

BOOK REVIEW

LEMONADE OUT OF LEMONS: CAN WRONGFUL CONVICTIONS LEAD TO CRIMINAL JUSTICE REFORM?

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JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* (N.Y.U. Press 2007). 345 pp.

The Commonwealth of Virginia, like many other jurisdictions across the country, witnessed, during the 1990s and the current decade, a series of exonerations of persons who had been convicted and sent to prison (some to Death Row) for crimes they did not commit. Jon Gould's heartfelt and thoughtfully reasoned volume chronicles the efforts of a small group of volunteers, Gould among them, to change some of Virginia's criminal justice practices in the wake of these miscarriages of justice.

The conviction and subsequent exoneration of the innocent has assuredly been the most dramatic—perhaps the most important—recurring criminal justice story of the last two decades. Through repetition, the pattern is now familiar: before or shortly following 1989 (the year of the nation's first DNA exoneration); a suspect—often brown or black, almost invariably indigent, is convicted of a rape or murder; the state's evidence is facially compelling: a confession to the police, the testimony of a jail house snitch, an eyewitness's confident identification, possibly forensic evidence that appears to link the defendant to the crime scene; but years later, after

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the advent of DNA forensic technology, biological evidence establishes that someone other than the defendant committed the crime. As of this writing, this scenario has unfolded 218 times in the United States.¹

In tandem with DNA exonerations, and probably to some extent because of them, this same time period has also witnessed the exoneration of hundreds of additional prisoners as a result of witness recantations, the exposure of investigatory misconduct, and the like.² There is every reason to presume that the documented wrongful convictions are but a fraction of the true number of cases in which an innocent person was sent to prison for a crime he did not commit.³

The consequences of wrongful conviction are profound. An unspeakable tragedy is visited upon those who are falsely convicted, some of whom endure decades of harsh, unjust imprisonment before their exonerations.⁴ With news of exonerations, victims and their family members are forced to relive the crime and its aftermath, years after they had every reason to believe the guilty party had been safely locked away. In some cases, with police, prosecutors, and the courts focused on the wrong person, the guilty perpetrator has remained free and has committed subsequent serious crimes that might have been prevented.⁵

¹ The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Sept. 23, 2008).

² Estimates of non-DNA exonerations vary. The Northwestern University School of Law's Center on Wrongful Convictions estimates the number of non-DNA exonerations since 1989 as in excess of four hundred. Samuel R. Gross and co-authors put the number of non-DNA exonerations between 1989 and 2003 at around two hundred. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

³ Gross et al., *supra* note 2, at 527.

⁴ In one case in Illinois, Paul Terry and Michael Evans each served twenty-seven years for the rape and murder of Lisa Cabassa before DNA evidence exonerated them. Center on Wrongful Convictions, Michael Evans, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilEvansTerrySummary.html> (last visited Sept. 23, 2008). In another case in Louisiana, Rickey Johnson served twenty-five years for a sexual assault that he did not commit before DNA evidence also exonerated him in January 2008. Koran Addo, *DNA Test Sought in BR Case*, THE ADVOC. (Baton Rouge), Jan. 16, 2008, at B1.

⁵ Gould describes a bizarre scenario of this type. Julius Ruffin was convicted of a 1984 rape, and was exonerated when DNA tests in 2002 excluded him and pointed to a convicted rapist, Aaron Doxie III, as the perpetrator. Previously, Arthur Lee Whitfield was wrongfully prosecuted and convicted for two rapes that had occurred in 1981. When Whitfield was exonerated by DNA evidence in 2004, the testing established that the crimes for which he served time had also been committed by Doxie. If Doxie had been charged in Ruffin's place, the crimes for which Whitfield was wrongfully convicted would never have occurred. See JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 108-09 (2008).

The costs are enormous and impossible to quantify. Immeasurable suffering is caused to the wrongfully convicted as a result of shattered personal and community ties, the loss of freedom (sometimes for decades), harsh conditions of imprisonment, and ruined psyches.⁶ There is also a broader effect, as confidence in the criminal justice system is shaken. Police-community relations may be further undermined in communities where such relationships have historically been strained. In extreme cases, the legitimacy of the entire criminal justice process may be called into question.

There is also high drama and human interest in the exoneration of an innocent person, who may have spent many years in prison. Even after scores of repetitions, the image of an innocent person walking through the prison gates still has great salience for the media and the public. This is now the stuff of movies, novels, and best selling non-fiction accounts.⁷

Gould's book discusses how reformers might capitalize on the so-called "innocence issue" to advance criminal justice reforms designed to safeguard against conviction of the innocent. In a few more years there will be very few cases in which old evidence can be re-examined using new DNA analysis. The era of wholesale DNA exonerations is drawing to a close. If the public attention focused on wrongful convictions can catalyze criminal justice reform, then the window of opportunity afforded by this phenomenon is narrowing. For that reason alone, Gould's book is timely and important.

Another example, to which Gould alludes, is the case of David Vasquez. See GOULD, *supra*, at 112-19. The actual perpetrator of the rape and murder for which Vasquez was convicted, Timothy W. Spencer, committed four additional rape-murders three years following the crimes for which Vasquez was wrongfully sent to prison. See Dana Priest, *Wrongly Jailed Man Endures Ordeal by Fear*, WASH. POST, July 17, 1989, at A1.

⁶ In Illinois, four exonerated prisoners known as the Ford Heights Four, who had collectively spent over six decades in prison for a double murder and rape they did not commit, settled their civil rights claims for a total of \$36 million. Ken Armstrong & Robert Becker, *Record Ford Heights 4 Payout May Not Be End: Criminal Investigation Under Consideration*, CHI TRIB., Mar. 6, 1999, at 1. A jury awarded \$15 million to another Illinois man, James Newsome, who spent fifteen years in prison for a murder he did not commit. Matt O'Connor, *Lineup Suit Nets \$15 Million: U.S. Jury Awards Record Amount for 15 Years in Prison*, CHI TRIB., Oct. 30, 2001, at 1. In Chicago, the plaintiff's civil rights bar typically demands \$1 million per year of wrongful incarceration in suits against police investigators. Elsewhere, compensation has been less. Gould reports that Earl Washington, who spent sixteen years in prison for a crime he did not commit, later won a civil rights judgment of \$1.9 million, which Gould reports, was the largest civil rights judgment in Virginia history. GOULD, *supra* note 5, at 83.

⁷ See, e.g., JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006); SCOTT TUROW, *REVERSIBLE ERRORS* (2002); *IN THE NAME OF THE FATHER* (Hell's Kitchen Films 1993).

Reforming law enforcement practices is not easy. The State of Illinois is unquestionably the gold standard for positive accomplishment in this regard, but the successes there came about as a result of an unlikely combination of factors.⁸ In Illinois, reform of the criminal justice system was linked to the death penalty abolition movement. Capital punishment opponents used exonerations of the innocent from the state's Death Row to call for an end to the Illinois death penalty. They claimed that the capital punishment system was "broken," pointing to the fact that between 1977 and 2000 Illinois exonerated more men from its Death Row (thirteen) than it executed (twelve).⁹ Public concern was heightened with the exoneration of Anthony Porter, who, in 1999, came within forty-eight hours of execution, was given a stay of execution because of concern about his competency to stand trial, and, with the stay in place, was exonerated through the efforts of a team of Northwestern journalism students who were reinvestigating his case as a class project.¹⁰ Then, three additional death row exonerations—Steven Smith, Ronald Jones, and Steve Manning—followed in quick succession during the course of 1999.

In response, former Illinois Governor George Ryan in January 2000 declared a moratorium on executions and appointed a Commission on Capital Punishment to study the causes of wrongful convictions and recommend reforms.¹¹ The Governor's moratorium and call for study of criminal justice reforms was a middle ground, falling short of total abolition of the death penalty, which had been (and remained) the principal reform goal of many of those whose public advocacy had brought the wrongful conviction issue to the top of the political agenda.

Over two years later, after exhaustive research, the Ryan Commission issued a comprehensive report proposing eighty-five specific reforms. Some of the Ryan Commission's key proposals were enacted by the Illinois legislature. As Gould recounts,¹² Illinois now requires, for example, the video recording of custodial interrogations in all homicide investigations,¹³ reliability hearings prior to the admission of "snitch" testimony against a

⁸ For a detailed, well-told account of how exonerations of the innocent paved the way to criminal justice reform in Illinois, see Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005).

⁹ Editorial, *Fixing the Death Penalty*, CHI. TRIB., Dec. 29, 2000, at 22.

¹⁰ Anthony Porter, in the embrace of Northwestern journalism Professor David Protesch with his students looking on, is pictured on the dust jacket of Gould's book.

¹¹ Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

¹² GOULD, *supra* note 5, at 208-09.

¹³ 725 ILL. COMP. STAT. 5/103-2.1 (2008).

defendant,¹⁴ and competency certification for all counsel who defend capital cases.¹⁵ Most famously, the report also led Governor Ryan in January 2003 to commute the death sentences of every prisoner on the Illinois Death Row.¹⁶

Following several of its own miscarriages of justice, North Carolina, acting more modestly than Illinois, established the North Carolina Actual Innocence Commission at the urging of the state's chief justice.¹⁷ The Commission examines the correlates of wrongful convictions and issues recommendations for the improvement of criminal justices practices. By the Commission's account, its recommended protocols for line-ups and other eyewitness identification procedures are "increasingly" being implemented by law enforcement agencies.¹⁸ In 2006, North Carolina also created an Innocence Inquiry Commission with limited authority to review and recommend judicial reconsideration of cases with "suspected miscarriages of justice."¹⁹

In the wake of the widely reported DNA exoneration of Steven Avery in Wisconsin in 2003, that state enacted legislation to require electronic recording of custodial interrogations, to require implementation of law enforcement agency procedures for handling eyewitness identifications, and to require new procedures for retaining biological evidence.²⁰ In 2004, following a several-year campaign by Senator Patrick Leahy and activists at the Washington, D.C.-based Justice Project, the federal government enacted the Innocence Protection Act,²¹ which permits a federally convicted person to apply for post-conviction DNA testing under specified circumstances.

¹⁴ *Id.* § 5/115-21.

¹⁵ ILL. SUP. CT. R. 714.

¹⁶ Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1. Just prior to emptying Death Row with his mass clemency, Governor Ryan granted pardons based on actual innocence to four Death Row prisoners whose convictions rested on confessions produced by torture at the hands of Chicago Police detectives. With the exoneration of Randy Steidl in 2004, the total of Illinois Death Row exonerations reached eighteen out of 289 persons sentenced to death total—an error rate of over 6%. *See* Warden, *supra* note 8, at 381.

¹⁷ GOULD, *supra* note 5, at 40-41.

¹⁸ *Id.*

¹⁹ *Id.* at 226-27.

²⁰ *Id.* at 225-26. WIS. STAT. § 968.073 (2007) (electronic recording of custodial interrogations); WIS. STAT. § 175.50 (2007) (procedures for handling witness identifications); WIS. STAT. § 165.77 (2007) (procedures for handling of biological evidence).

²¹ Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3600 (2006)).

These are impressive successes. But, given the enormous personal toll for those directly affected by wrongful conviction, the practical costs to the entire criminal justice system of such miscarriages, and the moral implications for society at large, it is more noteworthy how little reform has actually occurred and how incomplete the reforms have been, even in Illinois, which failed to implement a number of the Ryan Commission's proposals.²² Gould, a veteran of multiple national political campaigns, lays out the problem in the language of political science: criminal justice practices are deeply entrenched and the system is highly resistant to change; wrongful convictions furnish an opportunity for reform, but not one that is self-executing; change can only come about through the efforts of "resourceful policy advocates," but those advocates face powerful opposition from those who are committed to the status quo.²³

As Gould acknowledges, Virginia's criminal justice system has historically been a backwater. It woefully underpays defense counsel appointed to represent the indigent, with fee caps that are at or near the lowest in the nation.²⁴ Until recently, Virginia infamously enforced a strict "21 day rule," which barred a defendant from attacking his conviction on the basis of new evidence of actual innocence when more than twenty-one days had expired following the conviction.²⁵ The Commonwealth has a sordid history of racial misconduct, including in its criminal justice system, which featured slave codes and a variety of other overtly racist provisions and practices.²⁶ Virginia remains deeply committed to the use of capital punishment, having executed 102 people since 1976, more than any other state except Texas.²⁷

²² See GOULD, *supra* note 5, at 208-09.

²³ *Id.* at 230-35.

²⁴ VA. CODE ANN. § 19.2-163 (2008) provides that attorneys may receive up to \$1235 for representing clients in non-capital felony cases where the client might receive more than twenty years in jail. Virginia caps fees for all other non-capital felonies at \$445. Virginia recently allowed courts to waive those caps under some circumstances and pay attorneys an additional \$850 for cases where their client might receive more than twenty years in jail, and \$155 in all other non-capital felony cases. However, some critics charge that the \$8.2 million appropriated to pay these increased fees "will fund only one out of four waiver requests." Georgia N. Vagenas, *National Developments in 2007*, 22 CRIM. JUST. 58, 59 (2008).

²⁵ VA. SUP. CT. R. 3A:15. Virginia has since adopted two provisions that limit the scope of this rule, discussed *infra*, notes 45-53 and accompanying text.

²⁶ A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 30-36, 43, 135-37 (1996).

²⁷ Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, <http://www.deathpenaltyinfo.org/article.php?did=186> (last visited Sept. 23, 2008).

Not surprisingly, Virginia has produced its fair share of wrongful convictions. In 2001, Earl Washington, Jr. and Marven Anderson, both black and each convicted in the early 1980s of sexually attacking a white woman, were formally exonerated as a result of DNA evidence that excluded them as a possible attacker. In the judgment of Gould and his collaborators, these widely reported and shocking exonerations furnished in their aftermath a window of opportunity to push for reform of some of Virginia's criminal justice practices.²⁸

Lacking "an immediate political constituency"²⁹—i.e., legislative or other official sponsorship—Gould and colleagues took the creative and audacious step of privately constituting themselves as "The Innocence Commission for Virginia," with a mission to investigate "the problems that may lead to wrongful convictions," to report their findings, and to "offer a series of best practices to improve" the system.³⁰ The directors of the Innocence Commission planned that the legitimacy of their report would derive from their established reputations,³¹ from the thoroughness of their investigation, and from the reasonableness of their recommendations.

The staff of the Innocence Commission³² conducted a comprehensive examination of the eleven "official" exonerations of rape and murder convictions that had occurred in that state since 1980. Believing that the inclusion of cases in which the judiciary and/or the executive had not officially acknowledged the innocence of the convicted person would invite a distracting debate, the Innocence Commission chose to limit its study to those cases in which state officials had ultimately admitted the defendant's innocence.³³

The Commission surveyed law enforcement agencies regarding their practices for handling eyewitness identifications and conducting custodial questioning of suspects, and surveyed Virginia prosecutors regarding their pretrial discovery practices.³⁴ In the end, the Commission identified nine factors that were linked to erroneous convictions: (1) mistaken eyewitness

²⁸ GOULD, *supra* note 5, at 52-53.

²⁹ *Id.* at 234.

³⁰ *Id.* at 64.

³¹ In addition to Gould, an established academic at George Mason University, the directors included the president and founder of the Washington, D.C.-based Constitution Project; the pro bono counsel at Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; a litigator from Sidley Austin LLP; and the project director for what is now known as the Mid-Atlantic Innocence Project. *Id.* at 46, 57.

³² The Commission was staffed by in-kind pro bono contributions from several prominent law firms. *Id.* at 58-59.

³³ *Id.* at 61.

³⁴ *Id.* at 65.

identifications, (2) suggestive eyewitness identification procedures, (3) “tunnel vision” on the part of police and prosecutors, (4) “antiquated” forensic science, (5) inadequate defense counsel, (6) failure by police and prosecutors to disclose exculpatory material, (7) police interrogations of mentally challenged suspects, (8) “inconsistent statements” made by wrongfully accused defendants, and (9) the unavailability of adequate post-conviction remedies.³⁵

Based on its investigation and analysis, the Commission proposed seven broad reforms in its March 2005 report, the first three of which Gould identifies as “primary[.]”³⁶

- Police procedural reforms to increase the accuracy of eyewitness identifications, including: (a) use of multiple person line-ups or photo arrays as opposed to single-suspect identification procedures, (b) specific instructions to witnesses that the perpetrator may not be included in the array, (c) sequential, rather than simultaneous, presentation of line-up participants to the witness, and (d) electronic recording of the procedure.
- Reforms to the custodial interrogation process, including a requirement that custodial interrogations be videotaped from inception to conclusion and a requirement that detectives be trained to recognize mental illness and mental retardation in interrogation subjects.
- The creation of a clear judicial procedure for convicted persons to present claims of actual innocence based on newly discovered evidence, without time limitation.
- Improvement of the indigent defense system, including the creation of a statewide system and allowing appropriate compensation for appointed counsel.
- Judicial acceptance of advances in scientific forensic detection, but subject to rigorous examination under a rubric similar to that set out in the *Daubert* decision.³⁷
- “Open file” discovery to the defense of all non-privileged material relating to the investigation in the possession of police and prosecutors.
- Training of police in how to avoid “tunnel vision”—the unwarranted focus on a single suspect early in the investigation.

The reform proposals flow from the eleven cases that the Innocence Commission examined; they are an attempt to correct practices that figured

³⁵ *Id.* at 77-78.

³⁶ *See id.* at 133-98.

³⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

in one or more of the wrongful convictions. They are all eminently reasonable and should not be controversial. Indeed, they mirror several key proposals from the Illinois Ryan Commission report and the suggestions of leading practitioners in the “innocence” field.³⁸ Mistaken eyewitness identifications have figured in the great majority of the known wrongful convictions.³⁹ False confessions have also been present in a number of these cases, as Steven Drizin and Richard Leo have impressively documented.⁴⁰ Underpaid and inept defense counsel have perniciously affected the criminal justice system, particularly in capital cases,⁴¹ and have had an unfortunate role in dozens of wrongful convictions (the well-to-do are almost never victims of miscarriage of justice). Concealed exculpatory evidence is a particularly galling feature of a number of false convictions.⁴² Procedural reform to permit full and fair judicial examination of serious claims of wrongful conviction is an obvious need. Nor can there be any doubt as to the value of training to alert police and prosecutors to the real possibility of erroneous prosecutions.⁴³

As Gould emphasizes, none of the Commission’s proposed criminal justice reforms could be tailored solely to benefit the wrongfully accused.⁴⁴ Wrongful conviction cases arise in the context of broadly applied practices. There are not, in other words, strict causes of wrongful convictions that could be somehow surgically removed from the system. Instead, reforms must be aimed at practices that have been found to *correlate* with wrongful

³⁸ See JIM DWYER ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* app.1 (New Am. Library 2003).

³⁹ GOULD, *supra* note 5, at 133.

⁴⁰ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

⁴¹ Stephen B. Bright, Director, Southern Ctr. For Human Rights, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, Twelfth Thomas E. Fairchild Lecture at the University of Wisconsin Law School (Oct. 27, 2000), in 2001 WIS. L. REV. 1, 16-22.

⁴² See, e.g., *Newsome v. McCabe*, 319 F.3d 301, 304 (7th Cir. 2003) (affirming a \$15 million jury verdict against police officers who concealed exculpatory evidence from a man who spent fifteen years in prison for a crime he did not commit); DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE* (1998) (describing how police withheld an exculpatory police report, causing the so-called Ford Heights Four to spend collectively over six decades in prison for a crime they did not commit).

⁴³ Notably absent from the Innocence Commission’s list of needed reforms is a proposal for the pre-trial vetting of snitch testimony, an omission that results from the fact that none of the eleven cases in the Commission’s study featured snitch evidence. But such evidence, often introduced by prosecutors to buoy an otherwise weak case, is a hallmark of many wrongful convictions. See the discussion of the James O’Dell case, *infra*, at notes 67-72 and accompanying text.

⁴⁴ GOULD, *supra* note 5, at 126-31.

convictions. When the reforms are applied, they will sweep more broadly and will affect many cases in which the accused person is guilty.

This is why the innocence phenomenon is so important for the criminal justice system. It furnishes a sense of urgency and can potentially open the minds of judges, legislators, and law enforcement actors to the need for change. Importantly, since the reforms that Gould and others have proposed are designed to improve the accuracy and integrity of the system, implementation of those reforms can also be expected to contribute to securing swifter and more certain convictions in cases where the defendant is guilty.

Gould argues that the chances for achieving criminal justice reforms are maximized when advocates pursue a conciliatory strategy, appealing not only to the defense bar but also to law enforcement and conservative interests. “Sober” arguments, based on the proposition that criminal justice reform will improve public safety and confidence in law enforcement, offer the only hope of persuading law-and-order conservatives. An element of this across-the-aisle strategy is the avoidance of what Gould at one point terms “puerile flame throwing.”⁴⁵ Accusations that the system is “broken” destroy the possibility for dialogue and the establishment of common ground; they should be avoided.⁴⁶

The Virginia Innocence Commission was an unprecedented and bold initiative. Lacking official sanction, an abundance of faith and conviction was required to instigate this project. Within its defined parameters, the Commission’s study and findings are thorough—the obvious product of many hours of labor on the part of a number of individuals. It is no surprise that the release of the Commission’s report was widely covered in the media and was respectfully received by legislators and other policy makers.

But the Commission’s report had little effect on Virginia’s criminal justice practices. On the positive side, in July 2005, three months after the Commission’s report, the Virginia Department of Criminal Justice Services issued a sample order for use by police departments regarding the conduct of eyewitness identification procedures. The sample order, which has no binding effect, calls for the sequential presentation of line-up subjects. But, disappointingly, it does not call for double-blind administration of line-ups, a reform that is essential to remove the risk of intentional or inadvertent steering of eyewitnesses. As Gould notes, the DCJS sample order was to some degree prompted by the Virginia State Crime Commission’s issuance

⁴⁵ *Id.* at 57.

⁴⁶ *Id.*

of a report on line-up procedures at about the same time as the Innocence Commission report was released.⁴⁷

Virginia has also limited the scope of the draconian twenty-one-days-from-conviction limitation on presentation of newly discovered evidence of innocence, a rule that had long sullied Virginia's reputation. In 2001, the year of the Washington and Anderson exonerations, Virginia began permitting a person convicted of a felony to move for new scientific testing of evidence (if certain conditions are met) at any time following conviction.⁴⁸ And in 2004, the year prior to the Commission's report, Virginia established a "writ of actual innocence," permitting persons convicted of a felony, unless as the result of a guilty plea, to present newly discovered evidence of their actual innocence at any time after conviction. To prevail, the petitioner must establish that, taking into account the new evidence, "no rational finder of fact could have found proof of guilt beyond a reasonable doubt."⁴⁹

As Gould notes,⁵⁰ however, decisions that the Virginia Supreme Court issued in 2007 following the issuance of the Innocence Commission's report have made the writ of actual innocence all but unavailable as a practical matter for petitioners who do not have DNA evidence establishing their innocence.⁵¹

In 2004, in the wake of a scathing study performed by the Spangenberg Group under the auspices of the American Bar Association,⁵² Virginia established an Indigent Defense Commission to provide oversight and certification of attorneys who accept appointments to represent indigent defendants. Since the Innocence Commission report, however, little else has transpired to improve the state of indigent defense in the state. Virginia has increased the amount that court appointed attorneys can receive, but the increase still leaves those attorneys vastly undercompensated.⁵³ The state

⁴⁷ *Id.* at 213-14.

⁴⁸ VA. CODE ANN. § 19.2-327.1 (2008).

⁴⁹ *Id.* §§ 19.2-327.2 to -327.6.

⁵⁰ GOULD, *supra* note 5, at 214.

⁵¹ *Carpitcher v. Commonwealth*, 273 Va. 335, 345-47 (2007); *Johnson v. Commonwealth*, 273 Va. 315, 321-24 (2007).

⁵² ROBERT L. SPANGENBERG ET AL., THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004).

⁵³ See VA. CODE ANN. § 19.2-163 (2008) and discussion, *supra*, note 24. Even with the possibility of earning up to \$2085 (\$1235 plus \$850) for work on felony cases that carry the possibility of more than twenty years in prison, Virginia remains one of the worst states in terms of compensating court-appointed attorneys. Not all states impose per-case maximums, but, of those that do, only Mississippi imposes a lower non-waiveable cap on fees paid to its court-appointed attorneys (\$1000 plus \$25 per hour for "overhead expenses"). REBECCA A.

has not enacted any other reforms to improve its crippled indigent defense system.

The Virginia state crime lab was subjected to an extensive audit, ordered by former Governor Mark Warner in 2004. Governor Warner claimed that the audit, which was performed by the American Society of Crime Laboratory Directors Laboratory Accreditation Board, gave the state lab a clean bill of health—a conclusion that, Gould intimates, may be fairly debated.⁵⁴

There is no further progress to report. The Virginia judiciary has not adopted the *Daubert* framework for evaluating the admissibility of forensic findings, as the Innocence Commission recommended. The criminal discovery practices of Virginia prosecutors continue to be shockingly regressive. The Innocence Commission survey found that most prosecutors in the state do not disclose police reports to defense counsel.⁵⁵ Two-thirds of Virginia prosecutors do not provide the defense with the names and addresses of witnesses.⁵⁶ Prosecutors in the state almost never disclose police officers' field notes or crime lab technicians' bench notes.⁵⁷ Gould offers no indication that these practices have changed. Virginia has not adopted measures to require videotaping of custodial interrogations. And, finally, the State has taken no steps to mandate training on the dangers for police investigators of "tunnel vision."

This is certainly not a basis for criticism of the Innocence Commission, the report that it issued, or the reform strategy that followed the release of the report. The success of reform movements necessarily depends upon raw political factors well beyond the control of the "resourceful policy advocates" who conceive the reforms and advance the policy reasons in favor of their adoption.

As Rob Warden, a key player in the Illinois reform movement, has noted, the success of the reform legislation there hinged entirely on the confluence of two highly unlikely events in the political arena. First, Republican Governor George Ryan, a lifelong death penalty supporter, metamorphosed into a death penalty opponent. Then, with Governor Ryan departing from office in the shadow of a corruption scandal that would

DESILETS ET AL., THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (2007).

⁵⁴ See GOULD, *supra* note 5, at 219-21.

⁵⁵ *Id.* at 186.

⁵⁶ *Id.*

⁵⁷ *Id.*

shortly thereafter lead to his federal indictment and conviction,⁵⁸ the Republican majority was voted out of the Illinois Senate in the 2002 general election and a progressive Democrat assumed the powerful post of Senate majority leader, replacing a long-term opponent of criminal justice reform.⁵⁹ No comparable realignment of the political stars has yet happened in Virginia.⁶⁰ There is cause for disappointment at Virginia's failure thus far to more fully reform problematic criminal justice practices, and for righteous indignation at the events that led to some of Virginia's most notorious miscarriages of justice and at Virginia's striking failures to acknowledge the deep flaws in its system.

The Earl Washington case, the first of the eleven cases that the Innocence Commission analyzed, is by Gould's account⁶¹ a study in how the government can remain committed to a prosecution even in the face of exonerating evidence, and in how the system can stubbornly refuse for years to correct an undeniable miscarriage of justice. Washington, an African-American, was charged in 1983 with the rape and murder of a white woman the prior year in Culpepper, Virginia. He was convicted and sentenced to death despite the fact that the seminal fluid found at the crime scene did not match Washington's blood type.⁶²

Gould writes that Washington's trial counsel "did not appreciate the significance" of the semen evidence, which the Commonwealth had turned over in pre-trial discovery.⁶³ This is an understatement. There could be no serious dispute that a single attacker had committed the crime and that, therefore, the lack of a match had enormous, if not decisive, exonerative effect. That Washington was nonetheless prosecuted and sentenced to death without strenuous objection based on this exculpatory evidence is a testament to his trial counsel's mind-boggling ineptitude. Indeed, even with no objection from the defense, it should deeply trouble any objective observer that the Commonwealth, also in possession of the information, chose to pursue this prosecution at all.⁶⁴ Years later, in 1993, DNA testing

⁵⁸ Matt O'Connor & Ray Gibson, *Ryan Indicted: U.S. Charges Former Governor with Pattern of Corruption*, CHI. TRIB., Dec. 18, 2003, at 1.

⁵⁹ Warden, *supra* note 8, at 388.

⁶⁰ It might be interesting to analyze the extent to which Virginia's changing political demographics have and will continue to make the Commonwealth more open to the kinds of reforms proposed by the Innocence Commission. Gould mentions that possibility, but it is not his subject here.

⁶¹ See GOULD, *supra* note 5, at 79-83.

⁶² *Id.* at 80.

⁶³ *Id.*

⁶⁴ Washington, who suffers from mental retardation, had "confessed" to the crime during an interrogation in which, as the prosecutors knew, Washington had been fed information

confirmed that the seminal fluid had a genetic marker that Washington does not possess. Inexplicably, this led former Virginia Governor L. Douglas Wilder not to pardon Washington for the wrongful conviction, but, instead, merely to commute his sentence from death to life in prison. The test results that led to Wilder's decision were not shared with Washington's attorneys.⁶⁵

In 1999, facing media pressure, Virginia's new Governor, James Gilmore, disclosed the 1993 DNA results and ordered another round of tests, which confirmed the findings from 1993—and those in the original report—and, for the first time, also connected the semen to the true perpetrator.⁶⁶ Gilmore thereupon pardoned Washington, some sixteen years following his arrest, based on the 1999 DNA findings that *essentially did little more than confirm exonerating information that had been in the Commonwealth's possession prior to Washington's conviction.*

Virginia's most infamous failure to admit the possibility that the Commonwealth had convicted an innocent man was in the case of Joseph O'Dell, who was executed in 1997 for a rape and murder that had taken place in Virginia Beach in 1985. O'Dell's conviction rested on his checkered past, on the facts that he had been in the same bar as the victim during the evening before she was attacked and had blood on his shirt and jacket at the time of his arrest, and on the testimony of a jail house snitch claiming that O'Dell confessed to the crime.⁶⁷

Post-conviction DNA testing failed to establish a match between the blood on O'Dell's clothing and victim's blood, and O'Dell claimed that the blood had resulted from a fistfight on the night of the murder. The jail house snitch evidence, given in exchange for prosecutorial lenience, has twice been recanted since the trial.⁶⁸ Much of the remaining circumstantial evidence against O'Dell withers under scrutiny.⁶⁹

Seminal fluid was recovered from the victim, which the prosecution theorized had been deposited by the perpetrator. In the months leading to his execution, O'Dell and his counsel petitioned the Virginia courts for

about clothing left at the crime scene and had made statements wildly at odds with the evidence—including getting the victim's race wrong. *See id.* at 79-80. In 2006, a federal jury concluded that investigators had fabricated the confession and awarded Washington \$1.9 million in compensation. Jerry Markon, *Wrongfully Jailed Man Wins Suit: Va. Officer Falsified Confession, Jury Rules*, WASH. POST, May 6, 2006, at B1.

⁶⁵ GOULD, *supra* note 5, at 82.

⁶⁶ *Id.* at 82-83.

⁶⁷ This account of the O'Dell case is drawn from SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* 54-166 (2005).

⁶⁸ *Id.* at 165-66.

⁶⁹ *See id.* at 61-82.

permission to conduct PCR-based DNA testing on this evidence. A DNA result excluding O'Dell would have further substantiated O'Dell's claim that he did not attack the victim. At a minimum, it would have undermined the rape case and required the vacation of O'Dell's death sentence. The Virginia Supreme Court refused O'Dell's petition for DNA testing.⁷⁰

Following O'Dell's execution, the Roman Catholic Archdiocese of Richmond petitioned the Virginia courts for access to the evidence, seeking, in effect, the opportunity to make a factual record as to whether Virginia had executed an innocent person. Testing might even have led to the discovery of a true perpetrator who was not O'Dell. The Commonwealth vehemently opposed the petition, famously arguing that if the test results did suggest O'Dell's innocence, "it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man."⁷¹ The petition was denied and the evidence has been destroyed.⁷²

Gould does not discuss the O'Dell case. Since O'Dell never achieved an official exoneration, his case fell outside of the Innocence Commission's scope. The case merits study, however, because it, like the Washington case, glaringly reveals a recurrent theme in wrongful prosecution cases: the government's stubborn official refusal to acknowledge error, to engage in critical self-examination, and to discipline those whose negligent or intentional misconduct caused the miscarriage of justice.⁷³ Better to circle the wagons, as the Commonwealth did in the O'Dell case, or to take half measures, as Governor Wilder did in the Washington case, than to face the cold truth that persons in possession of enormous power may have negligently or intentionally abused it. This is not "tunnel vision"—it is blind intransigence.

Gould certainly appreciates this dimension of the problem. He argues persuasively that the criminal justice system should engage in a post hoc search for the causes of wrongful convictions similar to the investigations of airline disasters that are undertaken by the National Transportation Safety Board.⁷⁴ But, intent on his across-the-aisle political objectives, he chooses to dwell lightly on the distressing fact that, in criminal justice, such

⁷⁰ *Va. Killer is at Death's Door*, DAILY PRESS, July 21, 1997, at A4.

⁷¹ Paul F. Enzina, *Afraid of a Shadow of a Doubt*, WASH. POST, May 7, 2000, at B8.

⁷² *Id.*

⁷³ The month after a federal jury awarded Kevin Fox a \$15.5 million verdict against Will County, Illinois sheriff's deputies, including hefty punitive damages, the Will County Sheriff's spokesperson essentially dismissed the verdict as "Monday morning quarterbacking." Hal Dardick, *Cop in Fox Case Linked to Lawsuits; High Profile Cases That Detective Worked Fell Apart*, CHI. TRIB., Jan. 27, 2008, at 1.

⁷⁴ GOULD, *supra* note 5, at 76.

self-criticism routinely fails to happen. Nor does he fully address the ethical implications of that failure.

By Gould's account, a number of the other wrongful conviction cases in the Innocence Commission study were the product of serious official failings, be they gross negligence or deliberate misconduct. By way of example:

- David Vasquez, mentally impaired and vulnerable, was interrogated by investigators who must have recognized that he was clueless about how the rape-murder for which he was wrongfully charged had been committed, until they fed him the details of the crime and lied to him about his fingerprints having been found at the crime scene. Vasquez was then prosecuted for the crime despite serological evidence showing that seminal material recovered from the victim could not have come from Vasquez. Since Vasquez's "confession" did not include an accomplice and Vasquez was completely incapable of naming one when he was questioned on that point, any reasonable investigator should have recognized that the serological evidence was exonerating.⁷⁵
- The investigators who wrongfully charged Marvin Anderson with rape manipulated the complaining witness into identifying Anderson as her attacker with a suggestive photo array. At his criminal trial, Anderson, astonishingly, was represented by counsel who had previously represented the actual perpetrator of the crime.⁷⁶
- The wrongful murder prosecution of Jeffrey Cox was tainted by egregious failures of police and prosecutors to disclose exculpatory information—i.e., impeachment evidence regarding key witnesses and a trove of evidence from police files—and by police destruction of potentially exculpatory evidence only three months after Cox's conviction.⁷⁷

There is no doubting the cogency of Gould's argument that these cases demonstrate the need for specific criminal justice reforms: the Washington, Vasquez, Anderson, and Cox cases are all clear examples of the problem of tunnel vision. Washington and Vasquez demonstrate the need for videotaping interrogations. Anderson shows the need for reform of eyewitness identification procedures. And Cox reflects the need to reform prosecutorial discovery practices.

⁷⁵ *Id.* at 112-19.

⁷⁶ *Id.* at 83-88.

⁷⁷ *Id.* at 94-99.

But there is more. The events in Gould's chronicle of the Virginia wrongful conviction cases cry out for censure. Yet Gould purposefully avoids opprobrium—a style that may gain points in legislative negotiation, but leaves the reader puzzled about whether Gould has the ability to recognize evidence of police and prosecutorial misconduct (and judicial acquiescence). Gould's book, after all, is not written solely for legislative staffers. It is a retelling for the general audience of how the Innocence Commission came to be, how the report was fashioned, and the results of the Commission's post-report lobbying efforts. Thus, it is an opportunity for Gould's own moral views to shine through in the telling. Regrettably, there is a flat and toneless quality to much of Gould's account.

The cause of reform will not be advanced by a single voice. Righteous indignation at governmental indifference and outright abuse of power, unleavened with reasoned argument, will surely burn itself out without ever meaningfully engaging with authority or offering any prospect of reform. Gould nails that point, and he's certainly right about it. There is a vital role for Gould's "sober," well-informed "resourceful policy advocates."

But, just as clearly, "sober" reason without more cannot rally policy makers to enact reform. For better or worse, the story of a wrongful conviction is often a story about the face of evil: indifference to the truth; indolence in the face of evidence that demanded investigation; raw abuse of authority. Some human beings entrusted with power are destined to abuse it. No procedural reform holds out any real hope of restoring trust and confidence in the criminal justice system, or effectuating real change, unless corruption and evil are rooted out and punished. We risk seeming to appease forces of prejudice, indifference, and oppression if we avoid stating that undeniable fact.

