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The Federal Role in the Innocence Movement in America

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Abstract

Despite its small contribution to the ranks of the exonerated, and more broadly its relatively small share of all criminal cases, the federal government has played a distinct and important role in fostering and shaping the innocence movement. This article recounts the various ways in which the federal government has done so: through high-profile measures to recognize the reality of wrongful convictions, direct funding of innocence work, use of federal purse strings to shape criminal justice policy, setting an example through legislation on matters as diverse as access to postconviction DNA testing and compensating the wrongly convicted, and leadership on issues such as the problems with the forensic sciences. The article concludes that, moving forward, the committed involvement of the federal government will remain important, especially in tackling such challenging problems as flawed forensic sciences and ensuring financial resources for innocence advocates.

Keywords

wrongful convictions, exoneration, innocence, criminal justice, DNA, federal government

In terms of sheer numbers, criminal justice administration in the United States is predominantly a state, rather than federal, concern (Kurland, 1996). More than 97% of all felony criminal cases are prosecuted in state and local courts under state laws (Klein & Grobey, 2012). Of the country's 2.3 million individuals in prison and jail, 2 million are in state custody, and only 211,000 (less than 1%) are in federal custody (Wagner & Rabuy, 2016). Of the nation's probationers and parolees (or individuals on similar

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community supervision), 97.3% are under state supervision, and 2.7% are under federal supervision (Glaze & Kaeble, 2014).

Despite its comparatively small numbers, however, the federal system has long played an oversized role in setting criminal justice policy in America. In the 1960s and early 1970s, the Supreme Court under Chief Justice Earl Warren embarked on a criminal justice revolution that expanded constitutional rights of criminal defendants, and thereby turned the federal constitution, largely as applied to the states through the Fourteenth Amendment's Due Process Cause, into a sort of de facto code of criminal procedure. As never before, the federal constitution became the standard for criminal procedure in state, as well as the federal courts. President Richard Nixon responded in the early 1970s by pushing back with a "war on crime" that systematically ratcheted up criminal enforcement and penalties and, with the aid of the Supreme Court under Earl Warren's successor, Chief Justice Warren Burger, began to scale back the procedural protections that the Warren Court had extended to criminal defendants.[1] In the early 1980s, the Reagan era "war on drugs" led the way toward increased efforts to punish drug offenses, and a resulting explosion in the prison populations (Krasnow, 1992, p. 220; Sentencing Project, 2015; Wagner & Rabuy, 2016). Each step of the way, federal policy was reflected in state criminal justice systems, in part because federal policy shaped public policy views and in part because the federal government used its funding power to stimulate state policies that conformed to federal priorities; the federal government, for example, has provided money, equipment, personnel, and power to local police to support federal public safety priorities (Harmon, 2015).

In other fundamental ways, federal policy has continued to shape criminal justice administration in the states. In 1984, Congress ushered in a revolution in American sentencing policy when it enacted a major sentencing reform law (Sentencing Reform Act, 1984; Rezneck,1985). That Act marked the demise of rehabilitation as a dominant goal of sentencing, replacing the parole-based indeterminate system that had been a hallmark of criminal justice in America for decades or longer with a rigid guidelines-based determinate sentencing system. More recently, the federal government—perhaps most visibly through the President's Task Force (2015) on 21st-Century Policing—has taken the lead in examining policing issues in an era in which simmering rifts between local police and the communities they serve have exploded into the headlines.

Exonerations and the Federal Government

Although not as widely recognized, since the late 1990s, the federal government has played a similar, even if smaller and quieter, role in fostering what has now become known as the "innocence movement" (Findley, 2008). Marvin Zalman (2010-2011) defines the innocence movement as

> a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent

> prisoners and rectify perceived causes of miscarriages of justice in the United States. (p. 1468)

The Innocence Project—the largest and best-known of the innocence advocacy organizations at the center of the movement—defines the movement more simply in its Mission Statement: "The Innocence Project's mission is to free the staggering number of innocent people who remain incarcerated, and to bring reform to the system responsible for their unjust imprisonment" (Innocence Project, n.d.-a). Zalman (2010-2011) notes the significance of this "movement," observing that

> [t]he movement is characterized by innocence consciousness—the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place. (p. 1468)

Zalman (2010-2011) adds that "[i]nnocence consciousness replaces a belief that the justice system almost never convicts an innocent person. When translated into public opinion, innocence consciousness becomes one of the forces generating policy change" (p. 1468). Although the federal government is not specifically referenced in these definitions, that does not mean it has had no role in the movement.

Although the federal government's role in the innocent movement—especially compared with its role in more broadly addressing the war on crime, the war on drugs, sentencing, and policing, among other things—has been fairly modest, its impact has nonetheless once again been more significant than would be suggested by the comparatively small number of exonerations it has produced. The federal criminal justice system is almost absent from the picture of wrongful convictions nationwide. Among DNA exonerations—that is, cases in which DNA alone has rather conclusively established innocence of a convicted individual—not one was convicted in federal court; all 344 (to date) were convicted and exonerated in state court (Innocence Project, n.d.-b). Considering exonerations more broadly, including those exonerated by any sort of new evidence of innocence, not just DNA, the National Registry of Exonerations (NRE) at the University of Michigan Law School lists, as of September 2016, 1,884 exonerations since 1989 (NRE, n.d.). Of those exonerations, only 98, or just over 5%, were federal court convictions (including military courts), and another 16, or less than 1% more, were in the local courts of the District of Columbia (NRE, n.d.).

Several factors likely explain the small share of exonerations in federal courts. The most obvious is the federal government's small share of all prosecutions and prison sentences; indeed, 5% of wrongful convictions exceeds the federal government's proportionate share of criminal convictions.

The data with regard to DNA exonerations, however, are different, given that the federal system has not produced a single DNA exoneration. Yet the complete absence of federal cases in the Innocence Project's list of 344 DNA exonerations is not surprising, given that 99% of those convictions are rape, murder, and rape–murder cases, and rape and murder are not generally prosecuted in federal court. Only rarely does federal

jurisdiction extend to rapes and murders, such as when they are committed on military bases or Indian reservations or in other federal territories, or in special-jurisdiction cases such as murders committed in the course of robberies of federally insured banks. Yet DNA exonerations are generally limited to rapes and murders because these are the kinds of cases where DNA evidence most likely is present and the cases are serious enough that postconviction litigators are likely to look for and test the evidence after conviction.

It is also possible that *exonerations* based on DNA testing (as opposed to convictions based on all types of new evidence) are comparatively rare in federal courts because *wrongful convictions* are rarer in federal court than in state court. That thesis appears to be inconsistent, however, with the data showing that federal cases are more than proportionately represented in the pool of exonerations based on all types of evidence (NRE, n.d.). Yet federal courts are generally far-better resourced than state courts, and that translates into lower caseloads for federal prosecutors, defenders, and judges,[2] and more resources for the kinds of investigations that, in theory, can minimize wrongful convictions (Mosteller, 2012; United States Courts, 2016). And because federal cases are so dominated by drug offenses, rather than the rapes, murders, robberies, and assaults that make up so much of state court criminal caseloads, there may be something unique about such cases. The error rate in federal drug cases may be lower than the error rates in other types of cases. Indirect support for this hypothesis can be found in data from the NRE (n.d.), which list only 104 drug possession or sale cases—state or federal—among its 1,884 total exonerations since 1989—or about 5.5% of all exonerations. In its most recent fiscal year (FY) report, the U.S. Sentencing Commission (2016) reported that, of the 71,003 criminal cases reported to the Commission in FY 2015, 22,631, or 31.8%, were drug cases. In total, 50.1% of all federal prisoners are serving sentences for drug offenses (Carson, 2015, Table 12). In the states, by comparison, only 15.7% of prisoners are serving sentences for drug offenses. (Carson, 2015, Table 11).

Or it may be that errors in federal drug cases are no less frequent (or perhaps even more frequent), but exonerations—especially DNA exonerations—are less likely because it may be especially difficult to develop new evidence of innocence for exoneration in drug cases. No one knows which, if any of these alternatives is correct, because no one has studied the differences. All that can be said safely is that, when it comes to exonerations, the federal government is a bit player.

Regardless, the relative dearth of exonerations in federal cases does not mean the federal government has been a non-player in the innocence *movement*. To the contrary, the federal government has, since nearly the beginning of the movement, played a key role in significant respects—indeed, as in other areas of criminal justice, an outsized role.

Emergence of the Innocence Movement

It is widely recognized that the Innocence Movement was born in the 1990s when forensic DNA profiling began to exonerate previously unimagined numbers of convicted individuals and thereby shatter the "myth of near infallibility" that had previously dominated thought about the criminal justice system (Findley, 2014, p. 4; Findley

& Golden, 2014, p. 93; Zalman, 2010-2011). A few scholars, and at least one advocacy group—Centurion Ministries (n.d.) in Princeton, New Jersey—had been studying wrongful convictions or working to exonerate the innocent for decades before DNA came along (Bedau & Radelet, 1987; Borchard, 1932; Frank & Frank, 1957; Radelet, Bedau, & Putnam, 1992). But it was the DNA exonerations, harnessed initially by the Innocence Project and then a growing group of innocence advocacy organizations that together formed the Innocence Network (n.d.), that really created the "innocence consciousness" required to launch the "movement" (Findley, 2014; Scheck, Neufeld, & Dwyer, 2000, p. 261). Although Barry Scheck and Peter Neufeld, co-founders of the Innocence Project, very early in the movement, set a goal of forming an innocence network in law schools across the country,[3] most of these organizations emerged organically, at the local level (and not all were at law schools) (Findley, 2014). Hence, the movement, like the criminal justice system itself, was largely a matter of state and local, rather than federal, concern.

The Federal Government's Role in Fostering "Innocence Consciousness"

As in other areas of the criminal justice system, the federal government quickly began to play a significant and formative role in the innocence movement, even though innocence issues were primarily germane at the state level. In 1995, the National Institute of Justice (NIJ) under Attorney General Janet Reno took note of the growing number DNA exonerations and commissioned a study. The result was an NIJ publication, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, published in June 1996, that examined the first 28 DNA exonerations (Connors, Lundregan, Miller, & McEwan, 1996). The study was commissioned just 3 years after the flagship Innocence Project in New York City formally organized, and 2 years before emergence of any of the other innocence organizations that would eventually come together to form the Innocence Network.[4] The NIJ study reflected the impact that the DNA exonerations were beginning to have on perceptions of the criminal justice system, giving credence to the reality of wrongful convictions. Significantly, the NIJ study began the important work of learning the lessons that could be gleaned from those cases. Among other things, the NIJ study not only revealed that wrongful convictions are real—and not just an "unreal dream" (United States v. Garsson, 1923)—but also began to identify factors that contribute to wrongful convictions. Most notably, the study revealed that mistaken eyewitness testimony was a factor in most of the 28 included in its dataset (Connors et al., 1996).

The study had a profound impact in state systems across the country, and in policy discussions at the national level. At the federal level, after reading the report, Attorney General Janet Reno asked the NIJ to create a National Commission on the Future of DNA Evidence "to identify ways to maximize the value of DNA in our criminal justice system" (DNA Commission, 1999, p. iii). The Commission organized itself around five specific topics of inquiry, one of which focused directly on using DNA to exonerate the innocent.[5]

The Commission's first publication addressed the issues of most concern to the innocence movement: standards for postconviction DNA testing (DNA Commission, 1999). The report explicitly recognized the need for postconviction DNA testing because of its potential to prove innocence, and encouraged cooperation on the part of law enforcement officials (DNA Commission, 1999). The report broke postconviction DNA testing cases into five categories, ranging from Category 1 cases in which biological evidence was collected and still exists and would exonerate the defendant if the DNA testing were to produce "exclusionary results," to Category 5 cases, "in which a request for DNA testing is frivolous." In the former category, the report recommended, "prosecutors and defense counsel should concur on the need for DNA testing." In the latter, obviously, "prosecutors and defense counsel should generally agree that no testing is warranted" (DNA Commission, 1999, pp. xiii-xiv).

Although these recommendations seem mundane now, at the time they were groundbreaking. The criminal justice system is notorious for its lack of discovery provisions for defendants (Prosser, 2006), and that is especially true in the postconviction context. In most states, there simply were at the time no, or at best very scanty, provisions for postconviction discovery (Levenson, 2014). Indeed, prior to the DNA revolution, virtually no rules or laws even required preservation of evidence after conviction—an obvious prerequisite for any postconviction DNA testing and discovery. As DNA testing began to exonerate, however, a few states began to adopt statutes requiring both preservation of biological evidence after conviction and access to that evidence for DNA testing in cases where it might prove innocence. New York and Illinois were the first states to adopt such laws, and not coincidentally led the nation in the early years in numbers of DNA exonerations (Findley, 2002).

Given this virtual vacuum in postconviction discovery rules, the recommendation by the National Commission on the Future of DNA Evidence that prosecutors and defense attorneys should work together to obtain postconviction DNA testing when it might prove innocence was significant. As Congress would later recognize in its Findings in the Innocence Protection Act of 2001, which proposed the federal government's postconviction DNA preservation and testing statute,

> The National Commission on the Future of DNA Evidence . . . has urged that postconviction DNA testing be permitted in the relatively small number of cases in which it is appropriate, notwithstanding procedural rules that could be invoked to preclude that testing, and notwithstanding the inability of an inmate to pay for the testing. (Innocence Protection Act, 2004, Title I, Sec. 101(a)(9))

In summary, Congress declared, a central purpose of the Innocence Protection Act was to "substantially implement the Recommendations of the National Commission on the Future of DNA Evidence in the Federal criminal justice system, by authorizing DNA testing in appropriate cases" (Innocence Protection Act, 2004, Title I, Sec. 101(b)(1)).

Moreover, in those jurisdictions that did not promptly enact a viable postconviction DNA testing scheme, the Commission's recommendations became the guiding authority in many a state postconviction DNA testing motion. And even after states began

enacting postconviction DNA testing statutes, the National Commission's recommendations provided arguments that could be marshaled in disputes about how to interpret and apply those statutes.

From "Innocence Consciousness" to Innocence Action: Accessing DNA

As the innocence movement gained momentum, federal involvement accelerated as well. The high point of the federal government's embrace of "innocence consciousness" may have come when Congress enacted The Justice for All Act (2004) of 2004,[6] which included the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program[7] (Kirk Bloodsworth Program, 2004) and the Innocence Protection Act of 2004 (2004) (Leahy, 2001).

The Innocence Protection Act essentially attacked two separate but innocence-related problems: (a) the need to utilize new DNA technology to prove innocence through postconviction DNA testing; and (b) the need to ensure adequate representation for individuals facing the death penalty (Weiers & Shapiro, 2002-2003). As Senator Patrick Leahy (2001), chief sponsor of the Innocence Protection Act explained,

> The goal of our bill is simple, but profoundly important: to reduce the risk of mistaken executions. The Innocence Protection Act proposes basic, common-sense reforms to our criminal justice system that are designed to protect the innocent and to ensure that if the death penalty is imposed, it is the result of informed and reasoned deliberation, not politics, luck, bias, or guesswork . . . [I]t is . . . structured around two principal reforms: improving the availability of DNA testing, and ensuring reasonable minimum standards and funding for court-appointed counsel. (p. 1115)

Although the Act focused on improving the capital punishment system, its DNA preservation and testing provisions were not limited to capital cases. And while the law has not yet produced any federal exonerations, Senator Leahy recognized even in 2001 that one of the key contributions of the law was that it created a model for state laws and incentives for states to enact such laws. Upon introducing the bill, Senator Leahy (2001) commented,

> I am gratified that our bill has served as a catalyst for reforms in the States with respect to post-conviction DNA testing. In just one year, several States have passed some form of DNA legislation. Others have DNA bills under consideration. Much of this legislation is modeled on the DNA provisions proposed in the Innocence Protection Act, and we can be proud about this. (p. 1115)

This was not just hopeful thinking. In addition to creating a model on postconviction DNA preservation and testing statute for states to emulate (Innocence Protection Act, 2004, Title I, Sec. 102), the Innocence Protection Act (2004) also used the tried-and-true method of exerting federal influence over state policy by creating financial

incentives for the states to follow suit (Title I, Sec. 103.). Among other things, the Act "[c]ondition[ed] receipt of Federal grants for DNA-related programs on an assurance that the State will adopt adequate procedures for preserving biological material and making DNA testing available to inmates" (Leahy, 2001, p. 1118). And it seemed to work, for within a few short years, all 50 states had enacted postconviction DNA preservation and testing statutes (although it is of course possible the states would have enacted those laws even without the federal nudge; Abrams & Garrett, 2016).

Funding Growth of the Innocence Movement

As innocence consciousness spread and new laws started creating the tools for postconviction DNA testing, new innocence organizations began emerging across the country. But most were small organizations with few resources and limited capacity to meet the crushing demand for assistance. Few states provided direct financial support to innocence organizations, yet the casework was expensive and time-consuming. Into this breach stepped the federal government again, this time providing direct financial support to innocence casework. Two programs in particular, provided a direct shot of resources to the movement: the already-mentioned Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, and the Wrongful Conviction Review Grant Program.

The Bloodsworth Grant program was designed to stimulate postconviction DNA testing in cases where it might prove innocence. Since the program started issuing awards in FY 2008 through August 2016, the program had disbursed nearly US$42 million to 50 state recipients (some recipients received multiple awards, so the total number of recipients was considerably smaller than 50) (NIJ, n.d.-b). The grant awards have ranged from a low of US$48,298 to a high of US$2.5 million, and have been awarded typically to five to eight recipients each year for 18-month or 2-year grants (NIJ, n.d.-b). This funding has gone to state and more recently local entities, including law enforcement and prosecution offices, that often have partnered with local innocence organizations to support postconviction DNA testing in innocence cases.

A second federal funding stream—the Wrongful Conviction Review Grant Program, which is administered by the Bureau of Justice Assistance within the U.S. Department of Justice's (DOJ) Office of Justice Programs—has also provided a direct boost to innocence organizations and the innocence movement. This program is designed to fund and foster "high-quality and efficient representation for defendants in post-conviction claims of innocence" and, unlike the Bloodsworth Grant program, is not limited to DNA cases (Public Safety Grants.Info, n.d.). These grants, beginning in FY 2009, have largely gone directly to innocence organizations and have typically been awarded to approximately a dozen organizations annually in amounts ranging from about US$138,000 to US$316,000, again for 18-month or 2-year awards. More recently, the funding has gone to a smaller group of projects, as funding has shrunk.

Together, these grant programs have provided a significant proportion of the funding for Innocence Network member organizations, and a boost to the size and ability of those programs to provide services. In 2012, for example, among the then-62 organizations that comprised the Network, the average project obtained 27% of its revenue

from federal grants.[8] Although many projects received no federal funding, at least one project in 2012 received 100% of its budget from federal funds, while a number of others received 50% to 80% of their funding from the federal government.[9] Recent funding cuts, not yet reflected in the most recent budget data, have shrunk the federal contribution beyond what is reported here.

The federal funding thereby enabled a great deal of added innocence activity. But it created a conundrum for many projects. With the federal funding, some projects were able to more than double their staff size and take on significantly more cases than they could have without the funding. But the grants typically funded 18-month to 2-year cycles, while the cases typically take years to investigate and litigate; indeed, among the DNA exonerations, the average term of wrongful imprisonment is 14 years (Innocence Project, n.d.-d). That meant, for many projects, the jolt of federal funds simultaneously created a challenge, as the projects struggled to find ways to maintain staffing and service levels once their federal grants expired. Although many projects were successful in obtaining renewed federal funding or other sources of income, others were not. And as federal dollars became scarcer, that meant that, by 2015, the total share of Innocence Network member organization budgets provided by federal grants had shrunk by more than half to 12%.[10]

Federal Guidance on Innocence-Related Criminal Justice Policy

Study of wrongful conviction cases has identified a "canonical list" of factors that contribute to convictions of the innocent (Gross, 2008, p. 186). That list now includes, among other things, eyewitness identification error, false confessions, perjured jailhouse or informant testimony, flawed forensic science evidence, prosecutorial and police misconduct, inadequate defense counsel, and tunnel vision. To varying degrees, the federal government has played a key role in shaping policy initiatives aimed at redressing these error points.

Forensic Science

Although, like most other aspects of the criminal justice system, forensic science is typically applied at the state and local level, the federal government, through the Federal Bureau of Investigation (FBI), has long played a leading role in shaping the way forensic sciences are developed and analyses are conducted. For decades, the FBI Crime Lab has been the gold standard lab in the United States, setting policy, providing services, and training state-level analysts.

The FBI, for example, working with other federal agencies, has for more than 20 years supported a range of scientific working groups (SWGs) and technical working groups (TWGs), whose mission is to establish and advance forensic standards and techniques. Among others, those SWGs have included such fields as Facial Identification (FISWG); Forensic Anthropology (SWGANTH); DNA Analysis Methods (SWGDAM); Forensic Document Examination (SWGDOC); Dogs and

Orthogonal Detection Guidelines (SWGDOG); Friction Ridge Analysis, Study and Technology (SWGFAST); Fire and Explosives Sciences (SWGFEX); Firearms and Toolmarks (SWGGUN); Gun Shot Residue (SWGGSR); Bloodstain Pattern Analysis (SWGSTAIN); and Shoeprint and Tire Tread Evidence (SWGTREAD) (FBI, n.d.). Many of these disciplines have played a prominent role in wrongful conviction cases.

Despite the FBI's attention to these disciplines, however, most of these forensic disciplines have come under intense scrutiny and criticism, now that the exoneration cases have revealed the forensic sciences to be leading contributors to false convictions. Peter Neufeld, co-director of the Innocence Project, and Professor Brandon Garrett examined the first 200 DNA exonerations, and determined that, among those cases in which a forensic analyst testified and for which they could find a complete record (n = 137), the analysts testified in a way that was scientifically invalid in 60% of the cases (Garrett & Neufeld, 2009).

All of this scrutiny ultimately led Congress to ask the National Academy of Sciences (NAS) to conduct a thorough review of forensic sciences in the United States. The result was a "landmark" report issued by the NAS, through the National Research Council (NRC) in 2009, which exposed the reality that most of the forensic disciplines have very little grounding in science at all (Giannelli, 2011; NRC, 2009). This was not the first time, though, that the NAS—the nation's preeminent authority on scientific issues—had evaluated forensic disciplines. The NAS previously issued in-depth reports on voiceprint analysis (NRC, 1979), DNA analysis (NRC, 1992, 1996), the polygraph (NRC, 2003), and comparative bullet lead analysis (NRC, 2004). In each case, with the exception of the DNA reports, the NAS found the forensic discipline largely scientifically unsupportable. With DNA profiling, the NAS recognized the scientific validity of the underlying principles, but still had a major impact by recommending procedures and protocols that would enhance its scientific validity and reliability. The reports changed the way DNA profiling was done at both the federal and state levels.

The 2009 NRC Report on the general field of forensic sciences took the National Academies' critique of forensic sciences to a new level. After extensive examination of the forensic sciences, the NRC concluded, dramatically, that,

> [w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. (NRC, 2009, p. 7)

The Report continued:

> In most areas of forensic science, no well-defined system exists for determining error rates, and proficiency testing shows that some examiners perform poorly . . .
>
> In most forensic science disciplines, no studies have been conducted of large populations to establish the uniqueness of marks or features. Yet . . . examiners make probabilistic claims based on their experience . . .

> Little rigorous research has been done to validate the basic premises and techniques in a number of forensic science disciplines. (NRC, 2009, pp. 188-189)

The report included 13 specific recommendations for reforms to improve the scientific validity and reliability of the forensic disciplines. Despite the dire need for these reforms, however, very few, if any, have been implemented yet in most jurisdictions, including at the federal level. The Report, however, has stirred a great deal of debate, provided material for litigation about the admissibility of some of the forensic disciplines (most of it in unsuccessful challenges to admissibility), and moved a few states to create state-based forensic science commissions to oversee and improve forensic science evidence in their jurisdictions (Goldstein, 2011).

The central recommendation of the NRC Report was that Congress should create an independent federal entity, a National Institute of Forensic Science (NIFS), "[t]o promote the development of forensic science into a mature field of multidisciplinary research and practice, founded on the systematic collection and analysis of relevant data . . ." (NRC, 2009, p. 14). Creation of the NIFS was the key to most of the other recommendations in the NAS Report, because the NAS envisioned the NIFS as the authority that would implement the remaining reforms.

But Congress has been in no mood to create a new independent federal agency, and has done little-to-nothing to implement the recommendations of the NAS. Until recently, that space has been occupied by the states, attempting in a very uneven and fragmented way to address the concerns raised by the NAS in 2009.

In 2013, given Congress's inaction, the DOJ and the National Institute of Standards and Technology (NIST) stepped in to create a National Commission on Forensic Science (NCFS), tasked with doing much that the NAS had envisioned for the NIFS. Although the new Commission, as an arm of the DOJ (and hence of law enforcement) is not independent, as the NAS urged, it has brought together stakeholders from across the criminal justice system (including naming Peter Neufeld, co-director of the Innocence Project, as a member) to begin serious work on the problems confronting the forensic sciences (NCFS, Members, n.d.). To advance its work, the Commission has created subcommittees on Accreditation and Proficiency Testing; Human Factors; Interim Solutions; Medicolegal Death Investigations; Reporting and Testimony; Scientific Inquiry and Research; and Training on Science and Law. At the same time, the Commission's co-sponsor, the NIST, has created a cluster of Organization of Scientific Area Committees (OSACs), "to coordinate development of a quality infrastructure for forensic science standards development" (NIST, n.d.). With these developments, the potential for federal guidance on forensic sciences is now at a new height.

In other respects, the federal government has played a role in addressing issues with a few specific forensic disciplines. For decades, for example, the FBI had analyzed the lead composition of bullets and had claimed to be able to match bullets based on their composition to bullets possessed by criminal defendants. After the 2004 NRC Report on this method of analysis, known as Composition of Bullet Lead Analysis (CBLA), concluded that the technique lacked scientific viability, the FBI initially reacted defensively, but eventually abandoned the technique altogether.

More significantly, the FBI ultimately announced that it would work with the National Association of Criminal Defense Lawyers and the Innocence Project to identify cases in which individuals might have been wrongly convicted based on erroneous CBLA evidence (Findley, 2008). Although that move had minimal direct impact on state forensic science systems, because only the FBI had been conducting CBLA analysis (sometimes on behalf of the states), it was nonetheless important for the example it set for cooperative efforts to correct miscarriages of justice based on flawed forensics.

A few years later, the FBI followed its own example when it recognized that its analysts, for years, had been testifying in scientifically insupportable ways about microscopic hair analysis evidence. The FBI then worked jointly with the DOJ, the National Association of Criminal Defense Lawyers, and the Innocence Project to re-examine old cases to identify individuals who might have been wrongly convicted because of those errors (National Association of Criminal Defense Lawyers, 2015). In a joint report issued April 20, 2015, the government identified nearly 3,000 cases in which FBI examiners used microscopic hair analysis. As of March 2015, the FBI had reviewed approximately 500 of those cases. In the 268 cases where examiners provided testimony that inculpated a defendant at trial, analysts made erroneous statements in 257, or 96%, of the cases (National Association of Criminal Defense Lawyers, 2015).

This development had a profound effect on state criminal cases, because hair microscopy had been used widely in the states, and many state hair microscopists were trained by the FBI, presumably learning the same flawed modes of testifying that infected so much of the FBI analysts' work (Riemer, 2013). Accordingly, the FBI has taken the extraordinary step of not only re-examining its own cases in which hair microscopists testified but also, in a letter from FBI Director James Comey in June 2016 to the governors of all the states, urging them "to ask your state and local labs to ensure their examiners were staying within the bounds of science and, if they weren't, to take appropriate corrective action" (Comey, 2016).

Finally, the federal government has also used the power of the purse strings to influence forensic science policy at the state level, in ways that are consistent with the policy agenda of the innocence movement. Enacted as part of the Justice for All Act of 2004, the Paul Coverdell Forensic Sciences Improvement Grant Program requires states that receive funding under the program to certify the existence of an independent state entity responsible for conducting external investigations of allegations of laboratory misconduct or negligence. As a prominent group of wrongful convictions scholars has observed, "The legislative history of the Justice for All Act reveals that concerns over forensic testing errors and wrongful convictions played a substantial role in animating the external audit legislation" (Norris, Bonventre, Redlich, & Acker, 2010-2011, p. 1322). And because crime laboratories in all 50 states receive Coverdell Forensic Science Improvement grants, "they all presumably have certified that they have entities in place to conduct external investigations when instances of forensic misconduct or negligence arise" (Norris et al., 2010-2011, p. 1324, footnote omitted).

Eyewitness Identification Reform

Among the early lessons from examination of the DNA exoneration cases was the revelation that eyewitness error was a leading contributor to the problem of wrongful conviction of the innocent. As noted, that was one of the takeaways of the NIJ's early inquiry into the first 28 DNA exonerations (Connors et al., 1996). That conclusion was reinforced by subsequent studies of the DNA exonerations, which consistently showed that eyewitness error was present in approximately three quarters of all such cases (Garrett, 2008; Scheck et al., 2000).

Responding to this revelation, a growing number of organizations and governmental bodies began scrutinizing the social science of human memory and perception and applying its lessons to recommend best practices for police to use when obtaining eyewitness identification evidence (Findley, 2016). A "white paper" commissioned by the American Psychology and Law Society in 1998 was among the first organizational publications to note the growing consensus among researchers about a set of best practices (Wells et al., 1998). The American Bar Association (ABA) followed a few years later with a published statement of best practices that incorporated similar findings and recommendations (ABA, 2004).

An early contributor to this policy initiative was, once again, the federal government. In 1999, just a year after the American Psychology and Law Society issued its seminal white paper, the "NIJ" of the DOJ compiled the most up-to-date research and published a similar set of findings and recommendations in an official guide for law enforcement (NIJ, 1999). The aftermath was a widespread—but far from universal—adoption of similar policy statements in a variety of states and law enforcement organizations (Findley, 2016, pp. 387-388).

Most recently, the NAS published a report whose purpose was to settle any lingering disputes about the science of eyewitness identification. While noting gaps and weaknesses in the research base, the NRC (2014) Report, published in 2014, agreed with many of the reforms identified in these previous policy statements, concluding, "A range of best practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures" (p. 104).

On eyewitness identification reform, therefore, federal leadership has been important. But its impact should not be overstated. As much—indeed more—reform initiative has come from the states and local actors. Numerous state commissions, law enforcement agencies, courts, and legislatures have adopted social-science-based best practices requirements. Yet despite all this activity, eyewitness identification reform remains spotty and incomplete, at best (Findley, 2016).

Interrogations

A counter-intuitive revelation from the wrongful conviction cases has been the discovery of false confessions as a significant contributor to the problem of conviction of the innocent. Examination of the DNA exonerations has shown that false confessions are

present in nearly one quarter of the cases (Garrett, 2008). The NRE's larger dataset of exonerations based on all types of evidence reveals a smaller, yet still quite significant, presence of false confessions, finding them in approximately 12% of the 1,884 wrongful convictions in the Registry (NRE, n.d.).

On false confessions, federal leadership has been slow coming. Scholarship on interrogations and false confessions has identified a variety of police interrogation practices and tactics that run the risk of inducing a false confession (Drizin & Leo, 2004; Kassin et al., 2009, 2010). But by far, the most prominent reform recommendation to minimize false confessions has been to require police to electronically record custodial interrogations, from start to finish (Sullivan, 2005). And a large number of police departments, including some entire states—but again by no means all or even most—have implemented mandatory electronic recording (Sullivan, 2012). Yet only recently, in 2014, the DOJ has grudgingly dropped its resistance to electronic recording and adopted it as policy for federal agencies including the FBI, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the US Marshals Service (DOJ, 2014; Sullivan, 2008, 2012). That embrace of electronic recording by the federal government is generally seen as a significant breakthrough in advancing this reform uniformly throughout the states—even if it is late in coming.

Compensation and Reentry

An unsettling reality of the criminal justice system in most jurisdictions is that a guilty person, released on parole or other similar supervision, gets more reentry support from the government than does an actually innocent person released upon exoneration. The system simply is not set up to recognize the reality of wrongful convictions and exoneration. In most jurisdictions, therefore, the government just releases exonerated individuals to fend for themselves, with no assistance finding housing, employment, counseling, health care, education, or meeting any of the other myriad needs a wrongly convicted individual will have.

Even financial compensation for the significant losses occasioned by wrongful conviction is hard to come by in most states. Civil suits are rarely successful because most of the actors who contributed to the wrongful conviction, including police, prosecutors, witnesses, jurors, and judges, have various forms of absolute and qualified immunity from civil liability (Bailey, 2015). And the states themselves have sovereign immunity. Although it is theoretically possible to pierce those immunities under federal civil rights statutes, the standards in such law suits are so onerous that only the fortunate few exonerees succeed.

Most compensation to the wrongly convicted is therefore addressed through jurisdiction-specific compensation statutes. The statutes vary in procedure and substance considerably. The least generous provide as little as US$5,000 per year of wrongful imprisonment (Wisconsin Statute § 775.05, 2016), and total award caps as low as US$20,000 (New Hampshire Stat. § 541-B:14, 2016). The most generous provide no limits, or specify as much as US$80,000 per year of wrongful imprisonment, plus an annuity of US$80,000 per year for life (Texas Code Ann § 103.001, 2016). Many of

the more progressive statutes also provide for a host of services, including education, housing, counseling, and the like. But 19 states still have no compensation statute at all (Innocence Project, n.d.-c).

In this area, federal law has again played a leading role. The Justice for All Act of 2004 amended the federal compensation statute by increasing the federal compensation amount from a paltry maximum award US$5,000—which had not been changed since the law was enacted in the early 20th century, no matter how many years were served—to a maximum award of US$50,000 per year in custody, or US$100,000 per year on death row, with no total cap (Bailey, 2015). That standard has set the mark—the "federal standard"—that many states have used as a baseline for reassessing their own compensation schemes (Bailey, 2015). Again, that is no accident. The federal law explicitly encourages states to emulate its lead, at least in capital cases, by urging them to provide "reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death" (Justice for All Act, 2004). And, indeed, a number of states have "followed the lead of the federal government" and increased the maximum amount of compensation available for victims of wrongful compensation to US$50,000 for each year of incarceration (Emanuel, 2014). Most recently, federal law has directly affected state compensation packages by making compensation awards—whether state or federal—tax exempt (Wrongful Convictions Tax Relief Act, 2015).

Conclusion

Despite its small contribution to the ranks of the exonerated, and more broadly its relatively small share of all criminal cases, the federal government has played a distinct and important role in fostering and shaping the innocence movement. It has done so in a myriad of ways: through its high-profile measures to recognize the reality of wrongful convictions, its direct funding of innocence work, its use of federal purse strings to shape criminal justice policy, its ability to set an example through legislation on matters as diverse as access to postconviction DNA testing and compensating the wrongly convicted, and its leadership on issues such as the problems with the forensic sciences. Moving forward, the committed involvement of the federal government will remain important, especially in tackling such challenging problems as flawed forensic sciences and ensuring financial resources for innocence advocates. The federal government's commitment to preventing conviction of the innocent and ensuring justice for the wrongly convicted will help determine whether the vast and diffuse network of jurisdictions, institutions, and actors that together compose the criminal justice system in America will heed the lessons from the innocence cases.

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Notes

1. As James Voernberg (1972), who served as executive director of the President's Commission on Law Enforcement and Administration of Justice under President Lyndon Johnson, wrote in 1972, "President Nixon came into office after a campaign that invited the police and the public generally to blame crime on Supreme Court decisions designed to curb police abuses."
2. In the federal system, there were only 107 criminal felony actions filed per federal judgeship between June 2015 and June 2016, and all told approximately 72,000 criminal filings in the same period (United States Courts, 2016). State felony criminal actions were reported at a much higher rate: California's criminal caseload per judgeship was roughly 900 incoming cases for 2010, the last year data are available. The total number of criminal filings in California alone for 2010 was 1.8 million (Court Statistics Project, 2010). In 2009, state court felony caseloads reached approximately 2.5 million, while federal court felony caseloads were roughly 63,600 (Klein & Grobey, 2012).
3. Although that Innocence Network has indeed now emerged, not all members of the Network are based in law schools. Of the Network's 68 member organizations, as of the end of 2015, 38% were law school based, another 25% were non-profit organizations with some affiliation with a law school, 15% were independent non-profits, 13% were affiliated with a public defender's office, 4% were affiliated with non–law school educational institutions, 3% were pro bono sections of a law firm, and 2% were non-profits affiliated with a non–law educational institution (2015 Innocence Network Annual Report Summary, Figure 1.1, on file with the author).
4. The second innocence advocacy organization that would eventually become a member of the Innocence Network was the Innocence Project Northwest, affiliated with the University of Washington School of Law, which was founded in 1997. A year later, in 1998, the Wisconsin Innocence Project opened its doors at the University of Wisconsin Law School, and a year after that in 1999, a number of projects formally emerged including the Center on Wrongful Convictions at Northwestern University School of Law (although advocates at Northwestern had been exonerating people for a number of years prior to formation of the Center), the California Innocence Project at California Western School of Law, and others (*Findley, 2014*).
5. The five categories, which translated into five working groups, were as follows: (a) the use of DNA in postconviction relief cases; (b) legal concerns, including challenges to the admissibility of DNA evidence and the scope of discovery in DNA cases, (c) criteria for training and technical assistance for crime scene investigators responsible for collecting and preserving DNA evidence, (d) laboratory capabilities, and (e) the impact of future technological developments in DNA (NIJ, Office of Justice Programs, n.d.).
6. The Justice for All Act (2004) was a broad piece of legislation designed to achieve a variety of objectives, including

   To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and

development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes. (preamble)

7. The program is now titled the *Postconviction Testing of DNA Evidence to Exonerate the Innocent Program*. As of August 2016, program funds had been used to exonerate at least 25 innocent individuals (NIJ, n.d.-a).
8. 2012 Innocence Network Annual Report Summary (on file with the author).
9. 2012 Innocence Network Member Snapshots (on file with the author).
10. 2015 Innocence Network Annual Report Summary (on file with the author).

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