of eyewitness testimony.⁴⁶ The first inquiry focuses on

⁴⁰ Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978).

⁴¹ *Id.* at 1552–53.

⁴² *Id.* at 1548.

⁴³ *Id.* at 1555.

⁴⁴ Witnesses who received confirming feedback expressed significantly more confidence in their false identifications than those receiving disconfirming feedback or no feedback at all. Hastie et al., *supra* note 36, at 7; Wells & Bradfield, *supra* note 37, at 366.

⁴⁵ Wells et al., *supra* note 11, at 626.

⁴⁶ *Manson v. Brathwaite*, 432 U.S. 98 (1977).

whether the identification procedure was unnecessarily suggestive.⁴⁷ If it was, the second prong asks whether the identification meets threshold reliability standards despite the suggestive procedure.⁴⁸ The justices identified several factors to be considered in determining the reliability of identification testimony, including: (1) the witness’s opportunity to view the perpetrator at the time of the crime; (2) the witness’s degree of attention at the original viewing; (3) the extent to which the witness’s description of the perpetrator is consistent with the defendant’s appearance; (4) the time lapse between the witness’s original viewing of the perpetrator and the subsequent identification; and (5) the witness’s level of certainty in his or her identification.⁴⁹

Scholars have argued that the Court’s guidelines governing the admissibility of identification testimony do not go far enough to guard against the threat of unreliable identifications being considered by juries.⁵⁰ The high incidence of misidentifications among known cases of wrongful convictions offers some support for this conclusion.⁵¹ Various researchers and organizations, including the National Institute of Justice (“NIJ”), the American Bar Association (“ABA”), and the Innocence Project, have recommended procedural reforms to increase the reliability of eyewitness identifications. Many of the reforms are consistent with the position that lineup procedures can and should, as closely as possible, resemble scientific experiments. In such experiments it is acknowledged that much can, and occasionally does, go wrong and that procedural safeguards should be in place to help minimize error.⁵² We next discuss several of the proposed procedural reforms.

1. Blind Procedures

Advocates of reform, including the Innocence Project, propose that eyewitness identification procedures be conducted in a “blind” or “double-blind” fashion, meaning the investigator administering the

⁴⁷ *Id.* at 106.

⁴⁸ *Id.*

⁴⁹ *Id.* at 114.

⁵⁰ Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW AND HUM. BEHAV. 1, 1 (2009).

⁵¹ *Eyewitness Identification Reform*, *supra* note 14 (eyewitness misidentifications are present in seventy-five percent of exonerations); Gross et al., *supra* note 8, at 530.

⁵² Wells et al., *supra* note 11, at 627.

lineup or photo array is unaware of the true suspect's identity.⁵³ Presently, in many jurisdictions, the person conducting the identification procedure is likely to be a detective or police officer who is heavily involved in the case and knows the identity of the suspect. This officer often contacts the eyewitness and conducts the lineup, which involves considerable interaction with the witness. The officer then makes a record of the procedures and handles any questions or follow-up issues that arise.⁵⁴ The risk that such an administrator might influence a witness during identification procedures through visible or verbal cues,⁵⁵ even unintentionally,⁵⁶ is substantial.⁵⁷

The rationale for blind administration of identifications is reduced if such procedures do not eliminate the tendency for administrators to provide confirming or disconfirming feedback to the witness.⁵⁸ The recommendation for double-blind procedures is based upon years of experimental research on eyewitness identification rather than systematic research involving actual cases. Unless identification procedures are recorded, it is difficult to determine with certainty whether a lineup administrator may have provided cues that influenced a witness. However, studies have consistently shown that such cues often are transmitted, and that they do affect witness behavior.⁵⁹ Thus, advocates commonly propose blind lineup procedures as a reform to promote more reliable identification procedures.⁶⁰

⁵³ *Id.* at 627, 629; MODEL LEGISLATION: AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS §3 (Innocence Project, 2009), http://www.innocenceproject.org/docs/09_model_legislation/Eyewitness_ID_Prescriptive_Model_Bill_2009.pdf [hereinafter INNOCENCE PROJECT MODEL LEGISLATION]; AMERICAN BAR ASS'N STATEMENT OF BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES DATED AUGUST 2004 3 (2004), <http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessIDrecommendations.pdf> [hereinafter A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES].

⁵⁴ Wells et al., *supra* note 11, at 627.

⁵⁵ Monica J. Harris & Robert Rosenthal, *Mediation of Interpersonal Expectancy Effects: 31 Meta-Analyses*, 97 PSYCHOL. BULL. 363, 378 (1985).

⁵⁶ Confirmation bias refers to the propensity of people to test hypotheses in ways that may bias the results toward confirming previously held beliefs. See Wells et al., *supra* note 11, at 627; Robyn M. Dawes, *The Mind, the Model, and the Task*, in COGNITIVE THEORY 119, 119 (Frank Restle et al. eds., 1975); Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211, 212 (1987).

⁵⁷ Wells et al., *supra* note 11, at 631; Klayman & Ha, *supra* note 56, at 212.

⁵⁸ Wells et al., *supra* note 11, at 629; *Eyewitness Identification Reform*, *supra* note 14.

⁵⁹ Wells et al., *supra* note 11, at 630.

⁶⁰ *Id.* at 629; *Eyewitness Identification Reform*, *supra* note 14.

2. Witness Instructions

As previously noted, witnesses confronted with a lineup or photo array often assume that the suspect is present and consequently may feel obliged to make an identification even if entertaining doubts about their ability to do so.⁶¹ Providing advice or instructions to witnesses prior to their attempt to make an identification may help guard against this presumption. Specifically, witnesses should be instructed that the perpetrator may or may not be present in the lineup, and that they should not feel compelled to make an identification. Witnesses additionally should be informed that the investigator does not know the identity of the suspect.⁶² The model legislation proposed by the Innocence Project goes further—suggesting that witnesses be informed prior to their attempted identification that the investigation will continue whether or not they identify a suspect, that they will be requested to make a confidence statement, and that the identification procedures should not be discussed with others.⁶³ The NIJ recommendations explicitly mention actual innocence, suggesting that witnesses should be informed that “it is just as important to clear innocent persons from suspicion as to identify guilty parties.”⁶⁴

These recommendations stem from a substantial body of empirical research showing that witnesses are less likely to mistakenly identify an innocent suspect if they are first warned that the culprit may not be present.⁶⁵ Explicit instructions tend to have a selective effect on witnesses, reducing mistaken identifications in lineups where the true culprit is absent but not reducing accurate identifications when the culprit is present.⁶⁶

⁶¹ *Eyewitness Identification Reform*, *supra* note 14.

⁶² Wells et al., *supra* note 11, at 629; INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(D)(2); NAT’L INST. OF JUSTICE, UNITED STATES DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 35 (1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 53, at 13.

⁶³ INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(D); NAT’L INST. OF JUSTICE, *supra* note 62, at 19; A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 53, at 13.

⁶⁴ NAT’L INST. OF JUSTICE, *supra* note 62, at 32.

⁶⁵ *See, e.g.*, Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482 (1981); Janat Fraser Parker & Virginia Ryan, *An Attempt to Reduce Guessing Behavior in Children’s and Adults’ Eyewitness Identifications*, 17 LAW & HUM. BEHAV. 11 (1993); Wells et al., *supra* note 11.

⁶⁶ *See generally* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997) (providing a

Furthermore, instructing the witness that the procedure is blind (*i.e.*, the lineup administrator does not know which, if any, of the displayed subjects is the suspect) may help reduce witnesses' tendencies to look to the administrator for cues.⁶⁷

3. Structure of the Lineup or Photo Array

Advocates understandably recommend that the lineup or photo array should be designed to ensure "that the suspect does not unduly stand out."⁶⁸ Alternatively stated, the fillers used (*i.e.*, those lineup members who are not the suspect) should be appropriate for the procedure.⁶⁹ Fillers generally should fit the witness's description of the perpetrator.⁷⁰ However, when the witness's description is markedly different from the suspect under investigation, the fillers should resemble the suspect's appearance.⁷¹ Furthermore, the Innocence Project suggests that in the event that multiple lineups are conducted for the same witness, different fillers should be used for each procedure.⁷²

Some scholars refrain from offering recommendations regarding the specific number of lineup members or photographs that should be employed.⁷³ This position has been adopted by the ABA, which suggests only that a "reasonable" number be used.⁷⁴ Others, however, suggest that at least five fillers should be used in a photo array and at least four in a corporeal lineup.⁷⁵ Other steps that go beyond what typically is presented in scholarly literature may be recommended. For instance, the Innocence Project explicitly suggests that the picture of the suspect that is used in a photo array

meta-analysis of studies examining these effects).

⁶⁷ Wells et al., *supra* note 11, at 615.

⁶⁸ NAT'L INST. OF JUSTICE, *supra* note 62, at 29; INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(F); Wells et al., *supra* note 11, at 630.

⁶⁹ INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §§3(G), (H)1–4.

⁷⁰ *Id.*; NAT'L INST. OF JUSTICE, *supra* note 62, at 29.

⁷¹ Wells et al., *supra* note 11, at 632; NAT'L INST. OF JUSTICE, *supra* note 62, at 29.

⁷² INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(H)4.

⁷³ See Wells et al., *supra* note 11, at 634–35 ("Our formal recommendation regarding lineup structure does not state how many people should be in the lineup. The reason for this is because it would be arbitrary to pick a number."). However, Wells et al. go on to say that the probability of false identification is inversely related to the number of lineup members, though there is a diminishing return on this reduction in false identifications with each new lineup member added. *Id.* at 635.

⁷⁴ A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 53, at 3 ("Lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition . . .").

⁷⁵ INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(H)4–5.

must be contemporary.⁷⁶ It further recommends that all lineup members be kept out of witnesses’ view prior to the procedure, and that witnesses should not be made aware of any previous arrests, indictments, or convictions that the suspect may have.⁷⁷

In cases involving multiple witnesses, it commonly is recommended that the suspect be placed in different positions in each lineup.⁷⁸ If the descriptions of the perpetrator provided by multiple witnesses differ, different lineups should be constructed for each witness. Such manipulations help ensure that the witnesses are not exposed to the same bias or source of suggestiveness that may be present in identically orchestrated lineups.⁷⁹ These recommendations regarding the structure of lineups and photo arrays relate directly to the analogy between identification procedures and experiments.⁸⁰ In a scientific experiment, the researcher must not alert the subject to the nature of the hypothesis being tested. In the case of a lineup procedure, the investigator should not indicate to the witness the identity of the true suspect.⁸¹

Virtual unanimity exists that a lineup or photo array is a better option than a “show-up” involving the presentation of a single suspect to a witness.⁸² Show-up procedures clearly do not adhere to the above recommendations, and abundant evidence suggests that show-ups are more likely to result in false identifications than well-structured lineups or photo arrays.⁸³

4. Witness Confidence Statements

Experts suggest that confidence statements be obtained from witnesses when an initial identification is made, and before any feedback has been provided.⁸⁴ As previously noted, a witness’s

⁷⁶ *Id.* at §3(E).

⁷⁷ *Id.* at 5; NAT’L INST. OF JUSTICE, *supra* note 62, at 30.

⁷⁸ *E.g.* NAT’L INST. OF JUSTICE, *supra* note 62, at 30; INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(I)2.

⁷⁹ Wells et al., *supra* note 11, at 634; NAT’L INST. OF JUSTICE, *supra* note 62, at 30.

⁸⁰ Wells et al., *supra* note 11, at 617–19.

⁸¹ *Id.* at 618.

⁸² *Id.* at 630 (defining a “show-up” as “a procedure in which the eyewitness is presented with only one person and asked if that person is the perpetrator in question”); INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(S) (“Efforts shall be made to perform a live or photo lineup instead of a showup.”).

⁸³ Wells et al., *supra* note 11, at 630–31; Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1, 3 (1996); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 460 (1996).

⁸⁴ Wells et al., *supra* note 11, at 635; *Eyewitness Identification Reform*, *supra* note 14;

confidence in his or her identification can be affected significantly by events occurring after the procedure, and a witness's level of confidence then becomes an important determinant of the weight placed on the eyewitness testimony by judges and juries.⁸⁵ Recording the witness's confidence level immediately following the identification procedure, prior to any influence from post-identification events, may help the fact-finder assess any changes in the witness's expressed confidence between the identification procedure and the subsequent testimony.⁸⁶

5. Sequential Lineups

Another reform that may enhance the reliability of eyewitness identifications is to present lineup members or photographs to witnesses sequentially (one at a time) rather than simultaneously (all at the same time). Although Wells and his colleagues stop short of formally recommending sequential identification procedures, they discuss the potential benefits of such a reform.⁸⁷ Similarly, the Innocence Project offers sequential procedures as an "optional" reform, in part due to the potential of encountering political resistance to such a change.⁸⁸ Although the model legislation proposed by the Innocence Project to govern eyewitness identification does not mandate sequential lineups, it requires law enforcement agencies to adopt written policies for identification procedures and includes sequential lineups as one of the recommended practices.⁸⁹ The NIJ does not formally recommend

INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(P) ("If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator . . .").

⁸⁵ Wells et al., *supra* note 11, at 635.

⁸⁶ *Id.* at 635–36.

⁸⁷ *Id.* at 639–40. Wells and colleagues posit that sequential lineups, while useful, must be accompanied by double-blind testing, as the influence exerted by an administrator who knows the identity of the suspect may be greater with sequential lineups than simultaneous ones. *Id.* In addition, they contend that the superiority of sequential lineups is most evident under conditions where the witness is not instructed that the suspect may not be present and when the fillers used are not adequate. *Id.* Still, they mention that were they to make another formal recommendation, it would be for sequential lineup procedures. *Id.*

⁸⁸ *Eyewitness Identification Reform*, *supra* note 14 ("If lingering controversy and concerns about sequential presentation present political resistance, however, the Innocence Project urges jurisdictions to adopt reforms 1–5 above." These include blind procedures, witness instructions, proper lineup composition, and confidence statements).

⁸⁹ AN ACT REGARDING WRITTEN EYEWITNESS IDENTIFICATION AND ADMINISTRATION PROCEDURES §§3(A), (C)9 (Innocence Project 2010) (recommending law enforcement agencies

sequential procedures, instead relying on a series of best practices for both sequential and simultaneous lineups.⁹⁰

6. Videotaping Identification Procedures

Wells and colleagues offer several reasons in support of videotaping identification procedures and encourage such a policy. However, they do not make a formal recommendation to that effect, reasoning that recording will not, on its own, reduce the likelihood of eyewitnesses making false identifications.⁹¹ On the other hand, several organizations do include the videotaping of identifications among their policy recommendations.⁹² If videotaping is not practicable, they suggest that an audio recording be made as an alternative; if both audio and video recording are impracticable, a written record of the lineup procedure should be made.⁹³ Another perspective recommends the creation of a written record only, while making clear that the video recording of identifications is an option that can be considered.⁹⁴

In the following section, we discuss the extent to which different states have reformed their eyewitness identification procedures in light of this substantial body of scientific research and related policy recommendations.

C. State Practices⁹⁵

Currently, ten states have some form of eyewitness identification policy.⁹⁶ Following his August 1994 conviction in a New Jersey courtroom for aggravated sexual assault and related crimes,

to “adopt written policies for using an eyewitness to identify a suspect” and present “lineup members one at a time”).

⁹⁰ NAT'L INST. OF JUSTICE, *supra* note 62, at 2, 33–34.

⁹¹ Wells et al., *supra* note 11, at 640–41.

⁹² A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 53, at 3; INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(T) (“Unless impracticable, a video record of the identification procedure shall be made that includes the following information: 1. All identification and non-identification results obtained during the identification procedures, signed by the eyewitness, including the eyewitnesses’ confidence statements; 2. The names of all persons present at the identification procedure; 3. The date and time of the identification procedure; 4. In a photo or live lineup, any eyewitness identification(s) of (a) filler(s); and 5. In a photo or live lineup, the names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup . . .”).

⁹³ A.B.A. EYEWITNESS IDENTIFICATION PROCEDURES, *supra* note 53, at 3; INNOCENCE PROJECT MODEL LEGISLATION, *supra* note 53, at §3(T).

⁹⁴ NAT'L INST. OF JUSTICE, *supra* note 62, at 24, 34.

⁹⁵ Current as of November 2010.

⁹⁶ See *supra* Table 1.

McKinley Cromedy was sentenced to sixty years imprisonment. His conviction was supported primarily by the victim's identification testimony; no forensic evidence linked him to the offense. DNA testing subsequently excluded him as the source of the semen preserved in a vaginal swab obtained from the victim. Cromedy was released from prison after serving five years of his sentence.⁹⁷ Shortly after his exoneration, New Jersey became the first state to adopt the recommendations of the NIJ concerning eyewitness identification procedures when the State Attorney General issued guidelines for law enforcement that included witness instructions, use of appropriate fillers, obtaining witness confidence statements following an identification, and creating a written record of the procedure.⁹⁸ The guidelines additionally required the use of blind, sequential identification procedures when practical.⁹⁹

TABLE 1: STATES WITH EYEWITNESS IDENTIFICATION POLICIES

State	Eyewitness Identification	Year First Action Taken
<i>Georgia</i>	Based on recommendations of Task Force, the Georgia Peace Officers Standards and Training Council instituted statewide training which includes blind administration of lineups.	2007
<i>Maryland</i>	Law enforcement agencies required to adopt written procedures. Recommended that they follow D.O.J. standards.	2007
<i>New Jersey</i>	Attorney General mandates particular practices, including witness instructions, appropriate filler use, witness confidence statements, blind procedures, sequential presentation, and creation of written record of proceeding.	2001

⁹⁷ See *McKinley Cromedy*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/75.php> (last visited Feb. 5, 2011) (providing a detailed description of Cromedy's case).

⁹⁸ N.J. ATTY GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

⁹⁹ *Id.* at 1; INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 4–5 (2009), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

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<i>North Carolina</i>	Mandated procedures, including: witness instructions, appropriate filler use, confidence statements, blind procedures, sequential presentation, and video recording. Also provides for law enforcement training.	2008
<i>Ohio</i>	Mandated procedures, including: blind procedures, creation of a written record, and witness instructions.	2010
<i>Rhode Island</i>	Task force created to identify best practices.	2010
<i>Vermont</i>	Task force created. In 2010, legislature directed the Vermont Law Enforcement advisory board to develop a proposal to establish best practices (including show-up procedures, blind lineups, proper filler use, witness instructions, and confidence statements). The proposal must be presented to lawmakers in January 2011.	2011
<i>Virginia</i>	Law enforcement agencies must adopt written policies.	2003
<i>West Virginia</i>	Mandated procedures, including: witness instructions, confidence statements, and creation of a written record. Also created task force to examine eyewitness procedures and recommend additional best practices.	2007
<i>Wisconsin</i>	Law enforcement agencies must adopt written procedures. Attorney General recommends blind, sequential procedures, witness instructions, appropriate filler use, and confidence statements. AG’s office provides for training and is willing to work with local jurisdictions to support effective implementation.	2006

In 2007, West Virginia also mandated specific identification procedures, including witness instructions, confidence statements, and written recordation of the process.¹⁰⁰ This law also created a task force to examine eyewitness identification procedures and to identify additional best practices.¹⁰¹ A recently enacted Ohio

¹⁰⁰ W. VA. CODE ANN. § 62-1E-2 (LexisNexis Supp. 2010).

¹⁰¹ W. VA. CODE ANN. § 62-1E-2(c) (LexisNexis Supp. 2010).

statute requires the blind administration of lineups,¹⁰² the creation of a written record,¹⁰³ and specific witness instructions.¹⁰⁴ The statute provides that judges shall consider a lack of compliance with the rules when determining the admissibility of eyewitness testimony.¹⁰⁵ If identification evidence is admitted, it can be accompanied by a cautionary instruction advising the jury that it may consider noncompliance with the statutory requirements in determining the reliability of the identification.¹⁰⁶

The most comprehensive eyewitness identification reform statute to date was enacted in North Carolina in 2008.¹⁰⁷ This law requires all of the practices now followed in New Jersey and West Virginia, and includes additional important elements as well. Specific guidelines address the pictures to be used in photo arrays, as well as situations involving multiple witnesses.¹⁰⁸ The statute explicitly provides that witnesses should not be made aware of any previous arrests or convictions the suspect may have,¹⁰⁹ and that all lineup members should be kept out of the witnesses' view prior to the identification procedure.¹¹⁰ A video recording of the procedure is to be made whenever practicable.¹¹¹ Importantly, the North Carolina statute goes beyond mandating specific procedures; it also provides for the training of law enforcement officers,¹¹² and specifies potential remedies upon law enforcement's failure to comply with the required procedures.¹¹³

Most states have failed to enact similarly comprehensive reforms, but six have addressed identification issues in at least some fashion. Maryland, for example, requires that law enforcement agencies adopt written policies governing identification procedures, which

¹⁰² OHIO REV. CODE ANN. § 2933.83(B)(1) (LexisNexis 2010).

¹⁰³ OHIO REV. CODE ANN. § 2933.83(B)(4) (LexisNexis 2010).

¹⁰⁴ OHIO REV. CODE ANN. § 2933.83 (A)(6)(e) (LexisNexis 2010).

¹⁰⁵ OHIO REV. CODE ANN. § 2933.83 (C)(1) (LexisNexis 2010).

¹⁰⁶ OHIO REV. CODE ANN. § 2933.83 (C)(3) (LexisNexis 2010).

¹⁰⁷ N.C. GEN. STAT. § 15A-284.52 (2009); REEVALUATING LINEUPS, *supra* note 99, at 17.

¹⁰⁸ N.C. GEN. STAT. § 15A-284.52(b)(4)–(6) (2009).

¹⁰⁹ N.C. GEN. STAT. § 15A-284.52(b)(7) (2009).

¹¹⁰ N.C. GEN. STAT. § 15A-284.52(b)(9) (2009).

¹¹¹ N.C. GEN. STAT. § 15A-284.52(b)(14) (2009).

¹¹² N.C. GEN. STAT. § 15A-284.53 (2009) (the state “shall create educational materials and conduct training programs on how to conduct lineups in compliance with this Article”).

¹¹³ N.C. GEN. STAT. § 15A-284.52(d) (2009) (noncompliance (1) “shall be considered by the court in [deciding] motions to suppress the eyewitness identification”; (2) is “admissible in support of claims of eyewitness misidentification”; and (3) is grounds for a cautionary jury instruction, in that the fact finders “may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications”).

must be filed with the Department of State Police.¹¹⁴ Those policies are to “comply with the United States Department of Justice standards on obtaining accurate eyewitness identification.”¹¹⁵ A similar requirement was endorsed by Wisconsin’s Attorney General, who promulgated guidelines recommending the use of blind and sequential procedures, witness instructions, appropriate lineup composition, and obtaining witnesses’ confidence statements.¹¹⁶ The Wisconsin Attorney General’s Office also provides training for law enforcement officers and has expressed a willingness to work with local jurisdictions to support effective implementation of procedural reforms.¹¹⁷ Virginia law requires local departments to establish eyewitness identification procedures, but does not go as far as mandating specific statewide practices.¹¹⁸

Other states have not required procedural changes, but have at least recognized the problem of mistaken eyewitness identifications. Rhode Island has created a task force to identify best practices for improving the accuracy of eyewitness identifications.¹¹⁹ Georgia created a similar task force and, based in large part on the task force’s work, the Georgia Peace Officers Standards and Training Council began statewide training regarding identification procedures, part of which included the blind administration of lineups.¹²⁰ Similarly, in Vermont, the work of an eyewitness identification task force influenced the state legislature to direct the Vermont law enforcement advisory board to develop a proposal for the establishment of best practices, including considerations such as blind procedures, proper use of fillers, witness instructions, and witness confidence statements.¹²¹ The report was to be presented to

¹¹⁴ MD. CODE ANN. [Public Safety] § 3-506(b) (LexisNexis Supp. 2010).

¹¹⁵ MD. CODE ANN. [Public Safety] § 3-506(a) (LexisNexis Supp. 2010).

¹¹⁶ REEVALUATING LINEUPS, *supra* note 99, at 22.

¹¹⁷ *Wisconsin: State Eyewitness Identification Reform Policies*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawViewstate5.php?state=wi> (last visited Feb. 5, 2011).

¹¹⁸ VA. CODE ANN. § 19.2-390.02 (2008).

¹¹⁹ H.R. 7570, 2010 Gen. Assem., Jan. Sess. (R.I. 2010), *available at* <http://www.rilin.state.ri.us/billtext10/housetext10/h7570a.pdf>; *Rhode Island: State Eyewitness Identification Reform Policies*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawViewstate5.php?state=ri> (last visited Feb. 5, 2011).

¹²⁰ *Georgia: State Eyewitness Identification Reform Policies*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawViewstate5.php?state=ga> (last visited Feb. 5, 2011).

¹²¹ *Vermont: State Eyewitness Identification Reform Policies*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawViewstate5.php?state=vt> (last visited June 17, 2011).

the legislature in January 2011.¹²²

III. FORENSIC SCIENCE OVERSIGHT

A. *The Issue*

Forensic evidence can play a critical role in the successful investigation and prosecution of crimes. Yet, the role of forensic science in the criminal justice system presents a paradox. On the one hand, DNA testing has led to the exoneration of more than 272 wrongfully convicted individuals.¹²³ On the other hand, research demonstrates that forensic evidence has also figured significantly in producing wrongful convictions.¹²⁴ Professor Brandon Garrett has reported that fifty-seven percent of the first 200 DNA exonerations involved convictions that were supported by forensic evidence, albeit evidence that was either mistakenly or intentionally in error.¹²⁵ This section addresses the role of forensic science in contributing to wrongful convictions, and the creation of forensic science oversight entities as a measure that states can take to reduce those contributions.¹²⁶

Errors in forensic testing can lead to wrongful convictions. Inadvertent errors can result from cognitive biases, poor training, lack of education, and simple inattention or sloppiness, to name a few causes.¹²⁷ Psychologists,¹²⁸ legal scholars,¹²⁹ and forensic scientists¹³⁰ have recognized the risks created by cognitive biases in forensic analysis.¹³¹ For example, psychologists have confirmed that

¹²² *Id.*

¹²³ INNOCENCE PROJECT, <http://www.innocenceproject.org> (last updated Feb. 5, 2011).

¹²⁴ Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 81 (2008).

¹²⁵ *Id.*

¹²⁶ For the sake of convenience, these entities will be referred to generically as “entities” or “commissions.”

¹²⁷ Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 220–29 (2007).

¹²⁸ *See, e.g.*, Itiel E. Dror & David Charlton, *Why Experts Make Errors*, 56 J. FORENSIC IDENTIFICATION 600 (2006) (discussing how expert latent fingerprint examiners’ analyses were influenced by biasing information).

¹²⁹ *See, e.g.*, D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002) (discussing how observer effects in forensic science have led to wrongful convictions).

¹³⁰ *See, e.g.*, Bruce Budowle et al., *A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement*, 54 J. FORENSIC SCI. 798 (2009) (explaining how contextual bias and confirmatory biases affect the accuracy of forensic findings).

¹³¹ Cognitive biases are a natural consequence of human decision making.

contextually biasing information can affect the way fingerprint examiners evaluate latent fingerprint evidence, leading to erroneous conclusions.¹³² Moreover, when some forensic testing errors come to light, there may be doubt about whether they were inadvertent or intentional. A recent exoneration in North Carolina illustrates how forensic misconduct can help produce a wrongful conviction.

Gregory Flint Taylor was recently exonerated by the North Carolina Innocence Inquiry Commission after having spent almost seventeen years incarcerated for a murder he did not commit.¹³³ Taylor was convicted in 1993 of murdering a woman whose body was found near his sport utility vehicle.¹³⁴ The State Bureau of Investigation Crime Laboratory (“SBI Crime Lab”) provided the investigating law enforcement agency with preliminary forensic test results that indicated there was blood on Taylor’s vehicle.¹³⁵ Taylor’s conviction was based in part on testimony regarding this presumably incriminating evidence. What the jury in Taylor’s case did not hear was that the results of more conclusive, sensitive tests conducted on the stains from Taylor’s vehicle were negative—that is, that no blood was present.¹³⁶ The jury did not hear this information because the SBI Crime Lab did not provide this exculpatory evidence to the prosecutor.¹³⁷ Following Taylor’s exoneration, North Carolina Attorney General Roy Cooper commissioned an independent review of the SBI Crime Lab Forensic Biology section.¹³⁸ The review found more than two hundred cases in which the lab reports discussed the results of the preliminary tests, but not the more conclusive tests.¹³⁹ Although the review cautioned that it should not be assumed that a wrongful conviction resulted in each of these cases, the pattern of conduct is cause for concern.¹⁴⁰ It raises the disturbing possibility that the failure to supply the more conclusive test results was deliberate, perhaps resulting from pro-prosecution biases maintained by Crime

¹³² See generally Dror & Charlton, *supra* note 128.

¹³³ CHRIS SWECKER & MICHAEL WOLF, AN INDEPENDENT REVIEW OF THE SBI LABORATORY 5 (2010), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/An-Independent-Review-of-the-SBI-Forensic-Laborato.aspx>; Martha Waggoner, *Judges Free NC Murder Convict After 16 Years*, ASSOCIATED PRESS, Feb. 18, 2010.

¹³⁴ SWECKER & WOLF, *supra* note 133, at 5–6.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 2.

¹³⁹ *Id.* at 3.

¹⁴⁰ SWECKER & WOLF, *supra* note 133, at 4.

Lab personnel.¹⁴¹

B. Recommendations

In light of their potentially grave consequences, it is important that states take measures to prevent forensic science errors. Indeed, the Justice for All Act of 2004¹⁴² includes a provision that requires all states that receive federal funding under the Paul Coverdell Forensic Sciences Improvement Grant Program¹⁴³ to certify the existence of a state entity that provides independent external investigations into laboratory misconduct or negligence.¹⁴⁴ The legislative history of the Justice for All Act reveals that concerns over forensic testing errors and wrongful convictions played a substantial role in animating the external audit legislation. The bill that was incorporated as Title III of the Justice for All Act contained the provision regarding independent external investigations of crime laboratories involved in negligence or misconduct.¹⁴⁵ In contrast, a version of the bill introduced in the

¹⁴¹ See Mandy Locke & Joseph Neff, *Witness for the Prosecution: Crime Lab is Loyal to Law Enforcement*, CHARLOTTE OBSERVER (Aug. 12, 2010), <http://www.charlotteobserver.com/2010/08/12/1616799/crim-lab-is-witness-for-prosecution.html>.

¹⁴² Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified at 42 U.S.C. § 3797j). The Justice for All Act was a broad piece of legislation designed

[t]o protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Id. at pmb1.

¹⁴³ 42 U.S.C. § 3797j (2006).

¹⁴⁴ Justice for All Act § 311(b)(4) (requiring states to certify "that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount").

¹⁴⁵ The external investigation requirement of § 311(b) of Title III of the Justice for All Act of 2004 first appeared in a bill called the Advancing Justice Through DNA Technology Act of 2003. Advancing Justice Through DNA Technology Act of 2003, H.R. 3214, 108th Cong. § 210(b) (2003). H.R. 3214 was introduced in the House on October 1, 2003 to, among other things, address the backlog of forensic DNA samples, improve DNA testing capacity, and provide for post-conviction testing to exonerate the innocent. *Id.* The predecessor bill of H.R. 3214 was the DNA Sexual Assault Justice Act of 2002, which did not contain the external audit requirement. DNA Sexual Assault Justice Act of 2002, S. 2513, 107th Cong. (2002). This act was introduced in the Senate on May 14, 2002 to, among other things, address the rape kit analysis backlog. *Id.* Both Title III of the Justice for All Act and what was Title II of H.R. 3214 are named "DNA Sexual Assault Justice Act." Justice for All Act Title III; H.R.

preceding session of Congress failed to include the external audit requirement.¹⁴⁶ In the period between the introductions of the respective bills, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing entitled, *Advancing Justice Through Forensic DNA Technology*.¹⁴⁷ Both Peter Neufeld,¹⁴⁸ co-founder of the Innocence Project, and Texas Congresswoman Sheila Jackson Lee,¹⁴⁹ who represented the district encompassing the city of Houston, testified at the hearing.

In the period preceding the introduction of the second version of the bill that contained the external investigation requirement, a newspaper reported on erroneous testing results from the Houston Police Department Crime Laboratory.¹⁵⁰ Congresswoman Jackson Lee subsequently addressed forensic lab accreditation, quality control, and laboratory malfeasance at the hearing.¹⁵¹ She argued that legislation governing forensics and criminal justice must include control mechanisms to prevent the sort of malfeasance that led to the wrongful conviction of Josiah Sutton for rape, which was owed partly to faulty forensic testing performed by the Houston Police Department Crime Laboratory.¹⁵² Peter Neufeld argued for rigorous quality assurance as well as independent external investigations.¹⁵³ Neufeld commended the manner in which the federal Office of the Inspector General investigated allegations of testing errors at the FBI Crime Laboratory and contrasted such action to the oversight that was “sorely lacking in its state counterparts.”¹⁵⁴ Neufeld observed:

One way vigilance can be achieved is by utilizing some of the same quality assurance measures we employ in other institutions where health, safety, and security are at stake. When the Challenger crashed and NASA initially suggested

3214, 108th Cong. Title II (2003).

¹⁴⁶ See Innocence Protection Act of 2001, H.R. 912, 107th Cong. (2001).

¹⁴⁷ *Advancing Justice Through Forensic DNA Technology: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. (2003).

¹⁴⁸ *Id.* at 30–37.

¹⁴⁹ *Id.* at 69–71.

¹⁵⁰ See, e.g., MICHAEL R. BROMWICH, SECOND REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 10 (2005), <http://www.hpdlabinvestigation.org/reports/050531report.pdf>.

¹⁵¹ *Advancing Justice through Forensic DNA Technology*, *supra* note 147, at 69–71.

¹⁵² *Id.* at 71. Sutton spent four and one half years incarcerated and was exonerated in 2004. *Know the Cases: Josiah Sutton*, INNOCENCE PROJECT, www.innocenceproject.org/Content/Josiah_Sutton.php (last visited Feb. 5, 2011).

¹⁵³ *Advancing Justice through Forensic DNA Technology*, *supra* note 147, at 36–37.

¹⁵⁴ *Id.* at 36.

an internal audit, Congress would not allow it. When the Enron scandal broke, the nation would not accept yet another audit from Arthur Anderson. In fact, whenever there is evidence of serious misconduct affecting the public, an independent external audit is obligatory. One of the few notable exceptions to this fundamental principle, I am afraid, has been the state and local criminal justice system.¹⁵⁵

Since all fifty states received Coverdell Forensic Science Improvement grants in 2009, they all presumably have certified that they have entities in place to conduct external investigations when instances of forensic misconduct or negligence arise.¹⁵⁶

Although having an entity in place to investigate allegations of misconduct is important, it is only one aspect of a comprehensive crime laboratory oversight program. In 2009, the National Research Council of the National Academies of Sciences (“NAS”) issued a report that identified and discussed a number of issues concerning the current practice of forensic science in the United States.¹⁵⁷ The report noted, “the quality of forensic practice in most disciplines varies greatly because of the absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight.”¹⁵⁸ In addition, the ABA recommended that “[c]rime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence[.]”¹⁵⁹

¹⁵⁵ *Id.*

¹⁵⁶ NAT’L INST. JUSTICE, FISCAL YEAR 2009 REPORT ON THE PAUL COVERDELL FORENSIC SCIENCE IMPROVEMENT GRANTS PROGRAM (2010), *available at* <http://www.ojp.usdoj.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2009-report.htm>.

¹⁵⁷ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD xix (2009), <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

¹⁵⁸ *Id.* at 6 (citing Giannelli, *supra* note 127, at 171–72, and Ben Schmitt, *Detroit Police Lab Shut Down After Probe Finds Errors*, DETROIT FREE PRESS, Sept. 25, 2008). When a laboratory is accredited, it has demonstrated to an outside institution that it “adheres to an established set of standards of quality and relies on acceptable practices within these requirements.” *Id.* at 195. While accreditation addresses the quality and reliability of forensic practices at the organizational level, certification ensures that the individual forensic analyst is competent to perform his or her duties. *Id.* at 208. Indeed, the NAS Report recommended that laboratory accreditation and forensic analyst certification should be mandatory. *Id.* at 215.

¹⁵⁹ AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, AM. BAR ASS’N, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 47 (2006).

Adopting such recommendations would directly help guard against conduct that can contribute to wrongful convictions.¹⁶⁰ A comprehensive state crime laboratory oversight program would include both measures to ensure the quality practice of forensic science and also to investigate and remedy errors when they occur. Indeed, Professor Paul Giannelli has observed, “[a] forensic commission could employ an established accreditation program . . . but it should do much more than monitor lab procedures. These commissions should also ensure adequate funding, investigate misconduct, and compile a registry of independent experts whom the defense could consult.”¹⁶¹

C. State Practices

Thirteen states have created permanent forensic science oversight entities by statute.¹⁶² In two additional states, the state attorney general established oversight entities.¹⁶³

Most such bodies were established after the advent of forensic DNA testing.¹⁶⁴ The oversight entities vary in composition and

¹⁶⁰ It should be noted, however, that the adoption of such measures is no guarantee that errors, either intentional or inadvertent, will not occur.

¹⁶¹ Giannelli, *supra* note 127, at 229.

¹⁶² ARK. CODE ANN. § 12-12-302 (2009); 20 ILL. COMP. STAT. § 3981/5 (West 2008); IND. CODE ANN. § 4-23-6-1 (LexisNexis 2008); MD. CODE ANN., HEALTH-GEN. § 17-2A-12 (LexisNexis 2009); MASS. GEN. LAWS ch. 6, § 184A (2008); MINN. STAT. ANN. § 299C.156 (West 2007); MO. ANN. STAT. § 650.059 (West 2011); N.M. STAT. § 29-16-5 (Supp. 2010); N.Y. EXEC. § 995-a (McKinney 1996); R.I. GEN. LAWS § 12-1.1-3 (2002); TEX. CRIM. PROC. CODE ANN. § 38.01 (Vernon 2010); VA. CODE ANN. § 9.1-1109 (Supp. 2010); WASH. REV. CODE ANN. § 43.103.010 (West 2007). The California legislature created the California Crime Laboratory Review Task Force with a mandate to “review and make recommendations as to how best to configure, fund, and improve the delivery of state and local crime laboratory services in the future.” CAL. PENAL CODE § 11062(c) (West Supp. 2011). The statute, however, mandated that the Task Force submit a final report by July of 2009. CAL. PENAL CODE § 11062(f) (West Supp. 2011). The Task Force submitted its final report in November of 2009. CALIFORNIA CRIME LABORATORY REVIEW TASK FORCE, AN EXAMINATION OF FORENSIC SCIENCE IN CALIFORNIA (2009), http://ag.ca.gov/publications/crime_labs_report.pdf. It is unclear whether the Task Force will continue its operations. *See id.* at 10.

¹⁶³ Those states are Arizona and Montana. *See infra* Table 2; Press Release, Office of Attorney General Terry Goddard, State of Arizona Dep’t of Law, Terry Goddard Appointing New Panel to Assist State Crime Labs (Nov. 20, 2007), http://www.azag.gov/press_releases/nov/2007/TGAppointsNewPanelToAssistStateCrimeLabs.pdf; *Forensic Science Division—State Crime Lab*, MONT. DEPT OF JUSTICE, <http://www.doj.mt.gov/enforcement/crimelab> (last visited Feb. 5, 2011).

¹⁶⁴ Scientist Alec Jeffries introduced the use of DNA testing to identify individuals (and suggested its forensic application) in 1985. *See* Alec J. Jeffreys et al., *Hypervariable ‘Minisatellite’ Regions in Human DNA*, 314 NATURE 67, 67 (1985). Both the Indiana and Rhode Island commissions were created prior to 1985. *See infra* Table 2. The first forensic application of DNA was in 1987. *See* JOSEPH WAMBAUGH, THE BLOODING 197 (1989).

functional scope, but share some common features. The entities typically have multi-disciplinary representation in their membership. The most commonly represented interests are those of law enforcement and prosecutor's offices. By statute, eight of the statutory oversight entities have representatives from law enforcement¹⁶⁵ and nine have representatives from the prosecutorial entities.¹⁶⁶ The next most commonly represented perspectives are those of defense attorneys¹⁶⁷ and forensic scientists,¹⁶⁸ with seven and six commissions, respectively, required by statute to include such representation. Next in line are representatives from academia, whose membership is required by five state statutes.¹⁶⁹ Some commissions also include members of the medical community¹⁷⁰ and others include members of the judiciary.¹⁷¹ One of the more comprehensive commissions, in terms of diversity of membership, is the Illinois Laboratory Advisory Committee, which

¹⁶⁵ These entities are the Arkansas State Crime Laboratory Board, the Massachusetts Forensic Sciences Advisory Board, the Minnesota Forensic Laboratory Advisory Board, the Missouri Crime Laboratory Review Commission, New York State Commission on Forensic Science, the Rhode Island State Crime Laboratory Commission, the Virginia Forensic Science Board, and the Washington Forensic Investigations Council. *See supra* note 162.

¹⁶⁶ These entities are the Arkansas State Crime Laboratory Board, the Illinois Laboratory Advisory Committee, the Massachusetts Forensic Sciences Advisory Board, the Minnesota Forensic Laboratory Advisory Board, the Missouri Crime Laboratory Review Commission, the New York State Commission on Forensic Science, the Texas Forensic Science Commission, the Virginia Forensic Science Board, and the Washington Forensic Investigations Council. *See supra* note 162.

¹⁶⁷ These entities are the Illinois Laboratory Advisory Committee, the Minnesota Forensic Laboratory Advisory Board, the Missouri Crime Laboratory Review Commission, the New York State Commission on Forensic Science, the Texas Forensic Science Commission, the Virginia Forensic Science Board, and the Washington Forensic Investigations Council. *See supra* note 162.

¹⁶⁸ These entities are the Maryland Forensic Laboratory Advisory Committee, the Minnesota Forensic Laboratory Advisory Board, the Missouri Crime Laboratory Review Commission, the New York State Commission on Forensic Science, the Texas Forensic Science Commission, and the Virginia Forensic Science Board. *See supra* note 162.

¹⁶⁹ The entities that specify members of academia in their membership are the Arkansas State Crime Laboratory Board, the Illinois Laboratory Advisory Committee, the Maryland Forensic Laboratory Advisory Committee, the Minnesota Forensic Laboratory Advisory Board, and the Texas Forensic Science Commission. *See supra* note 162.

¹⁷⁰ For example, the membership of the Arkansas State Crime Laboratory Board must include a "physician engaged in the active practice of private or academic medicine." ARK. CODE ANN. § 12-12-302(b)(6) (2009). The Washington State Forensic Investigations Council must include "one pathologist who is currently in private practice." WASH. REV. CODE ANN. § 43.103.040 (West 2007).

¹⁷¹ Both the Arkansas and Minnesota commissions require representatives of the judiciary in their membership. Arkansas requires a "member of the active judiciary" on its State Crime Laboratory Board. ARK. CODE ANN. § 12-12-302(b)(1) (2009). The Minnesota Forensic Laboratory Advisory Board includes a "judge or court administrator." MINN. STAT. ANN. § 299C.156(a)(11) (West 2007).

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includes fifteen representatives from several state agencies including the state departments of agriculture, natural resources, public health, and transportation, as well as law enforcement representatives, attorneys, and forensic scientists.¹⁷²

TABLE 2: STATES WITH FORENSIC SCIENCE OVERSIGHT

State	Forensic Oversight	Year Established
<i>Arizona</i>	Forensic Services Advisory Committee (Attorney General)	2007
<i>Arkansas</i>	State Crime Laboratory Board (Statutory)	1991
<i>Illinois</i>	Illinois Laboratory Advisory Committee (Statutory)	2005
<i>Indiana</i>	Commission on Forensic Sciences (Statutory)	1959
<i>Maryland</i>	Forensic Laboratory Advisory Committee (Statutory)	2007
<i>Massachusetts</i>	Forensic Sciences Advisory Board (Statutory)	2004
<i>Minnesota</i>	Forensic Laboratory Advisory Board (Statutory)	2006
<i>Missouri</i>	Crime Laboratory Review Commission (Statutory)	2009
<i>Montana</i>	Forensic Science Laboratory Advisory Board (Attorney General)	unknown
<i>New Mexico</i>	DNA Identification System Oversight Committee (Statutory)	1997
<i>New York</i>	New York State Commission on Forensic Science (Statutory)	1994
<i>Rhode Island</i>	State Crime Laboratory Commission (Statutory)	1978
<i>Texas</i>	Texas Forensic Science Commission (Statutory)	2005
<i>Virginia</i>	Virginia Forensic Science Board (Statutory)	2005
<i>Washington</i>	Washington State Forensic Investigations Council (Statutory)	1999

¹⁷² 20 ILL. COMP. STAT. § 3981/5 (West 2008).

The specified functions of the forensics entities vary from broad statements of authority¹⁷³ to detailed lists of mandates.¹⁷⁴ The New York State Commission on Forensic Science, created in 1994, is one of the earliest established post-DNA forensic oversight entities.¹⁷⁵ Its powers also are among the most comprehensive of all such entities. The New York Commission's powers include the duty to [D]evelop minimum standards and a program of accreditation for all forensic laboratories in New York state, including establishing minimum qualifications for forensic laboratory directors and such other personnel as the commission may determine to be necessary and appropriate, and approval of forensic laboratories for the performance of specific forensic methodologies.¹⁷⁶

The statute identifies several objectives of the accreditation program, including to “increase and maintain the effectiveness, efficiency, reliability, and accuracy of forensic laboratories, including forensic DNA laboratories; [and] ensure that forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable”¹⁷⁷ Of the forensic oversight statutes that address accreditation, only New York's makes laboratory accreditation mandatory.¹⁷⁸ In contrast, the Minnesota Forensic Laboratory Advisory Board is empowered to “encourage” forensic laboratories to become accredited.¹⁷⁹ The Massachusetts Forensic Science Advisory Board is authorized to direct the undersecretary of forensic sciences to “advise” the board on accreditation and training.¹⁸⁰

As previously noted, forensic misconduct is an important concern with respect to wrongful convictions. As a consequence, the specified duties of some of the commissions are largely reactive to laboratory problems that have surfaced and been revealed. Three of the statutory commissions are specifically authorized to investigate

¹⁷³ For example, the Arkansas State Crime Laboratory Board's authority is to “promulgate such policies, rules, and regulations as shall be necessary to carry out the intent and purpose of this subchapter along with the specific duties and responsibilities set out in this subchapter.” ARK. CODE ANN. §12-12-303(a) (2009).

¹⁷⁴ See *infra* notes 175–78 and accompanying text (discussing the New York State Commission of Forensic Science).

¹⁷⁵ N.Y. EXEC. § 995-a (McKinney 2010).

¹⁷⁶ N.Y. EXEC. § 995-b(1).

¹⁷⁷ N.Y. EXEC. § 995-b(2)(a)–(b).

¹⁷⁸ N.Y. EXEC. § 995-b(1).

¹⁷⁹ MINN. STAT. ANN. § 299C.156(2)(4) (West 2007).

¹⁸⁰ MASS. GEN. LAWS ANN. ch. 6, § 184A (2008).

allegations of misconduct as contemplated by the Justice for All Act.¹⁸¹ Thus, the Missouri Crime Laboratory Review Commission is empowered to “[a]uthorize independent external investigations into allegations of serious negligence or misconduct committed by employees or contractors of a crime laboratory substantially affecting the integrity of forensic results,” to issue reprimands, and to recommend corrective action.¹⁸² Minnesota permits its commission to investigate misconduct and recommend corrective action.¹⁸³ The Texas Forensic Science Commission requires forensic laboratories to report misconduct or negligence and is itself required to investigate such allegations.¹⁸⁴

All but three of the states with forensic oversight entities have experienced at least one DNA exoneration.¹⁸⁵ Some have experienced highly publicized forensic laboratory or forensic science problems.¹⁸⁶ The success of these state commissions will be measured by the extent to which they help prevent problems and how they respond to and correct problems that occur.¹⁸⁷

IV. INTERROGATION AND FALSE CONFESSIONS

A. *The Issue*

Confessions are among the most potent of all forms of trial evidence.¹⁸⁸ Unfortunately, they do not invariably represent

¹⁸¹ See Justice for All Act, *supra* note 142; 42 U.S.C. § 3797k (2006).

¹⁸² MO. REV. STAT. § 650.059(8)(2) (West 2006).

¹⁸³ MINN. STAT. ANN. § 299C.156 Subd. 2–3 (West 2007).

¹⁸⁴ TEX. CRIM. PROC. CODE ANN. § 38.01(a) (Vernon 2010).

¹⁸⁵ *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Feb. 5, 2011); *Exonerations by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/StateView.php> (last visited Feb. 5, 2011).

¹⁸⁶ See Giannelli, *supra* note 127, at 166–67 (observing that, “[i]n addition to Houston, lab problems have surfaced in Baltimore, Chicago, Cleveland, Los Angeles, Fort Worth, Montana, Oklahoma City, San Antonio, Seattle, Virginia, and West Virginia, as well as other locations”).

¹⁸⁷ One could also argue that success could be measured by the extent to which such commissions withstand political pressure. When the Texas Forensic Science Commission gained momentum in determining whether the arson investigation that led to Cameron Todd Willingham’s conviction and execution for murder was based on discredited science, Governor Rick Perry replaced a number of the commissioners and the commission’s efforts have since stalled. See Barry C. Scheck & Patricia Willingham Cox, *Forensic Panel Must Resist Chair’s Efforts at Sabotage*, HOUSTON CHRON., July 20, 2010, <http://www.chron.com/disp/story.mpl/editorial/outlook/7117183.html>.

¹⁸⁸ Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1309 (2008); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27,

reliable evidence of guilt. False confessions were a contributing factor in roughly one out of four of the first two hundred and fifty wrongful convictions exposed by later DNA analysis.¹⁸⁹ Other samples of wrongful convictions have yielded similar findings. For example, in their study of three hundred and forty exonerations, Gross and his colleagues found that false confessions were present in twenty percent of wrongful murder convictions and seven percent of wrongful rape convictions.¹⁹⁰ The prevalence of false confessions prompted the American Psychological Association's Psychology and Law Division ("Division 41") to commission a comprehensive "White Paper" addressing the issue.¹⁹¹

Although several factors might help explain why an individual would falsely admit to committing a crime, most false confessions occur within the potentially intimidating context of police interrogations.

1. Police Interrogation

"Third-degree" tactics that rely on physical coercion to produce confessions for the most part are a relic of the past,¹⁹² but modern interrogations can be intense psychological experiences.¹⁹³ Interrogations begin with the presumption that the subject is guilty, and the officers conducting them often have one purpose: to extract incriminating statements from the suspect.¹⁹⁴ Thus, interrogation tactics deliberately induce stress and are designed to make suspects feel isolated, anxious, and desperate.¹⁹⁵ A widely used manual on criminal interrogations, *Criminal Interrogation and Confessions*, describes the leading approach to accomplish this goal.¹⁹⁶ The recommended strategy is commonly known as "the Reid technique," in reference to one of the authors of the interrogation manual.¹⁹⁷

27 (1997).

¹⁸⁹ 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED, *supra* note 17, at 32–33.

¹⁹⁰ Gross et al., *supra* note 8, at 524, 544.

¹⁹¹ See Kassin et al., *supra* note 11, at 4.

¹⁹² See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 45 (2008). The "third-degree" refers to the use of physical or mental pain and suffering in order to extract information from suspects. *Id.* at 46. Techniques used include, but are not limited to, physical beating or kicking, torture, deprivation of food and sleep, and threats of punishment. *Id.* at 47, 50, 53. These techniques were used in America throughout the 1930s. *Id.* at 43; Kassin et al., *supra* note 11, at 6.

¹⁹³ See generally LEO, *supra* note 192.

¹⁹⁴ Kassin et al., *supra* note 11, at 6.

¹⁹⁵ *Id.*

¹⁹⁶ FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 212 (4th ed. 2001).

¹⁹⁷ Kassin et al., *supra* note 11, at 7. The Reid technique is named after John E. Reid, who

After isolating the suspect in order to build anxiety, the police are encouraged to follow a nine-step process to extract a confession.¹⁹⁸ This process relies on both positive and negative incentives. Interrogators are advised to assert the guilt of the suspect, interrupt him, and belittle any attempts to refute the evidence, whether real or manufactured.¹⁹⁹ These techniques are designed to make the suspect feel trapped in a hopeless situation, with the implication that a confession is an available and rational option for escape.²⁰⁰ Conversely, interrogators might also offer sympathy and attempt to minimize the severity of the crime in hopes of influencing suspects to confess and thus escape their immediate plight.²⁰¹ The objective is to convince the suspect that the costs associated with maintaining innocence are outweighed by the benefits that can be derived from making a confession.²⁰²

Within the psychologically intense environment that characterizes modern interrogation, researchers have identified diverse circumstances that may increase the likelihood of a false confession. These circumstances include the situational characteristics surrounding the interrogation as well as the dispositional characteristics of the suspect.²⁰³

2. Situational Characteristics

Several situational risk factors are associated with false confessions.²⁰⁴ As discussed earlier, suspects undergoing interrogation are typically first isolated in an effort to deny them the support or comfort they might derive from familiar surroundings or other persons, and to increase the stress associated

developed the approach in the 1940s along with his colleague, Fred Inbau. *Id.*

¹⁹⁸ *Id.*; see generally INBAU ET AL., *supra* note 196 (providing a detailed discussion of Reid's nine steps of interrogation).

¹⁹⁹ Kassin et al., *supra* note 11, at 7; INBAU ET AL., *supra* note 196, at 218–19.

²⁰⁰ Deborah Davis & William O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in HANDBOOK OF FORENSIC PSYCHOLOGY: RESOURCE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 918–19 (William T. O'Donohue & Eric R. Levensky eds., 2004); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confession: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 45–46 (2004); LEO, *supra* note 192, at 236.

²⁰¹ Kassin et al., *supra* note 11, at 12.

²⁰² See Kassin & Gudjonsson, *supra* note 200, at 45.

²⁰³ Kassin et al., *supra* note 11, at 16–22.

²⁰⁴ The discussion will mostly be limited to three factors expanded upon by Kassin and colleagues: interrogation time, the presentation of false evidence, and minimization of the seriousness of the offense. *Id.* at 16. The authors chose to highlight these factors “because of the consistency in which they appear in cases involving proven false confessions.” *Id.*

with the questioning process.²⁰⁵ Under such circumstances, the length of the interrogation can be crucial. Interrogations commonly last between thirty minutes and two hours.²⁰⁶ Reid personnel claim that usually three to four hours is sufficient.²⁰⁷ This advice would appear to be prudent to help guard against false confessions. For example, in a study of known false confessions, Drizin and Leo found that the average interrogation session endured for 16.3 hours.²⁰⁸ These findings should not be surprising. Marathon interrogation sessions involving prolonged isolation increase a suspect's distress and perceived urgency for escaping the situation.²⁰⁹ Studies have also shown that sleep deprivation can adversely affect decision-making and flexibility of thought, and enhance individuals' suggestibility.²¹⁰

Another tactic that can heighten the risk of an innocent suspect confessing to a crime is the presentation of false evidence of guilt. Thus, among other deceptive practices, a suspect might be confronted with false or fabricated fingerprint evidence, forensic samples, reports of eyewitness identifications, or failed polygraph tests during the course of an interrogation.²¹¹ Although such tactics generally are considered lawful²¹² and might even be actively encouraged²¹³ as a part of American interrogations,²¹⁴ they entail corresponding dangers to the innocent; several known wrongful convictions in the United States have involved false confessions induced by the presentation of fabricated evidence of guilt.²¹⁵ Research evidence suggests that people tend to become more malleable and vulnerable to manipulation as more inaccurate information is presented to them.²¹⁶ In particular, research has confirmed that providing individuals with false information can

²⁰⁵ *Id.*

²⁰⁶ *Id.*; John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 331 (1993); Richard A. Leo, *Inside the Interrogation Room*, 86 J. OF CRIM. L. & CRIMINOLOGY 266, 279 (1996).

²⁰⁷ Kassin et al., *supra* note 11, at 16; INBAU ET AL., *supra* note 196, at 423.

²⁰⁸ Drizin & Leo, *supra* note 8, at 948. The authors found that 34% of the interrogations lasted six to twelve hours, and 39% lasted twelve to twenty-four hours. *Id.*

²⁰⁹ Kassin et al., *supra* note 11, at 16.

²¹⁰ *Id.*; see Yvonne Harrison & James A. Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. EXPERIMENTAL PSYCHOL. 236, 237 (2000).

²¹¹ Kassin et al., *supra* note 11, at 17.

²¹² *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

²¹³ INBAU ET AL., *supra* note 196, at 429.

²¹⁴ This tactic is not allowed in Great Britain and most other European nations. Kassin et al., *supra* note 11, at 17.

²¹⁵ *Id.* at 5-6.

²¹⁶ *Id.* at 17.

substantially affect their ability to make accurate visual judgments,²¹⁷ and influence their opinions and beliefs,²¹⁸ emotional states,²¹⁹ and memories,²²⁰ among other consequences.

Finally, minimization tactics are often used in an attempt to provide justifications or excuses for a crime, and to make confessions seem like an appealing way to escape the intense pressures associated with the interrogation.²²¹ Interrogators are trained to suggest that the suspect’s actions were accidental, provoked, or otherwise justified.²²² These strategies can be interpreted by suspects as implicitly promising leniency and can induce innocent individuals, who feel trapped within the interrogation process, to confess.²²³

3. Dispositional Characteristics

A suspect’s individual or “dispositional” characteristics also can affect the likelihood of an interrogation resulting in a false confession. For example, research has shown that juveniles are at increased risk for making involuntary and false confessions.²²⁴ Juveniles are overrepresented in cases of known false confessions,²²⁵ including several high-profile cases.²²⁶ Studies completed by developmental psychologists have confirmed that youths are less psychosocially mature than adults, which can lead to impulsive decision making, prioritizing short-term over long-term consequences, risky behavior, and increased susceptibility to negative influence and suggestion.²²⁷ Juveniles also tend to become emotionally aroused more readily than adults and generally are more likely to opt for immediate rewards over delayed or longer

²¹⁷ See Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1, 27 (1956).

²¹⁸ Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045 (1980).

²¹⁹ See Stanley Schachter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, 69 PSYCHOL. R. 379, 383 (1962).

²²⁰ See Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361, 361 (2005).

²²¹ Kassir et al., *supra* note 11, at 12.

²²² *Id.*

²²³ *Id.*

²²⁴ See Jessica Owen-Kostelnik, et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 293–97 (2006).

²²⁵ See Drizin & Leo, *supra* note 8, at 968–69.

²²⁶ For example, the Central Park Jogger case in New York City.

²²⁷ Kassir et al., *supra* note 11, at 19.

term ones.²²⁸

The cognitive and behavioral limitations of juveniles can have serious ramifications in the context of interrogations. Youths often fail to understand or fully appreciate their *Miranda* rights and may be more willing than adults to waive those rights.²²⁹ Children and adolescents also frequently experience restlessness, boredom, and have low resistance to temptation. These qualities, along with increased suggestibility and obedience to authority, make juveniles especially prone to confess to crimes they did not commit.²³⁰

Many of these same factors affect persons with mental illnesses and developmental disabilities, who also are overrepresented in known false confession cases.²³¹ Intellectually disabled individuals suffer impairments that may affect how they respond to the process of interrogation, including poor adaptation to social norms, underdeveloped communication and interpersonal skills, and the lack of a strong sense of self.²³² Mental retardation leads to increased susceptibility to influential tactics for several reasons, including the tendency to rely on authority figures to solve problems, a desire to please authority figures, attempts to feign competence, a lack of impulse control, and a willingness to accept blame.²³³ This increased suggestibility makes suspects with severe intellectual impairments more likely to yield to leading questions and respond to negative feedback in ways that may be sought or reinforced by interrogators.²³⁴ In common with juveniles, mentally impaired suspects also are less likely to comprehend their legal rights, including *Miranda* warnings.²³⁵

²²⁸ See generally Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS COGNITIVE SCI. 69 (2005) (explaining that heightened vulnerability in adolescents is attributed to the development of the brain's behavioral and cognitive systems at independent rates, which explains both normative and atypical developments during adolescence).

²²⁹ Owen-Kostelnik et al., *supra* note 224, at 293.

²³⁰ Kassin et al., *supra* note 11, at 19.

²³¹ *Id.* at 20–21; GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 325 (2003).

²³² Kassin et al., *supra* note 11, at 21.

²³³ *Id.*; Robert Perske, *Understanding Persons with Intellectual Disabilities in the Criminal Justice System: Indicators of Progress?*, 42 MENTAL RETARDATION 484, 486 (2004).

²³⁴ Kassin et al., *supra* note 11, at 21; Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 218 (1999).

²³⁵ Several studies have shown that persons with mental retardation often lack an adequate understanding and appreciation of *Miranda* warnings compared to the general adult population. Solomon M. Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 163, 165–66 (G. Daniel Lassiter, ed., 2004); Everington &

Individual personality traits and disorders also may increase the likelihood of false confessions. For instance, research suggests that having an antisocial personality disorder,²³⁶ depression,²³⁷ and exposure to traumatic life experiences²³⁸ all may be associated with higher rates of false confessions. In addition, attention deficit hyperactivity disorder (“ADHD”) can help produce false confessions, in part because individuals suffering from ADHD may display certain behaviors that are deemed suspicious by officers²³⁹ and also because they have a tendency to be compliant.²⁴⁰

Although several reforms have been suggested to help alleviate the problem of false confessions,²⁴¹ the recommendation most commonly implemented in the form of legal policy is electronically recording interrogations. We focus on this reform in the following section.

Fulero, *supra* note 234, at 217; Michael J. O’Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359, 367 (2005).

²³⁶ Gisli Gudjonsson, *Disputed Confessions and Miscarriages of Justice in Britain: Expert Psychological and Psychiatric Evidence in the Court of Appeal*, 31 MANITOBA L.J. 520 (2006); Gisli H. Gudjonsson & Thomas Grisso, *Legal Competencies in Relation to Confession Evidence*, in 2 INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW 183–84 (Alan.R. Felthous & Henning Sass eds., John Wiley & Sons, Ltd. 2008).

²³⁷ Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession, and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY & INDIVIDUAL DIFFERENCES 49, 56–57 (2006).

²³⁸ Gisli H. Gudjonsson et al., *Custodial Interrogation: What Are the Background Factors Associated with Claimed False Confessions?*, 18 J. FORENSIC PSYCHIATRY & PSYCHOL. 266, 273 (2007).

²³⁹ Gisli H. Gudjonsson et al., *Interrogative Suggestibility in Adults Diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD). A Potential Vulnerability During Police Questioning*, 43 PERSONALITY & INDIVIDUAL DIFFERENCES 737, 744 (2007).

²⁴⁰ Gisli H. Gudjonsson et al., *Interrogative Suggestibility, Compliance and False Confessions Among Prison Inmates and Their Relationship with Attention Deficit Hyperactivity Disorder (ADHD) Symptoms*, 38 PSYCHOL. MED. 1037, 1041 (2008).

²⁴¹ See Kassin et al., *supra* note 11, at 27–30. Several researchers have advocated for an overhaul of the interrogation culture, from one that is confrontational and guilt-presumptive to one that is more investigative. This shift has taken place in Great Britain, where police have transitioned from traditional interrogations to “investigative interviewing.” Rather than obtaining a confession, the purpose of such interviews is fact-finding. If changing the interrogation culture is not feasible, experts suggest addressing specific risk factors for false confessions by altering current practices. Such changes could include limits on interrogation length, disallowing interrogators to lie outright to suspects, and reducing or removing the use of minimization tactics. Other suggestions have been geared at protecting vulnerable populations through either the mandatory presence of an attorney or specialized training for law enforcement personnel.

B. Recommendations

To “lift the veil of secrecy” from interrogations, Kassin and colleagues have advocated that “all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator.”²⁴² Although some law enforcement agencies have been resistant to recording interrogations, many have embraced the practice and have begun utilizing or experimenting with different recording policies.²⁴³

Electronically recording interrogations has several benefits. First and foremost, a full recording provides an accurate, objective account of the process that led to the incriminating statements. Furthermore, electronic recording may discourage interrogating officers from using impermissibly coercive tactics.²⁴⁴ Recording interrogations does not only benefit suspects. Cameras may assist law enforcement officers in obtaining voluntary confessions and protect them from false allegations of abuse.²⁴⁵ The practice allows interrogators to focus on suspects and the contents of their statements, rather than note-taking, and enables investigators to make a detailed later review of statements for information they may not have recognized as important during the original questioning.²⁴⁶ Other benefits to the police include increased accountability and public trust in law enforcement, and reduced time spent having to defend interrogation practices in court.²⁴⁷ Importantly, the electronic recording of interrogations has not proven to be prohibitively costly, and does not appear to decrease the willingness of suspects to speak with interrogators.²⁴⁸

Various organizations also have endorsed the practice of recording interrogations. The ABA has recommended that law

²⁴² Kassin et al., *supra* note 11, at 25.

²⁴³ Recent surveys of law enforcement agencies in states that do not require recording of interrogations have revealed that many departments already utilize the practice and strongly support its widespread use. Kassin et al., *supra* note 11, at 25; THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6–7 (2004) (hereinafter POLICE EXPERIENCES); Thomas P. Sullivan et al., *The Case for Recording Police Interrogation*, 34 LITIG. 30, 30 (2008).

²⁴⁴ Kassin et al., *supra* note 11, at 26.

²⁴⁵ *Id.*; William A. Geller, *Videotaping Interrogations and Confessions*, in THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING 303, 308 (Richard A. Leo & George C. Thomas III eds., Northeastern Univ. Press 1998)

²⁴⁶ Kassin et al., *supra* note 11, at 27; POLICE EXPERIENCES, *supra* note 243, at 10–11, 18.

²⁴⁷ Kassin et al., *supra* note 11, at 27.

²⁴⁸ *Id.*

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enforcement agencies should videotape entire custodial interrogations or, if video recording is impractical, to audiotape the interrogation process.²⁴⁹ The Justice Project also advocates that interrogations be video-recorded in their entirety or, if resource constraints preclude that option, at least to be audio-recorded.²⁵⁰ This policy would apply at a minimum in all serious felony cases and all cases involving juveniles or the intellectually impaired. Exceptions would be recognized where recording an interrogation is impractical and when officers make a good faith effort to record the interrogation but are unable to do so because of equipment malfunctions.²⁵¹ If a recording is not made and no exception applies, a suspect’s statement would presumptively be inadmissible in evidence, although courts would be required to consider the admissibility of unrecorded statements on a case-by-case basis.²⁵² Finally, recordings of statements are to be preserved until all post-conviction and habeas corpus proceedings have become final.²⁵³ Similar recommendations have been made by the Innocence Project.²⁵⁴

C. State Practices

Nineteen states have addressed the electronic recording of custodial interrogations (see Table 3).

The first state to require law enforcement officers to record interrogations was Alaska, pursuant to the Alaska Supreme Court’s decision in *Stephan v. State*.²⁵⁵ The ruling, based exclusively on state constitutional grounds, required the police to record the entire

²⁴⁹ N.Y. CNTY. LAWYERS’ ASS’N & AM. BAR ASS’N SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 15, available at <http://www.abanet.org/crimjust/policy/revisedmy048a.pdf>.

²⁵⁰ THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 3, available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Recording%20of%20interrogations%20policy%20brief.pdf.

The Justice Project is a non-profit organization that “develops, coordinates, and implements integrated national and state-based campaigns involving public education, litigation and legislation to reform the criminal justice system, with particular focus on capital punishment.” *About the Innocence Project*, THE JUSTICE PROJECT, <http://www.innocenceproject.org/about/> (last visited Feb. 5, 2011).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See AN ACT DIRECTING THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS, (Innocence Project 2009), http://www.innocenceproject.org/docs/2010/Recording_of_Custodial_Interrogations_Model_Bill_2010.pdf.

²⁵⁵ *Stephan v. State*, 711 P.2d 1156, 1162, 1165 n.33 (Ala. 1985).

interrogation process, including the administration of *Miranda* rights, whenever feasible.²⁵⁶ The decision did not specify limitations on the type of crime necessary to trigger the recording mandate, although in both cases joined for decision in *Stephan*, the interrogations occurred in police stations and the court limited the recording requirement to questioning that takes place in a “place of detention.”²⁵⁷ The court further ruled that the unexcused failure to make a recording renders the suspect’s statements inadmissible.²⁵⁸

TABLE 3: STATES WITH INTERROGATION RECORDING REQUIREMENTS

State	Interrogation Requirements	Year
<i>Alaska</i>	Required recording of entire interrogation whenever feasible. Unexcused failure violates due process.	1985
<i>District of Columbia</i>	Required recording of interrogation in cases of violent crime. Statements obtained in violation of this policy are presumed to be involuntary.	2005
<i>Illinois</i>	Required recording of interrogation in homicide cases. Presumed inadmissible.	2005
<i>Indiana</i>	Required recording in felony cases. Presumed inadmissible.	2011
<i>Iowa</i>	Supreme Court encouraged electronic recording, but not required.	2006
<i>Maine</i>	Maine Criminal Justice Academy must establish minimum standards for policy of electronically recording interrogations. Law enforcement agencies must adopt policies and provide training.	2005
<i>Maryland</i>	Required recording for certain offenses.	2008
<i>Massachusetts</i>	Supreme Court expressed preference for recording of all interrogations. Failure to record results in cautionary jury instruction.	2004
<i>Minnesota</i>	Required recording of all interrogations. Failure to record results in cautionary jury instruction.	2004

²⁵⁶ *Id.* at 1162.

²⁵⁷ *Id.* at 1165 n.33.

²⁵⁸ *Id.* at 1164. The court also recognized various exceptions that would excuse the failure to record an interrogation session. *Id.* at 1165.

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<i>Missouri</i>	Required recording for certain offenses. Failure may result in governor withholding any state funds appropriated to the noncompliant agency. Also, agencies must adopt written guidelines for recording interrogations.	2009
<i>Montana</i>	Required recording in felony cases. Statements presumed inadmissible.	2009
<i>Nebraska</i>	Recording of interrogations with certain offenses. Failure results in cautionary jury instruction.	2008
<i>New Hampshire</i>	Recording of interrogations after <i>Miranda</i> warnings are given. Failure results in statements begin inadmissible, but information gained is still deemed credible	2001
<i>New Jersey</i>	Recording of interrogations in most major felonies. Failure considered by courts in determining admissibility.	2005
<i>New Mexico</i>	Law enforcement agencies must adopt written policies for recording interrogations.	2005
<i>North Carolina</i>	Recording of interrogations in homicide cases. Failure considered by courts in determining admissibility.	2008
<i>Ohio</i>	Required recording. Failure may be considered in determining admissibility. If admissible, cautionary jury instruction given.	2010
<i>Oregon</i>	Recording of interrogations with certain offenses. Failure results in cautionary jury instruction.	2010
<i>Wisconsin</i>	Recording of interrogations in felony cases. Failure results in cautionary jury instruction.	2005

Similarly, in 1994, the Minnesota Supreme Court, exercising its “supervisory power to insure the fair administration of justice,” ruled that custodial interrogations occurring in a place of detention must be electronically recorded whenever feasible, including any information regarding the administration of the suspect’s rights and the waiver of those rights.²⁵⁹ Consistent with the Alaska Supreme Court’s ruling in *Stephan*, the Minnesota Supreme Court’s decision did not specify the particular crimes to which the recording rule applies, and the court ruled that a substantial violation of the requirement would result in the suppression from evidence of any

²⁵⁹ See *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (citations omitted).

statements made.²⁶⁰

Alaska and Minnesota were the only states to require the recording of police interrogations as the 20th century came to a close.²⁶¹ Since 2000, additional jurisdictions have begun to address interrogation issues in various ways. Legislation was enacted in Washington, D.C. that requires entire interrogations, including the administration of rights and securing of waivers, to be electronically recorded in cases involving crimes of violence.²⁶² According to the statute, any statements obtained in violation of this policy are presumed to be involuntary.²⁶³ Similar policies have been adopted in Illinois (limited to homicides),²⁶⁴ Montana (limited to felonies),²⁶⁵ and, more recently, Indiana (limited to felonies).²⁶⁶

Other states require interrogations to be recorded but do not mandate the suppression of unrecorded statements. The Massachusetts Supreme Judicial Court has expressed a preference for the recording of all interrogations, but the police's failure to make a recording results only in a cautionary jury instruction upon request by defense counsel.²⁶⁷ Similar policies have been adopted elsewhere, including Nebraska,²⁶⁸ Ohio,²⁶⁹ Oregon,²⁷⁰ and Wisconsin.²⁷¹ New Jersey and North Carolina have similar policies, but additionally stipulate that the police's failure to record an interrogation can be considered by courts in determining the admissibility of statements into evidence.²⁷² North Carolina's legislation explicitly provides that any explanation to the suspect of his or her constitutional rights must be recorded as a part of the procedure.²⁷³ In contrast, New Hampshire requires the recording of interrogations only after *Miranda* warnings have been

²⁶⁰ *Id.*

²⁶¹ Kassin et al., *supra* note 11, at 26.

²⁶² D.C. CODE § 5-116.01 (2005).

²⁶³ D.C. CODE § 5-116.03 (2005).

²⁶⁴ 725 ILL. COMP. STAT. 5/103-2.1 (2005).

²⁶⁵ MONT. CODE ANN. Sec 46-4-406 (2009).

²⁶⁶ Order Amending Rules of Evidence, Ind. S. Ct. No. 94S00-0901-MS-4 (amending Ind. R. Evid. 617), <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-evid617.pdf>.

²⁶⁷ Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004).

²⁶⁸ NEB. REV. STAT. § 29-4501 to 4508 (2008) (includes rights and waivers; limited to crimes resulting in death or felonies involving sexual assault, kidnapping, child abuse, or strangulation).

²⁶⁹ OHIO REV. CODE ANN. § 2933.81 (2010).

²⁷⁰ OR. REV. STAT. § 133.400 (2010) (limited to aggravated murder, Class A and B felonies).

²⁷¹ WIS. STAT. § 972.115 (2009) (limited to felonies).

²⁷² N.J. Ct. R. 3:17 (includes most major felonies); N.C. GEN. STAT. § 15A-211 (2009) (includes homicides).

²⁷³ N.C. GEN. STAT. § 15A-211.

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administered.²⁷⁴ The police’s failure to adhere to this requirement results in the inadmissibility of any recordings that are made, although information gained from the interrogation remains available as evidence.²⁷⁵

In Missouri, interrogations must be recorded for certain crimes, but the penalty for noncompliance has no direct impact on criminal trials. Instead, “the governor may withhold any state funds appropriated to the noncompliant law enforcement agency.”²⁷⁶ Missouri additionally requires law enforcement agencies to adopt written guidelines for interrogation recording procedures.²⁷⁷ Maryland also requires interrogations to be recorded for certain offenses, but does not specify sanctions for noncompliance.²⁷⁸ Similarly, New Mexico fails to specify the consequences of lack of compliance with its requirement that entire interrogations, including the administration of the suspect’s constitutional rights, be recorded in felony cases.²⁷⁹

A few states that do not specifically mandate that interrogations be recorded have nevertheless adopted related measures. For example, Maine law requires all law enforcement agencies to promulgate written policies regarding the recording of interrogations.²⁸⁰ And in Iowa, the state supreme court has encouraged law enforcement officers to make an electronic recording of custodial interrogations, although it stopped short of requiring them to do so.²⁸¹

V. CRIMINAL INFORMANTS: THE PROBLEM OF SNITCHES

A. *The Issue*

False informant testimony is recognized as regularly contributing to wrongful convictions. Approximately 19% of the cases comprising the first 250 DNA exonerations involved unreliable testimony from informants or “snitches.”²⁸² Furthermore, false informant testimony

²⁷⁴ State v. Barnett, 789 A.2d 629, 632 (N.H. 2001).

²⁷⁵ *Id.* at 632-33.

²⁷⁶ MO. REV. STAT. § 590.701(5) (2011) (limited to committed or attempted first or second degree murder, first degree sexual assault, and other serious felonies as defined in section 590.701(2)).

²⁷⁷ MO. REV. STAT. § 590.701(2) (2011).

²⁷⁸ See MD. CODE ANN., CRIM. PROC. § 2-401 to 2-404 (2008).

²⁷⁹ N.M. STAT. ANN. § 29-1-16 (2010).

²⁸⁰ ME. REV. STAT. tit. 25 § 2803-B(1)(K) (2009).

²⁸¹ State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006).

²⁸² 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED, *supra* note 17, at 38–39.

has been a factor in many wrongful capital convictions, with estimates ranging between roughly one out of five (21%)²⁸³ and almost one-half (45.9%)²⁸⁴ of the known cases. Even more so than erroneous eyewitness identification testimony or false confessions, it appears that snitches are “the leading cause of wrongful convictions in U.S. capital cases.”²⁸⁵

Although any witness can be unreliable, criminal informants and snitches present a unique problem because they “have such predictable and powerful inducements to lie.”²⁸⁶ The primary inducement for a criminal informant to offer false testimony is to receive leniency or preferable treatment in connection with his or her own criminal activity.²⁸⁷ Informants might also be offered monetary compensation in exchange for their testimony, which similarly can compete with their obligation to be truthful.²⁸⁸ The problems associated with the testimony of “incentivized” informants are exacerbated by the extent to which “the government depends on lying informants,”²⁸⁹ even if the police and prosecutors are persuaded that their testimony is truthful.²⁹⁰

It may be difficult to determine an informant’s veracity for several reasons.²⁹¹ First, snitches are often deeply invested in their false stories and motivated to have others perceive them as truthful, because their own freedom from incarceration or other concessions will hinge on their ability to convince the government that their information is reliable.²⁹² Second, police and prosecutors are not always in a position to scrutinize the credibility of criminal informants’ statements closely, nor do they always desire to do so.²⁹³ Law enforcement relies heavily on informant testimony, and such

²⁸³ JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 156 (Doubleday 2000).

²⁸⁴ CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCH. OF LAW, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH* ROW 3 (2004), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf>.

²⁸⁵ *Id.*

²⁸⁶ ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 70 (N.Y. Univ. Press 2009) [hereinafter NATAPOFF, *SNITCHING*].

²⁸⁷ See CTR. ON WRONGFUL CONVICTIONS, *supra* note 272, at 3; Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Conviction*, 37 *GOLDEN GATE U. L. REV.* 107, 108 (2006) [hereinafter Natapoff, *Beyond Unreliable*].

²⁸⁸ Natapoff, *Beyond Unreliable*, *supra* note 287, at 108.

²⁸⁹ *Id.* at 108.

²⁹⁰ *Id.*

²⁹¹ NATAPOFF, *SNITCHING*, *supra* note 286, at 72.

²⁹² *Id.*

²⁹³ Natapoff, *Beyond Unreliable*, *supra* note 287, at 108.

evidence might well serve as the foundation of the government’s case against a defendant.²⁹⁴ The need to place significant reliance on informant testimony can dissuade police and prosecutors from collecting and objectively analyzing information that might discredit their witness. This combination of factors “gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.”²⁹⁵

The dangers that informants pose to innocent defendants, however, extend beyond contested trials. The information they supply may trigger charges that induce innocent defendants, particularly those with prior records, to plead guilty rather than face a potentially more onerous sentence following conviction at a trial.²⁹⁶ Such miscarriages of justice may be all the more likely when indigent defendants are represented by court-appointed counsel who may be overworked or lack the resources to make a full investigation of a case in preparation for trial. Prosecutors also may be inclined to offer reduced charges or sentences in exchange for a guilty plea in order to avoid trial, secure a conviction, and protect the identity of their informants.²⁹⁷

B. Recommendations

As the number of known wrongful conviction cases involving lying informants has increased, various scholars and organizations, including the ABA and the Justice Project, have advocated measures to help guard against abuses and protect the innocent from conviction.²⁹⁸ Proposals for reforming the use of informants have been diverse.²⁹⁹ In this section we focus on a few of the

²⁹⁴ NATAPOFF, SNITCHING, *supra* note 286, at 73.

²⁹⁵ Natapoff, *Beyond Unreliable*, *supra* note 287, at 108.

²⁹⁶ NATAPOFF, SNITCHING, *supra* note 286, at 80.

²⁹⁷ *Id.*

²⁹⁸ ABA Res. 108B (2005), available at <http://www.thejusticeproject.org/wp-content/uploads/aba-108b.pdf> (prosecutions should not be “based solely on uncorroborated jailhouse informant testimony”; adopted by the House of Delegates on Feb. 14, 2005); THE JUSTICE PROJECT, IN-CUSTODY INFORMANT TESTIMONY: A POLICY REVIEW 2 (2007), <http://www.thejusticeproject.org/wp-content/uploads/pr-in-custody-informant-testimony.pdf> (hereinafter IN-CUSTODY INFORMANT TESTIMONY).

²⁹⁹ Natapoff recommends several changes to the current use of snitches, including definitional changes, the development and implementation of a systematic, comprehensive system for data collection and reporting, limits on who can be used as informants and the benefits they can receive for their cooperation, procedures to protect criminal informants, and the development of stricter guidelines for police and prosecutors. NATAPOFF, SNITCHING, *supra* note 286, at 175–90.

recommended reforms, including enhanced discovery and disclosure practices, pretrial reliability hearings, corroboration requirements, and cautionary jury instructions.

1. Discovery and Disclosure

One proposed reform would obligate prosecutors to investigate and disclose to the defense important factors relating to an informant's anticipated testimony, and to do so prior to a guilty plea being negotiated or the onset of a trial.³⁰⁰ The information required to be disclosed would include any promises made or agreements reached between the prosecution and the informant, as well as any facts bearing on an informant's credibility, such as prior criminal history, the time and place of the statements allegedly provided, any recantations or material alterations of the statements, and a listing of other cases in which the informant has testified.³⁰¹ Such disclosures would help ensure that the defense is equipped to make a full assessment of the merits of tendering a guilty plea or proceeding to trial, and would allow more meaningful cross-examination of informants in cases that go to trial.³⁰²

2. Pretrial Reliability Hearings

Another suggested reform would give courts an expanded role in screening proposed informant testimony prior to trial and in determining whether the proffered testimony bears sufficient indicia of reliability to be admissible as evidence.³⁰³ This role would be similar to the gate-keeping function that trial courts serve in assessing the reliability of scientific or expert testimony before admitting it for jurors' consideration.³⁰⁴ A court's determination

³⁰⁰ *Id.* at 192 ("Prosecutors should discover and disclose to defendants all pertinent impeachment information regarding criminal informants used in the case, prior to the entry of a guilty plea or the beginning of trial."); IN-CUSTODY INFORMANT TESTIMONY, *supra* note 273, at 2 ("States should adopt rules requiring mandatory, automatic pretrial disclosures of information related to jailhouse snitch testimony.")

³⁰¹ NATAPOFF, SNITCHING, *supra* note 286, at 192–93; IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2–3.

³⁰² IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2.

³⁰³ NATAPOFF, SNITCHING, *supra* note 286, at 194 ("Upon a defendant's request, courts should hold a pretrial reliability hearing requiring the government to establish the reliability of any informant witness, or statements made by that informant, that the government intends to use at trial."); IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2 ("States should adopt rules mandating pretrial determinations of reliability in cases where the prosecution intends to employ jailhouse snitch testimony.")

³⁰⁴ NATAPOFF, SNITCHING, *supra* note 286, at 195; IN-CUSTODY INFORMANT TESTIMONY,

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about whether the informant’s proposed testimony meets threshold reliability requirements would be informed by many of the same facts made available through pretrial discovery, as discussed above.³⁰⁵

3. Corroboration

Another key reform proposal would require the corroboration of informant testimony as a prerequisite to its admissibility. Snitching expert Alexandra Natapoff and The Justice Project support a corroboration requirement for informant testimony.³⁰⁶ In addition, the ABA has recommended “that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.”³⁰⁷

4. Cautionary Jury Instructions

Another common recommendation is that juries should be instructed to be especially cautious and critical in assessing the testimony of incentivized informant witnesses.³⁰⁸ Although jury instructions are not alone sufficient to remove the risks posed by the testimony of criminal informants,³⁰⁹ they at least highlight the potential dangers and may help to “ensure that jailhouse snitch testimony is examined and weighed with proper caution.”³¹⁰

supra note 298, at 2; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (holding that in cases involving expert witnesses, the court screens such witnesses to establish their reliability in order to avoid confusing and misleading jurors, who may find it difficult to evaluate expert testimony).

³⁰⁵ IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2; *see* discussion *supra* Part V.A.

³⁰⁶ NATAPOFF, SNITCHING, *supra* note 286, at 196 (“All information from compensated criminal informants should be corroborated.”); IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2 (“States should adopt corroboration requirements for jailhouse snitches to mitigate the inherent risks incentivised [*sic*] witness testimony carries.”).

³⁰⁷ ABA Res. 108B (2005).

³⁰⁸ Natapoff gives an example of such an instruction from California:

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case.

NATAPOFF, SNITCHING, *supra* note 286, at 197; IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2.

³⁰⁹ NATAPOFF, SNITCHING, *supra* note 286, at 198.

³¹⁰ IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 2.

C. State Practices

Eight states have reformed the use of criminal informants in some way that it has been suggested will increase the accuracy of such evidence (Table 4).

TABLE 4: STATES WITH CRIMINAL INFORMANT EVIDENCE POLICIES

State	Informant/Snitch Use
<i>California</i>	Cautionary jury instruction.
<i>Connecticut</i>	Cautionary jury instruction.
<i>Illinois</i>	Enhanced discovery in capital cases. Pre-trial reliability hearings. Court may decertify a death conviction if based on uncorroborated jailhouse snitch testimony.
<i>Montana</i>	Cautionary jury instruction.
<i>Nebraska</i>	Enhanced discovery in capital cases.
<i>Nevada</i>	Pre-trial reliability hearings.
<i>Ohio</i>	Cautionary jury instruction if testimony is uncorroborated.
<i>Oklahoma</i>	Enhanced discovery in capital cases. Pre-trial reliability hearings. Cautionary jury instruction.

1. Discovery and Disclosure

In Illinois, the legislature heeded the advice of the state's Commission on Capital Punishment³¹¹ and required the disclosure of certain information to the defense, including: the informant's criminal history, any promises made to or benefits received by the informant, the statement(s) attributed to the accused, the time and place of the statements and the names of all who were present, whether the informant recanted at any time, other cases in which the informant has testified, and any other information relevant to

³¹¹ Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 407–10 (2005). The Illinois Commission on Capital Punishment found that the use of jailhouse snitches was a major contributor to the wrongful capital convictions that had occurred in the state and issued a set of recommendations for increased safeguards to prevent the reoccurrence of similar wrongful convictions. *Id.* at 382.

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the informant’s credibility.³¹² The disclosure requirements, however, are limited to capital cases and apply only when “the prosecution attempts to introduce evidence of incriminating statements made by the accused to or overheard by an informant”;³¹³ they presumably are not necessary when capital charges are resolved by a guilty plea. The Oklahoma Court of Criminal Appeals has mandated similar disclosure in all criminal cases involving “jailhouse informant testimony,” and has required that disclosure be made at least ten days prior to trial.³¹⁴ Legislation including analogous requirements had been effective in Nebraska but was repealed in 2009.³¹⁵

2. Pretrial Reliability Hearings

As part of the reforms applicable to capital prosecutions, Illinois mandates a pretrial judicial determination of the reliability of informant testimony, based upon the factors specified in the disclosure requirements described above. Importantly, the government bears the burden (by a preponderance of the evidence) to prove the reliability of its proposed informants.³¹⁶ Similar requirements have been imposed through rulings issued by the Oklahoma Court of Criminal Appeals³¹⁷ and, as a prerequisite to the admission of informant testimony in capital sentencing hearings, by the Nevada Supreme Court.³¹⁸

3. Corroboration

Few states have embraced reforms that require the corroboration of informant testimony.³¹⁹ Illinois courts have the authority to “decertify” a death penalty case—or preclude the prosecution from pursuing a capital sentence—upon a determination that the evidence on which a murder conviction was based was limited to the uncorroborated testimony of a jailhouse informant.³²⁰ Although

³¹² 725 ILL. COMP. STAT. 5/115-20(c) (2010).

³¹³ 725 ILL. COMP. STAT. 5/115-20(b).

³¹⁴ *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

³¹⁵ NEB. REV. STAT. § 29-1929 (2008) (repealed 2009).

³¹⁶ 725 ILL. COMP. STAT. 5/115-21(d).

³¹⁷ *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2008).

³¹⁸ *D’Agostino v. State*, 823 P.2d 283, 285 (Nev. 1992) (holding that before jailhouse snitch testimony is considered admissible in capital sentencing hearings, the trial judge must determine “that the details of the admissions supply a sufficient indicia of reliability”).

³¹⁹ IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 4.

³²⁰ *Id.*

some states have considered proposals to expand corroboration requirements to include jailhouse snitches, those efforts typically have been stymied short of enactment. For example, the California legislature twice passed bills that would have required corroboration of in-custody informant testimony, but Governor Arnold Schwarzenegger vetoed the tendered legislation on both occasions.³²¹

4. Cautionary Jury Instructions

Several states require that jurors be given special cautionary instructions in criminal cases involving informant testimony. Such instructions typically admonish jurors that they should be “especially cautious about believing that testimony,”³²² should be suspicious of the testimony, or, at a minimum, should consider the extent to which any benefits received by the snitch may have influenced his or her testimony. States requiring such instructions include California,³²³ Connecticut,³²⁴ Montana,³²⁵ and Oklahoma.³²⁶ In Ohio, a cautionary jury instruction is required only if informant testimony is uncorroborated.³²⁷

5. A Note About Accomplice Testimony

The previous discussion of informant testimony has concerned criminal informants, in-custody informants, and jailhouse snitches. Accomplices, or alleged co-participants in the criminal activity with which a defendant has been charged, present many of the same unreliability issues as other criminal informants.³²⁸ More states have addressed accomplice testimony than the testimony of other types of informants. For example, several states require a cautionary jury instruction in cases involving accomplice

³²¹ See S.B. 609, 2007–2008 Leg. Sess. (Cal. 2007), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0601-0650/sb_609_bill_20070906_enrolled.pdf; see also S.B. 609, 2007–2008 Leg. Sess. (Cal. 2007) (Governor Schwarzenegger’s veto message), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0601-0650/sb_609_vt_20071013.html (calling the bill “unnecessary”).

³²² NATAPOFF, SNITCHING, *supra* note 286, at 197.

³²³ CAL. JURY INSTR., CRIM. 3.20 (7th ed. 2008).

³²⁴ State v. Patterson, 886 A.2d 777, 790 (Conn. 2005).

³²⁵ State v. Grimes, 982 P.2d 1037, 1043 (Mont. 1999).

³²⁶ Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

³²⁷ State v. James, No. 96-CA-17, 1998 WL 518135, at *5 (Ohio Ct. App. 1998).

³²⁸ IN-CUSTODY INFORMANT TESTIMONY, *supra* note 298, at 5.

testimony,³²⁹ and others condition the admissibility of accomplice testimony on its corroboration by other evidence.³³⁰

VI. CRIMINAL JUSTICE REFORM COMMISSIONS

A. *The Issue*

Wrongful convictions represent tragic injustices, involving the unfortunate innocent who are tried and punished in error, the guilty who elude prosecution and deserved punishment, and to society at large. When exposed, they also embody opportunities to learn about how justice can and occasionally does miscarry, and what measures might be taken to prevent recurrences.³³¹ The states and their criminal justice systems have responded variously to known cases of wrongful conviction, and have done so increasingly in an era in which DNA-based exonerations have brought heightened awareness to the plight of innocent people who have been prosecuted, convicted, and punished for crimes they did not commit.³³² Some jurisdictions have responded in ways that are essentially backward looking and case-specific, focusing on redressing the harm suffered by individuals who have been unjustly punished.³³³ Other

³²⁹ State v. Patterson, 886 A.2d 777, 789 (Conn. 2005); People v. Montoya, 942 P.2d 1287, 1293 (Colo. App. 1996); People v. Petschow, 119 P.3d 495, 504-05 (Colo. App. 2004); State v. Spiller, 635 N.W.2d 905 (Wis. Ct. App.2001).

³³⁰ ALA. CODE § 12-21-222 (2010); ALASKA STAT. § 12.45.020 (2010); ARK. CODE ANN. §16-89-111(e)(1)(A) (2010); CAL. PENAL CODE § 1111 (West 1985); GA. CODE ANN. § 24-4-8 (1982); IDAHO CODE § 19-2117 (2010); IOWA CODE 2.21(3) (2002); MINN. STAT. § 634.04 (2010); NEV. REV. STAT. § 175.291(1) (2010); N.Y. CRIM. PROC. LAW § 60.22(1) (2011); N.D. CENT. CODE § 29-21-14 (2009); OKLA. STAT. tit. 22 § 742 (2010); OR. REV. STAT. § 136.440(1) (2011); S.D. CODIFIED LAWS Sec. 23A-22-8 (2010); TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2011); Clapp v. State, 30 S.W. 214, 217 (Tenn. 1895); State v. Shaw, 37 S.W. 3d 900, 903 (Tenn. 2001); Humber v. State, 466 So. 2d 165, 167 (Ala. Crim. App. 1985);

³³¹ See Keith A. Findley, *Learning from our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002).

³³² Increased awareness of the problem of wrongful convictions tends to produce intensified demand for reforms. See, e.g., Rodney Ellis & Cory Session, *Finding Ways to Reduce Wrongful Convictions*, HOUSTON CHRON., Sep. 4, 2010, at B10 (observing that “wrongful convictions are disturbingly routine” in Texas and urging the legislature to enact into law the reforms recommended by a state criminal justice reform panel). According to the Innocence Project, DNA exonerations have occurred in thirty-four states. States in which there are no identified DNA exonerations include the following: Alaska, Arkansas, Colorado, Delaware, Hawaii, Iowa, Maine, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, and Wyoming. See *Fact Sheet*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Feb. 5, 2011). It has become conventional wisdom, however, that DNA-based exonerations and documented wrongful convictions more generally are but a fraction of the cases in which innocent persons suffer conviction and punishment. See Gross et al., *supra* note 8, at 531 (observing that “the false convictions that come to light are the tip of an iceberg”).

³³³ Such individualized approaches might include a judge’s personal apology. See Robert

approaches are more future-oriented, systemic, and designed to minimize or prevent a recurrence of the problems that are known to contribute to wrongful convictions generally.³³⁴ Such responses, of course, need not be mutually exclusive. Some jurisdictions have attempted to gain greater insights about the causes of wrongful convictions and their prevention by establishing specialized governmental bodies or agencies, commonly known as “innocence commissions,” that are charged with those functions and with making responsive legal and policy recommendations.³³⁵

B. Recommendations

Many social scientists, legal scholars, and social justice advocates have called for the formation of innocence commissions in one form or another.³³⁶ It is important to be clear on the precise form contemplated, however, because the phrase “innocence commission” can refer to a variety of institutions, with vastly different functions.³³⁷ The dominant models of innocence commissions center on error correction and, alternatively, systemic reform.³³⁸ The former type reviews post-

Tharp, *DNA Frees Man Jailed 18 Years: Dallas: Judge Apologizes, Immediately Releases Worker Innocent in Attack*, DALLAS MORNING NEWS, Mar. 21, 2006, at 1B (quoting district Judge John Creuzot saying, “I don’t know how to apologize . . . I don’t know where to start, but I’ll start with me and I’m sorry”).

³³⁴ See Tables 5 & 6 *infra* and accompanying discussion.

³³⁵ See *Criminal Justice Reform Commissions: Case Studies*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php (last visited Feb. 5, 2011).

³³⁶ See Findley, *supra* note 307; Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89 (2010); Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. L. BULL. 169 (2005); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 100 (2002); Robert Carl Schehr & Jamie Sears, *Innocence Commissions: Due Process Remedies and Protection for the Innocent*, 13 CRITICAL CRIMINOLOGY 181, 195 (2005).

³³⁷ Roach, *supra* note 336, at 89.

³³⁸ *Id.*; Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 109–10 (2009) (like Roach, dividing innocence commissions in the United States into two separate models: those that “study documented wrongful convictions and recommend changes to the criminal justice system” and those that “receive[] and investigate[] individual wrongful conviction claims and refer[] them to a special court”); Zalman, *supra* note 336, at 169 (noting that innocence commissions include, “(1) a permanent, governmental body that reviews and investigates prisoners’ claims of actual innocence and forwards positive claims to appellate courts (modeled after the English Criminal Case Review Commission or CCRC); (2) occasional commissions set up to investigate specific wrongful conviction cases (based on Canadian practices); (3) a permanent, governmental body that performs ‘post-mortem’ investigations of proven wrongful convictions, and reports on justice system failures that caused a particular miscarriage of justice (proposed by Scheck and Neufeld); and (4) one-time ‘blue-ribbon’ study commissions, established by a branch of government (e.g., governor, state legislature, state supreme court) to recommend justice system reforms designed to reduce miscarriages of

conviction claims of factual innocence in individual cases,³³⁹ whereas the latter examine known wrongful convictions, and the general functioning of the jurisdiction’s criminal justice system, to make recommendations to prevent future injustices.³⁴⁰ The systemic reform models can further be divided into government-appointed commissions and those that are independently constituted,³⁴¹ and commissions that are permanent and those that are ad hoc.³⁴² Innocence commissions charged with making systemic reforms have been called advisory commissions³⁴³ or advisory committees,³⁴⁴ task forces,³⁴⁵ and study commissions³⁴⁶ or committees,³⁴⁷ among other names.

The co-founders of the Innocence Project, Barry Scheck and Peter Neufeld, with their co-author Jim Dwyer, have called for the formation of permanent, systemic reform innocence commissions to examine wrongful convictions.³⁴⁸ They have likened their proposed model to the National Transportation Safety Board (“NTSB”).³⁴⁹ Innocence commissions thus would investigate known wrongful convictions within their jurisdiction, much in the same manner that the NTSB investigates airplane crashes,

justice”).

³³⁹ Griffin, *supra* note 338, at 109–10. The British Criminal Cases Review Commission and the North Carolina Innocence Inquiry Commission provide examples of this model. *Id.* at 109–10, 112.

³⁴⁰ Roach, *supra* note 336, at 89.

³⁴¹ *Id.*

³⁴² Zalman, *supra* note 336, at 169.

³⁴³ See e.g., CONN. GEN. STAT. § 54-102pp (2003) (establishing the Connecticut Advisory Commission on Wrongful Convictions); *Advisory Commission on Wrongful Convictions*, STATE OF CONNECTICUT JUDICIAL BRANCH, <http://www.jud.ct.gov/committees/wrongfulconviction/> (last visited Feb. 5, 2011).

³⁴⁴ See e.g., S. Res. 381, 2006 Gen. Assemb., Reg. Sess. (Pa. 2006), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2005&sessInd=0&billBody=S&billTyp=R&billNbr=0381&pn=2254> (creating the Pennsylvania Wrongful Conviction Advisory Committee).

³⁴⁵ See e.g., *Welcome to the Task Force on Wrongful Convictions*, N.Y. ST. B. ASS’N, <http://www.nysba.org/AM/Template.cfm?Section=Blogs1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=21310> (last visited Feb. 5, 2011).

³⁴⁶ See e.g., N.C. GEN. STAT. § 15A-1462 (2006) (establishing the North Carolina Chief Justice’s Criminal Justice Study Commission, also known as the North Carolina Actual Innocence Commission, and the North Carolina Innocence Inquiry Commission).

³⁴⁷ See e.g., S.J. Res. 9, 95th Gen. Assemb. (Ill. 2007), <http://ilga.gov/legislation/fulltext.asp?GAID=9&SessionID=51&GA=95&DocTypeID=SJR&DocNum=9&LegID=27957&SpecSess=&Session=> (creating the Illinois Justice Study Committee).

³⁴⁸ BARRY SCHECK ET AL., *WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 361 (New American Library 2003). The book’s first and second authors are the cofounders of the Innocence Project, “a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice.” *About the Organization*, THE INNOCENCE PROJECT, available at <http://www.innocenceproject.org/about/> (last visited Feb. 5, 2011).

³⁴⁹ SCHECK ET AL., *supra* note 348, at 361.

to determine their causes, assign responsibility, and recommend measures to prevent their recurrence.³⁵⁰ Innocence commission members would include “prosecutors, defense attorneys, law enforcement officials, victims’ rights advocates, judges, legislators, forensic scientists, and legal scholars.”³⁵¹ Scheck and Neufeld elsewhere have argued that the essential features of innocence commissions should include “subpoena power, access to first-rate investigative resources, and political independence”³⁵² and that such bodies should have the discretion to investigate wrongful convictions on their own initiative.³⁵³ The Innocence Project currently advocates for innocence commissions to function as, “Criminal Justice Reform Commissions.”³⁵⁴ The essential model remains the same—an entity comprised of stakeholders in the criminal justice system including judges, prosecutors, members of law enforcement, the

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² SCHECK ET AL., *supra* note 348, at 100. Specifically, Scheck and Neufeld argued that the following six items constitute the essential elements of a workable innocence commission:

1. Innocence commissions should be standing committees chartered to investigate, at their own discretion, any wrongful conviction and to recommend any public policy reforms they deem necessary;
2. Innocence commissions need the power to order reasonable and necessary investigative services, including forensic testing, autopsies, and other research services;
3. Innocence commissions must have the power to subpoena documents, compel testimony, and bring civil actions against any person or entity that obstructs its investigations;
4. The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public;
5. Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public;
6. Innocence commissions should be required to file periodic public reports on their findings and recommendations, and the relevant branch of government to which these reports are submitted should issue a formal written response to the recommendations within a fixed period of time.

Id. at 103–05.

³⁵³ *Id.* at 103–04.

³⁵⁴ *Criminal Justice Reform Commissions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions.php (last visited Feb. 5, 2011). It should be noted that Professor Findley has argued that calling such commissions “innocence commissions” may marginalize the work of these institutions as the name implies an issue that is primarily a concern of the defense bar. Findley, *supra* note 307, at 353. The reforms proposed by such commissions typically seek to increase the accuracy of the criminal justice system thereby ensuring only the guilty are convicted and the innocent are acquitted—a valuable goal to *all* criminal justice stakeholders. *Id.* Findley thus proposes these commissions be called “Criminal Justice Study Commissions.” *Id.* For the purposes of this article, we shall use the terms “innocence commission,” “criminal justice reform commission,” or simply “commission” to refer generically to such entities whether or not the name of any particular commission incorporates these terms. See also *supra* note 338 for a typology of innocence commissions.

defense bar, and forensic scientists, with the power to investigate wrongful convictions and recommend systemic reforms.³⁵⁵

Others, alternatively, have argued for government-established “ad hoc, blue ribbon study commissions” comprised of “the necessary talent and expertise needed to address policy issues born from wrongful convictions.”³⁵⁶ Such commissions would convene for a limited period of time, review the extant literature and known cases of wrongful convictions to identify the causes, and make corresponding policy recommendations. The ABA Criminal Justice Section’s Ad Hoc Innocence Committee (“ABA Innocence Committee”), a group of prosecutors, defense, attorneys, judges, academics and representatives of law enforcement and the forensic sciences, represents a non-governmental version of such an ad hoc blue ribbon commission. In 2006, the ABA Innocence Committee addressed what are by now the well-known correlates of wrongful convictions, such as eyewitness identification procedures, false confessions, forensic evidence, and defense and prosecution practices, and issued several reform resolutions.³⁵⁷ Its report stressed the importance of establishing “governmental entities to identify the causes of wrongful convictions and to propose reforms to prevent such convictions in the future.”³⁵⁸

The most salient recommendations for criminal justice reform commissions, whether temporary or permanent, are that they include major stakeholders in the jurisdiction’s criminal justice system, as well as academics with relevant expertise, and that they address issues of state and local concern.³⁵⁹ Although much research has been invested in understanding the causes and correlates of wrongful convictions nationally, such studies do not necessarily apply in all respects

to local circumstances, identify all the error points in a given criminal justice system, translate neatly into reforms applicable in a particular jurisdiction, or respond to local political realities in a way that is likely to lead to reform.

³⁵⁵ Findley, *supra* note 331, at 353.

³⁵⁶ Zalman, *supra* note 336, at 191, 193.

³⁵⁷ See e.g., AD HOC INNOCENCE COMMITTEE OF THE ABA CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 1 (Paul Giannelli & Myrna Raeder, eds. ABA 2006).

³⁵⁸ *Id.* at 2. The ABA Innocence Committee set forth its recommendations in the form of resolutions. Thus, the first resolutions in the report were as follows. “RESOLVED, That the American Bar Association urges federal, state, and territorial governments to identify and attempt to eliminate the causes of erroneous convictions. FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to assist in the effort to identify and attempt to eliminate the causes of erroneous convictions.” *Id.* at 1 (capitalization in the original).

³⁵⁹ Findley, *supra* note 331, at 340–41; Zalman, *supra* note 336, at 193.

More systematic, localized inquiries, by respected and authoritative bodies, are necessary to create the possibility of real meaningful reform based on the lessons of the false convictions.³⁶⁰

The next section identifies the states that have formed innocence commissions to engage in such jurisdiction-specific inquiries.

C. State Practices

We consider an innocence commission or criminal justice reform commission³⁶¹ to have been initiated under state auspices if it was created or appointed by one of the three branches of state government or by an individual member of any of the three branches while acting in an official capacity.³⁶² Under this definition, just nine states³⁶³ have taken measures to identify and address the causes of wrongful convictions, forming a total of eleven criminal justice reform commissions.³⁶⁴

³⁶⁰ Findley, *supra* note 331, at 341.

³⁶¹ Although the foregoing discussion makes clear that there is no one way to constitute an innocence commission, for our purposes, an entity was considered an innocence commission or criminal justice reform commission if it sought to examine the criminal justice system to identify causes of wrongful convictions and ways to prevent them.

³⁶² Accordingly, this discussion does not include self-appointed criminal justice reform commissions, such as those formed by state bar associations, as they are beyond the scope of this article. See, e.g., James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245 (2010) (discussing the New York State Bar Association's Task Force on Wrongful Convictions); JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 5 (2008) (discussing the formation and work of the Innocence Commission for Virginia, a self-appointed commission "[o]rganized by a small band of lawyers, academicians, and activists")

³⁶³ Those states are: California, Connecticut, Florida, Illinois, New York, North Carolina, Pennsylvania, Texas, and Wisconsin. *Criminal Justice Reform Commissions*, *supra* note 354.

³⁶⁴ Those government-appointed criminal justice reform commissions are: The California Commission on the Fair Administration of Justice, the Connecticut Advisory Commission on Wrongful Convictions, the Florida Innocence Commission, the Illinois Justice Study Committee, the [Illinois] Governor's Commission on Capital Punishment, the North Carolina Actual Innocence Commission (formerly known as the North Carolina Chief Justice's Criminal Justice Study Commission), the Justice Task Force (New York), the Advisory Committee on Wrongful Convictions (Pennsylvania), the Pennsylvania Committee for the Analysis and Reform of our Criminal Justice System, the Timothy Cole Advisory Panel on Wrongful Convictions (Texas), and the Criminal Justice Reforms Task Force (formerly known as the Avery Task Force) (Wisconsin).

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TABLE 5: STATES WITH INNOCENCE COMMISSIONS

State	Innocence Commission	Established
<i>California</i>	CA Commission on the Fair Administration of Justice (Ad hoc)	2004
<i>Connecticut</i>	CT Advisory Commission on Wrongful Convictions (Permanent)	2003
<i>Florida</i>	Florida Innocence Commission (Ad hoc)	2010
<i>Illinois</i>	Governor’s Commission on Capital Punishment (Ad hoc); IL Justice Study Committee (Ad hoc)	2000; 2007
<i>New York</i>	Justice Task Force (Permanent)	2009
<i>North Carolina</i>	NC Actual Innocence Commission (Permanent)	2002
<i>Pennsylvania</i>	PA Committee for Analysis and Reform of our Criminal System (Ad hoc); Advisory Committee on Wrongful Convictions (In progress)	2003; 2006
<i>Texas</i>	Timothy Cole Advisory Panel on Wrongful Convictions (Ad hoc)	2009
<i>Wisconsin</i> ³⁶⁵	Avery Task Force (Criminal Justice Reforms Task Force) (Ad hoc)	2003

Commissions were created through some form of legislative action in six of the states.³⁶⁶ For example, the California Commission on the Fair Administration of Justice,³⁶⁷ the Illinois Justice Study Committee,³⁶⁸ and the Pennsylvania Advisory Committee on Wrongful Convictions³⁶⁹ were created by senate resolution. The Connecticut Advisory Commission on Wrongful Convictions³⁷⁰ and the Timothy Cole Advisory Panel on Wrongful Convictions (Texas)³⁷¹ were both established by statute. In other states, members of the judiciary have taken the lead in creating

³⁶⁵ Note that all applicable orders and statutes are cited in the following footnotes, with the exception of the Wisconsin legislation, which is: Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005), available at <http://www.law.wisc.edu/fjr/clinical/ip/taskforcelegislation.pdf>.

³⁶⁶ Commissions established through legislative action—whether by statute, resolution, or the act of an individual legislator—are or have been present in California, Connecticut, Illinois, Pennsylvania, Texas, and Wisconsin.

³⁶⁷ S. Res. 44, 2003–2004 Leg., Reg. Sess. (Cal. 2004), http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sr_44_bill_20040827_enrolled.pdf.

³⁶⁸ S.J. Res. 9, 95th Gen. Assemb. (Ill. 2007).

³⁶⁹ S. Res. 381, 2006 Gen. Assemb., Reg. Sess. (Pa. 2006).

³⁷⁰ CONN. GEN. STAT. § 54-102pp (2003).

³⁷¹ TEX. GOV’T CODE ANN. § 71.051 (2009).

innocence commissions. Chief Justice Charles T. Canady of the Florida Supreme Court recently established the Florida Innocence Commission by administrative order of the court.³⁷² Following the publication of the report of the New York State Bar Association's Task Force on Wrongful Convictions,³⁷³ Chief Judge Jonathan Lippman of the New York Court of Appeals established the Justice Task Force to examine wrongful convictions and make recommendations to help prevent them.³⁷⁴ The first judicially established innocence commission was created when then-Chief Justice I. Beverly Lake formed the North Carolina Chief Justice's Study Commission in 2002, presently known as the North Carolina Actual Innocence Commission.³⁷⁵ Governors have established criminal justice reform commissions in two states, Illinois³⁷⁶ and Pennsylvania.³⁷⁷

Only three of the eleven state-created reform commissions are permanent.³⁷⁸ Consistent with the recommendations made by legal advocates and scholars, these commissions all include judges, prosecutors, defense attorneys, and other criminal justice stakeholders as members.

³⁷² Order Establishing the Florida Innocence Commission, No. AOSC10-39 (Fla. 2010), http://www.floridasupremecourt.org/pub_info/documents/Innocence_Commission/Filed_07-02-2010_Innocence_Commission_AO.pdf.

³⁷³ N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (Apr. 4, 2009), <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (hereinafter NYSBA TASK FORCE ON WRONGFUL CONVICTIONS).

³⁷⁴ See Acker & Bonventre, *supra* note 362, at 1247.

³⁷⁵ Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648-49 (2004) (describing the genesis of the North Carolina Actual Innocence Commission).

³⁷⁶ Governor's Commission on Capital Punishment. Although the commission established by then-Governor Ryan of Illinois was a capital punishment study commission, it is included in our definition because it was prompted by concerns over executing the wrongfully convicted. Press Release, ILL. GOV'T NEWS NETWORK, *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System* (Jan. 31, 2000), <http://www.illinois.gov/pressreleases/showpressrelease.cfm?subjectid=3&recnum=359> (quoting then-Governor Ryan saying, "I now favor a moratorium, because I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row, . . . [a]nd, I believe, many Illinois residents now feel that same deep reservation. I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life. Thirteen people have been found to have been wrongfully convicted.").

³⁷⁷ *Final Report of The Pennsylvania Committee for Analysis and Reform of Our Criminal System*, PENN. INNOCENCE COMMISSION, <http://pennsylvaniainnocencecommission.com/> (last visited Feb. 5, 2011).

³⁷⁸ The states that formed permanent commissions are Connecticut, North Carolina, and New York. CONN. GEN. STAT. § 54-102pp (2003); N.C. GEN. STAT. § 15A-1462 (2006); NYSBA TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 3703. For the purpose of the present study, a commission was deemed "ad hoc" if it issued a final report then ceased operations (as in the case of the California Commission on the Fair Administration of Justice) or if the statute, resolution, or order that established the commission identified a specific date on which the commission was to release its final report.

Many of the commissions also include academics, typically law professors, but sometimes also scholars from the forensic and social sciences, as well as legislators and victims’ advocates. Although composition is important—diverse perspectives from multiple stakeholders not only enhance the range of the commission’s expertise but also can help garner support for reform³⁷⁹—the crucial test of a commission’s efficacy is the extent to which its recommended reforms are adopted and implemented, with a resulting reduction in wrongful convictions. Thus, an important feature of the New York Justice Task Force is that it will monitor the effectiveness of recommended reforms on an ongoing basis.³⁸⁰ As more criminal justice reform commissions are created and their reforms are implemented, it will be important for systematic research to be completed to assess their effectiveness. In contrast, recommendations that go unheeded cannot offer hope for change. In California, for example, the legislature passed a number of bills based on the recommendations of the California Commission on the Fair Administration of Justice, only to have the governor veto them.³⁸¹

VII. POLICY REFORMS: CURRENT PRACTICES AND FUTURE DIRECTIONS

Tremendous variability characterizes the extent to which the states have enacted measures designed to reduce wrongful convictions. While thirty-four states and the District of Columbia have addressed at least one of the reform areas discussed above, sixteen states have failed to address any of them.³⁸² Interestingly, the states that have adopted reforms correspond only weakly with those in which known cases of wrongful conviction have occurred.³⁸³ Indeed, eleven of the sixteen states that have enacted no reforms

³⁷⁹ See Mumma, *supra* note 375, at 656.

³⁸⁰ Nicholas Confessore, *Top Judge Plans a Task Force on Wrongful Convictions*, N.Y. TIMES, Apr. 30, 2009, at A19.

³⁸¹ *Gov. Vetoes 3 Bills on Crime Case Procedures*, L.A. TIMES, Oct. 16, 2007, at B4.

³⁸² See Appendix.

³⁸³ States in which at least one exoneration has been discovered include Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and West Virginia, as well as the District of Columbia. See *Browse the Profiles*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Feb. 5, 2011) (reporting DNA exonerations in thirty-four states and the District of Columbia); Gross et al., *supra* note 8, app. at 555–60 (reporting DNA exonerations in thirty-seven states and the District of Columbia).

have experienced at least one documented wrongful conviction.³⁸⁴ On the other hand, of the thirty-five jurisdictions that have enacted some type of policy reform, six have no known cases of wrongful conviction.³⁸⁵

Of the thirty-five jurisdictions that have enacted reforms, only one has addressed more than three of the five areas discussed here; and most have focused on only one or two areas.³⁸⁶ The most common reform area has been interrogations; the least common involves the use of informants or snitches. Table 6 shows the number of states that have enacted reform measures in the five identified policy domains.

TABLE 6: NUMBER OF STATES ENACTING DIFFERENT POLICY REFORMS

Reform Area	Number of States
Recording Interrogations	19
Forensic Oversight	15
Eyewitness Identification	10
Innocence Commission	9
Snitch/Informant Use	8

Examining the policy reforms adopted by the individual states helps highlight the varied practices among jurisdictions. Ohio appears to have implemented the most comprehensive set of policy changes to help reduce wrongful convictions. In 2010, the state enacted policies requiring law enforcement to use a series of best practices when conducting eyewitness identifications and to record

³⁸⁴ States that have at least one known wrongful conviction but have not enacted any reforms include Alabama, Colorado, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, South Carolina, Tennessee, and Utah. *See* Appendix.

³⁸⁵ These states include Alaska, Arkansas, Maine, New Hampshire, New Mexico and Vermont. *Id.*

³⁸⁶ Of the thirty-five jurisdictions enacting reforms: sixteen have enacted reforms in only one area (Alaska, Arizona, Arkansas, Florida, Georgia, Iowa, Maine, Nevada, New Hampshire, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and the District of Columbia); thirteen have enacted reforms in two areas (California, Connecticut, Indiana, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Rhode Island, Texas, and Virginia); five have enacted reforms in three areas (Maryland, Montana, North Carolina, Ohio, and Wisconsin); and one has enacted reforms in four areas (Illinois). *Id.*

interrogations whenever practicable.³⁸⁷ In addition, Ohio requires a cautionary jury instruction to be given when informant testimony is uncorroborated.³⁸⁸ Several other states also have enacted promising reforms designed to minimize the risk of wrongful convictions. In Maryland, for instance, law enforcement agencies have been required to adopt written guidelines for eyewitness identification procedures, and it is recommended that the guidelines conform to United States Department of Justice standards.³⁸⁹ The state also requires the recording of interrogations for specified offenses³⁹⁰ and has established a statewide advisory committee for forensic laboratories.³⁹¹ Similarly, Montana requires that interrogations be recorded in felony cases³⁹² and has created a state forensic advisory board.³⁹³ Montana also requires a cautionary jury instruction in cases involving criminal informant testimony,³⁹⁴ although it has not implemented reforms in eyewitness identification procedures.

These states, and several others that have taken measures to reduce the number of innocents wrongly convicted, stand in stark contrast to states that have enacted no reforms or that have done little to guard against miscarriages of justice. For example, both Texas and New York, which are among the leaders in known wrongful convictions,³⁹⁵ have formed forensic oversight commissions³⁹⁶ and criminal justice reform commissions,³⁹⁷ yet

³⁸⁷ OHIO REV. CODE ANN. §§ 2933.81, 2933.83.

³⁸⁸ *State v. Keith*, No. 97-CA-44-2, 2000 WL 329812, at *3 (Ohio Ct. App. 2000).

³⁸⁹ MD. CODE ANN. PUB. SAFETY § 3-506 (LexisNexis 2010).

³⁹⁰ MD. CODE ANN. CRIM. PROC. § 2-402 (LexisNexis 2010).

³⁹¹ MD. CODE ANN. HEALTH—GEN. § 17-2A-12 (LexisNexis 2010).

³⁹² MONT. CODE ANN. § 46-4-406 (2010).

³⁹³ *Forensic Science Laboratory Advisory Board*, MONT. DEPT OF JUST., <http://www.doj.mt.gov/enforcement/crimelab/> (last visited Feb. 5, 2011).

³⁹⁴ *State v. Grimes*, 982 P.2d 1037, 1043 (Mont. 1999).

³⁹⁵ New York is second only to Illinois with thirty-five exonerations and Texas ranks third with twenty-eight exonerations between 1989 and 2003. Gross et al., *supra* note 8, at 541. Similarly, Texas leads in DNA exonerations with forty-one, while New York ranks third with twenty-seven. See *Browse the Profiles*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Feb. 5, 2011).

³⁹⁶ TEX. CRIM. PROC. CODE ANN. § 38.01 (West 2010); N.Y. EXEC. LAW § 995-a (McKinney 2010).

³⁹⁷ Texas established the ad-hoc Timothy Cole Advisory Panel on Wrongful Convictions in 2009. TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 1 (2010), *available at* <http://www.courts.state.tx.us/tfid/pdf/FINALTCAPreport.pdf>. That same year, the permanent Justice Task Force was established in New York. Confessore, *supra* note 380, at A19. It should be noted that the Timothy Cole Advisory Panel issued several recommendations for reform to the Texas legislature including mandatory electronic recording of custodial interrogation as well as reforms aimed at improving eyewitness identification procedures. TIMOTHY COLE ADVISORY PANEL ON WRONGFUL, *supra*, at 5. The eyewitness identification

neither state has enacted policies to reduce wrongful convictions stemming from eyewitness misidentifications, false confessions, or jailhouse snitch testimony.³⁹⁸ Florida, another leader in known wrongful convictions,³⁹⁹ established an Innocence Commission in 2010,⁴⁰⁰ but the state has yet to pass any substantive reforms to safeguard innocent defendants against wrongful conviction.⁴⁰¹

Much remains to be learned about why some states have emerged as leaders and others have lagged in adopting policy reforms designed to curb wrongful convictions. It seems clear that the development of policies designed to guard against miscarriages of justice is more than a simple reaction to the incidence of known wrongful convictions within a jurisdiction. Although highly publicized cases involving the conviction and punishment of innocent parties may help stimulate change, other factors—political, economic, and systemic—almost certainly interact to promote or impede reform efforts. Scholars and policymakers should be attentive to the circumstances that have resulted in safeguards being enacted in states where those reforms have been implemented. Commanding a better understanding of the conditions that both facilitate and stand in the way of change should be a priority of those concerned with enacting meaningful policy reforms.

Monitoring and assessing the efficacy of enacted reform measures also are essential features of reform efforts. For example, it will be important to understand how law enforcement agencies within a jurisdiction have reacted to changes in eyewitness identification or interrogation procedures, and whether they are provided with the training and resources that may be necessary to implement the reform measures. The reactions of prosecutors, defense lawyers, trial courts, and appellate courts within a jurisdiction should

reforms would require the state law enforcement development agency to work with experts to create a model policy for the administration of eyewitness identification procedures that would be binding on all law enforcement agencies. *Id.* It remains to be seen whether the Texas legislature will adopt the recommendations.

³⁹⁸ See Appendix.

³⁹⁹ Gross et al., *supra* note 8, at 541 (finding fifteen exonerations in Florida); *Florida: Exonerations by State, THE INNOCENCE PROJECT*, <http://www.innocenceproject.org/news/state.php?state=fl> (last visited Feb. 5, 2011) (finding twelve exonerations in Florida).

⁴⁰⁰ Order Establishing the Florida Innocence Commission, No. AOSC10-39 (Fla. 2010), *available at* http://www.floridasupremecourt.org/pub_info/documents/Innocence_Commission/Filed_07-02-2010_Innocence_Commission_AO.pdf.

⁴⁰¹ See Appendix.

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likewise be tracked and evaluated. Many recently enacted reforms are still in their infant stages. Owing to the lengthy period of time that often passes between conviction and exoneration,⁴⁰² definitive evaluation research must await the day when more is known about the link between implemented reforms and the causes and incidence of miscarriages of justice. However, this fact should not discourage implemented reforms from being monitored or evaluation efforts from being initiated.

VIII. CONCLUSION

Although hundreds of cases of wrongful conviction have been documented in the United States in recent decades, most states have adopted few serious measures in an effort to prevent more from occurring. The advent of DNA testing has brought a new level of scientific certainty to the demonstration of actual innocence. For the better part of a century, scholars have identified similar factors contributing to wrongful convictions and have suggested corresponding reforms to help guard against miscarriages of justice. Although far from exhaustive, research addressing wrongful convictions has produced ample evidence to justify specific practice and policy reforms to help guard against wrongful convictions. Rather than tolerate further delay, as evidence of recurring problems accumulates, now is the time for policymakers, criminal justice practitioners, social scientists, legal scholars, and serious-minded reformers to take action to reduce wrongful convictions. None can dispute the benefits, and the wisdom, of having fewer innocents suffer and fewer guilty go free.

⁴⁰² Of the first 250 wrongful convictions discovered through DNA evidence, the average length of time spent in prison was 13 years. 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED, *supra* note 17.

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APPENDIX: MISCARRIAGES OF JUSTICE REFORMS ENACTED IN THE
FIFTY STATES AND WASHINGTON, D.C.

State	Eyewitness Identification	Forensic Oversight	Inter- rogation	Informant/ Snitch Use	Innocence Commission
<i>Alabama</i>					
<i>Alaska</i>			X		
<i>Arizona</i>		X			
<i>Arkansas</i>		X			
<i>California</i>				X	X
<i>Colorado</i>					
<i>Connecticut</i>				X	X
<i>Delaware</i>					
<i>District of Columbia</i>			X		
<i>Florida</i>					X
<i>Georgia</i>	X				
<i>Hawaii</i>					
<i>Idaho</i>					
<i>Illinois</i>		X	X	X	X
<i>Indiana</i>		X	X		
<i>Iowa</i>			X		
<i>Kansas</i>					
<i>Kentucky</i>					

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<i>Louisiana</i>					
<i>Maine</i>			X		
<i>Maryland</i>	X	X	X		
<i>Massachusetts</i>		X	X		
<i>Michigan</i>					
<i>Minnesota</i>		X	X		
<i>Mississippi</i>					
<i>Missouri</i>		X	X		
<i>Montana</i>		X	X	X	
<i>Nebraska</i>			X	X	
<i>Nevada</i>				X	
<i>New Hampshire</i>			X		
<i>New Jersey</i>	X		X		
<i>New Mexico</i>		X	X		
<i>New York</i>		X			X
<i>North Carolina</i>	X		X		X
<i>North Dakota</i>					
<i>Ohio</i>	X		X	X	
<i>Oklahoma</i>				X	
<i>Oregon</i>			X		

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<i>Pennsylvania</i>					X
<i>Rhode Island</i>	X	X			
<i>South Carolina</i>					
<i>South Dakota</i>					
<i>Tennessee</i>					
<i>Texas</i>		X			X
<i>Utah</i>					
<i>Vermont</i>	X				
<i>Virginia</i>	X	X			
<i>Washington</i>		X			
<i>West Virginia</i>	X				
<i>Wisconsin</i>	X		X		X
<i>Wyoming</i>					