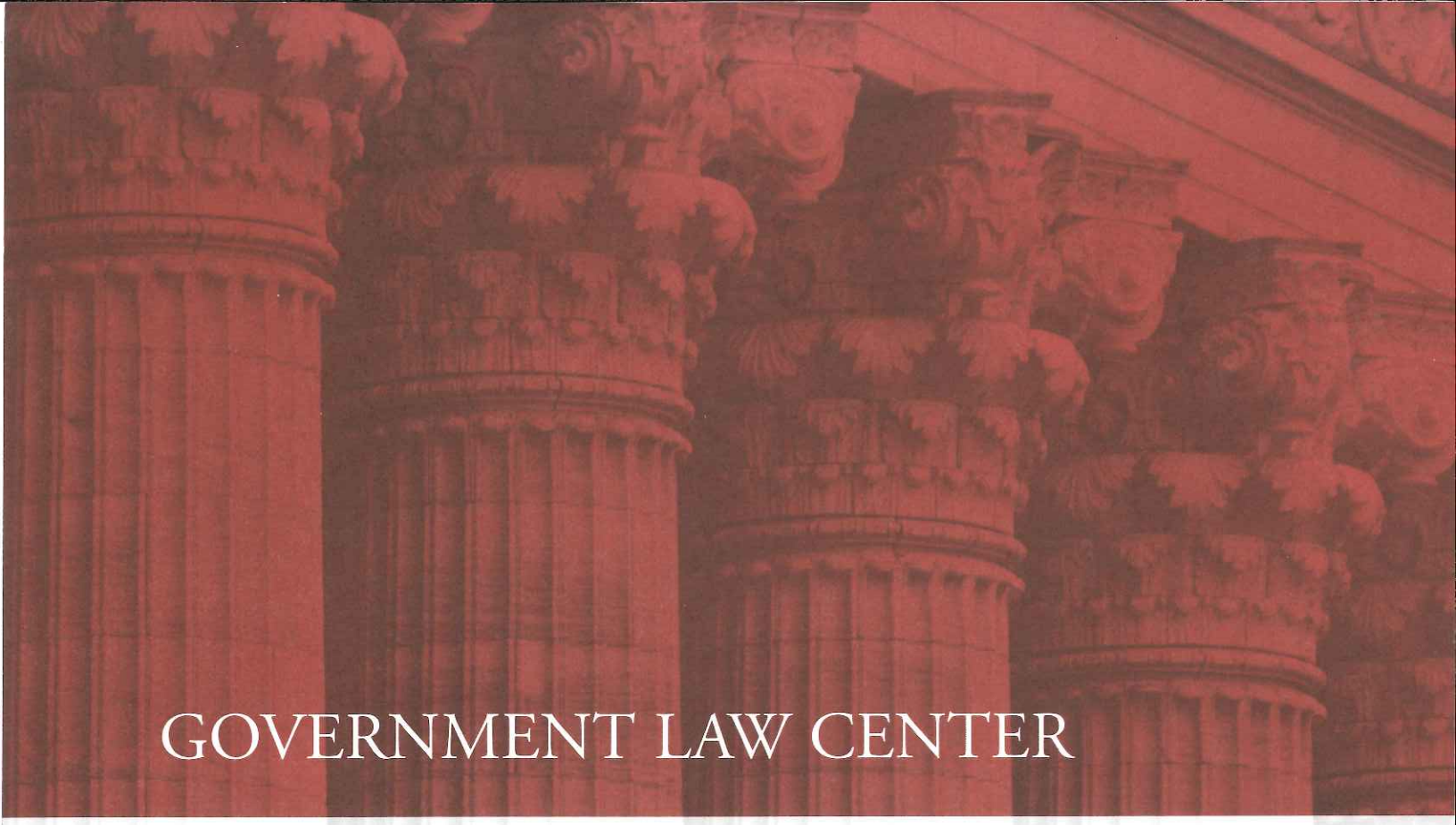

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May 5, 2015

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WARREN M. ANDERSON LEGISLATIVE BREAKFAST SEMINAR SERIES
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SPEAKER BIOGRAPHIES

JAMES R. ACKER, Ph.D., is a Distinguished Teaching Professor in the School of Criminal Justice at the University at Albany. He earned his J.D. at Duke University and his Ph.D., in criminal justice, at the University at Albany. Dr. Acker is co-editor (with Allison Redlich) of WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY (Carolina Academic Press 2011), and (with Allison Redlich, Robert Norris, and Catherine Bonventre), EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Carolina Academic Press 2014). He is on the Board of Editors of the annual issue of the *Albany Law Review* which is devoted to Miscarriages of Justice, and which involves a collaboration between the Law Review and the University at Albany School of Criminal Justice. Dr. Acker's principal teaching and scholarly interests include constitutional criminal procedure, substantive criminal law, capital punishment, miscarriages of justice, and the uses of empirical evidence in legal decision-making.

REBECCA BROWN, who joined the Innocence Project in 2005, directs its federal and state policy agenda, which is aimed at both revealing and preventing wrongful convictions and assuring adequate compensation for the wrongfully convicted upon release from prison. Ms. Brown began her career at the Civilian Complaint Review Board, where she investigated allegations of police misconduct for the City of New York. She has also served as the Juvenile Justice Policy Analyst for the Mayor's Office, analyzing policies and programs affecting the delivery of services within the juvenile justice system in New York City, and as a Senior Planner at the Center for Alternative Sentencing and Employment Services (CASES), where she conducted research, evaluation and planning work around its alternative to incarceration programs. Ms. Brown graduated *cum laude* from Barnard College and holds a Masters in Urban Planning, with a concentration in economic and community development, from the Robert F. Wagner School of Public Service at New York University.

SCOTT FEIN, ESQ., is a senior partner at Whiteman Osterman and Hanna, a law firm with offices in Albany and Washington, D.C. He serves as Director of the PUBLIC AUTHORITIES PROJECT of the Government Law Center (GLC) of Albany Law School and as Chair of the GLC's Advisory Board. Mr. Fein has been involved in matters pertaining to public authorities for more than fifteen years. On behalf of the State, and as required by the Public Authorities Reform Act of 2005, he has taught ethics and governance to the boards of directors of most State and

many local public authorities. Mr. Fein served as an Assistant Counsel to Governors Hugh Carey and Mario Cuomo and, prior to that, as a prosecutor. He received a law degree from Georgetown Law School and a Masters of Law degree from NYU Law School. Mr. Fein is a member of the Governor's Task Force on the Implementation of the Public Authority Reform Act and the Council to the State Independent Authority Budget Office. He serves as Chair of the Annual New York State Bar Association program on Ethics and Civility for Lawyers and as Counsel to the New York State Archives Partnership Trust. He was a United Nations speaker/panel moderator for the program, "Role of Public Authorities in the Development of Infrastructure in Developing Nations," which took place at the United Nations in 2012. He also participated in the conference, "Combatting Slavery in the 21st Century" which took place at the UN in 2014. On behalf of the NYS Authority Budget Office, and the City University of New York, Mr. Fein has taught compliance with the Public Authority Reform Act and the State and local Codes of Ethics to more than 400 State and local public authority board members since 2005. He was the Editor of the Fall 2009 GOVERNMENT, LAW AND POLICY JOURNAL on "Public Authority Reform." Mr. Fein has written extensively on public authorities. He co-authored the REPORT OF THE GOVERNOR'S TASK FORCE ON THE IMPLEMENTATION OF THE PUBLIC AUTHORITIES REFORM ACT OF 2009 (2010) and authored THE ROLE OF PUBLIC AUTHORITY MODEL TO ESTABLISH AND MAINTAIN INFRASTRUCTURE IN DEVELOPING NATIONS (2012).

MARK J. HALE, ESQ. has been a prosecutor in the Kings County (Brooklyn, New York) District Attorney's Office since November, 1983. In 2014, Mr. Hale was appointed as the Chief of the office's newly-formed Conviction Review Unit. To date, the Unit's investigations have resulted in the exonerations of thirteen men convicted of murder and other serious felonies and garnered national attention for the scope, innovation and industry in the review of problematic prosecutions. For 25 years prior to his current assignment, Mr. Hale worked as a trial assistant and supervisor in the office's Homicide Bureau. Mr. Hale prosecuted almost two-hundred jury trials to verdict. Mr. Hale was at the forefront of the use of forensic DNA in criminal prosecutions and tried the first New York State multi-defendant case which utilized three juries simultaneously. Mr. Hale is the recipient of the 2014 *Thomas E. Dewey Medal* presented by the New York City Bar Association for outstanding achievement by a Brooklyn Assistant District Attorney. He has twice been honored by the Patrolmen's Benevolent Association of the New York City Police Department in recognition of successful prosecutions of defendants who murdered uniformed NYPD Officers. Mr. Hale has previously lectured on trial strategy and tactics to the Criminal Division of the American Bar Association, the New York State Prosecutors Training Institute, the Harvard Law School Trial Advocacy Workshop, the Kings County Criminal Bar Association, and, internally, at the District Attorney's Office. A native of Akron, Ohio, Mr. Hale graduated from Kent State University and The Ohio State University, Michael. E. Moritz College of Law.

Perspectives

PROTECTING THE INNOCENT IN NEW YORK: MOVING BEYOND CHANGING ONLY THEIR NAMES

Albany Law Review

Authored by:
James R. Acker
Catherine L. Bonventre

PERSPECTIVES

PROTECTING THE INNOCENT IN NEW YORK: MOVING BEYOND CHANGING ONLY THEIR NAMES

*James R. Acker**
*Catherine L. Bonventre***

I. INTRODUCTION

New York courts generated more than forty thousand felony convictions in 2007[1] and an additional 155,746 misdemeanor convictions.[2] Roughly sixty-two thousand individuals are presently incarcerated in New York prisons[3] and many more are in jail.[4] Some of them are innocent. It is impossible to know precisely how many and who they all are. But there is no disputing that wrongful

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[1] NEW YORK STATE DIV. OF CRIM. JUSTICE SERVS., DISPOSITION OF ADULT ARRESTS: NEW YORK STATE (2009), *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf [hereinafter NEW YORK STATE CRIME STATISTICS]. The New York State Division of Criminal Justice ("The Division") reports that 113,183 felony arrests resulted in convictions during 2007, and 35% of the convictions were for felonies—a total of 39,258 felony convictions. *Id.* In addition, 230,309 misdemeanor arrests resulted in convictions during 2007, and 0.7% of the convictions were for felonies—a total of 1,530 felony convictions. *Id.* Thus, 39,258 + 1,530 = 40,788 felony convictions.

[2] *Id.* The Division reports that 230,309 misdemeanor arrests resulted in convictions during 2007, and that 47% of the convictions were for misdemeanors—a total of 108,151 misdemeanor convictions. *Id.* Additionally, 113,183 felony arrests resulted in convictions during 2007, and 42% of the convictions were for misdemeanors—a total of 47,595 misdemeanor convictions. *Id.* Thus, 108,151 + 47,595 = 155,746 misdemeanor convictions.

[3] HEATHER C. WEST & WILLIAM J. SABOL, PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 3 (2009), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim08st.pdf (last visited Apr. 25, 2009) (reporting U.S. Department of Justice statistics indicating that 62,211 prisoners were under the jurisdiction of New York State correctional authorities on June 30, 2008).

[4] NEW YORK STATE CRIME STATISTICS, *supra* note 1. The New York State Division of Criminal Justice reports that 74,593 individuals were sentenced to jail, jail time served, or jail and probation following misdemeanor arrests in 2007. *Id.* In addition, 39,004 individuals were sentenced to jail, jail time served, or jail and probation following felony arrests in 2007. *Id.* Thus, 74,593 + 39,004 = 113,597 misdemeanor and felony arrestees received some type of jail sentence during 2007.

convictions occur. Even if guilty verdicts are usually, or almost always reliable, converting estimated error rates into absolute numbers produces a staggering total of wrongful convictions. An accuracy level as high as 99.5%, which by some projections is decidedly optimistic,[5] would still mean that nearly one thousand innocent New Yorkers a year are convicted of crimes[6] and in excess of eleven thousand of the nation's incarcerated population (including well over eight hundred in New York) are in prison or jail for crimes they did not commit.[7] The tragedy is compounded because not only do innocent people suffer the devastating consequences of wrongful convictions, but actual offenders escape justice, perhaps to prey on additional victims.[8] Errors, inevitable in all human endeavors, are both predestined and tacitly acknowledged in systems of criminal justice that need negate only reasonable doubts—not all doubts—to support convictions.[9]

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[5] A recent survey of criminal justice professionals (police, prosecutors, defense attorneys, and judges) in Ohio revealed that roughly one quarter (24%) of the respondents estimated that wrongful convictions occur in 1% to 3% of cases throughout the United States resulting in conviction, "and an additional 40.7% of the respondents [estimated that wrongful convictions] occur in more than 3% of all cases." Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQ. 436, 453 (2007). *See* C. RONALD HUFF, AYRE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 60–62 (1996) (discussing CRJ officials' estimate of 0.5% error rate and translating into absolute numbers); *cf.* Samuel L. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 947 (2008) (estimating 2.3% as rate of wrongful death sentences); *see also* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (estimating between 3.3 to 5% wrongful conviction rate in capital murder-rape cases—though these might be especially prone to error).

[6] Using the 2007 New York State Division of Criminal Justice conviction figures, a 99.5% accuracy rate (or an error rate of 0.5%) would produce approximately 204 wrongful felony convictions (.5% of 40,788 = 203.94) and approximately 779 wrongful misdemeanor convictions (.5% of 155,746 = 778.73), or a total of 983 wrongful convictions. *See supra notes* 1–2 and accompanying text.

[7] According to Bureau of Justice Statistics data, 2,396,002 individuals were incarcerated in federal or state prisons or in local jails at midyear 2008. U.S. Dep't of Justice, Bureau of Justice Statistics, Total Correctional Population (2009), http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11 (last visited Apr. 25, 2010). If New York incarcerated an estimated 62,211 people in its prisons and an additional 113,401 in its jails, its contribution to the national total of innocent people serving prison and jail sentences using the estimated wrongful conviction rate of 0.5% would be approximately 878. *See supra* notes 3–4

[8] *See infra* note 485 and accompanying text.

[9] Victor v. Nebraska, 511 U.S. 1, 18 (1994) (approving jury instruction defining proof beyond a reasonable doubt that included, in part, this caveat: "'absolute certainty . . . is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. . . .'"); *In re* Winship, 397 U.S. 358 (1970) (holding that due process requires proof beyond a reasonable doubt of all elements of the

In June 2008, upon assuming the presidency of the New York State Bar Association ("NYSBA"), Bernice Leber appointed "a blue ribbon Task Force to find ways to prevent wrongful convictions"[10] in the state. The task force promptly convened and over the next several months studied known cases of wrongful conviction in New York, examined other states' experiences, issued a preliminary report,[11] and received testimony at two public hearings.[12] It released its final report on April 4, 2009.[13] Less than a month later, New York Court of Appeals Chief Judge Jonathan Lippman announced his creation of a task force that similarly would focus on the causes of wrongful convictions in the state. He requested a report, including recommended reforms, by December 1, 2009.[14]

By some estimates, New York is one of the nation's leaders in convicting innocent people. This dubious distinction is perhaps not surprising in light of the state's large population and high volume of criminal cases. It also is home to organizations such as the New York City-based Innocence Project, which actively investigates possible wrongful convictions,[15] and to journalism and media

charged offense in juvenile delinquency adjudications involving deprivation of liberty as well as in criminal cases). *See generally* ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 34–48 (1996) (discussing the criminal law's requirement of "proof beyond a reasonable doubt" and how the adversarial process differs from an objective search for truth, and application of those concepts in the context of the trial of O.J. Simpson for murder); BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 57–65 (2004) (estimating frequency of erroneous convictions, as well as erroneous acquittals, applying different levels of certainty to interpretation of "proof beyond a reasonable doubt"); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1364–68 (1997) (discussing implications of differing interpretations of proof beyond a reasonable doubt).

[10] Press Release, New York State Bar Association, Bernice K. Leber Begins Presidency of Nation's Largest Voluntary State Bar Association (June 2, 2008), *available at* http://readme.readmedia.com/news/show/Bernice-K-Leber-Begins-Presidency-Of-Nation-s-Largest-Voluntary-State-Bar-Association/175265.

[11] N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, PRELIMINARY REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (Jan. 30, 2009), *available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/TFWrongfulConvictionsreport.pdf [hereinafter TASK FORCE PRELIMINARY REPORT].

[12] *Hearing Before the New York State Bar Association Task Force on Wrongful Convictions* (Feb. 13, 2009), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=25681&TEMPLATE=/CM/ContentDisplay.cfm; *Hearing Before the New York State Bar Association Task Force on Wrongful Convictions* (Feb. 24, 2009) [hereinafter *Feb. 24 Hearing*] (on file with author).

[13] 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), *available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf [hereinafter TASK FORCE FINAL REPORT].

[14] Nicholas Confessore, *Top Judge Plans a Task Force on Wrongful Convictions*, N.Y. TIMES, May 1, 2009, at A19. No report had issued as of May 2010.

[15] The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld

centers that help expose and publicize wrongful convictions.[16] New York ranks third, behind only Texas and Illinois, with 24 of the country's 249 DNA-related exonerations between 1989 and June 2009.[17] One study, which attempted to chronicle wrongful convictions that occurred in the United States between 1989 and 2003—including those not based on DNA analyses—reported 35 in New York, the second highest number in the nation.[18] These tallies account only for cases that come to light and in which error has officially been recognized. As such, they almost certainly represent but a fraction of all cases in which innocent people have been convicted of crimes.[19] Other researchers, relying on unofficial and hence more controversial measures to identify wrongfully convicted individuals, have concluded that the State of New York likely executed eight innocent people during the twentieth century, more than any other jurisdiction.[20]

The initiatives undertaken by the New York State Bar Association and Chief Judge Lippman to investigate the causes and propose remedies for wrongful convictions in the state are significant. At a minimum, they help solemnize the gravity and

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at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. . . .

Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

The Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Apr. 25, 2010).

[16] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 541 (2005).

[17] INNOCENCE PROJECT, LESSONS NOT LEARNED 3 (2009), *available at* http://www.innocenceproject.org/docs/NY_Report_2009.pdf; The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php# (last visited Apr. 25, 2010).

[18] Gross et al., *supra* note 16, at 541. The researchers excluded from their tally mass exonerations resulting from cases involving widespread police scandals and large-scale child sex abuse prosecutions. *Id.* at 533–40.

[19] *See* Gross & O'Brien, *supra* note 5, at 928–30; Risinger, *supra* note 5, at 791.

[20] Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72–75 (1987) [hereinafter Bedau & Radelet, *Miscarriages*]. Unlike studies that have relied on official recognition of erroneous convictions, Bedau and Radelet's historical study employed a more subjective measure: "the cases we have included in our catalogue are those in which we believe a majority of neutral observers, given the evidence at our disposal, would judge the defendant in question to be innocent." *Id.* at 47. Others have questioned the reliability of this study. *See* Kansas v. Marsh, 548 U.S. 163, 190–93 (2006) (Scalia, J., concurring); Stephen J. Markman & Paul G. Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126–28 (1988). The researchers defended their methodology in Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 161–70 (1988) [hereinafter Bedau & Radelet, *Reply*].

urgency of the issues. They nevertheless represent only a beginning. Even the most discerning of recommendations must be implemented to make a difference. To be most meaningful and effective, reforms must reach beyond the rules and procedures that directly contribute to miscarriages of justice and embrace root causes. Policymakers must be willing not only to consider, but also to take comprehensive action. Otherwise, in a perverse twist of Joe Friday's famous introductory homily on the television show, *Dragnet*, only the names of the innocent will be changed;[21] nothing of substance will be gained to protect innocent people from being ensnared by the criminal justice system.

This article examines miscarriages of justice in New York criminal cases, focusing specifically on the findings and recommendations of the Final Report of the New York State Bar Association's Task Force on Wrongful Convictions ("Task Force").[22] We begin with a more precise definition of wrongful convictions and then discuss what is known about their incidence nationally and in New York. We thereupon consider several factors known to contribute to wrongful convictions and corresponding measures designed to help guard against error, relying both on the Task Force report and related studies. We next consider systemic issues not fully addressed within the Task Force report and conclude by urging

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[21] The television series *Dragnet* originally aired on NBC between 1952 and 1959, starring Jack Webb as Sergeant Joe Friday.

> From the distinctive four-note opening of its theme music to the raft of catch phrases it produced, no other television cop show has left such an indelible mark on American culture as *Dragnet*. . . . Episodes began with a prologue promising that 'the story you are about to see is true; the names have been changed to protect the innocent' . . . .

Eric Schaeffer, Museum of Broadcast Communications, *Dragnet*, http://www.museum.tv/eotvsection.php?entrycode=dragnet (last visited Apr. 25, 2010).

[22] The Task Force report also issued several recommendations concerning the compensation of wrongfully convicted individuals. TASK FORCE FINAL REPORT, *supra* note 13, at 16–17, 128–83. These important issues are beyond the scope of this article and are not here addressed. *See generally* Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403 (2009) (discussing comprehensive statutes); Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439 (2009) (discussing specific claims that may be alleged by the wrongfully convicted as well as the obstacles faced); Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227 (2008) (proposing that compensation be proportionate to the claimant's contributory conduct); Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069 (2007) (arguing in favor of states' liability regarding compensation for the wrongfully convicted and incarcerated); Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) (encouraging state legislatures to enact compensation statutes).

the enactment of reforms to help detect and prevent wrongful convictions.

II. WRONGFUL CONVICTIONS: THEIR INCIDENCE AND CORRELATES

American systems of justice value not only the truth, but are committed as well to preserving fundamental liberties, procedural fairness, and promoting other norms that do not always coincide with factual guilt or innocence. "Wrongful convictions" thus could be defined, with considerable justification, as deriving from infidelity to a number of different governing principles. In the present context, however, the meaning is more restrictive, referring exclusively to the erroneous conviction of factually innocent people. Even "innocent" takes on a narrow definition, applying only to individuals charged with crimes that either never occurred[23]—as when the "victim" of an alleged criminal homicide emerges alive and well following an unfortunate defendant's conviction[24]—or, more commonly, were committed by someone else. Excluded are vast numbers of cases where the *mens rea* needed to support a conviction may have been lacking,[25] or in which defenses based on provocation, excuse, or justification arguably were strong enough to have produced a not guilty verdict.[26]

Beyond appropriate conceptualization, however, is the daunting task of identifying cases in which wrongful convictions have occurred. A conservative tack, and the one most commonly adopted by researchers studying the problem, is to require official

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[23] For example, a controversy recently has arisen about whether Cameron Todd Willingham, who was executed in Texas in 2004 for the arson-related murder of his children, may have been innocent. Several experts who reanalyzed the evidence in his case have concluded that the fire supporting the arson-murder conviction was likely accidental and that scientific evidence did not support the conclusion that the fire was intentionally set. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, *available at* http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

[24] *See* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 182 (2008) (describing the conviction of Jesse and Stephen Boorn in Vermont in 1819 for the murder of their brother-in-law, Russell Colvin; months later, and shortly before Stephen was scheduled to be hanged, Colvin was found alive in another state); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT; SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE 14-21 (1932) (discussing the story of the Boorn brothers). Gross describes other "no-crime" cases involving individuals convicted of crimes that never actually occurred. *See* Gross, *supra*, at 182–84.

[25] *See* CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46–50 (1974); Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199, 204–06 (2008).

[26] *See* BLACK, *supra* note 25, at 50–55 (discussing vagaries associated with insanity defense); Radelet, *supra* note 25, at 205–07 (discussing self defense and insanity); Gross, *supra* note 24, at 184–85 (discussing self defense, defense of others, and insanity).

recognition of "innocence" in the form of a previously convicted individual's exoneration through acquittal on retrial, the dismissal of charges because of newly discovered evidence, or a pardon.[27] The State Bar Association Task Force adopted this approach essentially, although somewhat less precisely than might have been expected in light of the centrality of the concept to its mission. "[T]he group defined what it meant by the term 'wrongfully convicted.' That definition, which would determine the criteria of those cases which the Task Force would study, was determined to be only those individuals whose New York convictions were subsequently overturned by judicial/formal exoneration."[28] An accompanying footnote, offering scant clarification, continued: "The Task Force does not express an opinion that all [of the included] exonerees were actually innocent. However, while some individuals may not have been, in fact, innocent, in all these cases the criminal justice system broke down to the degree that a conviction was wrongly obtained."[29]

As the qualifying footnote suggests, even a conservative definition of wrongful conviction risks being overly inclusive. In some cases, evidentiary shortcomings or other barriers to prosecution and conviction will make reversals and "exoneration" an imperfect proxy for actual innocence.[30] A greater threat to validity, however,

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[27] *See* Gross et al., *supra* note 16, at 524 ("As we use the term, 'exoneration' is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. The exonerations we have studied occurred [when] . . . governors . . . issued pardons based on evidence of the defendants' innocence[;] . . . [when] criminal charges were dismissed by courts after new evidence of innocence emerged[;] . . . [when] defendants were acquitted at retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted[;] . . . [and where] states posthumously acknowledged the innocence of defendants who had already died . . . ." (footnotes omitted)). The Death Penalty Information Center has identified 138 individuals convicted of capital crimes and sentenced to death between 1973 and May 2010 who gained release from death row "based on evidence of their innocence." Death Penalty Information Center, Innocence and the Death Penalty, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited June 4, 2010). This list includes "all former death row inmates who have: (a) [b]een acquitted of all charges related to the crime that placed them on death row, or (b) [h]ad all charges related to the crime that placed them on death row dismissed by the prosecution, or (c) [b]een granted a complete pardon based on evidence of innocence." RICHARD C. DIETER, INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY (2004), http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty.

[28] TASK FORCE FINAL REPORT, *supra* note 13, at 5 (footnote omitted).

[29] *Id.* at 5 n.1.

[30] *See* Kansas v. Marsh, 548 U.S. 163, 196 (2006) (Scalia, J., concurring) ("[M]ischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and . . . prominent catalogues of 'innocence' in the death-penalty context suffer from [this] defect."); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005) ("To call someone 'innocent' when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been 'exonerated.'"); Daniel S. Medwed,

involves the likelihood that wrongful convictions are substantially undercounted because so many people erroneously convicted of crimes languish in anonymity or, despite their protestations, never have their innocence officially recognized. While no methodologies allow a precise measure of the incidence of wrongful convictions,[31] the number of officially acknowledged cases almost certainly represents but a small tip of a dramatically larger iceberg.[32]

Studies of wrongful convictions in the United States are not new. In 1932, Yale Law School Professor Edwin Borchard published *Convicting the Innocent*, a groundbreaking work describing "sixty-five criminal prosecutions and convictions of completely innocent people"[33] and cataloguing the factors contributing to the erroneous results. At the time, many were skeptical, if not dismissive of the possibility that innocent people risked conviction. As Borchard explained:

> A district attorney in Worcester County, Massachusetts, a few years ago is reported to have said: 'Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility.' The present

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Innocentrism, 2008 U. ILL. L. REV. 1549, 1552 (2008) (discussing critics who "have accused the innocence movement of inflating the actual number of wrongful convictions by including factually ambiguous cases in the innocence ledger"). *See generally* John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property,"* 59 HASTINGS L.J. 515, 517–28 (2008) (discussing differences between procedural error and factual innocence in reversals of convictions).

[31] C. Ronald Huff, *Wrongful Convictions in the United States*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 59, 60 (C. Ronald Huff & Martin Killias eds., 2008).

[32] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 ("[K]nown exonerations almost surely reflect only the tip of a very large iceberg." (footnote omitted)). One commentator has criticized the logic of using known, officially recognized instances of wrongful convictions as a measure of actual error rates by drawing an analogy to estimating steroid use among baseball players:

> [E]stimates . . . based on some version of dividing the number of known false convictions—exonerations—by the total of all convictions [ignores] the fact that almost all of these exonerations occurred in a few narrow categories of crime (primarily murder and rape) and that even within those categories many false convictions remain unknown, perhaps the great majority. By this logic we could estimate the proportion of baseball players who have used steroids by dividing the number of major league players who have been caught by the total of all baseball players at all levels: major league, minor leagues, semipro, college, and Little League—and maybe throwing in football and basketball players as well.

Gross, *supra* note 24, at 176.

[33] BORCHARD, *supra* note 24, at 367. Borchard explained that "innocence was established in various ways" in the cases presented: "by the turning up alive of the alleged 'murdered' person; by the subsequent conviction of the real culprit; [and] by the discovery of new evidence demonstrating in a new trial or to the Governor or President, as the basis for a pardon, that the wrong man was convicted." *Id.* at vi.

> collection of sixty-five cases, which have been selected from a much larger number, is a refutation of this supposition.[34]

Borchard might additionally have cited the rather querulous opinion of Judge Learned Hand, who in 1923 observed:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[35]

Ironically, two of the wrongful convictions reported by Borchard originated in the United States District Court for the Southern District of New York, where Judge Hand presided during his distinguished career.[36] Eight others involved individuals convicted in New York State courts,[37] including Charles Stielow and Nelson

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[34] *Id.* at v.

[35] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Hand offered these observations while denying the defendants' request to inspect the grand jury's minutes in connection with a motion to quash their indictments. Hand's dictum is somewhat reminiscent of utilitarian philosopher Jeremy Bentham's lament:

> But we must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence. Public applause has been, so to speak, set up to auction. At first it was said to be better to save several guilty men, than to condemn a single innocent man; others, to make the maxim more striking, fixed on the number *ten;* a third made this ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned, unless the evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.

M. DUMONT, A TREATISE ON JUDICIAL EVIDENCE, EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM, ESQ. 198 (1825).

[36] Oscar Krueger was convicted in 1911 for depositing a lewd, lascivious, and obscene letter in the United States mail. He was pardoned by President Taft nearly a year later, following his continuing claims of innocence and re-examination by handwriting experts of the document in question. BORCHARD, *supra* note 24, at 128–31. In 1924, Irving Greenwald was convicted of passing and uttering forged postal money orders. Following his conviction and incarceration, additional forged money orders from the same series continued to be circulated, which led to the apprehension and conviction of the true culprit. *Id.* at 79–84. Learned Hand served as a judge in the United States District Court for the Southern District of New York between 1909 and 1924. *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

[37] In addition to the murder convictions of Charles Stielow and Nelson Green, see *infra* text accompanying note 38, Borchard presents several other cases of wrongful convictions, including the following. Ameer Ben Ali was convicted of a Manhattan murder in 1891 and released from prison in 1902 following the discovery of exculpatory evidence that resulted in Governor Odell's grant of clemency. BORCHARD, *supra* note 24, at 66–72. Joseph Nedza was convicted in 1931 of attempted robbery committed near Syracuse, and was exonerated later that year on the district attorney's application for a new trial and dismissal of the indictment when one of the actual offenders admitted that Nedza was not involved and named his

Green, who in 1915 were found guilty of committing a double murder in Orleans County. Stielow was convicted of first-degree murder following a jury trial and was sentenced to death. Green pled guilty to second-degree murder on advice of counsel following Stielow's conviction and death sentence. Each man was apparently of significantly sub-average intelligence. Stielow allegedly confessed to the killings following prolonged interrogation. A judge issued a stay of execution based on newly discovered evidence just forty minutes before Stielow was to be strapped into the electric chair. Following an extensive investigation ordered by Governor Charles Whitman, suspicion focused on another man, who subsequently confessed to the crimes although he was never prosecuted for them. Whitman pardoned Stielow and Green in 1918, and they were released from prison.[38]

Several other writers followed in the path of Borchard's seminal study, typically employing a similar format involving case synopses of wrongful convictions accompanied by a roster of contributing factors and suggested reforms. In this tradition was *The Court of Last Resort*, a 1952 book written by Erle Stanley Gardner, the attorney and mystery writer better known as the creator of Perry Mason, the famous fictional defense lawyer whose clients almost never suffered conviction.[39] Gardner's breezy style and popularity helped garner public attention to the plight of innocent people being convicted of crimes, as was his intention. Many of his case accounts

accomplice, and the accomplice confessed. *Id.* at 166–71. Frank Pezzulich and Frank Sgelirrach were convicted of participating in a 1919 robbery in New York City, but were exonerated on the district attorney's application and dismissal of the indictments after the actual robbers were apprehended and confirmed that Pezzulich and Sgelirrach were not involved. *Id.* at 177–81. J. Anthony Barbera was convicted of a Brooklyn robbery in 1931, and later was released following the arrest and confession of the true offender and the district attorney's motion to set aside the verdict and dismiss the indictment. *Id.* at 322–24. Icie Sands was convicted in 1929 of vagrancy and sentenced to thirty days in the workhouse based on the testimony of a corrupt New York City police officer who subsequently was convicted of perjury for so testifying. *Id.* at 349–52. Borchard explains that Governor "Franklin D. Roosevelt granted pardons to six women who were then serving sentences under convictions resulting from similarly perjured testimony. No pardon was deemed necessary in the case of Icie Sands, as she had completed her sentence many months before." *Id.* at 351.

[38] *Id.* at 241–52; *see also* Bedau & Radelet, *Miscarriages*, *supra* note 20, at 119.

[39] ERLE STANLEY GARDNER, THE COURT OF LAST RESORT (1952). This book, written in a casual, journalistic style, describes investigations of cases involving the conviction of innocent people and offers various recommendations for improving the administration of justice. "In part it is an extremely sordid tale of political indifference—even hostility—to constructive efforts; but each chapter is doubtless persuasive to every citizen when in retrospect he asks himself: how could this man have been accused, found, guilty, and imprisoned without detection of his innocence?" Patrick Allen Flynn, *The Court of Last Resort*, 31 TEX. L. REV. 621, 621 (1953) (book review).

were published in *Argosy* magazine and thus were readily accessible to a broad readership.[40] His reporting is far from scientific or in the tradition of rigorous scholarship. Although Gardner enlisted the assistance of other attorneys and private investigators in examining possible cases of wrongful conviction, he emphasized that "it is to be continually borne in mind that the Court of Last Resort was not the magazine and was not the investigators, but was the public, the readers of the magazine themselves."[41]

Five years after the publication of *The Court of Last Resort*, Judge Jerome Frank and his daughter Barbara collaborated to write *Not Guilty*,[42] a book describing dozens of wrongful convictions.[43] Like

[40] GARDNER, *supra* note 39, at 20–22.

[41] *Id.* at 64.

[42] The Franks argued that "[t]he conviction and imprisonment of innocent men too frequently occur to be ignored by any of us. There are too many cases on record to prove the point, and there may be countless others of which we know nothing." JEROME FRANK & BARBARA FRANK, NOT GUILTY 31 (1957). Jerome Frank served as a judge on the Second Circuit Court of Appeals from 1941 through 1957 and was a prominent adherent of legal realism. *See, e.g.*, JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949); JEROME FRANK, LAW AND THE MODERN MIND (5th prtg. 1936). His daughter Barbara explained that her involvement as co-author of *Not Guilty* came at her father's invitation "since he felt that narrative writing was my forte and that, being a layman [sic], I could help him write the book in a way that would interest the lay public, for whom he intended it." FRANK & FRANK, *supra*, at 9. United States Supreme Court Justice William O. Douglas wrote the Foreword to *Not Guilty* in which he stated that

> our system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished.
>
> . . .
>
> [T]he sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness.

Id. at 11–12.

[43] Several New York cases were among the wrongful convictions canvassed. *See id.* at 96–99 (describing the conviction of Matthew Uchansky for a New York City armed robbery in 1939 and his subsequent exoneration after the actual robber named his true accomplices); *id.* at 129–36 (describing Philip Caruso's 1939 conviction for armed robbery in Brooklyn and his exoneration following the arrest and confession of the true offenders and retraction by the victim of his identification of Caruso); *id.* at 136–51 (describing the 1938 conviction of Bertram Campbell for forgery and grand larceny in New York City and his pardon in 1945, following which Campbell was awarded $115,000 compensation less than three months before he died); *id.* at 188–89 (describing how Edward Larkman was convicted of a Buffalo murder in 1925 and sentenced to death; Governor Alfred E. Smith commuted Larkman's death sentence on the night of his scheduled execution in 1927, and Governor Herbert Lehman pardoned Larkman in 1933 following an investigation and another man's confession to the murder); *id.* at 193 (describing Frank Trasco's conviction in 1935 in Garden City, New York for misappropriating his employer's funds, and his exoneration the following year after the primary witness admitted to having committed perjury); *id.* at 194–96 (describing the conviction in 1936 of Raymond Riley, a lawyer recently admitted to the New York Bar, for misappropriating a client's funds, and his exoneration twelve years later after evidence surfaced supporting his contention that the withdrawal of funds had been authorized).

Gardner, the Franks, addressing their readers, aimed "to get each of you keenly interested, to stir you to a lively sense of injustice about the plight of the wrong man convicted of a crime."[44] They similarly offered a collection of non-technical accounts of miscarriages of justice aimed at lay readers, while identifying factors commonly associated with wrongful convictions and urging corresponding reforms.[45]

Additional works continued in the same genre, designed more to refute skepticism about whether innocent people in fact ever suffered criminal conviction and punishment than representing systematic description or analysis.[46] Although they presented different cases, and are useful in helping to raise public awareness of the issues, the studies documented and proposed solutions to the problem of wrongful convictions with such consistency in style and substance that they risked redundancy. Professor Richard Leo's summary is apt:

> From the time Borchard published his book in the early 1930s until the early 1990s, there was typically one big-picture book or major article published every decade or so on the subject of miscarriages of justice, often following the same general format and repeating many of the same arguments but with newer (and sometimes even more

[44] *Id.* at 38.

[45] *See id.* at 199–248 (discussing, inter alia, problems associated with eyewitness identification, jury comprehension of testimony and instructions, the admissibility of prejudicial evidence and abuses of cross-examination, unreliable testimony by informants and accomplices, the adversarial method and its tendency to entice prosecutors to value securing convictions over the truth, and limitations on discovery). The Franks also advocated the abolition of capital punishment because an erroneous execution "cannot be undone. It may mean the judicially sanctioned governmental murder of the guiltless." *Id.* at 248. For his part, Gardner praised *Not Guilty* as "not only a very important book but . . . a very interesting and a somewhat terrifying book." Erle Stanley Gardner, *Not Guilty, by Jerome and Barbara Frank*, 10 STAN. L. REV. 189, 189 (1947) (book review). However, he also criticized the book for "present[ing] only one side of the picture," that is, for inadequately addressing the fact that "it is as great a miscarriage of justice when a guilty person is wrongfully acquitted as when an innocent person is wrongfully convicted." *Id.* at 190. He also characterized the Franks' suggested reforms as "vague remedial measures" and noted his disagreement with some of them. *Id.* at 193.

[46] *See, e.g.*, EDWARD D. RADIN, THE INNOCENTS 7 (1964) ("One of the most common American myths is the belief that innocent people are not convicted for crimes they have not committed."). Some earlier works, however, did aspire to deal "systematically with the problem of wrongful imprisonment, with all its implications for the working of the criminal law." RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES 23 (1973). Brandon and Davies discuss British cases of "[w]rongful imprisonment," which the authors define "as follows: the man who has been wrongfully imprisoned is the man who has been convicted of a crime he did not in fact commit and who has been sent to prison on the basis of this conviction." *Id.* at 19.

> compelling) cases. . . . First, they announced that the United States legal system had an ideology that it was better that some number (typically 100, sometimes as low as 10 or as high as 1,000) of guilty men went free than for one innocent one to be wrongfully convicted; then they pointed out the myriad procedural and legal protections seemingly designed to ensure this result; and then they argued that the wrongful conviction of the innocent problem had occurred regularly and was largely unnoticed, despite our vaunted democratic ideals. These works then discussed a number of wrong-man cases (often a parade of "horribles"), the seeming causes of wrongful conviction (from eyewitness misidentification to police and prosecutorial misconduct to ineffective assistance of counsel), and the reforms that should be implemented to lessen or eliminate the problem of wrongful conviction in American society.[47]

Perceptions as well as the study of the problem of wrongful convictions changed dramatically beginning in the mid- to late-1980s, when DNA analysis had its first criminal justice application.[48] A powerful tool in prosecutions, this new technology at the same time unambiguously demonstrated the innocence of some individuals convicted, incarcerated, and occasionally sentenced to death[49] for crimes they had not committed. DNA exonerations "changed the landscape of criminal justice,"[50] requiring acknowledgment that wrongful convictions are real, not hypothetical, and involve not just procedural error, but people who are factually innocent.[51] Still, the biological evidence required for

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[47] Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 203 (2005); *see also* Huff, *supra* note 31, at 59–60 ("[S]cholars, jurists, journalists, and activists have documented and analyzed cases of wrongful conviction since Borchard's . . . pioneering work more than seven decades ago. For more than half a century, the documentation and analyses focused almost exclusively on individual cases . . . .").

[48] DNA analysis was first employed in a criminal investigation in England in 1986 and was introduced in this country in a 1987 Florida rape trial. Karen Christian, Note, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1197 n.8 (2001); *see also* JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 16–18 (2008).

[49] The Death Penalty Information Center's list of 138 death row exonerees includes seventeen cases involving post-conviction DNA analysis. *See* Death Penalty Information Center, *supra* note 27; *see also* The Innocence Project, Facts on Post-Conviction DNA Exonerations, *supra* note 17.

[50] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56 (2008).

[51] *See* Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004)

DNA analysis[52]—such as semen, blood, saliva, or hair—is available in a distinct minority of crimes (less than twenty percent),[53] is not always secured or preserved properly to allow testing,[54] and may not negate an individual's participation in a crime even when he or she is ruled out as the source of the tested substance.[55] Mindful of such limitations, some researchers have used DNA exonerations as a basis to help estimate the true incidence of wrongful convictions.

Deriving reliable estimates of the number of innocent people erroneously convicted from DNA exonerations is challenging, in part because of the skewed distribution of those cases compared to the universe of criminal convictions. For example, all but three of the two hundred DNA exonerations between 1989 and April 2007

(arguing that DNA exonerations have changed discussions about wrongful convictions "from a theoretical argument to a factual one. . . . [DNA] has created a bright-line distinction between cases in which the accused is acquitted, which to some people does not necessarily equate to innocence, and cases in which there is a complete exoneration and innocence cannot be debated"); Marvin Zalman, *The Adversary System and Wrongful Conviction, in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 71, 73 (C. Ronald Huff & Martin Killias eds., 2008) ("The 'DNA Revolution' . . . was the critical factor that forced complacent professionals to admit to systemic problems, thus leading to the acceptance of 'wrongful conviction' as a problem area." (citations omitted)); Leo, *supra* note 47, at 205 ("The advent of DNA testing and the window it opens onto the errors of the legal system have altered the nature and study of miscarriages of justice in America. Most fundamentally, DNA testing has established factual innocence—as opposed merely to procedural innocence—with certainty in numerous postconviction cases." (citation omitted)).

[52] Several sources offer a general description of DNA analysis. *See, e.g.*, Frederick R. Bieber, *Science and Technology of Forensic DNA Profiling: Current Use and Future Directions, in* DNA AND THE CRIMINAL JUSTICE SYSTEM 23 (David Lazer ed. 2004); JAY D. ARONSON, GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING (2007); DNA Initiative, Principles of Forensic DNA for Officers of the Court: Online Training, http://www.dna.gov/training/otc (last visited Apr. 25, 2010). For a more in-depth treatment, see JOHN M. BUTLER, FORENSIC DNA TYPING (2001).

[53] Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 281 n.49 (2008); Garrett, *supra* note 50, at 116 n.235.

[54] *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1668–70 (2008); Jeffrey M. Prottas & Alice A. Noble, *Use of Forensic DNA Evidence in Prosecutors' Offices*, 35 J.L. MED. & ETHICS 310, 314–315 (2007); Cynthia A. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239 (2005). Although the federal government and 46 states have enacted statutes authorizing criminal defendants to gain post-conviction access to DNA evidence under some circumstances, there is no constitutional right of access even where such evidence has been preserved. District Attorney's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009).

[55] *See* Hilary S. Ritter, Note, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 843–44 (2005) (discussing tack taken by some prosecutors in positing the existence of an "unindicted co-ejaculator[]" to maintain that post-conviction DNA exclusion does not necessarily mean that a defendant previously convicted of rape is innocent); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 n.17 (2004) (same, attributing phrase to Peter Neufeld, co-director of the Innocence Project).

involved individuals convicted of rape and/or murder,[56] crimes that account for less than 2% of all felony convictions[57] and less than 25% of the incarcerated population.[58] Moreover, roughly 96% of the wrongful convictions resulted from trial verdicts,[59] an almost exact inversion of the norm for criminal cases, where approximately 95% of convictions are based on guilty pleas.[60] Wrongful convictions occasionally stem from guilty pleas—on the order of 5% of DNA exonerations have surfaced in cases in which defendants pled guilty, often in exchange for leniency in charging or sentencing decisions[61]—and unreliable guilty pleas may be especially prevalent in high volume, lower level cases.[62]

Extrapolating from the eleven DNA-based exonerations involving individuals convicted of capital murder accompanied by rape and sentenced to death between 1982 and 1989—before DNA evidence was typically used in criminal trials—Michael Risinger has estimated that between 3.3% and 5% of all persons convicted of

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[56] Garrett, *supra* note 50, at 73 n.69 (describing the three exceptions that involved individuals convicted, respectively, of attempted murder, robbery, and armed robbery and carjacking).

[57] *Id.* at 74; Gross, *supra* note 24, at 179.

[58] Gross et al., *supra* note 16, at 530–31.

[59] Garrett, *supra* note 50, at 74–75.

[60] Sourcebook of Criminal Justice Statistics Online, Table 5.46.2004 http://www.albany.edu/sourcebook/pdf/t5462004.pdf (last visited Apr. 25, 2010) (indicating that 95% of criminal convictions obtained in the state courts in 2004 were produced by guilty plea, including 69% of convictions for murder and non-negligent manslaughter and 83% of convictions for rape).

[61] The Innocence Project, An End to Plea Bargains, http://www.innocenceproject.org/Content/1784.php (last visited Apr. 25, 2010) ("Of the 227 wrongful convictions overturned in the United States by DNA testing, 12 defendants pled guilty to crimes they didn't commit. Almost always, they pled guilty to avoid the threat of longer sentences—or in some cases the death penalty."); *see also* Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1442–45 (2004) (discussing cases of wrongful convictions based on guilty pleas); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1164 (2005) (discussing special problems posed by acceptance of "*Alford* pleas," named after the Supreme Court case, North Carolina v. Alford, 400 U.S. 25 (1970), that authorized courts to accept guilty pleas even when defendants are unwilling to admit guilt and/or maintain that they are innocent); Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007).

[62] Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 849 (2002) ("There is no reason to doubt that . . . routine cases, which are usually resolved by guilty plea or very short trials, are subject to the same or more errors as the high profile cases we are more familiar with. Arguably, wrongful guilty pleas and wrongful convictions in less serious cases have an even more deleterious impact on the justice system than the well-known scandals.").

capital murder-rape during that period were factually innocent.[63] Using what many would agree is classic understatement, he suggested that it would be hard to characterize "a 3–5% factual innocence error rate in a significant set of real-world capital cases . . . as de minimis."[64] Risinger also speculated that the incidence of erroneous convictions in capital murder cases, analogous non-capital murder cases, and rape cases not resulting in homicide that were tried during the pre-DNA era, was likely similar to the 3 to 5% error rate that he observed in his more limited sample.[65]

Also focusing on death row exonerations, Samuel Gross and Barbara O'Brien have estimated that approximately 2.3% of individuals convicted of capital murder and sentenced to death in this country are actually innocent.[66] They initially calculated a 1.5% exoneration rate for death-sentenced murderers, derived from the 111 death row exonerations that occurred between 1973 and 2004 and the total of 7534 death sentences imposed during that period.[67] They adjusted that figure upward to account for wrongful convictions that were likely to have occurred but had not yet been discovered in light of the relative recentness of many of the cases and the typically lengthy time lags between conviction and exoneration (the wrongly convicted spent an average of 9.5 years on death row and many remained under sentence of death considerably longer).[68] They considered 2.3% to be "a conservative estimate"[69] of

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[63] Risinger, *supra* note 5, at 779–80.

[64] *Id.* at 780.

[65] *Id.* at 785–87.

> What is true for capital cases in general and for non-capital 'analogous' murders, however, may not necessarily . . . be true for other kinds of crime. I suspect that the wrongful conviction rate for many kinds of crimes of interpersonal violence (robbery, for example) might be at least as high, while the rate for white collar crimes may be much lower. But without more study, we cannot really know for sure.

Id. at 788 (footnote omitted).

[66] Gross & O'Brien, *supra* note 5, at 927.

[67] *Id.* at 944.

[68] *See* Gross, *supra* note 24, at 177.

[69] Gross & O'Brien, *supra* note 5, at 947. The authors noted that their estimate of wrongful convictions is based on "exonerations" of death-sentenced individuals. Although "innocence is beyond dispute" for many of the exonerees, it remains "[v]ery likely . . . [that] some defendants we count as 'exonerated' did in fact participate in the crimes for which they were convicted." *Id.* at 946. However, they also considered it

> likely that at least some . . . 'nonexonerated' defendants who were released from death row are actually innocent. And, of course, the set of exonerated defendants does not include innocent defendants who were executed, nor those who remain on death row, nor the undetected innocent defendants among the thousands of defendants who have been removed from death row but remain in prison.

Id. at 947.

the rate of wrongful convictions in capital murder cases resulting in death sentences. If generalizable to other cases—which would be largely guesswork, as Gross and O'Brien caution—their findings would have truly dramatic implications. "If defendants who were sentenced to prison had been exonerated at the same rate as those who were sentenced to death, there would have been nearly 87,000 non-death-row exonerations in the United States from 1989 through 2003 . . . ."[70] Moreover, "if the false conviction rate for prison sentences were 2.3%, about 185,000 innocent American defendants were sent to prison for a year or more from 1977 through 2004."[71]

The NYSBA Task Force reviewed fifty-three New York wrongful convictions. The cases span four decades—the oldest conviction dates to 1964, the most recent is 2004—although most come from the 1980s and 1990s.[72] It is unclear how the examined cases came to the Task Force's attention and whether they are representative of New York wrongful convictions generally, considering the localities and counties spawning them, the types of crimes and characteristics of the individuals involved, and their causes and consequences.[73]

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[70] *Id.* at 958–59. *See* Gross et al., *supra* note 16, at 523, 532 (reporting 266 known exonerations in non-capital cases in the United States between 1989 and 2003).

[71] Gross, *supra* note 24, at 178 (noting, however, that "there are strong theoretical reasons to believe that the rate of false convictions is higher for murders in general, and for capital murders in particular, than for other felony convictions").

[72] The cases are identified by name of defendant and year of conviction in Appendix B of the Task Force Report. TASK FORCE FINAL REPORT, *supra* note 13, at 186. By decade, the cases of wrongful convictions studied by the Task Force were as follows:

1960–1969 (n = 1)—George Whitmore (1964)

1970–1979 (n = 4)—William Maynard (1971), James Walker (1971), Betty Tyson (1973), Charles Daniels (1979)

1980–1989 (n = 25)—Robert McLaughlin (1980), Collin Warner (1980), Nathaniel Carter (1982), Kerry Kotler (1982), Habib Wahir Abdal (1983), Charles Dabbs (1984), Victor Ortiz (1984), Marion Coakley (1985), Scott Fappiano (1985), Alan Newton (1985), Albert Ramos (1985), John Kogut (1986), Angelo Martinez (1986), Leonard Callace (1987), Anthony Capozzi (1987), Terry Chalmers (1987), Dennis Halstead (1987), John Restivo (1987), David Wong (1987), Anthony Faison (1988), Charles Shepherd (1988), Charles Braunskill (1989), Timothy Crosby (1989), Ruben Montalvo (1989), Jose Morales (1989)

1990–1999 (n = 22)—Jeff Descovic (1990), Antron McCray (1990), Kevin Richardson (1990), Yusef Salaam (1990), Raymond Santana (1990), Kharey Wise (1990), Collin Woodley (1990), Jeffrey Blake (1991), Roy Brown (1992), Lazaro Burt (1992), Jose Garcia (1992), Gerald Harris (1992), Michael Mercer (1992), Luis Rojas (1992), Lynn DeJac (1994), Lee Long (1995), Arthur Stewart (1995), John Vera (1995), Hector Gonzalez (1996), Douglas Warney (1997), James O'Donnell (1998), Napolean Cardenas (1999)

2000–2009 (n = 1)—Dan Lackey (2004).

[73] After defining the term "wrongfully convicted," see *supra* text accompanying note 27, the report simply explains that:

> A total of 53 cases were selected, and each Member reviewed all documentation available about the assigned cases, including but not limited to, court files and various media reports. In addition, many Task Force Members interviewed attorneys, law enforcement personnel and judges involved in both the original criminal case and the subsequent

The inclusion of all of the known DNA exonerations that had occurred in New York at the time the Task Force completed its review, comprising twenty-three of the fifty-three cases, suggests that the cases studied were not intended to be a representative sample of the state's wrongful convictions.[74] Based on anecdotal reports as well as more systematic studies, it is virtually certain that the fifty-three cases reviewed by the Task Force are but a fraction of the wrongful convictions produced by the state courts since the 1960s.[75]

The earliest of the wrongful convictions studied by the Task Force is also one of the state's most infamous. George Whitmore was arrested in 1964 for what was widely known as "The Career Girl Murders"[76]—the killings of two young women in an Upper East Side Manhattan apartment that "became the most deeply investigated and shrilly reported [crime] in New York City in a decade."[77] During prolonged interrogation following his arrest for an unrelated

exoneration efforts.

TASK FORCE FINAL REPORT, *supra* note 13, at 5–6.

[74] The twenty-three DNA exonerations reviewed by the Task Force included Roy Brown, Leonard Callace, Anthony Capozzi, Terry Chalmers, Charles Dabbs, Jeff Deskovic, Scott Fappiano, Hector Gonzalez, Dennis Halstead, John Kogut, Kerry Kotler, Antron McCray, Michael Mercer, Alan Newton, James O'Donnell, Victor Ortiz, John Restivo, Kevin Richardson, Yusef Salaam, Raymond Santana, Habib Wahir Abdal, Douglas Warney, and Kharey Wise. *See* INNOCENCE PROJECT, *supra* note 17, at 37–63. Steven Barnes was exonerated in 2009 with the assistance of DNA testing, too late to be included in the Task Force report. *Id.* at 64–67. For a discussion of reasons that DNA exonerations are not likely to be representative of wrongful conviction cases generally, see *supra* notes 50–60 and accompanying text.

[75] For example, the New York State Defenders' Association Wrongful Convictions Study Project uncovered fifty-nine wrongful homicide convictions in New York State courts between 1965 and 1988. Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965–1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 807 (1990–91).

> A "wrongful homicide conviction" is a conviction for any degree of homicide—including murder, manslaughter, or criminally negligent homicide—which is overturned and never reinstated. This includes basically three categories of cases: those where the conviction was overturned and either (a) the defendant was subsequently acquitted on retrial (seventeen of the cases . . .), (b) the charges were dismissed (thirty-five cases), or (c) the charges were resolved by conviction of a non-homicide crime (seven cases, of which three also included acquittals on the homicide charges).

Id. at 807. In addition, Scott Christianson examines New York wrongful convictions, "involving individuals who were convicted and imprisoned for crimes they didn't commit—defendants who were innocent although proven guilty." SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 2 (2004). The book features a number of cases that, in the author's view, fit that definition, although not all of the defendants had succeeded in having their convictions overturned at the time of the book's publication. It also includes brief descriptions of well over one hundred additional cases of New York wrongful convictions, most from the 1960s and later but some of which date to the early twentieth century. *Id.* at 167–86.

[76] SELWYN RAAB, JUSTICE IN THE BACK ROOM 30 (1967).

[77] FRED C. SHAPIRO, WHITMORE 1 (1969).

assault and attempted rape, the police secured a lengthy statement from Whitmore in which he admitted to the double murder. He almost immediately recanted the confession, claiming that the police had supplied its details and that it had been induced under duress. Following prolonged and dogged investigation by journalists and defense counsel, the murder charges unraveled, and another man eventually confessed to and was convicted for the killings.[78]

Whitmore's case was singled out by Chief Justice Earl Warren in his opinion for the Supreme Court in *Miranda v. Arizona* as "[t]he most recent conspicuous example" of how overbearing police interrogation tactics can "give rise to a false confession."[79] Although Whitmore was never brought to trial on the murder charges, amidst the wash of surrounding publicity, he was convicted on the original assault and attempted rape charges—which he had consistently denied—and sentenced to a lengthy term of imprisonment. Those convictions were vacated years later and the charges dismissed,[80] thus explaining Whitmore's inclusion among the "wrongful convictions" reviewed by the Task Force.

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[78] Whitmore's case is discussed in detail in RAAB, *supra* note 76, and SHAPIRO, *supra* note 77; *see also* TRUE STORIES OF FALSE CONFESSIONS 389–411 (Rob Warden & Steven A. Drizin eds., 2009); CHRISTIANSON, *supra* note 75, at 113–18; Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession*, 14 PACE L. REV. 1, 6–7 (1994).

[79] Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966) ("Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: 'Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten.' In two other instances, similar events had occurred." (citations omitted)).

[80] Whitmore's 1964 convictions on the assault and attempted rape charges were set aside. People v. Whitmore, 257 N.Y.S.2d 787, 820 (Sup. Ct. 1965). He was convicted again in 1966 on retrial, although those convictions also were reversed. People v. Whitmore, 278 N.Y.S.2d 706 (App. Div. 1967). A third trial and conviction followed in 1967. People v. Whitmore, 293 N.Y.S.2d 712 (App. Div. 1968) (remitting case to trial court for ruling on admissibility of witness's in-court identification), *denial of defense motion challenging identification aff'd*, 313 N.Y.S.2d 433 (App. Div. 1970), *aff'd*, 270 N.E.2d 893 (N.Y. 1971), *motion to amend remittitur granted*, 273 N.E.2d 318, (N.Y. 1971), *cert. denied*, 405 U.S. 956 (1972). Christianson writes that "[t]he Appellate Division finally reversed Whitmore's conviction for attempted rape and assault and ordered [another] trial, but after years of litigation, those charges, too were finally dropped."). CHRISTIANSON, *supra* note 75, at 115. *See* Whitmore v. City of New York, 436 N.Y.S.2d 323, 324 (App. Div. 1981) (describing how Whitmore "was eventually convicted of [attempted rape] in 1967, and his conviction was thereafter affirmed on appeal. . . . However, in 1973, his conviction was vacated and the charges dismissed on motion of the District Attorney, Kings County. . . . [T]he basis of that motion was the discovery of 'fresh evidence' which cast doubt upon the sufficiency and trustworthiness of the trial evidence . . . ." (citation omitted)).

A more recent highly publicized double murder case, also based on a false confession, suggests the recurrence of circumstances giving rise to wrongful convictions. Although not among the cases considered by the Task Force, Martin Tankleff's conviction in Suffolk County for the 1988 murder of his parents[81] could have been included. Tankleff was seventeen years old when his parents were murdered in their exclusive Belle Terre, Long Island home. Interrogated for hours by the police after discovering his parents' bodies and making a frantic 911 call, and duped by a ruse that his father had regained consciousness and identified him as his killer, the young Tankleff began to question whether he might have somehow "blacked out" and committed the murders. Many of the details provided in his ensuing confession were not corroborated by physical evidence. He promptly disclaimed the confession,[82] but the police, convinced of his guilt, failed to investigate other possible suspects including one of his father's business partners who was heavily in debt to the Tankleffs and had fled to California a few days after the murders.

Newspaper stories published shortly after the murders depicted Martin Tankleff as a spoiled adolescent, angry at his parents for refusing to buy him a better car. Despite his protestations of innocence, Tankleff was sentenced to fifty years to life in prison upon his conviction for the murders. He served more than seventeen years of that sentence before the appellate division ruled in 2007 that newly discovered evidence cast doubt on his guilt. The court vacated his convictions and granted him a new trial.[83] The charges against him were dismissed in June 2008, soon after the state attorney general's office completed an investigation of the case.[84]

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[81] *See* People v. Tankleff, 606 N.Y.S.2d 707 (App. Div. 1993), *aff'd*, 646 N.E.2d 805 (N.Y. 1994), *writ of habeas corpus denied*, Tankleff v. Senkowski, 993 F. Supp. 151 (E.D.N.Y. 1997), *aff'd in part and rev'd in part*, 135 F.3d 235 (2d Cir. 1998). Robert C. Gottlieb, who served as Martin Tankleff's attorney at his trial, was a member of the New York State Bar Association's Task Force on Wrongful Convictions. *See infra* note 112.

[82] Long before Tankleff's exoneration, two experts included his statement to the police as a textbook example of a false confession. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 458–59 (1998); *see also* Margaret A. Berger, *False Confessions: Three Tales from New York*, 37 SW. L. REV. 1065, 1071–74 (2008); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 792–94 (2006).

[83] People v. Tankleff, 848 N.Y.S.2d 286 (App. Div. 2007).

[84] The case is described in detail in RICHARD FIRSTMAN & JAY SALPETER, A CRIMINAL INJUSTICE: A TRUE CRIME, A FALSE CONFESSION, AND THE FIGHT TO FREE MARTY TANKLEFF

Although separated by decades, and in many respects quite different, the Whitmore and Tankleff cases evidence undeniable similarities. Each involved an unreliable confession produced by the prolonged interrogation of a young and vulnerable suspect (Whitmore was nineteen and, by many accounts, of limited intelligence, while Tankleff was seventeen and questioned in the immediate aftermath of his parents' murder). In each case, the police investigations prematurely focused on a single suspect to the exclusion of others, notwithstanding conflicting or competing evidence, a problem commonly referred to as tunnel vision.[85] It is not unusual for cases of wrongful conviction to share commonalities. Wrongful convictions typically derive from multiple causes, rather than a single, isolated reason, and those causes tend to recur, as studies have regularly documented.[86]

Among the 245 DNA-based exonerations recorded between 1989 and 2009, by far the leading contributing factor to wrongful convictions has been erroneous eyewitness identifications, which were evident in three quarters of the cases.[87] Overstated or unreliable scientific evidence was presented in roughly half of the trials that produced wrongful convictions,[88] and nearly a quarter of the cases involved false confessions.[89] False or misleading testimony of accomplices and/or jailhouse informants (snitches) was introduced in 16% of the cases of wrongful conviction that were confirmed by DNA testing.[90] Other recurring factors included

(2008); *see also* CHRISTIANSON, *supra* note 75, at 118–21.

[85] *See infra* notes 119–29, 133–34, and accompanying text.

[86] *See, e.g.*, Innocence Project, Factors Leading to Wrongful Convictions, http://www.innocenceproject.org/understand/factors_74_chart.php (last visited Apr. 25, 2010) (presenting the findings of one such study).

[87] Innocence Project, Facts on Post-Conviction DNA Exonerations, *supra* note 17; *see also* Innocence Project, Eyewitness Misidentification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Apr. 25, 2010).

[88] Innocence Project, Facts on Post-Conviction DNA Exonerations, *supra* note 17; *see also* Innocence Project, Unvalidated or Improper Forensic Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited Apr. 25, 2010); Innocence Project, Forensic Science Misconduct, http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php (last visited Apr. 25, 2010).

[89] Innocence Project, Facts on Post-Conviction DNA Exonerations, *supra* note 17; *see also* Innocence Project, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Apr. 25, 2010).

[90] Innocence Project, Facts on Post-Conviction DNA Exonerations, *supra* note 17; *see also* Innocence Project, Informants/Snitches, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Apr. 25, 2010).

misconduct by police or prosecutors[91] and inadequate representation by defense counsel.[92] The Innocence Project reports[93] that among the twenty-four New York DNA exonerations that help comprise the national totals, thirteen (54%) of the cases included eyewitness identification errors,[94] ten (42%) were marred by false confessions,[95] five (21%) by government misconduct,[96] five (21%) by the unreliable testimony of informants or snitches,[97] and one (4%) by forensic science misconduct.[98]

Although the technology giving rise to the DNA exonerations is relatively new, the factors contributing to wrongful convictions in those cases are not. For example, Borchard found that eyewitness identification errors helped produce twenty-nine of the sixty-five wrongful convictions that he reviewed in 1932, representing "[p]erhaps the major source of these tragic errors."[99] Jerome and

[91] Some form of police misconduct figured in thirty-seven of the first seventy-four wrongful conviction cases involving DNA exonerations (50%), and some form of prosecutorial misconduct was a factor in thirty-three of those cases (45%). Innocence Project, Factors Leading to Wrongful Convictions, *supra* note 86; Innocence Project, Government Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Apr. 25, 2010).

[92] "Bad Lawyering" was evident in twenty-four of the first seventy-four wrongful conviction cases involving DNA exonerations (32%). Innocence Project, Factors Leading to Wrongful Convictions, *supra* note 86; *see also* Innocence Project, Bad Lawyering, http://www.innocenceproject.org/understand/Bad-Lawyering.php (last visited Apr. 25, 2010).

[93] In describing the "Causes of Wrongful Convictions by State," the Innocence Project Web site cautions that "[c]ontributing causes are selected examples and do not represent a comprehensive listing." Innocence Project, Causes of Wrongful Convictions by State, http://www.innocenceproject.org/news/CauseView7.php (last visited Apr. 25, 2010).

[94] Innocence Project, New York: Eyewitness Misidentification, http://www.innocenceproject.org/news/CauseViewstate1.php?state=NY (last visited Apr. 25, 2010) (the cases include Habib Wahir Abdal, Leonard Callace, Terry Chalmers, Charles Dabbs, Scott Fappiano, Hector Gonzalez, Kerry Kotler, Alan Newton, Michael Mercer, James O'Donnell, Victor Ortiz, Anthony Capozzi, and Steven Barnes).

[95] Innocence Project, New York: False Confessions, http://www.innocenceproject.org/news/CauseViewstate3.php?state=NY (last visited Apr. 25, 2010) (the cases include Jeff Deskovic, Dennis Halstead, John Kogut, Antron McCray, John Restivo, Kevin Richardson, Yusef Salaam, Raymond Santana, Douglas Warney, and Korey Wise).

[96] Innocence Project, New York: Government Misconduct, http://www.innocenceproject.org/news/CauseViewstate5.php?state=NY (last visited Apr. 25, 2010) (the cases include Jeff Deskovic, Habib Wahir Abdal, Kerry Kotler, Kevin Richardson, and Roy Brown).

[97] Innocence Project, New York: Informants/Snitches, http://www.innocenceproject.org/news/CauseViewstate6.php?state=NY (last visited Apr. 25, 2010) (the cases include Dennis Halstead, John Kogut, John Restivo, Roy Brown, and Steven Barnes).

[98] Innocence Project, New York: Forensic Science Misconduct, http://www.innocenceproject.org/news/CauseViewstate4.php?state=NY (last visited Apr. 25, 2010) (Dennis Halstead's case).

[99] BORCHARD, *supra* note 24, at 367 ("These cases illustrate the fact that the emotional

Barbara Frank also wrote at length about how unreliable identification testimony factored into the wrongful conviction cases they studied.[100] Eyewitness identification errors occurred in fifty-six of the three-hundred and fifty (16%) wrongful convictions in potentially capital cases compiled by Bedau and Radelet.[101] The comparatively low incidence of erroneous identifications likely reflects the overrepresentation of homicides—and consequent unavailability of victims' identification testimony—in their study.[102] By the same token, the frequency of mistaken eyewitness testimony in the DNA exonerations is likely attributable in part to the preponderance of rape and sexual assault cases among that grouping, crimes that are much more likely than others to entail DNA testing.[103] "Nearly 90 percent of the rape exonerations

balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. . . . How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in twelve other cases, the resemblance, while fair, was still not at all close. In only two cases can the resemblance be called striking." (citations omitted)).

[100] FRANK & FRANK, *supra* note 42, at 199–223.

> 'He lies like an eyewitness,' you may hear a lawyer say. That statement is made in jest. But it does point up an important fact: Any witness, being human, may be fallible.
>
> . . .
>
> Into [a witness's] . . . initial observation of the event, his memory of that observation, his communication of his memory in the courtroom—error can enter, and often does.

Id. at 199–200.

[101] Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57. Their study encompassed wrongful convictions in potentially capital cases between 1900 and 1986.

[102] *See* Gross et al., *supra* note 16, at 542 (noting that in a study of 1989–2003 wrongful convictions, approximately 90% of rape wrongful convictions involved misidentification by at least one eyewitness; for homicide wrongful convictions, 50% involved misidentification by at least one eyewitness).

[103] The Innocence Project Web site allows a search to be made by crime of conviction for the 240 DNA exonerations listed as of early July 2009. A search for "rape" convictions produced 138 cases. Innocence Project, Search the Profiles—Rape, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=&compensation=&conviction=sexual+assault&x=0&y=0 (last visited Apr. 25, 2010). A search for "sexual assault" convictions produced forty-three additional cases. Innocence Project, Search the Profiles—Sexual Assault, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=&compensation=&conviction=sexual+assault&x=0&y=0 (last visited Apr. 25, 2010). A search for "murder" as conviction type revealed that 32 of the rape and sexual assault convictions also involved a murder. Innocence Project, Search the Profiles—Murder, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=&compensation=&conviction=murder&x=0&y=0 (last visited Apr. 25, 2010). Thus, when the thirty-two rape-murder and sexual assault-murder convictions are excluded from the total of 181 rape and sexual assault convictions, it appears that approximately 149

[between 1989 and 2003] . . . included eyewitness misidentifications —but how could it be otherwise? . . . In retrospect, looking only at cases in which a convicted rape defendant was ultimately exonerated, misidentification and innocence are almost synonymous."[104]

The same contributing factors surface with almost numbing regularity in wrongful conviction cases, regardless of the era or whether DNA analysis helped establish the defendant's innocence. Perjury, often (but not exclusively)[105] committed by accomplices or informants in anticipation of official consideration or leniency;[106] false confessions;[107] unreliable expert and forensic testimony;[108] the

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of the 240 DNA exonerations (62%) involved a rape or sexual assault case in which the victim survived. The Web site indicates that a mistaken identification was a contributing cause in 114 (out of 138, or 82.6% of) wrongful convictions for rape. Innocence Project, Search the Profiles—Rape with Eyewitness Misidentification, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=Eyewitness+Misidentification&perpetrator=&compensation=&conviction=rape&x=0&y=0 (last visited Apr. 25, 2010). Mistaken identification also was a contributing cause in thirty-nine (out of forty-eight, or 81.3%) wrongful convictions for sexual assault. Innocence Project, Search the Profiles—Sexual Assault with Eyewitness Misidentification, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=Eyewitness+Misidentification&perpetrator=&compensation=&conviction=sexual+assault&x=54&y=3 (last visited Apr. 25, 2010). The Web site listings do not reveal whether the victim made the erroneous identification, and a cautionary note indicates that contributing causes are select examples rather than a comprehensive listing.

[104] Gross & O'Brien, *supra* note 5, at 932–33.

[105] New York is not a stranger to police misconduct including perjury. Take, for example, the evidence-tampering scandal involving New York State Police officers during the mid-1990s, and the practice of "testilying," described in the Mollen Commission report, regarding New York City Police officers' testimony about the circumstances under which they discovered evidence while carrying out warrantless searches and seizures. *See* CHRISTIANSON, *supra* note 75, at 122–37; DERSHOWITZ, *supra* note 9, at 52–60; Richard Perez-Pena, *Supervision of Troopers Faulted in Evidence-Tampering Scandal*, N.Y. TIMES, Feb. 4, 1997, at B1; Joe Sexton, *Types of Perjury Common Among Police Officers Are Detailed*, N.Y. TIMES, Apr. 23, 1994, at 1:27. *See generally* Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1266–68 (2005); Dianne L. Martin, *The Police Role in Wrongful Convictions: An International Comparative Study*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 77, 90 (Saundra D. Westervelt & John A. Humphrey, eds., 4th prtg. 2008).

[106] *See, e.g.*, BORCHARD, *supra* note 24, at 369; GARDNER, *supra* note 39, at 163–82; HUFF, RATTNER & SAGARIN, *supra* note 5, at 77–79; RADIN, *supra* note 46, at 130–45; Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57; Gross et al., *supra* note 16, at 543–44.

[107] *See, e.g.*, BORCHARD, *supra* note 24, at 371–72; BRANDON & DAVIES, *supra* note 46, at 47–65; GARDNER, *supra* note 39, at 157–59; HUFF, RATTNER & SAGARIN, *supra* note 5, at 110–41; RADIN, *supra* note 46, at 146–56; Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57; Gross et al., *supra* note 16, at 544–46.

[108] *See, e.g.*, BORCHARD, *supra* note 24, at 373; GARDNER, *supra* note 39, at 261; Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57; Clive Walker & Russell Stockdale, *Forensic Evidence*, *in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 119–50 (Clive Walker & Keir Starmer, eds., 1999).

suppression of exculpatory evidence or other misconduct by police and prosecutors;[109] and inadequate representation by defense counsel,[110] along with unreliable eyewitness identifications and sundry other causes, are the recurrent staples of wrongful convictions. A 2006 report completed by the American Bar Association's Criminal Justice Section on the causes of wrongful convictions focused on these same issues.[111]

Not surprisingly, the report of the New York State Bar Association's Task Force on Wrongful Convictions in many respects mirrors the findings and recommendations of these related studies.[112] Indeed, although the included state cases evidence and help illustrate the recurring problems associated with wrongful convictions, and are a testament to the tragic toll they exact on individual lives and in undermining public confidence in the administration of justice, the substantive recommendations within the Task Force report might almost as easily have been issued independently. New York is not unique when it comes to miscarriages of justice. We consider the Task Force's findings and recommendations in the ensuing section.

III. THE REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS

The twenty-two member New York State Bar Association's Task Force on Wrongful Convictions, chaired by New York City Criminal Court Judge and NYSBA Past President Barry Kamins,[113] began

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[109] *See, e.g.*, BORCHARD, *supra* note 24, at 369; FORST, *supra* note 9, at 66–133; GARDNER, *supra* note 39, at 142; HUFF, RATTNER & SAGARIN, *supra* note 5, at 70–73; RADIN, *supra* note 46 at 17–50; Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57.

[110] *See, e.g.*, BORCHARD, *supra* note 24, at 374; Bedau & Radelet, *Miscarriages*, *supra* note 20, at 57; HUFF, RATTNER & SAGARIN, *supra* note 5, at 76–77.

[111] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY (2006).

[112] *Cf.* Zalman, *supra* note 51, at 71 ("A consensus of sorts exists among those who think about the conviction of factually innocent people in the United States about what 'causes' and what must be done to reduce wrongful convictions.").

[113] The Task Force members included:
Richard Aborn, Esq.—President, Constantine & Aborn Advisory Services LLC and President of the Citizen's Crime Commission of New York City; Jack Auspitz, Esq.—Morrison & Foerster LLP, New York City; Hon. Phylis Skloot Bamberger—Retired Judge, New York City Court of Claims; Thomas Belfiore—Commissioner-Sheriff, Westchester County Department of Public Safety, Hawthorne; David Louis Cohen, Esq.—Law Office of David L. Cohen, Esq., Kew Gardens; Tracee Davis, Esq.—Zeichner, Ellman & Krause LLP, New York City; Hon. Janet DiFiore—Westchester County District Attorney, White Plains; Vincent E. Doyle, III, Esq.—Connors & Vilardo LLP, Buffalo; Mark Dwyer, Esq.—New York County District Attorney's Office, Manhattan;

work in June 2008. Its 187-page Final Report was issued in April 2009 and was promptly approved by the NYSBA House of Delegates.[114] The task force members individually collected and examined information about the fifty-three cases considered and then formed subcommittees to make recommendations regarding the six "root causes" or "primary factors responsible for the wrongful convictions"[115] that emerged from their review.[116] The subcommittees thus were organized around the following topics,[117]

Anthony Girese, Esq.—Bronx County District Attorney's Office, Bronx; Robert C. Gottlieb, Esq.—Law Offices of Robert C. Gottlieb, New York; Prof. William Hellerstein—Brooklyn Law School, Garrison; Hon. Charles J. Hynes—Kings County District Attorney's Office, Brooklyn; Hon. Barry Kamins—Judge, Criminal Court, New York County and Chair of the Task Force on Wrongful Convictions; Hon. Howard Levine—Retired Court of Appeals Judge, Whiteman, Osterman & Hanna LLP, Albany; Hon. John Martin—Former U.S. District Judge for the Southern District, Martin & Obermaier, New York City; JoAnne Page, Esq.—President and Chief Executive Officer, the Fortune Society, New York City; Matthew Scott Peeler, Esq.—Arent Fox LLP, New York City, and Secretary of the Task Force on Wrongful Convictions; Norman L. Reimer, Esq.—Executive Director, National Association of Criminal Defense Lawyers, Washington, DC; Prof. Laurie Shanks—Clinical Professor of Law, Albany Law School, Albany; Hon. George Bundy Smith—Retired Court of Appeals Judge, Chadbourne & Parke LLP, New York City; Lauren Wachtler, Esq.—Mitchell, Silberberg & Knupp LLP, New York City. TASK FORCE FINAL REPORT, *supra* note 13, at 184–85.

[114] Joel Stashenko, *Bar Leaders Approve Proposal to Reduce Wrongful Convictions*, N.Y. L.J., Apr. 7, 2009, at 1 (reporting that the New York State Bar Association's House of Delegates approved the Task Force report "without opposition")

[115] TASK FORCE FINAL REPORT, *supra* note 13, at 6.

[116] The report notes that multiple problems contributed to most of the wrongful convictions. It describes the frequency of the specific factors as follows: identification procedures—thirty-six cases; government practices—thirty-one cases; forensic evidence—twenty-six cases; defense practices—nineteen cases; false confessions—twelve cases; jailhouse informant—four cases. *Id.* at 7. The report further stresses that:

> Slightly *less* than half of the cases reviewed by the Task Force resulting in a wrongful conviction involved a DNA exoneration. This meant that while scientific advances have played an essential role in helping to prevent wrongful convictions, many other non-scientific factors have also been the cause of wrongful convictions and had to be carefully examined and considered.

Id. at 6–7. These passages should be interpreted with caution. Without further information about how the fifty-three wrongful conviction cases were selected, it cannot be determined how representative they are of known wrongful convictions within the state, or of wrongful convictions generally. *See supra* notes 70–73 and accompanying text. The breakdown of contributing factors provided for the fifty-three cases studied may or may not resemble what would be evidenced more generally. It appears that all of the known New York DNA exonerations were reviewed by the Task Force. *See supra* note 72 and accompanying text. Whether those twenty-three cases comprise more or less than half of the wrongful convictions studied is simply an artifact of how many additional cases the Task Force chose to review. The statement about DNA and scientific advances "helping to prevent wrongful convictions" may be correct, but in the present context may be something of a non sequitur. The non sequitur involves the apparent lack of relationship between the use of DNA to confirm that wrongful convictions had occurred and the report's addressing DNA's role in "helping to prevent" such convictions.

[117] A seventh subcommittee focused on compensation for the wrongfully convicted, an important issue but one that we do not attempt to address in this article. *See* TASK FORCE

which also provide the structure for the Task Force's findings and recommendations:

> [(1)] Government Practices: one or more general errors committed by a government actor (a prosecutor, member of law enforcement, or judge).
>
> [(2)] Identification Procedures: the misidentification of the accused by the victim and/or one or more eyewitnesses.
>
> [(3)] Mishandling of Forensic Evidence: errors in the handling or preservation of key forensic evidence and/or the failure to use DNA testing.
>
> [(4)] Use of False Confessions: the extraction and use of what turned out to be a false confession by the accused.
>
> [(5)] Use of Jailhouse Informants: the admission and reliance by the jury on what later was determined to be false testimony by a jailhouse or other informant.
>
> [(6)] Defense Practices: one [or] more errors by an attorney representing the falsely accused, usually a failure to fully investigate or to offer alternative theories and/or suspects.[118]

A. Government Practices

Innocent people obviously are at a heightened risk of conviction when evidence that is inconsistent with or casts doubt on their guilt remains undiscovered or, if discovered, is not properly preserved or disclosed. Consequently, both the police and prosecutors' offices can assume central roles in guarding against—and contributing to—wrongful convictions. Several of the Task Force's recommendations focus on procedures designed to regulate law enforcement and prosecution practices regarding potentially exculpatory evidence.

Few decisions in the criminal justice process rival the importance of an arrest. An arrest not only often harbingers the suspect's continuing involvement with the criminal justice system, including possible formal accusation, prosecution, and conviction, but also may "clear" the case from law enforcement's perspective, thus largely dictating if not preempting further investigation.[119] An

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FINAL REPORT, *supra* note 13, at 8.

[118] TASK FORCE FINAL REPORT, *supra* note 13, at 6.

[119] Findley & Scott, *supra* note 32, at 325–27 ("The most common measure of investigator performance—at both the organizational and the individual level—is the so-called 'clearance rate,' the rate at which crimes reported to the police are deemed satisfactorily closed. . . . The rules for calculating clearance rates are set by the Federal Bureau of Investigation through its Uniform Crime Reporting program. According to the FBI rules, cases can be cleared either by arresting an offender and turning the case file over to prosecutors for prosecution or by so-

erroneous arrest decision can have devastating consequences, immersing an innocent person in a web of suspicion while allowing the true offender to remain at large. Criminal investigations that conclude prematurely, before alternative plausible theories and suspects are explored, are especially susceptible to error. The biasing effects of "tunnel vision" may cause the police, who by no means are alone in succumbing to this tendency, to

> focus on a suspect, [and] select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt. This drive to confirm a preconceived belief in guilt adversely impacts on witness interviews, eyewitness procedures, interrogation of suspects, and the management of informers in ways that have been identified in virtually all known cases of wrongful conviction.[120]

Citing several affected cases among those it reviewed, the Task Force report identified tunnel vision—"the early prosecutorial focus, especially by the police, on a particular individual as the person who committed the crime coupled with a refusal to investigate to determine if there is a basis to believe, based on available information, that someone else may have committed the crime"—as one of the government practices contributing importantly to wrongful convictions.[121] The report recommended that the police "should be trained to investigate alternate theories for a case, at least until they are reasonably satisfied that those theories are without merit."[122] It placed ultimate responsibility on prosecutors

called 'exceptional means' (a variety of circumstances under which police can be deemed to have identified the offender but through no fault of their own are unable to take the offender into custody). . . . [T]he net effect can lead police to conclude that their responsibility ends with the arrest of an offender. . . . A detective's preferred theory of the case might also influence the collection of physical evidence: deciding where and what type of evidence to look for is significantly influenced by the theory of how the crime unfolded, including the sequence of actions taken by the offender. Important physical evidence, either confirmatory or exculpatory, might also be overlooked if the theory of the case prevailing at the time of evidence collection later proves wrong." (footnotes omitted)); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1247–48 (2001) ("'The seeds of almost all miscarriages of justice are sown within a few days, and sometimes hours, of the suspect's arrest.' That is, wrongful convictions result from one-sided investigations because once the police arrest someone, they believe they have resolved the question of guilt or innocence and ignore evidence that might contradict their belief in a suspect's guilt." (citation and footnotes omitted)).

[120] Martin, *supra* note 62, at 848.

[121] TASK FORCE FINAL REPORT, *supra* note 13, at 19 (capitalization not observed). Case examples in which problems of this nature arose included James Walker, George Whitmore, and Nathaniel (erroneously identified as "Norman") Carter. *Id.* at 43–44.

[122] *Id.* at 44 (capitalization not observed).

to determine and ensure that police investigations are conducted appropriately.[123]

Tunnel vision typically is not born of malice, but rather is the product of quite normal psychological tendencies that help individuals structure events and bring order to facts and perceptions.[124] The pressure brought to bear on law enforcement and prosecutors' offices to solve a case quickly can help induce and reinforce tunnel vision,[125] as can various institutionalized norms and practices. For example, the police may be trained to adopt and convey an attitude of certainty about a suspect's guilt as an interrogation tactic to help produce a confession, thus initiating what may become a self-fulfilling prophecy.[126] Prosecutors, who work closely with the police and must rely heavily on their investigations, may too readily accept and then defend initial police assessments of guilt.[127] This tendency, in combination with various rules of law[128] and the inherent competitiveness of the adversarial

[123] *Id.* ("Prosecutors must be trained to recognize when witnesses' information and other evidence points to other possible suspects. The trial prosecutor and the supervising prosecutor should examine the entire police file and interview all investigation officers as well as witnesses in the case to determine that appropriate investigations were conducted. This review of the file should take place early in the process with the police officers or detectives so that the prosecutor can direct any further investigations. The actual as well as the legal responsibility for appraisal of the case should be that of the prosecutor and not of the police officer.").

[124] Findley & Scott, *supra* note 32, at 292 ("Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference."); *id.* at 307–33 (describing psychological and institutional factors that help give rise to tunnel vision); *see also* GOULD, *supra* note 48, at 193–94.

[125] *See* Donald J. Sorochan, *Wrongful Convictions: Preventing Miscarriages of Justice—Some Case Studies*, TEX. TECH L. REV. 93, 103–05 (2008); Findley & Scott, *supra* note 32, at 323–25; Medwed, *supra* note 55, at 140–41 n.69 (2004).

[126] Findley & Scott, *supra* note 32, at 333–38. *See infra* note 268 and accompanying text.

[127] Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 45–46 (2009); Susan Bandes, *Loyalty to One's Convictions*, 49 HOW. L.J. 475, 477–78 (2005); Findley & Scott, *supra* note 32, 329–30; Medwed, *supra* note 55, at 141–42; Givelber, *supra* note 9, at 1361–63.

[128] For example, doctrine governing the admissibility of eyewitness identification testimony, which depends in part on the witness's expressed level of confidence in recognizing a suspect, can create incentives for the police and prosecutors to cultivate, defend, and ultimately believe and reinforce the certainty of identifications. *See* Findley & Scott, *supra* note 32, at 292–93 ("[M]istaken eyewitness identifications—the most frequent single cause of wrongful convictions—can convince investigators early in a case that a particular individual is the perpetrator. Convinced of guilt, investigators might then set out to obtain [additional incriminating evidence] . . . . All of this additional evidence then enters a feedback loop that bolsters the witnesses' confidence in the reliability and accuracy of their incriminating testimony and reinforces the original assessment of guilt held by police, and ultimately by prosecutors, courts, and even defense counsel." (footnotes omitted)); *see also id.* at 346–48; Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1507–08 (2008); *infra* note 176 and accompanying text (discussing rules governing admissibility of eyewitness

process,[129] can entice those involved in the early stages of a case investigation to embrace and try to fortify tenuous evidence of guilt. The origins and biasing effects of tunnel vision thus can be extraordinarily difficult to recognize as well as resist.

Admonishing the police and prosecutors to guard against focusing on a particular suspect and closing criminal investigations prematurely cannot be effective alone. A starting point, as the Task Force report suggests, is specific and continuing education and training[130] to reinforce the twin dangers associated with tunnel vision: convicting the innocent and allowing the guilty to escape justice. Appropriately designed police investigation protocols, coupled with compliance checklists, can be useful and have been implemented in some jurisdictions.[131] Requiring the police to document their investigations and record the evidence collected—both inculpatory and exculpatory—and transmit a written report to the prosecutor can both promote compliance and foster more effective police-prosecution communications.[132] Supervision, monitoring, creating appropriate incentives, and enforcing sanctions can help ensure accountability and that the designed policies are taken seriously and carried out.[133] Periodic, structured deliberations, including routinely having counterarguments presented by devil's advocates, as well as internal and external review mechanisms, also have been suggested to bring fresh perspectives to case investigations and to help inhibit and detect tunnel vision.[134]

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identification testimony and problems of misidentification).

[129] *See* Bandes, *supra* note 127, at 488–90; Zalman, *supra* note 51, at 83–86; Givelber, *supra* note 9, at 1359–61.

[130] Findley & Scott, *supra* note 32, at 370–75; Medwed, *supra* note 55, at 170–71; Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 522–23 (2007); AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 95–97.

[131] Findley & Scott, *supra* note 32, at 375–80; AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 93–95.

[132] Such measures are required, for example, in England, Illinois, and elsewhere. *See* Griffin, *supra* note 119, at 1251–55; Findley & Scott, *supra* note 32, at 385–88.

[133] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 94–95 ("[W]ritten procedures should be (1) established for every law enforcement agency, (2) made available to all personnel, and (3) designed to ensure compliance with law and the preservation, safeguarding, and collection of physical evidence, the accurate questioning of victims, witnesses and suspects, and the proper conducting of identification procedures. . . . They should also be enforceable through the agency disciplinary process in the same manner as other violations of agency rules would be addressed." (footnotes omitted)); Medwed, *supra* note 55, at 171–72 (discussing incentives and sanctions regarding police and prosecutorial compliance with rules); Findley & Scott, *supra* note 32, at 387.

[134] Case reviews that include devil's advocacy and pointed counterarguments, assessments and critiques by previously uninvolved third parties, and related measures have been

One of the most pernicious consequences of tunnel vision is its potential to curtail criminal investigations prematurely, before other leads are pursued. Another ill effect is its tendency to color inferences, so that evidence that is uncovered is construed as being consistent with the targeted suspect's guilt, to the exclusion of other plausible interpretations. It thus can prevent the discovery and obscure the relevance of potentially exculpatory evidence. In these respects, tunnel vision is functionally related to *Brady* issues,[135] involving the prosecution's duty to disclose material evidence favorable to the defense, and can exacerbate them. Evidence not gathered or perceived as exculpatory will remain blind to disclosure.

The *Brady* rule, rooted in due process,[136] embodies the well-known principle that the prosecution's overriding obligation is "not that it shall win a case, but that justice shall be done. . . . [The prosecutor is] the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[137] Inadvertent as well as intentional failures to disclose evidence favorable to the defendant threaten the fairness of a trial, and hence constitute *Brady* violations.[138] Consistent with this principle, prosecutors are

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suggested to try to expose weaknesses in investigations. *See* Burke, *supra* note 130, at 523–27; Findley & Scott, *supra* note 32, at 382–84, 388–89.

[135] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[136] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Court subsequently ruled that the prosecution's obligation under *Brady* applies and that the "materiality" of the evidence is to be assessed by the same standard whether or not the defense files a request for the evidence. "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion)); *see also* Youngblood v. West Virginia, 547 U.S. 867 (2006); Kyles v. Whitley, 514 U.S. 419, 432 (1995).

[137] Berger v. United States, 295 U.S. 78, 88 (1935).

[138] *Brady*, 373 U.S. at 87. After ruling that due process was violated by the prosecution's failure to disclose material exculpatory evidence, "irrespective of . . . good faith or bad faith," the *Brady* court continued:

> The principle of *Mooney v. Holohan* [294 U.S. 103 (1935)] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile' . . . .

Id. at 87–88 (footnote and citation omitted).

charged with having constructive knowledge of information known to the police, and can therefore violate the *Brady* rule even if they do not actually know of exculpatory information.[139] *Brady* principles have special vigor under the New York Constitution, "predicated both upon 'elemental fairness' to the defendant, and upon concern that the prosecutor's office discharge its ethical and professional obligations."[140]

The Task Force report includes several recommendations that implicate *Brady* issues as well as violations of the truthful evidence rule, which condemns the reckless or knowing presentation of false evidence and perjured testimony. Some of the recommendations are designed to forestall violations, while others speak to remedies and sanctions in the event of a breach. In the former category are proposals for the enhanced training and supervision of law enforcement officers[141] and prosecutors[142] regarding *Brady* and

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[139] *Kyles*, 514 U.S. at 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); People v. Santorelli, 741 N.E.2d 493, 497 (N.Y. 2000) ("[T]his Court has charged the People with knowledge of exculpatory information in the possession of the local police, notwithstanding the trial prosecutor's own lack of knowledge." (citations omitted)) (ruling, however, that prosecutor was not responsible for knowledge of information possessed by the FBI, which was conducting a parallel investigation separate from the state prosecution).

[140] People v. Vilardi, 555 N.E.2d 915, 919–20 (N.Y. 1990) (citations omitted). In particular, the threshold standard for the "materiality" of the evidence that has not been disclosed is less demanding in New York than under federal law in cases where the defense has made a specific request for its production. *Id.* at 920 (rejecting the federal "reasonable probability" standard, *see supra* note 136, and ruling that under state due process principles "a showing of a 'reasonable possibility' that the failure to disclose the exculpatory [evidence] contributed to the verdict remains the appropriate standard to measure materiality, where the prosecutor was made aware by a specific discovery request that defendant considered the material important to the defense."). *See* Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990,* 12 PACE L. REV. 1, 26–28 (1992) (discussing *People v. Vilardi* and related *Brady* principles).

[141] TASK FORCE FINAL REPORT, *supra* note 13, at 37. ("Law Enforcement Officials Should be Trained and Supervised in the Application of *Brady* and Truthful Evidence Rules.") . The commentary suggests that the police "training should emphasize the importance of the *Brady* rule to the innocent accused and to the public when the actual perpetrator of the crime remains unpursued. The use of hypothetical situations, either on tape or orally presented, to discuss the nature of *Brady* material and what needs to be done with it should be used as a teaching tool." *Id.* at 38. It further notes that training has become increasingly important as more and more cases are disposed of through guilty pleas instead of trial, and the consequent lack of intense questioning of police officers by prosecutors in preparation for trial and by defense attorneys through cross-examination. "The lack of this intense type of questioning is a lost opportunity to demonstrate to police officers the importance of learning about exculpatory (as well as inculpatory) evidence, the need to inform the prosecutor of the information, and the importance of preserving the information." *Id.*

[142] *Id.* at 29. "Where Procedures Do Not Currently Exist, Prosecutors Should Put in Place Appropriate Internal Procedures for Preventing *Brady* and Truthful Evidence Rule Violations . . . ." *Id.* The commentary notes that the New York State District Attorney's Association and

truthful evidence rule obligations, and for scheduling pre-trial judicial conferences to confirm that required disclosures have been made.[143] Trial courts are recommended to grant an adjournment in the event of late disclosures to enable the defense to investigate the possible significance of the evidence and prepare accordingly. The courts are encouraged to issue an adverse jury instruction, as appropriate, regarding the prosecution's failure to make timely disclosure, or fashion other remedies.[144]

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the New York State Prosecutors Training Institute offer educational and training programs and specifically cites the Queens County District Attorney's Office and its efforts, which include having a full time director of training. *Id.* at 37. In general, it "recommends that prosecutors conduct regular training programs for all Assistants to make sure that the relevant due process principles are fully internalized and become the starting point for all cases." *Id.* Prosecutors who fail to perceive evidence as *Brady* material will, of course, fail to perceive a duty to disclose the evidence. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 690 n.24 (2006) (discussing New York State prosecutors' responses to survey items asking whether evidence presented in hypothetical domestic violence case fell within parameters of *Brady*).

[143] TASK FORCE FINAL REPORT, *supra* note 13, at 36 ("A *Brady* conference should be held before trial to resolve issues of turnover.") (capitalization not observed). The commentary continues:

> At a designated date before the first scheduled date for trial (assuming a possible adjournment), the judge should conduct a *Brady* proceeding with a certification that the police and prosecutor's files (as well as any related files), have been examined and all material delivered. Applications for delayed delivery can be made at that time.

Id. (footnote omitted). Some Task Force members objected to this recommendation, arguing that the executive branch and not the judiciary should determine compliance with *Brady*.

> The *Brady* obligation belongs solely to the prosecutor who, guided by ethical rules and the Constitution, and based on his or her experience, knowledge of the case, and consultation with superiors in his or her office, exercises the evidentiary determination to fulfill that obligation. Mandating a pre-trial conference in *every* case for judicial review of the prosecutor's file impermissibly allows the judicial branch to intrude into the exclusive domain of a member of the executive branch, the prosecutor, in the advocacy determination of what to disclose and when; weakens the adversary system and the vigorous performance of the prosecutor's function; and unnecessarily expends scarce judicial resources and time in sifting through prosecutors' files that in some cases consists of thousands of pages.

Id. n.II (citations omitted).

[144] *Id.* at 26 ("In the event of a late *Brady* disclosure, whether before or during trial, the court should grant an adjournment of sufficient length to enable the defense to prepare, and, where appropriate, preclude evidence, give an appropriate instruction to the jury and grant such other relief as is appropriate.") (capitalization not observed). The commentary accompanying this recommendation refers approvingly to Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450 (2006). The remedial jury instruction there advocated is "that when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law and allowing the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt." *Id.* at 1456. The Task Force's recommendation about the preclusion of evidence is not explained and is not immediately clear. The recommendation presumably applies to evidence other than *Brady* material, which by hypothesis is favorable to the defense and thus should not be precluded from being admitted.

The Task Force's recommendations grow bolder in the event that prevention fails, such as where *Brady* and truthful evidence rule violations do not surface until after a trial has concluded in a conviction. Eschewing more demanding tests for the materiality standard—whether the undisclosed evidence has either a "reasonable probability" or a "reasonable possibility" of affecting the verdict[145]—the Task Force report urges that defendants should be granted a new trial on appeal or collateral challenge "unless the State shows there was no possibility the information would have affected the decision."[146] Some Task Force members objected to the proposed test, arguing that in practice it requires the "virtually automatic reversal" of convictions and is especially inappropriate where violations are unintentional.[147]

The "no possibility" standard nevertheless received the Task Force's endorsement and, in addition to highlighting the importance of the prosecution's obligations, signals the Task Force's intent to promote more rigorous judicial enforcement of *Brady* principles. The courts, like others in the justice system, are not immune to hindsight or "confirmation bias,"[148] and have regularly rejected *Brady* claims raised by convicted defendants in reliance on the traditional and more demanding materiality requirements.[149] Such

[145] *See supra* notes 136, 140. *See generally* Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1940–43 (2008); Corinne M. Nastro, Note, Strickler v. Greene: *Preventing Injustice by Preserving the Coherent "Reasonable Probability" Standard to Resolve Issues of Prejudice in* Brady *Violation Cases*, 60 MD. L. REV. 373 (2001).

[146] TASK FORCE FINAL REPORT, *supra* note 13, at 27 (capitalization not observed).

[147] *Id.* at 28 n.7 ("Certain members of the Task Force do not approve of the [materiality standard] recommendation for the following two reasons. First, the recommendation appears to require reversal even when there is no 'knowing' use of false testimony. Second, in determining when a reversal is appropriate, [*People v.*] *Vilardi* strikes the appropriate balance among the significant interests implicated. The recommended rule could mean windfall reversals for guilty defendants, as it seems to require virtually automatic reversal for *any* violation (even in cases in which courts employed remedies), unless the prosecutor can demonstrate 'no possibility' that the violation affected the verdict, a burden unclear and impossible to meet.").

[148] Findley & Scott, *supra* note 32, at 348–55.

[149] *Cf.* People v. Ennis, 900 N.E.2d 915, 922–23 (N.Y. 2008) ("While the People have an ongoing obligation to turn over exculpatory information—and their failure to do so in this case cannot be condoned—noncompliance with this requirement will not rise to the level of a *Brady* violation unless the evidence was material which, in New York, turns on whether the defense made a specific request for the information. Here, defense counsel sought disclosure of all statements made by participants in the crime that were exculpatory of defendant. As such, the People's failure to turn over [the witness's] statement would be material if there is a 'reasonable possibility' that the nondisclosure contributed to the verdict. That standard is not met . . . .") (citations omitted); People v. Thompson, 863 N.Y.S.2d 824, 825 (App. Div. 2008) ("To warrant reversal based on a prosecutor's failure to disclose *Brady* material that was specifically requested by a defendant, it must be shown that there is a reasonable possibility

skepticism, ironically, has even contributed to appellate courts' dismissing *Brady* claims in cases involving defendants who later were exonerated through DNA evidence.[150]

In addition to recommending enhanced training for police and prosecutors regarding *Brady* and truthful evidence rule obligations, and more readily available case-specific remedies for violations, the Task Force urged more effective internal monitoring and sanctioning to ensure compliance.[151] It also proposed statewide mechanisms for disciplining prosecutors in appropriate cases for

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that the failure to disclose the exculpatory material contributed to the verdict. Here, . . . there was no reasonable possibility that had the *Brady* material been disclosed to the defense, the result would have been different." (citation omitted)); People v. Williams, 854 N.Y.S.2d 586, 590 (App. Div. 2008) (rejecting *Brady* claim with respect to certain evidence because the "defendant failed to show a reasonable possibility that the result at trial would have been different if the materials had been timely disclosed," but granting *Brady* claim with respect to other evidence because of its greater materiality). *See generally* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 660–61 (2002) ("While many prosecutors are likely to turn over 'so-called' *Brady* [material] to be on the safe side and out of a sense of ethical obligation, cases like *Strickler v. Greene* [527 U.S. 263 (1999)] send the message that even powerful exculpatory evidence is unlikely to cause the prosecutor to run afoul of *Brady*. In *Strickler*, the majority went so far as to say that '[t]he District Court [which had found a *Brady* violation based on "potentially devastating impeachment material" that had not been disclosed] was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of [the eyewitness's] testimony might have produced a different result, either at the guilt or sentencing phases,' but proceeded to deny relief because the evidence did not establish 'a reasonable *probability* of a different result.'" (quoting *Strickler*, 527 U.S. at 291)). *See generally* Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. VA. L. REV. 611 (2008) (discussing how many courts impose a requirement that potentially exculpatory evidence be admissible to impose a duty to disclose under *Brady*); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 35 (2001) ("[T]he standard the Supreme Court constructed for addressing *Brady* violations does not lend itself to strict enforcement. Even when there has been a *Brady* violation, a defendant will have no recourse unless he meets the strict requirement of demonstrating that there was a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. After there has already been a conviction, even if it was unfairly obtained, it is very difficult to convince a court that withheld evidence would have likely changed the outcome of the case." (footnote omitted)).

[150] Brandon Garrett studied court rulings on claims raised on appeal and post-conviction review by the first two-hundred defendants who were exonerated by post-conviction DNA tests, 133 of whom involved cases with published court opinions. Garrett, *supra* note 50, at 110. He found that court opinions concluded with some regularity that errors asserted by the later-exonerated defendants were harmless or otherwise failed to demonstrate prejudice because of "overwhelming' evidence of guilt." *Id.* at 109. Although courts granted reversals on *Brady* grounds in three cases in which the DNA exonerees claimed innocence, *Brady* claims were rejected in cases involving twenty-one other defendants. *Id.* at 110–11.

[151] TASK FORCE FINAL REPORT, *supra* note 13, at 29 ("Where procedures do not currently exist, prosecutors should put in place appropriate internal procedures for preventing *Brady* and truthful evidence rule violations and for examining, evaluating, and determining whether the official conduct of an Assistant is improper and should be sanctioned, and if appropriate imposing such sanctions.") (capitalization not observed).

breaching those duties.[152] Citing the responses to a questionnaire on internal procedures for addressing *Brady* and truthful evidence rule violations, received from twenty district attorneys' offices and the New York State District Attorneys Association, the Task Force reported that some counties lack even informal procedures. Collectively, the responses revealed only one instance of an internal sanction for a violation and one referral to a disciplinary committee.[153] Although Task Force members had different impressions about the frequency with which prosecutors were disciplined under the Rules of Professional Conduct for intentional or reckless *Brady* and truthful evidence rule violations—information which is not publicly available[154]—evidence generally suggests that such breaches only rarely result in disciplining for professional ethics violations.[155] Recognizing that rules not enforced

[152] *Id.* at 31 ("Under the Rules of Professional Conduct (superseding the Code of Professional Responsibility), a statewide procedure should be established for identifying and reviewing intentional or reckless violations of both *Brady* and the truthful evidence rule.") (capitalization not observed).

[153] *Id.* at 30. Where internal procedures did exist for monitoring compliance and responding to misconduct, they generally consisted of "review of the questioned conduct by the District Attorney or the Chief Attorney with a report to the District Attorney. In one office, the Chief of Appeals was involved in the review process." *Id.* With respect to the imposition of sanctions or referral to a disciplinary committee, "[m]any of the responders to the questionnaire explained that there had been no need to impose a sanction or even to have a process for examining conduct because there had been no questionable conduct identified or found by a court. Others added that there had been none in many years." *Id.*

[154] *Id.* at 32 n.8 ("There can be no thorough empirical study of how New York State's disciplinary system has functioned in this regard due to the secrecy imposed by Judiciary Law Section 90. Moreover, it is obvious that not all violations of the *Brady* rule are appropriate bases for disciplinary sanctions. . . . Some Task Force Members express the belief . . . that the disciplinary system frequently fails to investigate and bring charges when *Brady* violations occur. Other Members of the Task Force believe, based on their own experience, that investigations do occur in appropriate cases.").

[155] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696–97 (1987) [hereinafter Rosen, *Paper Tiger*] ("Disciplinary Rules . . . can be an effective deterrent only if they are applied with enough regularity and severity to discourage prosecutors from committing *Brady*-type misconduct. To determine how effectively these rules have been applied, an exhaustive search of the available printed sources was conducted. To supplement this research, the lawyer disciplinary bodies in each of the fifty states and the District of Columbia were surveyed. The results of this research demonstrate that despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence and falsification of evidence, and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied. The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement." (footnotes omitted)). Little appears to have changed since Professor Rosen first reported the results of his research. *See, e.g.*, Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 272 & n.143 (2006) [hereinafter Rosen, *Reflections*]; Huff, *supra* note 31, at 62; Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and*

are unlikely to be observed, the Task Force recommended that "cases in which a state court finds there has been intentional or reckless prosecutorial misconduct based on a *Brady* or truthful evidence rule violation [should] be referred by the clerk of the court to the appropriate disciplinary committee for examination, investigation and further processing where appropriate."[156]

The Task Force report's recommendations concerning government practices further include several designed to ensure that physical evidence is properly secured, maintained, documented, made accessible to the defense, and preserved,[157] thus complementing the

Solutions in a New Era of Scrutiny, 61 VAND. L. REV. 1935, 1952–54 (2008); Gershman, *supra* note 142, at 722–25; JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 175 (2000). One notable exception to the normal practice involves the North Carolina State Bar's disciplinary action against and eventual disbarment of District Attorney Michael Nifong for ethics violations in connection with his prosecution (later terminated) of Duke University lacrosse players for an alleged sexual assault. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); DON YAEGER & MIKE PRESSLER, IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED (2007).

[156] TASK FORCE FINAL REPORT, *supra* note 13, at 35. "Where there are vacatures of convictions by federal courts, upon the remand to the state court, the state court clerk should likewise forward the case to the committee for consideration of sanctions." *Id.* Endorsement of this recommendation was not unanimous.

> Certain members of the Task Force view this recommendation as unnecessary as they believe existing controls suffice to discourage and deter violations. They also believe that it is essential to strive to avoid such errors, but a statewide procedure that appears to result in a virtual automatic referral for disciplinary action could deter the vigorous advocacy necessary to the effective performance of the prosecutorial function. *Cf., e.g., Imbler v. Pachtman*, 424 U.S. 409, 431 n. 34 (1976). The recommendation also appears to offer no guidance as to when the rule would apply, and what specific standard must be met before a referral occurs.

Id. at 35 n.10.

[157] The report provides that

> The Subcommittee on Government Procedures Jointly Recommends the Proposals Submitted by the Subcommittee on Forensic Evidence and Adds the Following:
>
> First, a careful examination of the crime scene, so fundamental to prosecutions of violent crime, should be conducted.
>
> Second, evidence should be maintained in a way that ensures its integrity and permits ready retrieval.
>
> Third, before and after trial physical evidence of all types should be logged and stored to guarantee retrieval.
>
> Fourth, evidence should not be discarded or destroyed except in conformity with established protocols.
>
> Fifth, with proper safeguards, before and after trial the defense should enjoy access to physical evidence.
>
> Sixth, where either a prosecution test or a subsequent defense test of a limited sample may destroy the sample, and make future tests impossible, trained representatives of both sides should where practicable be permitted to select the testing procedure and observe the testing.
>
> Seventh, police department and other prosecutorial agencies should establish, with

report's more specific prescriptions pertaining to forensic evidence.[158] The report stops short of calling for other reforms that occasionally have been advocated. For example, the report mentions,[159] but does not recommend, open file discovery, a practice touted by some as the most effective way to avoid *Brady* issues by providing the defense access to exculpatory evidence known to the government.[160] Perhaps mindful of the state's budgetary shortfalls, the report also remains silent regarding workload standards and additional resources to help prosecutors ensure that justice is served in individual cases.[161]

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the advise [sic] of biological scientists and other significant experts, a protocol for the testing of samples taken in all cases that meet certain established criteria and that each such case be monitored for compliance with the protocol.

Eighth, the failure to follow protocols should, where appropriate (as in cases in which public officials have failed to establish procedures or have systematically violated them or the state has acted intentionally to destroy the evidence), give to the defendant at a trial or post conviction procedure the benefit of a permissible presumption that any forensic result would be deemed favorable to the defendant's position.

TASK FORCE FINAL REPORT, *supra* note 13, at 9–10.

[158] *See infra* notes 250–52 and accompanying text.

[159] TASK FORCE FINAL REPORT, *supra* note 13, at 30 (discussing responses it received from prosecutors regarding their offices' efforts to promote and monitor compliance with *Brady* requirements (*see supra* text accompanying note 150), the commentary notes a suggestion for "open file discovery which reduces the chance that information will not be disclosed.").

[160] *See generally* Mosteller, *supra* note 155 (discussing open-file discovery in the context of the infamous Duke lacrosse prosecution); *see also* Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 640–42 (2007); Burke, *supra* note 130, at 521 n.37; Rosen, *Reflections*, *supra* note 155, at 270–75 (advocating government disclosure in criminal cases that is equivalent to the discovery allowed in civil cases, subject to the availability of protective orders to safeguard witnesses and the integrity of investigations in specific circumstances, and noting that open discovery in criminal cases is routine in the European continental justice system); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 105 (2005); *see also* Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695 (2007).

[161] For example, The American Bar Association

urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty by adopting the following principles:

1. Provid[ing] adequate funding to prosecutors' offices;
2. Establish[ing[standards to ensure that workloads of prosecutors are maintained at levels to allow them to provide competent legal representation.

AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 99. With respect to workloads, the accompanying commentary explains:

The issue of manageable workloads is a continuing problem for prosecutors nationally. As staffing levels decrease and assistant prosecutors' responsibilities and caseloads increase, the ability to be fair can be compromised. No prosecutor should be forced to surrender justice due to an overwhelming caseload. Funding allocated to prosecutors' offices must be maintained at levels sufficient to ensure that caseloads remain manageable. This Resolution calls upon prosecutors to establish additional safeguards to insure that the innocent are not wrongly convicted. To ask our nation's prosecutors to undertake these additional tasks without providing for adequate resources is ill-advised.

B. Identification Procedures

Volumes have been written about eyewitness identification and its reliability,[162] subjects that implicate principles of both psychology and law. The issues are informed by research on human perception, memory, and recognition and how those processes are influenced by individual and situational factors, including witnesses' interactions with the police and the criminal justice system.[163] Studies consistently point to erroneous identifications as the largest single factor contributing to wrongful convictions,[164] a revelation not entirely lost on the United States Supreme Court. In an oft-cited passage from *United States v. Wade*,[165] issued during

Id. at 100–01. Interestingly, the New York State Bar Association's Task Force on Wrongful Convictions included the following "general proposal" in its Preliminary Report, immediately following the specific proposals that it recommended: "Funding necessary for successful implementation of these recommendations should be provided by the Legislature. TASK FORCE PRELIMINARY REPORT, *supra* note 11, at 16. This proposal was not included in the Task Force's Final Report.

[162] *See* Leo, *supra* note 47, at 208–09 ("[T]he study of eyewitness memory and identification now boasts a literature of more than 2,000 research articles and an impressive array of validated findings that have substantially improved understanding of the factors that influence eyewitness misidentification and wrongful conviction (for example, the role of stress, weapons focus, cross-racial identification, the dubious relationship between witness confidence and the accuracy of the identification, the predictive accuracy of simultaneous versus sequential lineups).")

[163] *See generally* RACHEL WILCOCK, RAY BULL & REBECCA MILNE, WITNESS IDENTIFICATION IN CRIMINAL CASES: PSYCHOLOGY AND PRACTICE (2008); Christian A. Meissner, Siegfried L. Sporer & Kyle J. Susa, *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 EUR. J. COGNITIVE PSYCHOL. 414 (2008); Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod & E. Kernan McGorty, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004); Nancy Steblay, Jennifer Dysart, Solomon Fulero & R. C. L. Lindsay, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523 (2003); Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978).

[164] *See supra* notes 84–101 and accompanying text.

[165] 388 U.S. 218 (1967). The Court held in *Wade* that the Sixth Amendment right to counsel requires the participation of defense counsel, absent a suspect's knowing, intelligent, and voluntary waiver, at lineups conducted during a "critical stage" of a criminal prosecution. *Id.* at 237. Wade was identified by witnesses to a bank robbery at a lineup that took place after his indictment. *Id.* at 219. As to the validity of the lineup, the Court held that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" *Id.* at 239 (footnote omitted). In a companion case, *Gilbert v. California*, the Court created a per se rule of exclusion to prohibit testimony regarding out-of-court identifications made in violation of the accused's right to counsel. 388 U.S. 263 (1967). In *Wade*, the Court addressed whether in-court identifications could be made of a defendant following a lineup held in violation of his or her right to counsel. *Wade*, 388 U.S. at 219–20. Rejecting *Gilbert*'s per se rule of exclusion, the justices ruled that under such circumstances, in-court

the heyday of the Warren Court, the justices acknowledged that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[166] Critics nevertheless maintain that subsequent Court decisions—such as *Kirby v. Illinois*, which limited the right to counsel recognized in *Wade* to lineups and show-ups conducted during "critical stages" of a criminal prosecution,[167] and *Manson v.*

identifications of the defendant would be admissible only if the prosecution can "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification." *Id.* at 240.

> Application of this test . . . requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241 (footnote omitted).

[166] *Id.* at 228 (footnote omitted). The opinion also stated:

> Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."

Id. at 228–29 (footnotes and citations omitted); *see also* People v. McCann, 476 N.Y.S.2d 3, 3–4 (App. Div. 1984).

[167] Kirby v. Illinois, 406 U.S. 682, 690 (1972). The Court also has ruled that photo identifications, even if made following a suspect's indictment, do not require the presence of defense counsel. United States v. Ash, 413 U.S. 300, 321 (1973).

> We conclude that the dangers of mistaken identification, mentioned in *Wade*, . . . [are an insufficient] basis for requiring counsel. Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the "Assistance of Counsel" to preserve the adversary process by compensating for advantages of the prosecuting authorities.

Id. at 314. Concurring in the judgment, Justice Stewart argued that:

> A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photograph may be markedly different from the others displayed, but this unfairness can

Brathwaite, which allowed identification testimony to be admitted as evidence notwithstanding suggestive police procedures as long as the witness's identification was deemed reliable[168]—have been woefully inadequate in constructing safeguards against unreliable identifications and keeping such testimony from tainting criminal trials.[169] Drawing on reforms adopted in some jurisdictions, the Task Force offered several proposals to help guard against and offset the dangers of unreliable eyewitness identifications. Many of the proposals focused on avoiding the contamination of identifications in the first place, a strategy which should be preferred over after-the-fact measures that attempt to expose and neutralize the potentially distorting effects of suggestive procedures. Prevention is particularly important since a witness's initial identification of a suspect is typically reinforced through repetition and the confirmatory conduct of the police and prosecutors as a criminal case progresses from investigation to

> be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness—and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display. For this reason, a photographic display cannot fairly be considered a "critical stage" of the prosecution.

Id. at 324–25.

[168] Manson v. Brathwaite, 432 U.S. 98, 114 (1977). In dissent, Justice Marshall asserted that the majority's "decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States v. Wade* . . . ." *Id.* at 118. While disputing the reliability of the identification in the case, he argued that the prior question involved whether the police used unnecessarily suggestive identification procedures. *Id.* at 128 ("The decision suggests that due process violations in identification procedures may not be measured by whether the government employed procedures violating standards of fundamental fairness. By relying on the probable accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty. . . . By importing the question of guilt into the determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause.").

[169] *See, e.g.*, Amy Luria, *Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 NEB. L. REV. 515 (2008); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 815 (2007); Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence Is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21 (2007); Wallace W. Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 731, 770 (1987); Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1079 (1973); *see also* People v. Hawkins, 435 N.E.2d 376, 384–85 (1982) (Meyer, J., dissenting).

grand jury proceedings or a preliminary hearing and preparation for trial. By the time of a trial, a witness's belief in his or her ability to identify the accused as the perpetrator of the crime may be sincere, unequivocal, and virtually unshakable, even if wrong.[170]

The Task Force thus recommended that eyewitness identification procedures include a number of safeguards. It urged that the police officer overseeing the lineup or photo array not know the identity of the true suspect, a practice known as "blind" or "double-blind" administration designed to prevent police officers from giving cues or feedback to witnesses about whom the officers believe may be responsible for the crime.[171] The report further advocates that before the witness attempts to make an identification, the police should instruct the witness that the officer does not know who the suspect is, and that the actual perpetrator may or may not be represented in the lineup or photo array—"in effect that 'none of the above' is a valid answer."[172]

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[170] *See* TASK FORCE FINAL REPORT, *supra* note 13, at 56. Richard A. Wise, Nell B. Pawlenko, David Meyer & Martin A. Safer, *A Survey of Defense Attorneys' Knowledge and Beliefs About Eyewitness Testimony*, CHAMPION, Nov. 31, 2007, at 18, 20; Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1277–78 (2005); Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 112 (2002); 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, 361 (1998); John S. Shaw III & Kimberly A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629 (1996).

[171] TASK FORCE FINAL REPORT, *supra* note 13, at 58. According to Professor Gary Wells, a leading authority on eyewitness identification issues, "the double-blind lineup procedure is the most important single reform that can be implemented to enhance the integrity of eyewitness identification evidence." Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, CHAMPION, Apr. 29, 2005, at 12, 18. *See* Amy Bradfield Douglass & Nancy M. Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 866–67 (2006); Melissa B. Russano, Jason J. Dickinson, Sarah M. Greathouse & Margaret Bull Kovera, *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 355, 357 (2006); Mark R. Phillips, Bradley D. McAuliff, Margaret Bull Kovera & Brian L. Cutler, *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED. PSYCHOL. 940, 941 (1999).

[172] TASK FORCE FINAL REPORT, *supra* note 13, at 58. *See* Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 70 (2009); Michael R. Leippe, Donna Eisenstadt & Shannon M. Rauch, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 196 (2009); Nancy M. Steblay, *Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Show-Ups Versus Lineups*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 341, 347–48 (2006); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 285–86

The Task Force did not take a position on the more controversial issue of whether subjects being presented for identification should be displayed "sequentially"—that is, one at a time, with the witness asked to make a "yes" or "no" judgment before the next subject is exhibited—or "simultaneously," the traditional method in which all of the subjects in a lineup or photo array are viewed at the same time. Sequential presentation is thought by many to help guard against witnesses' tendency to make a "relative" identification judgment—selecting whichever subject most closely resembles their recollection of the perpetrator, even if the actual perpetrator is not present—when subjects are displayed simultaneously. Sequential presentation tends to discourage a comparative assessment of the displayed subjects (who may or may not include the true perpetrator) and instead requires witnesses to make an individualized, "yes-no," or "absolute" determination of whether the person they are asked to identify committed the crime.[173]

On the other hand, some research suggests that sequential identification procedures, while generally more effective in protecting against the erroneous identification of an innocent party, or errors involving "false positives," may increase the incidence of "false negatives," or the failure of a witness to identify the true perpetrator.[174] New York trial courts have generally declined to

(1997).

[173] Zack L. Winzeler, Comment, *Whoa, Whoa, Whoa . . . One at a Time: Examining the Responses to the Illinois Study on Double-Blind Sequential Lineup Procedures*, 2008 UTAH L. REV. 1595, 1602–03 (2008); Heather D. Flowe & Ebbe B. Ebbesen, *The Effect of Lineup Member Similarity on Recognition Accuracy in Simultaneous and Sequential Lineups*, 31 LAW & HUM. BEHAV. 33, 33 (2007); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 618–20 (2006); Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1, 13–14 (2005).

[174] *See, e.g.*, Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL., PUB. POL'Y & L. 394, 397 (2006) ("The meta-analysis [*see* Steblay, Dysart, Fulero & Lindsay, *supra* note 163] showed two major results, conditional on the presence or absence of the culprit in the lineup. When the culprit is absent, the lineup is correctly rejected as not containing the culprit 72% of the time for sequential lineups, as opposed to only 49% of the time for simultaneous lineups. However, when the culprit is present in the lineup, he is correctly identified 35% of the time in sequential lineups versus 50% of the time in simultaneous lineups. Although sequential lineups are associated with fewer false identifications, they also are associated with fewer correct identifications." (citation omitted)); *see also* Steven E. Clark, Ryan T. Howell & Sherrie L. Davey, *Regularities in Eyewitness Identification*, 32 LAW & HUM. BEHAV. 187, 196–97 (2008); Dawn McQuiston-Surrett, Roy S. Malpass & Colin G. Tredoux, *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 PSYCHOL., PUB. POL'Y & L. 137, 138–39 (2006); Nancy Steblay, Jennifer Dysart, Solomon Fulero & R. C. L. Lindsay, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 471 (2001) ("Identification of perpetrators from target-present lineups occurs at a higher rate from simultaneous than from sequential lineups. However, this difference largely

order that lineups be conducted using one of the two formats, although at least one ruling granted a defense motion for a sequential lineup.[175] The Task Force recommended additional research, including field studies involving police departments, about the relative merits of simultaneous and sequential identification procedures.[176]

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disappears when moderator variables are considered. Under the most realistic simulations of crimes and police procedures (live staged events, cautionary instructions, single perpetrators, adult witnesses asked to describe the perpetrator), the differences between the correct identification rates for simultaneous and sequential lineups are likely to be small or nonexistent. On the other hand, correct rejection rates are significantly higher for sequential than simultaneous lineups and this difference is maintained or increased by greater approximation to real world conditions."). In practice, sequential presentations can be confounded somewhat by witnesses who ask to have subjects presented more than once, thus increasing the risk that relative judgments will be made. *See* Amy Klobuchar, Nancy M. Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 381, 411–12 (2006); Wells, *supra* note 173, at 627.

[175] *Compare* People v. Hammonds, 768 N.Y.S.2d 166, 174 (Sup. Ct. 2003) (declining to order sequential lineup), *with In re* Investigation of Thomas, 733 N.Y.S.2d 591, 597 (Sup. Ct. 2001) (stressing that its ruling did not imply that simultaneous lineups are unconstitutional). *See generally* Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, N.Y. ST. B. ASS'N J., Jan. 2009, at 24, 28; Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 508 (2001–02).

[176] TASK FORCE FINAL REPORT, *supra* note 13, at 63–64. This recommendation is consistent with some other approaches. *See, e.g.*, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 25; Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 47 (2008) (discussing Illinois legislation mandating field studies to compare the efficacy of sequential and simultaneous lineups). An evaluation was completed—under the direction of the Illinois State Police—of Illinois police departments that received instruction and then conducted lineups using either the simultaneous or sequential method of presentation. SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES, at i (2006), *available at* http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf. The ensuing report concluded that simultaneous lineups produced a greater rate of "accurate identifications" (in which witnesses selected the actual suspect) (59.9% vs. 45% for sequential lineups) and also a lower rate of "inaccurate identifications" (in which witnesses selected a filler) (2.8% vs. 9.2% for sequential lineups). *Id.* at 38. Witnesses also made no identification at all more frequently in sequential than in simultaneous lineups (47.2% vs. 37.6%). *Id. See* Winzeler, Comment, *supra* note 173, at 1605–06. The results of this study are inconsistent with other research, which suggests that sequential lineups generally result in a lower rate of false positive identifications. *See supra* note 171 and accompanying text. The Illinois report has been criticized by some who claim that the study was flawed methodologically and that its results consequently are of doubtful validity. *See* Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6, 7 (2008) ("[T]he Illinois study contains a central and serious confound. Specifically, the sequential lineups were always conducted using double-blind procedures and the simultaneous lineups were always conducted using non-blind procedures. Hence, we cannot be certain whether the results (fewer filler identifications and more suspect identifications for the non-blind simultaneous than for the double-blind sequential) are

The report also addressed the number and general characteristics of the "fillers" used in identifications, i.e., the individuals other than the true suspect who are displayed in a lineup or photo array. It recommended that at least five fillers be employed,[177] as is the custom when the police present a "six pack" of pictures in photo arrays, and that insofar as possible fillers should be chosen to

attributable to the sequential versus simultaneous difference or to the double-blind versus non-blind difference."); Thompson, *supra*, at 45 n.112 (citing other lineup research sources); Winzeler, Comment, *supra* note 173, at 1607–09; Shirley N. Glaze, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 LAW & PSYCHOL. REV. 199, 204–07 (2007). For a defense of the Illinois study and report, see Sheri S. Mecklenburg, Patricia J. Bailey & Mark R. Larson, *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 LAW & HUM. BEHAV. 22 (2008). Other researchers have evaluated a pilot project involving blind, sequential identification procedures that was conducted by police in Hennepin County (Minneapolis), Minnesota. In general, the researchers reported, the "suspect identification rate [of 54%] is comparable to that achieved with simultaneous lineups in the field and in the lab, and is higher than laboratory sequential rates, with a much lower filler choice rate (8%)." Klobuchar, Steblay & Caligiuri, *supra* note 174, at 397–98; *see also* Klobuchar & Caligiuri, *supra* note 173, at 17. One commentator has suggested that the Kings County (Brooklyn) District Attorney's Office "has considered persuading the police to engage in an experiment in which some districts used sequential, others simultaneous identification methods, seeking to learn the best course of action from experience and further study." Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 271, 300–01 (2006). He notes that going forward with such a plan could well result in defense counsel challenging the reliability and admissibility of identifications, although suggesting that the courts should reject those challenges. *Id.* at 301.

[177] TASK FORCE FINAL REPORT, *supra* note 13, at 59. The Innocence Project approvingly cites research that suggests that photo arrays should include a minimum of six subjects (i.e., at least five fillers in addition to the suspect), and lineups should include at least five subjects. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 18 (2009), *available at* http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf [hereinafter INNOCENCE PROJECT REPORT]. The American Bar Association's Criminal Justice Section refrained from recommending a minimum size, resolving instead that "[l]ineups 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." AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 25. The commentary strongly suggests, however, that a minimum of six subjects should be included in both lineups and photo arrays, and more where feasible:

> [A]ny increase in size will help to reduce the false positive rate. But many researchers believe that 6 person lineups create an unacceptably high risk of error, one study concluding, for example, that in real-world 6 person lineups the likely risk of a false positive would be 10% *even if most of the other recommendations to improve lineup accuracy were followed.* This Resolution therefore urges larger size lineups than is currently the case whenever practicable. However, given debate over the necessary lineup size the Resolution does not mandate a specific minimum number of foils, leaving that to the judgment of local jurisdictions in light of the teachings of science and the resources available to local departments.

Id. at 35–36 (footnotes omitted); *see also* Thompson, *supra* note 176, at 49–52 (discussing, among other things, the British practice of using nine-subject lineups, and the recommendation made by the North Carolina Actual Innocence Commission that photo arrays include at least eight subjects—a recommendation not accepted by the North Carolina legislature).

conform to the witness's verbal description of the perpetrator rather than based on their resemblance to the target suspect.[178] In cases involving multiple suspects, the report counseled against including more than one suspect in the same lineup or photo-array, a practice that functionally reduces the number of fillers and increases the likelihood of mistaken chance identifications.[179] It finally urged that all aspects of the identification procedure be documented—by both video-recording and audio-recording whenever feasible[180]—and that specific measures should be taken to record the witness's degree of confidence in picking out a suspect when the identification is first made.[181] The failure to observe the recommended procedural

[178] TASK FORCE FINAL REPORT, *supra* note 13, at 59 ("Fillers should be chosen for their similarity to the witness' description of the perpetrator, rather than for their similarity to the suspect. At the same time, the suspect should not differ from the fillers in a way that would make the suspect stand out, and there should be no other factors drawing attention to the suspect. In addition, no filler should so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from that filler."); *see also* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 25 ("Foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect."); *id.* at 36.

[179] For example,

> if five suspects are put in a lineup or photo array, whichever one the witness picks will likely have charges brought against him because the witness identified a suspect. However, if one suspect and five fillers are put in a lineup or photo array, and a filler is picked, the identification was obviously a mistake. Therefore, the more suspects there are per lineup, the more likely it is that a witness' identification of one of those suspects is a mistake that could not be identified as such.

TASK FORCE FINAL REPORT, *supra* note 13, at 60 (footnote omitted); *see also* Wells, *supra* note 173, at 618 n.13 ("Having more than one suspect in a lineup . . . is one of the worst possible procedures. Analyses show that the chance of a mistaken identification increases dramatically when lineups include multiple suspects." (citations omitted)).

[180] TASK FORCE FINAL REPORT, *supra* note 13, at 11 ("Where the identification procedure is a police-arranged procedure such as a lineup or photographic array, the entire identification procedure should be videotaped with enough cameras with audio to capture the witness, administrator and members of the lineup or photo array. . . . If such video documentation is not possible due to the location or circumstances of the procedure (e.g., the eyewitness is in the hospital), then the procedure should be documented with audio recording and detailed written notes."); *see id.* at 61 ("We propose that a failure by law enforcement to implement these documentation procedures would be considered by the trial court as a factor in determining whether evidence of the eyewitness identification procedure could be introduced at trial."); *see also* INNOCENCE PROJECT REPORT, *supra* note 177, at 20–21; Thompson, *supra* note 176, at 48–49.

[181] TASK FORCE FINAL REPORT, *supra* note 13, at 11 ("[T]he eyewitness' confidence level immediately after identifying an individual should be documented before any feedback is given as to his or her selection."). The commentary elaborated on the importance of this procedure:

> An eyewitness' confidence level is malleable and can be influenced by information coming to light after the lineup identification is made. Recording the eyewitness' visible and audible reaction contemporaneously with the recording of the identification itself will assist the judge and/or jury in evaluating the witness' confidence level at the time of the identification.

reforms would be one factor considered by trial courts in determining the admissibility of contested identifications.[182]

Many of the procedures recommended by the Task Force to enhance the reliability of eyewitness identifications have been adopted in other jurisdictions. New Jersey took a leading role in 2001, when the state attorney general issued guidelines and sponsored intensive training sessions regarding police lineup and photo identification procedures. The guidelines incorporated a number of reforms including double-blind administration "whenever practical,"[183] sequential presentation of subjects "[w]hen possible,"[184] instructions cautioning witnesses that the perpetrator may not be among the displayed subjects, recording witnesses' degree of confidence at the time of identifications, and others.[185] In 2005, the Wisconsin attorney general recommended the use of double-blind, sequential identification procedures, and the state legislature directed law enforcement authorities to adopt written policies to govern identifications.[186] North Carolina[187] and West Virginia[188]

Id. at 61; *see also* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 37 n.51 ("[P]rompt recording of a witness's stated confidence level elicited in a non-suggestive manner immediately after the identification is essential." (citation omitted)); INNOCENCE PROJECT REPORT, *supra* note 177, at 20 ("Whatever the witness's exact words, the lineup administrator should ask for and document a clear statement from the witness about his or her level of confidence immediately upon identifying the suspect. Also, the witness should not be provided with any information about the selection until after the confidence statement has been documented, though even then feedback is discouraged. This simple reform is critical to giving jurors a complete understanding of the eyewitness evidence."); Wells, *supra* note 173, at 631 ("At the time an eyewitness makes an identification, a statement should be obtained from the eyewitness indicating how confident he or she is that the person identified is the offender. . . . The point is to assess the confidence of the eyewitness before the eyewitness can be influenced by other events, such as learning the status of the identified person. . . . [T]he confidence of an eyewitness is the primary determinant of whether people will assume the identification to be accurate, even though the confidence of an eyewitness is readily influenced by feedback.").

[182] TASK FORCE FINAL REPORT, *supra* note 13, at 12, 72.

[183] ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES 1 (2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

[184] *Id.*

[185] *Id.* at 1–7. *See generally* Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681, 699–700 (2002); Wells, *supra* note 173, at 616 n.9, 627 n. 63.

[186] STATE OF WIS., OFFICE OF THE ATT'Y GEN., MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 3 (2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf.; WISC. STAT. § 175.50(2) (2006); INNOCENCE PROJECT REPORT, *supra* note 177, at 23.

[187] N.C. GEN. STAT. § 15A-284.52 (2007) (requiring sequential presentation, blind administration, cautionary instructions, a minimum of five fillers, documentation of witnesses' confidence level following an attempted identification, video recording of procedures unless impractical, and additional measures, along with alternative methods to be

have recently enacted statutes implementing eyewitness identification reforms and several states have task forces that are studying or have made recommendations about identification practices.[189] In the absence of statewide action, local police departments and prosecutors' offices also have put procedures in place in attempting to guard against unreliable identifications.[190]

The Task Force report additionally endorsed measures designed to assist jurors understand the potential limitations of eyewitness identification evidence that is admitted at trials. It thus recommended that expert testimony be allowed when relevant, with both the defense and prosecution eligible for funding to enlist experts if they lack sufficient resources.[191] The New York Court of Appeals has ruled that the reliability of eyewitness identifications is a proper subject for expert testimony,[192] and that although trial courts retain latitude in making admissibility rulings in particular cases,[193] precluding expert identification testimony can be an abuse of discretion.[194] Some jurisdictions disallow expert testimony on the

used under certain circumstances); § 15A-284.53 (mandating related education and training).

[188] W. VA. CODE § 62-1E-2 (2007 & Supp. 2009) (requiring cautionary instruction and written record of procedure, and creating a task force to identify best practices for eyewitness identification and issue guidelines for administration of lineups and photo arrays).

[189] *See, e.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS REGARDING EYE WITNESS IDENTIFICATION PROCEDURES (2006), *available at* http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf; STATE OF VT., REPORT OF THE EYEWITNESS IDENTIFICATION AND CUSTODIAL INTERROGATION COMMITTEE (2007), *available at* http://www.leg.state.vt.us/reports/2008ExternalReports/228563.pdf; INNOCENCE PROJECT REPORT, *supra* note 177, at 22–24; Scott Ehlers & John Cutler, *State Legislative Affairs Update*, CHAMPION, Jan./Feb. 2008, at 45, 46; Thompson, *supra* note 176, at 40–41. The Task Force report collects and provides information about several reform initiatives. TASK FORCE FINAL REPORT, *supra* note 13, at 74–89.

[190] *See, e.g.*, INNOCENCE PROJECT REPORT, *supra* note 177, at 23–24 (reporting Dallas Police Department's implementation of blind, sequential lineups effective January 2009); Wells, *supra* note 173, at 642 (describing joint initiative of the Suffolk County, Massachusetts District Attorney's Office and Boston and other police departments within the county, and identifying Northampton, Massachusetts, Virginia Beach, Virginia, and Santa Clara County, California, as moving forward with initiatives); Medwed, *supra* note 55, at 127 n.6 (describing how in 2002 "the chief prosecutor in Brooklyn implemented a rule whereby he must personally approve all felony cases in which only a single eyewitness identified the accused" (citation omitted)).

[191] TASK FORCE FINAL REPORT, *supra* note 13, at 11–12, 64–65.

[192] People v. Lee, 750 N.E.2d 63 (N.Y. 2001).

[193] People v. Young, 850 N.E.2d 623 (N.Y. 2006). In ruling that the trial court had not abused its discretion in excluding expert testimony relating to the reliability of eyewitness identification, the majority opinion placed principal reliance on two factors: "the extent to which the research findings discussed by [the expert] were relevant to [the witness's] identification of defendant; and the extent to which that identification was corroborated by other evidence." *Id.* at 626. Judge George Bundy Smith dissented. *Id.* at 627.

[194] People v. Abney, 918 N.E.2d 486 (N.Y. 2009); People v. LeGrand, 867 N.E.2d 374, 375–

reliability of eyewitness identification, but many others follow rules similar to New York's.[195] Experts have helped educate jurors on a host of issues that relate to the reliability of eyewitness identifications, including cross-racial encounters,[196] the influence of stress[197] and "weapon focus,"[198] and many others.[199]

While stressing that they are not an adequate substitute for expert testimony, the Task Force also recommended that detailed jury instructions should be administered by addressing factors that can affect eyewitness identification reliability.[200] The proposed instructions encompass a number of considerations, including the witness's degree of attentiveness[201] and opportunity to observe the perpetrator at the time of the crime,[202] factors implicating the

76 (N.Y. 2007) ("[W]e hold that where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proferred by a qualified expert and (4) on a topic beyond the ken of the average juror.").

[195] *See generally* Gregory G. Sarno, Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R.4th 1047 (1986); Bethany Shelton, Comment, *Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom*, 56 U. KAN. L. REV. 949 (2008); Wise, Dauphinais & Safer, *supra* note 169, at 823–42; Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895 (2005); AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 41–42.

[196] *See, e.g.*, Jody E. Frampton, Case Note, *Can a Jury Believe My Eyes, and Should Courts Let Experts Tell Them Why Not: The Admissibility of Expert Testimony on Cross-Racial Eyewitness Identification in New York After* People v. Young, 27 PACE L. REV. 433 (2007); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001).

[197] Deffenbacher, Bornstein, Penrod & McGorty, *supra* note 163; WILCOCK, BULL & MILNE, *supra* note 163, at 36–37, 75–76.

[198] Kerri L. Pickel, *The Influence of Context on the "Weapon Focus" Effect*, 23 LAW & HUM. BEHAV. 299 (1999); WILCOCK, BULL & MILNE, *supra* note 163, at 76–77.

[199] Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 327 (2006); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3 (2006); WILCOCK, BULL & MILNE, *supra* note 163, at 61–88. *See infra* notes 206–08 and accompanying text.

[200] TASK FORCE FINAL REPORT, *supra* note 13, at 65–71.

[201] With respect to whether the witness was "sufficiently attentive" to the perpetrator at the time of the crime, jurors would be instructed to "consider whether the witness knew that a crime was taking place during the time he [she] observed the actor." *Id.* at 69.

[202] Jurors would be instructed to consider the lighting conditions, the distance between the witness and perpetrator, whether the witness's view was obstructed, the witness's ability to see and recall different features of the perpetrator, the length of time the witness viewed the perpetrator, specific reasons the witness may have had to observe and recall the perpetrator, distinctive features that the perpetrator may have had, the extent to which any description of the perpetrator given by the witness matches the defendant's appearance, the witness's

witness's memory,[203] how the identification procedure was conducted,[204] and the witness's degree of certainty in making an identification.[205] The report additionally proposes that jurors be instructed that they may consider a lack of adherence to recommended procedures, "i.e., double-blind; one suspect per procedure; cautionary instructions provided to the eyewitness; effective use of fillers . . . [and] law enforcement's failure to properly document the identification procedure" in determining whether to credit a witness's identification.[206]

The proposed instructions are designed to assist jurors in determining how much weight to give to a witness's identification of a defendant, although they substantially mirror the criteria used by judges in resolving due process challenges to the admissibility of identification testimony that is alleged to be fundamentally unreliable. The Supreme Court announced those criteria more than three decades ago:

> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be

mental, physical, and emotional state at times relevant to the observation, the witness's prior familiarity with the perpetrator, if any, and whether the witness and perpetrator are of different races, with a cautionary instruction about difficulties associated with cross-racial identifications, where relevant. *Id.* at 67–69.

[203] Jurors would be asked whether "the witness' identification of the defendant [was] completely the product of his [her] own memory," and to consider how much time elapsed between the crime and the identification of the defendant, the witness's state of mind and mental capacity at the time of the crime, the witness's exposure to any information that might have affected the independence of the identification, and any instances where the witness failed to identify the defendant or gave a description of the perpetrator inconsistent with the defendant's appearance. *Id.* at 69–70.

[204] Jurors would be instructed that potentially relevant procedural considerations include whether the individual administering the lineup or photo array knew the identity of the target suspect, which could result in inadvertent cues about the suspect's identity being transmitted; whether simultaneous presentation of the subjects was made, which might make a witness "more likely to select one of the individuals than a witness who is presented with the individuals sequentially"; whether any suggestive procedures were used; that "an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone"; that in-person identifications generally are more reliable than identifications made from photographs; and that "failing to warn the witness that the perpetrator may or may not be in the procedure may increase the likelihood that the witness will select one of the individuals in the procedure even when the perpetrator is not present." *Id.* at 70–71.

[205] *Id.* at 71. *See infra* text accompanying note 209.

[206] TASK FORCE FINAL REPORT, *supra* note 13, at 12.

> weighed the corrupting effect of the suggestive identification itself.[207]

Although the enumerated considerations for testing reliability appear to be almost self-evident, research has called several of these premises and related assumptions into question.[208] For example, studies suggest that a witness's "level of certainty," or expressed confidence in making an identification, bears only a tenuous relationship to the correctness of the selection.[209] "[R]eliance on this factor is particularly troubling because scientific research has shown that it is the single most important factor that determines whether jurors believe that an eyewitness has made an accurate identification."[210] Under the Task Force's recommendations, efforts would be made to anticipate and correct this and other potential misapprehensions about eyewitness identifications. Thus, jurors would be instructed that "[c]ertainty, however, does not mean accuracy, and a witness may be sincere in his [her] belief but may still be mistaken in that belief."[211] Other factors showing the unreliability of eyewitness identifications (which can be demonstrated to the jury through judicial instructions and/or expert testimony) include the propensity of witnesses to overestimate the length of a time they observed a perpetrator[212] and to make

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[207] Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).

[208] *See* 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 & HUM. BEHAV. 1 (2009); *see also* Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389 (1996).

[209] Research suggests that the correlation between a witness's level of confidence in an identification and the accuracy of the identification is approximately .40—or roughly the same as that between height and gender.

> Hence, if you knew only someone's height and used that height to decide whether the person was male or female, you would be about as successful as if you used an eyewitness's certainty to decide whether the eyewitness was accurate or inaccurate. It is far better than just guessing. However, there are . . . confident inaccurate witnesses and non-confident accurate witnesses in the mix just [as] there are tall females and short males.

Wells, *supra* note 171, at 12, 15. Factors that artificially inflate a witness's confidence, such as post-identification feedback and the tendency for repetition of the identification to enhance the witness's certainty, not only have the potential to weaken the relationship between confidence and accuracy, but also to encourage fact-finders to credit identification testimony because of the heightened reliance they place on the witness's perceived certainty. *Id.* at 17–18. Wells & Quinlivan, *supra* note 208, at 11–12; *see also* WILCOCK, BULL & MILNE, *supra* note 163, at 68–71; Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1021–22 (1995).

[210] Wise, Dauphinais & Safer, *supra* note 169, at 817 (footnote omitted).

[211] TASK FORCE FINAL REPORT, *supra* note 13, at 71.

[212] "[E]yewitnesses' estimates of time during witnessing are greatly overestimated, especially when there is stress or anxiety at the time of witnessing. Furthermore, the

erroneous identifications under highly stressful circumstances—such as where criminal activity is involved[213]—and discrepancies between witnesses' verbal descriptions and the actual characteristics of persons they observed.[214]

In recognition of the complexity of eyewitness identification and its importance in contributing to wrongful convictions, the Task Force recommended that specialized training be provided to police, prosecutors, defense attorneys, and judges about scientific research on eyewitness identification and its implications for identification procedures.[215] It also advocated that necessary funding be provided to law enforcement agencies to allow the proposed reforms to be implemented.[216] It finally urged that New York change its idiosyncratic practice of prohibiting trial testimony about witnesses' pre-trial photographic identifications of criminal defendants[217]—a rule based largely on what appears to be an outmoded concern that jurors might infer that a mug shot served as the basis for

proportion of time that a person's face is occluded is greatly underestimated by eyewitnesses." Wells & Quinlivan, *supra* note 208, at 10.

[213] Deffenbacher, Bornstein, Penrod & McGorty, *supra* note 163, at 687; Wells, *supra* note 171, at 13; WILCOCK, BULL & MILNE, *supra* note 163, 75–76.

[214] Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL., PUB. POL'Y & L. 1057, 1083–84 (2000); Wells & Quinlivan, *supra* note 208, at 12–13.

[215] TASK FORCE FINAL REPORT, *supra* note 13, at 72–73. *See* Wise, Dauphinais & Safer, *supra* note 169, at 865–68 (extolling the benefits of educating law enforcement officers, attorneys, and judges about eyewitness identification issues. The authors discuss survey results suggesting that judges may be less than fully informed about important issues related to eyewitness identification, and cite other studies supporting the conclusion "that educating jurors, attorneys, police officers, and judges about eyewitness testimony may be useful in decreasing eyewitness error").

[216] TASK FORCE FINAL REPORT, *supra* note 12, at 73. It is not clear what funding would be required, although some expenses might be incurred for training, for video- and/or audio-recording identification procedures, and perhaps for staffing in smaller departments to allow double-blind administration of identifications. *See generally* Thompson, *supra* note 176, at 57–62 (discussing the need for cost assessments of reforms designed to minimize wrongful convictions, including those associated with eyewitness identification procedures).

[217] TASK FORCE FINAL REPORT, *supra* note 13, at 71–72. A majority of the Task Force recommended conditioning the admission of pre-trial photographic identifications on compliance with recommendations designed to promote the reliability of those identifications, that is,

> if such photographic identification procedures are properly documented in accordance with the proposed procedures (i.e., video recordings of the procedure and the eyewitness' assessment of certainty) and if the photographic procedure is conducted in accordance with our proposed improvements (i.e., double-blind; one suspect per procedure; cautionary instructions provided to the eyewitness; effective use of fillers).

Id. (footnote omitted). "A minority of the Task Force expressed the opinion that photographic identifications should be admissible as long as the procedure was conducted in compliance with constitutional requirements and without any linkage to video recording or other improvements to identification procedures." *Id.* at 72 n.97.

identification, to the defendant's prejudice.[218]

C. Forensic Evidence

A rising wave of criticism against the forensic sciences recently crested with the release of a report by the National Academy of Sciences ("NAS Report"), which included a number of critical observations about the non-DNA forensic sciences.[219] A major goal of the report was to address the disparities in the nation's crime laboratories in terms of "capacity, oversight, staffing, certification, and accreditation."[220] In addition, the NAS Report noted that the present resource and staffing limitations among forensic laboratories make it difficult for the labs to, among other things, "avoid errors that could lead to imperfect justice."[221] Moreover, the

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[218] *See* People v. Caserta, 224 N.E.2d 82, 83–84 (N.Y. 1966) ("As for previous identifications from photographs, not only is it readily possible to distort pictures as affecting identify, but also where the identification is from photographs in the rogues' gallery (even though the name or number of the picture has been excinded [sic]) the inference to the jury is obvious that the person has been in trouble with the law before."); People v. Perkins, 876 N.Y.S.2d 517, 518 (App. Div. 2009) ("In general, evidence regarding pretrial photographic identifications is not admissible at trial. This general prohibition is based in large part on the inference a jury may draw that possession by the police of the defendant's photograph was the result of prior arrests." (citations omitted)). The rule is thoroughly discussed, and questioned, in *People v. Woolcock*, 792 N.Y.S.2d 804 (Sup. Ct. 2005). The court there reported the results of

> an exhaustive review of identification procedures employed nationwide. Every other state, forty-nine in all, as well as the Federal Courts, permit evidentiary use of a prior photographic identification in a fair array. . . .
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> . . . Despite this almost universal acceptance of testimony regarding a pre-trial photographic identification, New York continues to enisle itself from this modern rule. . . .
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> . . . Recognizing that our Court of Appeals has not re-visited the issue of photographic identifications in decades, and given advances in both technology and social science research, this Court respectfully suggests that the time has come to re-evaluate New York's singular exception regarding photographic identification.

Id. at 815–16.

[219] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009). The committee was formed at the behest of Congress with a mandate designed to enhance the quality and use of forensic technology by: assessing resource needs of state and local crime labs as well as coroners and medical examiners; identifying advances in scientific technology that could enhance the use of forensic science by law enforcement; communicating "best practices and guidelines concerning the collection and analysis of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques" used in criminal investigations; and recommending ways to "increase the number of qualified forensic scientists and medical examiners available to work in public crime laboratories." *Id.* at 1–2.

[220] *Id.* at 14.

[221] *Id.*

report found that the scientific foundations upon which the major forensic science disciplines rest are either limited or non-existent.[222] The first recommendation of the NAS Report, therefore, was that Congress should establish a national oversight commission or agency to promulgate and ensure standards for best practices; require accreditation of forensic laboratories and certification of forensic analysts; promote scholarship in the forensic sciences and medicine; improve forensic science education; and perform other related functions.[223]

The Task Force noted that New York has been a leader with respect to forensic laboratory oversight, having established the State Commission on Forensic Science in 1995.[224] New York law requires all forensic laboratories to be accredited by the commission.[225] Notwithstanding this accomplishment, the Task Force identified the "mishandling of forensic evidence" as one of the principal causes of New York wrongful convictions.[226] Indeed, the report counted twenty-six of the fifty-three wrongful conviction cases as being affected by forensic evidence issues—making it the third most prevalent factor associated with the wrongful convictions.[227]

The forensic evidence problems the Task Force identified related primarily to "systemic deficiencies in how and when forensic evidence is collected, stored and used,"[228] rather than to forensic laboratory testing. Indeed, the sixteen cases the Task Force highlighted as "forensic evidence failures"[229] illustrate that the problems in New York appear to derive more from the handling of evidence than laboratory negligence or misconduct. The sixteen case summaries revealed instances where police "mishandl[ed]"

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[222] For example, the committee noted that it "found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA." *Id.* at 161. The committee further observed that "[s]cientific studies support some aspects of bloodstain pattern analysis." *Id.* at 178. However, it noted that "[t]he uncertainties associated with bloodstain pattern analysis are enormous." *Id.* at 179. On the other hand, because the analysis of controlled substances rests on solid chemistry, the committee stated that such analysis "is a mature forensic science discipline and one of the areas with a strong scientific underpinning." *Id.* at 134. It reached a similar conclusion for forensic nuclear DNA analysis which, according to the committee, "is now universally recognized as the standard against which many other forensic individualization techniques are judged." *Id.* at 130.

[223] *Id.* at 19–20.

[224] N.Y. EXEC. LAW § 995-a (McKinney 1996).

[225] N.Y. EXEC. LAW § 995-b (McKinney 1996 & Supp. 2010).

[226] TASK FORCE FINAL REPORT, *supra* note 13, at 6 (capitalization not observed).

[227] *Id.* at 7.

[228] *Id.* at 91.

[229] *Id.* at 92 (capitalization not observed).

forensic evidence,[230] where evidence was collected but not tested,[231] or was stored improperly making it difficult to locate,[232] or where biological evidence contradicted other evidence but was not investigated further.[233] The convictions obtained in the sixteen cases summarized in the report all occurred between 1983 and 1998—when forensic DNA testing was still in early development.[234] A common sentiment throughout the case summaries is the notion that DNA testing either was not available or, if available, was not sufficiently advanced to permit definitive exclusions or identifications. It is questionable whether the criminal justice system should be faulted when the imprecision or unavailability of test results owes to the nascent stage of DNA analytical techniques.[235]

The "imperfect justice" resulting from forensic science errors to which the NAS Report referred[236] is reflected in a number of wrongful convictions. A 2008 study of the first two hundred DNA exonerations nationwide concluded that 57% of those wrongful

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[230] *Id.* at 94–95. In the cases of Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise, the report cites "police mishandling of forensic evidence which may have caused the hairs to be picked up at the precinct house, rather than during the crime." *Id.*

[231] In the case of James O'Donnell, the report notes that biological evidence was not tested until two years after conviction. *Id.* at 92. In Anthony Faison's and Charles Shepard's case, latent fingerprints were collected from the crime scene but not checked against "existing databases." *Id.* According to the report, this latter failure was a missed opportunity to identify the actual perpetrator. *Id.*

[232] For example, in Anthony Capozzi's case the report notes that "[i]mproper cataloguing may have led law enforcement to believe that slides from the rape kit were unavailable, further hampering defendant's efforts to conduct DNA testing." *Id.* at 93.

[233] For Douglas Warney, this meant that law enforcement failed to "further investigate and analyze forensic evidence that was inconsistent with defendant's alleged confession." *Id.* at 96.

[234] The use of DNA testing to determine human identity was first described in 1985. Alec J. Jeffreys, Victoria Wilson & Swee Lay Thein, *Hypervariable 'Minisatellite' Regions in Human DNA*, NATURE, Mar. 7, 1985, at 67. The current set of genetic markers used by the FBI, and all crime laboratories that participate in the FBI DNA database, were not selected until 1997. JOHN M. BUTLER, FORENSIC DNA TYPING 62 (2001)

[235] It is doubtful that cases in which forensic DNA testing was unavailable because it was yet to be developed or it was not sufficiently advanced to be used in the specific case should be included as "forensic evidence failures." TASK FORCE FINAL REPORT, *supra* note 13, at 92 (capitalization not observed). For example, Victor Ortiz was convicted in 1983, yet one of the forensic evidence failures identified in his case was "unavailability of DNA testing." *Id.* Michael Mercer's conviction for rape, robbery, and sodomy has been described as a straightforward case of "misidentifi[cation]." INNOCENCE PROJECT, 200 EXONERATED: TOO MANY WRONGFULLY CONVICTED 28 (n.d.), *available at* http://www.innocenceproject.org/200/ip_200.pdf. Yet, in the Task Force report, the case is cited as a "forensic evidence failure" because "[m]ore sophisticated DNA testing was unavailable at the time of trial." TASK FORCE FINAL REPORT, *supra* note 13, at 94.

[236] *See supra* notes 219–21 and accompanying text.

convictions were supported by forensic evidence.[237] A subsequent study of DNA exonerations for which trial transcripts were available revealed that forensic analysts provided invalid forensic science testimony in 60% of the cases.[238] Indeed, the mounting sharp criticism of the forensic sciences has been partly due to notable crime laboratory failures or the misconduct of some forensic laboratory analysts. For example, operations in the DNA/Serology section of the Houston Police Department Crime Laboratory were suspended in 2002 after an investigative report by a local television station prompted an audit of the crime laboratory by the city.[239] Recent, well documented incidents of misconduct by publicly-employed forensic laboratory analysts have included using bogus statistical analyses at trial, falsifying lab reports, and fabricating test results.[240] Such lapses and misconduct have contributed to the wrongful convictions of a number of individuals who were ultimately exonerated through DNA testing.[241]

Long before Congress called on the National Academies to evaluate the state of affairs in the nation's crime labs, a number of scholars and commentators raised concerns about the quality,

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[237] Garrett, *supra* note 50, at 80.

[238] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009). The authors defined "'invalid' testimony" as "a conclusion not supported by empirical data." *Id.* at 7.

[239] *See* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 187 (2007). Giannelli describes the Houston Police Department Crime Laboratory ("HPD Crime Lab") as "the paradigmatic example of a failed forensic agency." *Id.* Problems at the laboratory included contamination issues, poor training and supervision of analysts, and "mistake-ridden and poorly-documented casework." *Id.* at 188 (quoting MICHAEL R. BROMWICH, THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 5 (2005), *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf). Exonerated defendants who were convicted based on evidence developed at the HPD Crime Lab include Josiah Sutton, who served four and one-half years of a twenty-five year sentence for a rape he did not commit and George Rodriguez, who served seventeen years for sexual assault and kidnapping that he did not commit. Innocence Project, Know the Cases: Josiah Sutton, http://www.innocenceproject.org/Content/268.php (last visited Apr. 25, 2010); Innocence Project, Know the Cases: George Rodriguez, http://www.innocenceproject.org/Content/246.php (last visited Apr. 25, 2010). In August 2009, DNA testing led to the release of Ernest Sonnier from prison after he spent twenty-three years incarcerated for a rape conviction supported in part by HPD Crime Lab evidence. James C. McKinley, Jr., *Man Held for 23 Years Is Set Free by DNA Tests*, N.Y. TIMES, Aug. 8, 2009, at A11.

[240] Giannelli, *supra* note 239, at 172–86 (discussing incidents involving forensic analysts Fred Zain, Joyce Gilchrist, Arnold Melnikoff, Jacqueline Blake, and Pamela Fish).

[241] Curtis McCarty, for example, was convicted and sentenced to death for rape-murder based on Oklahoma City Police Department forensic analyst Joyce Gilchrist's testimony. *Id.* at 175. McCarty was exonerated in 2007 after DNA testing demonstrated that he was not the source of the sperm found on the victim. Innocence Project, Know the Cases: Curtis McCarty, http://www.innocenceproject.org/Content/576.php (last visited Apr. 25, 2010). McCarty spent twenty-one years incarcerated, including over a decade on death row. *Id.*

training, and education of forensic analysts[242] as well as the need for crime laboratories to be independent of law enforcement.[243] Professors Saks and Koehler predicted in 2005 that a paradigm shift in the forensic sciences was forthcoming.[244] Four events, according to Saks and Koehler, contributed to the heightened scrutiny of the traditional forensic sciences: the scientifically sound underpinnings of forensic DNA typing; changes in expert testimony admissibility laws; empirical evidence of error rates; and awareness of wrongful convictions.[245]

Although the Task Force report did not identify specific instances of outright forensic science misconduct or fraud leading to the wrongful convictions it examined, New York has not been immune from such scandals.[246] For example, six New York State Police investigators fabricated and planted fingerprint evidence in dozens of cases between 1984 and 1992.[247] The revelation in 2007 that analysts with the New York City Police Department crime laboratory falsified results in drug tests performed in 2002 led the department to retest thousands of old evidence samples.[248] An audit by the American Society of Crime Laboratory Directors Laboratory Accreditation Board ("ASCLD/LAB") revealed that a New York State Police forensic expert had not followed proper

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[242] *See, e.g.*, Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109 (1991).

[243] Paul C. Giannelli, Essay, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997) (describing a number of cases in which a forensic analysts employed by public crime laboratories engaged in intentional misconduct that favored law enforcement); *see also* Roger Koppl, *How to Improve Forensic Science*, 20 EUR. J.L. & ECON. 255 (2005) (arguing that the location of forensic laboratories within police agencies induces bias among forensic analysts).

[244] Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005). Saks and Koehler criticized the traditional forensic sciences such as hair, handwriting, and bullet-mark comparisons, for resting on the empirically unsupported assumption that "markings produced by different people or objects are observably different." *Id.* at 892. Based upon this assumption of "discernable uniqueness," forensic analysts have concluded that two markings that look alike must have come from the same person or have been made by the same object. *Id.*

[245] *Id.*

[246] *See supra* note 105.

[247] Perez-Pena, *supra* note 105, at B1. The special prosecutor who investigated the matter found that the state troopers "had no fear of detection by supervisors, who maintained a willful ignorance."

[248] *See* Thomas J. Luek, *Sloppy Police Lab Work Leads to Retesting of Drug Evidence*, N.Y. TIMES, Dec. 4, 2007, at B1. Incidents of dry-labbing (the practice of reporting results for tests not conducted) involving analysts in the controlled substances analysis section were revealed and investigated internally in 2002, but laboratory officials failed to report the incidents to the appropriate accrediting bodies. The matter came to the attention of the New York State Division of Criminal Justice Services in 2007, which prompted an investigation by the New York State Office of the Inspector General. *Id.*

testing procedures, causing State Police officials to review the analyst's cases and notify district attorneys about the oversights.[249] Although the foregoing incidents were not cited in the Task Force report, it is important to be mindful that such misconduct has occurred and places innocent people at risk.

The Task Force proposed several reforms designed to enhance the handling and preservation of evidence, bolster oversight of forensic disciplines, provide greater defense access to forensic evidence, and authorize judges to order comparisons of crime scene evidence with forensic databases,[250] among others.[251] Some of the recommendations transcend the relatively narrow confines of forensic evidence, including a proposal to allow wrongfully convicted individuals to prove their innocence even if the conviction resulted from a guilty plea.[252] Another recommendation, the establishment of a statewide innocence commission, comprises a major reform worthy of separate and focused attention.[253]

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[249] *See* Nicholas Confessore, *Police Review Lab Work After Suicide of Scientist*, N.Y. TIMES, June 12, 2008, at B1.

[250] TASK FORCE FINAL REPORT, *supra* note 13, at 99.

[251] The Task Force's recommendations were as follows:

> Ensure proper preservation, cataloguing and retention of all forensic evidence;
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> Enact legislation to expand the jurisdiction of the forensic science commission to include responsibility to promulgate mandatory standards for the preservation, cataloguing and retention of all forensic evidence obtained at crime scenes or other locations relevant to the commission of a crime;
>
> Enact legislation to require that all existing forensic evidence, especially biological and fingerprint evidence, which currently exists in local or state warehouses and/or storage facilities, be catalogued using state-of-the-art technology, such as bar-coding;
>
> Enact legislation to require that all forensic evidence obtained in connection with the commission of a crime be maintained for a minimum of ten years after a person convicted of such crime has been discharged from any post-incarceration period of supervision; in cases where no person has been accused of the crime, all forensic evidence shall be maintained until the expiration of all applicable statutes of limitations for prosecution of the crime;
>
> Expand the jurisdiction of the forensic science commission to provide independent oversight of forensic disciplines;
>
> Establish authority for judges to order comparison of crime scene evidence to available forensic databases upon request of an accused or convicted person;
>
> Permit wrongfully convicted persons to prove their innocence, regardless of whether the conviction was the result of a trial verdict or a guilty plea;
>
> Promulgate standards and best practices to guide all law enforcement agencies in the processing of crime scenes and the collection, processing, evaluation and storage of forensic evidence;
>
> Provide forensic science training for prosecutors, defense lawyers and judges;
>
> Establish a permanent independent commission to minimize the incidence of wrongful convictions.

Id. at 96–102 (capitalization not observed).

[252] *Id.* at 100.

[253] *See infra* Part IV.B.

The Task Force's first forensic science recommendation addresses the problem of improper preservation and unsystematic storage of forensic evidence which, while not a direct cause of wrongful convictions, presents a significant obstacle to proving innocence post-conviction.[254] For example, in 1994, almost ten years after his conviction for rape and robbery, Alan Newton began filing a series of motions requesting DNA testing of the sexual assault evidence kit and other items of evidence collected during the investigation.[255] On each occasion the evidence was either reported as missing or assumed to have been destroyed.[256] Not until eleven years following Newton's first request for DNA testing did a search reveal the location of the evidence—the analysis of which led to Newton's exoneration.[257] The Task Force thus called on the legislature to have New York join the more than twenty other states that mandate evidence preservation and to designate the New York State Commission on Forensic Science as the entity responsible for promulgating "standards for the preservation, cataloguing and retention of forensic evidence."[258]

The New York State Commission on Forensic Science oversees the state's crime laboratories. Through the development of minimum standards and an accreditation program, the commission seeks to "increase and maintain the effectiveness, efficiency, reliability, and accuracy of forensic laboratories, including forensic DNA laboratories [and to] ensure that forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable."[259] The commission's mandate,

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[254] TASK FORCE FINAL REPORT, *supra* note 13, at 96.

[255] The Task Force report describes Alan Newton's case as being one plagued by mishandling of evidence. *Id.* at 39.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 98. As a safeguard against a potentially protracted legislative process to fulfill the goals of recommendations one and two, the Task Force proposed under recommendation three that the New York State Bar Association develop and disseminate standards and best practices to guide law enforcement agencies in the collection, preservation, and processing of forensic evidence. *Id.* at 100–01.

[259] N.Y. EXEC. LAW § 995-b(2)(a)–(b) (McKinney 1996 & Supp. 2010). Accreditation may be obtained either through the ASCLD/LAB or, in the case of toxicology laboratories, through the American Board of Forensic Toxicology ("ABFT"). N.Y. COMP. CODES R. & REGS. tit. 9, § 6190.3 (2008). The ASCLD/LAB accreditation programs are those "in which any crime laboratory may participate to demonstrate that its management, personnel, operational and technical procedures, equipment and physical facilities meet established standards." American Society of Crime Laboratory Directors/Laboratory Accreditation Board, Programs of Accreditation, http://www.ascld-lab.org/programs/prgrams_of_accreditation_index.html (last visited Apr. 25, 2010). Seven state and local forensic laboratories have attained ASCLD/LAB international accreditation under ISO/IEC 17025, thereby demonstrating compliance with the

however, extends only to "forensic laboratories," a restrictive definition that does not include all of the forensic disciplines.[260] As the Task Force points out, disciplines such as forensic odontology (bite-mark analysis), arson, and in some cases latent print and ballistics analyses do not fall within the purview of the commission.[261] These exclusions are especially problematic because the National Academies criticized bite-mark analysis and other such disciplines as lacking a reliable scientific foundation.[262] The Task Force correctly noted that "[p]rocedural and methodological deficiencies in these disciplines contribute to wrongful conviction" and proposed that the jurisdiction of the commission on forensic science be expanded to "ensure the integrity" of *all* forensic disciplines.[263]

D. False Confessions

> "People just do not confess, particularly to something of this magnitude, this heinous, this vicious, without having participated in it. It's just not natural, it's just not reasonable."
> —*Assistant Commonwealth Attorney D.J. Hansen*[264]

> "I was not there and . . . I lied . . . when I made my statements . . . due to the fact that I was scared out of my

International Organization for Standardization ("ISO") requirements for the competence of testing and calibration laboratories. American Society of Crime Laboratory Directors/Laboratory Accreditation Board, Accredited Laboratories, http://www.ascld-lab.org/accreditedlabs.html#ny (last visited Apr. 25, 2010). As of April 2010, the ASCLD/LAB-International accredited laboratories are: the New York City Police Department Police Laboratory, the New York State Police Forensic Investigation Center, the New York State Police Mid-Hudson Regional Crime Laboratory, the New York State Police Southern Tier Regional Crime Laboratory, the New York State Police Western Regional Crime Laboratory, the Onondaga County Health Department Center for Forensic Sciences, and the Westchester County Department of Laboratories and Research Division of Forensic Sciences Laboratory. *Id.*

[260] N.Y. EXEC. LAW. § 995(1) (McKinney 1996) ("Forensic laboratory [is defined as any] laboratory operated by the state or unit of local government that performs forensic testing on evidence in a criminal investigation or proceeding or for purposes of identification provided, however, that the examination of latent fingerprints by a police agency shall not be subject to the provisions of this article.").

[261] TASK FORCE FINAL REPORT, *supra* note 13, at 98.

[262] *See supra* notes 219–23 and accompanying text.

[263] TASK FORCE FINAL REPORT, *supra* note 13, at 98–99.

[264] TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR 251 (2008) (quoting Assistant Commonwealth Attorney D.J. Hansen's closing argument during the second trial of Derek Tice for murder and rape, following the reversal of Tice's initial convictions on appeal).

> right frame of mind."
> —Derek Tice[265]
>
> "[Tice's confession] just washed everything else away . . . . That was the supernova circumstance of the entire trial. It overwhelmed everything else."
> —*Randall McFarlane*[266]

The three statements above, made in connection with Derek Tice's Virginia trial for capital murder and rape, by the prosecutor, Tice himself, and the foreman of Tice's jury,[267] respectively, are not

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[265] *Id.* at 210 (quoting handwritten statement of Derek Tice, who did not testify at either his first trial for murder and rape or (following reversal of those convictions on appeal) at his second trial).

[266] *Id.* at 228 (quoting Randall McFarlane, foreman of the jury that convicted Derek Tice of murder and rape at his first trial).

[267] Tice and three co-defendants, Joseph Dick, Danial Williams, and Eric Wilson (sometimes referred to as "the Norfolk 4") were charged with murdering and raping Michelle Moore-Bosko in Norfolk, Virginia in July 1997. Each confessed to participating in the crimes following intensive police interrogation. At separate proceedings, Dick and Williams pled guilty to murder and rape and were sentenced to life in prison. Wilson pled not guilty. He was acquitted of murder, convicted of rape, and sentenced to eight and one-half years in prison. Tice was twice tried and convicted on the murder and rape charges (his initial convictions were reversed on appeal). Each man claimed to have confessed falsely, although Dick in particular equivocated and testified against Wilson and Tice in consideration for the prosecution not seeking the death penalty against him. Williams also vacillated between admitting and denying guilt, and also pled guilty in exchange for the prosecution's agreement not to seek a capital sentence. Three other men were arrested for the crimes but maintained their innocence and were not prosecuted. Later, Omar Ballard, an acquaintance of the victim and her husband whose DNA matched semen found in the victim following her murder, was arrested and pled guilty to the crimes. Ballard issued statements assuming sole responsibility for the crimes, specifically denying that any of the "Norfolk 4" were involved. *See generally* WELLS & LEO, *supra* note 264; TRUE STORIES OF FALSE CONFESSIONS, *supra* note 78, at 415–27. Although Tice's conviction was vacated by a lower court on a state habeas corpus application, the Virginia Supreme Court reversed and reinstated the judgment. Johnson v. Tice, 654 S.E.2d 917, 925 (Va. 2008). In August 2009, Governor Timothy Kaine acted to grant Tice, Dick, and Williams partial clemency (Wilson already had been released from prison and thus would not benefit from the governor's action). *See infra* note 272 and accompanying text. The governor previously had been reluctant to act on the defendants' requests for clemency. Tom Jackman, *Grisham's Passion Project: A "Norfolk 4" Screenplay*, WASH. POST, July 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/07/AR2009070702604_pf.html. Author John Grisham, who has written a book about the wrongful conviction of Ron Williamson, who had been found guilty of capital murder and sentenced to death in Oklahoma (see JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006)), had begun writing a screenplay about the case, calling it "the most egregious case of wrongful conviction I've seen." Jackman, *supra*; *see also* Tom Jackman, *Retired Agents Take up Cause of "Norfolk 4": Navy Men Recanted Confessions*, WASH. POST, Nov. 11, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/10/AR2008111002763_pf.html; *Clemency for the Norfolk Four: It's Time for Gov. Kaine to Act*, WASH. POST, Nov. 11, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/10/AR2008111002634_pf.html.

atypical in cases where the police secure a confession from an individual who later renounces the incriminating statements and professes innocence. "[M]ost people believe that a normal suspect would not confess to something he did not do."[268] And once a suspect does confess, circumstances tend rapidly to converge to confirm guilt: the police may consider the case closed and curtail further investigation, prosecutors will likely follow through with charges,[269] defense attorneys are apt to concentrate on securing a plea bargain rather than risking trial and almost certain conviction, and jurors are likely to consider the defendant's admission as virtually conclusive proof of guilt.[270] Judges are similarly skeptical of claims of false confessions.[271] Tice, a former sailor and one of the so-called "Norfolk 4," was released from prison following more than eleven years of incarceration when Governor Tim Kaine granted Tice—and two others who had confessed to and were convicted of the rape-murder—a partial pardon. The governor based his

[268] WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 139 (2001).

[269] Researchers analyzing 125 cases involving police-induced false confessions, however, reported that the police or prosecutors successfully screened ten (8%) of the cases by not charging suspects following arrest. Prosecutors dropped charges against an additional sixty-four individuals, or more than half of the original sample, following indictment, either recognizing that the confessions were false or else because the confessions were suppressed. Thus, approximately 59% of the false confession cases (seventy-four out of 125) were terminated prior to a trial or guilty plea. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 950–51 (2004).

[270] Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 485 (2006) ("Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible." (footnote omitted) (quoted in TASK FORCE FINAL REPORT, *supra* note 13, at 104–05)); *see also* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381 (2009); Drizin & Leo, *supra* note 269, at 951–53 (reporting that seven out of fifty-one falsely confessing defendants in their sample of cases pled not guilty and were acquitted at trial (13.7%); the remaining forty-four were convicted, including fourteen as a result of guilty pleas, and thirty following trials (twenty-eight of which were before a jury and two of which were bench trials). The conviction rate among the falsely confessing defendants who pled not guilty, accordingly, was 81.1% (thirty out of thirty-seven). Findley & Scott, *supra* note 32, at 333–38; Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005).

[271] Saul M. Kassin, *Confession Evidence: Commmonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1317–19 (2008); Garrett, *supra* note 50, at 61 ("[W]hile half of [the defendants in his sample of DNA exonerees] who falsely confessed raised claims challenging the confession, none received relief.").

decision on "grave doubts" about the men's guilt.[272]

False confessions happen. Roughly one out of four of the country's DNA-based exonerations have involved convictions supported by a false confession.[273] New Yorkers need look no farther than the confessions and convictions of five young men in the infamous Central Park Jogger case.[274] All five of the young men spent years in prison for committing a brutal rape before being exonerated when a serial rapist, whose DNA matched that found in the victim, confessed to having committed the crime.[275] A few months later, in early 1990, Peekskill police secured admissions from sixteen-year-old Jeffrey Deskovic concerning the rape and murder of a high school classmate. Despite his subsequent denials, and DNA results excluding him as the source of the semen retrieved from the victim, he was convicted and sentenced to fifteen years to life imprisonment. In affirming his convictions on appeal, the appellate division specifically rejected the argument that Deskovic's incriminating statements were "precipitated by a coercive environment or police misconduct 'that could induce a false confession.'"[276] The court concluded that evidence of his guilt was "overwhelming."[277] Deskovic spent sixteen years in prison before being exonerated when a more sophisticated DNA analysis and a records check matched the semen found in the victim to a man

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[272] Ian Urbina, *Virginia Governor Sets Free 3 Sailors Convicted in Rape and Murder*, N.Y. TIMES, Aug. 7, 2009, at A9. Joseph Dick, Jr. and Danial Williams also were granted partial pardons. The fourth defendant comprising "the Norfolk 4," Eric Wilson, had been convicted only of rape, and not murder, and already had been released from prison when Governor Kaine acted. In granting a partial pardon, the governor left the men's convictions undisturbed, but reduced their life prison sentences to time served, thus allowing them to be freed from incarceration. "'The petitioners have not conclusively established their innocence, and therefore an absolute pardon is not appropriate,' Mr. Kaine said. 'However, I conclude that the petitioners have raised substantial doubts about their convictions and the propriety of their continued detention.'" *Id.*

[273] Innocence Project, False Confessions, *supra* note 89. *See supra* notes 89, 95, and accompanying text. False confessions may be overrepresented among murder cases. Leo, *supra* note 47, at 210; Gross et al., *supra* note 16, at 544 (reporting that 20% of the wrongful convictions for murder in their study involved false confessions, compared to 7% of the wrongful convictions for rape).

[274] The five youths, who ranged between fourteen and sixteen years old, were Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise. *See* INNOCENCE PROJECT, *supra* note 17, at 45–48; *see also* TRUE STORIES OF FALSE CONFESSIONS, *supra* note 78, at 193–202; TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS (1992) (written shortly after the defendants' convictions and prior to their exoneration with respect to the rape or sexual abuse convictions).

[275] *Id.*; Drizin & Leo, *supra* note 269, at 894–900; Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209 (2006); Berger, *supra* note 82, at 1069–71.

[276] People v. Deskovic, 607 N.Y.S.2d 957, 958 (1994) (citation omitted).

[277] *Id.*

serving a life sentence for another murder, who then confessed to the crimes.[278]

The Task Force made three recommendations to help guard against false confessions: that (1) the "custodial interrogations of all felony-level crime suspects should be electronically recorded in their entirety;" (2) "specific training about false confessions should be given to police, prosecutors, judges and defense attorneys;" and (3) "further study should be undertaken on the impact of the phenomenon of false confessions on a defendant's willingness to plead guilty."[279] The first of these proposals is clearly the most ambitious, and likely the most controversial. Yet calls for recording police interrogations are not new and are not necessarily destined to meet resistance. Several jurisdictions already enforce such a requirement, often with the full support of law enforcement authorities.

Citing the example of New Yorker Charles Stielow's confession, which resulted in his conviction and near execution for murder before he ultimately was pardoned,[280] Edwin Borchard cautioned more than seventy-five years ago that "[w]hile confessions may often seem conclusive, they must be carefully examined. . . . [E]ven without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result."[281] Borchard advocated that police questioning of suspects "be carried on only before a magistrate and witnesses, perhaps in the presence of phonographic records, which shall alone be introducible as evidence of the prisoner's statements."[282] In 1975, the American Law Institute's Model Code of Pre-Arraignment Procedure included a provision requiring the police to audio-record suspects' custodial interrogation and

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[278] *See* LESLIE CROCKER SNYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (2007), *available at* http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf (prepared at the request of Janet DiFiore, Westchester County District Attorney). INNOCENCE PROJECT, *supra* note 17, at 74–76, 79–116 (reprinting the report prepared by SNYDER ET AL., *supra*). In addition to the five defendants in the Central Park Jogger case and Jeffrey Deskovic, six other of the wrongful convictions reviewed by the Task Force were supported in part by false confessions. TASK FORCE FINAL REPORT, *supra* note 13, at 104. *See supra* notes 76–80 and accompanying text (discussing George Whitmore's false confession to murder and his wrongful conviction for an unrelated assault).

[279] TASK FORCE FINAL REPORT, *supra* note 13, at 13–14 (capitalization not observed); *see id.* at 104–13.

[280] *See supra* text accompanying notes 37–38.

[281] BORCHARD, *supra* note 24, at 371–72.

[282] *Id.* at 371 (footnote omitted). *See* Kassin et al., *supra* note 270, at 25 (discussing Borchard's proposal).

authorized suppression as a remedy for noncompliance.[283] Since 1984, Parliament has required that police interviews with criminal suspects in England be tape-recorded, unless impracticable, and confessions obtained in violation of this policy can be excluded from evidence.[284]

Several states and the District of Columbia now require police to record the interrogation of suspects under various circumstances. This practice is required by judicial decision in Alaska[285] and Minnesota,[286] and by court rule in New Jersey (in serious felony cases when custodial interrogation occurs in a "place of detention"[287]). Legislation governs the electronic recording of police

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[283] Lisa C. Oliver, Note, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code*, 39 SUFFOLK U. L. REV. 263, 268 (2005) (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 130.4(3), 150.3(2)–(3) (1975)).

[284] Kassin et al., *supra* note 270, at 25; Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rule*, 14 MICH. J. INT'L L. 171, 185–86 (1993); Irina Khasin, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1031–32 (2009) (discussing the requirements of England's Police and Criminal Evidence Act of 1984, or PACE, including the recording of police interviews of criminal suspects and the courts' authority to exclude confessions obtained in violation of this policy).

[285] Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985) ("Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible." (footnote omitted)). "[E]xclusion is the appropriate remedy for an unexcused failure to electronically record an interrogation, when such recording is feasible. A general exclusionary rule is the only remedy that provides crystal clarity to law enforcement agencies, preserves judicial integrity, and adequately protects a suspect's constitutional rights." *Id.* at 1164 (footnote omitted).

[286] State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("[I]n the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial. The parameters of the exclusionary rule applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis. Following the approach recommended by the drafters of the Model Code of Pre-Arraignment Procedure, suppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed 'substantial.'"). The court indicated that the determination of whether a violation is "substantial" should consider "all relevant circumstances . . . including those set forth in § 150.3(2) and (3) of the Model Code of Pre-Arraignment Procedure." *Id.* at 592 n.5.

[287] N.J. R. CT. 3:17 (2010). A "place of detention" is defined to include buildings that house law enforcement agencies as well as jails and prisons. R. 3:17(a). The requirement for electronic recording applies unless one of several exceptions governs, including that electronic recording is not feasible. R. 3:17(b). The suppression of statements obtained in violation of the rule is not required:

> The failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement.

R. 3:17(d). Additionally, "[i]n the absence of [required] electronic record[ing] . . . the court

interrogations elsewhere, with varying provisions regarding when electronic recording is required, recognized exceptions, and the consequences of noncompliance. Statutes, many of which are of recent vintage, impose requirements for electronic recording of police interrogation of criminal suspects in Washington D.C.,[288] Illinois,[289] Maine,[290] Maryland,[291] Missouri,[292] Montana,[293]

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shall, upon request of the defendant, provide the jury with a cautionary instruction." R. 3:17(e).

[288] D.C. CODE § 5-116.01 (Supp. 2009). The police "shall electronically record, in their entirety, and to the greatest extent feasible, custodial interrogations of persons suspected of committing a crime of violence . . . when the interrogation takes place in Metropolitan Police Department interview rooms equipped with electronic recording equipment." § 5-116.01(a)(1).

> Any statement of a person accused of a criminal offense in the Superior Court of the District of Columbia that is obtained in violation of § 5-116.01 shall be subject to the rebuttable presumption that it is involuntary. This presumption may be overcome if the prosecution proves by clear and convincing evidence that the statement was voluntarily given.

§ 5-116.03.

[289] 725 ILL. COMP. STAT. 5/103-2.1 (2006).

> An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding brought under [specified sections governing different types of criminal homicide] unless: (1) an electronic recording is made of the custodial interrogation; and (2) the recording is substantially accurate and not intentionally altered.

Id. 5/103-2.1(b). Various exceptions to this requirement are recognized. *Id.* 5/103-2.1(e). "The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." *Id.* 5/103-2.1(f).

[290] ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2007) (requiring law enforcement agencies to adopt written policies regarding "[d]igital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases"). The Maine Department of Public Safety, through its Criminal Justice Academy Board of Trustees, adopted policies in 2006 that require law enforcement officers to electronically record the custodial interrogation of persons suspected of serious crimes if conducted in a place of detention. Exceptions apply when such recording is not feasible. *See* DEP'T PUB. SAFETY, ME. CRIMINAL JUSTICE ACAD., MINIMUM STANDARDS 26–28 (2008), *available at* http://www.maine.gov/dps/mcja/links/documents/MandatoryMinimumStandardsasof1-22-2010.doc.

[291] MD. CODE ANN., CRIM. PROC. § 2-402 (LexisNexis 2008) ("It is the public policy of the State that: (1) a law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible; and (2) a law enforcement unit that does not regularly utilize one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audio recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible.").

[292] MO. REV. STAT. § 590.700 (Supp. 2009). The Missouri statute requires the recording,

Nebraska,[294] New Mexico,[295] North Carolina,[296] Oregon,[297] Texas,[298]

"when feasible," of custodial interrogations of suspects of designated serious crimes, subject to specified exceptions, and requires law enforcement agencies to adopt written policies governing such recordings, and authorizes the withholding of state funds in the event of noncompliance. § 590.700.2.

> Nothing in this section[, however] shall be construed as a ground to exclude evidence, and a violation of this section shall not have impact other than [the possible loss of state funds.] Compliance or noncompliance with this section shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.

§ 590.700.6. *See* Innocence Project, Missouri: State Laws Requiring Recorded Interrogation, http://www.innocenceproject.org/fix/state3.php?state=MO (last visited Apr. 25, 2010) (providing link to HB 62 and indicating that the bill was enacted).

[293] MONT. REV. STAT. §§ 46-4-406–46-4-411 (2009) (requiring electronic recording of custodial interrogations in a place of detention of suspects, including youths, in felony cases, subject to specified exceptions). *See* Innocence Project, Montana: State Laws Requiring Recorded Interrogation, http://www.innocenceproject.org/fix/state3.php?state=MT (providing link to HB 534 and indicating that the bill was enacted) (last visited Apr. 25, 2010).

[294] NEB. REV. STAT. §§ 29-4501–29-4508 (2008) (requiring the electronic recording of custodial interrogations conducted in places of detention in cases involving specified serious felonies, subject to specified exceptions). "Except as otherwise provided . . . if a law enforcement officer fails to comply with [the recording requirement], a court shall instruct the jury that they may draw an adverse inference from the law enforcement officer's failure to comply . . . ." § 29-4504. "If a law enforcement officer fails to comply with [the recording requirement], such failure shall not bar the use of any evidence derived from such statement if the court determines that the evidence is otherwise admissible." § 29-4506.

[295] N.M. STAT. ANN. § 29-1-16 (Supp. 2009) (requiring electronic recording of custodial interrogations in cases involving suspected felonies unless "good cause" is shown and subject to specified exceptions). "This section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding." § 29-1-16(I).

[296] N.C. GEN. STAT. § 15A-211 (2007) (requiring electronic recording of entire custodial interrogation conducted in a place of detention of suspects in criminal homicide cases).

> If the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement. The State may establish through clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety.

§ 15A-211(e). "Failure to comply with" the electronic recording requirements "shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation" and "shall be admissible in support of claims that the defendant's statement was involuntary or is unreliable . . . ." § 15A-211(f). "When evidence of compliance or noncompliance with the requirements of this section has been presented a trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable." § 15A-211(f)(3).

[297] OR. REV. STAT. § 133.400 (2009) (requiring electronic recording of custodial interrogation conducted in a law enforcement facility in aggravated murder cases and other serious felonies, subject to specified exceptions).

> If the state offers an unrecorded statement made under [the required circumstances] . . . and the state is unable to demonstrate, by a preponderance of the evidence that an exception [provided in the statute] applies, upon the request of the defendant, the court shall instruct the jury regarding the legal requirement described in [the statute] and the superior reliability of electronic recordings when compared with testimony about what

and Wisconsin.[299] Some state courts have stopped short of mandating that police interrogation of criminal suspects be electronically recorded, but have authorized cautionary jury instructions when law enforcement authorities fail to make such recordings without explanation,[300] or have encouraged the electronic recording of interrogations.[301]

Numerous police departments throughout the country, including several within New York, also voluntarily audio-record or video-record custodial interrogations.[302] Concerns that suspects may be

was said and done. (b) The court may not exclude the defendant's statement or dismiss criminal charges as a result of a violation of this section.

§ 133.400(3). *See* Innocence Project, Oregon: State Laws Requiring Recorded Interrogation, http://www.innocenceproject.org/fix/state3.php?state=OR (last visited Apr. 25, 2010) (providing link to the Oregon bill).

[298] TEX. CODE CRIM. PROC. ANN. art. 38.22(3) (Vernon 2005) (providing that no oral or sign language statement resulting from a custodial interrogation is admissible against the accused unless an electronic recording is made of the statement, subject to several specified exceptions, including that the requirement "shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed."); *see also* art. 38.22(3)(e).

[299] WIS. STAT. § 968.073 (2007) (audio or audio-visual recording of custodial interrogation of felony suspects required, subject to exceptions enumerated in other statutory sections); § 972.115(2)(a) ("If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant . . . and unless the state asserts and the court finds [an enumerated exception] or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case . . . .").

[300] *See* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004) ("[W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.")

[301] *See* State v. Jones, 49 P.3d 273, 279 (Ariz. 2002); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006); *see generally* Oliver, *supra* note 283, at 272–74.

[302] *See* State v. Combest, 828 N.E.2d 583, 589 n.5 (N.Y. 2005) ("We note that an increasing number of jurisdictions are now mandating that police questioning of arrestees be recorded, and that a resolution calling for all law enforcement agencies to videotape in their entirety the custodial interrogations of crime suspects has recently been adopted by the New York State and American Bar Associations. . . . As of summer 2004, law enforcement agencies in at least 238 cities and counties, including Los Angeles, San Francisco, San Diego and Houston,

less willing to confess if they know they are being recorded,[303] as well as reservations based on costs and logistic difficulties,[304] typically dissipate as law enforcement agencies gain experience with electronically recording interrogations and come to appreciate the corresponding benefits. One advantage of having an interrogation session recorded is that the officers can concentrate on questioning the suspect unburdened by having to take detailed notes.[305] As time passes, they are able to review recorded interviews for potential inconsistencies and information that might not have been deemed significant, or even noticed, when a statement was first given.[306] Having a contemporaneous record of an interrogation reduces and helps to resolve disputes about alleged improprieties.[307] A recording further allows judges and juries to

regularly record custodial interviews of suspects in felony or other serious investigations . . . ." (citations omitted)); Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005) [hereinafter Sullivan, *Everybody*] ("We now know of more than 300 police and sheriff's departments in forty-three states—plus all departments in Alaska and Minnesota—that record full custodial interviews in various kinds of felony investigations . . . ."); THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004) [hereinafter SULLIVAN, EXPERIENCES], *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C748%5CCWC_article_with%20Index.final.pdf (collecting data from police departments that electronically record interrogations); Oliver, *supra* note 283, at 276–77 (noting that many localities and police departments voluntarily make electronic recordings of custodial interrogations); TASK FORCE FINAL REPORT, *supra* note 13, at 109–10 ("[Twenty-six] of the 62 counties in the state have voluntarily adopted some form of recording."). Four counties—Broome, Greene, Schenectady, and Westchester—are participating in a state-funded pilot program involving the electronic recording of police interrogations. *Id.* at 110.

[303] Sullivan, *Everybody*, *supra* note 302, at 1129 ("In most instances, the ability to obtain confessions and admissions is not affected by recording. Most states permit police to record covertly. But if a suspect realizes a recording is to be made and refuses to cooperate if recorded, the officers simply make a record of the suspect's refusal, and proceed in the 'old-fashioned' manner with handwritten notes."); *see also* SULLIVAN, EXPERIENCES, *supra* note 302, at 19–22.

[304] Sullivan, *Everybody*, *supra* note 302, at 1130 ("[V]ery few officers mentioned cost as a concern. They said that front-end expenses (e.g., equipment set up, training) were more than offset by saving officers' time in court, reducing motions to suppress, increasing the incidence of guilty pleas, saving defense costs in civil suits based on police coercion and perjury, and avoiding civil judgments based on wrongful convictions traced to false or coerced confessions."); SULLIVAN, EXPERIENCES, *supra* note 302, at 23–24.

[305] Sullivan, *Everybody*, *supra* note 302, at 1129 ("Without the need to make detailed notes, officers are better able to concentrate on suspects' demeanors and statements. They no longer have to attempt to recall details about the interviews days and weeks later when recollections have faded."); SULLIVAN, EXPERIENCES, *supra* note 302, at 10–12).

[306] Sullivan, *Everybody*, *supra* note 302, at 1129 ("Later review of recordings affords officers the ability to retrieve leads and inconsistent statements overlooked during the interviews.").

[307] *Id.* ("Voluntary admissions and confessions are indisputable. Defense motions to suppress based on alleged coercion and abuse drop off dramatically, and the few that are filed are easily resolved by the recording."); SULLIVAN, EXPERIENCES, *supra* note 302, at 8 ("Experience shows that recordings dramatically reduce the number of defense motions to

have access to the best evidence of the accused's statements and the surrounding circumstances; such evidence is apt to greatly enhance the probative value of reliable confessions, just as it helps to expose involuntary or unreliable ones.[308]

The Task Force recommendation, importantly, specifies that custodial interrogations should be electronically recorded *"in their entirety."*[309] Especially with respect to the threat of false confessions, it is imperative that a record be made of the police-suspect interactions that precede an incriminating admission. Otherwise, there will be no documentation of techniques of persuasion that may have been employed earlier nor a record of what details of a statement originated with the suspect and what may have been suggested or supplied by the interrogators.[310] Indeed, presenting only an audio-recorded or video-recorded confession to a crime, isolated from its antecedents, can exacerbate rather than help minimize the dangers associated with false confessions by enhancing the perceived credibility of the damning admission.[311]

In recommending that an electronic recording be made of the

suppress statements and confessions. The record is there for defense lawyers to see and evaluate: if the officers conduct themselves properly during the questioning, there is no basis to challenge their conduct or exclude the defendants' responses from evidence. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations.").

[308] SULLIVAN, EXPERIENCES, *supra* note 302, at 6 ("An electronic record made in the station interview room is law enforcement's version of instant replay.").

[309] TASK FORCE FINAL REPORT, *supra* note 13, at 13, 108 (emphasis added) (capitalization not observed).

[310] *See* Leo et al., *supra* note 270, at 511 ("Because police are prone to suggest and incorporate corroborating evidence into a suspect's confession, whether inadvertently or intentionally, many false confessions masquerade as true confessions. Without an electronic recording of the entire interrogation process, courts are left to decide a swearing contest between a suspect and police officer about who provided the details of the crime that only the true perpetrator could have known."); Kassin et al., *supra* note 270, at 25 ("Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, *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*.").

[311] *See* State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) (declining to require electronic recording of police custodial interrogation of criminal suspects, but ruling that audio-recording of defendant's confession was inadmissible when recording did not capture entirety of interrogation); Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 644 (2004) (citing the case of Corethian Bell as illustrating "[t]he flaws of taping only the final confession"; Bell had made a videotaped confession to murdering and sexually assaulting his mother; DNA analysis later implicated another man and resulted in Bell's exoneration).

custodial interrogation "of all felony-level crime suspects,"[312] the Task Force report went beyond some jurisdictions, which only enforce this policy in criminal homicide cases or especially serious felonies.[313] The report advanced the "aspirational goal" that the custodial interrogations "in all criminal investigations" should be electronically recorded.[314] It did not specifically address other important issues, including what consequences should attach to violations of the recommended policy (e.g., exclusion of a statement from evidence or administration of a cautionary instruction[315]), and circumstances that would excuse the failure to electronically record a custodial interrogation.[316] Nor did it propose specific safeguards for populations known to be particularly vulnerable to persuasive interrogation techniques and likely to make false confessions—juveniles and mentally impaired suspects[317]—or (unlike its

[312] TASK FORCE FINAL REPORT, *supra* note 13, at 13, 108 (capitalization not observed).

[313] *See supra* notes 288–92, 294, 296–97 (citing legislatively imposed limitations concerning the types of suspected crimes to which electronic recording requirements apply in Washington D.C., Illinois, Maine, Maryland, Missouri, Nebraska, North Carolina, and Oregon).

[314] TASK FORCE FINAL REPORT, *supra* note 13, at 111.

[315] The report discussed different approaches with respect to remedies, although it did not endorse one. *Id.* at 109–10.

[316] Remedies for noncompliance and exceptions to requirements for electronically recording custodial interrogations are typically, although not always, enumerated in rules in force in other jurisdictions. *See generally supra* notes 285–99 and accompanying text. For model legislation proposed by the Innocence Project to govern the electronic recording of custodial interrogations, see INNOCENCE PROJECT, MODEL LEGISLATION, 2010 STATE LEGISLATIVE SESSIONS: AN ACT DIRECTING THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS (2009), *available at* http://www.innocenceproject.org/docs/2010/Recording_of_Custodial_Interrogations_Model_Bill_2010.pdf; *see also* A. 6528, 231st Leg., Reg. Sess., at 14 (N.Y. 2009) (proposed legislation creating a rebuttable presumption of inadmissibility of a felony defendant's statement made during a custodial interrogation that was not electronically recorded).

[317] The report did suggest that "[s]pecial training . . . should be developed to educate police on the particular vulnerability of juveniles, the mentally disabled and the mentally ill." TASK FORCE FINAL REPORT, *supra* note 13, at 111. It noted that "in the cases studied by the Task Force, . . . eight out of the ten false confessions came from suspects who were juveniles and/or had mental disabilities or mental illnesses." *Id.* at 107. *See* Drizin & Leo, *supra* note 269, at 963–74 (discussing peculiar vulnerabilities of children, juveniles, mentally retarded, and mentally ill suspects with respect to police interrogation tactics and making false confessions, and the overrepresentation of such individuals in known false confession cases); Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 251 (2008) (discussing youth as a substantial risk factor regarding false confessions, owing to young people's relatively great compliance and suggestibility); MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR. (2003); Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089 (2001) (discussing false confession, capital conviction, and death sentence of Earl Washington, Jr., a mentally retarded individual, for committing a rape and murder in Virginia; DNA analysis excluded Washington as the source of the semen in the victim who had been raped and murdered and other evidence demonstrated the unreliability of his

recommendations regarding eyewitness identification[318]) speak to the admissibility of expert testimony concerning false confessions.[319]

E. Jailhouse Informants

As the Task Force report recognizes, "[e]very witness to a crime is in effect an informant whose motives may be pure or suspect."[320] The concern in the context of wrongful convictions, of course, is not with disinterested witnesses who supply information, but with those whose motives may be suspect: informants "who receive benefits from the government for their testimony."[321] Although the Task Force's recommendations are collected under the rubric of "jailhouse informants," the specific proposals and their underlying principles appear to be applicable as well to interested government informants who are not incarcerated.[322]

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confession; Washington eventually was pardoned by Governor James Gilmore with respect to the capital charges); TRUE STORIES OF FALSE CONFESSIONS *supra* note 78, at 221–48 (discussing false confession cases of mentally disabled defendants Ozem Goldwire, Barry Laughman, and Earl Washington, Jr.). Some have advocated that vulnerable suspect populations, including juveniles and the cognitively or psychologically impaired, receive special protection while being interrogated by the police—e.g., the required presence of counsel—and have echoed the Task Force's recommendation that the police receive special training regarding how vulnerable populations are especially susceptible to being manipulated and confessing falsely. *See* Kassin et al., *supra* note 270, at 20–21.

[318] *See infra* note 425 and accompanying text.

[319] Some New York courts have excluded or upheld the exclusion of expert testimony regarding false confessions. *See, e.g.*, People v. Green, 683 N.Y.S.2d 597 (App. Div. 1998); People v. Rosario, 862 N.Y.S.2d 719 (Sup. Ct. 2008). Others have admitted such testimony. *See, e.g.*, People v. Kogut, 806 N.Y.S.2d 366 (Sup. Ct. 2005). Courts in some other jurisdictions allow expert testimony on issues relating to false confessions, although many others do not, being of the opinion that the subject matter is not beyond the ken of average jurors, that the testimony bears too closely on issues of credibility, that the underlying science is not sufficiently reliable or is not generally accepted, or for related reasons. *See generally* Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191 (2005) (presenting information about rules adopted in federal and state courts regarding admissibility of expert testimony on false confession issues). Researchers have suggested that, in fact, most jurors are not likely to appreciate why an innocent person might falsely confess to having committed a crime or the factors that typically contribute to false confessions. Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1 (2008); Leo & Liu, *supra* note 270. Several commentators have advocated that expert testimony pertaining to false confession issues should be admissible in appropriate cases. *See, e.g.*, Chojnacki, Cicchini & White, *supra*; Berger, *supra* note 82, at 1075–76; Kassin, *supra* note 317, at 252.

[320] TASK FORCE FINAL REPORT, *supra* note 13, at 114.

[321] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 67; *see also* TASK FORCE FINAL REPORT, *supra* note 13, at 114.

[322] *Cf.* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 67 ("Witnesses who receive benefits from the government for their testimony include jailhouse informants, immunized witnesses, and accomplices. This Resolution is directed at the first of these. A jailhouse informant is 'someone who is purporting to testify about admissions made to him or

The proposals generally encompass the testimony of a person, "not an accomplice, who seeks to provide information in order to obtain a favorable disposition of pending charges or some other benefit."[323] Although informants frequently are in jail or prison, and thus are commonly (if not disparagingly) referred to as "jailhouse snitches," not all individuals who testify with the expectation of receiving governmental benefits are in custody.[324] The Task Force's decision to focus on informants who are "not an accomplice" apparently is rooted in a provision of New York law that already prohibits the uncorroborated testimony of an accomplice—defined as an individual who "may reasonably be considered to have participated in" the charged offense[325]—to support a criminal conviction.[326] This restriction, in turn, is in keeping with the longstanding legal tradition of viewing "criminal accomplice testimony with a 'suspicious eye.'"[327]

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her by the accused while incarcerated in a penal institution contemporaneously.'" (citation omitted)).

[323] TASK FORCE FINAL REPORT, *supra* note 13, at 114.

[324] *See* REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN: RECOMMENDATIONS 20 (1998), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf [hereinafter KAUFMAN COMMISSION REPORT] (While discussing policies governing "in-custody informers," this Canadian commission, working in conjunction with the Ontario Ministry of the Attorney General, observed that "similar categories of witnesses . . . raise similar, but not identical concerns. For example, a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits.").

[325] N.Y. CRIM. PROC. LAW § 60.22(2) (McKinney 2003) ("An 'accomplice' means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in: (a) The offense charged; or (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.").

[326] § 60.22(1) ("A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.").

[327] Peter Preiser, *Practice Commentaries*, *in* N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2003). *See* People v. Cona, 399 N.E.2d 1167, 1170 (N.Y. 1979) ("The accomplice corroboration rule is premised upon a legislative determination that the testimony of individuals who may themselves be criminally liable is inherently suspect. This is deemed to be true because such individuals may be subject to pressures impelling them to color testimony in order to protect themselves by belittling the actual extent of their involvement in the criminal enterprise at the expense of others. In a similar vein, a person who agrees to turn State's evidence may believe it to be in his best interests to embellish the truth when testifying about the defendants in order to secure the approval of officials who have the authority to prosecute the accomplice should they not be satisfied with his cooperation. In short, the accomplice corroboration rule entails a legislative recognition that, as a result of these various pressures, both real and imagined, to which an informant may be subject, such testimony is somewhat suspect. At the same time, such testimony is often a necessary predicate for successful criminal prosecutions. Whatever the wisdom of the solution the Legislature has developed in order to resolve this dilemma, the rule is plain and must be properly applied by the courts.");

The untruthful testimony of informants, including jailhouse snitches, contributed to thirty-six of the 225 (16%) wrongful convictions exposed nationwide through DNA analysis through mid-year 2009.[328] The proportion is considerably higher in wrongful convictions for murder,[329] and "snitches [are] the leading cause of wrongful convictions in U.S. capital cases,"[330] providing testimony in 45.9% of cases in which death-sentenced defendants eventually were exonerated through 2004.[331] Jailhouse informants provided key testimony in two cases that rocked the Canadian justice system, involving the wrongful murder convictions of Guy Paul Morin in Ontario,[332] and Thomas Sophonow in Manitoba.[333] Inquiries conducted in each case included detailed recommendations regarding the future use and presentation of such testimony.[334]

The Task Force report identified four New York wrongful convictions that were supported in part by informant testimony.[335]

J. Arthur L. Alarcon, *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOY. L.A. L. REV. 953 (1992).

[328] Innocence Project, The Causes of Wrongful Convictions, http://www.innocenceproject.org/understand/ (last visited Apr. 25, 2010); Innocence Project, Informants/Snitches, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Apr. 25, 2010); *see also* Garrett, *supra* note 50, at 86–88 (discussing false testimony of informants in wrongful conviction cases involving DNA exonerations).

[329] *See* Gross et al., *supra* note 16, at 544 (reporting that 56% of murder exonerations in their sample (114/205) involved convictions supported by perjury). Not all of the perjury was committed by informants, but by far the largest category involved "a civilian witness who did not claim to be directly involved in the crime . . . usually a jailhouse snitch or another witness who stood to gain from the false testimony." *Id.* at 543–44. The authors theorize that the "high stakes [in murder cases] . . . can also produce false evidence. The real perpetrator is at far greater risk, and far more motivated to frame an innocent person to deflect attention . . . . Co-defendants, accomplices, jail house snitches and other police informants, can all hope for substantial rewards if they provide critical evidence in a murder case—even false evidence—especially if the police are desperate for leads." *Id.* at 542–43.

[330] NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (2004), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf ("For the most part, the incentivised witnesses were jailhouse informants promised leniency in their own cases or killers with incentives to cast suspicion away from themselves.").

[331] *Id.*

[332] *See* KAUFMAN COMMISSION REPORT, *supra* note 324. *See generally* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 342–44 (2002); Steven Skurka, *Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759 (2002).

[333] *See* Manitoba Justice, The Inquiry Regarding Thomas Sophonow, http://www.gov.mb.ca/justice/publications/sophonow/index.html (last visited Apr. 25, 2010) [hereinafter *The Sophonow Inquiry*]. *See generally* Richard J. Wolson & Aaron M. London, *The Structure, Operation, and Impact of Wrongful Conviction Inquiries: The Sophonow Inquiry as an Example of the Canadian Experience*, 52 DRAKE L. REV. 677 (2004).

[334] *See* KAUFMAN COMMISSION REPORT, *supra* note 324, at 11–23; *The Sophonow Inquiry*, *supra* note 333.

[335] TASK FORCE FINAL REPORT, *supra* note 13, at 7.

It recognized that "there is a delicate balance between law enforcement's legitimate need for informant testimony, particularly in murder cases where there may be no eyewitnesses to the crime, and safeguarding the rights of those who stand to be convicted on the basis of informant testimony."[336] The report offered six recommendations in an attempt to plumb that balance, proposals that encompass multiple actors and span several stages of criminal cases, including investigation, prosecution, and trial.

With respect to criminal investigations, the Task Force recommended that "[a] videotape recording, when possible, should be made of any informant's statement given to any law enforcement agent or prosecutor."[337] This proposal, in keeping with analogous recommendations for video-recording eyewitness identifications and electronically recording custodial interrogations, is designed to provide judges and juries with as much direct evidence as possible for assessing the reliability of informants and their testimony.[338] The reports issued in the wake of the wrongful convictions in the Canadian cases of Guy Paul Morin and Thomas Sophonow, noted above, both recommended that police and prosecutors' interviews with in-custody informants should be videotaped in their entirety.[339] Various commentators have advocated for electronically recording jailhouse informants' statements, subject to appropriate safeguards against disclosure when revealing the informant's identity would jeopardize the informant's safety or compromise the integrity of

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[336] *Id.* at 115.

[337] *Id.* at 14 (capitalization not observed).

[338] TASK FORCE FINAL REPORT, *supra* note 13, at 119 ("[Videotaping] would be an additional safeguard added to the reliability of the testimony and would be useful to the judge in the 'gatekeeper' hearing in advance of determining the admissibility of the informant testimony in both the pre-trial or pre-plea disclosure which we are recommending.").

[339] The inquiry following Morin's exoneration resulted in a recommendation that "all contacts between police officers and in-custody informers must, absent exceptional circumstances, be videotaped or, where that is not feasible, audiotaped. This policy should also provide that officers receive statements from such informers under oath, where reasonably practicable." KAUFMAN COMMISSION REPORT, *supra* note 324, at 21. In addition, "The Ministry of the Attorney General should amend its Crown Policy Manual to encourage all contacts between prosecutors and in-custody informers to be videotaped or, where that is not feasible, audiotaped." *Id.* at 23. The recommendations included several additional limitations on the use of the testimony of in-custody informants. The inquiry concerning Sophonow's wrongful conviction recommended that, "[a]s a general rule, jailhouse informants should be prohibited from testifying." In the "rare case" where their testimony is allowed, several additional limitations would apply, including that the police interview with the informant "should be videotaped or audiotaped from beginning to end. At the outset, the jailhouse informant should be advised of the consequences of untruthful statements and false testimony." *The Sophonow Inquiry*, *supra* note 333.

other investigations.[340]

Recognizing that recording informants' interviews with police and prosecutors would not alone represent an adequate safeguard, the Task Force proposed additional pre-trial reliability checks on informants' testimony. It urged prosecutors to invoke the rigorous screening criteria set forth in the Morin commission report and later adopted by the American Bar Association Criminal Justice Sections' Ad Hoc Innocence Committee,[341] in considering whether to credit and offer an informant's testimony. As the ABA Committee noted, "[t]he first (and perhaps the most important) check on unreliable testimony by informants is the prosecutor."[342] Since information bearing on an informant's credibility may not be made available through discovery prior to the completion of plea negotiations, the Task Force further recommended that prosecutors make timely disclosure (i.e., before a defendant is required to make a decision about entering a guilty plea) of such information to reduce the risk that innocent defendants will plead guilty in the face of apparently damning informant testimony.[343] In cases where

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[340] *See* Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 560–61, 560 n.193 (2009); Joy, *supra* note 160, at 639–40; Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257 (2005); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 861–62 (2002).

[341] TASK FORCE FINAL REPORT, *supra* note 13, at 119–20 ("The Task Force recommends as a 'best practice' that the prosecution itself check on the reliability of the informant's testimony and that a 'checklist' of factors that prosecutors should review be provided to them. These would include assessing: (i) the extent to which the statement is corroborated; (ii) the specificity of the alleged statement; (iii) the extent to which the statement contains details of evidence known only to the perpetrator; (iv) the extent to which the statement contains details which could reasonably be assessed by the in-custody informer, other than through inculpatory statements by the accused; (v) the informer's general character; (vi) any request the informer has made for benefits or special treatment; (vii) whether the informer has, in the past, given reliable information to the authorities; (viii) whether the informer has previously provided information which was shown to be unreliable; (ix) whether the informer has previously testified in any court proceeding; (x) whether the informer made some written or other record of the words spoken by the accused; (xi) circumstances under which the informer's report of the alleged statement was taken; (xii) the manner in which the report of the statement was taken by the police (written, interview, investigation of circumstances, etc.); (xiii) any other known evidence that may attest to or diminish the credibility of the informer; and (xiv) any relevant information contained in any available registry of informers."). *See* KAUFMAN COMMISSION REPORT, *supra* note 324, at 13–15; AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 67–69. Employing such criteria, "a committee of senior prosecutors which vets the use of jailhouse informants by Ontario prosecutors" reviewed the proposed use of jailhouse informants in nine murder cases and determined that the informants should not be used in all but two of the cases. Skurka, *supra* note 332, at 764.

[342] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 67 (footnote omitted).

[343] *See, e.g.*, Joy, *supra* note 160, at 625–26 ("At the plea stage, efforts to eliminate false snitch testimony and to guarantee the defendant access to exculpatory evidence are necessary

an informant's identity might require protection, in camera review by judges would be completed prior to its disclosure.[344] The report stopped short of calling for open-file discovery or related measures designed to ensure that material facts regarding informants' credibility are known to the defense.[345]

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in order for there to be confidence in the accuracy of guilty pleas. This is especially true because some innocent defendants plead guilty in order to secure a certain shorter sentence or avoid the possibility of a death sentence. . . . The issue of false guilty pleas is accentuated by the extremely high number of criminal cases resolved by guilty pleas.").

[344] The Task Force report is somewhat ambiguous about whether these recommendations are intended to be limited to the context of guilty pleas. The formal recommendation is not so limited: "When the court finds the need to protect the identity of an informant compelling, it should conduct an in camera review of the information relating to the informant's credibility, and provide the defense with all such information as may be provided without disclosing the informant's identity." TASK FORCE FINAL REPORT, *supra* not 13, at 14 (capitalization not observed). The later commentary, however, corresponds to "Plea Bargains" (*id.* at 118) and addresses the

> inherent tension between the ability of a defendant to receive a reduced sentence by taking a plea early on in the development of a case, and the need to prevent wrongful convictions based upon false informant testimony that would not normally be revealed until later in pre-trial discovery or during trial. . . .
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> . . . Even an innocent individual may decide to plead guilty when faced with a plea offer that substantially diminishes or even eliminates the prison term he or she would serve if convicted. A defense lawyer, who is told by a prosecutor that there is a witness who will testify that the defendant admitted committing the crime, may be skeptical of the client's protestation of innocence and strongly recommend that the client plead to a substantially reduced charge.
>
> Given these concerns, it seems desirable that a defendant, who is offered a plea bargain, be given all the relevant information about any informant in the case before being required to accept the plea. We recognize . . . that there may be legitimate reasons why a prosecutor would be willing to offer a defendant a favorable plea disposition in order to avoid the disclosure of the informant's role in the case . . . . [W]e recommend that the judge conduct an in camera review of the information relating to the informant's credibility . . . and [when it is necessary] provide defendant with all such information as may be provided without disclosing the informant's identity. . . . [W]hen taking a plea in any case in which the prosecution would be required to provide the defendant with information about an informant, the judge should be required to find that the defendant is aware that if he were to proceed to trial he would have the right to obtain information about any informant whom the prosecution would call at the trial, and to cross-examine any such informant and that the defendant is knowingly waiving that right in order to obtain the agreed upon disposition.

Id. at 118–19.

[345] Some commentators have advocated open file discovery to help promote fuller disclosure about informants and other potentially exculpatory evidence. *See* Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do About It*, 50 WM. & MARY L. REV. 1063, 1080–81, 1080 n.102 (2008); Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 604 (2007); Joy, *supra* note 160, at 641–42; Rosen, *Reflections*, *supra* note 155, at 273. The Oklahoma Court of Criminal Appeals has ruled that specific disclosure requirements apply concerning jailhouse informants:

> [W]e adopt a procedure to ensure complete disclosure so that counsel will be prepared to cross-examine an informant-witness. The following procedures shall apply to all

Other recommendations would condition the admissibility of informant testimony on two requirements: that it survive judicial scrutiny at a pre-trial reliability hearing,[346] and that, as with accomplice testimony,[347] it be corroborated by other evidence.[348] The proposal for a hearing and judicial determination that the informant's proposed testimony bears sufficient indicia of reliability to be admissible has been analogized to trial courts' "gatekeeping" function with respect to allowing expert testimony before a jury.[349] Illinois has enacted legislation requiring such pre-trial determinations in capital cases. Under this policy, jailhouse informants are prohibited from testifying unless the prosecution demonstrates "by a preponderance of the evidence that the informant's testimony is reliable."[350] Remarking on the frequency with which "we are confronted with cases in which a jailbird comes forward to testify that the accused admitted to him that he not only committed the crime that he is accused of but also several other assorted crimes," the Nevada Supreme Court has similarly required a judicial determination that an informant's proposed testimony is

jailhouse informant testimony not specifically excluded by the United States Constitution.

> At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant . . . ; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.

Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000). *See generally* Dodds, Note, *supra*, at 1098–99; Giannelli, *supra*, at 605. For capital cases, Illinois has legislated similar discovery requirements. *See* 725 ILL. COMP. STAT. 5/115-21(c)(1)–(7) (2008).

[346] TASK FORCE FINAL REPORT, *supra* note 13, at 14 ("The court should conduct a pre-trial reliability hearing with respect to the testimony of informants.") (capitalization not observed).

[347] *See supra* notes 325–27 and accompanying text.

[348] TASK FORCE FINAL REPORT, *supra* note 13, at 14 ("Any informant's testimony should be corroborated (the corroboration requirement for the use of accomplice testimony should be extended to non-accomplice informants).") (capitalization not observed).

[349] *Id.* at 117; George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 63 (2000) ("Because of the inherent unreliability of compensated witness testimony, the court should play a gatekeeping function with regard to compensated cooperating witnesses in criminal cases parallel to its *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)] gatekeeping role with regard to scientific expert testimony." (footnote omitted)); Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 112–15 (2006).

[350] 725 ILL. COMP. STAT. 5/115-21(d) (2008) (requiring courts to consider the factors itemized in 725 ILL. COMP. STAT. 5/115-21(c) "as well as any other factors relating to reliability").

reliable before it is admissible at a capital penalty hearing.[351]

The proposed corroboration requirement, which is modeled after the recommendation of the American Bar Association Criminal Justice Section,[352] does not go as far as the policy endorsed by the Morin commission. The Canadian commission affirmed that a prosecution should never go forward "based only upon the unconfirmed evidence of an in-custody informer."[353] It emphasized that "confirmation . . . is not the same as corroboration. . . . Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated."[354]

In cases in which informant testimony has survived prosecutorial and judicial screening and is admitted into evidence, the Task Force report recommends, as a final reliability check, that special cautionary instructions be delivered to the jury.[355] Although such instructions are administered in some jurisdictions,[356] they are not

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[351] D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1992) ("[W]e now hold that testimony in a penalty hearing relating to supposed admissions by the convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission."). *See* Joy, *supra* note 160, at 646–47.

[352] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 63 ("[N]o prosecution should occur based solely upon uncorroborated jailhouse informant testimony."). *See* Giannelli, *supra* note 345, at 610.

[353] KAUFMAN COMMISSION REPORT, *supra* note 324, at 12.

[354] *Id.* ("One in-custody informer does not provide confirmation for another.").

[355] TASK FORCE FINAL REPORT, *supra* note 13, at 14 ("The jury should be instructed to consider several factors indicating the extent to which the testimony is credible, including: (i) any explicit or implied inducements that the informant may have received or will receive; (ii) the prior criminal history of the informant; (iii) evidence that he or she is a 'career informant' who has testified in other criminal cases; and (iv) any other factors that might tend to render the witnesses' [sic] testimony unreliable." (capitalization not observed)). *See id.* at 116–17 ("In addition to telling the jury that the informant's testimony must be corroborated, at the request of a party, the judge will instruct the jury in any case in which an informant testifies that the testimony should be viewed with caution and close scrutiny, and that the jury should consider the extent to which that testimony may have been influenced by the expectation of any benefit or remuneration or promised favorable treatment in connection with a pending criminal prosecution.").

[356] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 76–77; Giannelli, *supra* note 345, at 610–11. *See, e.g.*, CAL. PENAL CODE § 1127a(b) (West 2004) ("In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows: 'The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such 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 such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.").

typically required.[357] The Supreme Court[358] as well as commentators[359] have nevertheless endorsed such instructions as another safeguard against the dangers inherent in informant testimony. The Canadian commissions reviewing the wrongful convictions of Guy Paul Morin and Thomas Sophonow urged in no uncertain terms that jurors should be administered cautionary instructions about the possible unreliability of informant testimony.[360] The Morin commission additionally recommended, as

[357] Garrett, *supra* note 50, at 124–25. The ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process considered but did not formally propose the use of cautionary jury instructions with respect to informant testimony. AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 70–71, 76–77.

[358] *See* Banks v. Dretke, 540 U.S. 668 (2004) (ordering a new capital sentencing hearing for a defendant in a case in which the prosecution had made incomplete disclosure concerning a paid informant who offered testimony). Justice Ginsburg's opinion for the Court observed, in part, that:

> The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. This Court has long recognized the "serious questions of credibility" informers pose. . . . . We have therefore allowed defendants "broad latitude to probe [informants'] credibility by cross examination" and have counseled submission of the credibility issue to the jury "with careful instructions."

Id. at 701–02 (citations omitted).

[359] *See* Arthur L. Burnett, Sr., *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 SW. U. L. REV. 1079, 1088–89 (2008) ("[A] special cautionary instruction should be given whenever there is testimony by any informant, whether corroborated or not and regardless of other factors in the case. . . . [A]t a minimum the instruction in clear comprehensible language [should] convey to the jury its duty to weigh the testimony of an informant with greater care than the testimony of an ordinary witness, and that in making such a determination they should consider whether the informant has received any benefit for his or her testimony, such as immunity from prosecution, reduction in criminal charges, release on lenient bail conditions, promises of leniency in sentencing, monetary compensation, or anything else of value and any other evidence relevant to the informant's credibility such as his or her prior criminal conviction record. . . . [T]he trial judge [should have] the discretion to give the jury cautionary instruction both at the time the informant actually testifies and at the time of giving the final jury instructions at the end of the case. Such an approach alerts the jury to pay close attention to the informant's testimony at the time it is actually being given." (footnote omitted)); Martin, *supra* note 62, at 862–63; Giannelli, *supra* note 345, at 610–12. Recommendations of this nature are not new. *See, e.g.*, Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1122 (1951) ("The testimony of the informant and the temporary spy or stool pigeon clearly should be scrutinized with care. If a defendant requests a cautionary instruction in regard to their testimony he should get it and a refusal to so charge, where there is no corroboration, should be reversible error.").

[360] KAUFMAN COMMISSION REPORT, *supra* note 324, at 23 ("Where the evidence of an in-custody informer is tendered by the prosecution and its reliability is in issue, trial judges should consider cautioning the jury in terms stronger than those often contained in a [standard] warning, and to do so immediately before or after the evidence is tendered by the prosecution, as well as during the charge to the jury."); *The Sophonow Inquiry*, *supra* note 333 ("In those rare cases where the testimony of a jailhouse informant is to be put forward, the jury should still be instructed in the clearest of terms as to the dangers of accepting this evidence. . . . There must be a very strong direction to the jury as to the unreliability of this type of evidence. In that direction, there should be a reference to the ease with which jailhouse informants can, on occasion, obtain access to information which would appear that

have some commentators, that the instructions should be administered at the time the informant testifies, and not only during the judge's final charge.[361]

F. Defense Practices

In February 2004 Judith Kaye, then-chief judge of the New York Court of Appeals, appointed a "Commission on the Future of Indigent Defense Services" ("Kaye Commission"). Its charge was to "examine the effectiveness of indigent criminal defense services across the state, and consider alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities."[362] After being presented with the commission's interim report in December 2005, Chief Judge Kaye confessed

> that she had not seen the word "crisis" so often, or so uniformly, echoed by all of the sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color.[363]

The Kaye Commission issued its final report in June 2006. That report was no less sobering.

The Kaye Commission's recommendations addressed several structural impediments to the delivery of effective indigent defense representation, encompassing the fragmented, county-based provision and financing of services, inadequate resources, the absence of meaningful oversight and enforcement of standards of representation, and the ongoing need for the collection and analysis of data to monitor attorney performance. It advocated creating a

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only the accused could know. Because of the weight jurors attach to the confessions and statements allegedly made to these unreliable witnesses, the failure to give the warning should result in a mistrial.").

[361] KAUFMAN COMMISSION REPORT, *supra* note 324, at 23; *see also supra* note 360; Giannelli, *supra* note 345, at 611 n.93 ("Research indicates that the timing of the instruction is important—*i.e.*, instructions close in time to the admission of the evidence are more effective." (citations omitted)).

[362] COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2006) [hereinafter KAYE COMMISSION], *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

[363] *Id.* at 4.

statewide defender office, with regional and local defender offices, to be funded through state (rather than county) revenues.[364] Proposed legislation, the Public Defense Act of 2009,[365] incorporated many of the Kaye Commission's recommendations, including the formation of a statewide public defense commission and the appointment of a state defender in place of the balkanized, county-administered system of providing indigent criminal defense services. The envisioned public defense commission would be charged with "promulgating a strategic plan for the administration and funding of public defense services throughout the State; and commencing April 1, 2012, undertaking the oversight and administration of all public defense services in New York."[366] Although the bill garnered considerable support, inspiring optimism among reform-minded backers, it fell as a casualty to the gridlock that overtook lawmakers amidst disputes over leadership in the state senate toward the end of the 2009 legislative session.[367]

A functional adversarial system of justice presumes the participation of opposing advocates of comparable capabilities. A criminal defense bar that is either ineffective or overmatched by the talent or resources available to the prosecution undermines this essential premise.[368] One obvious consequence of an adversarial process skewed in such a manner is an enhanced risk of wrongful convictions. Evidence suggests that there is reason to be concerned about these issues in New York. The Spangenberg Group, which has researched the provision of legal services nationwide—including completing comprehensive reviews of indigent defense systems in forty states—was enlisted by the Kaye Commission to engage in such a study in New York. Its final report, consistent with the

[364] KAYE COMMISSION, *supra* note 362, at 27–33.

[365] S. 6002, 231st Leg., Reg. Sess. (N.Y. 2009); A. 8793, 232d Leg., Reg. Sess. (N.Y. 2009).

[366] Sponsor's Memorandum in Support of S. 6002, 231st Leg., Reg. Sess. (N.Y. 2009).

[367] Joe Walker, *Gideon's Crossing*, THE CAPITOL, June 22, 2009, http://www.nycapitolnews.com/news/126/ARTICLE/1524/2009-06-22.html.

[368] *See* United States v. Cronic, 466 U.S. 648, 655–56 (1984) ("'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" (citations omitted)); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (citations omitted)).

forewarnings that already had been sounded, concluded that "New York's indigent defense system is in a serious state of crisis."[369]

> At the conclusion of our comprehensive review of New York's indigent defense system, we found that it fails to comply with each of the American Bar Association's Ten Principles of a Public Defense Delivery Service. . . . New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them. New York also lacks statewide enforceable standards to govern the performance of attorneys providing indigent defense representation, and in some areas, substandard practice has become the acceptable norm. Institutional providers lack both standards and sufficient resources to allow them to control workload and ensure quality representation. Providers are burdened with heavy caseloads, inadequate staff and salaries, poor technology and other support resources, and numerous court dockets to cover. In order to handle their numerous dockets and difficult workload, staff attorneys are often assigned to a court docket rather than to a client, causing a lack of continuity in representation that is difficult for public defender and legal aid clients.
>
> Throughout the state, indigent defendants suffer from a serious lack of contact from their attorneys. Too often, the only attorney-client contact takes place in court.[370]

"[A] grievous lack of adequate funding by the state"[371] was at the heart of many of the reported problems associated with the delivery of indigent defense services.

The Spangenberg Group's findings and conclusions bear eerie resemblance to Edwin Borchard's observations in 1932 in *Convicting the Innocent*:

> In the majority of these cases [of wrongful conviction] the accused were poor persons, and in many of the cases their defense was for that reason inadequate. The practice of

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[369] THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES—FINAL REPORT, at ii (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

[370] *Id.*

[371] KAYE COMMISSION, *supra* note 362, at 15; *id.* at 2 ("The seriousness of its principal conclusions—that funding for indigent defense services is totally inadequate and that the system, as presently constituted, is dysfunctional—cannot be minimized.").

> assigning attorneys or the inability to engage competent attorneys makes it often impossible for the accused to establish his innocence. The establishment of a Public Defender paid by the county or state would do much to remedy this source of injustice.
>
> The Committee on Public Defenders of the New York State Bar Association reported in 1930 as follows:
>
> > In the opinion of your committee, the present system of assigned counsel to represent accused persons is a total failure, it is not fair to the accused person, it creates a public disrespect for the administration of the criminal law, it does not promote justice, and it places an innocent prisoner at a distinct disadvantage in obtaining that fair trial which is guaranteed to all by our laws.[372]

The contemporary New York State Bar Association Task Force on Wrongful Convictions clearly could not hope to address all aspects of criminal defense representation in its report. It did, however, endorse the recommendations made by the Kaye Commission, "specifically including the recommendation of an Independent Public Defense Commission to oversee the quality and delivery of public defense services."[373] It additionally endorsed[374] and advocated publicizing and widely distributing[375] the detailed recommendations made by the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process,[376] and the National Legal Aid and Defender Association Performance Guideline for Criminal Defense

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[372] BORCHARD, *supra* note 24, at 374–75 (citation and footnote omitted).

[373] TASK FORCE FINAL REPORT, *supra* note 13, at 15. Interestingly, this recommendation had not been included in the Task Force's preliminary report. *See* TASK FORCE PRELIMINARY REPORT, *supra* note 11, at 15. Testimony offered at the Task Force's public hearings noted the absence of an endorsement of the proposal for the establishment of an Independent Public Defense Commission. The Task Force was urged to make such a recommendation. *See Feb. 24 Hearing*, *supra* note 12, at 39–59 (testimony of Jonathan Gradess, Exec. Director, New York State Defenders Association). It was pointed out during this testimony that the House of Delegates of the New York State Bar already had gone on record as supporting the creation of an Independent Public Defense Commission. *Id.* at 40, 50.

[374] TASK FORCE FINAL REPORT, *supra* note 13, at 14 ("The Task Force generally endorses the specific recommendations made by the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee to ensure the integrity of the criminal process and Guideline 4.1 of the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation." (capitalization not observed)). *See id.* at 123–26.

[375] *Id.* at 15, 126 ("Those standards should be widely publicized by the New York State Bar Association and distributed extensively to the criminal defense bar through the heads of all defender agencies, the administrators of all assigned counsel plans, and by malpractice insurance providers to those attorneys whom they insure." (capitalization not observed)).

[376] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 79–91.

Representation addressing counsel's duty of investigation (Guideline 4.1), including the obligation "to conduct an independent investigation regardless of the accused's admission or statements to the lawyer of facts constituting guilt."[377]

Subsumed within the American Bar Association's Criminal Justice Section's Ad Hoc Innocence Committee recommendations were proposals designed to ensure meaningful implementation and enforcement of expected standards of representation, including maintaining reasonable workloads and providing adequate compensation and resources for appointed defense counsel, and requiring effective advocacy in cases resolved through guilty pleas.[378] The Task Force offered additional, related recommendations: that administrators of assigned counsel plans review more carefully the qualifications of attorneys seeking to represent indigents,[379] are given sufficient resources to monitor attorney performance, and, if possible, develop a structure offering appointed counsel supervision and legal consultation;[380] that bar associations attempt to enlist experienced defense attorneys willing to offer advice to other defense counsel as the need arises;[381] that

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[377] PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 4.1(A) (Nat'l Legal Aid & Defender Ass'n 1995), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#fourone.

[378] AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 79–91. *See generally Feb. 24 Hearing*, *supra* note 12, at 52–53 ("We have a study in this county done of an upstate jurisdiction in which the case load, when you add up what is done in city court and you add up what is done in town and village court, the lawyers are handling more than 2265 cases a year. That means, if they did all they could and cared as much as they could, they would have 59 minutes for each of the clients they represent in a year. . . . People slip through those cracks, not as a matter of accident. They slip through them as a matter of routine. They are unfound innocent people, unfound wrongly convicted people.") (testimony of Jonathan Gradess, Exec. Director, New York State Defenders Association). With respect to the issue of guilty pleas, *see id.* at 42–43 ("[W]hen you have high case loads, you do not investigate. . . . When you're handling a thousand or more cases as a public defender in a jurisdiction where the plea rates in some cases are as high as 97 percent, what that means is you are not spending the time in cases to reveal the problems."); *see also* Allison D. Redlich & Asil Ali Ozdogru, Alford *Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467 (2009); F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B.Y.U. J. PUB. L. 189 (2002).

[379] TASK FORCE FINAL REPORT, *supra* note 13, at 15, 126 ("The administrators of assigned counsel plans must scrutinize more carefully the qualifications of attorneys seeking appointment under the plan to represent indigent defendants." (capitalization not observed)).

[380] *Id.* ("The administrators of assigned counsel plans should be provided with adequate resources to be allocated for staff to enable those plans to increase their ability to monitor the performance of attorneys assigned under the plan, and, if possible, to develop within the plan a structure which offers supervision and legal consultation to plan attorneys." (capitalization not observed)).

[381] *Id.* ("Bar associations should solicit experienced members of the criminal defense bar to make themselves available on a designated telephone hotline or in a specific office to fellow attorneys who seek advice and counsel with regard to their representation of a criminal

attorneys engaging in criminal defense representation be required to complete relevant Continuing Legal Education ("CLE") credits annually;[382] and that additional resources be made available to resource centers serving the defense bar.[383]

The quality of advocacy provided to an individual accused of a crime is critical because it has direct implications for virtually every other factor bearing on the risk of wrongful convictions, at every stage of the proceedings: from investigation, to plea negotiations or trial, to post-conviction review. Defense counsel not only can be indispensable in helping to protect against miscarriages of justice but, ironically, also can facilitate, or even actively contribute to wrongful convictions.[384] Consequently, one cannot overstate the importance of sustaining a system of defense representation that enforces high standards and allocates necessary resources efficiently.[385] The Task Force report identifies fourteen cases, among the fifty-three reviewed, in which the inadequate investigation, preparation, or conduct of the trial by the defense counsel contributed to wrongful convictions.[386]

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defendant, and bar associations should give formal recognition in some fashion to attorneys who provide such mentoring." (capitalization not observed)).

[382] *Id.* at 15, 127 ("The rules governing CLE credits should be amended to provide that attorneys who undertake the defense of criminal cases must certify that in each calendar year that they have taken a specified number of CLE hours devoted to subjects pertaining to the representation of criminal defendants." (capitalization not observed)).

[383] *Id.* ("Organizations which currently operate a resource center for public defenders and assigned counsel should be given additional resources that would enable them to increase their ability to provide guidance and counsel to any attorney, assigned or retained, who seeks assistance." (capitalization not observed)).

[384] *See* Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 370–74 (2006) (discussing the wrongful conviction of David Wong, a New York case included among the fifty-three reviewed by the New York State Bar Association Task Force on Wrongful Convictions, and arguing that ineffective assistance of counsel was a factor contributing to the wrongful conviction and that counsel's deficient performance compounded other factors (e.g., less than comprehensive investigation of Wong's innocence claim and failure to uncover problem with translator who did not speak dialect with which defendant was most familiar)).

[385] *See* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 740–67 (2006); Lawrence C. Marshall, *Gideon's Paradox*, 73 FORDHAM L. REV. 955 (2004); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

[386] TASK FORCE FINAL REPORT, *supra* note 13, at 121 (naming sixteen cases). The Final Report twice refers to sixteen cases involving inadequate defense representation, but once states that nineteen wrongful convictions were caused in part by defense practices. *Id.* at 7. Because counsel's performance might logically relate to the presence or absence of so many other factors contributing to wrongful convictions, it would be particularly difficult to measure the frequency with which inadequate representation is a cause of miscarriages of justice under any circumstances. In any event, because it is impossible to know how representative the sample of 53 cases studied might be of the universe of wrongful convictions the precise number of cases identified by the Task Force as involving inadequate performance

IV. BEYOND THE TASK FORCE RECOMMENDATIONS: GETTING TO THE ROOT OF WRONGFUL CONVICTIONS

With the endorsement of the Task Force's ambitious recommendations by the New York State Bar Association's House of Delegates, and the ensuing creation of a blue-ribbon task force to address related issues by New York Court of Appeals Chief Judge Jonathan Lippman, leaders of the state's legal community have helped highlight the significance of wrongful convictions and the importance of identifying and remedying the factors contributing to them. If enacted, the Task Force's recommendations almost certainly will spare some innocent New Yorkers the injustice of a criminal conviction and incarceration. Which of the proposed reforms will be implemented—and the number of miscarriages of justice that will occur prior to implementation—remains to be seen. It is challenging to unsettle long established operating procedures and introduce change under the best of circumstances; questions are certain to arise about potential costs attending the recommendations—not only investments of time, money, and personnel, but also the risk that adopting various measures will hinder law enforcement and the courts in bringing the guilty to justice.[387]

Even if the entirety of the Task Force's recommendations were to become binding legal or administrative directives, eradicating the true "root causes"[388] of wrongful convictions would remain elusive. The immediate causes of erroneous convictions—eyewitness

by defense counsel does not permit generalization. *See supra* note 384 and accompanying text.

[387] *See, e.g.*, Stashenko, *supra* note 114, at 1 ("Mark Dwyer, appeals chief for Manhattan District Attorney Robert M. Morgenthau and a member of the task force, said prosecutors agreed with many of the recommendations, but have practical concerns on how some can be implemented. Prosecutors, for instance, are not opposed to the videotaping of all stationhouse interrogations of criminal suspects, he said. 'Our only issue goes toward the appropriation of funds sufficient to accomplish that purpose in a quality way,' Mr. Dwyer said in an interview yesterday. Prosecutors would have a harder time going along with recommendations that could affect current evidentiary rules and hinder their ability to introduce evidence at trial, Mr. Dwyer said. 'We all share in the commitment to take whatever steps are appropriate to reduce the instance of wrongful convictions,' Mr. Dwyer said. 'The important thing is simply not to make convictions more difficult, it is to focus on efforts that would specifically make wrongful convictions more difficult.'").

[388] TASK FORCE FINAL REPORT, *supra* note 13, at 4 ("When Bernice Leber assumed the presidency of the New York State Bar Association on June 2, 2008, she immediately recognized the need to study the root causes of wrongful convictions in New York and to promulgate any changes necessary to make certain that only the guilty are convicted."); *id.* at 6 ("[S]ix root causes were readily identified as primary factors responsible for the wrongful convictions."). *See supra* note 112 and accompanying text.

misidentifications, false confessions, overstating or misrepresenting the results of forensic analyses, and others—frequently arise from much more deeply seated attitudinal, organizational, and structural factors; they are not likely to represent the actual primary causes.[389] As with other similarly complicated issues, the essential causes of wrongful convictions are grounded in the complex antecedents "of human behavior and human error in social and organizational contexts."[390] It follows that root solutions to the problem of wrongful convictions "cannot be prescribed merely by rule."[391] The more direct and immediately attainable reforms recommended by the Task Force are certainly important, but will not alone result in the type of fundamental changes that must rely on normative, institutional, and systemic underpinnings. We sketch some additional, important steps toward achieving reforms that may help produce a more enduring brand of change below.

A. Data Collection and Analysis

Legal and policy reforms are more apt to be effective if informed by the collection and careful analysis of data pertaining to wrongful convictions. At present, even the most basic information about the incidence, correlates, and causes of miscarriages of justice in New York is lacking. These deficiencies are evidenced by the Task Force's elemental need to identify a sample of cases involving wrongful convictions and then attempt to diagnose what went wrong in them as a prelude to preparing its report. The absence of an institutionalized method for gathering and analyzing information to understand and respond to wrongful convictions—a

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[389] Leo, *supra* note 47, at 213 ("It is superficial, and to some extent simply inaccurate, to say that eyewitness misidentification or false confession or police and prosecutorial misconduct caused either individually or in combination an innocent person to be wrongfully convicted. Eyewitness misidentification, false confession, and police and prosecutorial misconduct are not actual *root* causes. By identifying them as causes, we beg the obvious, deeper causal questions: What are the causes of eyewitness misidentification? What are the causes of police-induced false confessions? What are the causes of police and prosecutorial misconduct?").

[390] *Id.*

[391] Findley & Scott, *supra* note 32, at 397; *see also* Martin, *supra* note 62, at 853 ("The wrongful conviction cases . . . illustrate[] the inadequacy of legalistic solutions alone in addressing ingrained . . . attitudes and behaviours. . . . In practice . . . legal rules offer only an illusion of protection."); Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction*, 17 CRIM. JUST. POL'Y REV. 468, 483 ("Most legal writing on innocence reforms is conceptual and descriptive and tends to equate reform with rule creation. The formal adoption of a policy by legislation, court decision, or administrative rule, however, is only the beginning of reform . . . .").

problem that not only is highly important but also is attributable to state and local governments' systems of justice—is perplexing, if not distressing. Such inattention would be unthinkable in the aftermath of other calamities susceptible of diagnosis and intervention, such as airplane crashes or the distribution of tainted foods, where investigating causes is obligatory and implementing and enforcing measures to guard against recurrences is expected.[392]

A reporting requirement thus should accompany all judicial and executive action resulting in a convicted defendant's exoneration based on actual innocence. All relevant information about the case should be transmitted to a repository comprising a statewide database of wrongful convictions.[393] Because of the considerable gap between known cases of wrongful convictions and the greater universe of miscarriages of justice,[394] such a database would necessarily represent an imperfect sample. Nevertheless, having a comprehensive collection of official exonerations would be an

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[392] *See* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 98 (2002) ("In the United States there are strict and immediate investigative measures taken when an airplane falls from the sky, a plane's fuel tank explodes on a runway, or a train derails. Serious inquiries are swiftly made by the National Transportation Safety Board (NTSB), an agency with subpoena power, great expertise, and real independence to answer the important and obvious questions: What went wrong? Was it system error or an individual's mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it from happening again? . . . The American criminal justice system, in sharp contrast, has no institutional mechanism to evaluate its equivalent of a catastrophic plane crash, the conviction of an innocent person.").

[393] *See* DWYER, NEUFELD & SCHECK, *supra* note 155, at 1260 (advocating the creation of governmental institutions to investigate wrongful convictions, coupled with a requirement for "the official collection and reporting of data on cases where newly discovered evidence of innocence is the basis for overturning a conviction"); C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 12–13 (2003) (calling for systematic data collection on cooperating informants and jailhouse snitches to support study of their testimony and associated dangers). The lack of basic descriptive information has proven frustrating in the study of the functioning of other important criminal justice policies and institutions, including state systems of capital punishment. *See, e.g.*, Deborah Fleischaker, *The ABA Death Penalty Moratorium Implementation Project: Setting the Stage for Further Research*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 69, 78–79 (Charles S. Lanier, William J. Bowers & James R. Acker eds., 2009) ("Central to assessing a state's death penalty system is the ability to collect data about that system. Yet, in state after state, the ABA could not reach conclusions about whether a state complied with many of its recommendations because no one collects and maintains much of the necessary data. Despite the fact that lives are in jeopardy and that the adequacy of state judicial systems are at stake, states routinely fail to keep comprehensive and searchable records of their death penalty systems . . . in once central location.").

[394] *See supra* text accompanying notes 72–75 (discussing how officially recognized wrongful convictions almost certainly are neither representative nor inclusive of all wrongful convictions, and also are likely to include some cases involving individuals who are not actually innocent).

important first step in identifying wrongful conviction cases and analyzing their causes. A bill to establish a state commission for the integrity of the criminal justice system, with many of these essential functions, was endorsed by the Task Force report in connection with its recommendations regarding forensic evidence.[395] The bill was introduced, but not acted upon, during the 2009 New York legislative session.[396]

The collection of information about known wrongful convictions of course is but a prelude to analysis and informed policy recommendations. Meaningful data analysis involves considerably more than cataloguing the immediate sources of error—a litany that is well known and unlikely to yield important new insights.[397] In recognition of this fact, researchers seeking to get closer to the root causes of wrongful convictions—to explain the underlying factors that make the immediate causes (such as tunnel vision, eyewitness misidentification, false confessions, acceptance of unreliable jailhouse snitch testimony, *Brady* violations, forensic error, ineffective defense representation, and the like) more or less likely to occur—have invoked more sophisticated methods of study. They have compared known cases of wrongful conviction to matched samples of cases that are presumably error-free, searching for the idiosyncratic and systemic variables that tend to distinguish, and help explain, the different outcomes.[398]

Such an undertaking involves more than traditional legal analysis. It requires the participation and skills of social scientists, working in collaboration with legal practitioners and policymakers.[399] Several state and national innocence projects have

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[395] TASK FORCE FINAL REPORT, *supra* note 13, at 102–03. *See supra* text accompanying notes 253–62.

[396] *See* A. 3795, 232d Leg., Reg. Sess. (N.Y. 2009) ("Whenever a person who has been convicted of a crime or adjudicated a youthful offender is subsequently determined to be innocent of such crime or offense and exonerated, the Commission shall conduct an investigation, hold hearings on and make findings of fact regarding the wrongful conviction in order to determine the cause or causes of the wrongful conviction. Upon the completion of such process, the Commission, within sixty days, shall issue a preliminary written report of its findings of fact and conclusions, and any recommendations to prevent wrongful convictions from occurring under similar circumstances in the future. . . ."); *see also* A. 6528, 232d Leg., Reg. Sess. (N.Y. 2009).

[397] *See supra* notes 102–11 and accompanying text (discussing the fact that it is essentially tautological to state that rape wrongful convictions involve eyewitness misidentifications).

[398] *See* Gross & O'Brien, *supra* note 5; Garrett, *supra* note 50; Risinger, *supra* note 5; *see also* Leo, *supra* note 47, at 216–17.

[399] Leo, *supra* note 47, at 202 ("[H]owever, the criminological and sociolegal study of wrongful conviction is arguably still in its infancy. . . . [S]pecific strategies [are needed] for developing a more empirically diverse, methodologically sophisticated, and theoretically oriented criminology of wrongful conviction."); Zalman, *supra* note 51; Zalman, *supra* note

performed admirably in investigating and seeking to correct injustices in individual cases.[400] A research analogue would be an important advance to help root out the sources of injustice systemically. A research-oriented complement to the traditional quest of identifying and correcting error in individual cases could be located, like many innocence projects, in an academic institution and involve criminal justice scholars and other social scientists working in concert with law schools and the legal community. Alternatively, this research function could be entrusted to a governmental agency or standing commission.

Wrongful convictions are the products of human fallibilities and systemic imperfections, some of which can be identified and guarded against or changed. They "represent an opportunity to advance the cause of justice since these cases provide an opportunity to critically examine some well-entrenched criminal justice processes and practices."[401] Without institutionalized mechanisms for first collecting, and then engaging in creative and sophisticated analysis of data bearing on the correlates and causes of wrongful convictions,[402] those advances are significantly less likely to be

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[400] The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. . . .

. . . .

. . . Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Apr. 25, 2010). Since the Innocence Project's founding at the Cardozo School of Law, more than forty university-based innocence projects have been spawned. They typically involve law school and/or journalism students and are devoted to investigating factual innocence claims in several states as well as in Canada, Australia, New Zealand, and England. Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43, 45 (2009). *See* The Innocence Network, Innocence Network Member Organizations, http://www.innocencenetwork.org/members.html (last visited Apr. 25, 2010). *See generally* Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231 (2006); Jan Stiglitz, Justin Brooks & Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002).

[401] Martin, *supra* note 62, at 847; *see also* Barry C. Scheck, *Foreword* to AM. BAR ASSOCIATION CRIMINAL JUSTICE SECTION, *supra* note 111, at xiii ("By treating each DNA exoneration as a learning moment, we have identified systemic causes of wrongful conviction that lie at the foundation of our nation's accepted criminal justice practices.").

[402] *See generally* INNOCENCE PROJECT, MODEL LEGISLATION, 2010 STATE LEGISLATIVE SESSIONS: AN ACT CREATING A (STATE) CRIMINAL JUSTICE REFORM COMMISSION (2009), *available at* http://www.innocenceproject.org/docs/2010/CJR_Commission_Model_Bill_2010.pd

realized.

B. An Innocence Commission

A related, and in some respects more ambitious, initiative is the creation of a statewide innocence commission charged with investigating individual claims of wrongful convictions and making recommendations regarding their disposition. The Criminal Cases Review Commission ("CCRC") has served this function in England for more than a decade; the CCRC was created in 1995 and commenced operation in 1997. The mandate of this fourteen-member commission, which by design functions largely independently of the Home Secretary,[403] "is to review the applications of convicted defendants who claim they have been wrongfully convicted and to refer cases to the court of appeals for review where there is a 'real possibility that the conviction . . . would not be upheld were the reference to be made.'"[404] Review normally is undertaken only in cases in which appeals have been exhausted and "strong fresh evidence" that was unavailable at the time of conviction has materialized.[405]

After an initial screening for eligibility, applications are reviewed by a lone commission member working with staff. If applications are not deemed to present a "real possibility" that a conviction will be upset, they will advance no further. On being notified of such a denial at the preliminary assessment stage, however, the applicant is entitled to respond by requesting further internal review. The CCRC has the authority to appoint outside investigators, including experts, if it needs additional information about a case. It does not have the power to invalidate convictions, but can refer cases for

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f (model legislation for the creation of a state criminal justice reform commission, which would be charged with reviewing all state cases involving the conviction and exoneration of innocent persons, identifying the causes of the wrongful convictions, relying on research and experts to help devise remedies, and issuing regular reports and policy recommendations); *see also* Scheck & Neufeld, *supra* note 392, at 103–05.

[403] Clive Walker & Carole McCartney, *Criminal Justice and Miscarriages of Justice in England and Wales*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 183, 194–95 (C. Ronald Huff & Martin Killias eds., 2008).

[404] Griffin, *supra* note 119, at 1276. The "real possibility" standard is not defined legislatively. The standard has been judicially construed as meaning "'more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty' that the conviction will be found 'unsafe.'" *Id.* at 1277 (quoting R. v. CCRC ex p. Pearson, 3 All E.R. 498 (1999)); *see also* Jerome M. Maiatico, Note, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1365 (2007); Walker & McCartney, *supra* note 403, at 202–03.

[405] Griffin, *supra* note 119, at 1281–82; Maiatico, Note, *supra* note 404, at 1364–65.

review in the Court of Appeal of England and Wales if a panel of three commission members concurs. After referral, the work of the CCRC is complete, and the Court of Appeal determines whether the new evidence renders the verdict unsafe.[406]

This process has not proven to be unduly burdensome, and has helped correct a number of miscarriages of justice, which has in turn bolstered public confidence in the British justice system. Between 1997 and 2005, the CCRC received 7,602 applications requesting review of criminal convictions or sentences, a total that includes a considerable backlog of cases that predated the commission's creation. It had completed review of 6,842 cases through March 2005. The commission saw the need to appoint an outside investigator in just thirty-seven (0.5%) of the cases it considered and referred 271 (4.0%) cases to appeals courts for review. Among the referrals adjudicated, the appeals courts quashed convictions in 135 cases and upheld convictions in another sixty-three cases.[407] The CCRC helps compensate for a system of appellate review that is considerably more limited in England than in the United States.[408] But beyond that, it evidences that an independent body that is available to investigate and help correct miscarriages of justice is both feasible and potentially quite useful.[409]

In 2006, North Carolina became the first state in this country to adopt a similar initiative, modeling its "Innocence Inquiry

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[406] Griffin, *supra* note 119, at 1278–80; Maiatico, Note, *supra* note 404, at 1365–67; Walker & McCartney, *supra* note 403, at 194–97.

[407] Maiatico, Note, *supra* note 404, at 1367–68; *see also* Walker & McCartney, *supra* note 403, at 197–98.

[408] Griffin, *supra* note 119, at 1267–69. In England, there is no right to appeal a conviction, and courts will grant leave to appeal only if there is a reasonable prospect of relief. *Id.* If leave to appeal is granted, however, the prosecution has the burden of defending the conviction, rather than the defendant having to demonstrate error, and the standard for granting relief—a belief that the verdict is "unsafe"—is considerably less demanding than in the United States. *Id.*

[409] Some observers are not as sanguine about the contributions of the CCRC. *See* Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1296 (2005).

> [T]he CCRC role has been skillfully crafted to assure that few contentious cases are ever submitted for review to the Court of Appeal (typically 4%), and that few, if any recommendations for changes to criminal due process are put forth by Commissioners. . . . [T]he CCRC acts purposively as a state strategic selection mechanism to enhance systemic stability.

Id.; *see also* Robert Carl Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122, 123 (2004); Roberts & Weathered, *supra* note 400, at 63 ("Since the CCRC's inception it has been besieged by problems of funding, delays and backlogs.").

Commission" on the CCRC.[410] The foundation for such a commission was laid by former North Carolina Supreme Court Chief Justice I. Beverly Lake, Jr., who convened a broadly representative group of stakeholders in 2002 to consider a comprehensive agenda and offer recommendations.[411] This task force, the North Carolina Actual Innocence Commission, submitted a set of proposals to the state legislature in 2005 which, following modification,[412] were enacted and signed into law the following year.[413]

The statute created the North Carolina Innocence Inquiry Commission ("NCIIC") and authorized this body to investigate claims of factual innocence filed by individuals convicted in the state's criminal courts and ascertain whether sufficient evidence of innocence exists to refer claims for judicial review.[414] Cases determined to merit review are submitted, with supporting

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[410] Maiatico, Note, *supra* note 404, at 1346.

[411] Mumma, *supra* note 51, at 648–49. The thirty-one-member task force was chaired by the chief justice and included the state attorney general, several representatives of law enforcement, judges, legislators, prosecutors, defense attorneys, victim advocates, law professors and private attorneys. *Id.* at 650–51. The group's mission statement listed seven specific objectives and identified as its

> primary objective . . . to make recommendations which reduce or eliminate the possibility of the wrongful conviction of an innocent person. Through its work, the commission hopes to raise awareness of the issues surrounding wrongful convictions. It is anticipated that accomplishment of this objective will increase the conviction of the guilty, positively impact public trust and confidence in the State's justice system, and decrease the overall cost of the prosecution, trial and appeal processes.

Id. at 650; *see also* North Carolina Actual Innocence Commission, Mission Statement, Objectives, and Procedures, http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (last visited Apr. 25, 2010).

[412] *See* Maiatico, Note, *supra* note 404, at 1358 n.89 (describing changes made in the commission's proposal before legislators voted approval).

[413] N.C. GEN. STAT. §§ 15A-1460 to -1475 (2008).

[414] The Commission shall have the following duties and powers:

> (1) To establish the criteria and screening process to be used to determine which cases shall be accepted for review.
>
> (2) To conduct inquiries into claims of factual innocence, with priority given to those cases in which the convicted person is currently incarcerated solely for the crime for which he or she claims factual innocence.
>
> (3) To coordinate the investigation of cases accepted for review.
>
> (4) To maintain records for all case investigations.
>
> (5) To prepare written reports outlining Commission investigations and recommendations to the trial court at the completion of each inquiry.
>
> (6) To apply for and accept any funds that may become available for the Commission's work from government grants, private gifts, donations, or bequests from any source.

§ 15A-1466. The commission has discretion to determine whether it will conduct a formal inquiry regarding a claim of factual innocence. § 15A-1467(a). It has the power to subpoena witnesses and evidence and to place witnesses under oath to receive testimony. § 15A-1467(d)–(e). The full eight-member commission hears evidence and may conduct public hearings at its discretion. § 15A-1468(a).

materials, to the clerk of the superior court in the district of conviction, with a copy provided to the district attorney.[415] The chief justice of the North Carolina Supreme Court thereupon appoints a special three-judge panel[416] to preside over an evidentiary hearing at which the district attorney represents the State and the defendant is entitled to representation by counsel.[417] If, at the conclusion of the hearing, the three-judge panel unanimously determines that "the convicted person has proved by clear and convincing evidence that [he or she] is innocent of the charges . . . the panel shall enter dismissal of all or any of the charges."[418] The panel's decision is not subject to further review.[419] The NCIIC is additionally charged with filing annual reports with the legislature and the state judicial council regarding its activities, including any recommendations for legislative change related to its duties.[420]

Skeptics,[421] agnostics,[422] and supporters[423] exist regarding the

[415] Five affirmative votes are required to refer a case for judicial review if the defendant was convicted following a plea of not guilty. § 15A-1468(c). All eight members of the innocence inquiry commission must concur before a referral is made in cases in which defendants pled guilty. *Id.* The commission must also file a report documenting its conclusion that a case does not merit referral for judicial review. *Id.*

[416] The appointed panel is "not to include any trial judge that has had substantial previous involvement in the case." § 15A-1469(a).

[417] § 15A-1469(c)–(d).

[418] § 15A-1469(h).

[419] § 15A-1470(a).

[420] § 15A-1475 ("Recommendations concerning the district attorneys or the State Bureau of Investigation shall only be made after consultations with the North Carolina Conference of District Attorneys and the Attorney General.").

[421] *E.g.*, Schehr, *supra* note 409, at 1300 ("On the surface, innocence commissions appear to provide state-based relief to the problem of wrongful conviction by wielding a big stick. Independent investigatory bodies with the power to conduct thorough case reviews and make recommendations for changes to due process appear to offer a way around implacable institutional obstacles. That said, as a state strategic selection mechanism, innocence commissions present movement actors with a very real dilemma. Once an institution has been created, it is very difficult to dissolve it, especially if that institution has been created to serve the meliorating purpose of appeasing institutional critics. As such, states considering creation of an innocence commission must proceed very carefully. There are at least three reasons for concern with respect to creation of innocence commissions: 1) their presence may serve to diffuse public disaffection, thereby stifling movements for change; 2) for those considering creation of an innocence commission to conduct post-mortem investigations of cases that may lead to exonerations, they create an additional institutional decision-making body to filter cases through, thereby delaying and/or potentially quashing remedies in wrongful conviction cases; and 3) they may be established in such a way that the composition of the Commission is geared toward maintaining the status quo institutional arrangement.").

[422] *E.g.*, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at 2. The American Bar Association Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process "considered two systematic issues. The first concerns the post-conviction adjudication of claims of innocence in individual cases. The second involves the creation of governmental entities to identify the causes of wrongful convictions and to

wisdom and likely efficacy of governmental innocence commissions that are designed to investigate individual claims of wrongful conviction. On balance, the arguments favoring such bodies seem strongest. As innocence commissions serve as a safety net to help correct injustices in individual cases, they also can help stimulate systemic reforms by revealing recurring themes and patterns associated with wrongful convictions and by recommending and endorsing corresponding policy changes. Moreover, they signify a commitment to the importance of responding to wrongful convictions and their underlying causes.[424] New York should consider establishing an innocence commission modeled generally after the CCRC and North Carolina initiatives.

C. Education, Training, and Beyond

Virtually every issue addressed in the Task Force report is accompanied by a call for enhanced education and training.[425] The training envisioned for prosecutors, defense counsel, and judges concerning the forensic sciences—including training on DNA—would be traditionally academic in design. This is not necessarily an easy task; many attorneys have admitted to shortcomings and

propose reforms to prevent such convictions in the future." *Id.* "After much consideration, [the Committee] decided that no particular type of entity or procedure should be recommended to address innocence issues [in individual cases]. Instead, the Resolution favors an approach that lends itself to a systemic review of policies and practices that affect erroneous convictions . . . ." *Id.* at 4.

[423] *E.g.*, Findley, *supra* note 332, at 345–46 (citing several commentators who support creating innocence commissions or related mechanisms for reviewing claims of wrongful conviction); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000).

[424] *See* Maiatico, Note, *supra* note 404, at 1375–76; Findley, *supra* note 332, at 347–48; Horan, *supra* note 423, at 188–89.

[425] With respect to *Government Practices*, the Task Force recommended: "Law enforcement officials should be trained and supervised in the application of *Brady* and truthful evidence rules," and "[p]olice officers should be trained to investigate alternate theories for a case at least until they are reasonably satisfied that those theories are without merit." TASK FORCE FINAL REPORT, *supra* note 13, at 9–10 (capitalization not observed). Concerning identification procedures: "Police prosecutors, defense attorneys and judges should be trained in the issues related to eyewitness identifications and should be made aware of the factors that can cause erroneous eyewitness identifications and the procedures that can minimize them." *Id.* at 12 (capitalization not observed). Regarding forensic evidence: "Provide forensic science training for prosecutors, defense lawyers and judges." *Id.* at 13 (capitalization not observed). For false confessions: "Specific training about false confessions should be given to police, prosecutors, judges and defense attorneys." *Id.* at 13 (capitalization not observed). Finally, for defense practices: "The rules governing CLE credits should be amended to provide that attorneys who undertake the defense of criminal cases must certify that in each calendar year they have taken a specified number of CLE hours devoted to subjects pertaining to the representation of criminal defendants." *Id.* at 15 (capitalization not observed).

phobias regarding molecular biology, organic chemistry, and the like. By contrast, other topics—*Brady* requirements, law enforcement officers' obligation to investigate alternative case theories, factors affecting the reliability of eyewitness identifications, and circumstances capable of eliciting false confessions, for example—almost certainly demand less attention to facts and commensurately greater emphasis on inculcating and reinforcing values and attitudes to help inspire receptivity to the information and stimulate behavioral change. The different objectives involve distinct challenges and require correspondingly different approaches.

With respect to the former, more knowledge-based learning, law schools can contribute by ensuring that interdisciplinary classes involving both the natural and social sciences are included in their curricula, in general coursework, and within clinical programs and trial practice seminars.[426] In an effort to encourage interdisciplinary education addressing factors contributing to wrongful convictions, the Innocence Project video-recorded a series of lectures given by legal experts, DNA experts, experts in other types of forensic identification, and social scientists. The lectures took place at Cardozo Law School in 2001, and addressed issues relating to DNA, eyewitness identification, and false confessions, among several others. The lectures were made available to law schools and other university programs offering seminars on wrongful convictions.[427] CLE classes with similar content could be made available to—or required of—attorneys whose earlier studies did not provide grounding in the natural and social sciences, to help them stay abreast of new and emerging developments.[428]

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[426] *See generally* Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL'Y 11, 26 n.51 (2003) (identifying criminal law as a subject appropriate for interdisciplinary law school education).

[427] The senior author of this article offered a seminar in wrongful convictions making use of the Innocence Project lecture series at the University at Albany School of Criminal Justice during the spring 2001 academic semester. *See generally* Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 121 n.1 (2006); Stiglitz, Brooks & Shulman, *supra* note 400, at 422 n.57; Barry Scheck, Peter Neufeld & Jim Dwyer, *Freeing the Innocent*, CHAMPION, Mar. 24, 2000, at 18.

[428] *Cf.* TASK FORCE FINAL REPORT, *supra* note 13, at 15 (generally recommending that CLE rules be amended to require attorneys who engage in criminal defense work to complete a minimum number of credits annually in subjects pertaining to criminal defense representation); Findley & Scott, *supra* note 32, at 374 ("[P]rosecutors and judges should be educated about the causes of, and correctives for, tunnel vision. This education should begin in the juris doctorate programs in law schools and continue through the various continuing legal education opportunities afforded to prosecutors and judges by law schools, national and state judicial and prosecutorial colleges and institutes, state bar associations, and so forth."

Because of the critical role the police play in the criminal justice process through their investigation and arrest decisions, it is especially important that they be included in educational and training programs focusing on issues germane to wrongful convictions. Their job is not an easy one. The police are taxed with sorting out ambiguous, conflicting, and sometimes falsified accounts of dangerous and violent crimes. While they investigate, the police must be sensitive to the harms suffered by victims. At the same time, police officers are constantly under the watchful scrutiny of both their superiors and the public, and are often expected to restore order and security through the perpetrator's rapid apprehension. The metaphor of the hunter and the hunted is apt; the analogy was memorialized in *Miranda v. Arizona* by Chief Justice Warren's quotation of a leading police interrogation manual counseling that "the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective [i.e., the suspect's confession] may be attained.'"[429] Under such circumstances, more than simple knowledge of the rules may be necessary to constrain behavior; rather, a commitment to them, fostered by a deeper appreciation of their justifications and fortified by institutional norms, supervision, and incentives, may be required.

Recognizing this fact—that training about police procedures bearing on matters such as the conduct of investigations, disclosing exculpatory evidence, and regulating identification and interrogation practices requires more than just imparting information about rules in order to be meaningful—is an important first step. Considerably more daunting is the challenge of crafting an affirmative strategy so that training effectively transcends cognitive understanding. Most law enforcement officers will not dispute that wrongful convictions occur and that they entail the doubly distressing result of innocent parties being punished and guilty ones remaining free. The challenge is to make these premises less abstract and more directly linked to how the police carry out their jobs. While no magic formula will invariably produce such results, some techniques hold more promise than others.

Employing case studies in which problems such as prematurely

(footnotes omitted)).

[429] Miranda v. Arizona, 384 U.S. 436, 455 (1966) (quoting FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

focusing on a suspect resulted in a flawed investigation and led to the arrest and prosecution of an innocent person, and then asking officers to analyze where and how errors were made, can be a useful strategy.[430] Engaged learning also can be facilitated through structured role-playing exercises and obligatory critiques of others' or one's own case investigations. Assignments requiring pointed counter-argumentation and enlisting colleagues to play the role of devil's advocate about case theories and evidentiary matters can be effective. Adherence to procedural checklists designed to avoid pitfalls commonly associated with investigations and highlighting *Brady* obligations can help reinforce proper protocols. Prosecutors, defense attorneys, and judges might also profit by participating in such exercises with respect to issues involving their respective roles.[431]

Training initiatives should be one component of a larger institutional framework that involves meaningful supervision of the targeted audience—e.g., police officers or assistant district attorneys—and incentives and sanctions for compliance and noncompliance with prescribed procedures.[432] The organizational culture must reflect a true commitment to the values underlying the rules. Unfortunately, it is easier to articulate this aspiration than to achieve it, although sound managerial skills employing essential principles of organizational psychology will facilitate the task.[433]

> [T]he most important factor . . . is one that cannot be prescribed merely by rule: creating and sustaining an ethical organizational and professional culture. An ethical organizational or professional culture is more than . . . just the sum of doctrine, rules, policies, procedures, and training programs. Such a culture . . . is one that treats wrongful arrest, prosecution, and conviction with the utmost seriousness. It seeks to minimize [the factors that contribute to] wrongful convictions not because it must, but because it is right."[434]

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[430] We thank Dr. Julius Wachtel for sharing his insights with us based on his experience with offering instruction on the correlates and causes of wrongful convictions. Others have endorsed using case studies in a similar fashion. *See* Findley & Scott, *supra* note 32, at 374.

[431] Findley & Scott, *supra* note 32, at 373–77; Burke, *supra* note 130; Medwed, *supra* note 55, at 170–71, 175–77.

[432] Findley & Scott, *supra* note 32, at 380–89; Medwed, *supra* note 55, at 171–75; Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third-Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1224–25 (2005).

[433] *See* Leo, *supra* note 47, at 213–16; Zalman, *supra* note 391, at 478–79.

[434] Findley & Scott, *supra* note 32, at 397; *see also* Norm Maleng, *Foreword* to AM. BAR

D. The Justice System

In addition to its many specific procedural recommendations, the Task Force report advocated broad, structural changes in aspects of the justice system with its calls to expand the jurisdiction of the New York State Commission on Forensic Science,[435] to create an independent commission to review wrongful conviction cases and propose remedial reforms,[436] and endorsing the establishment of an indigent public defense commission.[437] Other systemic issues have implications for wrongful convictions,[438] even if perhaps beyond the Task Force's purview. We briefly identify a few such issues below.

1. The State DNA Databank

The Task Force report did not address the scope of the state DNA database,[439] although this issue has direct implications for the ability of law enforcement and the courts to help discriminate between the guilty and innocent. Privacy concerns and debates about cost-effectiveness make decisions about who should be required to provide DNA samples for inclusion in the state's database especially controversial.[440] New York law presently

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ASS'N CRIMINAL JUSTICE SECTION, *supra* note 111, at ix ("The next step is to instill in every prosecutor's office, police agency, and crime laboratory an unwavering ethic to seek the truth through the most reliable methods available.").

[435] *See supra* text accompanying notes 250–53.

[436] *See supra* text accompanying notes 250–51.

[437] *See supra* text accompanying notes 362–80.

[438] *See, e.g.*, Zalman, *supra* note 51 (arguing that the adversarial system of justice is a structural factor that has certain disadvantages in comparison to inquisitorial systems of justice with respect to producing wrongful convictions); Siegel, *supra* note 432 (arguing that South Carolina prosecutors' control of criminal court dockets is a structural flaw that contributes to wrongful convictions). Commentators also have suggested that racial variables influence wrongful convictions, much as race plays a role in other facets of the administration of criminal justice. *See, e.g*, Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481 (2005); Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845 (2003); Karen F. Parker, Mari A. DeWees & Michael A. Radelet, *Race, the Death Penalty, and Wrongful Convictions*, 18 CRIM. JUST. 49 (2003); Sheri Lynn Johnson, *Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

[439] For a general description of the New York State DNA Databank, see New York State Division of Criminal Justice Services, The NYS DNA Databank and CODIS, http://criminaljustice.state.ny.us/forensic/dnabrochure.htm#B (last visited Apr. 25, 2010).

[440] *See, e.g.*, Natalie A. Bennett, *A Privacy Review of DNA Databases*, 4 J.L. & POL'Y INFO. SOC'Y 821 (2008–09); Robert Berlet, Comment, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 481 (2007); Robin Williams & Paul Johnson, *Inclusiveness, Effectiveness and Intrusiveness: Issues in the Developing Uses of DNA Profiling in Support of Criminal Investigations*, 34 J.L., MED. & ETHICS 234 (2006); D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413 (2003).

requires offenders convicted of several designated felonies and misdemeanors to provide a DNA sample.[441] New York City Mayor Michael Bloomberg has called for expanding the database to include arrestees,[442] a practice authorized under federal law[443] and in several states.[444] The Task Force could not be expected to stake out a position on all matters relevant to wrongful conviction, and perhaps it considered the present scope of the state DNA collection statute to be appropriate. The subject nevertheless merits discussion in connection with other recommendations that apply to forensic evidence.

2. Guilty Pleas

The Task Force report recommended studying the potential link between false confessions and defendants' willingness to plead guilty.[445] It also noted that the prevarications of jailhouse informants can help induce innocent defendants to plead guilty, and thus recommended the earlier disclosure of information bearing on informants' credibility.[446] The report further recommended that state compensation should not automatically be denied to innocent people who were convicted and incarcerated based on their guilty pleas.[447] It did not address what, if anything, can and should be done about deeply embedded structural issues involving guilty pleas and wrongful convictions. These issues defy easy resolution and

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[441] *See* N.Y. EXEC LAW §§ 995(7), 995-c(3) (McKinney 1996 & Supp. 2010).

[442] John D. Biancamano, Note, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 619, 619 n.2 (2009) (citing Jim Dwyer, *License, Registration and DNA, Please*, N.Y. TIMES, Jan. 19, 2008, at B1).

[443] 42 U.S.C. § 14135a(a)(1) (2006). *See* Patrick Haines, Comment, *Embracing the DNA Fingerprint Act*, 5 J. ON TELECOMM. & HIGH TECH. L. 629 (2007).

[444] National Conference of State Legislatures, State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample, http://www.ncsl.org/default.aspx?tabid=12737 (last visited Apr. 25, 2010) (indicating that fifteen states presently have laws requiring that at least some arrestees provide DNA samples). *See generally* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 201–03 (2007–08); Jacqueline K. S. Lew, Note, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 HASTINGS L.J. 199 (2005).

[445] TASK FORCE FINAL REPORT, *supra* note 13, at 14, 113.

[446] *Id.* at 14, 117–19. *See supra* text accompanying notes 343–49.

[447] TASK FORCE FINAL REPORT, *supra* note 13, at 16, 129–30 (recommending that statutory provision requiring proof that defendant's own conduct did not cause or bring about his or her conviction as a prerequisite to obtaining compensation for wrongful conviction not apply in cases involving guilty pleas resulting from attorney negligence or coerced confessions or duress). The New York Court of Appeals has granted review of a case presenting this issue. Warney v. State, __ N.E.2d__, 2010 WL 1854450 (N.Y. May 11, 2010), granting leave to appeal in Warney v. State, 894 N.Y.S.2d 274 (N.Y. A.D. 4th Dept. 2010).

may well be essentially intractable.

Defendants who plead not guilty and proceed to trial often risk conviction on significantly more serious charges than will result from a negotiated guilty plea. Indeed, the prosecution's willingness to adjust the number or magnitude of charges is often inherent in the plea-bargaining process and represents the defendant's consideration in exchange for forgoing a trial.[448] Defendants who plead not guilty also confront the related threat of incurring the judge's disfavor in the form of a more onerous sentence if they are convicted following a trial.[449] These pressures can, and in an unknown number of cases do, cause innocent people to plead guilty and suffer conviction and punishment.[450] It may be impossible to eliminate such concerns. Still, whether additional safeguards surrounding guilty pleas might be developed in anticipation of these problems, which infiltrate low-level misdemeanor cases as well as felonies, deserves specific discussion and consideration.[451]

3. State Post-Conviction: Newly Discovered Evidence

New York's provisions governing new trials based on newly

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[448] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas. . . .' To hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." (citations omitted)).

[449] *Cf.* Alabama v. Smith, 490 U.S. 794, 801 (1989). Factors that might help explain why a judge might impose a harsher sentence on a defendant following trial than on a plea of guilty include that,

> in the course of . . . [the] trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present.

Id. (citations omitted). A defendant's "acceptance of responsibility" for a criminal defense, as demonstrated by a plea of guilty, can support a sentence reduction under policies adopted in the (no longer binding) United States Sentencing Commission's Guideline. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3E1.1 (2009), *available at* http://www.ussc.gov/2009guid/GL2009.pdf; Puckett v. United States, 129 S. Ct. 1423 (2009).

[450] *See supra* notes 445–448 and accompanying text.

[451] *See generally* Givelber, *supra* note 9, at 1392–93; Redlich & Ozdogru, *supra* note 378; Eunyung Theresa Oh, Note, *Innocence After "Guilt": Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 SYRACUSE L. REV. 161, 162–71 (2004); Dianne L. Martin, *Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions*, 39 OSGOODE HALL L.J. 513, 526 (2001). For an argument that innocent individuals often benefit by being allowed to plead guilty, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

discovered evidence are relatively favorable to defendants who maintain their innocence and seek post-conviction relief. Unlike many other jurisdictions, the state has not enacted a statute of limitations to create time barriers for challenging convictions based on newly discovered evidence.[452] New York was the first state to enact special procedures authorizing prisoners to gain post-conviction access to DNA testing to contest guilt.[453] State legislation employs fairly traditional standards for granting new trials based on newly discovered evidence.[454]

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . .
>
> . . .
>
> . . . [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.[455]

The defendant must establish the statutory prerequisites by a preponderance of the evidence to prevail.[456]

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[452] Many jurisdictions require that motions for new trials based on newly discovered evidence must be raised within discrete time periods following the judgment of conviction. *See* George C. Thomas III, Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 277–81 (2003); Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 709–10 (2002); *see also* Herrera v. Collins, 506 U.S. 390, 408–11 (1993).

[453] N.Y. CRIM. PROC. LAW. § 440.30(1-a) (McKinney 2005). This provision was enacted in 1994. 1994 N.Y. Laws 737. *See* Schaffter, Note, *supra* note 452, at 709.

[454] *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 689 (2005) ("As for the legal and evidentiary standards pertaining to new trial motions and post-conviction petitions, nearly every jurisdiction requires that the defendant prove (at a minimum) that the purported new evidence could not have been discovered with due diligence at the time of trial, is neither merely cumulative nor impeachment evidence, and would probably result in a different verdict if it were received at trial . . . . [T]he defendant customarily bears the burden of proof in making these assertions . . . ." (footnotes omitted)).

[455] N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005). For a general history of the statute, see Frederic S. Berman & Brian Carroll, *Witness Recantation—How Does It Affect a Judgment of Conviction?*, 35 N.Y.L. SCH. L. REV. 593, 594–99 (1990).

[456] N.Y. CRIM. PROC. LAW § 440.30(6). *See* People v. Tucker, 834 N.Y.S.2d 590 (App. Div. 2007).

Although state rules governing motions to vacate judgment based on newly discovered evidence are generally permissive, they merit further consideration in a few particulars. For instance, motions for new trials based on newly discovered evidence can only be made by defendants challenging "a verdict of guilty after trial."[457] Defendants who pled guilty consequently are barred from relying on newly discovered evidence to vacate their convictions under this provision.[458] Such a prohibition is problematic in light of the propensity of some innocent defendants to plead guilty following false confessions or to avoid the potentially more onerous consequences of being convicted following a contested trial, as discussed above.[459]

New York law also requires that motions to vacate judgments based on newly discovered evidence must be filed in "the court in which [judgment] was entered."[460] This requirement commonly results in the application for a new trial being considered by the same judge who presided over the trial that resulted in the original conviction.[461] Such practice is justified primarily by the efficiency gained in having a judge who is already familiar with the witnesses and the evidence revisit the case, as opposed to bringing in a new judge who must learn the record of the original trial.[462] The potential drawback is that the original judge may have an interest in preserving the integrity of the trial judgment, even if entertained subconsciously: "Given the possibility of cognitive biases and political pressures impairing judicial decision-making, as well as the high stakes involved in resolving innocence claims, states should contemplate allowing defendants to file post-trial motions based on newly discovered evidence with a judge other than the one who conducted the original trial."[463]

Finally, appellate review of denials of hearings and/or motions for new trials based on newly discovered evidence is not available as a matter of right, but must be authorized by a certificate granting

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[457] N.Y. CRIM. PROC. LAW § 440.10(1)(g).

[458] *See* People v. Phillips, 817 N.Y.S.2d 373 (App. Div. 2006).

[459] *See supra* text accompanying notes 445–48; *see also* Borteck, Note, *supra* note 61, at 1463–65.

[460] N.Y. CRIM. PROC. LAW § 440.10(1).

[461] *See* Medwed, *supra* note 454, at 663–64 (describing motion for new trial based on newly discovered evidence filed on behalf of Stephen Schulz in Suffolk County before the judge who presided at Schulz's trial). *See* People v. Schulz, 829 N.E.2d 1192, 1194 n.1 (N.Y. 2005).

[462] Medwed, *supra* note 454, at 678–79.

[463] *Id.* at 706; *see id.* at 699–708.

leave to appeal.[464] If an appeal is allowed, the appellate division is not limited to reviewing trial court orders for an abuse of discretion, and may consider both the facts and law on an appeal.[465] Other than in capital cases, however, the New York Court of Appeals "has no power to review the discretionary denial of a motion to vacate judgment upon the ground of newly discovered evidence."[466] It concededly "may be impracticable to depart from the routine of allowing appeals only as a matter of permission in states where that is the norm, particularly in jurisdictions with high caseloads."[467] Nevertheless, in cases where motions for new trials involve claims of actual innocence accompanied by newly discovered evidence, striking the right balance between finality, economy, and fundamental fairness may well support allowing appeals as a matter of right.

Notably, some trial courts in New York have recognized actual innocence as a ground for post-conviction relief under the state's criminal procedure law.[468] This is so notwithstanding the fact that no appellate court in New York has expressly decided that such a ground for relief exists. In vacating Jonathan Wheeler-Whichard's convictions for murder and criminal possession of a weapon, Kings County Supreme Court Judge Joseph McKay opined,

> it would be abhorrent to my sense of justice and fair play to do other than to vacate defendant's convictions on both grounds and to declare that he is innocent of this horrible murder, and to ensure he does not continue to serve any more time in prison for these convictions.[469]

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[464] N.Y. CRIM. PROC. LAW §§ 450.15, 460.15 (McKinney 2005).

[465] People v. Tankleff, 848 N.Y.S.2d 286, 300 (App. Div. 2007).

[466] People v. Crimmins, 343 N.E.2d 719, 721 (N.Y. 1975); *see also Schulz*, 829 N.E.2d at 1194 n.1.

[467] Medwed, *supra* note 454, at 709. *See generally id.* at 708–15.

[468] The provision under which the courts have recognized an actual innocence claim states:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

N.Y. CRIM. PROC. LAW § 440.10(1)(h). In recognizing a free-standing actual innocence claim under the New Mexico constitution, the Supreme Court of New Mexico relied in part on another Kings County case in which the judge there held that actual innocence is a ground for relief under section 440.10(1)(h). Montoya v. Ulibarri, 163 P.3d 476, 482 (N.M. 2007) (citing People v. Cole, 765 N.Y.S.2d 477, 484 (Sup. Ct. 2003)); *see also* People v. Bermudez, No. 8759/91, 2009 WL 3823270, at *22 (Sup. Ct. Nov. 29, 2009) (agreeing with the decisions in *Cole* and *People v. Wheeler-Whichard*, 884 N.Y.S.2d 304, 314 (Sup. Ct. 2009), and recognizing actual innocence as a ground for relief).

[469] *Wheeler-Whichard*, 884 N.Y.S.2d at 314.

Judge McKay further noted in a footnote that

> it is based upon this relentless commitment to justice that the Chief Judge [Lippman], building on the work of the New York State Bar Association's Task Force on Wrongful Convictions, has recently formed the 'Justice Task Force' to review police, prosecutor, defense and judicial practices in cases where wrongful convictions have been confirmed.[470]

The Task Force, it would appear, has begun to work in an indirect fashion.

4. Executive Clemency

In *Herrera v. Collins*,[471] the Supreme Court affirmed a federal court's dismissal of a petition for a writ of habeas corpus filed by a Texas prisoner who maintained that he was innocent of the murder supporting his death sentence. Leonel Herrera had been denied an evidentiary hearing in the state courts to consider newly discovered evidence, which included affidavits from witnesses who identified his brother as the murderer. He argued that allowing his execution to go forward without a federal hearing would deny him due process and represent cruel and unusual punishment. In partial justification of its rejection of his claim, former Chief Justice Rehnquist's opinion for the Court observed that Herrera was "not left without a forum to raise his actual innocence claim."[472]

> For under Texas law, petitioner may file a request for executive clemency. Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. . . .
>
> . . . .
>
> . . . Executive clemency has provided the "fail safe" in our criminal justice system. . . . [H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.[473]

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[470] *Id.* at 314 n.44.

[471] 506 U.S. 390 (1993).

[472] *Id.* at 411.

[473] *Id.* at 411–15 (footnotes and citations omitted). In illustration of this point, Chief Justice Rehnquist's opinion continued:

> In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes. Clemency provided the relief mechanism in 47 of those cases; the remaining cases ended in

The dissenting opinion in *Herrera*,[474] and numerous commentators,[475] have disputed the suggestion that executive clemency—which generally is understood,[476] including in New York,[477] to be an act of executive grace rather than a legal entitlement—can substitute for judicial consideration of claims of

judgments of acquittals after new trials. Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made.

[474] *Id.* at 439–40 (Blackmun, J., dissenting) ("Whatever procedures a State might adopt to hear actual-innocence claims, one thing is certain: The possibility of executive clemency is *not* sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments. The majority correctly points out: 'A pardon is an act of grace.' The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive or administrative tribunal." (emphasis in original) (citation omitted)).

[475] *See, e.g.*, Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 520–21 (1996) ("Clemency is a particularly poor vehicle for consideration of claims of newly discovered evidence of innocence. Clemency is a matter of grace, not of right. The grant is discretionary with the governor, and the decision is rarely guided by substantive standards. Practices vary widely among the states. In other words, the decision whether to grant clemency is, by definition, arbitrary and unreviewable. In real as opposed to theoretical terms, moreover, grants of clemency are increasingly rare. . . . If indeed petitioners are entitled to a vehicle for consideration of newly discovered evidence, a discretionary, standardless, unreviewable avenue like clemency cannot meet the dictates of due process." (footnotes omitted)); Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121 (2005); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219 (2003); Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1079–81 (2003); Adam M. Gershowitz, Essay, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL'Y 669, 680–83 (2001); Horan, *supra* note 423, at 111 ("[T]he clemency process has not been and will not be a functional fail-safe to catch wrongful capital or non-capital convictions. Notwithstanding the difficulty that petitioners for clemency face in overcoming the political hurdles to convince elected executives to commute a sentence in an era of get-tough-on-crime politics, some petitioners who went before the courts and even the Supreme Court may in fact have found no relief for their innocence before their executions." (footnote omitted)).

[476] Concerning the President's clemency authority under the United States Constitution, Chief Justice John Marshall observed for the Supreme Court that, "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." United States v. Wilson, 32 U.S. 150, 160 (1833); *see also Herrera*, 506 U.S. at 412–14 (quoting *Wilson*, 32 U.S. at 160); *Ex parte* Garland, 71 U.S. 333, 380–81 (1866). *But see* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring in the judgment) (concluding that death-sentenced prisoner had constitutionally significant interest in life, and thus was entitled to minimal procedural due process protections, in state executive clemency decisions).

[477] Roberts v. State, 54 N.E. 678, 679 (N.Y. 1899) ("We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured or paid the pardon does not restore. When it takes effect it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed. A pardon proceeds, not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon. It is granted, not as a matter of right, but of grace. . . . The pardon in this case shows upon its face that it was granted as an act of mercy, and not as one of justice."); *see also* People v. Brophy, 38 N.E.2d 468, 470 (N.Y. 1941); People v. Larkman, 64 N.Y.S.2d 277, 278–79 (Erie County Ct. 1946).

actual innocence. Although discretionary, executive clemency does remain a mechanism that can be used to correct miscarriages of justice. Under the New York Constitution, the governor has the exclusive authority to pardon or commute the sentences of convicted offenders.[478] In some states, by contrast, the governor lacks clemency authority, which resides with a board of pardons, or must first consult with, or receive a favorable recommendation from, an administrative board before acting.[479]

New York governors have infrequently used their clemency authority to issue pardons. Clemency grants come far more often in the form of a sentence commutation. Sentence reductions have been granted, for example, in several cases involving convictions and lengthy prison terms imposed under the Rockefeller Drug Laws.[480] Executive guidelines indicate that pardons in New York are "most commonly available . . . to permit a judgment of conviction to be set aside where there is overwhelming and convincing proof of innocence not available at the time of conviction."[481] In practice, however, it appears that New York governors almost never encounter such cases.

In 2008 Governor David Paterson pardoned Ricky Walters for his 1995 conviction for attempted murder. The pardon allowed Walters, a British citizen, to escape deportation, and was based on

[478] N.Y. CONST. art. 4, § 4 ("The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons."). The legislature has codified such authority, and has provided for various procedures regulating clemency hearings. N.Y. EXEC. LAW § 15 (McKinney 2002); N.Y. CORREC. LAW §§ 261–265 (McKinney 2003).

[479] Gershowitz, *supra* note 475, at 680–83; Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 297–03 (2003); Joseph N. Rupcich, Comment, *Abusing a Limitless Power: Executive Clemency in Illinois*, 28 S. ILL. U. L.J. 131, 149–56 (2003).

[480] Governor Mario Cuomo used his clemency powers approximately thirty-three times during his twelve years in office between 1982 and 1994; many of those cases involved sentence commutations for individuals "sentenced under the state's so-called Rockefeller drug law, a decades-old statute that mandates jail sentences of 15 years to life or more for the sale or possession of even small amounts of narcotics." Peter Marks, *Making the Most of a Rare Clemency in New York*, N.Y. TIMES, July 27, 1993, at A1; *Gary Givern Case Commentary*, http://www.garymcgivern.info/ (last visited Apr. 25, 2010). Since 1995, New York governors have granted clemency in approximately thirty-eight cases, including twenty-nine commutations in Rockefeller Drug Law cases. New York State Defenders Association, *Clemency*, http://www.nysda.org/html/clemency.html (last visited Apr. 25, 2010).

[481] N.Y. STATE DEP'T OF CORR. SERVS., DIRECTIVE: INFORMATION CONCERNING EXECUTIVE CLEMENCY (2005), *available at* http://www.docs.state.ny.us/Directives/6901.pdf ("Absent exceptional and compelling circumstances, a pardon is not available if the applicant has an adequate administrative or other legal remedy . . . ." (quoting Attachment A: "Guidelines for Review of Executive Clemency Applications")).

Walters's clean prison record and community service rather than grounds of innocence.[482] Walters's pardon was the first one given in New York since 2003, when Governor George Pataki posthumously pardoned comedian Lenny Bruce. Bruce had been convicted on a misdemeanor obscenity charge based on a nightclub routine in 1964. He died two years later.[483] Bruce's pardon was just the tenth issued by a New York governor since Nelson Rockefeller's administration.[484]

The Task Force report did not address the potential role of governors' clemency authority in helping to correct wrongful convictions. Governors may be reluctant to grant clemency for several reasons, including entertaining doubts about the merits of an application, not wanting to be perceived as second-guessing the judicial process, and to avoid accusations of being soft on crime or incurring other political liabilities, among others.[485] Although New York governors retain essentially unfettered constitutional authority in making clemency decisions, their potentially important role in providing the envisioned "fail safe" corrective to judicial miscarriages of justice should not be forgotten.

V. CONCLUSION

No one disputes the fundamental injustice of punishing an

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[482] Kirk Semple, *Pardon Means No Deportation for a Musician*, N.Y. TIMES, May 24, 2008, at B1.

[483] John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES, Dec. 24, 2003, at A1.

[484] Semple, *supra* note 482, at B1 ("Of the 10 pardons, 4 were intended to help thwart a deportation . . . ."). Governor Rockefeller's administration ended in 1973. New York State, Governors of New York, http://www.state.ny.us/governor//nygovs/index.html (last visited Apr. 25, 2010).

[485] Brief for Anthony Amsterdam et al. as Amici Curiae Supporting Respondents, People v. Harris, 779 N.E.2d 705 (N.Y. 2002) (No. 80), *in* 27 N.Y.U. REV. L. & SOC. CHANGE 399, 424–26 (2001–02) (reviewing the New York constitutional history of executive clemency).

> A failsafe mechanism like executive clemency is indispensable to temper the unbearable prospect of executing innocents, the insane, the too young, the too old. But once in place, the mechanism produces visibly arbitrary and inconsistent outcomes, inasmuch as clemency decisions are inevitably subject to the vagaries of politics and are seen to be so.

Id. at 425 (footnote omitted); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 485–86 (2009) ("Executive clemency, although generally available, is rarely granted. Governors hesitate to second-guess the results of the criminal process. . . . Governors may doubt their own ability to make a sufficiently reliable determination of innocence. They may fear undermining public confidence in the criminal justice process. Or they may fear that they will pardon a convict who will commit another crime upon release. Most obviously, political interests militate against granting pardons based on innocence, at least in the absence of countervailing media pressure. Releasing convicted defendants is rarely a route to political popularity." (footnotes omitted)).

innocent person for a crime. The only one profiting in such cases is the truly guilty party, who escapes deserved punishment and remains at large, perhaps to prey on future victims.[486] Meanwhile, the person erroneously charged and convicted suffers grievously. As wrongful convictions are exposed and recur, they cannot help but erode public confidence in the administration of justice.[487] No one lobbies for, condones, or knowingly tolerates wrongful convictions. It is no small cause for wonder, then, that policy discussions about wrongful convictions today differ only modestly from those begun generations ago when Edwin Borchard published *Convicting the Innocent*.[488] By many measures, policy reforms have been similarly unremarkable.

If principled resistance were to be offered regarding policy initiatives designed to guard against wrongful convictions, objections might be based on the concern that avoiding miscarriages

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[486] *See* INNOCENCE PROJECT, *supra* note 17, at 4 ("In 10 of New York's 24 DNA exonerations, the actual perpetrator was later identified. . . . In nine of those 10 cases, the actual perpetrators of crimes for which innocent people were wrongfully convicted went on to commit additional crimes while an innocent person was in prison. . . . According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators of crimes for which innocent people were [convicted]—and each of those crimes was committed after the wrongful arrest or conviction, so they could have been prevented if wrongful convictions had not happened."); JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED—STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM 2–4 (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf (among the nation's first 233 DNA-based exonerations, the actual perpetrators were identified in ninety-one cases and the Innocence Project estimates that they were responsible for committing an additional forty-nine rapes and nineteen murders); Medwed, *supra* note 30, at 1565 ("[T]he conviction of an innocent defendant often leaves the true perpetrator at large and therefore free to commit more crimes. The cost imposed by that perpetrator's potential commission of an untold number of crimes may be difficult to quantify, but it is almost certainly sizeable." (footnotes omitted)).

[487] Huff, *supra* note 31, at 69 ("[T]he U.S. criminal justice system's accuracy is essential to its perceived legitimacy, and systematic attention must be paid to the errors that are committed and how those errors might be reduced."); Maiatico, Note, *supra* note 404, at 1349–50 ("Studies have consistently demonstrated that Americans have less confidence in the criminal justice system than in other institutions, which likely results in part from . . . documented, high-profile mistakes. The issue is not whether the North Carolina criminal justice system makes mistakes, because it clearly does. Instead, the issue has become how the system can be improved to limit and correct these mistakes, so that the government may rebuild public confidence in the system." (footnotes omitted)); Mumma, *supra* note 51, at 650 ("'Through its work, the [North Carolina Actual Innocence] Commission hopes to raise awareness of the issues surrounding wrongful convictions. It is anticipated that accomplishment of this objective will increase the conviction of the guilty, positively impact public trust and confidence in the State's justice system, and decrease the overall cost of the prosecution, trial and appeal processes.'" (quoting North Carolina Actual Innocence Commission, Mission Statement, Objectives, and Procedures, http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (last visited Apr. 25, 2010))).

[488] *See supra* text accompanying notes 33–34.

of justice, while a laudable objective, entails too high of costs. The envisioned costs involve not only scarce fiscal resources, time, and personnel. Fears also may exist that safeguards against convicting the innocent will hamper police investigations and create obstacles to convicting the guilty—a tradeoff that at some point becomes counterproductive and socially unacceptable.[489] It is true that error will never completely be expunged from systems of criminal justice. One can imagine procedures implemented in the name of minimizing erroneous convictions—for example, demanding absolute certainty of an accused party's guilt or requiring conviction by the unanimous vote of hundred-member juries—that would be prohibitively expensive and inefficient, and allow too many guilty offenders to go free.[490] At a principled level, resolving issues of this nature requires value judgments about the relative seriousness of making erroneous determinations of guilt and innocence. At a more practical level, decisions also must be made about the cost-effectiveness and affordability of potential interventions.[491]

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[489] *See* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008); *see also supra* note 35 and accompanying text.

[490] *See* Medwed, *supra* note 30, at 1564.

[491] At the heart of this debate is Blackstone's famous dictum that "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 352 (1979). *See generally* Coffin v. United States, 156 U.S. 432, 455–56 (1895) (quoting Fortescue for the proposition that "one would much rather that twenty guilty persons should escape punishment of death than that one innocent person should be condemned and suffer capitally"; Lord Hale for the proposition that "it is better five guilty persons should escape unpunished than one innocent person should die"; and Blackstone for the proposition stated above); *see also* Schlup v. Delo, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" (citations omitted)). Whether the proper ratio is, as Blackstone ventured, ten guilty to one innocent, and whether the seriousness of the consequences suffered by the innocent (i.e., death vs. imprisonment), or the seriousness of the crimes committed by the guilty who might go free should matter, are subjects of lively discussion in Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997). Volokh explains that "*n*"—the number of guilty offenders who might justifiably be spared so that one innocent does not erroneously suffer conviction—has varied wildly, ranging from 1, to 5, to 100, to 1,000 and higher, depending on the commentator and other variables. With respect to New York, Volokh reports:

> New York started out with *n = 1* in *People v. Barrett*, [2 Cai. R. 304, 309 (Sup. Ct. 1805) (Livingston, J.)] and stayed with this number for more than half a century. The confusion began in 1858, when *Ruloff v. People* [18 N.Y. 179, 184–85, *overruled on other grounds*, People v. Lipsky, 443 N.E.2d 925 (N.Y. 1982)] changed the value to *n = 'many'* and *n = 5* (at the same time). Since then, *n* has vacillated between *n =1* [*see* People v. Sher, 167 N.Y.S.2d 748, 751 (Ct of Special Sessions 1957); People v. Smith, 167 N.Y.S.2d 329, 331 (Sup. Ct. 1957); *In re* Ulster County Dept. of Social Servs., No. N-286-93W, 1995 WL 519189, at *5 (N.Y. Fam. Ct. Mar. 24, 1995)], *n = 5* [People v. Galbo, 112 N.E. 1041, 1044 (N.Y. 1916)], *n = 10* [People v. Cohen, 191 N.Y.S. 831, 842 (Sup. Ct. 1921)], *n = 99*

At some point, the abstract principles about which agreement is easy—that the innocent should not be convicted and punished, that human systems are inherently fallible, that resources are finite, and that society suffers as well when guilty and potentially dangerous offenders elude arrest and conviction—must give way to consideration of the more difficult, concrete issues that require debate and reconciliation through purposeful policy discussions. The report of the New York State Bar Association's Task Force on Wrongful Convictions has powerfully illuminated the essential contours of these prospective discussions. Chief Judge Lippman's commission promises to make additional contributions. Much empirical research already has been completed bearing on the likely costs, efficacy, and consequences of enacting many of the proposed reforms. More studies will certainly follow. We now know considerably more about these important issues than Borchard did in the 1930s, or than Erle Stanley Gardner[492] and Jerome and Barbara Frank[493] in the 1950s, or than what practitioners and scholars knew even a decade ago.

Along with other jurisdictions, New York has progressed well beyond the point where it is possible only to agonize about the problem of wrongful convictions. The Task Force report offers a useful roster of issues to be considered and provides a much needed impetus for reform. What becomes of its recommendations and others that might be proposed now remains largely in the hands of administrators, the legislature, and the courts. Moving forward with the recommended reforms must entail careful consideration of potential costs and continued monitoring, evaluation, and reassessment. But the time has come to propel the discussion beyond abstract principles and debate, and for New York policymakers to consider—and enact—meaningful reforms to help prevent the conviction of innocent people. The time to do nothing has long since passed.

[*In re* X, Y and Z, 43 N.Y.S.2d 361, 365 (Dom. Rel. Ct. 1943) (noting that $n = 99$ reflects "the spirit of the Anglo-Saxon attitude in law")], n = '*some*,' [People v. Oyola, 160 N.E.2d 494, 498 (N.Y. 1959); People v. Yonko, 339 N.Y.S.2d 837, 846 (App. Div. 1973) (Capozzoli, J., dissenting)] and n = '*many*.' [People v. Lipsky, 443 N.E.2d 925, 930 (N.Y. 1982)] The status of n in New York is therefore uncertain.

For other relevant discussion, see Risinger, *supra* note 5, at 788–99; Rosen, *Reflections*, *supra* note 155, at 289 ("The oft-repeated shibboleth, 'better that ten guilty people go free than to convict one innocent' person is a nice-sounding phrase, but one wonders whether political and justice systems can, or should, really operate on a premise that would let ten guilty child murderers walk free to kill again.").

[492] *See supra* text accompanying notes 39–41.

[493] *See supra* text accompanying notes 42–45.

The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free

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THE FLIPSIDE INJUSTICE OF WRONGFUL CONVICTIONS: WHEN THE GUILTY GO FREE

*James R. Acker**

I. INTRODUCTION

As the rosters of identified wrongful convictions continue to swell,[1] attention naturally focuses on the fractured lives of the innocent men and women who have endured the pains of unwarranted stigmatization and punishment. Their compound sufferings[2] become all the more apparent as statistics that detail the incidence, causes, and consequences of miscarriages of justice

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[1] The Innocence Project's list of wrongful convictions, confined to cases involving post-conviction DNA-based exonerations, is over three hundred. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited May 23, 2013) (identifying 307 post-conviction exonerations based on DNA since 1989). The National Registry of Exonerations identifies 891 exonerations in the United States since 1989 and includes descriptive information about 873 individuals wrongfully convicted through March 1, 2012. *Exonerations in the United States, 1989–2012, Key Findings*, NAT'L REGISTRY EXONERATIONS 1 (May 20, 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_summary.pdf; *see also Exoneration Detail List*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited May 18, 2013) (providing detailed exoneration information on 1123 individuals, including the year of exoneration). Not included are an additional 1170 individuals whose convictions were overturned in "group exonerations" explained by police perjury or corruption. *Exonerations in the United States, 1989–2012*, *supra*, at 4. Although there is not complete accord about the definition and operationalization of such key concepts as "wrongful conviction," "exoneration," and "innocence," see, for example, Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 246–58 (2012), there can be no doubt that the number of factually innocent people who have been erroneously convicted of crimes far exceeds the number of known wrongful convictions and official exonerations. *See id.* at 222–25. The "tip of the iceberg" analogy is commonly used to describe the presumed relationship between known and actual wrongful convictions. *See, e.g.*, Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 918 (2012); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1571.

[2] *See* Saundra D. Westervelt & Kimberly J. Cook, *Foreword*, 75 ALB. L. REV. 1223, 1223–24 (2012) (introducing the third-annual issue of *Miscarriages of Justice*, which focused on the aftermath when justice miscarries).

give way to identified individuals and glimpses of their life stories.[3] Post-conviction challenges in cases in which the innocent have been adjudged guilty often trigger the steadfast opposition of prosecutors[4] and are only resolved following years of sustained litigation championed by defense counsel on behalf of the unjustly convicted.[5] These attributes combine to invite conceptualizing "the Innocence Movement"[6] as defendant-oriented and adversarial, pitting law enforcement and prosecution interests against the defense in much the same spirit as the original trial.

The modest thesis of this article is that indulging an inflexible mindset of "us-against-them" in the context of miscarriages of

[3] There is a common tendency for observers to feel more sympathetic toward "identified others" than abstract "unidentified persons," often with consequences for social policy and the investment of resources. Mark Kelman, *Saving Lives, Saving from Death, Saving from Dying: Reflections on 'Over-Valuing' Identifiable Victims*, 11 YALE J. HEALTH POL'Y L. & ETHICS 51, 52–55 (2011). This tendency is illustrated by the "Baby Jessica" case, in which an extraordinary outpouring of public interest, effort, donations, and expenditures accompanied reports of a small child who fell into a backyard well and required rescue. *Id.* Meanwhile, countless other children in need of life necessities suffered in anonymity. *Id.* at 54–55; *see* Ronen Avraham, *Clinical Practice Guidelines: The Warped Incentives in the U.S. Health Care System*, 37 AM. J.L. & MED. 7, 12–13 (2011); Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 437–38 (2008).

[4] *See, e.g.*, DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 126–32 (2012) (discussing the various reactions by prosecutors to post-conviction innocence claims); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 86–87 (2000) (discussing the case of Robert Miller, who had been convicted of murder and sentenced to death in Oklahoma, and resistance of prosecutor to vacating his conviction notwithstanding exculpatory DNA results); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 408–19 (2011) (discussing prosecutorial denials of innocence in the context of DNA exonerations); Hilary S. Ritter, Note, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Cases*, 74 FORDHAM L. REV. 825, 834–36 (2005).

[5] "With a few exceptions, exonerations take a long time. The overall average is 11.9 years from conviction to exoneration, 13.0 years from arrest." Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, NAT'L REGISTRY EXONERATIONS 24 (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. Substantial amounts of time can be devoted to litigating post-conviction claims of innocence. *See generally* Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 240 & n.26 (2006) (describing how appeals can generally last through generations of students); Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 506–09 (2011) (describing the ease of conviction and the difficult process of exoneration); Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman's Case: More Lessons from Another DNA Exoneration*, 77 U. OF CIN. L. REV. 1499, 1502–03 & 1503 n.19 (2009) (describing the case of James Calvin Tillman, a prisoner who was exonerated after eighteen years of incarceration).

[6] *See* Marvin Zalman, *An Integrated Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468–77 (2011); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084 n.1 (2011).

justice is not only misguided but also counterproductive. Wrongful convictions entail profound social costs in addition to the hardships borne by the unfortunate individuals who are erroneously adjudged guilty. When innocents are convicted, the guilty go free.[7] Offenders thus remain capable of committing new crimes and exposing untold numbers of additional citizens to continuing risk of victimization. Public confidence in the administration of the criminal law suffers when justice miscarries.[8] At some point, as cases mount and the attendant glare of publicity intensifies, the perceived legitimacy of the justice system and the involved actors is jeopardized.[9] Associated monetary costs, paid from public coffers, represent yet another tangible social consequence of wrongful convictions.[10]

Adherents of neither the "Crime Control" nor the "Due Process" models of justice[11] should harbor disagreement about these simple premises. With the exception of the actual offenders, everyone benefits, and no one loses when innocent parties are spared conviction and when the actual perpetrators of crimes are brought to justice.[12] Acknowledging this commonality of interests causes other, ideologically divisive issues to pale in contrast. Every case of

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[7] *See infra* Part III.

[8] Ashley H. Wisneski, *'That's Just Not Right': Monetary Compensation for the Wrongly Convicted in Massachusetts*, 88 MASS. L. REV. 138, 150 (2004).

[9] *Id.*

[10] *See, e.g.*, John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTER GOV'T ASS'N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx [hereinafter Conroy & Warden, *Tax Dollars Wasted*].

[11] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 158–73 (1968) (describing the "Crime Control" and "Due Process" models of the criminal process in his influential book). The Crime Control model maintains a value orientation "that the repression of criminal conduct is by far the most important function to be performed by the criminal [justice] process." *Id.* at 158. This model places a premium on efficiency, with reliance on police and prosecutors to use informal, administrative fact-finding procedures to make early separation of cases involving likely innocence and likely guilt. *Id.* at 158–63. A working presumption of guilt becomes operative for retained cases, and subsequent formal adjudicatory procedures are considered superfluous if not unwelcome. *Id.* at 160–63. In contrast, the Due Process model emphasizes "the primacy of the individual and the complementary concept of limitation on official power." *Id.* at 165. Distrusting informal, nonadjudicative fact-finding procedures, it instead relies on formal judicial guilt-determination. *Id.* at 163–64. Although the Due Process model "does not rest on the idea that it is not socially desirable to repress crime," it embraces values in addition to reliable fact determination and thus demands that "legal guilt" and not simply "factual guilt" must be established. *Id.* at 163, 166–67.

[12] *See, e.g.*, John Eligon, *New State Office to Review Questionable Convictions*, N.Y. TIMES, Apr. 11, 2012, at A20 (describing a statement by New York Attorney General Eric Schneiderman following his decision to create a Conviction Review Bureau to investigate possible wrongful convictions) ("There is only one person who wins when the wrong person is convicted of a crime: the real perpetrator, who remains free to commit more crimes . . . ." (internal quotation marks omitted)).

wrongful conviction is also a case where the guilty party remains free.[13] Taking this self-evident proposition to heart is a simple yet perhaps necessary step in helping overcome barriers to meaningful policy discussions and enacting long overdue reforms.

II. COMPOUNDING THE TRAGEDIES OF WRONGFUL CONVICTIONS: NEW CRIMES COMMITTED AND NEW VICTIMS CLAIMED BY THE TRUE PERPETRATORS

When the wrong person is convicted of a crime, the true offender remains at large, free to commit additional offenses.[14] The actual perpetrators of crimes were identified in nearly half (149/307, or 48.5%) of the DNA-exoneration cases reported by the Innocence Project through February 2013.[15] These true offenders are known to have committed at least 123 additional violent crimes, including 32 murders and 68 rapes, following the arrest of the eventual exonerees who were erroneously prosecuted and convicted.[16] Had they been apprehended in a timely fashion, rather than the innocent persons accused in their place, their future victims would have been spared death, injury, and the related pernicious consequences of criminal violence.

An exhaustive analysis completed by the Better Government

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[13] *See* discussion *infra* Part II.

[14] *See infra* notes 17–30 and accompanying text.

[15] *Facts on Post-Conviction DNA Exonerations*, *supra* note 1.

[16] E-mail from Emily West, Research Director, The Innocence Project, to author (Feb. 8, 2012, 04:19 EST) (on file with author). *See also* BARRY SCHECK & PETER NEUFELD, INNOCENCE PROJECT 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 46–51 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("The true perpetrator was identified in 42% of the [first 250 DNA] exoneration cases. In 58% of the exoneration cases, the true perpetrator was never identified. If the true perpetrator had been originally convicted, instead of an innocent person, at least 72 violent crimes could have been prevented."); *Know the Cases, Search the Profiles, Real Perpetrator Found*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=Yes&compensation=&conviction=&x=32&y=2 (last visited May 18, 2013) (listing of real perpetrators found). In New York, the actual perpetrator was identified in ten of twenty-four exoneration cases. THE INNOCENCE PROJECT, LESSONS NOT LEARNED: NEW YORK STATE LEADS IN THE NUMBER OF WRONGFUL CONVICTIONS BUT LAGS IN POLICY REFORMS THAT CAN PREVENT THEM 15 (2009), *available at* http://www.innocenceproject.org/docs/NY_Report_2009.pdf. The Innocence Projected noted:

> According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators of crimes for which innocent people were convicted. Every one of those additional crimes was committed after the initial crime for which the wrong person was apprehended—meaning that each one of those crimes could have been prevented.

Id.

Association and the Center on Wrongful Convictions[17] of eighty-five exonerations in Illinois between 1989 and 2010, documented the crimes committed by actual offenders while innocent parties were instead punished.[18] "[W]hile 85 people were wrongfully incarcerated, the actual perpetrators were on a collective crime spree that included 14 murders, 11 sexual assaults, 10 kidnappings and at least 62 other felonies."[19] The study noted that the true criminals remained unknown in many of the exoneration cases, involving wrongful conviction for thirty-five murders, eleven rapes, and two rape-murders.[20] The ninety-seven offenses known to have claimed new victims thus undoubtedly comprised "just a fraction of the total number of crimes committed by the actual perpetrators."[21]

Unfortunately, dire predictions regarding the incidence of repeat offending by criminals can be well-grounded. Although predicting future criminal conduct in individual cases is hazardous,[22] violent criminals who remain at large constitute a palpable threat to public safety.[23] Not all will commit new crimes,[24] but criminologists

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[17] Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

[18] The Innocence Project lists thirty-one DNA-based exonerations in Illinois between 1989 and 2010. *Know the Cases, Search the Profiles, Jurisdiction, Illinois*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=IL&cause=&perpetrator=&compensation=&conviction=&x=23&y=1 (last visited May 18, 2013). There presumably is overlap between its national figures, and the Illinois study, which includes DNA-based as well as non-DNA-based exonerations.

[19] Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

[20] *Id.*

[21] *Id.*

[22] Not all criminals recidivate, and with the passage of time and changes in life circumstances most eventually desist from committing new offenses. *See, e.g.*, Robert Brame, Shawn D. Bushway & Raymond Paternoster, *Examining the Prevalence of Criminal Desistance*, 41 CRIMINOLOGY 423, 443 (2003); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 96 (2012). Eventual desistance is the norm even among violent offenders. Alex R. Piquero, Wesley G. Jennings & J.C. Barnes, *Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective*, 17 AGGRESSION & VIOLENT BEHAV. 171, 177 (2012).

[23] *See* Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 463 (2003) (citations omitted).

[24] *See* Richard Berk, *Balancing the Costs of Forecasting Errors in Parole Decisions*, 74 ALB. L. REV. 1071, 1072 (2011) (discussing the problem of "false negatives" in the context of parole decisions, or the erroneous prediction that a prisoner will reoffend if released when, in fact, he would not); Albert J. Reiss, Jr., *How Serious Is Serious Crime?*, 35 VAND. L. REV. 541, 570 (1982) (citing MARK A. PETERSON, HARRIED B. BRAIKER & SUZANNE M. POLICH RAND, DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES 24 (1980), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2005/R2200.pdf) (reporting relatively low rates of "specialization," or repeating commission of the same crime, among offenders with prior convictions for criminal homicide and forcible rape); Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36

generally agree about the accuracy of the maxim that "a key predictor of future crime is past crime."[25] Some hardcore, chronic offenders engage in numerous repeat acts of violence.[26] Recidivism rates among probationers[27] and previously incarcerated felons[28] are

N.M. L. REV. 341, 344 (2006) (presenting rates of known recidivism among offenders convicted of different types of crimes).

[25] Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 529 (2012).

[26] This tendency was documented long ago in a study of Philadelphia youths, where the researchers found that just 6% of the nearly 10,000 included in the sample, who represented approximately 18% of the delinquent subset, were responsible for committing more than half (52%) of the reported acts of delinquency. MARVIN E. WOLFGANG, ROBERT M. FIGLIO & THORSTEN SELLIN, DELINQUENCY IN A BIRTH COHORT 88 (2d impression 1974). "The finding that a small subset of sample members is responsible for a majority of criminal activity" is supported by numerous other research studies. Piquero, Farrington, & Blumstein, *supra* note 23, at 463 (citations omitted).

[27] *See* United States v. Knights, 534 U.S. 112, 120 (2001) (quoting Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) ("'[T]he very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'"). The recidivism rate of probationers is significantly higher than the general crime rate. *See* ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ-149076, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991, at 3 (1995) (stating that in 1991, 23% of state prisoners were probation violators); PATRICK A. LANGAN & MARK A. CUNNIFF, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ 131477, RECIDIVISM OF FELONS ON PROBATION, 1986–89, at 1, 6 (1992) (reporting that 43% of 79,000 felons placed on probation in 17 states were rearrested for a felony within three years while still on probation); *see also* Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1391–95, app. A at 1418, app. B at 1419 (2008) (presenting recidivism rates by offense and punishment type); Stuart S. Yeh, *Cost-Benefit Analysis of Reducing Crime Through Electronic Monitoring of Parolees and Probationers*, 38 J. CRIM. JUST. 1090, 1090 (2010) (citations omitted) ("An estimated 1,382,012 violent crimes were committed nationwide in 2008. One-third of those crimes were committed by individuals previously convicted of crimes but eventually released into the community on parole or probation . . . .").

[28] *See* Ewing v. California, 538 U.S. 11, 30–31 (2003) (O'Connor, J., plurality opinion) (upholding California's "three-strikes" legislation against a challenge that the sentencing statute, as applied, violated a repeat offender's Eighth Amendment right to be free from cruel and unusual punishment). The Court noted that

> Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release. . . . Approximately 73 percent of the property offenders released in 1994 were arrested again within three years, compared to approximately 61 percent of the violent offenders, 62 percent of the public-order offenders, and 66 percent of the drug offenders.
>
> In 1996, when the Sacramento Bee studied 233 three strikes offenders in California, it found that they had an aggregate of 1,165 prior felony convictions, an average of 5 apiece. The prior convictions included 322 robberies and 262 burglaries. About 84 percent of the 233 three strikes offenders had been convicted of at least one violent crime. In all, they were responsible for 17 homicides, 7 attempted slayings, and 91 sexual assaults and child molestations. The Sacramento Bee concluded, based on its investigation, that "[i]n the vast majority of the cases, regardless of the third strike, the [three strikes] law is snaring [the] long-term habitual offenders with multiple felony

high.[29] It seems plausible that the true offenders who elude detection in wrongful conviction cases are just as likely to have committed new crimes as the ones who eventually are identified and linked to the original offense.[30]

As revealing as the statistics are that measure the new crimes committed by the guilty who remain at large in the aftermath of wrongful convictions, they are no match for the raw intensity of the underlying case narratives.[31] Accounts from a wealth of cases that

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convictions . . . ."

Id. at 26 (alterations in original) (quoting Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1) (citing PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NCJ 193427 RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002)). *See also* Michael Barrett, *Don't Let a Good Economic Crisis Go to Waste: An Opportunity for Wholesale Corrections Reform*, 2011 J. INST. JUST. & INT'L STUD. 15, 18–19 (2011) ("[I]n most states, more than 50% of inmates are returned within two to three years following their release. A study of former inmates released from state prisons in 1994 found that 67% committed at least one new crime within the following three years.") (citing LANGAN & LEVIN, *supra*, at 1); Francis T. Cullen, Cheryl Lero Jonson & John E. Eck, *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77, 78–80 (2012); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 120 (2009) (citing LANGAN & LEVIN, *supra*, at 1); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State-Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 591–93 (2009).

[29] *See* COHEN, *supra* note 27, at 1–3, 6; LANGAN & CUNNIFF, *supra* note 27, at 1, 6; LANGAN & LEVIN, *supra* note 28, at 1.

[30] "In each of these innocence cases, a criminal investigation into a serious violent crime was shut down prematurely when authorities prosecuted the wrong person." THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED 1, 3 (2009), *available at* http://www.deathpenaltyinfo.org/documents/convicting-the-innocent.pdf (discussing thirty-nine wrongful conviction cases in Texas that resulted in exoneration since 1994 and observing that "[t]he crimes that are committed in the time between a wrongful conviction and the identification of the true perpetrator are an immeasurable cost to the community"); *see also* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 79 (2008) ("Every failure to convict the guilty means additional crimes undeterred and bad guys who, when left to their own devices, will almost certainly commit additional crimes.").

[31] While the additional emotional power that distinguishes narratives from descriptive statistics can promote insight, it can also cloud perspectives. Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1275 (2011) ("Surely we can do better to manage miscarriages of justice than to rely on sensational media accounts of innocent people released from death row following the discovery of exculpatory DNA evidence, and on equally sensational accounts of dangerous people committing heinous crimes following breakdowns in mechanisms for bringing them to justice in prior cases. These 'breaking news' stories are typically followed by political grandstanding that has produced draconian laws and contributed immeasurably to injustices and, more measurably, to billions of dollars of wasted resources that could have been applied more productively elsewhere."); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 145, 186–87 (2011) (footnote omitted) ("Narratives, more so than isolated facts, have the power to mentally transport the audience, temporarily altering their normal emotional and cognitive reactions to the information presented. By partly neutralizing the recipients' critical evaluation, the storyteller makes possible the acceptance of accounts that might otherwise have been rejected. . . . Still, there is a danger that factual inferences will be swamped by the narrative force of a case . . . .").

resulted in wrongful convictions could be presented. Twenty illustrative ones are offered below. They are not necessarily representative of all cases in which new crimes are known to have been committed by the perpetrators who originally cheated justice. The cases originated in multiple jurisdictions and arose in connection with wrongful convictions that were produced by diverse errors, attributable to a host of different actors and circumstances. All share the harsh consequences of a new round of victimizations being committed by the true offenders while innocent defendants instead suffered prosecution and punishment.

Mark Christie

Viola Manville, a seventy-four-year-old woman who regularly enjoyed hiking the countryside in Hilton, New York, on the outskirts of Rochester, was killed during the morning of November 29, 1988.[32] She had been badly beaten and shot with pellets from a BB gun.[33] Her body was left alongside railroad tracks, in the general vicinity of where a man had tried to rape her some three years earlier.[34] That man, Glen Sterling, remained in prison following his conviction for the rape attempt.[35] Glen Sterling's brother, Frank, was among the many people interviewed by sheriff's detectives during the homicide investigation.[36] Frank Sterling had no prior criminal record and no reputation for violence.[37] Although no physical evidence linked him to the crime, the authorities apparently reasoned that he may have had a motive to kill Ms. Manville in retaliation for his brother's conviction and punishment.[38] Sterling accounted for his whereabouts on the day of the murder, explaining that he had been working as a school bus monitor during the morning, returned home, walked to a grocery store to make a purchase, and watched cartoons on television in the afternoon.[39] His alibi was confirmed and neither he nor anyone else was arrested in the ensuing weeks and months.[40]

[32] Robert Kolker, *"I Did It": Why Do People Confess to Crimes They Didn't Commit?*, N.Y. MAG., Oct. 11, 2010, at 22, 24.

[33] Gary Craig, *Missteps Kept Man in Prison*, DEMOCRAT & CHRON. (Rochester, N.Y.), May 9, 2010, at 1A; Kolker, *supra* note 32, at 24.

[34] Kolker, *supra* note 32, at 24.

[35] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[36] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[37] Kolker, *supra* note 32, at 24.

[38] *Id.*

[39] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[40] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

More than two and one-half years later, in July 1991, detectives again visited Frank Sterling at his home.[41] He had just returned from a truck-driving job that had consumed the better part of two days.[42] Although tired, he agreed to a polygraph examination, and accompanied the detectives to the sheriff's office in Rochester.[43] During the pre-examination session, the polygraph technician falsely told Sterling that his brother Glen had bragged to other prisoners that Frank had killed Ms. Manville.[44] After the examination, Sterling was advised that he was being deceitful when he denied the killing.[45] As midnight approached, another interrogator took over the questioning.[46] He got Sterling to admit that he was angry enough about his brother's incarceration to have killed Manville, but Sterling continued to deny that he had done so.[47] He asked to be hypnotized to prove that he was telling the truth.[48] The investigators responded by holding his hands and assisting him with relaxation exercises.[49] They told him that "we were here for him, we understood [and] we felt he should tell the truth to get if off his chest."[50] Roughly eight hours into the interrogation session, Sterling admitted killing Ms. Manville.[51] Shortly after five o'clock in the morning, a twenty-minute video-recording preserved his detailed confession.[52]

Sterling repudiated his confession shortly after making it, but his recantation was not believed.[53] With his incriminating admission serving as the primary evidence of his guilt, Sterling was convicted of murder following trial in September 1992.[54] Just days later, several townspeople alerted the police that nineteen year-old Mark Christie was bragging that he had "just gotten away with

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[41] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[42] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[43] Kolker, *supra* note 32, at 24.

[44] Craig, *supra* note 33; Kolker, *supra* note 32, at 24.

[45] Craig, *supra* note 33.

[46] Kolker, *supra* note 32, at 24.

[47] *Id.* at 25.

[48] Craig, *supra* note 33; Kolker, *supra* note 32, at 25.

[49] Craig, *supra* note 33; Kolker, *supra* note 32, at 25. *See also* People v. Sterling, 619 N.Y.S.2d 448, 449 (App. Div. 4th Dep't 1994), *appeal denied*, 650 N.E.2d 1339 (N.Y. 1995) (affirming trial court's refusal to suppress Sterling's statements to the police and concluding that evidence supported the finding that "the state [Sterling] achieved by use of a relaxation technique" did not constitute hypnosis).

[50] Kolker, *supra* note 32, at 25.

[51] *See* Craig, *supra* note 33; Kolker, *supra* note 32, at 24, 25.

[52] Craig, *supra* note 33; Kolker, *supra* note 32, at 25.

[53] Kolker, *supra* note 32, at 26; *see* People v. Sterling, 787 N.Y.S.2d 846, 854 (County Ct. Monroe County 2004), *aff'd*, 827 N.Y.S.2d 920 (App. Div. 4th Dep't 2007).

[54] Craig, *supra* note 33; Kolker, *supra* note 32, at 25; *see Sterling*, 787 N.Y.S.2d at 847.

murder."[55] Christie was among the individuals questioned by the police during their 1988 investigation of the killing.[56] Then sixteen, Christie maintained that he had gone to school at mid-morning on the day of the murder.[57] Although school records indicated that he did not attend class until 1:20 that afternoon, investigators did not pursue him as a suspect.[58] Police interrogated Christie again in December 1992, following his reported boastings about the murder.[59] He claimed that he had only been "kidding around" when he made those statements.[60] The results of an initial polygraph exam, in which he denied the killing, were deemed "incomplete" owing to Christie's erratic breathing and excessive movement.[61] He passed a second exam, administered the next day.[62] The judge in Frank Sterling's murder trial concluded that Christie's purported admissions were not believable, and imposed a sentence of twenty-five years to life in prison on Sterling on December 23, 1992.[63]

In 1994, Mark Christie strangled four-year-old Kali Ann Poulton after luring her into his apartment.[64] He then disposed of her body in a water coolant tank at his workplace.[65] Later, he participated in searches for the child, whose disappearance caused widespread alarm and grief throughout the greater Rochester community.[66] The killing remained unsolved until 1996, when Christie blurted an admission during an argument with his wife that he had killed Kali.[67] His wife called the police.[68] Christie confessed to investigators, who subsequently uncovered the child's body.[69] Christie pleaded guilty to second-degree murder for the crime in 1997 and was sentenced to prison for twenty-five years to life.[70]

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[55] Kolker, *supra* note 32, at 25.

[56] *Rochester Man to be Freed 18 Years After Wrongful Murder Conviction*, INNOCENCE PROJECT (Apr. 28, 2010), http://www.innocenceproject.org/Content/Rochester_Man_To_Be_Freed_18_Years_After_Wrongful_Murder_Conviction_DNA_and_Confession_Lead_to_Actual_Perpetrator.php.

[57] Craig, *supra* note 33.

[58] *Id.*

[59] *See id.*

[60] Amy Mayron et al., *Kali's Tragedy: Arrest Made; Body Found*, DEMOCRAT & CHRON. (Rochester, N.Y.), Aug. 10, 1996, at 1A.

[61] Craig, *supra* note 33.

[62] *Id.*

[63] *Id.*

[64] *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, N.Y. TIMES, Oct. 16, 1997, at B5.

[65] Craig, *supra* note 33; *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64.

[66] *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64, at B5.

[67] Craig, *supra* note 33.

[68] *Id.*

[69] Mayron et al., *supra* note 60.

[70] *Ex-Guard Pleads Guilty to Killing 4-Year-Old*, *supra* note 64, at B5.

Christie's admission and conviction with respect to Kali's death inspired a new series of challenges to Sterling's conviction, which renewed the allegation that Christie was responsible for murdering Ms. Manville. Beginning in 1996 and over the next several years, Sterling filed a series of motions to vacate his conviction, all of which were denied.[71] In late 2008, "touch DNA"—testing on skin cells left on the clothing that Ms. Manville had worn when murdered—implicated Christie in the killing.[72] In early 2010, after being interviewed in prison by an Innocence Project attorney and an interrogation expert, Christie confessed to murdering Ms. Manville.[73] Frank Sterling's conviction was vacated and he was released from prison in April 2010, after spending eighteen years incarcerated for a crime that he did not commit.[74]

Christie pleaded guilty to murdering Ms. Manville in October 2011.[75] He was sentenced to twenty years to life in prison, to be served consecutively with the sentence imposed for his murder of Kali Ann Poulton.[76] At the sentencing hearing, one of Ms. Manville's grandsons observed that "[n]ot only did [Christie] murder my grandmother, he also took the life of a child so it's unforgivable."[77] Kali Ann Poulton's mother wiped at tears while reflecting that her daughter would still be alive if the investigation into Ms. Manville's murder had resulted in Christie's arrest and conviction, instead of Frank Sterling's.[78] "Of course it has crossed my mind. What if? . . . But unfortunately it is what it is. We can't go backward."[79]

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[71] People v. Sterling, 787 N.Y.S.2d 846, 850–51 (County Ct. Monroe County 2004), *aff'd*, 827 N.Y.S.2d 920 (App. Div. 4th Dep't 2007) (noting that a prior denial of a request to vacate Sterling's conviction had been affirmed by the Appellate Division, Fourth Department and leave to appeal was denied by the Court of Appeals); Kolker, *supra* note 32, at 26–27.

[72] Kolker, *supra* note 32, at 27.

[73] *Id.* at 27, 89.

[74] *Id.* at 89, 90; *Rochester Man to be Freed 18 Years After Wrongful Murder Conviction*, *supra* note 56.

[75] Sean Carroll, *Mark Christie Gets Another 20 Years-to-Life*, 13 WHAM NEWS (updated Oct. 28, 2011, 6:28 PM), http://www.13wham.com/news/local/story/Christie-Faces-Friday-Sentencing/458XQ9sUk0SreGbiszSqew.cspx.

[76] *Id.*

[77] *Id.*

[78] Ben Dobbin, *NY Child Killer Gets 20-to-Life for '88 Slaying*, DESERET NEWS (Oct. 28, 2011, 1:10 PM), http://www.deseretnews.com/article/700192455/NY-child-killer-gets-20-to-life-for-88-slaying.html.

[79] *Id.* (internal quotation marks omitted).

Walter Cruise

In 2002, Walter Cruise pleaded guilty in Tucson, Arizona to sodomizing a ten-year-old boy named David; a crime he had committed in October 1983 after he abducted the child from a carnival attended by David and his mother after they had left church.[80] He was sentenced to twenty-four years in prison.[81] Cruise had twice before been convicted for sexually abusing children, crimes he committed in Texas prior to his 1983 offense.[82] He had committed later offenses, as well, including burglary, and he had not yet completed serving a prison sentence in Texas for delivering cocaine when he entered his 2002 guilty plea in Arizona.[83] During the nineteen-year gap between Cruise's Arizona crime and his guilty plea and conviction, another man stood wrongfully convicted and served several years in prison for kidnapping and sodomizing the child Cruise had victimized.[84] That man was Larry Youngblood, who was exonerated in 2000 after DNA tests excluded him as the source of semen left during the child's assault.[85] The following year, the DNA profile from the crime scene was linked to Cruise, identifying him as the perpetrator.[86]

Ironically, Youngblood will forever be associated with a landmark United States Supreme Court decision that reinstated his conviction and imposed a significant burden on criminal defendants who attempt to substantiate claims of innocence. In *Arizona v. Youngblood*,[87] the Court ruled that to establish a Due Process violation, a defendant must demonstrate that the police acted in bad faith when they destroyed or failed to preserve potentially

[80] David L. Teibel, *Man Gets 24 Years in '83 Child-Sex Case*, TUCSON CITIZEN, Aug. 20, 2002, http://tucsoncitizen.com/morgue2/tag/criminal-procedure/page/61; *see* State v. Youngblood, 734 P.2d 592, 592 (Ariz. App. 1986), *rev'd*, 488 U.S. 51 (1988); Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 277 (2008); Tim O'Brien, *Reasonable Doubt and DNA*, WASH. POST, Sept. 7, 2000, at A25.

[81] Bay, *supra* note 80, at 277; Teibel, *supra* note 80.

[82] Bay, *supra* note 80, at 277.

[83] Teibel, *supra* note 80. Walter Cruise's criminal history is available through the Office of the Harris County, Texas District Clerk. *See Search Our Records and Documents*, HARRIS COUNTY DISTRICT CLERK, http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx [hereinafter *Search Records*] (To search, click on the "Criminal" tab and then search "Cruise, Walter" under "Defendant").

[84] Bay, *supra* note 80, at 243–44.

[85] *Id.* at 276; Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12

[86] *Know the Cases: Larry Youngblood*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Youngblood.php (last visited May 18, 2013).

[87] Arizona v. Youngblood, 488 U.S. 51 (1988).

exculpatory evidence.[88] Their negligent destruction of evidence, even if it might have substantiated the defendant's innocence, is not a constitutional violation.[89]

During the investigation that preceded Youngblood's conviction, the police had taken possession of the t-shirt and underwear that David had been wearing when he was sodomized.[90] Both items of clothing had semen stains from the assault but the police neglected to refrigerate them.[91] The semen on them thus degraded to the point that the samples could not be tested to reveal whether the assailant was a secretor[92] and, if so, what his blood type was—tests that potentially could have excluded Youngblood as the donor.[93] The young victim identified Youngblood—whose distinctive physical characteristics included having only one good eye and walking with a limp[94]—as his assailant.[95] Based largely on that identification,

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[88] *Id.* at 58.

[89] *Id.* "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56 n.* (citation omitted). Chief Justice Rehnquist's majority opinion explained:

> we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . [R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 57–58. Establishing bad faith in this context has proven difficult. *See* Susan Greene & Miles Moffeit, *Trashing the Truth Destruction of Evidence*, DENVER POST, July 22, 2007, at A1.

[90] *Youngblood*, 488 U.S. at 53.

[91] *Id.* at 53, 54.

[92] *Id.* at 54. "Secretors are persons whose bodily fluids—saliva or semen, for example—carry 'markers' that identify their blood types." David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 520 n.273 (1992). Approximately 75%–80% of the population are secretors. Bay, *supra* note 80, at 279–80. For the remaining percentage of non-secretors, blood typing is not revealed through other bodily fluids. *See id.*

[93] Youngblood was a secretor with type A blood. State v. Youngblood, 734 P.2d 592, 596 (Ariz. App. 1986), *rev'd*, 488 U.S. 51 (1988).

[94] *Id.* at 593. *See also* O'Brien, *supra* note 80 (recounting the victim's description of his abductor).

[95] *Youngblood*, 734 P.2d at 594.

> Nine days after the assault, a police detective came to David's school, took a taped statement from him, told him they had arrested the man who raped him, and asked him to pick the assailant out of a photographic lineup. Three of the photographs had the left eye whited out, and three had the right eye whited out. David's optometrist testified at trial that David had an astigmatism and "was instructed to wear glasses whenever he was in school [or] doing close work, [or watching] T.V." He was not wearing glasses the night of the incident nor when he first viewed the photographic lineup. After looking at the pictures by holding them very close to his face, David picked Youngblood as his

and without additional information to consider regarding the source of the semen deposits, a jury convicted Youngblood at his 1985 trial.[96] He was sentenced to ten and one-half years in prison.[97]

Youngblood was exonerated fifteen years later, when improvements in DNA testing technology permitted analysis of the small amount of semen retrieved from the sexual assault kit that had been preserved after the young victim received hospital treatment in October 1983.[98] Although Walter Cruise's new crimes were not as serious as those committed by the true perpetrators in many other wrongful conviction cases,[99] a wave of harms in addition to Youngblood's unjustified imprisonment rippled from his sexual assault of David.[100] Some were amplified by the original miscarriage of justice.[101] Youngblood, who had struggled with schizophrenia since before his conviction,[102] was arrested for assault in Tucson in 2003, following his release from prison.[103] He died from a drug overdose in 2007.[104]

At Cruise's 2002 sentencing hearing following his guilty plea to the sexual assault, David—then twenty-nine years old—and members of his family gave emotional testimony about their experiences.[105] David described how he "was raped repeatedly, brutally. I was 10 years old . . . [i]t was bad. He should have killed me. . . . He should be incarcerated like an animal."[106] One of David's sisters lamented that while Cruise escaped responsibility for the violation, she had "spent most of [her] life and wasted most

assailant, saying he was "pretty sure." Later, David identified another man in the lineup as the possible assailant.

Id. (alterations in original).

[96] *See* Gavin Frost, Arizona v. Youngblood: *Adherence to a Bad Faith Threshold Test Before Recognizing a Deprivation of Due Process*, 34 S.D. L. REV. 407, 408 (1989).

[97] *Youngblood*, 734 P.2d at 592. Youngblood served almost the entirety of that sentence, although he was in and out of prison on different occasions owing to the reversal and reinstatement of his conviction and for violating his parole because of his failure to notify the authorities about a change of address as was required under the state's sex offender registration law. Bay, *supra* note 80, at 276; Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 777–78.

[98] Bay, *supra* note 80, at 276.

[99] *See supra* Part II.

[100] *See infra* notes 103–04 and accompanying text.

[101] *See infra* notes 103–04 and accompanying text.

[102] Bay, *supra* note 80, at 250; *see* State v. Youngblood, 790 P.2d 759, 765 n.2 (Ariz. Ct. App. 1989), *vacated*, 844 P.2d 1152 (Ariz. 1993).

[103] Bay, *supra* note 80, at 278.

[104] *Id.*

[105] Teibel, *supra* note 83; *see* Bay, *supra* note 80, at 277.

[106] Teibel, *supra* note 83.

of [her] life hating Larry Youngblood."[107] Another sister testified that the family had "never been the same" after David was assaulted.[108] "This is something we will deal with forever."[109]

Her statement was partly grounded in past events and proved to be partly prophetic. Following his victimization, David grew increasingly troubled.[110] Before the assault, his mother recalled, David had been a "very sweet" little boy.[111] Afterwards, his mother said "I saw a tremendous change in my boy. I saw a lot of aggression and anger."[112] David abused drugs and alcohol.[113] He was sentenced to prison on two separate occasions for aggravated assaults committed against former girlfriends.[114] In 2004, two years after Cruise was convicted and sentenced for sodomizing him, an intoxicated David walked into the path of an oncoming train in Tucson and was killed.[115]

Steven Cunningham

Fifteen-year-old Angela Correa left her home in Peekskill, New York on the afternoon of November 15, 1989.[116] She failed to return and her family reported her missing the following day.[117] Her body was discovered in a wooded area on November 17.[118] She had been beaten and strangled.[119] Vaginal injuries and the presence of seminal fluid and spermatozoa suggested that she had been sexually assaulted.[120] Sixteen-year-old Jeffrey Deskovic, a high school classmate variously described as a "loner," naive, and psychologically troubled,[121] exhibited unusual interest in the ensuing police investigation.[122] He made his own inspection of the crime scene, sketched diagrams of it, and volunteered theories of

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[107] Bay, *supra* note 80, at 277; Teibel, *supra* note 83.
[108] Teibel, *supra* note 83.
[109] *Id.*
[110] Bay, *supra* note 80, at 277.
[111] *Id.*
[112] Mark Kimble, *The Accused Man Leaves Prison; Victim Enters*, TUCSON CITIZEN (Aug. 24, 2000), http://tucsoncitizen.com/morgue2/tag/mark-kimble/page/38.
[113] *Id.*
[114] *Id.*
[115] Bay, *supra* note 80, at 278.
[116] LESLIE CROCKER SNYDER ET AL, REPORT ON THE CONVICTION OF JEFFREY DESKOVIC 1 (2007), *available at* http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf.
[117] *Id.*
[118] *Id.*
[119] *See id.*
[120] *Id.* at 2.
[121] *See id.* at 11.
[122] *See id.* at 19.

how the offense was committed to the police.[123] In January 1990, at the conclusion of an eight-hour interrogation session that left him "lying under a desk in a fetal position, sobbing uncontrollably,"[124] Deskovic confessed to the murder.[125] The interrogation session was not recorded.[126] Deskovic's admissions included details "that the prosecution insisted could only have been known to the real perpetrator."[127] He was indicted for murder and rape.[128]

Just days after the indictment was returned, an FBI laboratory report was issued, revealing that DNA testing had excluded Deskovic as the source of the semen discovered in Ms. Correa's body.[129] The case against Deskovic nevertheless proceeded to trial in January 1991.[130] The prosecution offered various explanations of the source of the semen, suggesting that Deskovic may have had an accomplice who raped Ms. Correa, or that the young victim may have engaged in consensual sexual intercourse shortly before being murdered.[131] Although no physical evidence linked Deskovic to the crime, his incriminating admission—which defense counsel alternatively maintained was never made, was involuntary, or was false (the product of "his own 'fertile imagination'")[132]—proved decisive. The jury convicted him of murder and rape.[133] At the

[123] *Id.* at 2; People v. Deskovic, 607 N.Y.S.2d 957, 958 (App. Div. 2d Dep't 1994).

[124] SNYDER ET AL., *supra* note 116, at 15.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 17.

[128] *See id.* at 20; *Deskovic*, 607 N.Y.S.2d at 957.

[129] SNYDER ET AL., *supra* note 116, at 2, 20.

[130] *Know the Cases: Jeff Deskovic*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jeff_Deskovic.php (last visited May 18, 2013); *see* SNYDER ET AL., *supra* note 116, at 3.

[131] SNYDER ET AL., *supra* note 116, at 21–23. At the conclusion of the trial evidence, the trial judge "opined that there was no record support for the existence of an accomplice and the prosecutor withdrew his request to argue the accomplice theory in summation. Nevertheless, this argument already had been placed before the jury." *Id.* at 22 (footnotes omitted). Moreover,

> there was simply no evidence that, at the time of her death, Correa was involved in a consensual sexual relationship with anyone. . . .
>
> In the final analysis, the prosecution's "consensual partner" theory was both scientifically dubious and unsupported by the evidence. Like the "unapprehended accomplice" scenario, it could only have served to confuse the jury.

Id. at 23.

[132] *Id.* at 2, 25.

[133] *Id.* at 3. "Deskovic's January 25th statement was far and away the most important evidence at the trial. Without it, the State had no case against him. He would never have been prosecuted for killing Correa. He would never have been convicted." *Id.* at 14. The court opinion upholding Deskovic's conviction on appeal concluded that "[t]here was overwhelming evidence of the defendant's guilt in the form of the defendant's own multiple inculpatory statements." *Deskovic*, 607 N.Y.S.2d at 958.

hearing before he was sentenced to fifteen years to life imprisonment, Deskovic, then seventeen years old, told the trial judge: "I didn't do anything. I've already had a year of my life taken from me for something I didn't do, and I'm about to lose more time and I didn't do anything."[134]

While in prison, Deskovic made repeated efforts to have the DNA profile obtained from Ms. Correa's body entered into state and federal databases, hoping to find a match with the profile of a known offender.[135] Prosecutors rebuffed those attempts until Innocence Project attorneys became involved and a newly elected district attorney consented to the request.[136] In September 2006, when the profile was entered into the DNA database, it produced a "hit."[137] The crime scene DNA matched the DNA profile of Steven Cunningham, who was then serving a twenty-year to life prison sentence for murder.[138] Deskovic was released from prison.[139] He was thirty-three years old and "had been incarcerated [for] half [of] his life for a crime he did not commit."[140] In November 2006, the indictment charging him with the crimes against Ms. Correa was dismissed on the ground that he was actually innocent.[141]

Steven Cunningham initially denied involvement in Angela Correa's death.[142] When confronted with the DNA results, he confessed, pleaded guilty to her murder, and was sentenced to an additional twenty years to life in prison.[143] At the time he entered his guilty plea, he was imprisoned for the 1993 murder of Patricia Morrison of Peekskill.[144] Ms. Morrison, his girlfriend's sister, was a

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[134] SNYDER, *supra* note 116, at 3 (footnote omitted).

[135] *Id.* at 4, 31–32.

[136] *Id.* at 4, 31; *Know the Cases: Jeff Deskovic*, *supra* note 130.

[137] SNYDER, *supra* note 116, at 31.

[138] Jonathan Bandler, *Prisoner Confesses to 1989 Slaying*, J. NEWS (Westchester County, N.Y.), Oct. 6, 2006, at 2B; Robert N. Moles, *DNA Reports—New York: Steven Cunningham Convicted, Jeffrey Deskovic Released*, http://www.netk.net.au/DNA/DNA4.asp (last visited May 18, 2013).

[139] Bandler, *supra* note 138, at 2B.

[140] SNYDER, *supra* note 116, at 4; *see also id.* at 31 (mentioning that Deskovic was wrongfully incarcerated for nearly seventeen years).

[141] *Id.* at 4. See also John. M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(g-1)?*, 76 ALB. L. REV. 1453 (2013), for an in-depth analysis of the various jurisdictional treatments of actual innocence, including that of the State of New York.

[142] Fernanda Santos, *Inmate Enters Guilty Plea in '89 Killing*, N.Y. TIMES, Mar. 15, 2007, at B5.

[143] *Id.*; *Inmate Gets 20 More Years for 2nd Killing*, N.Y. TIMES, May 3, 2007, at B6.

[144] Bandler, *supra* note 138, at 2B. *See* SNYDER, *supra* note 116, at 31

teacher and the mother of three young children.[145] He strangled her more than three years after murdering Ms. Correa.[146] In 2006, Cunningham described himself as "a different man . . . than the 'monster' who was overcome by cocaine addiction" when he killed his victims.[147] Ms. Morrison's mother was not moved. "It's too late now to say he's a different man," she said after his sentencing.[148] If Cunningham had not originally escaped prosecution for Ms. Correa's murder, "maybe [Patricia would] still be with us; it gets me upset just thinking about it."[149] An attorney from the Innocence Project later echoed this sentiment: "Patricia Morrison was murdered in 1993 by her sister's boyfriend, Steven Cunningham. Unfortunately, this tragedy might have been prevented—but for the wrongful conviction of an innocent man . . . ."[150]

Leon Davis

A rash of sexual assaults committed against women in Richmond, Virginia, and closely neighboring Henrico County, began in January 1984.[151] On February 5, while on his way to a store to purchase groceries, eighteen-year-old Thomas Haynesworth was arrested when one of the assault victims saw him, recognized him as her assailant, and notified a police officer.[152] After Haynesworth was taken into custody, victims in other cases identified him as their assailant as well.[153] Although Haynesworth professed innocence, he was convicted in separate trials of raping a Richmond woman on

[145] Bandler, *supra* note 138, at 2B.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] Stephen Saloom, Op-Ed., *Prevent Wrongful Convictions*, TIMES UNION (Albany, N.Y.), May 19, 2011, at A15. *See also* Marisa Lascala, *An Innocent Man*, WESTCHESTER MAG. (Apr. 18, 2007), http://www.westchestermagazine.com/Westchester-Magazine/May-2007/In-the-News ("Patricia Morrison's murder took place in 1993—four years *after* Correa's murder—adding more names to the list of victims of the Deskovic case.").

[151] Frank Green & Reed Williams, *DNA Raises Questions in '84 Rape*, RICHMOND TIMES-DISPATCH, Mar. 19, 2009, at A1 [hereinafter Green & Williams, *DNA Raises Questions*].

[152] Press Release, Brian J. Gottstein, Office of the Attorney Gen., Statement of Attorney General Ken Cuccinelli on Thomas Haynesworth's State Compensation for Wrongful Incarceration (Apr. 5, 2012), *available at* http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Cuccinelli/040512_Haynesworth.html [hereinafter Ken Cuccinelli Statement]; *see Know the Cases: Thomas Haynesworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Thomas_Haynesworth.php (last visited May 18, 2013) [hereinafter *Know the Cases: Thomas Haynesworth*];

[153] *Know the Cases: Thomas Haynesworth*, *supra* note 152.

January 3, 1984, of abducting, raping and sodomizing a Henrico County woman on January 30, and of the abduction and attempted robbery of a Richmond woman who had thwarted a sexual assault on February 1.[154] He was acquitted in another trial of sodomizing a Richmond woman who was assaulted on January 21.[155] Another set of charges against him was *nolle prosequed*.[156] His prison sentences totaled seventy-four years.[157]

Although Haynesworth was taken into custody in early February 1984, the assaults did not abate.[158] The *modus operandi* in the continuing wave of crimes was similar.[159] The assailant typically threatened his victims with a large, serrated knife and often identified himself as "the Black Ninja."[160] Police issued a warning that "the Black Ninja rapist" was suspected of attacking a dozen women in Richmond and Henrico County beginning in April 1984.[161] The attacks continued through mid-December 1984, when Leon Davis finally was arrested.[162] Davis was found guilty of committing a string of sexual assaults over that several month period and was sentenced to seven terms of life imprisonment.[163]

Davis and Haynesworth lived in the same neighborhood.[164] They were not friends but they knew one another.[165] Although Haynesworth, at 5'6", was four inches shorter, the two men resembled one another.[166] They shared the same blood type.[167] Haynesworth maintained that he knew from the outset, and that he had told his attorney and the police, that Davis was responsible for

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[154] Green & Williams, *DNA Raises Questions*, *supra* note 151.

[155] *Id.*

[156] Haynesworth v. Commonwealth, 717 S.E.2d 817, 819 (Va. Ct. App. 2011) (Elder, J., dissenting).

[157] Green & Williams, *DNA Raises Questions*, *supra* note 151.

[158] *Know the Cases: Thomas Haynesworth*, *supra* note 152.

[159] *Id.*

[160] Frank Green, *Law Officials Work to Reduce Chances for Misidentification*, RICHMOND TIMES-DISPATCH (Mar. 20, 2011, 1:00 A.M.), http://www2.timesdispatch.com/news/2011/mar/20/tdmain01-witnessvictim-id-still-an-issue-ar-915795.

[161] Frank Green, *Prisoner Asks Va. High Court to Clear Him in 1984 Rape*, RICHMOND TIMES-DISPATCH, May 10, 2009, at B1, *available at* 2009 WLNR 9569499 [hereinafter Green, *1984 Rape*]

[162] *Know the Cases: Thomas Haynesworth*, *supra* note 152.

[163] Ken Cuccinelli Statement, *supra* note 152.

[164] Green, *1984 Rape*, *supra* note 161.

[165] *See id.*

[166] *See* Haynesworth v. Commonwealth, 717 S.E.2d 817, 820 n.4 (Va. Ct. App. 2011) (Elder, J., dissenting) (including a victim statement that her assailant was 5'8 ½" or slightly taller).

[167] Maria Glod, *'He's Home': Man Freed After 27 Years in Prison*, WASH. POST, Mar. 22, 2011, at B1.

the crimes for which Haynesworth was convicted.[168] Although he sought help from various sources, none was provided and he languished in prison for twenty-five years.[169] Finally, in 2009, Haynesworth was notified that as part of a systematic review of rape convictions returned in Virginia in the 1970s and 1980s, the State Department of Forensic Science had determined through DNA testing that he had been excluded as the source of the semen preserved from the January 3, 1984 rape for which he had been convicted.[170] Instead, the DNA from that crime matched Leon Davis.[171]

The immediate problem that Haynesworth faced was that no biological evidence remained for testing for the other two sets of crimes for which he had been convicted.[172] The Virginia Supreme Court voided the January 3 rape conviction upon being presented with the DNA results,[173] but Haynesworth remained incarcerated for the other crimes.[174] At the urging of Innocence Project attorneys and with the consent of Richmond's Commonwealth Attorney, a court ordered evidence from the trial that resulted in Haynesworth's acquittal on the January 21, 1984 sodomy charge to be tested.[175] That test also produced a match with Leon Davis.[176] Based on those results, Haynesworth applied for writs of actual innocence in an attempt to vacate his convictions for the January 30 and February 1, 1984 offenses.[177] The Virginia Attorney General's Office and the local prosecutors supported Haynesworth's request.[178]

In December 2011, in a 6–4 decision, the Virginia Court of Appeals issued the writs and vacated Haynesworth's remaining

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[168] Frank Green & Reed Williams, *DNA Points to Different Man in Rape: 'Black Ninja' Implicated in 1984 Richmond Attack; Another Was Convicted*, RICHMOND TIMES-DISPATCH, Mar. 24, 2009, at A1 [hereinafter Green & Williams, *DNA Points to Different Man*].

[169] Maria Glod & Anita Kumar, *Haynesworth is Exonerated*, WASH. POST, Dec. 7, 2011, at B7.

[170] Green & Williams, *DNA Raises Questions*, *supra* note 151.

[171] Green & Williams, *DNA Points to Different Man*, *supra* note 168.

[172] Haynesworth v. Commonwealth, 717 S.E.2d 817, 818 (Va. Ct. App. 2011) (Elder, J., dissenting).

[173] *Id.* at 819.

[174] Green & Williams, *DNA Points to Different Man*, *supra* note 168; *see Haynesworth*, 717 S.E.2d at 818.

[175] Glod & Kumar, *supra* note 169.

[176] *Id.*

[177] *Id.* *See* Leventhal, *supra* note 141, at 1513 (describing the State of Virginia's statutory scheme for the handling of claims of actual innocence).

[178] Glod, *supra* note 167; John Schwartz, *After Decades in Prison, Cleared of Rape but Lacking Full Exoneration*, N.Y. TIMES, Sept. 25, 2011, at 22;.

convictions.[179] Released on parole earlier that year while the case was pending, Haynesworth thus was fully exonerated.[180] He had spent twenty-seven years in prison for crimes he did not commit.[181] In the eleven months between Haynesworth's February 1984 arrest and his own arrest in December 1984, Leon Davis, the "Black Ninja" rapist, had continued to terrorize the Richmond area and sexually assaulted as many as a dozen additional victims.[182]

Aaron Doxie, III

Two women were raped and sodomized at knifepoint on the night of August 14, 1981 in Norfolk, Virginia.[183] The rapes were separated by only forty-five minutes and occurred in the same neighborhood.[184] The victims gave similar descriptions of their respective assailants.[185] Norfolk police concluded that Arthur Whitfield fit the descriptions even though Whitfield's appearance differed from the suspect's described characteristics in significant respects.[186] The police suspected Whitfield of committing a burglary that same night in the general vicinity of the rapes and thus included his photograph in an array presented to one of the rape victims.[187] The victim "selected Whitfield's photograph . . . [indicating] that she was 95 percent sure he was the man who raped her."[188] The next day, the victims from both rapes, who happened to know one another, drove together to the police station in anticipation of viewing a lineup.[189] They discussed what they had endured during their ordeals, including the description of their assailants.[190] They then independently observed lineups.[191] Each identified Whitfield as her rapist.[192]

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[179] Haynesworth v. Commonwealth, 717 S.E.2d 817, 817 (Va. Ct. App. 2011) (Elder, J., dissenting); Glod & Kumar, *supra* note 169.

[180] Glod & Kumar, *supra* note 169.

[181] *Id.* Haynesworth subsequently was awarded just over $1 million in compensation for his wrongful incarceration. Ken Cuccinelli Statement, *supra* note 152.

[182] Green & Williams, *DNA Points to Different Man*, *supra* note 168.

[183] JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 123 (2008).

[184] *Id.*

[185] *Id.*

[186] *Id.* at 123, 124.

[187] *Id.* at 123.

[188] *Id.*

[189] *Id.*

[190] *See id.* at 123, 124.

[191] *Id.* at 123.

[192] *Id.*

Whitfield denied the charges.[193] He maintained that he was at a party on the night of the rapes, a story that four family members and friends confirmed.[194] Separate trials were ordered for the two attacks.[195] Nevertheless, at the first scheduled trial, the judge allowed both rape victims to testify, one in her capacity as the victim named in the indictment, and the other to rebut the testimony of Whitfield's alibi witnesses.[196] The jury found Whitfield guilty and sentenced him to forty-five years in prison.[197] On the heels of this verdict, and knowing that both victims again would be allowed to testify in the trial scheduled for the second rape, Whitfield pleaded guilty to the other rape charge.[198] He received an eighteen year sentence, to be served consecutively with the earlier forty-five year sentence.[199]

On December 6, 1981, less than four months after the rapes for which Whitfield was convicted had occurred, another Norfolk woman was raped and sodomized at knifepoint by a man who broke into her apartment.[200] The woman, who was white, described her assailant, who was black, to the police and then examined hundreds of photos in a fruitless attempt to identify the man.[201] Roughly six weeks later, in the corridor of the hospital where she worked, the rape victim noticed a maintenance man who she felt certain was her assailant.[202] The man was Julius Ruffin, who not only had two prominent gold front teeth, which were not mentioned in the woman's earlier description of her rapist, but also was considerably taller, heavier, and had a lighter complexion than the man she had described.[203] The victim subsequently picked Ruffin out of a lineup.[204] He was arrested and charged with the crimes.[205]

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193 *Id.* at 124.
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 Geoff Dutton, *High Cost of Freedom: Despite Innocence, He's Labeled a Sex Offender*, COLUMBUS DISPATCH (Sept. 9, 2011, 4:50 PM), http://www.dispatch.com/content/stories/local/2008/01/30/dna4.html (quoting Whitfield as saying that he was aware that he did not "have a leg to stand on" when he made the decision to plead guilty); *see* GOULD, *supra* note 183, at 124.
199 GOULD, *supra* note 183, at 124.
200 *Id.* at 106.
201 *Id.*
202 *Id.* at 107.
203 *Id.* at 106, 107.
204 *Id.* at 107.
205 *Id.*

Ruffin's first two trials ended in hung juries.[206] The juries were racially mixed and in each trial the white jurors had voted to convict while the black jurors had voted not guilty.[207] At Ruffin's third trial, the prosecutor used peremptory challenges to excuse four prospective black jurors.[208] The resulting all-white jury heard the evidence (the testimony of both the victim and a police officer differed in respects from testimony they had offered at the earlier trials) and deliberated for only seven minutes before returning with a guilty verdict.[209] Ruffin was sentenced to five terms of life imprisonment.[210] He had maintained his innocence throughout the proceedings and continued to do so after he was incarcerated and became parole-eligible.[211]

While Arthur Whitfield and Julius Ruffin were serving sentences for what appeared to be unrelated offenses, their lives, the lives of the women they had been convicted of raping and sodomizing, and the lives of still other sexual assault victims would become discernibly intertwined with the criminal career of Aaron Doxie, III. In October 1981—sandwiched in between the August rapes for which Whitfield was convicted and the December rape resulting in Ruffin's conviction—Doxie received a suspended ten-year prison sentence for the attempted rape of an eleven-year-old girl in Norfolk.[212] In March 1982, he was convicted of assault.[213] In September 1983, following his release from jail, he was charged with committing rape after making a nighttime entry into a woman's residence with a knife.[214] As in Ruffin's case, Doxie's first two trials ended with hung juries.[215] Additionally, as in Ruffin's case, the jury at Doxie's third trial, in March 1984, convicted him.[216] Doxie was sentenced to three terms of life imprisonment.[217]

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[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Julius Ruffin*, MID-ATL. INNOCENCE PROJECT, http://www.exonerate.org/other-local-victories/julius-ruffin (last visited May 18, 2013).

[210] Tim McGlone, *Free, Finally. Persistence Pays Off with Proof of Innocence, but Justice Falls Short*, VIRGINIAN-PILOT, Feb. 9, 2004, at A1.

[211] GOULD, *supra* note 183, at 108–09.

[212] Tim McGlone, *The Wrong Man*, VIRGINIAN-PILOT, Feb. 9, 2004, at A1.

[213] *Id.*

[214] *See* Doxie v. Commonwealth, No. 0063 84, 1986 WL 400450, at *1 (Va. Ct. App. Aug. 26, 1986) ("On September 7, 1983, the grand jury returned indictments against Doxie for rape, sodomy, abduction and burglary.").

[215] McGlone, *supra* note 212.

[216] *Id.*

[217] Doxie v. Clarke, No. 2:10CV379, 2011 WL 1930666, at *1 (E.D. Va. Apr. 22, 2011); Timothy McGlone, *Governor Grants Pardon to Man Wrongly Convicted of 1981 Rape,*

Fortuitously, biological evidence from both Whitfield's and Ruffin's convictions was preserved in the records kept by Mary Jane Burton, a Virginia crime laboratory analyst who was employed in the era before the forensic use of DNA testing was anticipated.[218] Each man took advantage of a statute enacted in Virginia in 2001 authorizing them to apply for post-conviction DNA testing of evidence.[219] When the evidence in their cases was tested, each was excluded as the source of the preserved semen.[220] Remarkably, the DNA profiles from the rapes for which both Whitfield and Ruffin had been wrongfully convicted matched the profile of the same man: Aaron Doxie, III.[221] Ruffin was released on parole in February 2003, having served more than twenty years in prison.[222] He was issued a full pardon by Governor Mark Warner the following month.[223] Whitfield was paroled in August 2004.[224] He had spent twenty-two years in prison.[225] He was pardoned by Governor Timothy Kaine in 2009.[226]

Aaron Doxie, III was not prosecuted for the crimes to which his

VIRGINIAN-PILOT, Mar. 20, 2003, at A1. Doxie's prior criminal history is described somewhat differently in a presentation prepared by Virginia Deputy Secretary of Public Safety Clyde Cristman, who identifies prior convictions for two counts of burglary, contributing to the delinquency of a minor, and attempted rape. CLYDE CRISTMAN, DNA, EARL AND MARY JANE: THE VIRGINIA EXPERIENCE 40 (n.d.).

[218] *See* Kristen Gelineau, *She Taped Their Innocence Inside Her Crime Lab Files*, L.A. TIMES (Oct. 9, 2005), http://articles.latimes.com/2005/oct/09/news/adna-saved9.

[219] *See* GOULD, *supra* note 183, at 108. *See also* Act of May 2, 2001, ch. 873, § 1, 2001 Va. Acts 1621, 1621 (describing the application procedure for post-conviction DNA testing of evidence); Leventhal, *supra* note 141, at 1513 (describing the State of Virginia's statutory scheme for writs of actual innocence, and Virginia court treatment of similar claims).

[220] GOULD, *supra* note 183, at 108, 125.

[221] *Id.*

[222] *Julius Ruffin*, *supra* note 209.

[223] *Id.*

[224] *Arthur Whitfield*, MID-ATLANTIC INNOCENCE PROJECT, http://www.exonerate.org/other-local-victories/arthur-lee-whitfield (last visited May 18, 2013).

[225] *Id.*

[226] *Id.* Whitfield's pardon came years after his release from prison. Candace Rondeaux, *Freed Man Still Fighting to Clear Name*, WASH. POST (June 5, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/04/AR2006060400939.html. The victim of one of the rapes for which he was convicted continued to insist that, notwithstanding the results of the DNA testing—which she maintained may have resulted from a mix-up in evidence samples—she was certain that Whitfield was the man who had raped her. *Id.* In addition, the Virginia Supreme Court had refused to issue Whitfield a writ of actual innocence, concluding that he was ineligible because he had been paroled and was no longer incarcerated. Michelle Washington, *State Court Dismisses Man's Request for Ruling of Innocence*, VIRGINIAN-PILOT, Nov. 3, 2005, at B1; Rondeaux, *supra*. *See also* Leventhal, *supra* note 141, at 1513 ("Court will grant petition for post-conviction DNA testing if petitioner proves that he is convicted of a felony, currently incarcerated, and the evidence is material so that no reasonable trier of fact could have found proof of guilt beyond a reasonable doubt.").

DNA profile was linked and for which Ruffin and Whitfield were wrongly convicted.[227] The Norfolk Commonwealth's Attorney cited chain of custody problems with the semen samples and the unavailability of critical witnesses.[228] As Professor Jon Gould has observed: "[h]ad Doxie been caught at the time of the first rapes [i.e., those for which Whitfield was convicted], the victim in Ruffin's case might have been spared."[229] The same might be said about the victim of the sexual assault for which Doxie was ultimately convicted, and about Whitfield and Ruffin, each of whom endured decades of wrongful incarceration.[230]

Howard Dupree Grissom

In November 2001, an intruder wearing a ski mask and a blue hooded sweatshirt and armed with a baseball bat entered a Las Vegas, Nevada home occupied by a woman and her two daughters.[231] He demanded money, then forced the woman and her children into the family's car and ordered the woman to drive to a bank to withdraw more funds.[232] The woman's husband returned home, finding it in disarray and his wife, children, and the car missing.[233] He went searching for them and encountered his wife driving, with the masked intruder still in the vehicle.[234] The man ran and the family immediately notified the police, providing a general description of the robber and the clothes he was wearing.[235]

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[227] Jerry Markon, *Inmate Will Not Be Tried in 1981 Norfolk Rapes*, WASH. POST, Dec. 11, 2004, at B1.

[228] *Id.*; Michelle Washington, *DNA From 3 Rapes Points to 1 Man*, VIRGINIAN-PILOT, Dec. 8, 2004, at B1; Michelle Washington, *Evidence Problems Cancel Man's Rape Charges*, VIRGINIAN-PILOT, Jan. 6, 2004, at B3. One of the victims in the cases resulting in Whitfield's convictions also remained adamant that Whitfield was the man who had raped her. Rondeaux, *supra* note 226.

[229] GOULD, *supra* note 183, at 109. When confronted with the DNA evidence, Doxie denied having committed the crimes for which Ruffin was convicted. *See* Michelle Washington, *Hearing Could Re-implicate Man Freed by DNA*, VIRGINIAN-PILOT, Feb. 16, 2005, at B2. "A DNA analysis from the State Division of Forensic Science included in the court records [in the case pertaining to Julius Ruffin's wrongful conviction] said the chance the biological evidence came from someone other than Doxie is one in more than 6 billion." Michelle Washington, *Attorney Seeks Independent DNA Tests*, VIRGINIAN-PILOT, Aug. 6, 2003, at B4.

[230] *See supra* notes 222, 225 and accompanying text.

[231] Jackie Valley, *Metro Reviewing DNA Cases After Error Led to Wrongful Conviction*, LAS VEGAS SUN (July 7, 2011, 10:10 AM), http://www.lasvegassun.com/news/2011/jul/07/dna-lab-switch-led-wrongful-conviction-man-who-ser [hereinafter Valley, *Metro Reviewing DNA Cases*].

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

A short while later, the police spotted two young men—eighteen-year-old Dwayne Jackson and his cousin, fifteen-year-old Howard Dupree Grissom—riding bicycles near the family's home.[236] The youths led the police to a nearby parked car, inside of which were a ski mask and a blue hooded sweatshirt matching the description of the intruder's clothing.[237]

Jackson and Grissom both denied involvement in the crime.[238] Each young man provided the police with a DNA sample.[239] The samples were sent to the Metropolitan Police Department Crime Laboratory, stored in separate vials, and later were compared to DNA retrieved from the blue hooded sweatshirt.[240] The profile from the sweatshirt matched the DNA in Jackson's vial.[241] Jackson was charged with three counts of kidnapping, burglary, and robbery, crimes that could have resulted in his incarceration for life upon conviction.[242] He entered a guilty plea to a single count of robbery in exchange for the remaining charges being dropped.[243] He was imprisoned until 2006.[244]

Although it was not apparent at the time, Jackson's guilty plea resulted in his wrongful conviction. His DNA sample and Grissom's had inadvertently been mislabeled at the police crime lab.[245] The DNA from the blue hooded sweatshirt belonged to Grissom, whose DNA had erroneously been placed in the vial marked as Jackson's.[246] The mistake was not discovered until October 2010 when law enforcement authorities in California entered Grissom's

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[236] *Id.*; Lawrence Mower & Doug McMurdo, *Las Vegas Police Reveal DNA Error Put Wrong Man in Prison*, LAS VEGAS REV.-J. (July 7, 2011, 10:22 AM), http://www.lvrj.com/news/dna-related-error-led-to-wrongful-conviction-in-2001-case-125160484.html.

[237] Mower & McMurdo, *supra* note 236.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] Hans Sherrer, *Dwayne Jackson Cleared of Robbery After Discovery the Crime Lab Switched DNA Samples*, JUST. DENIED (July 8, 2011, 3:17 PM), http://justicedenied.org/wordpress/archives/1309.

[243] *Id.*

[244] *Id.*

[245] Brian Haynes, *Committee OKs $1.5 Million Settlement For Wrongly Imprisoned Man*, LAS VEGAS REV.-J. (July 25, 2011, 10:16 AM), http://www.lvrj.com/news/committee-oks-1-5-million-settlement-for-wrongly-imprisoned-man-126122823.html.

[246] Mower & McMurdo, *supra* note 236. A crime lab technician apparently placed the DNA sample that police had obtained from Jackson in a vial marked with Grissom's name, and vice-versa. Haynes, *supra* note 245; Mower & McMurdo, *supra* note 236. When the mistake came to light in 2011, Clark County (Las Vegas) Sheriff Doug Gillespie candidly acknowledged it: "[w]e sent an innocent man to prison," he was quoted as saying. Mower & McMurdo, *supra* note 236. "To say this error is regrettable would be an understatement." *Id*; Valley, *Metro Reviewing DNA Cases*, *supra* note 231.

DNA profile into the Combined DNA Index System (CODIS),[247] learned that it matched the profile associated with the 2001 Las Vegas crimes for which Jackson had been held responsible, and notified their counterparts in Nevada.[248] Grissom had been arrested in Moreno Valley, California in July 2010 for abducting a woman from her apartment, and then raping, robbing, and repeatedly stabbing her.[249] He subsequently was convicted of attempted manslaughter and sentenced to forty-one years to life in prison.[250] The DNA sample taken following his conviction produced the "hit" that revealed the mix-up that led to Jackson's erroneous conviction.[251] Jackson subsequently was exonerated and was awarded $1.5 million in compensation for his wrongful conviction and incarceration.[252]

The mistake could have been discovered earlier. In 2008, Grissom began serving a two to five year prison sentence in Nevada upon being convicted on robbery and conspiracy charges.[253] As state law required, DNA was collected from him at that time.[254] The swab with his DNA was sent to the Metropolitan Police Department's crime lab in Las Vegas, but the DNA profile was not entered into CODIS to be checked against the known offender database.[255] Instead, under the unorthodox policy then in effect in the police department, Grissom's profile was entered into a DNA database that only included "open" cases, which had not resulted in a conviction.[256] Thus, Grissom's profile was never compared against the profile linked to Jackson's 2002 conviction, as the California officials had done in discovering the error.[257]

Had Grissom's DNA profile been entered into CODIS by the Las

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[247] *See generally* Lab. Servs., *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited May 18, 2013) (explaining the operation of the nation's criminal DNA databases).

[248] Rebecca Clifford-Cruz, *Wrongfully Convicted: A Look at 5 Cases*, LAS VEGAS SUN (July 29, 2011, 2:00 AM) http://www.lasvegassun.com/news/2011/jul/29/wrongfully-convicted/; Mower & McMurdo, *supra* note 236; Sherrer, *supra* note 242.

[249] Clifford-Cruz, *supra* note 248; Mower & McMurdo, *supra* note 236.

[250] Mower & McMurdo, *supra* note 236; *see* Haynes, *supra* note 245.

[251] Mower & McMurdo, *supra* note 236.

[252] Haynes, *supra* note 245; Jackie Valley, *Man Wrongfully Convicted After a DNA Mix-up Awarded $1.5 Million*, LAS VEGAS SUN (July 25, 2011, 10:05 AM) http://www.lasvegassun.com/news/2011/jul/25/man-wrongly-convicted-after-dna-mix--awarded-15-mi [hereinafter Valley, *Man Wrongfully Convicted*].

[253] Clifford-Cruz, *supra* note 248.

[254] *See* Mower & McMurdo, *supra* note 236.

[255] *Id.*

[256] *Id.*

[257] *Id.*

Vegas police and this broader search conducted in 2008, Jackson would not have been spared his wrongful conviction and incarceration. Nevertheless, had the error been caught in this more timely fashion, Grissom presumably would have been held accountable for the kidnappings and robbery that had been attributed to Jackson. He almost certainly would not have been paroled and been able to migrate to California in 2010,[258] where he continued his violent criminal victimization.[259]

Clifton Hall

In November 1985, Byron Halsey was living with his girlfriend Margaret Urquhart and her eight-year-old son and seven-year-old daughter in a Plainfield, New Jersey rooming house.[260] Halsey was with the children on the evening of November 14 while Urquhart was at work.[261] He left the children alone after he accepted a ride from his next-door neighbor, Clifton Hall, and attended a party across town.[262] Halsey remained at the gathering, drinking heavily, while Hall departed.[263] When Halsey returned to the rooming house later that night, the children were nowhere to be found.[264] He telephoned Urquhart, notified others about the children's disappearance, and began looking for them.[265] The children's bodies were found the next morning in the basement of the rooming house.[266] They had been slain in horrific fashion. Four nails[267] had been hammered through the boy's skull, piercing his brain, and his face had been slashed with a pair of scissors.[268] The girl had been strangled, and her underwear stuffed into her mouth.[269] Both

[258] *Id.*

[259] *Id.*

[260] *Know the Cases: Byron Halsey*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Byron_Halsey.php (last visited May 18, 2013).

[261] *See id.*

[262] *See id.* (noting that he was dropped off "with friends").

[263] Julie O'Connor, *Exonerated After 22 Years in Prison, Man Files Federal Civil Rights Suit*, NJ.COM BLOG (May 24, 2009, 10:00 AM), http://blog.nj.com/ledgerupdates_impact/print.html?entry=/2009/05/the_man_who_spent_more.html.

[264] *Know the Cases: Byron Halsey*, *supra* note 260.

[265] *Id.*

[266] *Id.*

[267] O'Connor, *supra* note 263.

[268] Austin Fenner et al., *'Wrong Man' Free After 19 Yrs.—& Real 'Killer' Was Star Witness*, N.Y. POST (May 16, 2007), http://www.nypost.com/p/news/regional/item_gGegKp53z65FfbJNfOXKyM.

[269] *Id.*

children were sexually assaulted.[270]

The police initially considered both Halsey and Hall to be suspects.[271] Questioned by the police for thirty hours,[272] Halsey, a man with a sixth-grade education and serious learning disabilities,[273] made incriminating admissions that alternated between "gibberish"[274] and details that presumably could have been known only by the actual perpetrator.[275] He also failed a polygraph exam.[276] He was charged with capital murder and sexual assault and brought to trial in 1988.[277] Clifton Hall testified as a prosecution witness.[278] The jury found Halsey guilty of two counts of non-capital murder, sexual assault, and child abuse.[279] He was sentenced to two terms of life imprisonment without parole eligibility for sixty years.[280] In 2000, while affirming a lower court ruling that had denied Halsey's request for access to evidence so he could submit it to post-conviction DNA testing, a New Jersey appellate court described the evidence of Halsey's guilt as "overwhelming."[281]

Halsey subsequently gained access to the crime scene evidence.[282] DNA testing completed in 2007 excluded him as the source of the semen connected to the children's sexual assaults and also excluded him as the source of saliva retrieved from cigarette butts near their bodies.[283] The crime scene profiles instead matched Clifton Hall,

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[270] State v. Halsey, 748 A.2d 634, 637 (N.J. Super. Ct. App. Div. 2000); *Know the Cases: Byron Halsey*, *supra* note 260; Julie O'Connor, *Innocent Man Sues for Years Spent in Prison*, STAR-LEDGER (Newark, N.J), May 24, 2009, at 23.

[271] *Know the Cases: Byron Halsey*, *supra* note 260.

[272] Press Release, Innocence Project, Byron Halsey is Fully Exonerated in New Jersey after DNA Proves His Innocence in 1985 Child Rapes and Murders (July 9, 2007) [hereinafter Halsey Press Release].

[273] Tina Kelley, *New Jersey Drops Charges for Man Imprisoned 19 Years*, N.Y. TIMES, July 10, 2007, at B03; Halsey Press Release, *supra* note 272.

[274] *See Halsey*, 748 A.2d at 636; Halsey Press Release, *supra* note 272.

[275] *See* Brandon Garrett, *The Substance of False Confessions*, 62 STANFORD L. REV. 1051, 1088–89 (2010) (discussing the interrogation of Halsey and his "guesses" as to the manner in which the murder and rape of the children was conducted).

[276] *Halsey*, 748 A.2d at 635.

[277] *Know the Cases: Byron Halsey*, *supra* note 260.

[278] *Id.*; Fenner et al., *supra* note 268.

[279] *Know the Cases: Byron Halsey*, *supra* note 260.

[280] *Halsey*, 748 A.2d at 636.

[281] *Id.* at 636.

[282] Symposium, *Panel III—Legislative Moratorium and the New Jersey Death Penalty Study Commission*, 33 SETON HALL LEGIS. J. 137, 150 n.42 (2008). Legislation became effective in New Jersey in 2002 that authorized prisoners under qualifying circumstances to have access to evidence for post-conviction DNA testing. Leventhal, *supra* note 141, at 1503; N.J.S.A. § 2A:84A-32a (2012); *see* Symposium, *supra*, at 150 n.42.

[283] Halsey Press Release, *supra* note 272.

whose DNA was on file pursuant to his conviction for three "savage" sexual assaults carried out in 1991 and 1992.[284]

> In June 1991, [Hall] grabbed an 18-year-old woman from behind on a street and, holding a knife to her throat, orally, vaginally, and anally raped her for up to three hours. Three months later, he abducted a 19-year-old woman and took her to a building where he repeatedly and violently raped her vaginally and anally for two hours. Several months after that, he punched and attempted to rape a 26-year-old woman as she walked toward a train station . . . .[285]

Hall would not have remained at liberty to commit those crimes had the police investigation and prosecution of Halsey not misfired and resulted in Halsey's wrongful conviction.

Byron Halsey was released from prison in May 2007.[286] He was formally exonerated two months later when prosecutors dismissed the charges against him.[287] He had been incarcerated since 1985.[288] Clifton Hall was indicted in November 2007 for the crimes for which Halsey had been wrongfully convicted.[289] Hall died of kidney failure in 2009, at age 52, before he could be brought to trial and while still imprisoned for the sexual assaults he had committed in 1991 and 1992.[290] The prosecutor preparing for Hall's trial was quoted as saying, "Clifton cheated justice . . . . He never spent a day in state's prison for the atrocious murders he committed. He never had to pay for robbing 22 years from Byron Halsey—an innocent man who sat in jail for crimes he did not commit."[291]

Andrew Harris

Eva Gail Patterson was raped and murdered in her home in rural

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[284] Fenner et al., *supra* note 268.

[285] Halsey Press Release, *supra* note 272.

[286] *Id.*

[287] *Id.*; Kelley, *supra* note 273; *see also* Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, at B1 ("[Prosecutors] said that the DNA evidence pointed instead to Cliff Hall, a neighbor who testified against Mr. Halsey at his 1988 trial and who [was] currently in prison for three sexual assaults.").

[288] Halsey Press Release, *supra* note 272.

[289] *See* Claire Heininger, *Convicted Rapist Charged in Plainfield Children's Slayings*, NJ.COM (Nov. 19, 2007), http://www.nj.com/news/index.ssf/2007/11/six_months_after_publicly_admi.html.

[290] *Clifton Hall—Plainfield Man Facing 1985 Double Murder Charge Dies in Jail*, ALTERNATIVE PRESS (Aug. 24, 2010), http://thealternativepress.com/articles/clifton-hall-plainfield-man-facing-1985-double.

[291] *Id.*

Eatonville, Mississippi on the night of May 4, 1979.[292] The state supreme court opinion that affirmed Larry Ruffin's conviction for those crimes following his 1980 trial remarked that "[t]he physical facts demonstrate as ghastly a murder as can be envisioned. A harmless young housewife was raped in her home, and her throat slashed from ear-to-ear in the presence of her two little terrified children."[293] The prosecution had sought the death penalty but Ruffin was sentenced to life imprisonment when the jury was unable to reach a unanimous penalty verdict at his trial.[294]

Ruffin's conviction was supported by his May 30 and June 12 confessions to the police.[295] The confessions, which Ruffin later retracted, were inconsistent in respects, although in both statements he purported to have raped and murdered Mrs. Patterson while acting alone.[296] Mrs. Patterson's four-year-old son, Luke, witnessed the crime and although he could not identify his mother's killer, similarly reported a lone assailant: "[a] Black man tried to hurt my mommy."[297]

Contrary statements were given to the police roughly a year and one-half after the crime by Bobby Ray Dixon and Phillip Bivens, both of whom pleaded guilty to Mrs. Patterson's murder in exchange for life sentences and testified for the prosecution at Ruffin's trial.[298] From the witness stand and in videotaped statements to the police, each described how the three men had jointly entered Patterson's home and participated in the crime.[299] Dixon, who had been kicked in the head by a horse as a child and admitted at Ruffin's trial to being a "hard learner" and that "I don't have the right mind,"[300] offered particularly confusing testimony, which culminated with a retraction. He ultimately told the jury "he did not see Ruffin on the night of [the murder], that he did not go in the house, was not even there, and that he had never seen Mrs. Patterson before."[301] Bivens's testimony was less equivocal. However, he recanted that

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[292] *See* Ruffin v. State, 447 So. 2d 113, 114–15 (Miss. 1984).

[293] *Id.* at 115.

[294] Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 17, 2010, at A12.

[295] *Ruffin*, 447 So. 2d at 115.

[296] Robertson, *supra* note 294, at A12.

[297] *Ruffin*, 447 So. 2d at 114 (internal quotation marks omitted); *see also* Robertson, *supra* note 294, at A12 ("The 4-year-old, Luke, told the police that a single man, 'a bad boy,' had killed his mother.").

[298] *Id.* at 115, 117.

[299] *Id.*

[300] Robertson, *supra* note 294, at A12.

[301] *Ruffin*, 447 So. 2d, at 117.

testimony in a sworn affidavit submitted less than a month after Ruffin's conviction.[302] Like Dixon, Bivens claimed to have been threatened with the death penalty if he would not cooperate with the authorities.[303]

Ruffin, Dixon, and Bivens entered Mississippi's prison system in 1980.[304] Thirty years later, DNA testing excluded each of them as the source of the semen preserved as evidence in Mrs. Patterson's rape and murder.[305] The DNA profile instead matched Andrew Harris, who lived just up the road from the Pattersons at the time of Mrs. Patterson's rape and murder.[306] Harris was convicted of an unrelated rape committed in the same county in 1981.[307] When the DNA testing was completed in 2010, he remained in service of the sentence of life imprisonment imposed for that offense.[308]

Harris was indicted in December 2010 for Mrs. Patterson's 1979 murder,[309] a crime that, incredibly, spawned the false confessions and wrongful convictions of three other men and resulted in their decades-long incarceration.[310] Forrest County Circuit Judge Robert Helfrich vacated Bobby Ray Dixon's and Phillip Bivens's guilty pleas at a hearing conducted in September 2010.[311] He noted, "[t]he

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[302] *Exonerees Profiles: Phillip Bivens*, INNOCENCE PROJECT OF NEW ORLEANS, http://www.ip-no.org/exonoree-profile/phillip-bivens (last visited May 18, 2013).

[303] *Id.*

[304] *See id.*

[305] *Id.* The testing apparently was prompted when a corrections officer contacted the Innocence Project on behalf of Phillip Bivens. Robertson, *supra* note 294, at A12.

[306] *Id.*

[307] Associated Press, *Man Dies Weeks After Being Cleared in 1979 Killing*, KATC.COM (Nov. 9, 2010), *available at* http://www.katc.com/news/man-dies-weeks-after-being-cleared-in-1979-killing; *Man Dies Weeks After Being Cleared in 1979 Killing*, *supra* note 307; Ontario Richardson, *Suspect Appears in Forrest County Court on 1979 Rape and Murder Charges*, WDAM.COM (Apr. 19, 2011), *available at* http://www.wdam.com/story/14473126/suspect-appears-in-forrest-county-court-on-1979-rape-and-murder-charges?redirected=true; *see Exoneree Profiles*, *supra* note 302.

[308] Robertson, *supra* note 294, at A12; *Man Dies Weeks After Being Cleared in 1979 Killing*, *supra* note 307; Richardson, *supra* note 307. *See* Harris v. State, 435 So. 2d 689 (Miss. 1983) (affirming the conviction), *cert. denied*, 464 U.S. 1049 (1984).

[309] *Exoneree Profiles*, *supra* note 302. Harris's murder trial was scheduled to begin in October 2012. *Trial Set for 1979 Murder, Rape Case*, MISS. LINK (Aug. 7, 2012), *available at* http://themississippilink.com/2012/08/07/trial-set-for-1979-murder-rape-case.

[310] *Trial Set for 1979 Murder, Rape Case*, *supra* note 309.

[311] Associated Press, *DNA Testing Frees 2 Men After 30 Years*, WASH. TIMES (Sept. 16, 2010), *available at* http://www.washingtontimes.com/news/2010/sep/16/dna-testing-frees-2-men-after-30-years/print; *see also* Robertson, *supra* note 293 (describing the scene in the courtroom as Bivens and Dixon were exonerated by a judge). Dixon and Bivens were formally exonerated in December 2010, when a grand jury was asked to consider their cases and declined to indict them. Associated Press, *Forrest Co. Grand Jury Clears Men in Old Murder*, PICAYUNE ITEM (Dec. 16, 2010), *available at* http://picayuneitem.com/statenews/x1707767623/Forrest-Co-grand-jury-clears-men-in-old-murder/print; *Exonerees Profiles: Phillip Bivens*, *supra* note 302.

common thread in this case is tragedy."[312] Dixon, critically ill from lung and brain cancer,[313] died less than three months later.[314] He outlived Larry Ruffin, who suffered a heart attack and died in 2002, while still incarcerated on his wrongful conviction.[315] Bivens, age fifty-nine when released from prison,[316] had spent more than half of his life incarcerated for a crime he did not commit.[317] Details are unavailable regarding the victim of Andrew Harris's 1981 rape, which occurred two years after Eva Gail Patterson's rape and murder, and the year after Ruffin, Bivens, and Dixon were wrongfully convicted.[318]

Andrew Hawthorne

On October 20, 2002, a man riding a bicycle in Houston, Texas offered an eight-year-old boy ten dollars if the boy would help him clean up some trash.[319] The child left his six-year-old playmate[320] and accompanied the man to a vacant house, where he was sodomized at knifepoint.[321] Concerned citizens later encountered the hysterical boy running down a neighborhood street and took

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[312] *DNA Testing Frees 2 Men After 30 Years*, *supra* note 311.

[313] *Id.*; *Exoneree Profiles: Bobby Ray Dixon*, INNOCENCE PROJECT OF NEW ORLEANS, http://www.ip-no.org/exonoree-profile/bobby-ray-dixon (last visited May 18, 2013).

[314] *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Forest Co. Grand Jury Clears Men in Old Murder*, *supra* note 311.

[315] Robertson, *supra* note 294, at A12; *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Found Guilty in 1979, Larry Ruffin Exonerated by DNA After His Death*, DEATH PENALTY NEWS (Feb. 22, 2011), http://deathpenaltynews.blogspot.com/2011/02/found-guilty-in-1979-slaying-larry.html [hereinafter *Found Guilty*]; *Know the Cases: Larry Ruffin*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Ruffin.php (last visited May 18, 2013). Ruffin was formally exonerated posthumously, in February 2011. *Exoneree Profiles: Bobby Ray Dixon*, *supra* note 313; *Found Guilty*, *supra*.

[316] Robertson, *supra* note 294, at A12.

[317] *See id.*

[318] In 2011, former Mississippi Supreme Court Justice James L. Robertson offered several insights about Ruffin's wrongful conviction and the limited role that appellate courts have in reviewing cases where factual innocence, rather than procedural error, is at issue. James L. Robertson, *A Life Sentence Served by an Innocent Man*, CAPITAL AREA BAR ASS'N 8–11 (2011), www.caba.ms/newsletters/caba-newsletter-june2011.pdf; *see also* Leventhal, *supra* note 141, at 1500 (describing the State of Mississippi's post-conviction statutory relief for a defendant). Robertson was not on the three-judge panel that heard Larry Ruffin's appeal, but he concurred in the opinion affirming Ruffin's conviction. Ruffin v. State, 447 So. 2d 113, 120 (Miss. 1984).

[319] PATRICIA R. LYKOS & HAROLD L. HURTT, RACHELL REPORT 1–2 (n.d.), *available at* http://www.kennedy-law.biz/files/Rachell_Report.pdf.; Lise Olsen, et al., *Houstonian Cleared by DNA Lies Low as He Starts New Life*, HOUS. CHRON. (Dec. 13, 2008), http://www.chron.com/news/houston-texas/article/Houstonian-cleared-by-DNA-lies-low-as-he-starts-1612828.php.

[320] LYKOS & HURTT, *supra* note 319, at 1.

[321] Olsen et al., *supra* note 319.

him to his mother, where the child reported only that he had been abducted by a man who tried to kill him.[322] The police were called and took statements from the boy and his six-year-old friend, including a general description of the man on the bicycle as being about thirty years old and black.[323] The next morning, the boy's mother saw Richardo Rachell walking in a nearby street.[324] Rachell, forty-five years old, was severely disfigured; he had lost nearly half his face to a shotgun blast years earlier, and was known locally as "Scary Man."[325] Believing that Rachell might be her son's assailant, the mother retrieved her child from home, drove him to the location where Rachell was walking, and asked the boy if Rachell was the man who had attacked him.[326] When her son replied that he was, the mother called the police.[327]

The police arrived and placed Rachell inside of a patrol car.[328] In response to an officer's question, the boy reaffirmed that Rachell was his assailant and then disclosed for the first time that his pants had been pulled down by the man who had attacked him.[329] A subsequent examination confirmed that the child had been sexually assaulted.[330] Both a rape kit and the underwear that the boy had worn on the day of the attack preserved seminal fluid evidencing the sexual assault.[331] The rape kit and underwear were delivered to the Houston Police Department's property room and an officer completed a report on October 22 requesting that they be analyzed by the Houston Crime Lab.[332] Rachell was arrested on October 24, 2002.[333] Protesting his innocence, he voluntarily provided a DNA sample to the police, which also was secured in the police department's property room.[334]

The Houston Crime Lab was then in disarray, leading to its eventual closure in December 2002.[335] No one—not the police, nor

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[322] LYKOS & HURTT, *supra* note 319, at 1.

[323] *Id.*

[324] *Id.* at 1–2.

[325] Olsen et al., *supra* note 319.

[326] LYKOS & HURTT, *supra* note 319, at 1–2.

[327] *Id.* at 2.

[328] *Id.*

[329] *Id.*

[330] *See id.* at 2–3.

[331] *Id.* at 3.

[332] *Id.*

[333] *Id.*

[334] Rachell v. State, No. 11-03-00192-CR, 2004 WL 2244200, at *1 (Tex. Ct. App. Sept. 30, 2004); LYKOS & HURTT, *supra* note 319, at 3.

[335] MICHAEL R. BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 4, 8, 20 (2007),

Harris County prosecutors, and not Rachell's own attorney—followed up on testing any of the DNA evidence in the case.[336] Meanwhile, sexual assaults against boys committed by a man riding a bicycle continued in the same vicinity in the wake of Rachell's arrest.[337] An eight-year-old was victimized in November 2002, followed by an assault on another eight-year-old five weeks later, and one committed against a ten-year-old in October 2003.[338] Based largely on the eyewitness identification testimony of the eight-year-old victim and his six-year-old companion, Rachell was convicted in June 2003 of the October 20, 2002 assault and was sentenced to forty years in prison.[339]

While he was incarcerated, Rachell's mother sent him news stories reporting the string of similar assaults committed in his old neighborhood.[340] Identifying the pattern that apparently had eluded others, Rachell sent the clippings to his lawyer, urging him in vain to investigate.[341] While Rachell was imprisoned, in November 2003, Andrew Hawthorne, a registered sex offender who lived less than two miles from Rachell in Houston, and whose DNA profile was already on file from a prior conviction, was arrested for sexually assaulting a boy.[342] Hawthorne later was charged with three separate assaults.[343] In all cases, he rode a bicycle and offered the boys money to help him with odd jobs.[344] Hawthorne pleaded guilty in April 2004 to the three crimes and was sentenced to sixty years imprisonment.[345]

Although officers involved in Hawthorne's arrest also had investigated the crime for which Rachell was convicted, they made no connection between the offenses.[346] In contrast, Rachell did. He wrote one of those officers in September 2007, claiming that Hawthorne was the true perpetrator in the case resulting in his own

available at http://www.hpdlabinvestigation.org; *see* LYKOS & HURTT, *supra* note 319, at 3, 8; Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 187 (2007).

336 LYKOS & HURTT, *supra* note 319, at 4, 8, 9.

337 *Id.* at 6–7.

338 Roma Khanna & Carolyn Feibel, *Unanswered Questions: Attacks on Kids Continued After Rachell Jailed*, HOUS. CHRON., Dec. 18, 2008, at A1.

339 LYKOS & HURTT, *supra* note 319, at 5.

340 Olsen et al., *supra* note 317.

341 *Id.*; *Railroaded: A Chain of Legal Outrages Victimized Ricardo Rachell*, HOUS. CHRON., Dec. 28, 2008, at 2.

342 Khanna & Feibel, *supra* note 338, at A1.

343 *Id.*

344 *Id.*

345 LYKOS & HURTT, *supra* note 319, at 7; Khanna & Feibel, *supra* note 338, at A1.

346 Khanna & Feibel, *supra* note 338, at A1.

wrongful conviction.[347] Rachell had earlier filed a *pro se* petition for post-conviction DNA testing in the case.[348] Following further lapses, including the failure of the attorney appointed to assist him on the post-conviction petition to file the motion necessary to secure DNA testing, an assistant district attorney arranged to have the testing conducted.[349] A report issued in October 2008 excluded Rachell as the source of the semen in the case resulting in his conviction.[350] Two months later, Hawthorne's DNA profile was determined to be a match.[351]

Rachell was released from prison in December 2008 and he was formally exonerated the following month.[352] Andrew Hawthorne confessed to committing the crime for which Rachell had been convicted, pleaded guilty to the offense, and was sentenced to sixty years imprisonment, to be served concurrently with his previously imposed sixty-year term.[353] If the DNA evidence from the boy's underwear or the rape kit had been analyzed in October 2002 or shortly thereafter, Rachell would have been excluded as its source, and Hawthorne, whose DNA profile was on file because of his previous sexual assault conviction,[354] would have been identified as the perpetrator. With timely testing of the evidence, in addition to Rachell not suffering the hardships of his wrongful conviction, including almost six years of incarceration,[355] one or more of the multiple children who Hawthorne subsequently victimized would have been spared. The report, prepared by the Harris County District Attorney and the Chief of Houston's Police Department, conceded that these compound tragedies were "the result of a series of unfortunate events, blunders and omissions. There was a cascading, system-wide breakdown."[356]

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[347] LYKOS & HURTT, *supra* note 319, at 5.

[348] *Id.* at 6.

[349] *Id.*

[350] *Id.*

[351] *Id.*

[352] *Ex parte* Rachell, No. AP-76068, 2009 WL 81471, at *1 (Tex. Crim. App. Jan. 14, 2009); *Know the Cases: Ricardo Rachell*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ricardo_Rachell.php (last visited May 18, 2013).

[353] LYKOS & HURTT, *supra* note 319, at 7; Brian Rogers & Roma Khanna, *Offender Gets 60 Years in Crime That Sent Innocent to Jail*, HOUS. CHRON., (June 4, 2009), http://www.chron.com/news/houston-texas/article/Offender-gets-60-years-in-crime-that-sent-1731822.php.

[354] *See Know the Cases: Ricardo Rachell*, *supra* note 352.

[355] *See id.*

[356] LYKOS & HURTT, *supra* note 319, at 8.

Justin Albert Johnson

Three-year-old Courtney Smith lived with her mother and two young sisters in rural Noxubee County, Mississippi.[357] Sometime during the wee hours of September 15, 1990, she was snatched from her bed.[358] Two days later, her body was discovered in a nearby pond.[359] Courtney's five-year-old sister Ashley, who was sleeping with her, told a sheriff's department investigator that Levon Brooks, her mother's former boyfriend, was the man who had taken Courtney.[360] An autopsy performed by Dr. Stephen Hayne revealed that Courtney had been sexually assaulted and drowned.[361] Dr. Hayne noticed abrasions on the deceased child's wrists that resembled human bite marks.[362] Dr. Michael West, a dentist from Hattiesburg who had testified as an expert forensic odontologist for the prosecution in numerous cases, examined the marks.[363] He opined at Brooks's January 1992 murder trial that Brooks's upper teeth were their source.[364] Brooks was convicted of the child's abduction, sexual assault, and murder.[365] Although the prosecution sought the death penalty, the jury sentenced Brooks to life imprisonment without the possibility of parole.[366]

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[357] *See* Brooks v. State, 748 So. 2d 736, 737–38 (Miss. 1999).

[358] *Id.* at 738.

[359] *Id.* at 737–38.

[360] *Id.*

[361] *Id.* at 738.

[362] *Id.*

[363] *Id.*; Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 453 (1997); Peter Neufeld, *Keynote Address*, 37 SW. U. L. REV. 1051, 1052 (2008).

[364] *Know the Cases: Kennedy Brewer*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kennedy_Brewer.php (last visited May 18, 2013) (commenting on Dr. West's testimony in Levon Brooks's case); *see Brooks*, 748 So. 2d at 738.

[365] Application for Leave to File Motion for Post-Conviction Relief Based on Newly Obtained Evidence Demonstrating Innocence at 2, Brooks v. Mississippi, No. 5937 (Feb. 8, 2008) [hereinafter Application for Leave].

[366] *See Brooks*, 748 So. 2d, at 738; Application for Leave, *supra* note 365, at 2; *Know the Cases: Kennedy Brewer*, *supra* note 364. Ironically, as it turned out, the Mississippi Supreme Court used Brooks's appeal to rule: "[w]e now take the opportunity to state affirmatively that bite-mark identification evidence is admissible in Mississippi." *Brooks*, 748 So. 2d, at 739. Justice McCrae issued a vigorous dissent. *Id.* at 747–50 (McCrae, J., dissenting). A portion of his dissenting opinion singled out Dr. West's expert testimony. *Id.* at 748. Justice McCrae noted that: "[t]his is not the first time that Dr. West has been able to boldly go where no expert has gone before." *Id.* at 748. He observed that Brooks's case "went to trial . . . several years before West began to encounter difficulties with the [American Academy of Forensic Sciences, the American Board of Forensic Odontologists, and the International Association of Identification] and, thus, this evidence, which casts serious doubts as to West's credibility, was not before the jury." *Id.* at 750. In addition, "[i]t is also worth mentioning that West seems to have difficulty in keeping up with evidence. In the instant case, he lost the not only

Gloria Jackson lived with her three young children in Noxubee County, approximately three miles from where Courtney Smith had resided with her family.[367] Jackson returned to her house shortly after midnight on May 3, 1992, where her boyfriend, Kennedy Brewer, was staying with the children.[368] Three-year-old Christine Jackson customarily slept on a pallet in the single bedroom used by the entire family, and Gloria Jackson watched as Brewer appeared to place her on the pallet in the darkened room.[369] When Jackson arose at about 7:30 in the morning, Christine was nowhere to be found.[370] A search began.[371] Two days later, Christine's body was discovered in a creek behind the house.[372] She had been strangled and sexually assaulted.[373]

As he did in Courtney Smith's case, Dr. Hayne performed the autopsy.[374] His doing so was not unusual. Although he lacked the qualifications to be the State Medical Examiner, Dr. Hayne conducted most of Mississippi's autopsies.[375] He reportedly performed 1500 or more a year,[376] thus vastly exceeding the National Association of Medical Examiners' recommended maximum annual case load of 250.[377] And as he did in Courtney

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the mold [sic] to Brooks's lower teeth but also the mold of another suspect's teeth." *Id.* "Furthermore, West's opinion that 'it could be no one else but Levon Brooks that bit this girl's arm' was rendered despite the fact that the wound was comprised of a mere two indentations. . . . Even West admitted that the typical bite mark consists of indentations made by six teeth." *Id.* He concluded that "[t]his Court's apparent willingness to allow West to testify to anything and everything so long as the defense is permitted to cross-examine him may be expedient for prosecutors but it is harmful to the criminal justice system." *Id.* (footnote omitted). Commentators have also criticized Dr. West's forensic analyses and testimony. *See* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying* Daubert *Isn't the Only Problem*, 43 TULSA L. REV. 285, 356–59 (2007); Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1501–06 (2007); Giannelli, *supra* note 363, at 453–57. Although the Mississippi Attorney General at one time purported to be investigating cases in which Dr. West had testified, the investigation apparently never fully materialized and was halted. Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1469 (2012).

[367] Brewer v. State, 725 So. 2d 106, 112 (Miss. 1998); Application for Leave, *supra* note 365, at 2.

[368] *Brewer*, 725 So. 2d at 112.

[369] *Id.*

[370] *Id.* at 113.

[371] *Id.*

[372] *Id.* at 114.

[373] *Id.* at 115; Application for Leave, *supra* note 365, at 2; Neufeld, *supra* note 363, at 1051.

[374] *Brewer*, 725 So. 2d at 115; *see supra* note 361 and accompanying text.

[375] Neufeld, *supra* note 363, at 1052.

[376] *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, FORENSIC EXAMINER, Summer 2008, at 79, 80.

[377] Neufeld, *supra* note 363, at 1057; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79, 80.

Smith's case, Dr. Hayne asked Dr. Michael West to examine marks on Christine Jackson's body that he believed could have been caused by human bites.[378] Dr. West concluded that the wounds indeed were human bite marks.[379] After comparing the marks to the dental impressions of four suspects, Dr. West opined that five of the nineteen marks could be matched to Kennedy Brewer's upper teeth.[380] Based on evidence that the Mississippi Supreme Court conceded was "circumstantial,"[381] but grounded prominently in "the bite mark evidence,"[382] Brewer was convicted of Christine Jackson's rape and murder at his 1995 trial.[383] He was sentenced to death.[384]

In 2001, DNA testing excluded Kennedy Brewer as the source of the semen that had been preserved from the sexual assault kit from Christine Jackson's victimization.[385] The Mississippi Supreme Court ordered an evidentiary hearing,[386] and in 2002, the trial court vacated Brewer's conviction and death sentence.[387] Although the prosecutor had originally argued that Brewer had committed the rape and murder alone, his theory for the prospective retrial shifted to Brewer having acted in concert with the actual rapist.[388] Brewer languished in the county jail for five years awaiting a retrial that never occurred.[389] In 2007, at the urging of Innocence Project attorneys, the DNA profile from the sexual assault kit was compared to DNA samples provided by others who had once been under investigation in the case.[390] The profile matched one of the original suspects, Justin Albert Johnson.[391]

Johnson lived less than a quarter mile from the Jacksons's residence in 1992 and was awaiting trial for home invasion, and an

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[378] *Brewer*, 725 So. 2d at 115; *see supra* note 363 and accompanying text.

[379] *Brewer*, 725 So. 2d at 116.

[380] *Id.*

[381] *Id.* at 134.

[382] *Id.* The court's opinion noted that "[s]emen was detected on the child's vaginal slide. No conclusions could be drawn from this semen, however, because there were only five spermatozoa." *Id.* at 115.

[383] *Id.* at 112.

[384] *Id.* at 117, 135; Neufeld, *supra* note 363, at 1053.

[385] Neufeld, *supra* note 363, at 1053.

[386] Brewer v. State, 819 So. 2d 1169, 1174 (Miss. 2002).

[387] *See* Application for Leave, *supra* note 365, at 3.

[388] Shaila Dewan, *Despite DNA Result, Prosecutor Retries a '92 Rape-Murder Case*, N.Y. TIMES, Sept. 6, 2007, at A1; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79–80.

[389] Shaila Dewan, *New Suspect is Arrested in Mississippi Killings in Which 2 Men Were Convicted*, N.Y. TIMES, Feb. 8, 2008, at A11.

[390] Application for Leave, *supra* note 365, at 3; Neufeld, *supra* note 363, at 1053.

[391] Neufeld, *supra* note 363, at 1053; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 80.

attempted sexual assault, when Christine was raped and murdered.[392] In 1990, when Courtney Smith was abducted, raped, and murdered under "eerily similar"[393] circumstances, Johnson's former wife and his son lived next door to the Smiths.[394] Johnson had been considered an early suspect in both of the children's murders.[395] When law enforcement officials interviewed him following the DNA match in Christine Jackson's case, he made a videotaped confession to raping and murdering both of the three-year-old girls.[396] Kennedy Brewer was formally exonerated in February 2008, having been incarcerated for more than fifteen years including seven years on Mississippi's death row.[397] The following month, the charges against Levon Brooks in Courtney Smith's rape and murder were dismissed and he was officially exonerated.[398] Brooks had spent nearly eighteen years behind bars.[399] Johnson ultimately pleaded guilty to the crimes in both cases and was sentenced to consecutive terms of life imprisonment.[400]

Justin Albert Johnson not only was responsible for raping and murdering three-year-old Courtney Smith in September 1990, but also for raping and murdering three-year-old Christine Jackson a year and a half later.[401] His crimes caused two men, Levon Brooks and Kennedy Brewer, to be wrongfully convicted and spend more than a combined three decades incarcerated, including seven years for Brewer under sentence of death.[402] The cases were investigated by the same sheriff's deputy, prosecuted by the same district attorney, and involved the same forensic experts, Dr. Stephen

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[392] Motion for Post-Conviction Relief at 3, Brooks v. State, 748 So. 2d 736 (Miss. 1999) (No. 5937) [hereinafter Brooks Motion].

[393] Dewan, *supra* note 389, at A11.

[394] Brooks Motion, *supra* note 392, at 2.

[395] Press Release, Innocence Project, Two Innocent Men Cleared Today in Separate Murder Cases in Mississippi, 15 Years After Wrongful Convictions (Feb. 15, 2008), *available at* http://www.innocenceproject.org/Content/Two_Innocent_Men_Cleared_Today_in_Separate_Murder_Cases_in_Mississippi_15_Years_after_Wrongful_Convictions.php [hereinafter Press Release, Two Innocent Men].

[396] Brooks Motion, *supra* note 392, at 4.

[397] *See* Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1467, 1468 (2012).

[398] *Id.*

[399] Brooks Motion, *supra* note 392, at 1.

[400] Beety, *supra* note 397, at 1468; *see* Carmen K. Sisson, *Noxubee Man Gets Life Sentence for Rape, Murder*, COLUMBUS DISPATCH (Feb. 10, 2012, 10:19 PM), http://www.cdispatch.com/news/article.asp?aid=15589.

[401] Beety, *supra* note 397, at 1468.

[402] *Id.* at 1466–68.

Haynes and Dr. Michael West.[403] Yet no one perceived the connection between the cases until shortly before DNA testing in Brewer's case was initiated at the behest of Innocence Project attorneys.[404]

Following the revelations in the cases, the prosecutor maintained that "[n]obody wants to convict the wrong guy."[405] Kennedy Brewer offered: "[t]hey need to get the truth before they lock up the wrong somebody. It doesn't feel good to be called a rapist and murderer."[406] Dr. West protested that in Brewer's case, "I never testified he killed [Christine Jackson]. I never testified he raped her."[407] Vanessa Potkin, an attorney for the Innocence Project, lamented that if the authorities "had properly investigated the first murder, the second little girl wouldn't have been killed."[408]

Earl Mann

Judy Johnson, sixty-two years old, was savagely attacked, vaginally and anally raped, and murdered in her home in Barberton, Ohio, a small town near Akron, sometime between 2:30 and 5:30 on the morning of June 7, 1998.[409] Johnson's six-year-old granddaughter, Brooke Sutton,[410] was spending the night with her.[411] Brooke was also badly beaten and sexually assaulted, and was left unconscious.[412] On awakening shortly after 6:30, she tried unsuccessfully to contact a neighbor by telephone.[413] She then walked two doors down from the small house where she and her grandmother had been victimized, to the apartment of Tonia Brasiel, the mother of three young daughters who were Brooke's

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[403] Press Release, Two Innocent Men, *supra* note 395.

[404] *Id.*; *Falsely Accused: Prosecutor, Forensic Experts Take Heat for Mississippi 'Disaster'*, *supra* note 376, at 79.

[405] Steve Mills, *DNA Voids Murder Conviction*, CHI. TRIB., Feb. 16, 2008, at 4.

[406] Associated Press, *2 Men Freed in Child Death Bite-Mark Cases*, MSNBC.COM (Feb. 29, 2008), http://www.msnbc.msn.com/id/23411936/ns/us_news-crime_and_courts/t/men-freed-child-death-bite-mark-cases/#.UARAg5G8iJs.

[407] Ronni Mott, *'The Nightmare is Over': Levon Brooks Finally Free*, JACKSON FREE PRESS (Mar. 13, 2008, 6:08 PM), http://www.jacksonfreepress.com/news/2008/mar/13/the-nightmare-is-over-levon-brooks-finally-free.

[408] Dewan, *supra* note 389, at A11.

[409] *See* State v. Elkins, C.A. No. 19684, 2000 WL 1420285, at *2, *3 (Ohio Ct. App. Sept. 27, 2000).

[410] Laura A. Bischoff & Mary McCarty, *Murder, Then Rush to Judgment*, DAYTON DAILY NEWS, Aug. 6, 2006, at A8 [hereinafter Bischoff & McCarty, Aug. 6, 2006], *available at* 2006 WLNR 13658074.

[411] *Elkins*, 2000 WL 1420285, at *2.

[412] *Id.*

[413] *Id.*

frequent playmates.[414] Brasiel answered the door and the bloodied child hysterically told her that her grandmother was dead and that her Uncle Clarence—Clarence Elkins—had killed her.[415] Brooke remained outside of the apartment for a half-hour or more before Brasiel emerged with her daughters in tow.[416] Brasiel then drove the children to Brooke's parents' house, where Brooke recounted what had happened.[417] Her father rushed to Johnson's house, confirmed that she was dead, and called the police.[418]

Later that morning, a sheriff's department SWAT team descended on Clarence Elkins's mobile home in Magnolia, a forty minute drive from Barberton, handcuffed Elkins at gunpoint, and transported him to Barberton for questioning.[419] Elkins responded freely to the interrogating officers' questions and consented to having his fingernails scraped.[420] He maintained that he knew nothing about the crimes and had nothing to hide.[421] He explained that he had been with acquaintances at various bars throughout the night of June 6 and the early morning of June 7, returned home at 2:40 a.m., and then went to sleep.[422] His wife, Melinda, confirmed his account and several witnesses later corroborated his whereabouts during that time frame.[423] Other officers searched the Elkins' mobile home and Judy Johnson's home for evidence, finding nothing consistent with Elkins's involvement.[424] Pubic and head hairs were retrieved from Ms. Johnson's rectum and from Brooke's nightgown.[425] Subsequent DNA analyses excluded Elkins as the source of the hairs.[426]

In addition to the DNA exclusions, testimony at Elkins's June

[414] Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

[415] *Id.*

[416] *Id.*

[417] *Elkins*, 2000 WL 1420285, at *2; Elkins v. Summit Cnty., Ohio, No. 5:06-CV-3004, 2009 WL 1150114, at *4 (N.D. Ohio Apr. 28, 2009), *aff'd*, 615 F.3d 671 (6th Cir. 2010); JIM PETRO & NANCY PETRO, FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT 10 (2010); Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

[418] *Elkins*, 2000 WL 1420285, at *2; PETRO & PETRO, *supra* note 417, at 10.

[419] PETRO & PETRO, *supra* note 417, at 5–7; *see Elkins*, 615 F.3d at 674; Bischoff & McCarty, Aug. 6, 2006, *supra* note 410, at A8.

[420] PETRO & PETRO, *supra* note 417, at 7.

[421] *Id.*

[422] *Elkins*, 2000 WL 1420285, at *4.

[423] *Elkins*, 2000 WL 1420285, at *4; *see Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1.

[424] PETRO & PETRO, *supra* note 417, at 7, 11.

[425] *Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1; PETRO & PETRO, *supra* note 417, at 7.

[426] *Elkins*, 615 F.3d at 674; *Elkins*, 2009 WL 1150114, at *1; PETRO & PETRO, *supra* note 417, at 7, 11.

1999 trial revealed that after Brooke came home from the hospital where she was treated for her injuries, the child acknowledged to a family friend that she thought that the man who had attacked her and her grandmother sounded like her Uncle Clarence, although she did not know for sure.[427] Brooke nevertheless reaffirmed several times that Clarence Elkins was responsible for the attacks and her identification testimony was the crucial evidence against him.[428] Elkins, who had no prior criminal record, testified at his trial and presented numerous alibi witnesses.[429] The jury acquitted him of the capital charge of aggravated murder, but convicted him of murder, attempted aggravated murder, and three counts of rape.[430] The multiple, consecutive prison sentences imposed by the judge made Elkins ineligible for parole for fifty-five years, or until 2054.[431] At his sentencing hearing, Elkins declared, "I am an innocent man."[432]

Melinda Elkins believed in her husband's innocence. She hired a private investigator, raised funds, and relentlessly sought to prove that his conviction was erroneous.[433] In May 2002, Brooke Sutton, then ten years old, recanted her identification testimony.[434] The following December, the judge who had presided over Clarence Elkins's trial, denied Elkins's motion for a new trial based on the recantation, concluding that "the child-victim told the truth originally and her change of mind [was] the result of influence from her family and others who have an interest in the success of [Defendant's] [p]etition."[435] Undaunted, Melinda Elkins continued investigating individuals on the list of suspects that she had compiled.[436] One of those suspects was Earl Mann.[437]

Earl Mann was the boyfriend of Tonia Brasiel—the woman who lived two doors away from Judy Johnson's house—and from whom

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[427] PETRO & PETRO, *supra* note 417, at 10, 11.

[428] *See Elkins*, 2000 WL 1420285, at *3–5.

[429] PETRO & PETRO, *supra* note 417, at 9, 11.

[430] *Elkins*, 2000 WL 1420285, at *1; *see* PETRO & PETRO, *supra* note 417, at 8.

[431] Laura A. Bischoff & Mary McCarty, *'My God, This Thing Is Horrifying'*, DAYTON DAILY NEWS, Aug. 7, 2006, at A6 [hereinafter Bischoff & McCarty, Aug. 7, 2006], *available at* 2006 WLNR 13707807.

[432] *Id.*

[433] *See id.*; PETRO & PETRO, *supra* note 417, at 14. The investigator was Martin Yant, a former journalist and author of PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991). *See* PETRO & PETRO, *supra* note 417, at 14.

[434] *See* Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

[435] State v. Elkins, No. 21380, 2003 WL 22015409, at *3 (Ohio Ct. App. Aug. 27, 2003) (alterations in original); McCarty & Bischoff, Aug. 7, 2006, *supra* note 431, at A6.

[436] Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

[437] *Id.*

Brooke Sutton had sought help on the morning of the crimes.[438] Mann also was the father of Brasiel's three daughters, who were Brooke's playmates.[439] Melinda read a newspaper story in 2002 that reported that Mann had pleaded guilty to raping three young children (who proved to be his daughters) but had received a sentence of only seven years in prison because prosecutors had mishandled the indictment in his case.[440] This information was enough for Melinda to include Mann on her suspect list.[441] Several years later, the Elkinses learned that when a Barberton police officer had arrested Mann on strong-arm robbery charges on January 5, 1999—roughly six months before Clarence Elkins's trial—a drunken Mann asked the officer, "[w]hy don't you charge me with the Judy Johnson murder?"[442] Mann's statement was memorialized but apparently was never shared with prosecutors or with Elkins's defense attorney.[443]

Melinda Elkins enlisted the help of the Ohio Innocence Project at the University of Cincinnati School of Law in 2004.[444] In June 2005, the Elkinses learned that Mann and Clarence Elkins happened to be incarcerated in the same correctional facility.[445] Clarence surreptitiously managed to retrieve a cigarette butt that Mann had discarded.[446] He mailed it to his lawyer so that Mann's DNA profile could be obtained and compared to biological evidence from Judy Johnson's rape-murder, and Brooke Sutton's rape.[447] The analysis produced a match.[448] Notwithstanding these dramatic developments, Elkins's attorneys encountered continuing resistance

[438] *Id.*

[439] *Id.*

[440] *See* Elkins v. Summit Cnty., Ohio, 615 F.3d 671, 674 n.4 (6th Cir. 2010); PETRO & PETRO, *supra* note 411 at 19.

[441] Bischoff & McCarty, Aug. 7, 2006, *supra* note 431, at A6.

[442] *Elkins*, 615 F.3d at 673.

[443] *See id.* at 673–74. A federal civil suit based on this allegation, filed by the Elkinses against the Barberton police, subsequently resulted in a settlement that awarded the Elkinses more than $5 million. Charita Goshay, *Anatomy of an Aftermath: Movie Being Planned about Melinda Elkins Dawson*, CANTONREP.COM (June 13, 2012, 9:09 PM), http://www.cantonrep.com/news/x836128535/Anatomy-of-an-aftermath-Movie-being-planned-about-Melinda-Elkins-Dawson; Shane Hoover, *Elkins, Family Settle Federal Lawsuit Over Imprisonment*, CANTONREP.COM (Nov. 17, 2010, 10:40 AM) http://www.cantonrep.com/news/x684374778/Elkins-family-settle-federal-lawsuit-over-7-years-imprisonment.

[444] Mark A. Godsey, *False Justice and the "True" Prosecutor: A Memoir, a Tribute, and Commentary*, 9 OHIO ST. J. CRIM. L. 789, 791 (2012).

[445] *Id.* at 793.

[446] *Id.*

[447] *Id.*

[448] *Id.*

from the prosecutor's office responsible for Clarence Elkins's conviction as they attempted to win his freedom.[449] They eventually prevailed, relying in part on pressure applied on the prosecutors by Ohio Attorney General Jim Petro.[450] On December 15, 2005, all charges against Clarence Elkins were dismissed and he was released from prison after seven years of incarceration.[451]

On August 18, 2008, Earl Mann pleaded guilty to the aggravated murder and rape of Judy Johnson and to the attempted murder and rape of Brooke Sutton.[452] He was sentenced to fifty-five years to life in prison.[453] At the time, Mann remained in the service of the seven-year sentence imposed for raping his own daughters; crimes committed while Clarence Elkins had been arrested, wrongfully convicted, and incarcerated in his stead.[454] On accepting Mann's guilty pleas, the sentencing judge told Mann that "[t]here seems to be a depth of depravity in you that is beyond understanding . . . . You are not fit to be in society with the rest of us, and you will not be."[455]

Dennis McGruder

Beginning in 1989, a man who came to be known as the "Beauty Shop Rapist" committed a series of armed robberies and sexual assaults in Chicago's south side.[456] The *modus operandi* in the crimes was similar.[457] In most cases, the man would enter a beauty parlor with a pistol, rob the patrons of their valuables, order the women to disrobe, and then sodomize or rape one of them.[458] The police prepared and distributed a composite sketch of the suspect

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[449] *See id.*

[450] *Id.* at 797.

[451] *Id.*; *see* McCarty & Bischoff, *supra* note 440; *see also* PETRO & PETRO, *supra* note 417, at 43–49 ("Prosecutor Walsh had reversed her position and filed a motion to dismiss all charges against Clarence Elkins. The judge granted the motion and ordered his immediate release.").

[452] Shane Hoover, *Guilty Pleas Clear Carroll Resident Clarence Elkins of Murder, Rape*, TIMES-REPORTER (Phila.) (Aug. 19, 2008, 3:14 PM), http://www.timesreporter.com/news/x1543320711/Guilty-pleas-clear-Carroll-resident-Clarence-Elkins-of-murder-rape.

[453] *Id.*

[454] *See* Regina Brett, *Dogged Fight to Correct a Wrong: Summit Prosecutor Became Determined to Convict Real Killer*, CLEVELAND PLAIN DEALER, Aug. 24, 2008, at A1.

[455] Hoover, *supra* note 452.

[456] *Eyewitness Identification: A Policy Review*, JUST. PROJECT 12, http://www.psychology.iastate.edu/~glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf (last visited May 18, 2013).

[457] *Id.*

[458] *Id.*

based on witnesses' descriptions.[459] They arrested John Willis, Jr. on September 14, 1990, after receiving a tip from an anonymous caller.[460] Willis, a man with a fourth grade education who described himself as a "career tire thief and gambler," insisted that he was innocent.[461] Several of the crime victims and witnesses nevertheless identified him as the perpetrator in both photo arrays and line-ups and he was charged in five of the cases.[462]

While Willis remained in custody, similar crimes occurred in the same vicinity, including one robbery-rape committed in a beauty parlor and four others in taverns.[463] Dennis McGruder was arrested for those offenses in April 1992, subsequently pleaded guilty to them, and was sentenced to forty years imprisonment.[464] Meanwhile, Willis was brought to trial in February 1992 on a first set of charges[465] in which the victim, who had been orally sodomized, spat her assailant's ejaculate into a toilet tissue wrapper.[466] Dr. Pamela Fish of the Illinois State Police Crime Laboratory testified at Willis's trial and wrote in a typewritten report that a serology exam comparing Willis's blood type to the semen and sperm sample preserved in the wrapper was "inconclusive," meaning that Willis could not be excluded as a potential source.[467] With multiple witnesses identifying him as the perpetrator, Willis was convicted of armed robbery and the sexual assault and he was sentenced to forty-five years in prison.[468] He was tried on a second set of charges in November 1993, again was convicted, and he received a prison sentence totaling one hundred years.[469]

Not until 1997, in response to Willis's request for post-conviction DNA testing of the evidence preserved from his initial trial, did Fish's handwritten report of the serology exam conducted in that case surface.[470] This handwritten report had not been made

[459] *Id.*

[460] *Id.*

[461] Steve Mills et al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1.

[462] *See Eyewitness Identification: A Policy Review*, *supra* note 456, at 12, 13 (noting that the defendant was sentenced in two cases and the other three cases with which he was charged were dropped).

[463] *Id.* at 13.

[464] *Id.*

[465] *Id.*

[466] *Know the Cases: John Willis*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/John_Willis.php (last visited May 18, 2013).

[467] Mills et al., *supra* note 461, at 1.

[468] *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

[469] *Id.*

[470] *Id.*; Mills et al., *supra* note 461, at 1.

available to the defense prior to Willis's trial, yet it noted that Willis was a secretor with type B blood, while the crime scene sample belonged to someone with type A blood.[471] Fish's explanation for her assessment in her typed report and in her trial testimony that the comparison was "inconclusive" apparently concerned irregularities with control procedures.[472] In that event, according to her supervisor, the test at a minimum should have been conducted anew rather than resulting in a report that the comparison was inconclusive.[473] In September 1998, a microscopic slide containing a minute sample of the perpetrator's ejaculate in the case was located and subjected to DNA testing.[474] The analysis produced a match with Dennis McGruder.[475]

Willis was released from prison in February 1999.[476] He was officially exonerated the following month when the charges resulting in his wrongful convictions and more than eight years of incarceration were dismissed.[477] He was awarded $2.5 million in settlement of a claims filed against city and county officials.[478] McGruder, already in prison for committing five new crimes after Willis's arrest, later admitted his guilt in two of the offenses for which Willis had been wrongly convicted.[479] Ironically, Willis had attempted during his 1993 trial, involving the second set of charges against him, to show that McGruder had been arrested for committing similar crimes and that McGruder physically resembled him.[480] The trial judge had refused to allow that evidence to be admitted.[481]

Eddie Lee Mosley

Eddie Lee Mosley has been variously described as "the worst

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[471] Mills et al., *supra* note 461, at 1; *see* *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

[472] Mills et al., *supra* note 461, at 1.

[473] *Id.* *See also* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 402 (2004) (stating that so far, seven convictions in which Fish had provided misleading testimony, have been overturned).

[474] *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13–14.

[475] *Id.* at 14.

[476] *Id.*

[477] Maurice Possley, *Prisoner to Go Free as DNA Clears Him in Beauty Shop Rape*, CHI. TRIB., Feb. 24, 1999, at 1.

[478] Dan Mihalopoulos, *$2.5 Million Deal in Rape Case Suit*, CHI. TRIB., Mar. 9, 2004, at 3; Mills et al., *supra* note 461.

[479] *Know the Cases: John Willis*, *supra* note 466.

[480] *Eyewitness Identification: A Policy Review*, *supra* note 456, at 13.

[481] *Id.*

serial killer and rapist in Broward County, [Florida] history,"[482] and as "the most prolific serial killer in Florida history"[483] and "in U.S. history."[484] He has been called "a one-man crime wave"[485] whose reign of terror was "bigger than [John Wayne] Gacy. Bigger than [Ted] Bundy."[486] A court-appointed psychiatrist once characterized Mosley as "a shark who simply feeds on possible victims to satisfy his basic sexual needs."[487] Mosley is believed to have committed as many as sixty rapes[488] and nineteen killings[489] in Fort Lauderdale (Broward County) and Miami, Florida during the 1970s and 1980s.[490]

At least ten of his victims were killed after Jerry Frank Townsend, a twenty-two-year-old man suffering from mental retardation, was arrested in September 1979.[491] Townsend falsely confessed to several of the rapes and murders that Mosley had committed, and was convicted and sentenced to prison for life.[492] He spent twenty-two years in prison before he was exonerated by DNA analysis that linked Mosley to the crimes.[493] Townsend eventually received more than $4 million in settlement of lawsuits filed on his

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[482] Bob Norman, *A Devilish Deal*, BROWARD-PALM BEACH NEWTIMES (May 17, 2001), http://www.browardpalmbeach.com/2001-05-17/news/a-devilish-deal.

[483] Jonathon King, *Remembering the Dead: Obsessed with Justice*, BROWARD BULLDOG (Nov. 20, 2009), http://www.browardbulldog.org/2009/11/remembering-the-dead-obsessed-with-justice.

[484] Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, *in* WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 125 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

[485] *See* Barry Scheck, *Did Frank Lee Smith Die in Vain?*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/smith/ofra/scheck.html (last visited May 18, 2013) (describing the PBS documentary *Frontline: Requiem for Frank Lee Smith*).

[486] King, *supra* note 483 (quoting retired Fort Lauderdale Police Department Detective Doug Evans) (internal quotation marks omitted).

[487] *Id.* (quoting unidentified court-appointed psychiatrist) (internal quotation marks omitted).

[488] Scheck, *supra* note 485.

[489] King, *supra* note 483.

[490] *See generally id.* (describing the aftermath left by Mosely in the Fort Lauderdale and Miami area); Scheck, *supra* note 485 (same).

[491] *See Know the Cases: Jerry Frank Townsend*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Frank_Townsend.php (last visited May 18, 2013); Simon, *supra* note 484, at 134 (stating that the arrest took place on September 1979); King, *supra* note 483.

[492] Townsend v. State, 420 So. 2d 615, 616–17 (Fla. Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 452 (Fla. 1983); *Know the Cases: Jerry Frank Townsend*, *supra* note 491.

[493] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 989 (2004); Dan Christensen, *Anatomy of a Frame-Up*, BROWARD BULLDOG (Oct. 29, 2009), http://www.browardbulldog.org/2009/10/anatomy-of-a-frame-up; *Know the Cases: Jerry Frank Townsend*, *supra* note 491; *Ten Who Would Not Have Died*, BROWARD BULLDOG (Oct. 29, 2009), http://www.browardbulldog.org/2009/10/ten-who-might-not-have-died.

behalf against Broward County and the City of Miami.[494]

Mosley claimed responsibility for at least one of his victims after Frank Lee Smith was convicted of raping and murdering eight-year-old Shandra Whitehead in 1985 in Fort Lauderdale; crimes for which Smith was sentenced to death.[495] Although Smith did not match the description given of the man who was spotted at or near the child's home on the night she was killed, two witnesses later identified Smith as being near the crime scene after viewing a photo array and at his trial.[496] Smith had twice before been convicted of criminal homicide.[497] He also allegedly made a damaging admission to the police.[498] One of the trial witnesses would later recant her identification testimony and swear that the man she had seen was Eddie Lee Mosley, who was the murdered child's cousin.[499] The court, hearing Smith's post-conviction petition for a new trial based on the recantation, denied relief.[500] Smith died of cancer in January 2000, while still under sentence of death for the crime.[501] He earlier had come within eight days of his scheduled execution before the Florida Supreme Court granted a stay.[502] A posthumous DNA analysis exonerated Smith, who had maintained his innocence from the time of his arrest until his death.[503] The same analysis identified Mosley as the child's assailant.[504]

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494 Christensen, *supra* note 493. The Broward County Sherriff's Office paid out $2 million, while the city of Miami agreed to pay out $2.2 million, bringing the total settlement to $4.4 million. *See id.*

495 Smith v. Dugger, 565 So. 2d 1293, 1294 (Fla. 1990).

496 *Id.* at 1295–96.

497 Smith v. State, 515 So. 2d 182, 184 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988).

498 *Id.* at 183, 184; Drizin & Leo, *supra* note 493, at 991.

499 *Smith*, 565 So. 2d at 1296.

500 *See* Townsend v. State, 420 So. 2d 615, 618 (Fla. Dist. Ct. App. 1982), *petition for rev. denied*, 430 So. 2d 452 (Fla. 1983).

501 *Know the Cases: Frank Lee Smith*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Frank_Lee_Smith.php (last visited May 18, 2013).

502 Sydney P. Freedberg, *He Didn't Do It*, ST. PETERSBURG TIMES (Jan. 7, 2001), http://www.sptimes.com/News/010701/news_pf/State/He_didn_t_do_it_.shtml.

503 *Id.*

504 Drizin & Leo, *supra* note 493, at 991; Barry Scheck, *Innocence, Race, and the Death Penalty*, 50 HOW. L.J. 445, 458–59 (2007) (remarks of Barry Scheck); Symposium, *The Death Penalty, Religion, & the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity?*, 4 RUTGERS J. L. & RELIGION 1, 13–18 (2002) (remarks of Professor Barry Scheck); *Know the Cases: Frank Lee Smith*, *supra* note 501; *see* Sydney P. Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES (Dec. 15, 2000), http://www.sptimes.com/News/121500/news_pf/State/DNA_clears_inmate_too.shtml; Freedberg, *supra* note 491; Bob Norman, *Captain of Deceit*, BROWARD-PALM BEACH NEW TIMES (July 26, 2001), http://www.browardpalmbeach.com/content/printVersion/132425; Bob Norman, *The Captain of Deceit Strikes Again*, BROWARD-PALM BEACH NEW TIMES (Aug. 15, 2002), http://www.browardpalmbeach.com/2002-08-15/news/the-captain-of-deceit-strikes-again.

Mosley lived in the same impoverished Fort Lauderdale neighborhood where almost all of the women and girls had been raped and murdered under similar circumstances.[505] He was well known to law enforcement authorities.[506] Detective Doug Evans of the Fort Lauderdale Police Department so strongly believed that Mosley was responsible for the murders blamed on Townsend that he appeared as a defense witness at Townsend's trial.[507] The trial judge, however, precluded him from identifying Mosley as an alternative suspect.[508] Mosley, who was mentally retarded and had dropped out of third grade at age thirteen,[509] had been charged with committing numerous rapes in 1973, but was found not guilty by reason of insanity.[510] He remained involuntarily civilly committed until 1979.[511] Following release from the hospital, he was convicted of a sexual battery committed in April 1980 and sentenced to fifteen years in prison.[512] The conviction was reversed on appeal based on ineffective assistance of counsel because his lawyer had not presented an insanity defense.[513] Pursuant to a plea agreement following the remand, Mosley was released from prison in 1983.[514]

Detective Evans persisted in arguing that Mosley was responsible for the rapes and murders committed in the area.[515] The crimes, most of which targeted women and children, all but ceased while Mosley was in custody, but resumed during his periods of freedom.[516] Mosley was again arrested for sexual battery in May 1984, but a jury found him not guilty later that year.[517] Finally, in 1987, too late for Jerry Frank Townsend, Frank Lee Smith, and the scores of women he had victimized, Mosley was arrested and

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[505] *See* Jonathon King, *The 15-year Hunt for a Serial Killer After a Dozen Murders, 40 Rapes and the Sporadic Pursuit of Prime Suspects, Did the Fort Lauderdale Police Finally Get the Right Man?*, FT. LAUDERDALE SUN-SENTINEL, Oct. 30, 1988, at 6, *available at* 1988 WLNR 1977209.

[506] *Id.*

[507] King, *supra* note 483.

[508] *Id.*

[509] King, *supra* note 505.

[510] King, *supra* note 483.

[511] *See* Simon, *supra* note 484, at 130.

[512] *Id.* at 131.

[513] *Id.*

[514] *Id.*

[515] King, *supra* note 483; Simon, *supra* note 484, at 131 (explaining how Evans continued to believe that Mosley was the perpetrator and sought his arrest, prosecution, and 24-hour surveillance of Mosley).

[516] King, *supra* note 483; *see also* Simon, *supra* note 484, at 130–31 (describing the series of murders and rapes in Fort Lauderdale between 1979 and 1980).

[517] Simon, *supra* note 484, at 131.

confessed to murdering two women.[518] He was found incompetent to stand trial and committed to a state hospital.[519] He remained involuntarily civilly committed as of 2009.[520] He may never be released from custody.[521]

Kenneth Phillips

Kim Ancona worked as a cocktail lounge waitress in Phoenix, Arizona, where she was responsible for closing the establishment at the end of business hours.[522] Her body was found in the men's restroom of the lounge on the morning of December 29, 1991, where she had been stabbed to death and sexually assaulted.[523] Human bite marks were left on her breast and stab wounds on her neck.[524] The police learned that Ancona had mentioned that "Ray" had offered to help her close the bar on the night of her death.[525] The address book found in her purse included Ray Krone's name.[526] Krone, a U.S. Air Force veteran and a mail carrier for the U.S. Postal Service who had no prior criminal record, was a regular patron at the lounge.[527] He had recently given Ancona a ride to a Christmas party.[528] The police asked Krone to accompany them to the police station, where he provided hair and blood samples and responded to questioning.[529] Krone, who had distinctively irregular teeth, also bit into Styrofoam so that the police could secure a dental impression.[530] A dental examiner concluded that the marks on Ancona's body were consistent with the impressions of Krone's teeth.[531] Krone was arrested and charged with rape and capital murder.[532]

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[518] King, *supra* note 483.

[519] *Id.*

[520] *Id.*

[521] *See* King, *supra* note 505.

[522] *Meet Exoneree Ray Krone and Learn What Went Wrong*, 1 JUST. PROJECT Q., 1, 7 (n.d.), *available at* http://www.azjusticeproject.org/Assets/newsletter/jp_quarterly_01.pdf [hereinafter *Meet Exoneree Ray Krone*].

[523] *Id.*

[524] *Id.*

[525] *Id.* at 8.

[526] *Id.*

[527] *Id.* at 7.

[528] *Id.* at 8.

[529] *See* State v. Krone, 897 P.2d 621, 621–22 (Ariz. 1995).

[530] *Meet Exoneree Ray Krone*, *supra* note 522, at 7.

[531] *Id.*

[532] *Id.*; *see Krone*, 897 P.2d at 621; Molly O'Toole, *Ex-Death Row Inmate Krone Speaks to The Sun*, CORNELL DAILY SUN (Nov. 13, 2006, 1:00 AM), http://cornellsun.com/node/19806 (last visited May 18, 2013); Ray Krone, Address to students at Mansfield University (Apr. 5,

Scant other evidence connected Krone to the crime.[533] He had consistently maintained his innocence and his roommate corroborated that he had been at home and gone to bed early on December 28, 1991—hours before the murder.[534] Bloody footprints at the crime scene were linked to size nine or ten Converse athletic shoes; Krone owned no Converse shoes and wore a size eleven.[535] Later on the day of the murder, a man mysteriously left a note for homicide detectives stating that he had seen "an Indian about 5'8" to 6'1" . . . [who was fat and wearing blue jeans] hanging around" behind the lounge between 3:30 and 4:30 a.m. on December 29.[536] A friend of Ancona told the police that the slain waitress had refused to serve a heavy-set, highly intoxicated Native American with long black hair who was wearing blue jeans not long before the lounge closed.[537] A jet black hair was found congealed in blood on Ms. Ancona's buttocks, although a crime lab technician neglected to analyze that hair while concluding that other hairs discovered near her body were "'consistent' with Krone's."[538]

The prosecution enlisted a forensic odontologist, Dr. Raymond Rawson, to conduct another comparison between the bite marks found on Ancona's body and the dental impression secured from Krone.[539] Dr. Rawson prepared an elaborate videotape demonstrating the technique he used to analyze the bite marks and used the videotape at Krone's 1992 murder trial "to show a match between Krone's teeth and Ancona's wounds."[540] The Supreme Court of Arizona later described this testimony as "critical to the State's case"[541] and concluded that "[w]ithout the bite marks, the State arguably had no case."[542] A jury convicted Krone of capital murder and the trial judge sentenced him to death.[543] Krone remained on Arizona's death row until the Supreme Court of Arizona reversed his conviction in 1995 because the prosecution had

2010) (transcript available at http://files.podcast.mansfield.edu/transcripts/RayKroneSpeech.pdf) [hereinafter Ray Krone Address].

[533] *Meet Exoneree Ray Krone*, *supra* note 522, at 8.

[534] *See id.*; Robert Nelson, *About Face*, PHX. NEW TIMES (Apr. 21, 2005), http://www.phoenixnewtimes.com/2005-04-21/news/about-face.

[535] *Id.*; *see Meet Exoneree Ray Krone*, *supra* note 511, at 9.

[536] Nelson, *supra* note 534.

[537] *Meet Exoneree Ray Krone*, *supra* note 522, at 10.

[538] Nelson, *supra* note 534; *Meet Exoneree Ray Krone*, *supra* note 522, at 10.

[539] State v. Krone, 897 P.2d 621, 622 (Ariz. 1995).

[540] *Id.*

[541] *Id.* at 624.

[542] *Id.* at 622.

[543] *Id.* at 621.

failed to provide defense counsel with a copy of Rawson's videotaped demonstration sufficiently in advance of the trial to allow for adequate preparation.[544]

Krone was retried and again was convicted of capital murder.[545] As in the initial trial, the prosecution's case centered on Dr. Rawson's bite mark testimony.[546] Citing his lingering doubt about guilt, the trial judge sentenced Krone to life imprisonment.[547] Krone remained incarcerated until April 2002, when DNA testing of blood, saliva, and hair from the murder scene excluded him as the source and matched Kenneth Phillips, a heavy set Native American with long black hair who had lived just 600 yards[548] from the site of the killing.[549] In December 1991, when Ms. Ancona was raped and murdered, Phillips was on probation for breaking into a woman's home and choking her.[550] When confronted with the DNA match, he reportedly admitted to having blacked out from drinking on the night of the murder, and awoke to find himself covered in blood without remembering how he came to be in that condition.[551]

Phillips's DNA was in the CODIS database because he had been convicted of choking and sexually assaulting a seven-year-old girl.[552] He victimized the child just weeks after he had raped and murdered Ms. Ancona, while the authorities had prematurely focused their attention on Ray Krone.[553] Phillips pleaded guilty to the crimes committed against Ancona in exchange for a sentence of life imprisonment.[554] Ray Krone became the one hundredth person

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[544] *Id.* at 625.

[545] Hans Sherrer, *Twice Wrongly Convicted of Murder—Ray Krone is Set Free After 10 Years*, 2 JUST. DENIED MAG. 8, *available at* http://www.justicedenied.org/volume2issue8.htm#Ray (last visited May 18, 2013).

[546] *Id.*

[547] Ray Krone Address, *supra* note 532.

[548] Sherrer, *supra* note 545.

[549] Nelson, *supra* note 534; Sherrer, *supra* note 545.

[550] Nelson, *supra* note 534; Sherrer, *supra* note 545.

[551] Ray Krone Address, *supra* note 532; Robert Nelson, *Death Road: Ray Krone is America's New Anti-Death-Penalty Poster Boy*, PHX. NEW TIMES (May 22, 2003), http://www.phoenixnewtimes.com/2003-05-22/news/death-road.

[552] *See* Nelson, *supra* note 534.

[553] *See id.*; Sherrer, *supra* note 534.

[554] *Information for Inmate 077157 PHILLIPS*, ARIZ. DEPARTMENT OF CORRECTIONS, http://www.azcorrections.gov/inmate_datasearch/results_Minh.aspx?InmateNumber=077157&LastName=PHILLIPS&FNMI=K&SearchType=SearchInet (last visited May 18, 2013) (displaying results of Inmate Datasearch for Kenneth Phillips). *See generally* Phillips v. Araneta, 93 P.3d 480, 486 (Ariz. 2004) (en banc) (holding that while the trial judge did not abuse his discretion by ordering a mental health evaluation of defendant Phillips, the order should nonetheless be vacated because the order did not sufficiently protect Phillips against self-incrimination); Arizona v. Foreman, 118 P.3d 1117, 1121 (Ariz. Ct. App. 2005) (holding that the trial court erred in holding that A.R.S. § 13-4426.01 was unconstitutional because

exonerated since 1973 in this country after being convicted of capital murder and sentenced to death.[555]

Willie Randolph

Fourteen-year-old Cateresa Matthews was last seen alive on November 19, 1991, when she began walking from her great-grandmother's house to her own home in Dixmoor, Illinois, a suburb of Chicago.[556] Her body was discovered in a field near a major highway on December 8.[557] She had been shot in the mouth and sexually assaulted.[558] The condition of her body suggested that she had only recently died and an autopsy report listed December 8 as the date of her death.[559] The investigation of the crime soon went cold and the case yielded few clues until the following October, when Dixmoor police apparently learned from a fifteen-year-old classmate of the young victim that another fifteen-year-old, Jonathan Barr, stated that he had seen Cateresa get into a car occupied by Robert Veal, Robert Taylor, and some other boys on the date of her disappearance.[560] Barr, Veal, and Taylor were all fourteen years old at the time of the crime.[561]

The police questioned Robert Veal, a learning-disabled fifteen-year-old, over a several hour period on October 29, 1992.[562] Veal signed a statement admitting that he had participated with Barr,

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the defendant, Phillips, did not show that victim impact information existed or that it was necessary).

[555] Nelson, *supra* note 551; Beth DeFalco & Dennis Wagner, *DNA Evidence Frees 100th Death Row Inmate*, USA TODAY (Apr. 10, 2002), http://www.usatoday.com/news/nation/2002/04/10/krone.htm; *Know the Cases: Ray Krone*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ray_Krone.php (last visited May 18, 2013). Although Krone was heralded as the one hundredth death-sentenced exoneree when he was released from prison, where he was in service of a life sentence following conviction at his second trial, after the reversal of his original conviction and capital sentence, the Death Penalty Information Center currently identifies him as the ninety-eighth death-sentenced individual to be exonerated. *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited May 18, 2013).

[556] Joshua A. Tepfer et al., *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois*, 18 CARDOZO J. L. & GENDER 631, 638 (2012).

[557] *Id.* at 639.

[558] *See id.*

[559] *Id.*

[560] *Id.* at 639–40.

[561] *Know the Cases: Shainne Sharp*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Shainne_Sharp.php (last visited May 18, 2013). *See also* Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 570 (2012) (explaining that nearly one year after Cateresa Mathews was murdered, police brought in for questioning three fifteen-year-olds).

[562] Tepfer et al., *supra* note 556, at 640.

Taylor, seventeen-year-old James Harden, and seventeen-year-old Shainne Sharp in Cateresa's rape and murder.[563] Later that day, the police secured an incriminating admission from Taylor, who identified Veal and the other three boys named in Veal's statements as also being involved.[564] On October 31, Sharp, who was in police custody for twenty-one hours, confessed as well, and also named the other four boys.[565] The three boys' statements were consistent that Cateresa was raped and murdered on November 19—rather than December 8—although they differed in significant particulars.[566] None of the boys were represented by counsel or accompanied by an interested adult.[567] Subsequently, all of the boys, who would become known as the Dixmoor Five, were arrested and charged with the crimes.[568]

The charges were not reassessed when DNA analysis of sperm retrieved from Cateresa's body revealed a single male profile—although the crime had been depicted as a gang rape and murder—and excluded all five of the youths as the source.[569] With little incriminating evidence other than the confessions, prosecutors negotiated guilty pleas with Veal and Sharp (Harden had retracted his admissions) in exchange for their testifying against the other defendants.[570] Harden was convicted following a bench trial in 1995 and was sentenced to eighty years in prison.[571] Barr and Taylor were convicted at a trial conducted before separate juries in 1997 and were sentenced to eighty-five years and eighty years imprisonment, respectively.[572] Veal and Sharp received twenty-year prison terms as a part of their plea-bargains, effectively making them eligible for release within eight years of their sentencing.[573]

In 2005, Barr and Taylor sought more refined DNA testing of the

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563 *Id.*

564 *Id.*

565 *Know the Cases: Shainne Sharp*, *supra* note 561.

566 Tepfer et al., *supra* note 556, at 641.

567 *See id.* at 640–41; *Know the Cases: Shainne Sharp*, *supra* note 561.

568 Tepfer et al., *supra* note 556, at 639, 641; Tepfer & Nirider, *supra* note 561, at 571; *see* Joint Petition for Relief from Judgment, Immediate Vacation of Convictions, and Release of Petitioners on Their Own Recognizance, People v. Harden, No. 92-CR-27247 & People v. Barr, 95-CR-23475 (Cook County Cir. Ct. Mar. 25, 2011), *available at* http://www.cwcy.org/Sealed-Joint-Petition-to-vacate.pdf.

569 Tepfer et al., *supra* note 556, at 641.

570 *Id.* at 643.

571 *See id.* at 645; *see Know the Cases: Shainne Sharp*, *supra* note 561.

572 *Know the Cases: Shainne Sharp*, *supra* note 561; *see* Tepfer & Nirider, *supra* note 561, at 572.

573 Tepfer et al., *supra* note 556, at 643.

crime scene evidence but were rebuffed.[574] Harden filed a motion for additional DNA testing in 2009, which was joined the following year by Barr and Taylor.[575] The case against the defendants then began to crumble. Robert Veal recanted his confession and trial testimony in 2010.[576] After considerable delay caused by uncertainty surrounding its whereabouts, the prosecution consented to having the preserved semen sample retested and entered into the CODIS database.[577] In March 2011, the CODIS run produced a hit: the DNA profile from Cateresa Matthews's rape and murder matched that of Willie Randolph, an offender with a lengthy history of sexual assaults and criminal violence.[578]

When Cateresa's body was discovered in December 1991, Randolph was thirty-three years old.[579] He lived within a mile of both Cateresa's great-grandmother's house and the crime scene, and had recently been paroled from prison following a 1981 conviction in which he had robbed a woman at gunpoint.[580] Randolph had served an earlier prison sentence following his 1977 convictions for rape, deviate sexual assault, and robbery.[581] A former girlfriend reported that in the late 1970s, Randolph had raped her in the same field where Cateresa's body had been found, and that he had beaten her with a crowbar and broken her arm when she terminated their relationship.[582] His crimes continued in the wake of Cateresa's rape and murder, and after Barr, Taylor, Harden, Veal, and Sharp were arrested, convicted, and incarcerated for the offenses.[583] Randolph was arrested in March 1992 for possession of crack cocaine and two months later for possessing a firearm as a convicted felon.[584] He received prison sentences of two and four years for the respective crimes.[585] He was convicted and served jail time for aggravated assault with a deadly weapon and domestic battery for knifing his girlfriend in November 1998.[586] He subsequently was convicted and

[574] *Id.* at 645–46.
[575] *Id.* at 647.
[576] *Id.* at 648.
[577] *Id.* at 647.
[578] *Id.* at 648; *see* Tepfer & Nirider, *supra* note 561, at 572.
[579] Tepfer et al., *supra* note 556, at 648.
[580] *Id.* at 649.
[581] *Id.*
[582] *Id.* at 652.
[583] *See id.* at 649–50.
[584] *Id.*
[585] *Id.*
[586] *Id.* at 650.

imprisoned for drug offenses and residential burglaries.[587] In April 2011, after his DNA profile was matched to the sperm sample retrieved from Cateresa Matthews's body, he was arrested for additional drug crimes and then sentenced to prison for three more years.[588]

Despite the DNA match linking Randolph to Cateresa Matthews, Randolph denied having engaged in sexual relations with her or even knowing her.[589] Prosecutors initially resisted motions to vacate Barr, Taylor, and Harden's convictions.[590] An attorney representing Shainne Sharp, when Sharp was serving a prison sentence in Indiana in 2011 for an unrelated drug offense,[591] then advised the State Attorneys that Sharp had recanted his trial testimony and maintained that he, too, was innocent of Matthews's rape and murder.[592] Finally, on November 3, 2011, the charges against Barr, Taylor, and Harden were dismissed, and the young men were released from prison.[593] Barr and Taylor were then thirty-four years old, and Harden thirty-six.[594] Each had been incarcerated for nearly twenty years.[595] The convictions of Veal and Sharp were vacated in December 2011 and January 2012, respectively.[596] As of February 2013, Willie Randolph remained incarcerated.[597] He had yet to be charged with Cateresa Matthews's rape and murder.[598] An attorney representing James Harden commented following the exoneration of Harden, Barr, and Taylor that

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[587] *Id.*

[588] *Id.* at 651, 654; Sealed Joint Petition for Relief from Judgment, Immediate Vacation of Convictions, and Release of Petitioners of Their Own Recognizance at 10–12, 22–31, Illinois v. Harden (No. 92-CR-27247) & Illinois v. Barr (No. 95-CR-23475).

[589] Tepfer et al., *supra* note 556, at 651; Press Release, Three Men from Cook County, Illinois, Exonerated of 1991 Rape and Murder, Exonerations of Two Others to Follow (Nov. 3, 2011), *available at* http://www.innocenceproject.org/Content/Three_Men_from_Cook_County_Illinois_Exonerated_of_1991_Rape_and_Murder_Exonerations_of_Two_Others_to_Follow.php [hereinafter Three Men Press Release].

[590] Tepfer et al., *supra* note 556, at 651.

[591] *Know the Cases: Shainne Sharp*, *supra* note 561.

[592] Tepfer et al., *supra* note 556, at 653.

[593] *Id.* at 654.

[594] Steve Mills & Andy Grimm, *After Years in Prison, Men Cleared of Dixmoor Crime*, CHI. TRIB., Nov. 4, 2011, at 1.

[595] Andy Grimm, *Last of 3 Cleared in 1991 Killing Freed*, CHI. TRIB., Nov. 10, 2011, at 12.

[596] *Know the Cases: Shainne Sharp*, *supra* note 561.

[597] *See Inmate Search*, ILL. DEPARTMENT OF CORRECTIONS, http://www2.illinois.gov/idoc/offender/pages/inmatesearch.aspx (last visited May 18, 2013) (select "IDOC #"; then type "A71871"; then click the "Inmate Search" hyperlink).

[598] Tepfer et al., *supra* note 556, at 654; Tepfer & Nirider, *supra* note 561, at 573; Brian Slodysko, *Dixmoor Murder Conviction is Vacated*, CHI. TRIB., Dec. 13, 2011, at 10.

> "[e]ven before they were convicted, the state had DNA evidence proving that the confessions were false, yet it chose to go forward with the prosecutions in spite of this evidence . . . . This destroyed the lives of these young men while the real perpetrator was allowed to go free, destroying even more lives during a 20-year crime spree."[599]

Matias Reyes

Few crimes have roiled America with the intensity of the "the Central Park Jogger case," which originated with a woman's horrific rape and beating after she had embarked on a nighttime jog through New York City's Central Park.[600] She was left near death, with a fractured skull and enormous blood loss, on April 19, 1989.[601] News media trumpeted the violent episode and infused it with cultural meaning.[602] As *Time* magazine later described it:

> [The case] introduced New York City and the world to the word wilding. It came to stand for a racial nightmare: a young, white female stockbroker goes jogging in the park and is raped, beaten, and left near dead by a giddy horde of teenagers. Within days, five black and Hispanic teenagers, ages 14 to 16, were arrested and charged with the crime. The teens—Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise—had been part of a larger rampage in which several people were randomly attacked in the park that night. The boys described it as wilding, and four of them confessed on videotape that the jogger had been one of their victims.[603]

The police also obtained admissions from the fifth boy, fifteen-year-old Yusef Salaam, although his interrogation session had not been video-recorded.[604] The boys' incriminating statements were

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[599] Three Men Press Release, *supra* note 589 (quoting Tara Thompson of the UChicago Law School Exoneration Project).

[600] *See, e.g.*, Craig Wolff, *Youths Rape and Beat Central Park Jogger*, N.Y. TIMES, Apr. 21, 1989, at B1 (recounting the details of the Central Park Jogger's rape and beating).

[601] *See, e.g., id.* (describing the victim's injuries).

[602] *See, e.g.*, SARAH BURNS, THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING 67–90 (2011) (detailing the media's response to the Central Park Jogger case and exploring the cultural issues it raised).

[603] Ron Stodghill, *Law: True Confession of the Central Park Rapist*, TIME (Dec. 16, 2002), *available at* www.time.com/time/printout/0,8816,1003874,00.html.

[604] Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 480–81; *Know the Cases: Yusef Salaam*, INNOCENCE PROJECT,

inconsistent in important particulars, including where the assault had occurred, what weapons were used, and who had participated in which aspects of the beating and rape.[605] None of the boys were represented by an attorney, and two of them, Salaam and sixteen-year-old Korey (Kharey) Wise, were questioned without their parents or another responsible adult being present.[606] The police made use of interrogation tactics designed to induce admissions, including "good cop-bad cop" ploys and lying about evidence that purportedly confirmed the boys' guilt.[607] Most of the youths were interrogated in multiple sessions that lasted for several hours; fifteen-year-old Raymond Santana's videotaped statement was given after he had been in custody and subjected to periodic questioning for more than twenty-seven hours.[608]

The five youths pleaded not guilty and were prosecuted in two separate trials in 1990.[609] Prior to trial, a DNA analysis of semen found on the victim's sock excluded each of them as well as the victim's boyfriend as the source.[610] The prosecution's case rested almost exclusively on the boys' incriminating statements.[611] Following a six-week trial that ended in August, McCray, Salaam, and Santana were convicted of rape and robbery.[612] At a trial that

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http://www.innocenceproject.org/Content/Yusef_Salaam.php (last visited May 18, 2013).

[605] Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 217–18 (2006); *see also* BURNS, *supra* note 602, at 37–56, 64 (explaining that in the statements made by the boys, "the descriptions of the rape var[ied] widely").

[606] Under New York law, juveniles younger than sixteen were not to be questioned by the police in the absence of a parent or another interested adult. Salaam, although in fact only fifteen, had presented identification indicating that he was sixteen years old and his statements were admitted into evidence because the police reasonably believed that he was sixteen. People v. Salaam, 629 N.E.2d 371, 372, 374 (N.Y. 1993).

[607] *See* BURNS, *supra* note 602, at 46; Leo et al., *supra* note 604, at 481. One police officer admitted lying to Salaam by telling him that his fingerprints had been found on the victim's pants. BURNS, *supra* note 602, at 46; Leo et al., *supra* note 604, at 481. The youths and various relatives claimed that police officers had shouted and cursed at them during the interrogation sessions, although the trial judge later ruled that the confessions were voluntary. Leo et al., *supra* note 589, at 481. Officers relied on techniques of minimization and maximization, alternately suggesting seemingly innocuous explanations for incriminating details, and implying that grave consequences would accompany denials. BURNS, *supra* note 602, at 56–63.

[608] BURNS, *supra* note 602, at 49.

[609] *Id.* at 131, 161.

[610] *Id.* at 113, 146–47.

[611] *See id.* at 103.

[612] People v. Wise, 752 N.Y.S.2d 837, 840 (Sup. Ct. N.Y. County 2002); *see also* People v. Salaam, 629 N.E.2d 371, 371 (N.Y. 1993) (reciting Salaam's convictions of rape and robbery in the first degree); People v. McCray, 604 N.Y.S.2d 93, 94 (App. Div. 1st Dep't 1993) (reciting McCray's convictions for rape and robbery in the first degree). Each defendant also was convicted of assault and riot, but those convictions were set aside because of their juvenile

concluded in December, Richardson was convicted of attempted murder, robbery, rape, and sodomy, and Wise was found guilty of assault, sexual abuse, and riot.[613] Wise, the lone defendant who was sixteen at the time of the crimes, was sentenced to five to fifteen years of imprisonment.[614] He was released from prison in August 2002, after having been incarcerated for more than thirteen years from the time of his arrest.[615] The other four boys received five to ten year prison sentences, the maximum allowable under juvenile sentencing standards.[616] Each served between six and eight years before being released.[617]

In December 2002, the Manhattan District Attorney's Office joined the defendants' motion to vacate their convictions, dismissed the charges against them, and McCray, Richardson, Salaam, Santana, and Wise were exonerated.[618] Those dramatic developments followed the admission of Matias Reyes, a convicted murderer and rapist then serving a thirty-three-year to life prison sentence, that he and he alone had assaulted and raped Trisha Meili, "the Central Park jogger."[619] DNA testing confirmed that Reyes was the source of semen found on clothing that Ms. Meili had been wearing when attacked.[620] Reyes's detailed explanation of how he committed the crime, although imperfectly matching some of the evidence, included a number of particulars that corroborated his account.[621] Reyes's confession apparently was motivated by a "spiritual conversion" coupled with lingering guilt about the crime and the wrongful convictions of Korey Wise (who he had met in prison) and the other youths, although he did not come forward until long after the statute of limitations had expired, barring his

status. *Wise*, 752 N.Y.S.2d at 840; *see Salaam*, 629 N.E.2d at 371; *McCray*, 604 N.Y.S.2d at 94 (reciting McCray's convictions for rape and robbery in the first degree). Raymond Santana did not perfect an appeal. *Wise*, 752 N.Y.S.2d at 840.

[613] *Wise*, 752 N.Y.S.2d at 840; People v. Wise, 612 N.Y.S.2d 117, 117 (App. Div. 1st Dep't 1994); People v. Richardson, 608 N.Y.S.2d 627, 627 (App. Div. 1st Dep't 1994).

[614] *Wise*, 612 N.Y.S.2d at 117.

[615] BURNS, *supra* note 602, at 189.

[616] *Id.* at 161, 176.

[617] *See id.* at 184–85.

[618] *See Wise*, 752 N.Y.S.2d at 839–40, 848, 850; Robert D. McFadden & Susan Saulny, *13 Years Later, Official Reversal in Jogger Attack: A Probable Lone Rapist*, N.Y. TIMES, Dec. 6, 2002, at A1; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1.

[619] *Wise*, 752 N.Y.S.2d at 843–44.

[620] *Id.* at 847.

[621] *Id.* *See* Assistant District Attorney, County of New York, Affirmation in Response to Motion to Vacate Judgment of Conviction, at 46–47, People v. Wise, 752 N.Y.S.2d 837 (Sup. Ct. New York County 1994) (No. 4762/89) [hereinafter DA's Affirmation], *available at* http://big.assets.huffingtonpost.com/wise.pdf.

prosecution for the vicious assault.[622]

Reyes was eighteen years old on April 19, 1989, the date of Ms. Meili's assault and the infamous "wilding"[623] episode in Central Park.[624] Two days earlier, he had beaten, torn the clothing off, and raped another woman in Central Park.[625] When the woman described her assailant and remembered that he had fresh stitches in his chin, a detective used hospital records to identify Reyes, who had recently received stitches and otherwise fit the description, as a suspect.[626] The police investigation ended without the lead to Reyes being pursued, apparently owing in part to the victim's leaving New York City and declining to participate further in the investigation.[627] Nor did the police connect that attack to the Central Park jogger assault, perhaps because their attention had focused on the youths they had arrested and then charged upon securing their incriminating admissions.[628] Reyes remained at large, continuing "a sporadic siege of violence on the Upper East Side for the next four months."[629]

On June 11, 1989, Reyes entered a woman's apartment, raped her in her shower and then again on her bed, tried to drown her, and then repeatedly stabbed her, attempting to blind her in the process.[630] On June 14, he raped a pregnant woman in her apartment after locking her three small children in another room, where they could hear their mother screaming for her life.[631] Telling her that she had a choice between her eyes and her life, he

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[622] *See* BURNS, *supra* note 602, at 188; William K. Rashbaum, *Convicted Killer and Rapist Says He Attacked Central Park Jogger*, N.Y. TIMES, June 12, 2002, at B2; Christine Haughney, *Killer Claims He Attacked N.Y. Jogger*, CHI. TRIB., Sept. 6, 2002, at 19; Kevin Flynn, *Suspect in Rape Absorbed Pain and Inflicted It*, N.Y. TIMES, Dec. 7, 2002, at A1; DA's Affirmation, *supra* note 621, at 19. *See generally* TRISHA MEILI, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY (2003) (describing how Reyes confessed to her rape after the statute of limitations had tolled).

[623] *See* Robert F. Worth, *Wilding: A Word That Seared a City's Imagination*, N.Y. TIMES, Dec. 6, 2002, at B4.

[624] Jim Dwyer, *Amid Focus on Youths in Jogger Case, a Rapist's Attacks Continued*, N.Y. TIMES, Dec. 4, 2002, at B1 [hereinafter Dwyer, *Amid Focus*]. *See* Flynn, *supra* note 622, at A1.

[625] Chris Smith, *Investigating the Investigation: Central Park Revisited*, N.Y. MAG., Oct. 21, 2002, at 32.

[626] Dwyer, *Amid Focus*, *supra* note 624, at B1.

[627] *Id.*

[628] *See* BURNS, *supra* note 602, at 115–16. *See generally* Dwyer, *Amid Focus*, *supra* note 609 (indicating that the police department's focus was on the five teenagers that were ultimately arrested after they all confessed to the attack on the jogger).

[629] Jim Dwyer, *Verdict That Failed the Test of Time*, N.Y. TIMES, Dec. 6, 2002, at A1 [hereinafter Dwyer, *Verdict That Failed the Test of Time*].

[630] *See* BURNS, *supra* note 602, at 116.

[631] *Id.* at 116–17.

then stabbed her seven times.[632] She died three hours later.[633] On July 19, he repeatedly raped another woman after gaining access to her apartment and, armed with a knife, and again threatening that he would either have to kill her or blind her, stabbed her about the eyes.[634] He tied her up, stole her ATM card, and used it to withdraw $300 from her bank account, and then called 911 to request that an ambulance be sent to her apartment.[635] The recording of this telephone call would later be used to link Reyes to the crimes.[636] On July 27, he accosted a woman in the hallway of her apartment building, but fled when a neighbor approached before he was able to force the woman into her unit.[637] Finally, on August 5, 1989, Reyes made his way into another woman's apartment, raped her in her shower and on her bed, and then pocketed her ATM card.[638] The woman managed to break away and cried for help.[639] Two men captured Reyes as he tried to escape and subdued him until the police arrived.[640]

Reyes pleaded guilty to murder and four rapes in 1991.[641] At the November hearing where his sentence of thirty-three years to life imprisonment was imposed, he hurled obscenities at the judge, wheeled and punched his lawyer in the face, and then injured court officers as they wrestled to control him.[642] While serving his sentence and prior to coming forward and admitting his responsibility for raping and assaulting the Central Park jogger, he was cited for multiple prison infractions ranging from arson to fighting.[643] A reporter for the *New York Times* observed that no explanation was offered "[o]n the subject of why Mr. Reyes was not caught sooner, . . . [nor] on the topic of how the apparently false confessions were obtained."[644] The reporter further noted that "[t]he former defendants have lawyers to argue their case; [and] the

[632] *Id.* at 117.

[633] *Id.*

[634] *Id.* at 117–18. *See generally* Flynn, *supra* note 622, at A1 (detailing how victims who survived encounters with Mr. Reyes were all stabbed around the eyes and how Reyes raped a twenty-year-old victim in her apartment on July 19th).

[635] BURNS, *supra* note 602, at 118.

[636] Flynn, *supra* note 622, at A1.

[637] BURNS, *supra* note 602, at 118.

[638] *Id.*; Dwyer, *Amid Focus*, *supra* note 624, at B1.

[639] BURNS, *supra* note 602, at 118; Dwyer, *Amid Focus*, *supra* note 624, at B1.

[640] BURNS, *supra* note 602, at 118; Dwyer, *Amid Focus*, *supra* note 624, at B1; Chris Smith, *Investigating the Investigation: Central Park Revisited*, N.Y. MAG., Oct. 21, 2002, at 32.

[641] Rashbaum, *supra* note 622, at B2.

[642] Smith, *supra* note 625, at 29, 84.

[643] Flynn, *supra* note 622, at A1.

[644] Dwyer, *Verdict That Failed the Test of Time*, *supra* note 629, at A1.

former prosecutors and detectives have their outlets to argue their diligence. In this latest debates, the victims of Mr. Reyes are, so far, unspoken for."[645]

Altemio Sanchez

Delaware Park, designed by Frederick Law Olmsted, is considered to be Buffalo, New York's "Central Park."[646] A series of rapes with a similar *modus operandi* began there in 1981, causing citizens and the police to be on alert for "the Delaware Park rapist."[647] A city official, who had previously been a police officer, reported seeing a suspicious man in the vicinity the day before the July 8, 1984 rape of a female jogger.[648] When the official spotted the man again, well over a year later, he recorded the license plate number of the car he was driving and notified the police.[649] The car belonged to Anthony Capozzi, a twenty-nine-year-old man with a history of schizophrenia.[650] Capozzi was arrested on September 13, 1985.[651] Six women who had been raped in Delaware Park separately viewed line-ups in which Capozzi appeared.[652] Although some discrepancies existed between the victims' verbal descriptions of their assailant and Capozzi—the rapist reportedly weighed between 150 and 160 pounds, whereas Capozzi weighed more than 200 pounds, and Capozzi had a three-inch scar on his face that none of the victims had mentioned—three of the women, including the victim of the July 8, 1984 assault, identified Capozzi as their assailant.[653] Capozzi was tried in 1987 for committing the three rapes, was convicted of two of them, and was sentenced to serve eleven to thirty-five years in prison.[654]

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[645] *Id.*

[646] *Delaware Park*, BUFFALO OLMSTED PARKS CONSERVANCY, http://bfloparks.org/parksystem/majorparks/36/delaware_park (last visited May 18, 2013); *The Conservancy*, BUFFALO OLMSTED PARKS CONSERVANCY, http://bfloparks.org/pages/7/theconservancy (last visited May 18, 2013).

[647] *See, e.g.*, Maki Becker, *How Capozzi's Case Went Terribly Wrong*, BUFFALO NEWS, Mar. 30, 2007, at A1 [hereinafter Becker, *Capozzi's Case*] (noting the sexual assaults that dated back to 1981 had residents nervous). *See also* Michael Beebe, *'No Mercy': Bike Path Killer Gets Life in Prison*, BUFFALO NEWS, Aug. 15, 2007, at A1 [hereinafter Beebe, *No Mercy*] (describing that a wire garrote was used on the victims' necks).

[648] Becker, *Capozzi's Case*, *supra* note 647, at A1.

[649] *Id.*

[650] *Inmate Exonerated in 2 1980s Rapes*, BUFFALO NEWS, Mar. 28, 2007, *available at* 2007 WLNR 5979307.

[651] Becker, *Capozzi's Case*, *supra* note 647, at A1.

[652] *Id.*

[653] *Id.*

[654] *Know the Cases: Anthony Capozzi*, INNOCENCE PROJECT,

Capozzi consistently refused to admit that he had committed the crimes while incarcerated, and consequently was barred from enrolling in prison classes that were a prerequisite for sex offenders to earn good time credit.[655] He was denied parole five times.[656] On April 3, 2007—shortly before he was to be considered yet again for parole and after he had been confined for nearly twenty-two years—he was exonerated.[657] His convictions were vacated and the charges against him were dismissed after rape kits were located in his cases, and DNA tests were conducted that excluded him as the source of the preserved semen.[658] DNA from the rape kits—which had been stored in a local hospital and had been available for testing for years although, neither Capozzi's attorney nor the prosecution knew about their existence—matched the DNA profile of Altemio Sanchez.[659]

Sanchez, who had coached Little League baseball, was an active member of his church, and was highly regarded by his neighbors,[660] concurrently was a serial rapist and murderer. Known only as the "Bike Path Rapist" or the "Bike Path Killer" before he was finally exposed, Sanchez claimed at least sixteen sexual assault victims and three slaying victims over three decades between the late 1970s and September 2006.[661] His three known murders—Linda Yalem in 1990,[662] Majane Mazur in 1992,[663] and Joan Diver in 2006[664]—were all committed after Capozzi's September 1985 arrest and convictions for the rapes that Sanchez had also perpetrated.[665] At

http://www.innocenceproject.org/Content/Anthony_Capozzi.php (last visited May 18, 2013). *See also* People v. Capozzi, 544 N.Y.S.2d 95, 95–96 (App. Div. 4th Dep't 1989) (affirming the defendant's conviction).

655 Michael Beebe, *Capozzi a Free Man After 22 Years*, BUFFALO NEWS, Apr. 3, 2007, *available at* 2007 WLNR 6401112 [hereinafter Beebe, *Capozzi a Free Man*].

656 *Id.*; Stephen T. Watson, *Capozzi Gets $4.25 Million from State in Settlement*, BUFFALO NEWS, July 1, 2010, at A1.

657 *See* Beebe, *Capozzi a Free Man*, *supra* note 655.

658 *Id.*; Maki Becker, *Newfound Evidence That Exonerates Capozzi Stored at ECMC All Along*, BUFFALO NEWS, Mar. 29, 2007, at A1 [hereinafter Becker, *Newfound Evidence*].

659 Becker, *Newfound Evidence*, *supra* note 658; Michael Beebe, *Capozzi Officially Cleared of Rape Charges*, BUFFALO NEWS, Apr. 3, 2007, at A1 [hereinafter Beebe, *Capozzi Officially Cleared*].

660 Maki Becker, *Two Lives in Juxtaposition*, BUFFALO NEWS, Jan. 21, 2007, at A1 [hereinafter Becker, *Two Lives*]; Beebe, *No Mercy*, *supra* note 647, at A1.

661 Maki Becker, *16 Rapes May Have Spanned 30 Years*, BUFFALO NEWS, May 18, 2007, at A1 [hereinafter Becker, *16 Rapes*]; Becker, *Two Lives*, *supra* note 660, at A1.

662 Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

663 Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

664 Becker, *Two Lives*, *supra* note 660, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

665 *Inmate Exonerated in 2 1980s Rapes*, *supra* note 650.

least nine of his rapes occurred after Cappozi was arrested.[666]

The murder of Joan Diver on September 29, 2006 bore similarities to the numerous prior unsolved murders—Linda Yalem also was killed on September 29, sixteen years earlier—and rapes committed over the years in Buffalo-area communities and parks, causing police to re-investigate several of the earlier cases.[667] Their diligence paid off when they contacted Wilfredo Caraballo in early January 2007; a man who was first interviewed in April 1981 when a woman who had been raped three days earlier spotted a man resembling her rapist and took down the license plate number of the car he was driving.[668] The car was registered to Caraballo, who then told the police that his car was not insured and that it had not been driven for a long time, including on the day in question.[669] When the victim of the rape was shown a photograph of Caraballo she ruled him out as a suspect.[670] When the police interviewed Caraballo again in 2007, he told them a different story: that his nephew, Altemio Sanchez, had borrowed his car and was driving it on the day that the 1981 rape occurred.[671] Sanchez's name already was familiar to the police. He was on a suspect list they had developed because he was Hispanic (thus fitting the description offered by several victims), he had twice been arrested for frequenting prostitutes, and one of the bike path murder victims was a prostitute.[672]

The police had secured perspiration, believed to be that of Joan Diver's killer, from the car that Diver had been driving prior to her murder.[673] The perspiration yielded a DNA profile.[674] Investigators followed Sanchez after Caraballo's revelation and covertly seized a

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[666] Becker, *16 Rapes*, *supra* note 661, at A1; *see* T.J. Pignataro, *DNA Links Bike Path Killer to 8 More Rapes*, BUFFALO NEWS, July 25, 2007, at A1 (noting Sanchez confessed to at least eight rapes between 1981 and 1994).

[667] Becker, *16 Rapes*, *supra* note 661, at A1; Becker, *Two Lives*, *supra* note 660, at A1.

[668] *See* Lou Michel, *26 Years of Carrying the Burden of Untruth*, BUFFALO NEWS, Jan. 16, 2007, at A1 (discussing how Sanchez's uncle finally told the truth about his car that was used in one of the earlier attacks).

[669] Gene Warner et al., *1981 Rape Case, DNA Led to Bike Path Killing Suspect: Dogged Detective Work Draws Praise*, BUFFALO NEWS, Jan. 16, 2007, at A1; *see also* Michael Beebe, *Sanchez Says He Confessed to Uncle in 1981*, BUFFALO NEWS, Aug. 16, 2007, at A1 ("Caraballo, the car's owner, told police then that he had not driven the car for weeks.").

[670] Warner et al., *supra* note 669, at A1.

[671] *Id.*

[672] Donn Esmonde, Commentary, *Teamwork Turned Up Sanchez*, BUFFALO NEWS, Jan. 21, 2007, at B1; Gene Warner, *Cooperation the Key to Finding a Killer*, BUFFALO NEWS, May 20, 2007, at A1.

[673] Michael Beebe, *Bike Path Killer's Secrets are Likely to Remain Untold*, BUFFALO NEWS, Aug. 13, 2007, at A1; Warner, *supra* note 672, at A1.

[674] Warner, *supra* note 672, at A1.

drinking glass and utensils that Sanchez had used while dining at a restaurant with his wife.[675] The DNA profile from saliva on those items matched the profile obtained from Diver's car, leading to Sanchez's arrest on January 15, 2007.[676] Within days of the arrest, the authorities suspected that Capozzi had wrongfully been convicted of rapes that Sanchez had been committed.[677] After the rape kits stored at the Erie County Medical Center were located and DNA testing confirmed that suspicion, Capozzi was cleared.[678] Although statutes of limitations had long ago expired for the rapes attributed to him, Sanchez pleaded guilty in August 2007 to the murders of Linda Yalem, Majane Mazur, and Joan Diver.[679] He was sentenced to seventy-five years to life in prison.[680]

Timothy Spencer

On January 23, 1984, Arlington, Virginia police discovered the body of Carolyn Hamm, a thirty-two-year-old attorney who had been strangled and raped in her home.[681] A noose was fashioned around her neck and her wrists had been bound with venetian blind cords.[682] Two individuals reported that they had seen David Vasquez, variously described as "creepy," "weird," and a "peeping Tom," near Hamm's house on the days before and after the murder.[683] Vasquez, thirty-seven years old and a man of limited intelligence, used to live in the neighborhood but he had since moved to Manassas, about thirty miles away.[684] Investigators followed up by interviewing Vasquez.[685] After falsely telling him that his fingerprints had been found at the murder scene, they secured his confession, which largely took the form of his reporting

675 Warner et al., *supra* note 669, at A1; *see* Warner, *supra* note 672, at A1.

676 Warner, *supra* note 672, at A1.

677 Gene Warner, *Police: Jailed Man May Be Innocent*, BUFFALO NEWS, Jan. 28, 2007, at A1.

678 Pignataro, *supra* note 666, at A1.

679 Becker, *16 Rapes*, *supra* note 661, at A1; Beebe, *No Mercy*, *supra* note 647, at A1.

680 Beebe, *No Mercy*, *supra* note 647, at A1.

681 Jonah Horwitz & Rob Warden, *Meet the Exonerated: David Vazquez*, NORTHWESTERN L. CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/vavasquezdSummary.html (last visited May 18, 2013); Dana L. Priest, *At Each Step, Justice Faltered for Va. Man*, WASH. POST, July 16, 1989, at A1, *reprinted in* TRUE STORIES OF FALSE CONFESSIONS 269, 270 (Rob Warden & Steven A. Drizin eds., 2009).

682 Horwitz & Warden, *supra* note 681.

683 *Id.*; GOULD, *supra* note 183, at 112.

684 Horwitz & Warden, *supra* note 681; Uphoff, *supra* note 97, at 792.

685 Horwitz & Warden, *supra* note 681.

a "horrible dream" that corresponded to the killing.[686] An FBI agent who reviewed a transcript of the audio-recorded interrogation sessions years later remarked: "[w]e sure would like to have a copy of this for training purposes. How *not* to do an interview!"[687] The transcript revealed that a confused but compliant Vasquez repeatedly gave inaccurate answers to questions and frequently simply ratified information supplied by the police through their leading questions.[688]

Some considerable problems existed concerning the evidence of Vasquez's guilt. Vasquez's blood type did not match that of the presumed rapist, as revealed by analysis of semen linked to the crime.[689] Nor did shoeprints left at Ms. Hamm's home conform to the size or brand of Vasquez's shoes.[690] Vasquez did not drive and he had no explanation for how he might have traveled between Manassas, where he lived and worked, and Arlington in order to commit the crime.[691] How the crime was committed, including the

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[686] GOULD, *supra* note 183, at 113, 115–16; Horwitz & Warden, *supra* note 681; Uphoff, *supra* note 97, at 792.

[687] PAUL MONES, STALKING JUSTICE 173–74 (1995).

[688] For example, the transcription revealed the following exchanges between the police and Vasquez during an interrogation session regarding Carolyn Hamm's murder:

Det. 1: Did she tell you to tie her hands behind her back?
Vasquez: Ah, if she did, I did.
Det. 2: Whatcha use?
Vasquez: The ropes?
Det. 2: No, not the ropes. Whatcha use?
Vasquez: Only my belt.
Det. 2: No, not your belt . . . . Remember being out in the sunroom, the room that sits out to the back of the house? . . . and what did you cut down? To use?
Vasquez: That, uh, clothesline?
Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?
Vasquez: Ah, it's the same as rope?
Det. 2: Yeah.
Det. 1: Okay, now tell us how it went, David—tell us how you did it.
Vasquez: She told me to grab the knife, and, and, stab her, that's all.
Det. 2: (voice raised) David, no, David.
Vasquez: If it did happen, and I did it, and my fingerprints were on it . . .
Det. 2: (slamming his hand on the table and yelling) You hung her!
Vasquez: What?
Det. 2: You hung her!
Vasquez: Okay, so I hung her.

Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1081–82 (2010) (alterations in original). *See also* MONES, *supra* note 687, at 77–82, 174–75 (providing transcripts of the interrogations).

[689] Horwitz & Warden, *supra* note 681; TRUE STORIES OF FALSE CONFESSIONS, *supra* note 681, at 274.

[690] GOULD, *supra* note 183, at 117.

[691] *See id.* at 112–13, 118; MONES, *supra* note 687, at 86–87.

manner of entry into the home and the ligatures used, suggested a measure of skill and intelligence that likely exceeded Vasquez's limited capacity.[692] These shortcomings were apparently overcome by speculation, unsupported by Vasquez's admissions or other evidence that he may have acted with an accomplice.[693] Vasquez was indicted for capital murder, rape, and burglary.[694] Already having confessed, and facing the threat of the death penalty, Vasquez pleaded guilty in February 1985—through an *Alford* plea[695]—to second degree murder and burglary.[696] He was sentenced to thirty-five years in prison.[697]

Nearly three years later, on December 1, 1987, Susan Tucker was murdered in her Arlington home.[698] Like Carolyn Hamm, she had been strangled and raped.[699] A rope was wrapped tightly around her neck and her arms had been tied together.[700] As with Hamm's murder, entry had been made into the home through a small basement window.[701] Semen from the Tucker crime scene was consistent with the semen recovered from Hamm's rape and murder; the two samples shared characteristics reflected in only thirteen percent of the population.[702] A detective with the Arlington County Police Department noted the striking similarities between the two cases, yet he was aware that Vasquez remained in prison and could not have committed the recent crime.[703] He thus interviewed the incarcerated Vasquez, anticipating that whoever killed Tucker might have been Vasquez's accomplice in the Hamm murder.[704] Instead, he left believing that Vasquez was innocent of raping and murdering Carolyn Hamm.[705]

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[692] *See* MONES, *supra* note 687, at 13, 87.

[693] *See* GOULD, *supra* note 183, at 117; MONES, *supra* note 687, at 13, 56, 87–88; Horwitz & Warden, *supra* note 681.

[694] Uphoff, *supra* note 97, at 792–93.

[695] An *Alford* plea is a guilty plea, although the defendant is not required to admit to committing the offense when tendering it. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970).

[696] GOULD, *supra* note 183, at 117–18; Horwitz & Warden, *supra* note 681.

[697] GOULD, *supra* note 183, at 118; MONES, *supra* note 687, at 13; U.S. DEP'T JUSTICE, NAT'L INST. OF JUSTICE, NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 73 (1996); *see* Uphoff, *supra* note 97, at 793.

[698] GOULD, *supra* note 183, at 118; Horwitz & Warden, *supra* note 681.

[699] GOULD, *supra* note 183, at 118.

[700] *Id.*

[701] *Id.*

[702] MONES, *supra* note 687, at 140–41.

[703] GOULD, *supra* note 183, at 118, 119.

[704] *Id.* at 118.

[705] *Id.* (citations omitted); MONES, *supra* note 687, at 62, 92. Detective Joe Horgas's

Further investigation revealed that other rape-murders exhibiting the same *modus operandi* of the Hamm and Tucker killings had recently been committed on the south side of Richmond.[706] Debbie Dudley Davis's body was found on September 19, 1987, followed by Susan Hellams's on October 2.[707] On November 2, fifteen-year-old Diane Cho was raped and murdered in her family's home in nearby Chesterfield County.[708] This recent spate of rapes and killings—attributed to the "Southside Strangler"—bore similarities to a rash of ten or more unsolved rapes committed in Arlington and Alexandria by a slender, masked black man between June 1983 and January 1984.[709] Driven by the suspicion that the same man was responsible for the earlier rapes and the recent rape-murders, as well as the rape and murder of Carolyn Hamm for which Vasquez had been convicted, the police theorized that the two and a half year gap in offending between January 1984 and September 1987 might be explained by the perpetrator's incarceration during that interval.[710] Through continued, dogged investigation, detectives identified Timothy Spencer as a suspect.[711]

Spencer had been arrested for an Alexandria burglary in late January 1984, and was convicted, incarcerated, and then released to a Richmond halfway house in September 1987.[712] He matched the general description of the man responsible for the earlier string of rapes in Arlington and Alexandria.[713] The forensic use of DNA was just dawning in late 1987.[714] Investigators delivered blood and semen from the series of crimes they believed Spencer had committed to a New York laboratory for analysis.[715] Spencer was placed under surveillance while the tests were being conducted.[716] Fearing that he might strike again before the results were available, the police arrested Spencer following his January 1988

investigation was largely responsible for Vasquez's eventual exoneration and the apprehension of the true perpetrator. *See* GOULD, *supra* note 183, at 119 (noting that Horgas had to convince the FBI of the true perpetrator's guilt).

706 *See* MONES, *supra* note 687, at 92–99.

707 Horwitz & Warden, *supra* note 681.

708 *Id.*

709 *See* GOULD, *supra* note 183, at 119.

710 *Id.*; Horwitz & Warden, *supra* note 681.

711 MONES, *supra* note 687, at 189–97; Horwitz & Warden, *supra* note 681.

712 MONES, *supra* note 687, at 191, 192, 193, 196.

713 *See id.* at 192–93.

714 *See id.* at 159.

715 *Id.* at 156, 158, 202.

716 *Id.* at 201, 202.

indictment for burglary, rape, and murder in Susan Tucker's case.[717] Believing that he faced only burglary charges, Spencer consented to giving a blood sample, which also was forwarded to the New York crime lab.[718] The results came back in March 1988.[719] DNA from Spencer's blood matched the DNA profile from semen linked to the rape and murder of Susan Tucker, Debbie Davis, and a rape committed in Arlington in 1983.[720] Biological evidence from Carolyn Hamm's rape and murder was insufficient to allow analysis.[721]

The absence of DNA evidence linking Spencer to Carolyn Hamm's rape and murder, along with Vasquez's incriminating admissions, guilty plea, and the theory that he had not acted alone, presented difficulties in ensuring that Vasquez would be exonerated. The combined efforts of the lead detective and prosecutor and a detailed report issued by the FBI that concluded that Spencer and Spencer alone was responsible for the serial rapes and murders, including Hamm's, ultimately led Governor Gerald Baliles to pardon Vasquez.[722] Vasquez was released from prison on January 4, 1989.[723] Between October 1988 and June 1989, in four separate trials, Spencer was convicted and sentenced to death for raping and murdering Susan Tucker, Debbie Davis, Susan Hellams, and Diane Cho.[724] He had committed each of those crimes after Vasquez's wrongful conviction and incarceration for raping and murdering Carolyn Hamm.[725] Spencer was executed in Virginia's electric chair on April 27, 1994.[726]

Chester Dewayne Turner

Although they received far less attention than other serial killings in Los Angeles, including those popularly ascribed to such redoubtable figures as the Night Stalker, the Hillside Strangler, and the Freeway Killer, numerous women—predominantly black and marginalized because most were drug addicts, homeless, or

[717] *Id.* at 202, 212, 213, 217.
[718] *Id.* at 222, 248.
[719] *Id.* at 254–55.
[720] *Id.*
[721] *Id.* at 261.
[722] *Id.* at 292–94, 296.
[723] *Id.* at 296.
[724] *Id.* at 300, 301.
[725] *See supra* text accompanying notes 698–709.
[726] MONES, *supra* note 687, at 308, 312, 314.

prostitutes—were raped and strangled within a thirty-block area on the south side of the city over the decade spanning the late 1980s through the late 1990s.[727] David Allen Jones was convicted of murdering Mary Edwards and of manslaughter in the deaths of Tammie Christmas and Debra Williams following a 1995 trial.[728] The three women had been strangled and raped, and their bodies left near the same elementary school, between September and December 1992.[729] Jones became a suspect in the killings because he had been arrested and jailed in late December for attempting to rape a prostitute near the school and he had previously been arrested while at the school with another prostitute.[730]

Jones, a part-time janitor and barely literate with an IQ between sixty and seventy-three, underwent three interrogation sessions with the police.[731] Only the last two were recorded.[732] During those sessions, Jones insisted that he did not kill the women, although he admitted to having had sex with them near where their bodies were found, and to fighting with them and choking them after they demanded more money or drugs in exchange for sex acts.[733] The recorded interrogations revealed that Jones's admissions were procured as his interrogator repeatedly corrected apparent misstatements and led him to acceptable responses by reminding him of details gleaned from the initial, unrecorded session.[734] The police also showed him photos of the crime scenes, thus providing him with information pertinent to their questioning.[735] Forensic analyses later established that Jones's blood type (O) did not match that linked to semen and saliva found on the women's bodies (type A), and that hair left on some of the victims was not consistent with Jones's.[736] Prosecutors argued that these discrepancies were insignificant because the women likely had engaged in sexual relations with men in addition to Jones.[737]

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[727] Charlie LeDuff, *Man Charged in Killings City Didn't Know About*, N.Y. TIMES, Oct. 30, 2004, at A10; Andrew Blankstein et al., *DNA Analysis Links Inmate to 12 Slayings*, L.A. TIMES, Oct. 23, 2004, at A1.

[728] Andrew Blankstein et al., *How Wrong Man Was Convicted in Killings*, L.A. TIMES (Ventura County ed.), Oct. 25, 2004, at A1.

[729] *Id.*

[730] *Id.*

[731] *Id.*

[732] *See id.*

[733] *Id.*

[734] *Id.*

[735] *Id.*; Maura Dolan & Evelyn Larrubia, *Telling Police What They Want to Hear, Even if It's False*, L.A. TIMES, Oct. 30, 2004, at A1.

[736] Blankstein et al., *supra* note 728, at A1.

[737] Anna Gorman, *Ten Murder Charges Filed*, L.A. TIMES (Los Angeles ed.), Oct. 27, 2004,

Jones was sentenced to serve thirty-six years to life in prison following his convictions for the three killings and an unrelated rape.[738] Meanwhile, the rapes and strangulation deaths of women continued in the South Los Angeles neighborhood. In March 2002, a Los Angeles sexual assault victim broke free from her assailant, reported the crime to the police, and a rape kit was preserved when she received medical attention.[739] She identified Chester Dewayne Turner as her rapist.[740] Turner pleaded no contest and was sentenced to eight years in prison.[741] A sample of his DNA was obtained following his conviction.[742] Investigators in the Los Angeles Police Department's cold case unit continued pursuing unsolved homicides.[743] A database search linked Turner's DNA profile to two of the cases under investigation.[744] DNA databank searches eventually linked Turner to the murder of fourteen women, one of whom was more than six months pregnant.[745]

Turner was convicted of murdering ten women and one viable fetus in May 2007.[746] His victims were Diane Johnson (1987), Annette Ernest (1987), Anita Fishman (1989), Regina Washington (1989), Ms. Washington's fetus (1989), Andrea Tripplett (1993), Desarae Jones (1993), Natalie Price (1995), Mildred Beasley (1996), Paula Vance (1998), and Brenda Bries (1998).[747] He was sentenced to death.[748] In 2011, he was charged with four additional murders in the deaths of Elandra Bunn (1987), Mary Edwards (1992), Debra Williams (1992), and Cynthia Annette Johnson (1997).[749] David Allen Jones had been convicted of two of the homicides (Edwards

at B1; *see* Blankstein et al., *supra* note 728, at A1.

738 Blankstein et al., *supra* note 728, at A1.

739 *See* Andrew Blankstein, Richard Winton & Jill Leovy, *DNA Analysis Links Inmate to 12 Slayings*, L.A. TIMES, Oct. 23, 2004, at A1.

740 *See* Ashley Surdin, *Witness in Murder Trial Tells of Attack*, L.A. TIMES, (Apr. 19, 2007), http://articles.latimes.com/2007/apr/19/local/me-turner19.

741 *Id.*

742 *See* John Spano, *L.A. Man Guilty in 11 Deaths*, L.A. TIMES, May 1, 2007, at A1.

743 *See id.*

744 *Id.*; *see* John Spano, *Trial of Suspected Serial Killer Set to Begin Today*, L.A. TIMES, Apr. 3, 2007, at B2.

745 *See* Christine Pelisek, *Silent Wraith: Chester Turner*, LA WEEKLY NEWS (May 2, 2007), http://www.laweekly.com/2007-05-03/news/silent-wraith-chester-turner; Jack Leonard & Andrew Blankstein, *Chester Turner, Serial Killer on Death Row, is Charged with Four More Murders*, L.A. TIMES (Feb. 2, 2011), http://articles.latimes.com/print/2011/feb/02/local/la-me-serial-killer20110202.

746 Leonard & Blankstein, *supra* note 745.

747 *Serial Killer: Chester DeWayne Turner*, L.A. TIMES, http://projects.latimes.com/homicide/list/chester-dewayne-turner (last visited May 18, 2013).

748 Leonard & Blankstein, *supra* note 745.

749 *Serial Killer: Chester DeWayne Turner*, *supra* note 747.

and Williams) connected to Turner through the DNA matches.[750] Biological evidence was not available for analysis in the third killing attributed to Jones.[751] Seven of Turner's identified victims were slain after Jones was arrested in late 1992 and charged with crimes that Turner had committed.[752] Jones was exonerated and released from prison in March 2004, following more than eleven years of incarceration.[753]

Robert Weeks

On the night of September 16, 1981, a forty-four-year-old woman was attacked on the roof of a Chicago parking garage.[754] A man approached her from behind as she was entering her car, shoved her into the vehicle, fractured her nose as he beat her about the face, and then raped her.[755] He then forced her into the car's trunk and drove to the garage's exit.[756] The attendant at the exit gate recognized the vehicle and knew that the man was not its regular driver.[757] He refused to allow the car to pass and summoned help.[758] As a second attendant approached, the driver fled.[759] On hearing screams coming from the car's trunk, the attendants freed the woman and called an ambulance.[760] The woman's vaginal injuries were so pronounced that evidence could not be collected for a rape kit, but a semen deposit left on her clothing was located and preserved.[761]

A composite sketch of the suspect was made from descriptions

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[750] Leonard & Blankstein, *supra* note 745.

[751] *Id.*

[752] *See Death Row Inmate Ordered to Stand Trial in 4 More Murders*, L.A. CBS LOCAL.COM (Nov. 4, 2011), http://losangeles.cbslocal.com/2011/11/04/death-row-inmate-ordered-to-stand-trial-in-4-more-murders; *see Serial Killer: Chester DeWayne Turner*, *supra* note 747.

[753] Blankstein et al., *supra* note 728, at A1; Patrick McGreevy, *Council to Settle 6 LAPD Lawsuits*, L.A. TIMES, Oct. 5, 2006, at B3.

[754] *Know the Cases: Jerry Miller*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Miller.php (last visited May 18, 2013); *see also* Kari Lydersen, *Costs Are High for Convictions of Wrong People*, N.Y. TIMES (June 18, 2011), http://www.nytimes.com/2011/06/19/us/19cncwrongful.html?pagewanted=all&_r=0 (describing the attack and rape).

[755] John Conroy & Rob Warden, *The High Costs of Wrongful Convictions: Human Costs—A Devastating Toll: Lost Freedom, Family and Friends*, BETTER GOV'T ASS'N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_human_costs.aspx [Conroy & Warden, *High Costs of Wrongful Convictions*].

[756] Lydersen, *supra* note 754; *Know the Cases: Jerry Miller*, *supra* note 754.

[757] Lydersen, *supra* note 754.

[758] *Id.*; *Know the Cases: Jerry Miller*, *supra* note 754.

[759] Lydersen, *supra* note 754.

[760] *See Know the Cases: Jerry Miller*, *supra* note 754.

[761] Conroy & Warden, *High Costs of Wrongful Convictions*, *supra* note 755.

provided by the victim and the parking garage attendants.[762] A police officer thought the sketch resembled Jerry Miller, an employed, twenty-three-year-old Army veteran with no criminal record, who the officer had stopped a few days earlier because he believed that Miller was suspiciously peering into parked cars.[763] Miller was placed in a line-up, where both parking garage attendants identified him, although one did so only tentatively.[764] Miller was brought to trial on charges of rape, aggravated kidnapping, and robbery.[765] The two parking garage attendants identified him as the man who had been driving and then fled from the victim's car, while the victim testified that Miller "looked like" the man who had assaulted her.[766] An analysis of the semen left on the victim's clothing conducted by a Chicago Police Department crime lab technician was "inconclusive" concerning whether Miller could be the source.[767] Miller testified, maintaining his innocence and explaining that he had been home that night watching a televised boxing match between Sugar Ray Leonard and Thomas Hearns.[768] The jury found him guilty and he was sentenced to forty-five years in prison on October 1, 1982.[769]

Miller remained incarcerated until he was paroled nearly a quarter-century later, in March 2006.[770] As a convicted sex offender he was required to wear an electronic bracelet, have his photo and other identifying information posted on Illinois's sex offender registry, and he was subject to residential restrictions.[771] Still insisting that he had not committed the crimes, Miller had applied for post-conviction DNA testing with the assistance of the Innocence Project.[772] In March 2007, a comparison of the DNA profile left on

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[762] Maurice Possley, *Cleared by DNA After 26 Years: Ex-Inmate Wins Battle to Prove His Innocence in '81 Chicago Rape*, CHI. TRIB., Apr. 22, 2007, at 26.

[763] *Know the Cases: Jerry Miller*, *supra* note 754; Possley, *supra* note 762, at 26.

[764] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

[765] Possley, *supra* note 762, at 26.

[766] *Id.*

[767] Hal Dardick, *Man Wrongly Convicted of Rape May Get $6.3 Million*, CHI. TRIB. (June 25, 2010), *available at* http://articles.chicagotribune.com/2010-06-25/news/ct-met-city-lawsuit-settlement-0626-20100625_1_crime-lab-dna-testing-chicago-police. A lawsuit that later would be filed on Miller's behalf alleged that an expert witness had opined that the "inconclusive" result was inexplicable and that a competently conducted analysis at the time of the trial would have excluded Miller as the source of the semen. *Id.*

[768] Possley, *supra* note 762, at 26.

[769] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Possley, *supra* note 762, at 26.

[770] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

[771] *Id.*

[772] Possley, *supra* note 762, at 26.

the victim's clothing and Miller's profile excluded him as the source of the semen.[773] Miller was exonerated the following month when a trial judge granted a motion jointly filed by Miller's attorneys and the prosecution to vacate his convictions.[774] The governor subsequently pardoned him, entitling him to compensation for his wrongful conviction and incarceration.[775]

Within days of Miller's exoneration, the DNA profile from the victim's clothing was entered into the national DNA database and produced a match to Robert Weeks, who then was imprisoned following his conviction in May 2004 for assaulting police officers who had placed him under arrest for indecent exposure at O'Hare Airport.[776] That offense was not the only one that Weeks had committed since the September 16, 1981 rape, kidnapping, and robbery that had resulted in Miller's wrongful conviction and incarceration.[777] Indeed, "[w]hile . . . Miller lost more than half of his life [to imprisonment], the real perpetrator indulged in a decades-long crime spree,"[778] as follows:

> September 21, 1981: Five days after the parking lot rape [for which Miller was convicted], Weeks attacked a man near Division and Ashland at 11:55 p.m., beating his face and body with a chain in an unsuccessful attempt to steal the victim's watch.
>
> April 4, 1982: At 4:10 a.m., Weeks grabbed a 33-year-old woman who was coming home from work, pulled her into an alley off Division and Ashland, punched her in the face, bounced her head against the pavement, raped her, choked her, kicked her in the head, and then robbed her. She required surgery for a broken cheekbone and spent five days in the hospital.

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[773] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Dardick, *supra* note 767.

[774] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755; Possley, *supra* note 762, at 26.

[775] *Blagojevich Authorizes 26 Pardons*, CHI. TRIB., Oct. 31, 2008, at 27; Michael Higgins, *Cleared—But Not Yet Innocent: Man Wrongfully Convicted of Rape Seeks Full Pardon*, CHI. TRIB. Oct. 10, 2007, at 4. In addition to compensation that he received from the State, Miller was awarded $6.3 million by virtue of a settlement reached in a lawsuit that he had filed against the City of Chicago. Rob Warden, *Meet the Exonerated: Jerry Miller*, NORTHWESTERN L. CENTER ON WRONGFUL CONVICTIONS http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilmillerjerrySummary.html (last visited May 18, 2013); Dardick, *supra* note 767.

[776] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

[777] *Id.*

[778] *Id.*

April 9, 1982: Five days after the above rape, Weeks grabbed a 34-year-old woman at approximately 1 a.m. as she parked her car in an alley in Wicker Park, struck her in the face, choked her, bit her on the forehead, and tried to force her back into the car. He was unable to proceed further because a civilian responded to her screams, gave chase, and alerted police.

April 9, 1982: Weeks attacked the four officers who arrived on the scene in response to the above attack. According to court documents, he bit one officer in the hand, kicked two in the groin, and struck another in the face. Weeks pleaded guilty to the attacks on the two women in Wicker Park and the attacks on the officers, and in August, 1982 was sentenced to 12 years by Judge Thomas Maloney.

August 13, 1996: After being arrested while breaking into cars in Wicker Park, Weeks kicked the squad car window causing the door to bend out.

February 10, 1999: Weeks pleaded guilty to violating sex offender registration requirements.

December 22, 2000: Weeks raped a 28-year-old Wicker Park resident as she returned home from a party at 4:30 a.m. The woman was treated for lacerations, contusions, and hematomas to her face, neck, ribs, and legs. Weeks, who fled the scene, was not identified as the perpetrator for six years.

February 7, 2001: Weeks attacked a 23-year-old woman near Division and Ashland at 1:50 a.m. as she walked home from work, hit her in the head with a rock, broke her nose, crushed her orbital bone, and raped her. Aside from severe facial and head injuries, she suffered a compound fracture of the right wrist that required surgery. Weeks was in prison on other charges by the time he was identified as the perpetrator six years later.

March 23, 2001: After being taken to a South Side police station on a battery charge, Weeks attacked five Chicago police officers while being booked and taken to the lockup. He punched one in the face, kicked two in the head, spat in the face of a fourth, and kicked a lieutenant in the groin and back (leaving a footprint on his shirt). The lieutenant was also treated at Mercy Hospital for lacerations to his hand, sustained in the effort to get Weeks into a cell.

May 1, 2004: Weeks attacked two Chicago police officers who had arrived at the O'Hare L platform in response to a

complaint of public indecency. They tried to arrest Weeks, had to call for backup, and after he was subdued, the responding officers were taken to Resurrection Hospital, one in an ambulance, the other in a police car.[779]

III. WHEN THE GUILTY GO FREE

The toll of new victims claimed by the score of offenders in the cases discussed above, while innocent persons were charged, convicted, and punished for their earlier crimes, is both tragic and staggering. Added to the uncompensable individual harms caused by wrongful convictions are extravagant social costs, as well.[780] Some erroneous convictions, and the corollary failure to bring the true offenders to justice, are doubtlessly inevitable notwithstanding the best efforts of those who administer the laws. Occasional miscarriages of justice have been and will continue to be tolerated by the American public; their detection and correction sometimes are even offered as evidence that "the system works."[781] Just as surely, however, there must come a tipping point where, owing to the prevalence of error or its magnitude in individual cases, public confidence in the administration of justice is undermined.[782] The consequence is a serious erosion of perceived legitimacy in the operation of the criminal law.[783]

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[779] *Id.*

[780] Conroy & Warden, *High Costs of Wrongful Conviction*, *supra* note 755.

[781] *See* Kansas v. Marsh, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success."). *See generally* Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 668 (2007) (discussing mythology of innocence and data suggesting that the criminal justice system is working effectively in spite of some who are wrongfully convicted); Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 U.C.L.A. L. REV. 227, 238 (2008); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 707 (footnote omitted) ("Public officials sometimes respond that the fact of an exoneration proves that 'the system works' to correct its own mistakes, obviating the need to address deeper systemic issues."); Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?"*, 86 JUDICATURE 83, 84 (Sept.–Oct. 2002) (arguing that discovery of wrongful convictions of inmates sentenced to death in Illinois is not evidence that the system works); Margaret Raymond, *The Problem With Innocence*, 49 CLEV. ST. L. REV. 449, 453 (2001) ("[F]ar from concluding that the wrongful convictions cases reveal a system that is fundamentally broken, others will view these cases as proof that the existing system for identifying and redressing injustices works.").

[782] Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1437 (2012) (footnote omitted) ("[R]esearch has suggested that wrongful convictions lower the public's faith in the criminal justice system . . . .").

[783] *See, e.g.*, C. Ronald Huff, *Wrongful Convictions in the United States*, *in* WRONGFUL

The crisis in public confidence in the administration of justice occasioned by wrongful convictions is fueled not only by empathy for the unfortunate innocents, but also by the widely shared, deep-seated belief that it is fundamentally wrong, even offensive, to allow perpetrators of criminal violence to flout the law and avoid responsibility for the harm they have caused. The intensity of the perceived unfairness triggered by culpable offenders escaping justice surfaces, ironically, even in the aftermath of trials in which defendants' acquittals have incensed a skeptical public.[784] Indeed,

CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 59, 69 (C. Ronald Huff & Martin Killias eds., 2008) ("[T]he U.S. criminal justice system's accuracy is essential to its perceived legitimacy, and systematic attention must be paid to the errors that are committed and how those errors might be reduced."); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 137 (2008) (footnote omitted) ("[W]rongful convictions are an injustice that undermines our respect for and faith in our criminal justice institutions and the rule of law because they are inflicted directly by the State."); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. OF CRIM. L. & CRIMINOLOGY 825, 836 (2010) ("[T]he harms of wrongful convictions may seem obvious. So long as the wrong suspect is behind bars, the public remains at risk as the actual perpetrator is free to roam the community and prey on others. Taxpayers must commit resources to cover the imprisonment of an innocent person. The public may lose trust in the criminal justice system. And, of course, the innocent defendant loses his freedom while forced to confront the dangers of imprisonment."); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 611 (2009) (footnotes omitted) ("Continuing on the present course that leads to wrongful convictions permits the actual perpetrator to commit more crimes, requires society to compensate innocent suspects who were wrongly incarcerated, and causes further diminution of trust in the criminal justice system. Though precise cost estimates of the additional crimes and compensation of the innocent may not be absolutely essential, at the least we must acknowledge that the lost trust in the system is priceless."); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 789 (2007) ("[A wrongful conviction] not only imposes pain that has a moral claim to our recognition, but it is also seriously corrosive to the respect for law of the wronged individuals, and that of all those around them who believe the convicted were in fact innocent."); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VANDERBILT L. REV. 143, 214 (2011) ("As a normative matter, one can neither justify nor dismiss the risk of wrongful convictions, no matter which other competing objectives might be served by them. Convicting a person for a crime he did not commit renders any such objective—the public's acceptance of the verdict, the assertion of the state's authority, and the expression of society's values—a vacuous, even cynical, exercise of power."); Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1503 (2008) (footnote omitted) (reviewing GOULD, *supra* note 183) ("The costs [of wrongful convictions] are enormous and impossible to quantify. Immeasurable suffering is caused to the wrongfully convicted as a result of shattered personal and community ties, the loss of freedom (sometimes for decades), harsh conditions of imprisonment, and ruined psyches. There is also a broader effect, as confidence in the criminal justice system is shaken. Police-community relations may be further undermined in communities where such relationships have historically been strained. In extreme cases, the legitimacy of the entire criminal justice process may be called into question.").

[784] *See* M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TULANE L. REV. 1855, 1856–57

the "strain . . . upon the integrity of the justice system"[785] is felt so acutely when the guilty escape justice that the historic prohibition against double jeopardy has given way in England and kindred common law countries to permit retrials in serious criminal cases "where compelling fresh evidence has come to light after an acquittal."[786] Among the most deeply affected in cases where justice has miscarried may be the victims of crime and their families. Victims and their relatives not only may have inadvertently contributed to an innocent person's wrongful conviction through their cooperation with authorities or their testimony, but they also likely lived for years under the mistaken belief that their cases had been finally resolved and their assailants incapacitated, when in fact their assailants remained menacingly at large.[787]

(1993) (footnotes omitted) ("When four white Los Angeles police officers were acquitted in the brutal beating of Rodney King, an unemployed African-American construction worker, the nation's outrage erupted in large part through mass urban rebellion in Los Angeles and several other cities. The exoneration of these officers, which shocked and angered a majority of the nation, was acutely symbolic of the daily experience and frustration of African Americans, Latino Americans, and Native Americans: that crimes against these communities, committed by government's most visible representatives, continually go unpunished."). Two of the police officers acquitted in the state prosecution later were convicted in federal court of violating Rodney King's civil rights and were sentenced to prison. Jennifer Medina, *Police Beating Victim Who Asked 'Can We All Get Along?'*, N.Y. TIMES, June 18, 2012, at A1. Although no violence ensued in their wake, the acquittals in the murder trials of O.J. Simpson (in Los Angeles, California, in 1995) and Casey Anthony (in Orlando Florida, in 2011) often are cited as causing a considerable measure of public skepticism and cynicism regarding the administration of justice. *See* Forst, *supra* note 31, at 1259; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997); Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial by Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579, 1580–81 (2012); Lizette Alvarez, *On Her Release, a Chorus of "Happy Trails" to Anthony, Minus the "Happy"*, N.Y. TIMES, July 17, 2011, at 13.

[785] Kenneth G. Coffin, *Double Take: Evaluating Double Jeopardy Reform*, 85 NOTRE DAME L. REV. 771, 774 (2010).

[786] *Id.* at 773–74 (quoting HOME DEP'T, JUSTICE FOR ALL, 2002, CM 5563, at 83 (U.K.), http://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf. *See generally* David S. Rudstein, *Retrying the Acquitted in England Part II: The Exception to the Rule Against Double Jeopardy for "Tainted Acquittals"*, 9 SAN DIEGO INT'L L. J. 217, 228–29 (2008) (discussing exception to the traditional English rule against double jeopardy); Steven V. DeBraccio, Comment, *The Double Jeopardy Clause, Newly Discovered Evidence, and an "Unofficial Exception" to Double Jeopardy: A Comparative International Perspective*, 76 ALB. L. REV. 1821, 1821–22, 1830–34 (2013) (describing the history of the act and the procedure through which "a prosecutor could appeal an acquittal and retry a defendant on the grounds that newly discovered evidence incriminated him"); Nyssa Taylor, Note, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 TEMP. INT'L & COMP. L.J. 189, 189 (2005) (discussing relaxation of common law double jeopardy rule in England and similar proposal in Australia).

[787] JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION 211–17 (2009) (describing reactions of rape victim Jennifer Thompson-Cannino on learning that her identification and trial testimony had helped erroneously

Another consequence of wrongful convictions is their substantial financial cost, which almost invariably is passed on to taxpayers. The Better Government Association and the Center on Wrongful Convictions' study of eighty-five acknowledged wrongful convictions in Illinois reported that city, county, and state funds totaling $155.9 million had been paid through 2010 to exonerees through settlements and judgments reached in lawsuits.[788] Pending suits and anticipated new litigation ultimately were expected to make that figure balloon to the neighborhood of $300 million.[789] Additional compensation in the amount of $8.2 million was awarded to wrongly incarcerated individuals by the Illinois Court of Claims.[790] On top of those costs, government entities, and hence state and local taxpayers, paid $31.6 million in attorneys' fees to defend officials against lawsuits filed in these cases.[791] The study estimated the costs of incarcerating the wrongfully convicted, who spent a combined 926 years behind bars, to be $18.5 million.[792] Based on these figures, the total cost to Illinois taxpayers of the eighty-five cases of wrongful conviction was a whopping $214 million, with perhaps $100 million to $150 million more expected to accrue as additional lawsuits are filed and resolved.[793]

Huge additional direct and indirect monetary costs spiral from wrongful convictions and the new crimes that the actual perpetrators commit. These costs, which are virtually incalculable, include the wages lost to the falsely convicted and their families during (and frequently after) years of incarceration; expenses associated with exonerees' psychological counseling, education, job-

convict Ronald Cotton while the actual rapist, Bobby Poole, escaped prosecution for the crime); Givelber, *supra* note 784, at 1394 (footnote omitted) ("The costs of these erroneous convictions extend beyond the enormous price to defendants. Victims and their families also pay a significant price. Persuaded that the person convicted is the perpetrator, victims frequently experience a subsequent exoneration as a fresh injury, if not the reawakening of an old wound. Moreover, victims are confronted with the terrible realization that if the person who was convicted is not guilty, then the true perpetrator remains at large."); Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486, 505–14 (2003) (discussing media accounts of the views of murder victims' family members in cases in which the individuals convicted of the crimes and sentenced to death later were exonerated); Bowman, *supra* note 783, at 1502 ("With news of exonerations, victims and their family members are forced to relive the crime and its aftermath, years after they had every reason to believe the guilty party had been safely locked away.").

788 Conroy & Warden, *Tax Dollars Wasted*, *supra* note 10.

789 *Id.*

790 *Id.*

791 *Id.*

792 *Id.*

793 *See id.*

training, and other post-release services; and the property damage, medical and mental health care expenses,[794] and lost wages suffered by the victims of the true offenders' new crimes.[795] Such expenditures must surely total in the hundreds of millions or billions of dollars when aggregated.[796]

The individual and social harms spawned by wrongful convictions are undeniable, compound, and severe. The new crimes committed by offenders who have cheated justice, and the brutal devastation of the lives of additional rounds of victims, are paramount among those harms. Everyone loses when criminal justice miscarries; everyone, that is, except the murderers, rapists, burglars, robbers, and other lawbreakers who remain at liberty, often to reoffend, while the innocent are punished in their stead. In light of these seemingly obvious truths, it might be assumed that policymakers, politicians, and criminal justice officials would join forces and rally to enhance the reliability of systems of criminal justice and hence minimize the intertwined risks of convicting the innocent and enabling the guilty to go free. Yet sadly, policy reforms that would improve reliability in criminal justice practices and could readily be implemented too often stall or lag.[797] Progress can be held hostage by the rhetoric of competing ideologies, a mystifying blindness by representatives of diverse political views to the overwhelming commonality of interests shared by all, or simply a lack of will.

Considerable resistance to implementing reforms almost certainly owes to the misperception that measures enacted to safeguard the

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[794] Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 713 (2002).

[795] *See* Medwed, *supra* note 1, at 1565.

[796] *See generally* Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, *in* 4 CRIM. JUST. 263, 263–315 (David Duffee ed. 2000), *available at* http://www.smartpolicinginitiative.com/sites/all/files/Measuring%20the%20Costs%20and%20Benefits%20of%20Crime%20and%20Justice.pdf (discussing the costs and benefits of the criminal justice system). *See also* Forst, *supra* note 31, at 1219–24, 1221 tbl. 1 (citation omitted) (discussing the costs of a failed criminal justice system).

[797] *See, e.g.*, Gould & Leo, *supra* note 783, at 866–67 (footnotes omitted) ("Considering the interests at stake in a criminal prosecution and conviction, . . . it is incredible to the point of embarrassing that the American system of justice has been so resistant to innocence commissions or post-exoneration review. . . . Wrongful convictions do such harm to so many that one would expect criminal justicians to seek out the lessons from past errors in order to prevent them. And yet, experience suggests otherwise. Only a handful of states have undertaken serious and systematic review of wrongful convictions, and when practitioners have been involved, it has often taken 'kicking and screaming' to introduce new approaches or technologies to improve their work."). *See generally* Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1308–60 (2011) (discussing reforms aimed at limiting the number of wrongful convictions and giving an overview of states' progress with enacting these reforms).

innocent must also invariably or often serve to shield the guilty.[798] Such thinking likely helps account for intransigence in having the police videotape interrogation sessions, in limiting or more carefully scrutinizing the testimony of incentivized informants, in tightening regulations that govern identification procedures, and adopting other reforms that could be expected to help prevent miscarriages of justice.[799] Some procedures designed to help reduce the risk of convicting innocent persons doubtlessly would work at cross purposes with convicting the guilty.[800] One example would be requiring proof of 100% certainty to support a conviction in criminal trials, an innovation that would insulate some guilty offenders from conviction just as it would spare some innocent defendants from wrongful conviction.[801] Other reforms, such as requiring two defense attorneys to be appointed to represent indigents charged with crimes, or mandating that crime labs exist independently of police agencies, might be considered unduly expensive. Still, a number of meaningful reforms are available that would have the net effect of enhancing the accuracy of justice systems. Measures that achieve greater reliability in criminal justice procedures not only fail to erect barriers to apprehending and prosecuting the guilty, they make those outcomes all the more attainable.[802]

Progress must be made in embracing those reforms, and then implementing cost-effective measures that will promote greater reliability in systems of criminal justice. This work is necessary not only to help avoid wrongful convictions but also to contribute to the urgent social policy objective of bringing the guilty to justice. The

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[798] *See* Ronald J. Allen & Larry Laudan, *Why Do We Convict as Many People as We Do?: Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 80, 83–86 (2008); Risinger, *supra* note 783, at 763–64; Givelber, *supra* note 784, at 1333–35.

[799] *See, e.g.*, 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), *available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf (last visited Jan. 13, 2013) (offering numerous recommended reforms to New York law and practice to enhance the reliability of the criminal justice system and to help prevent wrongful convictions). *See also* James R. Acker & Catherine L. Bonventre, Perspective, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245 (2010) (same).

[800] *See* Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1089 (2011) (citations omitted); Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1105 (2011).

[801] *See* BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 64 (2004).

[802] *See* James M. Doyle, *Learning From Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 145–46 (2010); Findley, *supra* note 783, at 172–73 (citations omitted); Medwed, *supra* note 1, at 1565, 1567–68.

modest aspiration advanced here is simply to reframe the issues under discussion so they are not skewed by the misleading notion that proponents of different crime control ideologies must somehow be divided in finding solutions to how to minimize miscarriages of justice.[803] The most ardent law enforcement enthusiasts and the most passionate civil libertarians should have no disagreement about the desirability of disabling repeat violent offenders from claiming new victims, or of sparing innocent parties the pains and injustice of wrongful conviction and punishment.

IV. CONCLUSION

The hundreds of individuals who have been officially exonerated following wrongful conviction are commonly described as the tip of a much larger iceberg,[804] the visible manifestation of an exponentially greater number of innocents who have been adjudged guilty and punished for crimes they did not commit. The iceberg metaphor is equally apt, if not even more ominous, when applied to the truly guilty parties; the wrongful conviction cases that come to light and culminate with the true perpetrator's detection certainly represent but a small fraction of their vastly greater number. When the guilty go free, not only do their past crimes remain unredeemed, but they too often engage in repeat acts of criminal violence, with irreparable consequences to countless future victims. The capsule descriptions offered in the twenty cases discussed in this article are hopelessly inadequate to capture the devastation worked on the lives of those known victims. They also are incapable of even hinting at the pain and suffering experienced by the multitude of unknown victims of offenders who have escaped justice in cases resulting in the wrongful conviction of others.

As consequential as the continuing predations are of offenders who elude conviction for crimes committed, it is a testament to the ideals embodied in our justice systems that commitment remains firm to Blackstone's maxim: "better that ten guilty persons escape, than that one innocent suffer."[805] The guilty who do escape quite

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[803] *See* Findley, *supra* note 783, at 139–41; Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 337–38 (2002).

[804] *See supra* note 1.

[805] 4 WILLIAM BLACKSTONE, COMMENTARIES *358. *See generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing and expanding on the implications of Blackstone's maxim).

clearly have the capacity to, and frequently do, inflict serious violence on new victims and cause continuing damage to the social order. There can be no disagreement that rather than allowing ten guilty persons to escape justice, it would be better if only nine did, and better still if the number were reduced as close as possible to zero. This simple truism should be embraced, unsullied by the misperception that measures designed to prevent the innocent from suffering must inevitably invite the trade-off of allowing more guilty parties to escape justice. The sooner that it is, the sooner the day will dawn that meaningful discussions will ensue and reforms will be enacted that simultaneously promote the twin objectives in the administration of justice, shared by all, of neither allowing guilty persons to escape nor innocent ones to suffer.

Eyewitness Identification Reform

Updated: 3/15

INNOCENCE PROJECT

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EYEWITNESS IDENTIFICATION REFORM

Mistaken Identifications Are the Leading Factor in Wrongful Convictions

Mistaken eyewitness identifications contributed to approximately 72% of the 329 wrongful convictions in the United States overturned by post-conviction DNA evidence.

- Inaccurate eyewitness identifications can confound investigations from the earliest stages. Critical time is lost while police are distracted from the real perpetrator, focusing instead on building the case against an innocent person.

- Despite solid and growing proof of the inaccuracy of traditional eyewitness ID procedures – and the availability of simple measures to reform them – traditional eyewitness identifications remain among the most commonly used and compelling evidence brought against criminal defendants.

Traditional Eyewitness Identification Practices – and Problems

- In a standard lineup, the lineup administrator typically knows who the suspect is. Research shows that administrators often provide unintentional cues to the eyewitness about which person to pick from the lineup.

- In a standard lineup, an eyewitness is shown individuals or photographs *simultaneously*. Research shows that this tends to lead eyewitnesses to choose a lineup member based upon a relative judgment (i.e., who *looks most like* the perpetrator?), rather than basing the identification on his or her own mental image of the perpetrator.

- In a standard lineup, without instructions from the administrator, the eyewitness often assumes that the perpetrator of the crime is one of those presented in the lineup. This often leads to the selection of a person despite doubts.

How to Improve the Accuracy of Eyewitness Identifications

The Innocence Project endorses a range of procedural reforms to improve the accuracy of eyewitness identification. These reforms have been recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of these reforms are corroborated by over 30 years of peer-reviewed comprehensive research.

1. The "Double-blind" Procedure/ Use of a Blind Administrator: A "double-blind" lineup is one in which neither the administrator nor the eyewitness knows who the suspect is. This prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect.

2. Sequential Presentation of Lineups: When combined with a "blind" administrator, presenting lineup members one-by-one (sequentially), rather than all at once (simultaneously) has been proven to significantly increase the overall accuracy of eyewitness identifications.

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3. Instructions: "Instructions" are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection. They also prevent the eyewitness from looking to the lineup administrator for feedback during the identification procedure. One of the recommended instructions includes the directive that *the suspect may or may not be present in the lineup.*

4. Composing the Lineup: Suspect photographs should be selected that do not bring unreasonable attention to him. Non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the eyewitness* – as opposed to their resemblance to the police suspect. Note, however, that within this requirement, the suspect should not unduly stand out from among the other fillers. (More detailed recommendations can be provided upon request by the Innocence Project.)

5. Confidence Statements: Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made.

6. The Lineup Procedure Should Be Documented: Ideally, the lineup procedure should be electronically recorded. If this is impracticable, an audio or written record should be made.

Jurisdictions Utilizing "Sequential Double-Blind" Procedures:

New Jersey, North Carolina, and Connecticut, as well as jurisdictions ranging in size from Dallas and Denver to Northampton, MA, have implemented "sequential double-blind" as standard procedure. Georgia, Virginia, Texas, Wisconsin, and Rhode Island have recommended/promulgated "double-blind sequential" voluntary guidelines and incorporated them into law enforcement training.

Preservation of Evidence

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PRESERVATION OF EVIDENCE

Preserving DNA Evidence Preserves the Ability to Prove Innocence.

Preserved evidence can help solve closed cases – and exonerate the innocent. Preserving biological evidence from crime scenes is critically important because DNA can provide the best evidence of innocence – or guilt – upon review of a case.

None of the nation's 329 DNA exonerations would have been possible had the biological evidence not been available to test. Had the evidence been destroyed, tainted, contaminated, mislabeled, or otherwise corrupted, the innocence of these individuals would never have come to light.

Do All States Require the Preservation of Crime Scene Evidence?

More than half of the states have passed legislation that compels the automatic preservation of evidence upon conviction of a defendant. However, most of these laws are limited in a variety of ways. Many state statutes restrict both the timeframes for required retention and the crime categories for which evidence must be preserved. Other statutes only require the retention of evidence upon the effective date of their passage, legally allowing states to destroy old evidence attached to either innocence claims or old, unsolved cases. Still other states only mandate the preservation of evidence upon petition for re-testing of evidence. As a result, large quantities of evidence are destroyed in the window of time between conviction and petition, to make way for incoming evidence in the face of storage space concerns.

KEY FACTS:

- Requirements around the preservation of evidence are usually embedded in DNA testing access statutes.
- In 2004, Congress passed the **Justice for All Act (H.R. 5107)**, which provides financial incentives for states to preserve evidence – and withholds those same monies for states that do not adequately preserve evidence.

Not All States That Require the Preservation of Evidence Succeed in Fulfilling Their Mission.

Even when a state is amenable to testing post-conviction biological evidence and provides access to individuals who have petitioned to have the DNA evidence associated with their case tested, the Innocence Project has uncovered examples of cases where that evidence has not been preserved. Oftentimes, this is because evidence is destroyed during the window of time between conviction and the filing of a post-conviction petition for testing or re-testing of the biological evidence.

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What Are Some Common Shortcomings in Existing Statutes?

- ✓ Some legislation limits the preservation of evidence to only certain crimes.
- ✓ Nearly every state with legislation calling for the preservation of evidence allows for its premature disposal.
- ✓ By failing to sanction parties responsible for the disposal or corruption of evidence, most states do not adequately deter those who might destroy evidence.

What Should Be Contained in a Statute Requiring the Preservation of Evidence?

Elements of a meaningful preservation law, either as an amendment to a post-conviction DNA testing access statute, or as a separate bill, must include:

- The preservation of all items of physical evidence relating to felony crimes, regardless of whether an individual files a petition for post-conviction DNA testing.
- The retention of crime scene evidence that is associated with unsolved cases.
- The retention of all items of physical evidence secured in connection with a felony for the period of time that any person remains incarcerated, on probation or parole, involved in civil litigation in connection with the case, or subject to registration as a sex offender.
- Sanctions for parties responsible for the improper destruction of evidence and provisions enabling courts to determine the appropriate remedy when evidence is improperly destroyed.

Ideally, legislation requiring the preservation of evidence will include the following provisions:

- If biological evidence is destroyed, the court may vacate the conviction, grant a new trial, and instruct the new jury that the physical evidence in the case, which could have been subjected to DNA testing, was destroyed in violation of the law.
- The court will also instruct the jury that if it finds that the evidence was intentionally destroyed, it may presume that the results of the DNA testing would have been exculpatory.

Case in Point: Robin Lovitt- Virginia Death Row Inmate

Robin Lovitt, convicted of the capital murder and robbery of a pool hall employee in Arlington, Virginia, was sentenced to death in early 2000. When Mr. Lovitt sought to appeal the decision, it came to light that the evidence associated with his case had been destroyed. Despite being reminded that Virginia law required the preservation of evidence from the case, a court clerk nonetheless discarded the murder weapon, a blood-stained pair of scissors. The DNA testing available at the time of the trial could only conclusively tie the blood on the weapon to the victim and not to anyone else. By the time Mr. Lovitt sought an appeal, more sophisticated and modern DNA testing was available, but the evidence – which could have proven guilt or innocence, and/or informed the appropriateness of the death penalty – was not. The Supreme Court declined to address this issue, and Robin Lovitt was ultimately scheduled to become the 1,000th person executed since capital punishment resumed in 1977.

The wrongful destruction of the evidence that could have conclusively proven innocence or guilt denied a conclusive answer. Recognizing the ambiguity caused by the destruction of evidence, Virginia Governor Mark Warner commuted Lovitt's sentence to life in prison.

The Use of Incentivized Testimony

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THE USE OF INCENTIVIZED TESTIMONY

The use of jailhouse informants and other incentivized witnesses is a demonstrated cause of wrongful conviction. A groundbreaking report that focused upon the "snitch system," published by the Center on Wrongful Convictions in 2004, found that incentivized witnesses were the leading cause of wrongful convictions in U.S. capital cases. A comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were convicted, at least in part, on the basis of informant, jailhouse informant or cooperating alleged co-perpetrator testimony.[1]

Informant testimony is an undeniably valuable law enforcement tool, but it generally functions in service of only one side of the adversarial system and with little oversight. Although unsubstantiated testimony represents hearsay in its basest form, courts have done little to ensure that safeguards are in place to regulate its use.

There are many reasons why a witness might be compelled to provide untruthful testimony. The witness may have been promised cash or something else of value: leniency, reduced charges, a reduced sentence or immunity from prosecution. All of these motives can be tracked, controlled or otherwise regulated through a requirement that the prosecution disclose its arrangement with an incentivized witness to the defense. However, lying witnesses who have been promised nothing, but nevertheless act based on an expectation of some form of future compensation, fall outside of the scope of a prosecutorial disclosure requirement.

In order to ensure that all categories of incentivized witnesses – both those who have been promised an inducement by the prosecution and those who operate in the hope that a reward may follow – are properly vetted by the court before their testimony taints the judgment of the fact finders, the Innocence Project recommends the following:

I. Informant Statements Should Be Electronically Recorded

Much like the false confession phenomenon, the opportunity for law enforcement to "feed facts" about a crime's commission to a potential informant is a risk that must be protected against. In light of the ever-increasingly common practice of electronically recording interrogations, efforts should also be made to electronically record informant statements to law enforcement.

II. Pre-plea and pre-trial reliability/corroboration hearings for all informants

Pre-plea and pre-trial hearings that both assess reliability and corroborate the content of informant testimony should be held in all cases where informant testimony is intended for use at trial or in connection with a plea agreement. At minimum, before allowing for the use of informant testimony, the court should make a finding relating to reliability and consider the following factors at such a hearing:

Determining Reliability

- the relationship between the witness and the defendant
- a description from the witness of how many times he spoke to the defendant; the specific location of those conversations; who else, if anyone, was present during those conversations; and the nature of their conversations, including a specific accounting of the

[1] Brandon L. Garrett, *Judging Innocence*. 108 Colum. L. Rev. 55, 62 (2008).

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conversation(s) in which the defendant allegedly provided the incriminating information to the witness

- a description of the time and place of the statements made by the witness to law enforcement, including the names of individuals who were present
- the criminal history of the informant
- other cases in which the informant either provided testimony or offered to do so and whether or not incentives were offered to the witness in any of those cases
- a description of the specific arrangement between the witness and the prosecution, including promises of leniency, sentence reductions, immunity, cash, or anything of value
- a description of any form of recantation, including the substance of the recantation; where it took place; when it took place; the circumstances under which it took place (i.e. the reason provided by the informant for the recantation); and who was present

Corroboration of the Testimony

- The substance of testimony provided by the witness must be corroborated by other evidence that connects the defendant with the commission of the crime (i.e. could the informant's testimony be factually linked to the details of the crime?)
- In weighing the substance of the corroborated testimony, the fact finder should consider the reliability of the witness along with the following:
  - Did the informant statement lead to the discovery of new evidence previously unknown to the police?
  - Did the informant statement include an accurate description of the details of the crime that are not easily guessed, have not been reported publicly and can be independently corroborated?

Illinois law requires the use of reliability hearings to determine whether informants can provide testimony in capital cases (725 ILCS 5/115-21). In 2007, the California legislature passed a bill – later vetoed by the Governor – that would disallow convictions based upon uncorroborated testimony. Texas has a statutory corroboration requirement for drug informants (Vernon's Ann. Tex. Crim. Code Art. 38-141). Canada's inquiry into the famed Thomas Sophonow case recommended, at minimum, a judicial assessment of credibility before the admittance of informant testimony.

III. Jury Instructions

In those wrongful conviction cases documented by the Center on Wrongful Convictions, juries believed untruthful informants; it is evident that jury instructions need to be strengthened. States should approve jury instructions that seek both to educate jurors about the long-established fallibility of informant testimony and the specific factors (including implicit or explicit incentives, the informant's criminal history, information about other times he has provided informant testimony, etc.) that may have influenced the testimony in the particular case at hand. Juries should also be told about how easily an informant can obtain access to information that seemingly only the perpetrator of a crime would know and that informant testimony has been shown to be a large contributing factor to wrongful convictions.

False Confessions & Recording of Custodial Interrogations

Updated: 3/15

INNOCENCE PROJECT

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FALSE CONFESSIONS & RECORDING OF CUSTODIAL INTERROGATIONS

How Could Someone Confess to a Crime One Didn't Commit?

Many of the nation's 329 wrongful convictions overturned by DNA evidence involved some form of a false confession. Yet it's virtually impossible to fathom why a person would wrongly confess to a crime he or she did not commit. Researchers who study this phenomenon have determined that the following factors contribute to or cause false confessions:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

How to Prevent False Confessions From Leading to Wrongful Convictions

- **The entire interrogation – during the time in which a reasonable person in the subject's position would consider himself to be in custody and a law enforcement officer's questioning is likely to elicit incriminating responses – should be electronically recorded.** This is simply the only way to create an objective record of what transpired during the course of the interrogation process.

- In cases where law enforcement failed to make a recording, at minimum, a mandatory instruction should be given to the jury, directing them to disregard the confession if they believe it was coerced. Ideally, the judge should suppress "confessions" that were not recorded or improperly recorded so that they are not heard by jurors.

- The practice of recording of interrogations can be implemented in one of three ways:
  - Via legislation
  - By action of the highest court in a particular jurisdiction
  - Through adoption of policies by individual police departments

An important note about ***videotaping interrogations*** is that it is only a reform when the video camera is either focused upon both the interrogator *and* the suspect or when focused solely upon the interrogator. Research indicates that when the video camera is fixed upon the suspect, jurors tend to disregard the appearance of the interrogator and conclude that the confession was given freely – even when that confession is false. Therefore, jurors should be provided with audio only or transcripts generated from the videotape. The videotape should only be used to resolve disputes regarding certain actions made by either party.

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Do States Legislate the Electronic Recording of Interrogations?

To date, Connecticut, Illinois, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Vermont, Wisconsin, and the District of Columbia have enacted legislation regarding the recording of custodial interrogations. State supreme courts have taken action in Alaska, Indiana, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey. Approximately **850** jurisdictions have recording policies.

Electronic Recording of Interrogations: A Boon to Both the Innocent *and* to Law Enforcement

The mandated electronic recording of the entire interrogation process protects the innocent, ensures the admissibility of legitimate confessions, and helps law enforcement defend against allegations of coercion.

Electronic Recording of Interrogations Helps the Innocent By:

- Creating a record of the entire interrogation, including the interaction leading up to the confession;
- Ensuring that the suspect's rights are protected in the interrogation process; and
- Creating a deterrent against improper or coercive techniques that might be employed absent the presence of a recording device.

Electronic Recording of Interrogations Assists Law Enforcement By:

- Preventing disputes about how an officer conducted himself or treated a suspect;
- Creating a record of statements made by the suspect, making it difficult for a defendant to change an account of events originally provided to law enforcement;
- Permitting officers to concentrate on the interview, rather than being distracted by copious note-taking during the course of the interrogation;
- Capturing subtle details that may be lost if unrecorded, which help law enforcement better investigate the crime; and
- Enhancing public confidence in law enforcement, while reducing the number of citizen complaints against the police.

Case in Point: Chris Ochoa, Texas Exoneree

In 1988, a woman was raped and murdered at an Austin, Texas Pizza Hut restaurant where she worked. Based on a hunch that the crime was committed by a Pizza Hut employee with a master key, police began questioning employees of the chain restaurant. Chris Ochoa and his roommate, Richard Danziger, worked at a different Austin area Pizza Hut, but became the main suspects when they were observed drinking beer and appearing to toast the victim. Mr. Ochoa and Mr. Danziger were subsequently convicted of the crime. Both convictions grew out of a false confession by Mr. Ochoa. It was later discovered that his confession was coerced and that interrogators had threatened him with the death penalty. Years after their convictions, letters detailing the crime were sent to the police, to then-Governor George W. Bush's office, and the District Attorney's Office. The author of the letters, Achim Marino, had apparently undergone a religious conversion while in prison on three other convictions, and felt obligated to confess to the Pizza Hut rape/murder. The DNA evidence from the original crime scene was retested. It exculpated both Mr. Ochoa and Mr. Danziger, while implicating Mr. Marino. Had Mr. Ochoa's initial "confession" been taped, jurors, at the subsequent trial, would have had an opportunity to assess the circumstances under which his confession was made.

Access to Post-Conviction DNA Evidence

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INNOCENCE PROJECT

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ACCESS TO POST-CONVICTION DNA EVIDENCE

Despite its Ability to Prove Innocence, Some Courts Will Not Consider Newly Discovered DNA Evidence After Trial.

- The traditional appeals process is often insufficient for proving a wrongful conviction. It is not uncommon for an innocent person to exhaust all possible appeals without being allowed access to the DNA evidence in his case.
- Sometimes it comes to light that DNA evidence available at the time of the defendant's trial was never tested.
- Often the methods of DNA testing used at the time of the trial were not exact and yielded unreliable results. Today's more sophisticated technology provides irrefutable results.
- The only way a person can access the DNA evidence associated with his criminal case, absent a protracted legal battle, is through post-conviction DNA testing access statutes.

Do All States Have Post-conviction DNA Access Statutes?

***** Although all fifty states have post-conviction DNA testing access statutes, many of these testing laws are limited in scope and substance*****

What are the Common Shortcomings of Existing DNA Access Laws?

- Some laws present insurmountable hurdles to the individual seeking access, putting the burden on the wrongfully convicted person to effectively solve the crime and prove that the DNA evidence promises to implicate another individual.
- Despite the fact that approximately 31% of the nation's 329 wrongful convictions proven by DNA involved a false confession, admission, or guilty plea, certain laws still do not permit access to DNA when the defendant originally pled guilty or confessed to the crime.
- Many laws fail to include adequate safeguards for the preservation of DNA evidence.
- Several laws do not allow individuals to appeal denied petitions for testing.
- A number of states fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the potentially innocent to languish interminably in prison.

What Key Elements Should Be Included In a DNA Access Law?

Most states have post-conviction DNA testing access statutes. For those that do not, or for those state statutes with deadlines for individuals seeking access, a federal law, the Justice For All Act (JFAA) of 2004 (H.R. 5107), provides financial incentives for states to allow permanent

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post-conviction DNA testing access to qualified defendants.

The Innocence Project recommends the following elements be contained in new statutes or existing statutes in need of amending:

- Include a reasonable standard to establish proof of innocence at the stage where an individual is petitioning for post-conviction DNA testing;
- Allow access to post-conviction DNA testing wherever it can establish innocence, even if the petitioner is no longer incarcerated, and including cases where the petitioner pled guilty or provided a confession or admission to the crime;
- Exclude "sunset provisions," or absolute deadlines, for when access to post-conviction DNA evidence will expire;
- Enable judges to order comparisons of crime scene evidence against national and state-level criminal justice databases, including CODIS and IAFIS;
- Require state officials to properly preserve and catalogue biological evidence for as long as an individual is incarcerated or otherwise experiences any consequences of a potential wrongful conviction (e.g. probation, parole, civil commitment or mandatory registration as a sex offender), as well as to account for evidence in their custody;
- Disallow procedural hurdles that stymie DNA testing petitions and proceedings that govern other forms of post-conviction relief;
- Allow convicted persons to appeal from orders denying DNA testing;
- Require a full, fair and prompt response to DNA testing petitions, including the avoidance of debate around whether currently available DNA technology was available at the time of the trial;
- Avoid unfunded mandates by providing funding to DNA testing statutes; and
- Provide flexibility in where, and how, DNA testing is conducted.

Case in Point: Pennsylvania Man Originally Denied Access to DNA

In May of 1987, Bruce Godschalk was convicted of rape and burglary in Pennsylvania. The conviction was based primarily on eyewitness identification and a confession later proven to be false. Forensics techniques available at the time of the trial and used to test the semen from the crimes could not exclude Mr. Godschalk as the perpetrator. Following his conviction, Mr. Godschalk petitioned for access to DNA testing and was denied. After contacting the Innocence Project in 1995, which sought testing on his behalf, the District Attorney refused to allow access to the DNA evidence. It was not until November of 2000 that a Federal District Court granted access to the DNA testing. Delays in setting a testing protocol and delivering the evidence, in addition to some legal hurdles, deferred testing of the evidence until January of 2002. Mr. Godschalk was eventually excluded as the donor of the semen in the crimes and released from prison. Mr. Godschalk had spent seven of his fifteen years of incarceration fighting for access to DNA evidence. As a result of Mr. Godschalk's case, Pennsylvania introduced and later passed a law creating access to DNA evidence.

For further reading

Four Reforms for the 21st Century by Barry Scheck, printed in the Journal of the American Judicature Society, May/June 2013, Vol. 96 No. 6.

The National Registry of Exonerations

http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf