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Justin P. Brooks

Zachary Brooks

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# WRONGFULLY CONVICTED IN CALIFORNIA: ARE THERE CONNECTIONS BETWEEN EXONERATIONS, PROSECUTORIAL AND POLICE PROCEDURES, AND JUSTICE REFORMS?

*Justin Brooks\**  
*Zachary Brooks\*\**

## I. INTRODUCTION

According to the National Registry of Exonerations, 1900 documented exonerations<sup>1</sup> have occurred in the United States since 1989, with 166 coming from California.<sup>2</sup> From the national data, we have discovered that the leading causes of wrongful conviction in the United States are mistaken witness identifications, false confessions, false or misleading forensic evidence, perjury or false accusations, official misconduct, and inadequate legal representation.<sup>3</sup>

The saying “all politics are local” certainly applies to the criminal justice system. Each state has its own criminal penal code, where criminal activities in one state are often legal in another.<sup>4</sup> At the county

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\* Justin Brooks is the Director and Co-Founder of the California Innocence Project. He is a Professor of Law at California Western School of Law.

\*\* Zachary Brooks is a Political Science major at the University of California, Berkeley. He has worked as an intern at the California Innocence Project, and this Article grew out of one of his papers for a political science class. Both authors would like to thank Maurice Posley and Sam Gross for their invaluable statistics and pursuit to document the wrongful incarceration of the innocent.

1. See *Exonerations*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Dec. 31, 2016). An exoneration is defined as a “case[] in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence.” *Exoneration Registry*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Dec. 31, 2016).

2. *Exonerations*, *supra* note 1.

3. % *Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Dec. 31, 2016).

4. Compare COLO. CONST. art. XVIII, § 16, with ARIZ. REV. STAT. ANN. § 13-3405 (2016).

level, there can also be dramatic differences.<sup>5</sup> Jurors are drawn from within the county, prosecutors are often elected by the citizens of the county, resources allocated to criminal defense are decided at the county level, police departments respond to the needs and demands of their community, and thus, counties often have their own culture of patterns and practice.<sup>6</sup> As the largest state in the United States, where there is now a critical mass of exonerations,<sup>7</sup> it is worthwhile to look at the California exonerations not just at the state level, but at the county level, to see if there are connections between exonerations and patterns and practices in those counties.

Some conclusions are very difficult, if not impossible, to draw based on the raw numbers of exonerations. For example, the general conclusion that the counties with the highest per capita exoneration rate must be the counties with the worst criminal justice systems is a flawed conclusion. Some counties may have very cooperative prosecutor offices that work with defense attorneys to accomplish exonerations, and thus, the result could be a higher number of exonerations. The reverse could also be true where a county has very few exonerations per capita but, in actuality, a higher rate of wrongful convictions masked by the fact that the prosecutor's office fights every case and makes it very difficult to achieve exonerations. San Bernardino County is a perfect example of this phenomenon.<sup>8</sup> The County is notorious for fighting potential wrongful conviction cases and litigating every aspect of the case including access to evidence and testing.<sup>9</sup> Also, California has the highest standard for new evidence claims in the country, making it very difficult to reopen convictions when prosecutors force litigation of the claim.<sup>10</sup>

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5. See, e.g., *Tobacco Control Policies in NYS*, N.Y. ST. DEP'T HEALTH, [https://www.health.ny.gov/prevention/tobacco\\_control/current\\_policies.htm](https://www.health.ny.gov/prevention/tobacco_control/current_policies.htm) (last visited Dec. 31, 2016).

6. See Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 J. CAL. SUP. CT. HIST. SOC'Y 173, 193-96, 203-04 (2010).

7. *Exonerations*, *supra* note 1.

8. See Michael Ramos, *Conviction Review Unit*, SAN BERNARDINO COUNTY DISTRICT ATT'Y (Apr. 2016), <http://www.sbcountyda.org/ProsecutingCriminals/ConvictionReviewUnit.aspx>; Maurice Possley, *William Richards*, NAT'L REGISTRY EXONERATIONS (July 1, 2016), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4929>.

9. Possley, *supra* note 8. In a statement by San Bernardino District Attorney Mike Ramos dated April 7, 2016, he said: "According to the latest data from the National Registry of Exonerations, which researches and documents every wrongful conviction exoneration in the nation, San Bernardino County had zero exonerations." Ramos, *supra* note 8. Yet, in William Richards's case, Mike Ramos and his office fought against access to the evidence, specifically to the DNA testing, and then appealed the ruling when Richards had been found to have been wrongfully convicted. Possley, *supra* note 8. After more than fifteen years, Richards was finally exonerated. *Id.*

10. CAL. PENAL CODE § 1485.55(b) (West 2011). Section 1485.55(b) of the California Penal Code provides that new evidence means evidence that was not available or known at the time of

Even with this shortcoming, the data of wrongful convictions at a county level can reveal which causes of wrongful conviction are more dominant within a county.<sup>11</sup> Those numbers can be compared to the practices within the county.<sup>12</sup> For example, do counties with well-funded public defender offices have a lower rate of wrongful convictions based on ineffective assistance of counsel?<sup>13</sup> Do counties that follow best practices for identifications have a lower rate of wrongful convictions based on misidentification?<sup>14</sup>

Finally, it is important to learn which counties have responded to wrongful convictions by changing their practices.<sup>15</sup>

## II. THE STATISTICS

California has fifty-eight counties: from tiny Alpine County, with a population of only 1175, to Los Angeles County, the most populous county in the United States, with a population over 9,800,000.<sup>16</sup> In order to get meaningful per capita statistics, and remove outlying counties where there may have been an exoneration or two in a county with a very small population, only counties with a population greater than 100,000 have been reviewed.<sup>17</sup> Dividing the populations of the counties by the number of exonerations in each county achieves a per capita rate of exonerations on a county-by-county basis.<sup>18</sup>

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trial that completely undermines the prosecution's case and points unerringly to innocence. *Id.*

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part III.F.

14. *See infra* Part III.A.

15. *See infra* Part II.

16. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU (May 2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (basing estimates on the 2010 Census).

17. *See infra* Table 1.

18. *See infra* Table 1.

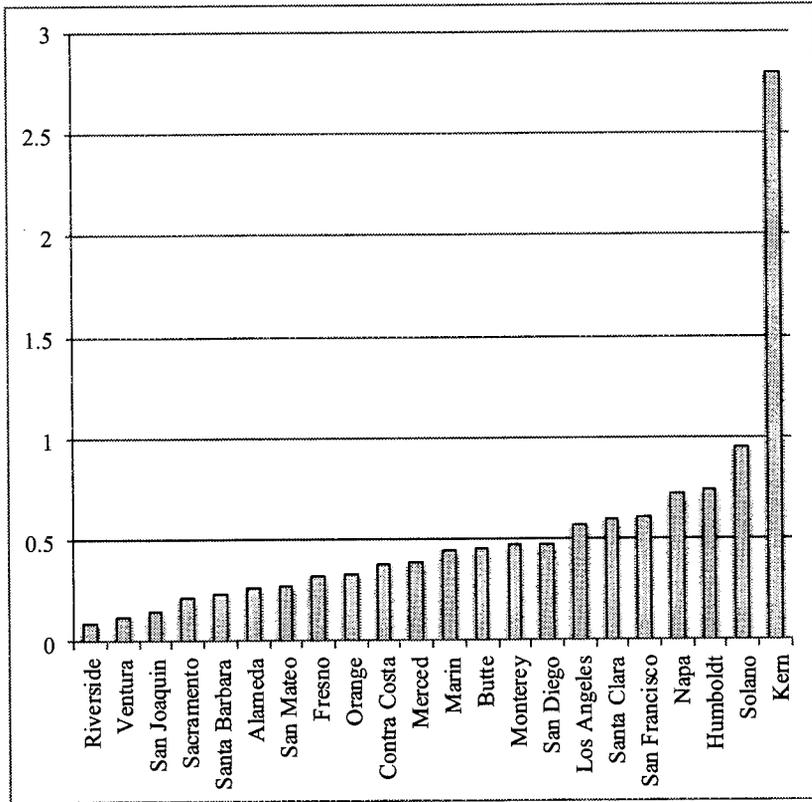
TABLE 1<sup>19</sup>

<i>County Name</i>	<i>Number of Exonerations</i>	<i>Exonerations per 100,000 Citizens</i>	<i>County Name</i>	<i>Number of Exonerations</i>	<i>Exonerations per 100,000 Citizens</i>
Alameda	3	0.257	Orange	10	0.324
Butte	1	0.452	Riverside	2	0.088
Contra Costa	4	0.371	Sacramento	3	0.207
Fresno	3	0.317	San Diego	15	0.472
Humboldt	1	0.743	San Francisco	5	0.604
Kern	24	2.805	San Joaquin	1	0.143
Los Angeles	56	0.563	San Mateo	2	0.271
Marin	1	0.443	Santa Barbara	1	0.232
Merced	1	0.382	Santa Clara	11	0.599
Monterey	2	0.469	Solano	4	0.952
Napa	1	0.719	Ventura	1	0.119

19. *Using the Registry*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=California> (last visited Dec. 31, 2016); see *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, *supra* note 16.

The following Figure displays the dramatic per capita distinctions county-to-county.<sup>20</sup>

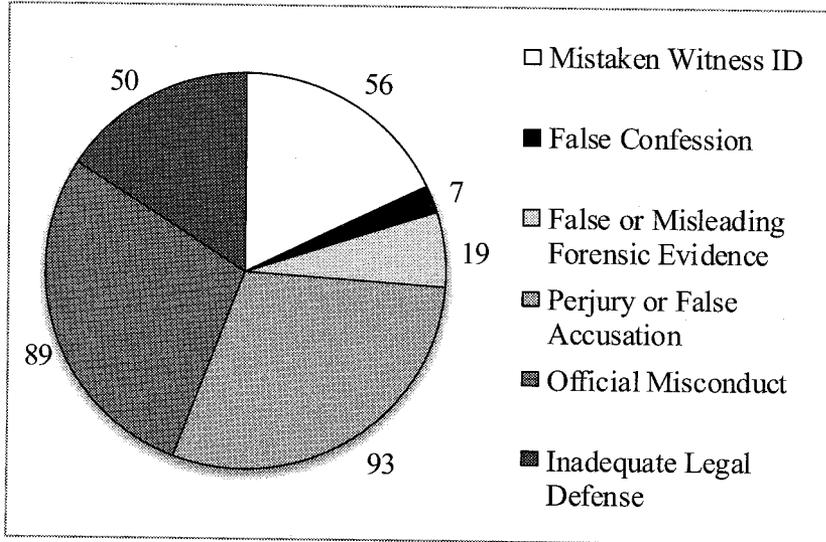
FIGURE 1: EXONERATIONS PER 100,000 CITIZENS



20. See *infra* Figure 1.

The following Figure shows all of the contributing factors that have caused wrongful convictions in California.<sup>21</sup> They are not mutually exclusive, in that many cases included more than one of these causes.<sup>22</sup>

FIGURE 2: CAUSES OF WRONGFUL CONVICTION<sup>23</sup>



Just as it is difficult to draw conclusions based on per capita data from small counties, it is also difficult to draw conclusions from counties that have only had a few exonerations.<sup>24</sup> Eliminating those outliers, the following chart shows the causes of wrongful convictions within the four counties that have at least five exonerations.<sup>25</sup>

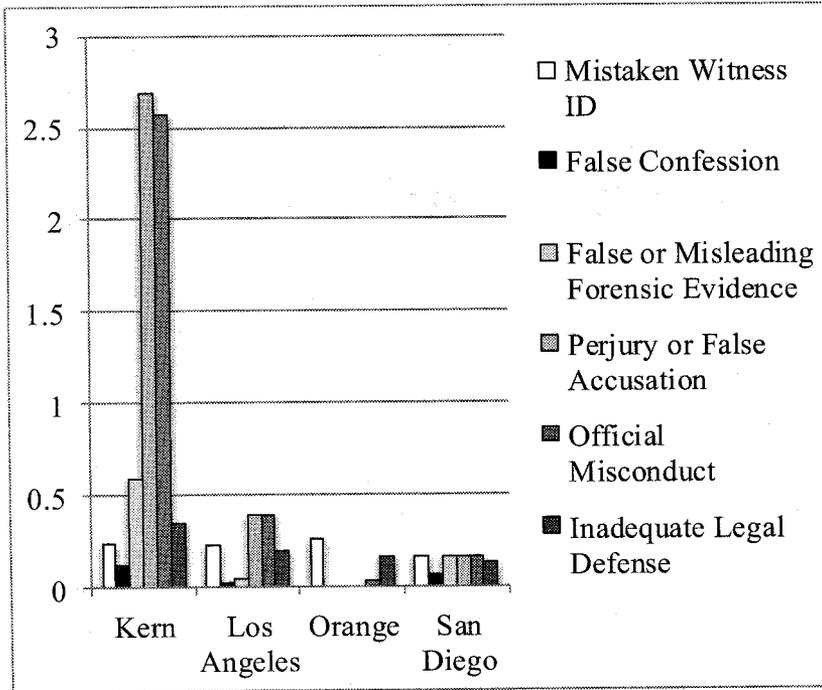
TABLE 2<sup>26</sup>

	<i>Kern</i>	<i>Los Angeles</i>	<i>Orange</i>	<i>San Diego</i>
Mistaken Witness ID	2	22	8	5
False Confession	1	2	0	2
False or Misleading Forensic Evidence	5	4	0	5
Perjury or False Accusation	23	39	0	5
Official Misconduct	22	39	1	5
Inadequate Legal Defense	3	19	5	4

21. See *Using the Registry*, supra note 19; infra Figure 2.  
 22. *Id.*  
 23. *Id.*  
 24. *Id.*  
 25. *Id.*  
 26. *Id.*

Using U.S. Census population data, a proportional rate can be achieved with regards to the causes of wrongful conviction.<sup>27</sup>

FIGURE 3: CAUSES OF WRONGFUL CONVICTION PER 100,000 CITIZENS<sup>28</sup>



A. Kern County

Clearly, Kern County jumps off this chart with an astounding number of wrongful convictions per capita compared to the other three counties with at least five exonerations.<sup>29</sup> In fact, Figure 1 shows a massive discrepancy between Kern and the rest of the California counties in which exonerations have occurred.<sup>30</sup> Kern has a rate nearly three times greater than second place Solano County and more than thirty-one times greater than last place Riverside.<sup>31</sup> Kern’s rate of perjury

27. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, supra note 16; *Using the Registry*, supra note 19.

28. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, supra note 16; *Using the Registry*, supra note 19.

29. See supra Figure 3.

30. See supra Figure 1.

31. See supra Figure 1.

or false accusation and official misconduct are both more than six times higher than Los Angeles, which has the second highest rate in the state.<sup>32</sup> Table 2 demonstrates a similar amount of exoneration cases between Kern and Los Angeles, despite the fact that Los Angeles has more than eleven times the population of Kern.<sup>33</sup>

There have been several books and a series of articles written about Kern County, which place most of the blame for the high wrongful conviction rates at the feet of former Kern County District Attorney Ed Jagels.<sup>34</sup> According to a 2009 *Reason Magazine* article written by Radley Balko during Jagels's time as the county's District Attorney, Kern had the highest per capita prison commitment rate of any major California county.<sup>35</sup> During what Balko refers to as the "coast-to-coast sex abuse panic of the 1980s" and 1990s, twenty-six individuals were charged on felony child sex abuse in Kern County alone.<sup>36</sup> Of those twenty-six, twenty-five of these cases have been overturned.<sup>37</sup> A 1986 report by California Attorney General John Van de Kamp accused Kern officials of "fostering a 'presumption of guilt' and bringing charges on little more than hunches."<sup>38</sup>

### B. Los Angeles

While completely trumped by Kern's massive wrongful conviction rate, Los Angeles has its own share of problems when it comes to the causes of wrongful conviction.<sup>39</sup> Similar to Kern, Los Angeles had its own scandal on which much of the blame could be placed for the high number of exonerations: the late 1990s L.A. Police Department Rampart Scandal.<sup>40</sup> A paper by Erwin Chemerinsky, Dean of the University of California, Irvine School of Law, described it as follows:

Police officers in the anti-gang CRASH unit in the Rampart Division of the Los Angeles Police Department framed innocent individuals by planting evidence and committing perjury to gain convictions. Innocent men and women pleaded guilty to crimes they did not commit and were convicted by juries because of the fabricated cases against

32. See *supra* Figure 3.

33. See *supra* Table 2.

34. See, e.g., Radley Balko, *Kern County's Monstrous D.A.*, REASON (Dec. 21, 2009, 12:00 PM), <http://reason.com/archives/2009/12/21/kern-countys-monstrous-da>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRAC. 121, 121 (2000); see *supra* Figure 1.

40. Chemerinsky, *supra* note 40, at 121.

them. Many individuals were subjected to excessive police force and suffered very serious injuries as a result.<sup>41</sup>

According to Chemerinsky, 100 convictions have been overturned and 3000 cases are in need of review as a result of this scandal.<sup>42</sup> Moreover, seventy officers faced disciplinary proceedings, with five officers arrested who faced criminal charges.<sup>43</sup>

### C. Orange County

Orange County has also not escaped scandal.<sup>44</sup> Earlier this year, Superior Court Judge Thomas Goethals disqualified all 250 prosecutors of the Orange County District Attorney's Office from working on the Scott Dekraai death penalty case.<sup>45</sup>

### D. San Diego

Despite having the fourth highest per capita exoneration rate in Figure 3, San Diego's causes of wrongful conviction are mostly uniform in their distribution. San Diego has not had any systemic scandals of recent vintage that can be tied to wrongful convictions, but, just like all criminal justice systems, it is imperfect.

Thus, it is significant to look at the patterns and practices of the counties in response to these wrongful convictions.

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41. *Id.*

42. *Id.* at 132 n.1.

43. *Id.* It is important to note that not all of these cases that grew out of the Rampart scandal have been documented as innocent defendants who were wrongfully convicted. See Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1143-49 (2013). Had all the defendants who had cases reversed due to the scandal been included in the registry of wrongful convictions, Los Angeles would have many more documented wrongful convictions. *Id.*

44. See Christopher Goffard, *Orange County D.A. Is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015, 6:55 PM), <http://www.latimes.com/local/orangecounty/law-me-jailhouse-snitch-20150313-story.html>.

45. *Id.* On March 12, 2015, the *Los Angeles Times* reported that a judge had removed the Orange County District Attorney's Office from one of its highest profile murder cases, saying prosecutors had violated mass shooter Scott Dekraai's rights. *Id.* They had violated his rights by repeatedly failing to turn over important evidence. *Id.* The judge had ruled that prosecutors had shown a "chronic failure" to turn over evidence to the defense, even after being ordered to do so. *Id.*

### III. PATTERNS AND PRACTICES

#### A. Identification Procedures

Misidentification has long been recognized as one of the leading causes of wrongful convictions.<sup>46</sup> Fundamental flaws with human memory combined with faulty identification procedures have led to many lost lives in prison and likely some wrongful executions.<sup>47</sup>

In response to all of the wrongful convictions that have resulted from faulty identifications, many counties around the country have reformed their identification procedures.<sup>48</sup> For example, studies have found the traditional six-pack photo procedure, where a witness looks at six photos of potential suspects, to be faulty.<sup>49</sup> This procedure has been replaced with a sequential photo array procedure where the witness reviews one photo at a time.<sup>50</sup> Studies have shown that when eyewitness procedures are not double-blind (neither the officer conducting the procedure nor the witness knows who the potential suspect is in a photo array or live lineup) they often result in a misidentification.<sup>51</sup>

San Diego, Santa Clara, and San Francisco counties have all reformed their eyewitness procedures, but most counties within the state have not.<sup>52</sup> In particular, Los Angeles, Orange, and Kern counties have not reformed their procedures even though each county has had wrongful convictions as the result of faulty identifications.<sup>53</sup> Multiple bills have been presented to the legislature seeking to reform procedures statewide.<sup>54</sup> The problem of bad identifications continues.

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46. See Paul Henderson, *Looking Back at Titus Case*, SEATTLE TIMES (July 2, 1981), <http://old.seattletimes.com/news/local/tituscas/lookingback.html>.

47. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/eyewitness-misidentification> (last visited Dec. 31, 2016).

48. See Steven E. Clark, *Eyewitness Identification: California Reform Redux*, POL'Y MATTERS, Fall 2015, at 2, 3.

49. *Id.* at 3, 5.

50. *Id.* at 5.

51. *Id.* at 6-8.

52. See John Terzano, *California Needs Eyewitness Identification Reform*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/john-terzano/california-needs-eyewitne\\_b\\_60601.html](http://www.huffingtonpost.com/john-terzano/california-needs-eyewitne_b_60601.html); *Eyewitness Identification Reform*, INNOCENCE PROJECT, <http://www.innocenceproject.org/eyewitness-identification-reform> (last visited Dec. 31, 2016).

53. See *California Exonerations Prove Need for Eyewitness Identification Reform*, INNOCENCE PROJECT (Jan. 8, 2013), <http://www.innocenceproject.org/california-exonerations-prove-need-for-eyewitness-identification-reform>.

54. See Clark, *supra* note 49.

### B. False Confessions

A study of the first 344 DNA exonerations revealed that twenty-eight percent of the defendants confessed to crimes they did not commit.<sup>55</sup> In California, seven wrongful convictions included a confession, with five of the cases coming from Kern, Los Angeles, and San Diego.<sup>56</sup>

False confessions can be the result of delusions or mental illness, but they are more often the result of poor police procedure.<sup>57</sup> The “Reid” investigation technique, which has been used by police departments throughout the United States since the 1970s, focuses on hours-long interrogations (often overnight) where the suspect is cut off from anyone but the police.<sup>58</sup> The suspect is repeatedly told what the police believe happened, and every time the suspect disagrees they are cut off.<sup>59</sup> There is also an attempt by the police to minimize the action by the defendant or create motive (for example, “he was a bad guy and deserved to be shot”).<sup>60</sup> Under these circumstances, innocent people often confess.<sup>61</sup>

One of the techniques that can reduce the impact of a false confession is recording the interactions between the police and the defendant.<sup>62</sup> That way the fact finder (judge or jury) can evaluate the context of the confession. There is no statewide rule in California as to recording adult confessions (except in murder cases).<sup>63</sup> However, Los Angeles, San Diego, Orange, and several other counties now record all confessions.<sup>64</sup> Kern County does not record confessions.<sup>65</sup>

55. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Dec. 31, 2016).

56. See *supra* Figure 2 and Table 2.

57. See Amelia Hritz et al., *False Confessions*, CORNELL U., [https://courses2.cit.cornell.edu/sociallaw/student\\_projects/FalseConfessions.html](https://courses2.cit.cornell.edu/sociallaw/student_projects/FalseConfessions.html) (last visited Dec. 31, 2016).

58. See *The Reid Technique*, JOHN E. REID & ASSOCS., INC., [https://www.reid.com/educational\\_info/critictchnique.html](https://www.reid.com/educational_info/critictchnique.html) (last visited Dec. 31, 2016).

59. *Id.*

60. See *False Confession Cases – The Issues*, JOHN E. REID & ASSOCS., <https://www.reid.com/pdfs/Falseconfessioncases.pdf> (last visited Dec. 31, 2016).

61. *Id.* at 1.

62. See THOMAS P. SULLIVAN, CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCH. OF LAW, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6 (2004), [https://jenner.com/system/assets/publications/7965/original/CWC\\_article\\_with\\_Index.final.pdf?1324470148](https://jenner.com/system/assets/publications/7965/original/CWC_article_with_Index.final.pdf?1324470148).

63. See CAL. PENAL CODE § 859.5 (West 2016).

64. SULLIVAN, *supra* note 63, app. A, at A2-A3. The other counties that record interrogation include: Alameda County, Contra Costa County, El Dorado County, Sacramento County, San Joaquin County, Santa Clara County, Ventura County, and Yolo County. *Id.*

65. See *id.*

### C. False and Misleading Forensic Evidence

In recent years, we have learned that many forensic techniques of the past are deeply flawed.<sup>66</sup> Lead bullet analysis, bullet casing matching, forensic odontology, microscopic hair analysis, arson science, and Shaken Baby Syndrome, to name a few, have all come under attack.<sup>67</sup> All of the counties in California have relied on faulty forensic evidence in the past, but exonerations in these cases only occur when there are lawyers willing to work on these cases and present evidence and expert testimony refuting the prior evidence.<sup>68</sup> These types of cases are very difficult, expensive, and often rely on evidence that may have been destroyed since trial.<sup>69</sup> Therefore, there may be more exonerations

66. See Jessica D. Gabel & Margaret D. Wilkinson, "Good" Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics, 59 HASTINGS L.J. 1001, 1003-04 (2008).

67. See *id.* at 1004-07; Mark Hansen, *Long-Held Beliefs About Arson Science Have Been Debunked After Decades of Misuse*, A.B.A. J. (Dec. 1, 2015, 12:30 AM), [http://www.abajournal.com/magazine/article/long\\_held\\_beliefs\\_about\\_arson\\_science\\_have\\_been\\_debunked\\_after\\_decades\\_of\\_m](http://www.abajournal.com/magazine/article/long_held_beliefs_about_arson_science_have_been_debunked_after_decades_of_m); Matt Stroud, *Biting Controversy: Forensic Dentistry Battles to Prove It's Not 'Junk Science'*, VERGE (Sept. 25, 2013, 2:10 PM), <http://www.theverge.com/2013/9/25/4770070/biting-controversy-forensic-dentistry-battles-to-prove-its-not-junk>; Maia Szalavitz, *The Shaky Science of Shaken Baby Syndrome*, TIME (Jan. 17, 2012), <http://healthland.time.com/2012/01/17/the-shaky-science-of-shaken-baby-syndrome>. The medical science used to determine the cause of an infant's death suspected of being shaken to death is not precise. See Szalavitz, *supra*. Shaken Baby Syndrome is diagnosed by a triad of symptoms: bleeding under the dural matter of the brain, bleeding in the retinas of the eyes, and brain swelling. *Id.* The cause behind this physical evidence is not always obvious. *Id.* There are numerous rare genetic disorders that can kill infants in ways that can lead to a mistaken Shaken Baby Syndrome diagnosis. *Id.* There are thousands of similarly rare disorders that can cause infant death. *Id.* As a result, Shaken Baby Syndrome is a diagnosis of exclusion and involves ruling out rare diseases that physicians may have never seen. *Id.*

Lead bullet analysis rests on one faulty premise—when the chemical composition of two bullets is identical, then they came from the same box. See Gabel & Wilkinson, *supra* note 67, at 1004. This has tied bullets to suspects when the gun is not recovered. See *id.* In 2004, the National Research Council released a report concluding that "variations in the manufacturing process rendered the FBI's testimony about the science 'unreliable and potentially misleading'" and that bullet lead testimony "should be considered 'misleading under federal rules of evidence,'" which caused the FBI to abandon the practice in 2005. John Solomon, *FBI's Forensic Test Full of Holes*, WASH. POST (Nov. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/story/2007/11/17/ST2007111701983.html?sid=ST2007111701983#> (quoting COMM. ON SCI. ASSESSMENT OF BULLET LEAD ELEMENTAL COMPOSITION COMPARISON, NAT'L RESEARCH COUNCIL, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE 5, 7 (2004)).

Microscopic hair analysis associates color, texture, pigment and other identifiers. See Gabel & Wilkinson, *supra* note 67, at 1007. A match is merely the product of eyeballing the suspect's hair and hair from a crime scene under a microscope and is not accompanied by empirical data that exhibits population frequencies. *Id.* at 1006-07 ("[T]he nature of hair microscopy makes it vulnerable to high error rates and uneven application.").

68. See *Using the Registry*, *supra* note 19.

69. See Molly Redden, *Why Is It So Hard for Wrongfully Convicted Women to Get Justice?*, MOTHER JONES (Aug. 4, 2015, 1:56 AM), <http://www.motherjones.com/politics/2015/05/wrongfully-convicted-women-exonerations-innocence-project>.

in a county that preserves evidence and cooperates than in a jurisdiction with no such policies.<sup>70</sup>

Kern has seen a highly disproportionate number of these cases of exoneration, amassing the same number as San Diego and more than Los Angeles.<sup>71</sup> With Kern County's reputation for fighting the reopening of cases post-conviction, it is hard to believe these numbers can be explained as such<sup>72</sup> and instead suggests that Kern utilizes more false and misleading evidence than other counties.<sup>73</sup>

#### D. Perjury

False testimony by informants, and other witnesses who are motivated to lie, is a leading cause of wrongful conviction in the United States and in California.<sup>74</sup> As we have seen an increase in sentences over the past two decades, we have seen an increase in false informant testimony.<sup>75</sup> This is a particular problem in California, a state with some of the toughest sentences in the country (including the death penalty) and a three strikes law that puts people in prison for life after three convictions.<sup>76</sup> Informants are often incentivized to testify against defendants to help themselves, sometimes telling the truth and sometimes lying.<sup>77</sup>

The Orange County informant scandal reveals how perjury can lead to a wrongful conviction.<sup>78</sup> Ironically, none of the exonerations from Orange County involved false witness testimony.<sup>79</sup> Perhaps this indicates how well false testimony was covered up and how these numbers may dramatically change once these cases are fully investigated.<sup>80</sup>

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70. See, e.g., DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 119-21, 135-39 (2012).

71. See *supra* Table 2.

72. See Balko, *supra* note 35.

73. See, e.g., *id.*

74. See *supra* Figure 2. Fifty-six percent of the national exonerations had perjury or false accusation as a contributing factor. See % Exonerations by Contributing Factor, *supra* note 3.

75. Using the Registry, *supra* note 19; see Trends in U.S. Corrections, SENTENCING PROJECT (Dec. 2015), <http://sentencingproject.org/wp-content/uploads/2016/01/trends-in-us-corrections.pdf>.

76. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W.L. REV. 263, 298, 328 n.172 (2009); see *supra* Figure 2.

77. See MEDWED, *supra* note 71, at 84-87.

78. See Goffard, *supra* note 45.

79. See *supra* Table 2.

80. See Goffard, *supra* note 45.

### E. Official Misconduct

Official misconduct involving police, prosecutors, and judges takes place in every state and every country in the world.<sup>81</sup> As stated, California has experienced several large scandals that led to wrongful convictions.<sup>82</sup> A disproportionate number of exonerations involving official misconduct has occurred, once again, in Kern County.<sup>83</sup> Kern has had twenty-two cases, where Orange has had one, San Diego has had five, and Los Angeles has had thirty-nine.<sup>84</sup>

### F. Inadequate Legal Defense

Poor criminal defense work is one factor in wrongful convictions.<sup>85</sup> Often, the defense attorney fails to conduct a sufficient independent investigation and fails to reveal to the court evidence proving his client's innocence.<sup>86</sup> California, like many states, has long been criticized for having overloaded public defenders.<sup>87</sup> In 2013, more than eighty percent of the public defenders in Fresno County signed a letter protesting their excessive caseloads making it difficult, if not impossible to provide effective assistance of counsel.<sup>88</sup> The letter stated: "We are discouraged and demoralized due to the decimation of staff, greatly increased caseload, lack of training, lack of mentoring, and refusal to promote anyone beyond [a mid-level attorney position] within the past five years."<sup>89</sup> Felony attorneys in Fresno at that time were handling an average of 230 cases at a time and more than 1000 cases a year.<sup>90</sup>

The problem, however, does not end with the public defender offices. In fact, of the thirty-nine exonerees represented by the California Innocence Project and the Northern California Innocence Project, two

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81. See, e.g., David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 259-62 (2011), [http://www.yalelawjournal.org/pdf/1018\\_hpkwev93.pdf](http://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf); Seth Apfel, Note, *Prosecutorial Misconduct: Comparing American and Foreign Approaches to a Pervasive Problem and Devising Possible Solutions*, 31 ARIZ. J. INT'L & COMP. L. 835, 846-47 (2014).

82. See, e.g., Balko, *supra* note 35; Goffard, *supra* note 45.

83. See *supra* Table 2.

84. See *supra* Table 2.

85. See Ion Meyn, *The Criminal Defense Attorney's Burden*, 31 GPSOLO 36, 36-39 (2014).

86. See *id.*

87. See, e.g., David Carroll, *Why the State of California Is Responsible for the Public Defense Crisis in Fresno County*, SIXTH AMEND. CTR. (Sept. 29, 2013), <http://sixthamendment.org/wp-content/uploads/2013/09/PACE-Legal-Notice-to-Public-Defender1.pdf>.

88. See *id.*

89. See *id.* (alteration in original).

90. Letter from Prof'l Ass'n of Fresno Cty. Emps., to Ken Taniguchi, Pub. Def., Fresno Cty. (Sept. 20, 2013) (on file with author).

were represented by public defenders and thirty-seven were represented by private lawyers. Public defenders may be overworked and have heavy caseloads, but they all have training and supervision at some level.<sup>91</sup> And, perhaps most important, they have access to resources for investigations.<sup>92</sup>

One of the problems with private lawyers is that there can be an incentive to do limited investigations and avoid trials.<sup>93</sup> Both of these cost time and money. In some cases, private lawyers are retained by families who have limited resources and are unable to foot the expenses for these investigations and trials.<sup>94</sup> This has led to attorneys sometimes advising innocent people to plead guilty without having all of the facts of the case.<sup>95</sup>

Some California counties use a hybrid contract criminal defense system that has problems going far beyond the public defense system.<sup>96</sup> One example, cited by the U.S. Department of Justice in a special report from 2000 entitled *Contracting for Indigent Defense Services* was a California county's contract for defense services in the late 1990s<sup>97</sup>:

[They] agreed to pay a low bid contractor slightly more than \$400,000 a year to represent half of the county's indigent defendants. The contractor was a private practitioner who employed two associates and two secretaries, but no paralegal or investigator. The contract required the contractor to handle more than 5,000 cases each year. All of the contractor's expenses came out of the contract. To make a profit, the contractor had to spend as little time as possible on each case. In 1998,

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91. See, e.g., *Hiring Practices of California Public Defender Offices*, U.C. DAVIS SCH. L. (2011), <https://law.ucdavis.edu/career-services/files/PDHiringPractices.pdf>.

92. See *id.*

93. See, e.g., *10 Ways Lawyers Rip off Clients*, BUS. INSIDER (July 10, 2013), <http://www.businessinsider.com/10-ways-lawyers-rip-off-clients-2013-7>.

94. See Rohn Barrow, *Hiring a Private Attorney or Going with the Public Defender (PD)?*, AVVO (Jan. 28, 2011), <https://www.avvo.com/legal-guides/ugc/hiring-a-private-attorney-or-going-with-the-public-defender-pd>.

95. See Sheila Martin Berry, "Bad Lawyering" *How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 489-90, 497 (2003). For example, California Innocence Project client Brian Banks, a high school football star with a scholarship to the University of Southern California at the time of his arrest, served five years in prison for a crime he did not commit after accepting a plea bargain under the advisement of his original attorney. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>.

96. ROBERT L. SPANGENBERG ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 1-2* (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

97. *Id.*

the contractor took fewer than 20 cases—less than 0.5 percent of the combined felony and misdemeanor caseload—to trial.<sup>98</sup>

The report gave one shocking example that can be the result of such a system:

One of the contractor's associates was assigned only cases involving misdemeanors. She carried a caseload of between 250 and 300 cases per month. The associate had never tried a case before a jury. She was expected to plead cases at the defendant's first appearance in court so she could move on to the next case. One afternoon, however, the associate was given a felony case scheduled for trial the following week. The case involved multiple felony and misdemeanor charges. When she looked at the case file, the associate discovered that no pretrial motions had been filed, no witness list had been compiled, no expert witnesses had been endorsed, and no one had been subpoenaed. In short, there had been no investigation of any kind into the case, and she had no one to help her with the basics of her first jury trial. The only material in the case file was five pages of police reports. In these reports she found evidence of a warrantless search, which indicated strong grounds for suppression. She told the judge she was not ready to proceed and that a continuance was necessary to preserve the defendant's sixth amendment right to counsel. The continuance was denied. The associate refused to move forward with the case. The contractor's other associate took over the case and pled the client guilty to all charges. The associate who had asked for a continuance was fired.<sup>99</sup>

The largest counties in California have public defender offices.<sup>100</sup> In fact, founded in 1914, California's largest county—Los Angeles—has the oldest public defender office in the United States.<sup>101</sup> However, twenty-four counties still use these types of indigent defense contracts, which allow contractors to hire less qualified (cheaper) staff and operate as a profit-motivated business.<sup>102</sup>

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98. *Id.* at 1.

99. *Id.* at 1-2.

100. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, *supra* note 16; LAW OFF. L.A. COUNTY PUB. DEFENDER, <http://pd.co.la.ca.us> (last visited Dec. 31, 2016); SAN DIEGO COUNTY PUB. DEFENDER, [http://www.sandiegocounty.gov/content/sdc/public\\_defender.html](http://www.sandiegocounty.gov/content/sdc/public_defender.html) (last visited Dec. 31, 2016).

101. Alan Gilman, *100 Years Since Founding of the Los Angeles Public Defender's Office*, WORLD SOCIALIST WEB SITE (Feb. 20, 2014), <https://www.wsws.org/en/articles/2014/02/20/pubd-f20.html>.

102. See Benner, *supra* note 77, at 273.

Also, there are great funding disparities county to county under these systems.<sup>103</sup> As reported by the Fair Commission on Criminal Justice in 2007 and explained in Professor Larry Benner's 2010 article on the defense system in California:

The statewide average spent on indigent defense is \$19.62 spent per capita. Stutter County, with a population of 91,000, however, spends only \$5.85 *per capita*, while Alpine, given its small population of less than 15,000, spends \$44.32 per capita. Moreover, Alpine County Spends almost four times more on prosecution than defense, while Stutter County spends over five times as much on prosecution as it does on defense.

Even within the same population class these are marked disparities. Butte County, with a population of 217,000, spends less than \$10.00 per capita on indigent defense, while Yolo County, with a population of 190,000, spends almost \$31.00 per capita. Despite this, there is still a glaring disparity between resources allocated to indigent defense and prosecution in Yolo County. Such disparities are especially troubling when death penalty cases are involved.<sup>104</sup>

The lack of consistency with representation across the state is something that needs to be addressed. The Sixth Amendment right to effective assistance of counsel<sup>105</sup> should apply to all citizens of all counties.

### G. Conviction Integrity Units

With the explosion of exonerations over the past two decades there has been a recognition by some prosecutors' offices that they have the responsibility to review their old cases and remedy wrongful convictions.<sup>106</sup> Craig Watkins, the elected District Attorney of Dallas County, is often credited as creating the first conviction integrity unit in 2007,<sup>107</sup> although prior to that there had been less publicized efforts around the country.<sup>108</sup> In 2000, the San Diego County District Attorney's Office began reviewing their old cases looking for potential wrongful convictions that could be remedied using DNA testing, and in 2004, the

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103. *Id.* at 309.

104. *Id.* at 309-10.

105. U.S. CONST. amend. VI.

106. See JOHN HOLLOWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 13 (2016); *DNA Exonerations in the United States*, *supra* note 56.

107. *Id.* at 14-15.

108. *Id.*

Santa Clara County District Attorney's Office began reviewing their old cases.<sup>109</sup>

Around the country, there are now conviction integrity units in Arizona, Colorado, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Washington, D.C.<sup>110</sup> In the state of California, there are conviction integrity units in Los Angeles, San Diego, Santa Clara, and Ventura counties.<sup>111</sup> Notably, missing from this list is Kern County.<sup>112</sup>

#### IV. CONCLUSIONS

The differences between the justice systems across California are disturbing.<sup>113</sup> All criminal defendants should have the same right to effective assistance of counsel. All counties should adopt best practices when it comes to police practices such as obtaining confessions and obtaining identifications. All counties should have the resources to present the best scientific evidence available. And, corruption should be ferreted out across the state.

Conviction integrity units are a great place to start.<sup>114</sup> They place a mirror on the system and we learn from past mistakes so that we are not destined to repeat them.<sup>115</sup> With prosecutors, defense attorneys, legislators, and public support, the criminal justice system across California can be improved across all counties.

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109. *Id.*; Debbie L. Sklar, *San Diego County's D.A. Office Establishes Conviction Review Unit*, TIMES SAN DIEGO (Mar. 30, 2016), <http://timesofsandiego.com/politics/2016/03/30/san-diego-countys-d-a-office-establishes-post-conviction-review-unit>.

110. *See* HOLLWAY, *supra* note 107, at 8, 15.

111. *Id.* at 8.

112. *See id.*

113. *See supra* Part II.

114. *See* HOLLWAY, *supra* note 107 at 13-14.

115. *See id.*