

## II. “JUSTICE” IN ACTION

### ONE HUNDRED YEARS LATER: WRONGFUL CONVICTIONS AFTER A CENTURY OF RESEARCH

JON B. GOULD\* & RICHARD A. LEO\*\*

*In this Article, the authors analyze a century of research on the causes and consequences of wrongful convictions in the American criminal justice system while explaining the many lessons of this body of work. This Article chronicles the range of research that has been conducted on wrongful convictions; examines the common sources of error in the criminal justice system and their effects; suggests where additional research and attention are needed; and discusses methodological strategies for improving the quality of research on wrongful convictions. The authors argue that traditional sources of error (eyewitness misidentification, false confessions, perjured testimony, forensic error, tunnel vision, prosecutorial misconduct, ineffective assistance of counsel, etc.) are contributing sources, not exclusive causes, of wrongful convictions. They also argue that the research on wrongful convictions has uncovered a great deal about how these sources operate and what might prevent their effects. Finally, the authors urge criminal justice professionals and policymakers to take this research more seriously and apply the lessons learned from a century of research into wrongful convictions.*

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\* Associate Professor and Director of the Center for Justice, Law and Society, George Mason University. A.B., University of Michigan, 1985; M.P.P., Harvard University, 1989; J.D., Harvard University, 1989; Ph.D., University of Chicago, 1999.

\*\* Associate Professor of Law, University of San Francisco. B.A. University of California, Berkeley, 1985; M.A., University of Chicago, 1989; Ph.D., University of California, Berkeley, 1994; J.D., University of California, Berkeley, 1994. We thank Sam Gross for helpful comments on an earlier draft of this article, and we thank Kevin Maass and Robyn Rosenthal for excellent research assistance. We also thank Alan Law for his research help.

## I. INTRODUCTION

Almost a century ago in the predecessor to this *Journal*,<sup>1</sup> Yale law professor Edwin Borchard kicked off the study of wrongful convictions in the modern era<sup>2</sup> when he published an article on European approaches to “unjust convictions.”<sup>3</sup> Almost a century later, professors Samuel Gross and Barbara O’Brien published a critical assessment of the state of knowledge on wrongful conviction. Arguing that researchers “do not know much about false convictions” and that “it will be difficult to learn more,” they concluded that the “main message is gloomy.”<sup>4</sup>

Although both of us greatly respect the work of Gross and O’Brien—indeed, Gross is a leading, perhaps even the leading, scholar in the field at the moment—we disagree with their conclusion about the state of knowledge. To be sure, questions remain about the representative characteristics of all (i.e., known and unknown) wrongful convictions and their prevalence, queries that may prove difficult ever to answer. Nor do we yet have a good grasp on how the sources of wrongful convictions differ from the frailties found in criminal cases as a whole. But to say we know little about the subject, we believe, is not fully to appreciate the import of decades of research on wrongful convictions, and especially some of the most insightful work that has been conducted in the last two decades.

In this Article, we analyze nearly a century’s worth of research into wrongful convictions, explaining the many lessons of this body of work and suggesting where additional research and attention are needed. The Article is divided into four sections. In Part II, we chronicle the range of research that has been conducted over the last several decades and explain how it has changed in form. Part III is the bulk of the Article and where we address the challenge provided by Gross and O’Brien. We begin this section by

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<sup>1</sup> Until 1932, the *Journal of Criminal Law and Criminology* was known as the *Journal of the American Institute of Criminal Law and Criminology*.

<sup>2</sup> Professor Bruce Smith traces interest in wrongful convictions back to seventeenth century England, with many “influential treatise writers and public officials . . . urg[ing] the courts [to] adopt stricter evidentiary safeguards in capital cases.” Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1188-89 (2005). In America, Borchard’s article, and his later book, which is described in Part II, *infra*, are among the earliest, most cited publications on wrongful convictions.

<sup>3</sup> Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1913).

<sup>4</sup> Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Convictions: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 958 (2008). Gross and O’Brien emphasize that there are no good case level data on accurate criminal convictions in the United States, or on all criminal convictions, with which to compare data on exonerations (which they treat as an imperfect proxy for a subset of likely wrongful convictions that are known), and that 95% of known exonerations occur in cases of murder and rape, which only account for 2% of all felony convictions. *Id.* at 937-40.

acknowledging questions about the rate of wrongful convictions and argue that, whatever the correct figure, wrongful convictions are far from rare in the criminal justice system. We then turn to the effects of wrongful convictions, describing the several harms of erroneous prosecutions and convictions that researchers have identified. From there, we address the sources of these errors and seek to categorize the various findings about these factors. Our overall argument in this section is two-fold: first, we should consider these factors as contributing sources, not exclusive causes, of wrongful convictions; and second, the research has actually uncovered a great deal about how these sources operate and what remedies might prevent their effect.

Although the research has identified a common set of sources, we agree with Gross and O'Brien that the methodology for studying wrongful convictions could be improved. In Part IV we discuss those studies that have used matched comparison samples and explain how the field could be improved by additional research that employs such comparisons or controls. Finally, in Part IV, we turn the tables, contending that improvement is needed less in the quality of research than within the professional, policy, and political communities that might employ the lessons learned from the wrongful convictions research. With all of the information that has been amassed over the last century of inquiry, it is embarrassing to the point of shameful that criminal justices, policymakers, and politicians do not follow the example of other professions and seek to learn from and prevent systemic error.<sup>5</sup> We have no doubt that researchers will continue to expand our understanding of wrongful convictions in the years ahead. But unless those charged with maintaining our criminal justice system are open to those findings and are willing to act on the lessons learned, the research may become, quite literally, an academic exercise.

## II. A SHORT HISTORY OF RESEARCH ON WRONGFUL CONVICTIONS

In 1913, Edwin Borchard's article opened the eyes of American observers to the scourge of wrongful convictions by describing European approaches to righting the wrongs of erroneous convictions.<sup>6</sup> Twenty years later, his book, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, created a stir when it identified sixty-five cases in which an innocent person had been convicted.<sup>7</sup> Borchard also classified the likely

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<sup>5</sup> See James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010).

<sup>6</sup> Borchard, *supra* note 3.

<sup>7</sup> EDWIN BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).

“sources of error including erroneous eyewitness testimony, false confessions, faulty circumstantial evidence, and prosecutorial excesses.”<sup>8</sup> Yet, for the next fifty years, research on wrongful convictions was sporadic. “Typically, one big-picture book or major article [was] published every decade or so on the subject of miscarriages of justice,” many of which “followed a familiar structure.”<sup>9</sup> Authors would assert the importance of clearing the innocent; they would describe cases in which an innocent defendant had been convicted; and they would close by proposing reforms to prevent future errors. Among those who followed in this literary path were Erle Stanley Gardner, creator of the fictional defense lawyer Perry Mason,<sup>10</sup> and Judge Jerome Frank, who collaborated with his daughter Barbara on the book, *Not Guilty*.<sup>11</sup>

“Until the late 1980s, it might have seemed bizarre, if not incoherent, to suggest that the study of miscarriages of justice constituted a field or area of academic study, rather than merely a series of unrelated and relatively infrequent articles and books.”<sup>12</sup> However, in 1987, Hugo Bedau and Michael Radelet published their groundbreaking study in the *Stanford Law Review*, claiming that 350 individuals had been wrongly convicted in potentially capital cases over much of the twentieth century.<sup>13</sup> In addition to describing the facts of these cases, Bedau and Radelet systematically analyzed the sources of these errors and the methods by which the mistakes had been discovered. Their work led to a florescence of research on wrongful convictions, inspiring others to research and write about the sources and consequences of wrongful convictions,<sup>14</sup> as well as to re-

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<sup>8</sup> Smith, *supra* note 2, at 1216.

<sup>9</sup> Richard A. Leo, *Re-thinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Convictions*, 21 J. CONTEMP. CRIM. JUST. 201, 203 (2005).

<sup>10</sup> Among other things, Gardner created the “Court of Last Resort,” an unofficial body to investigate suspected cases of wrongful conviction. Steve Weinberg, *A Short History of Exposing Misconduct*, in CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS (2003), available at <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=37>.

<sup>11</sup> JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957).

<sup>12</sup> Leo, *supra* note 9, at 204.

<sup>13</sup> Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987).

<sup>14</sup> See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 907 (2004); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

analyze<sup>15</sup> and extend their findings.<sup>16</sup> All the while, they have continued to collect, analyze, and publish data about wrongful conviction cases.<sup>17</sup>

Bedau and Radelet's article was followed in the 1990s by a series of books on the subject.<sup>18</sup> Often following a "familiar plot"<sup>19</sup> of works like Borchard's 1932 book, these publications once again reminded the reading public that wrongful conviction cases were real, that they contravened the ideals of the American criminal justice system, that they had common sources, and that these errors ought to be rectified. Yet, for the attention these books may have received, everything paled in the face of the revolution that arrived in the 1990s when DNA testing became feasible and affordable in many cases.<sup>20</sup> Once limited to such imperfect techniques as serology testing or hair comparison analysis,<sup>21</sup> law enforcement officials found that they could test biological evidence for common genetic links between perpetrators and potential suspects, permitting results that were

<sup>15</sup> See James Acker et al., *No Appeal From the Grave: Innocence, Capital Punishment, and the Lessons of History*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 154 (Sandra Westervelt & John Humphrey eds., 2001).

<sup>16</sup> Samuel Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 *BUFF. L. REV.* 469, 494 (1996); see also Samuel Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 *LAW & CONTEMP. PROBS.* 125 (1998).

<sup>17</sup> MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); Hugo Adam Bedau & Michael L. Radelet, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587 (2004); Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt*, 13 *T.M. COOLEY L. REV.* 907 (1996); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 *LAW & CONTEMP. PROBS.* 105 (1998); Michael L. Radelet, *The Role of Innocence Argument in Contemporary Death Penalty Debates*, 41 *TEX. TECH. L. REV.* 199 (2008).

<sup>18</sup> DONALD CONNERY, *CONVICING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION AND THE STRUGGLE TO FREE A WRONGED MAN* (1996); RONALD HUFF, *ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996); MARTIN YANT, *PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED* (1991).

<sup>19</sup> By that, we mean descriptive analyses of harrowing cases of wrongful conviction. These stories are often told in the style of "good guys" (the innocent defendant) succumbing to the efforts of "bad guys" (hard-charging police officers or prosecutors), who ignore exculpatory evidence, only to be freed by the efforts of dedicated advocates who never doubted the innocence of the wrongly convicted. These stories usually close with recommendations for "familiar policy solutions" to prevent future wrongful convictions. Leo, *supra* note 9, at 207.

<sup>20</sup> DNA testing of course became available both as an investigative tool in some cases that have not yet gone to trial as well as in some postconviction cases. To date, virtually all postconviction DNA exonerations have occurred in rape or rape and murder cases. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. CRIM. L. & CRIMINOLOGY* 523, 528-29 (2005).

<sup>21</sup> These and other forensic testing methods are discussed in Part II.C, *infra*.

infinitely more accurate. Innocent defendants also recognized the potential of DNA testing to clear them even after conviction if biological evidence from the crime scene had been retained. In what appeared to be an avalanche of cases over the next decade, advocates have managed to exonerate over 250 innocent persons of crimes they had not committed, including several defendants who had been on death row.<sup>22</sup> Even more individuals have been exonerated in this period in cases not involving DNA testing.<sup>23</sup>

These cases rightly drew media attention to the frailties of the criminal justice system and, perhaps more importantly, revealed serious problems in everyday police work. In 1996, the National Institute of Justice released a report noting that in “every year since 1989, in about 25 percent of the sexual assault cases referred to the FBI . . . the primary suspect has been excluded by DNA testing.”<sup>24</sup> Put another way, among rape cases referred to the FBI for DNA testing, law enforcement officers had been wrong one out of every four times in naming an initial suspect.

The advent of DNA testing not only generated more attention for, and research about, wrongful convictions, but it also seemed to have pushed academicians from “pure” research to research/advocacy. Here, the influence of Barry Scheck and Peter Neufeld cannot be underestimated. Two former legal aid attorneys, the pair founded the Innocence Project in 1992 at the Benjamin N. Cardozo School of Law. Today, the Innocence Project (IP) is a non-profit legal clinic that “handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. As a clinic, students handle the case work while supervised by a team of attorneys and clinic staff.”<sup>25</sup> The IP has led successful efforts to exonerate hundreds of innocent defendants. It also has spawned the creation of regional innocence projects and legal clinics at law schools around the country. Among the most famous is Northwestern University’s Center on Wrongful Conviction and Medill Innocence Project, at which law and journalism professors, along with their students and professional journalists, were the catalysts for a statewide investigation into wrongful convictions in Illinois. In an unprecedented move in 2000, then-Governor George Ryan commuted all death sentences and imposed a moratorium on

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<sup>22</sup> See The Innocence Project, <http://www.innocenceproject.org> (last visited Apr. 3, 2010).

<sup>23</sup> Gross et al., *supra* note 20, at 529 tbl.1.

<sup>24</sup> EDWARD CONNORS, THOMAS LUNDREGAN, NEAL MILLER & TOM MCEWEN, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii (1996).

<sup>25</sup> About the Innocence Project, <http://www.innocenceproject.org/about/> (last visited Apr. 3, 2010).

further executions until a special commission and the General Assembly addressed the several problems in investigations and prosecutions that had led to more convicted murderers released from prison upon questions of their guilt than actually executed over a twenty-two-year period.<sup>26</sup>

Illinois is not alone; North Carolina,<sup>27</sup> Virginia,<sup>28</sup> and California have also seen innocence commissions, modeled in many ways on the Criminal Case Review Commission (CCRC) in the United Kingdom and the Royal Commissions of Inquiry in Canada. The Royal Commissions have been available for over a century, with national and provincial governments permitted to conduct independent, nongovernment-affiliated investigations regarding the conduct of public businesses or the fair administration of justice.<sup>29</sup> Two of the most famous examples of the commissions were those investigating the exonerations of Guy Paul Morin and Thomas Sophonow.<sup>30</sup> More recently, the U.K. established the CCRV in 1997. The CCRV has jurisdiction over criminal cases from any Magistrates' or Crown Court in England, Wales, and Northern Ireland "to review possible miscarriages of justice and decide if they should be referred to an appeal court."<sup>31</sup>

As we discuss in a later section,<sup>32</sup> research has been instrumental in assisting innocence or related government commissions to establish "best practices" to prevent wrongful convictions, whether in the United States or abroad. Among these best practices are sequential, double-blind eyewitness identification procedures and electronically recorded interrogations. Indeed, in many ways, we have reached the point where researchers are now performing a dual function with regard to wrongful convictions; on one level scholars are conducting research for its intrinsic insight into the functioning of the criminal justice system; on another level, researchers have become instruments of reform, working alongside policymakers to

<sup>26</sup> Thomas P. Sullivan, *Repair or Repeal: The Report of the Illinois Governor's Commission on Capital Punishment*, 26 CHAMPION 10 (2002).

<sup>27</sup> Although Illinois's Ryan Commission often gets the most press coverage, in many ways the North Carolina Actual Innocence Commission deserves greater attention since it was the first in the nation and remains an ongoing entity. See Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647 (2004).

<sup>28</sup> Unlike the other innocence commissions, the Virginia Innocence Commission was a private organization, not a government commission. See JON GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* (2007).

<sup>29</sup> Watson Sellar, *A Century of Commissions of Inquiry*, 25 CAN. BAR REV. 1 (1947).

<sup>30</sup> Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions"*, 86 JUDICATURE 100 (2002).

<sup>31</sup> Criminal Cases Review Commission, *Our Role (Overview)*, [http://www.ccr.gov.uk/about/about\\_27.htm](http://www.ccr.gov.uk/about/about_27.htm) (last visited Apr. 3, 2010).

<sup>32</sup> See *infra* Part III.C.

implement the lessons their research uncovers. That alone is a significant step in the near-century of inquiry, one that Borchard hardly may have expected when he first published his article in the predecessor to this *Journal*.<sup>33</sup>

### III. WHAT WE KNOW ABOUT WRONGFUL CONVICTIONS

#### A. PREVALENCE OF WRONGFUL CONVICTIONS

Despite the numerous studies into wrongful conviction, there remains considerable debate about the extent of the problem. According to University of Southern California law professor Dan Simon, the “overall rate of error in the criminal justice system is unknown, and unknowable.”<sup>34</sup> Simon is correct that we may never know precisely how many wrongful convictions occur, but already research has greatly narrowed the range. Virtually no one denies the existence of wrongful convictions, while the several studies on this question cap estimates at around 3% to 5% of convictions.<sup>35</sup>

Much of the variation in these estimates turns on the definition of a wrongful conviction and the method of study. Initially, it's important to distinguish between procedural error (which some have referred to as “legal innocence”<sup>36</sup>) and factual innocence. The latter means that someone else committed the crime, whereas the former penalizes the state for violating a defendant's fundamental rights by overturning the ensuing conviction and, in some cases, ordering a new trial. Joshua Marquis, a district attorney from Oregon, has decried the improper usage of “innocence” when describing defendants who are released from prison on what some might consider a “legal technicality.” Says Marquis, “To call a man with blood on his hands innocent stains not only the truth, but calls into question the actual innocence of the fewer number who are truly exonerated.”<sup>37</sup>

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<sup>33</sup> Borchard, *supra* note 3.

<sup>34</sup> Dan Simon, *Are Wrongful Convictions Episodic or Epidemic?*, Paper Presented at the Annual Meeting of the Law and Society Association (July 7-9, 2006).

<sup>35</sup> See Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Error*, 53 *CRIME & DELINQ.* 436 (2007); see also Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 *J. CRIM. L. & CRIMINOLOGY* 768 (2007); Marvin Zalman, Brad Smith & Amy Kiger, *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 *JUST. Q.* 72 (2008).

<sup>36</sup> See, e.g., Daniel S. Medwed, *Innocentrism*, 2008 *U. ILL. L. REV.* 1549, 1560.

<sup>37</sup> Joshua Marquis, *The Myth of Innocence*, 95 *J. CRIM. L. & CRIMINOLOGY* 501, 521 (2005).

In several cases, factual innocence and procedural error coincide, when, for example, the constitutional violations that produce procedural error also lead to the conviction of a factually innocent person. But in reviewing the literature on error rates, it's important to keep the two terms distinct.<sup>38</sup> In 2000, Professor James Liebman and colleagues published their research on error rates in capital cases from 1973 to 1995.<sup>39</sup> The researchers estimated that 68% of capital convictions “were thrown out because of serious flaws” in the investigation or prosecution.<sup>40</sup> But whereas judicial reversal qualifies as at least procedural error, it does not necessarily imply factual innocence. Indeed, the vast majority of capital defendants who won on appeal in the study were tried once more, and upon retrial, only 5% of the original total were “cleared of the capital offense.”<sup>41</sup> Even among this group, Liebman and colleagues were not able to identify or estimate the number of defendants that were factually innocent.

Such distinctions should not imply that we disregard cases of procedural error, unconcerned, as some might imply, that such “legal technicalities” are hardly cause for alarm. Procedural error *is* a signal that the criminal justice system has failed, but the failure is much more troubling when the system convicts a person who is factually innocent. For this reason, much of the research that has sought to estimate the rate of wrongful convictions has focused on factual innocence. Huff, Rattner, and Sagarin sought to answer this question by surveying prosecutors, defense attorneys, judges, and sheriffs in seven Ohio cities about their familiarity with, and estimates of, wrongful convictions.<sup>42</sup> Out of a sample of nearly two hundred participants, approximately 70% estimated that wrongful convictions occurred less than 1% of the time, 20% rated the frequency at 1% to 5% of cases, 2% said errors occurred between 5% and 10% of the time, and 6% denied that wrongful convictions occur.<sup>43</sup> The weakness in this research, of course, is that it merely asks respondents to speculate about facts they likely do not know and, thus, reflects only their perceptions about the frequency of the problem, not any underlying reality.<sup>44</sup>

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<sup>38</sup> See Tony G. Poveda, Research Note, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 691 (2001).

<sup>39</sup> James S. Liebman, Jeffrey Fagan & Valerie West, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

<sup>40</sup> *Id.* at 1852.

<sup>41</sup> *Id.*

<sup>42</sup> C. Ronald Huff, Arye Rattner & Edward Sagarin, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518 (1986).

<sup>43</sup> *Id.* at 522.

<sup>44</sup> In their 1996 book *Convicted But Innocent*, Huff et al. estimated the error rate at 0.05% (1 out of every 200 convictions). See HUFF ET AL., *supra* note 18, at 59-62. However, this estimate reflects the collective speculation of some criminal justice officials in Ohio and

A different approach seeks to chronicle the number of known exonerations. Gross and colleagues did just this when, in 2005, they published their research recounting 340 exonerations that took place between 1989 and 2003.<sup>45</sup> But raw numbers alone may not pack the punch they warrant, leading some, such as Justice Scalia, to dismiss these figures as “fairly modest.”<sup>46</sup> Others, including Joshua Marquis, have sought to extrapolate from these numbers, arguing that even if the authors understated the results by a factor of ten, the data would still represent an error rate of just 0.027% in felony convictions.<sup>47</sup>

One must, of course, appreciate the limits of extrapolation. As Gross notes, more than 95% of the 340 exonerations from 1989 through 2003 that he and his colleagues uncovered came primarily from cases of rape and murder,<sup>48</sup> “which together account for only 2% of felony convictions.”<sup>49</sup> Certainly, there are far more kinds of criminal prosecutions, but “lesser” felonies, and certainly misdemeanors, may lack the record and interested advocates to investigate and pursue exonerations. Moreover, the vast

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some state attorneys general: it has no basis in observed fact. Huff et al. arrived at this figure by asking fifty-five Ohio county judges, fifty-three prosecutors, twenty-one public defenders, fifty-nine sheriffs and chiefs of police, and forty-one state attorneys general to guess into which of four categories the error rate in the system most likely fell (“never,” “less than 1%,” “1-5%,” or “6-10%”). Huff et al. then arbitrarily assigned the final number as the midpoint between the two most frequently chosen categories—“never” and “less than 1%.” Because this estimate is based on the aggregated guesswork of some criminal justice officials, it is not an empirically valid measure of the true error rate in the criminal justice system. See Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998). Two additional recent studies have used the same methodology to arrive at equally speculative findings: Ramsey and Frank surveyed 798 Ohio criminal justice officials (police, prosecutors, defense attorneys, and judges) and found that they perceived the error rate to be 0.5-1% of all felony cases in their county and 1-3% in the United States. Robert J. Ramsey & James Frank, *supra* note 35. Zalman, Smith, and Kiger surveyed 467 Michigan criminal justice officials (police, prosecutors, defense attorneys, and judges) who estimated that wrongful convictions occurred less than 0.5% in their own jurisdiction and at a rate of 1-3% in the United States. Zalman, Smith & Kiger, *supra* note 35, at 84. These findings do not reflect a precise, underlying error rate in the real world of criminal justice, as they are essentially collective guesswork.

<sup>45</sup> Gross et al., *supra* note 20.

<sup>46</sup> *Kansas v. Marsh*, 548 U.S. 163, 197 (2006) (Scalia, J., concurring).

<sup>47</sup> Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23. Marquis has subsequently “refined [his] statistics” to estimate a wrongful conviction rate of 0.75%. See <http://gritsforbreakfast.blogspot.com/2008/05/counting-innocent-discussion-of.html> (last visited Aug. 31, 2010).

<sup>48</sup> Gross et al., *supra* note 20, at 529.

<sup>49</sup> Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 173 (2008).

majority of criminal prosecutions are concluded with guilty pleas, yet research offers few glimpses into errors there.

For this reason, one must be extremely careful when evaluating claims such as those of Marquis and Scalia who contend a 0.027% error rate. As Simon explains, their analysis is “flat wrong and badly misleading. In fact, [the error rate is] much higher.”<sup>50</sup> The “Scalia-Marquis ratio,” as Simon calls it, divides the number of exonerations by the total number of felonies. However, the numerator is likely many times larger than Marquis estimates, and the denominator is several times smaller than he suggests. If, as Gross reminds us, 95% of known exonerations come from rape and murder cases,<sup>51</sup> then the denominator used by Marquis should be contracted fifty fold to reflect the proportion of rape and murder cases among criminal prosecutions as a whole. Furthermore, almost all exonerations in rape cases came from crimes in which the perpetrator and victim were strangers, yet stranger rape constitutes less than 30% of rape convictions.<sup>52</sup> These figures, in turn, should further shrink the denominator and thus raise the error rate.

With respect to the numerator, many of the exonerations to date have been based on DNA testing, yet fewer than 20% of violent crimes involve biological evidence, and in the vast majority of past cases, biological evidence was not properly collected and held for future testing.<sup>53</sup> Erroneous convictions are hardly “limited to cases in which biological evidence is available, meaning the number of known exonerations is likely a serious underestimate of the actual number of exonerations.”<sup>54</sup> To address concerns such as these, Michael Risinger conducted a study just three years ago in which he sought to match “apples-to-apples,” comparing known exonerations in capital rape-murders from the 1980s against a relevant denominator of cases. Although his study was based on a relatively small number of exonerations and a series of assumptions, he concluded that “a true minimum innocence rate for rape-murder[s] from 1982-1989” was at least 3.3% and potentially as high as 5%.<sup>55</sup> In this respect, Risinger’s estimate was higher, but not wildly so, from a study of the frequency of wrongful death sentences in which Gross and O’Brien calculated a 2.3% capital exoneration rate in cases post 1973.<sup>56</sup>

In the end, we think there are three conclusions to be made from the research on error rates. First, as Simon suggests, the “true” rate of error in

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<sup>50</sup> Simon, *supra* note 34.

<sup>51</sup> Gross, *supra* note 49, at 176.

<sup>52</sup> Simon, *supra* note 34.

<sup>53</sup> GOULD, *supra* note 28, at 19.

<sup>54</sup> *Id.*

<sup>55</sup> Risinger, *supra* note 35, at 778.

<sup>56</sup> Gross & O’Brien, *supra* note 4, at 942-47.

the criminal justice system is “unknowable.” However, the research to date at least has narrowed the range of estimates. Second, it is essential that observers consider the method of extrapolation made by researchers, for the numerator and denominator in such estimates must be comparable. Third, most of what we know concerns errors in the most serious criminal cases—rapes and murders, and capital trials at that. Gross points out that errors may be less common in “light felonies and misdemeanors,”<sup>57</sup> as murder cases are harder to investigate and prove, making errors potentially more prevalent because police clearance rates are higher.<sup>58</sup> But, it could be just the opposite, that errors are more common, and more commonly accepted, in cases where neither police nor prosecutors have as much time, resources, or pressure to investigate cases thoroughly and in which the lesser stakes of punishment do not command as many or as zealous advocates to investigate cases postconviction. It is here—where the debate moves from major felonies to lesser crimes—that Gross and O’Brien’s admonition is most relevant and where future research is especially needed.

#### B. THE HARMS OF WRONGFUL CONVICTIONS

To many observers, the harms of wrongful convictions may seem obvious. So long as the wrong suspect is behind bars, the public remains at risk as the actual perpetrator is free to roam the community and prey on others. Taxpayers must commit resources to cover the imprisonment of an innocent person. The public may lose trust in the criminal justice system. And, of course, the innocent defendant loses his freedom while forced to confront the dangers of imprisonment. But the harms of erroneous prosecutions and convictions go even deeper, a reality that has been brought home with a number of studies conducted in the last decade.

Westervelt and Cook, for example, have interviewed individuals exonerated of capital crimes.<sup>59</sup> As they concluded, the exonerees’ experiences were similar to “life-threatening traumas.”<sup>60</sup> Adrian Grounds, too, has studied former prisoners, including those exonerated after as many as nineteen years in prison.<sup>61</sup> Like Westervelt and Cook, he concluded that “those released following wrongful conviction and imprisonment may have significant psychiatric and adjustment difficulties of the kind described in

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<sup>57</sup> Gross, *supra* note 49, at 180.

<sup>58</sup> *Id.* at 178-79.

<sup>59</sup> Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence After Death Row*, CONTEXTS, Fall 2008, at 32.

<sup>60</sup> *Id.* at 35.

<sup>61</sup> Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 165 (2004).

other groups of people who have suffered chronic psychological trauma.”<sup>62</sup> Although it can be difficult at times to distinguish the needs of exonerees from those of any former inmate, Westervelt and Cook provide a virtual laundry list of the needs of exonerees that often go unmet. Tempered with the joy of their freedom, exonerees often require assistance finding housing, obtaining medical attention, securing employment and training, acquiring emergency financial support, managing anger and bitterness, reconnecting with family and children, addressing drug or alcohol dependency, negotiating social rejection and stigma, expunging their records, and seeking a gubernatorial pardon, among other needs.<sup>63</sup>

Such challenges exist only if the wrongly convicted defendant can establish his innocence in the first place and earn his release. As University of Utah law professor Daniel Medwed’s research indicates, however, these prospects are hardly assured, especially for the innocent defendant who remains behind bars and must seek release through the parole process.<sup>64</sup> As Medwed explains, it can be inordinately difficult for a defendant to convince a parole board that he is “rehabilitated” while maintaining his innocence when contrition and accepting responsibility for one’s misdeeds is considered to be a vital part of the rehabilitative process. Insistence on an admission of guilt before parole is based upon a mistaken belief that the judicial system is infallible and reveals a law enforcement bias towards “punishing” those who refuse to confess.<sup>65</sup>

Even if an innocent defendant can navigate this arduous process and secure his release, his prospects of redress are minimal at best. Those scholars who have studied compensation mechanisms for the exonerated are effectively unanimous in their conclusion that state compensation mechanisms are either nonexistent or woefully deficient.<sup>66</sup> In 1999, Pace Law School professor Adele Bernhard surveyed the field, discovering that “only fourteen states, the District of Columbia and the federal government” had laws to compensate individuals who had been unjustly convicted and

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<sup>62</sup> *Id.* at 178.

<sup>63</sup> Westervelt & Cook, *supra* note 60.

<sup>64</sup> Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

<sup>65</sup> *Id.* at 548.

<sup>66</sup> See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 106 (2008); Alberto B. Lopez, *\$10? And a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002).

later exonerated.<sup>67</sup> Five years later, she repeated the study, anticipating that, with “the continuing parade of exonerations . . . local legislatures [would have enacted] new statutes benefiting the unjustly convicted. . . . I was wrong,” she reluctantly concluded.<sup>68</sup> If anything, “several states [had] enacted legislation designed not to assist exonerates in a significant way, but only to bestow symbolic token support.”<sup>69</sup> Her conclusion is supported by Chunias and Aufgang’s 2008 finding that state compensation mechanisms for the exonerated “are excessively restrictive in identifying who will be compensated, and cap the amount of recovery at artificially low levels.”<sup>70</sup> Furthermore, they say, just three states offer meaningful post-release services, such as reentry planning services.<sup>71</sup> Quite clearly, the researchers collectively conclude, the harms of wrongful conviction are not adequately compensated.

### C. THE SOURCES OF WRONGFUL CONVICTIONS

We doubt that Gross and O’Brien would disagree with the preceding conclusion. Their claim is more that research into wrongful convictions has been unable to identify the specific circumstances under which cases will go awry. As we explain in the following section, the two are correct that the field lacks discrete “causes” of wrongful convictions, but this is hardly akin to concluding that we are unaware of the sources of these errors. To the contrary, there have been numerous studies of wrongful convictions conducted over the years, many of them identifying the same set of sources. Much of this research has been conducted by case study, meaning that researchers have examined one or a few cases of wrongful conviction and, in narrative form, described the process by which an innocent person was convicted. An excellent example of this genre is Margaret Edds’s book, *An Expendable Man*,<sup>72</sup> which describes the harrowing saga of Earl Washington, Jr. Mr. Washington, a man of very low intelligence, came within days of his execution before securing a reprieve and his eventual exoneration. In a case of a sensational murder, Washington was essentially talked into a confession by law enforcement officers, who should have known that he was innocent. What’s more, Mr. Washington’s trial counsel overlooked key evidence that likely would have established his client’s innocence at trial. In 2006, Mr. Washington won a multi-million dollar

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<sup>67</sup> Bernhard, *When Justice Fails*, *supra* note 66, at 77.

<sup>68</sup> Bernhard, *Justice Still Fails*, *supra* note 66, at 705.

<sup>69</sup> *Id.* at 706.

<sup>70</sup> Chunias & Aufgang, *supra* note 66, at 107.

<sup>71</sup> *Id.*

<sup>72</sup> MARGARET EDDES, *AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR.* (2003).

civil verdict against the sheriff's deputies whose bad actions had led to his wrongful conviction.<sup>73</sup>

There are many more examples of works like Edds's case study, including such well-known titles as *Guilty Until Proven Innocent*,<sup>74</sup> *A Promise of Justice*,<sup>75</sup> *The Innocent Man*,<sup>76</sup> and *Picking Cotton*.<sup>77</sup> Indeed, one of us is responsible for a book like that, chronicling the tragic multiple wrongful conviction story of the "Norfolk Four."<sup>78</sup> In that case, four Navy sailors were coerced and worn down in multiple lengthy interrogations to confess to a rape-murder that they did not commit, and DNA and other case evidence conclusively established that another man—who has since provided a corroborated confession to the crime—acted alone. To date, each of the four innocent defendants has been released from prison, but none has been granted a full pardon.<sup>79</sup>

In other works, groups of scholars or activists have conducted aggregated case studies. Under this approach, researchers "create a coding instrument to classify (demographic, legal, case, outcome) variables found in [the cases] and then identify and analyze the patterns, correlations, and outcomes that emerge from the aggregated data."<sup>80</sup> Bedau and Radelet's work on wrongful convictions first introduced this method to the field,<sup>81</sup> an approach that has been replicated by others, including both of us.<sup>82</sup> Utilizing pro bono lawyers from major law firms, Innocence Commission for Virginia (ICVA) researchers conducted separate case studies of eleven known exonerations in Virginia. Researchers were instructed in the use of an investigative instrument, and results were chronicled in both a narrative format and also in a spreadsheet. The Ryan Commission in Illinois used a

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<sup>73</sup> Editorial, *Delayed Justice for Earl Washington*, VIRGINIAN-PILOT, May 10, 2006, at B8.

<sup>74</sup> DONALD S. CONNERY, *GUILTY UNTIL PROVEN INNOCENT* (1977).

<sup>75</sup> DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN* (1998).

<sup>76</sup> JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006).

<sup>77</sup> JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TOMEI, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009).

<sup>78</sup> TOM WELLS & RICHARD LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

<sup>79</sup> Norfolk Four, <http://www.norfolkfour.com> (last visited Apr. 3, 2010).

<sup>80</sup> Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 19 (2009).

<sup>81</sup> Bedau & Radelet, *supra* note 13.

<sup>82</sup> See GOULD, *supra* note 30; see also Drizin & Leo, *supra* note 14, at 907; Leo & Ofshe, *supra* note 14.

similar approach when investigating erroneous convictions in capital cases.<sup>83</sup>

To be sure, neither the ICVA nor the Ryan Commission relied as stringently on a coding instrument as would be common in social science research, but interestingly, the results from both commissions mirror those found in the several other studies of wrongful convictions.<sup>84</sup> This repetition and replication gives us confidence that, far from anomalies, the sources identified in these several studies are commonly found in cases of wrongful conviction. For that matter, the scope of the problem is ever expanding. When DNA testing first came upon the scene in the early 1990s, the National Institute of Justice commissioned a study of wrongful convictions. As mentioned earlier, it found that among rape cases referred to the FBI for DNA testing, law enforcement officers had been wrong one out of every four times in naming an initial suspect.<sup>85</sup>

When considering the sources of wrongful convictions, it is important to distinguish, first, between correlation and causation, and second, between contributing and exclusive sources. Because much of the research to date has been conducted by case study, we are not able to say that the errors identified in these cases occur exclusively in wrongful convictions or that they are the only errors that may lead an innocent suspect to wrongful imprisonment. For example, the problems of tunnel vision, discussed in a section below, are likely prevalent in many criminal cases.<sup>86</sup> What should concern us (besides seeking to reduce any common source of error in criminal prosecutions) is how tunnel vision was overcome in certain cases to prevent wrongful convictions, but continued unchecked in others to contribute to mistaken prosecutions and convictions.

For this reason, we think it is better to understand the sources of wrongful convictions not so much as dichotomous causes—a witness correctly or incorrectly identified the defendant and the identification directly led the jury to convict—but as contributing factors in a path analysis that might have been broken at some point before conviction. We have written about path analysis in detail before,<sup>87</sup> so we do not wish to replicate that here. However, in sum, path analysis is similar to a decision tree; one starts with an initial condition regarding a case—say that a crime has occurred with eyewitnesses—and then traces the possible progression of that case, through investigation and prosecution, under competing

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<sup>83</sup> See GOULD, *supra* note 28, at 37-42.

<sup>84</sup> See, e.g., Bedau & Radelet, *supra* note 13.

<sup>85</sup> CONNORS ET AL., *supra* note 24, at xxviii.

<sup>86</sup> See *infra* Part III.C.1.

<sup>87</sup> See GOULD, *supra* note 28; Leo & Gould, *supra* note 80.

scenarios. Among other things, path analysis allows researchers to understand better where and how intervening forces shape the movement and outcome of a case through the criminal justice process. For example, the discovery of biological evidence in the case above could alter its progression depending upon how convincing the eyewitnesses are, how wedded detectives are to their initial theory of the case, and how experienced and diligent the defense attorneys are.

Path analysis takes account of the considerable research on the sources of wrongful conviction, for, indeed, the very point of a decision tree is to understand how an erroneous conviction occurred. In this respect, the last hundred years (and even more important, the prior two decades) have seen considerable research uncovering the likely sources of wrongful convictions. Together, this research has identified seven central categories of sources, including problems involving (1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) informant testimony; (5) imperfect forensic science; (6) prosecutorial misconduct; and (7) inadequate defense representation. Apart from these primary sources, the literature also discusses the potential role of race effects, media effects, and the failure of postconviction remedies.

### *1. Mistaken Eyewitness Identification*

Nationally, over three-quarters of known wrongful convictions (many of them in rape cases) are, in part, the result of mistaken eyewitness identifications.<sup>88</sup> Eyewitness misidentification is caused by natural psychological errors in human judgment. As Gary Wells and colleagues have ably noted, stress alters people's perception of an event. When confronted with a gun or other weapon during a violent crime, for example, the victim may focus so heavily on the firearm that he or she cannot take in and remember well the details of the perpetrator.<sup>89</sup> This problem is pronounced when the victim and perpetrator are of different races.<sup>90</sup> Victims may believe that they recall the events accurately—the crime ostensibly “stenciled into their minds”—but research indicates that there is

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<sup>88</sup> BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 95 (2000). In fact, Gross and colleagues estimate that as many as 88% of wrongful rape convictions nationwide may have been based in large part on misidentifications. Gross et al., *supra* note 45, at 530.

<sup>89</sup> Gary L. Wells & Donna M. Murray, *What Can Psychology Say about the Neil v. Biggers Criteria for Judging Eyewitness Accuracy?*, 68 *J. APPLIED PSYCHOL.* 347, 349-50 (1983).

<sup>90</sup> Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: A Meta-Analysis*, 7 *PSYCHOL. PUB. POL'Y & L.* 3 (2001).

little relationship between an eyewitness's certainty of her identification and the accuracy of that report.<sup>91</sup>

Eyewitness identifications can be influenced by the suggestiveness of the identification process, which "leads eyewitnesses to distort their reports of the witnessing experience across a broad array of questions."<sup>92</sup> In practice, suggestion can enter the identification process in two ways. First, law enforcement officers or other observers can confirm a witness's identification, whether at the time of the identification procedure or at any point before in-court identification.<sup>93</sup> This can be as subtle as an officer praising the witness for a "good job" in her identification or as overt as a detective thanking the witness "for confirming our suspicion." The problem with such suggestions is that they can give witnesses false confidence in their identifications, even if the witnesses are mistaken. Moreover, witnesses too rarely recognize that a reinforcing comment inflated their confidence.<sup>94</sup>

Law enforcement officers may also employ suggestive identification procedures that make the suspect stand out from others. For example, in the case of Marvin Anderson, Anderson's photograph appeared in color while the other photographs in the array were black-and-white.<sup>95</sup> A further example is lineups, in which problems have arisen when the suspect is the only person presented of a particular height, hair color, or complexion among a group of six or more. These frailties may lead witnesses to make "relative judgments," subtly encouraging them to select the individual in an identification procedure who looks most like the offender rather than employing independent judgment to ensure that the individual identified is the actual perpetrator.<sup>96</sup> Often, someone in a lineup or photo array looks more like the actual offender than the others present do, and witnesses, in turn, may be tempted to identify that person.<sup>97</sup> Additionally, any initial mistaken identification may further reinforce subsequent reports, because

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<sup>91</sup> Wells & Murray, *supra* note 89, at 351.

<sup>92</sup> Gary L. Wells & Amy L. Bradfield, *Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 367 (1998).

<sup>93</sup> *Id.* at 366-67.

<sup>94</sup> Wells & Murray, *supra* note 89, at 357-58.

<sup>95</sup> GOULD, *supra* note 28, at 144.

<sup>96</sup> Gary L. Wells, *Theory, Logic and Data: Paths to a More Coherent Eyewitness Science*, 22 APPLIED COGNITIVE PSYCHOL. 853, 854-55 (2008).

<sup>97</sup> See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 615-16 (1998) (explaining that in the absence of the actual perpetrator, witnesses tend to identify an innocent person who looks more like the perpetrator than other individuals in the lineup); Gary L. Wells, *The Psychology of Line Up Identifications*, 14 J. APPLIED PSYCHOL. 89 (1984).

eyewitnesses may confuse or replace their memory of the true perpetrator with the image of the person who looked most like the offender in the identification procedure.<sup>98</sup>

Given documented problems such as these, U.S. Attorney General Janet Reno commissioned a group of criminal justice professionals in the late 1990s to address and recommend guidelines for police identification procedures. Published by the National Institute of Justice in 1999,<sup>99</sup> the state of New Jersey has adopted these recommendations, and the guidelines provide the basis for best practices in law enforcement agencies around the country.<sup>100</sup> Among these best practices, researchers recommend that witnesses be shown photographs or individuals in a lineup sequentially—that is, one at a time—rather than simultaneously as a group.<sup>101</sup> Researchers also recommend that witnesses be asked to determine, upon looking at each photograph or individual, whether the witness recognizes the perpetrator. In an analysis of twenty-five studies comparing simultaneous and sequential identification procedures, scholars have estimated that sequential procedures can reduce the chances of a mistaken identification by nearly one-half.<sup>102</sup> Perhaps most important, identification procedures must be administered “double-blind” so that neither the eyewitness nor the person administering the lineup knows the identity of the prime suspect and thus cannot guess about or hint at the correctness of the identification. In this way, suggestion and feedback effects can be minimized.

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<sup>98</sup> GOULD, *supra* note 30, at 137.

<sup>99</sup> OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter EYEWITNESS EVIDENCE GUIDE].

<sup>100</sup> See Gary Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 286 (2003).

<sup>101</sup> EYEWITNESS EVIDENCE GUIDE, *supra* note 99, at 9.

<sup>102</sup> Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001). One study by the Chicago Police Department in 2006 suggests otherwise, concluding that sequential lineups have a higher error rate and lead to fewer identifications as a whole than do simultaneous lineups. However, subsequent analysis of the study showed that it was not double blind (because officers who knew the “correct” suspect were in the room for simultaneous but not sequential lineups) and thus had not properly controlled for the suggestion effects. David Feige, *Witnessing Guilt, Ignoring Innocence?*, N.Y. TIMES, June 6, 2006, at A21; see also Shirley N. Glaze, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 LAW & PSYCHOL. REV. 199, 204-07 (2007).

## 2. False Confessions

It is difficult for the public to understand why someone would confess to a crime that the individual did not commit,<sup>103</sup> but research not only indicates that false confessions occur but also explains how they happen.<sup>104</sup> Several studies of erroneous prosecutions conducted since 1987 have shown that anywhere from 14% to 25% of the cases reviewed involved false confessions.<sup>105</sup> According to the national Innocence Project, approximately two-thirds of the DNA exonerations in homicide cases involved false confessions.<sup>106</sup> This is consistent with Warden's finding that approximately 60% of wrongful homicide convictions in Illinois since 1970 involved false confessions. Moreover, false confessions when introduced into evidence at trial usually lead to the conviction of the innocent.<sup>107</sup>

There is no one cause, logic, or type of false confession. Rather, police-induced false confessions are the product of a multiple step process of influence, persuasion, and compliance. They usually involve psychological coercion.<sup>108</sup> Under certain conditions of interrogation, police are more likely to elicit false confessions, and certain types of individuals are more vulnerable to interrogation pressure and, thus, are more easily manipulated into giving false confessions. In order to understand why innocent suspects sometimes make false confessions, first we must look at the process through which police investigators identify criminal suspects

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<sup>103</sup> See Iris Blandon-Gitlin, Katheryn Sperry & Richard Leo, *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, PSYCHOL. CRIME & L. (forthcoming 2010); Danielle E. Chojnacki, Michael E. Cicchini & Lawrence T. White, *An Empirical Basis For the Admission Of Expert Testimony On False Confessions*, 40 ARIZ. ST. L.J. 1, 39 (2008); Mark Costanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231 (2010); Lisa A. Henkel, Kimberly A.J. Coffman & Elizabeth M. Dailey, *A Survey of People's Attitudes and Beliefs About False Confessions*, 26 BEHAV. SCI. & L. 555, 560 (2008); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 383 (2009).

<sup>104</sup> RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 195-236 (2008).

<sup>105</sup> *Id.* at 244; see also Innocence Project, False Confessions, [www.innocenceproject.org/understand/False-Confessions.php](http://www.innocenceproject.org/understand/False-Confessions.php) (last visited Apr. 3, 2010).

<sup>106</sup> WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 225 (2003).

<sup>107</sup> In two studies, innocent false confessors whose cases went to trial were convicted 73-81% of the time. See Drizin & Leo, *supra* note 14, at 996; Leo & Ofshe, *supra* note 14 at 482.

<sup>108</sup> Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 191-92 (1997).

and how police interrogation works as a psychological process, both in the pre-admission and post-admission stages of interrogation.

Three errors occur in sequence when police elicit a false confession that leads to a wrongful conviction. The first error occurs when detectives mistakenly classify an innocent person as guilty. As Davis and Leo point out, “once specific suspects are targeted, police interviews and interrogations are thereafter guided by the presumption of guilt.”<sup>109</sup> Whether to interrogate is arguably the most critical decision point in the investigative process. Police only elicit false confessions if they erroneously interrogate innocent people. If all the suspects the police interrogated were, in fact, guilty, they would never elicit false confessions from the innocent. Misclassifying innocent suspects is thus both the first and the most consequential error police interrogators make.

Although many cognitive errors lead police to mistakenly classify an innocent person as a guilty suspect, perhaps the most common errors are the product of their investigative training. Police officers in the United States are erroneously taught that they can learn to become human lie detectors, able to distinguish truth from deception at extraordinarily high rates of accuracy.<sup>110</sup> For example, detectives are taught that the following behaviors are symptomatic of deceptive, and thus guilty, suspects: averting one’s gaze, slouching, shifting body posture, touching one’s nose, adjusting or cleaning one’s glasses, chewing one’s fingernails, and stroking the back of one’s head. Suspects who are guarded, uncooperative, and offer broad denials and qualified responses are also believed to be lying and thus guilty. However, across a variety of contexts, social science studies have repeatedly shown that individuals are highly prone to error in their judgments about whether an individual is lying or telling the truth and, thus, are poor human lie detectors. Studies show that most people accurately make these types of judgments at rates no better than the flip of a coin.<sup>111</sup> Moreover, studies have suggested that police interrogators themselves cannot accurately distinguish between truthful and false denials of guilt at levels greater than chance but, instead, routinely make erroneous judgments when trying to separate the innocent from the guilty.<sup>112</sup>

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<sup>109</sup> Deborah Davis & Richard A. Leo, *Strategies for Preventing False Confessions and Their Consequences*, in PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 123 (Mark Keppell & Graham Davies eds., 2006).

<sup>110</sup> The Chicago-based firm Reid and Associates, for example, claims that detectives can learn to accurately discriminate truth and deception 85% of the time though this rate seems to be represented in their training seminars as 100%. See LEO, *supra* note 104, at 98.

<sup>111</sup> *Id.*

<sup>112</sup> Maria Hartwig et al., *Police Officers’ Lie Detection Accuracy: Interrogating Freely Versus Observing Video*, 7 POLICE Q. 429, 430-31 (2004); Saul M. Kassin & Christina T.

Once detectives misclassify an innocent person as a guilty suspect, the next step is to subject him to an accusatorial interrogation. Obtaining a confession becomes especially important when there is little or no other evidence against the suspect—especially in high-profile cases in which police detectives are under great pressure to solve the crime<sup>113</sup>—and typically no credible evidence exists against an innocent suspect who police erroneously believe is guilty. Perhaps not surprisingly, the vast majority of documented false confession cases occur in homicides and high profile cases.<sup>114</sup>

The primary cause of police-induced false confessions is the use of psychologically coercive police interrogation methods.<sup>115</sup> These include methods that were once identified with the old “third degree,” such as deprivation (of food, sleep, water, or access to bathroom facilities, for example), incommunicado interrogation, and extreme induced exhaustion and fatigue. Since the 1940s, however, these techniques have become rare in domestic police interrogations. Instead, when today’s police interrogators employ psychologically coercive techniques, they usually consist of implicit or explicit promises of leniency and implicit or explicit threats of harsher treatment in combination with other interrogation techniques such as accusation, repetition, attacks on denials, and false evidence ploys.<sup>116</sup> Even in the absence of promises of leniency or threats of harm, police interrogation may become psychologically coercive if it leads the interrogated suspect to perceive that he has no choice but to comply with the demands of his interrogators. Contemporary psychological interrogation can easily become coercive for multiple reasons. The custodial environment and physical confinement are intended to isolate and disempower the suspect. Interrogation also is designed to be stressful and unpleasant, and of course, the more intensely it proceeds and the longer it lasts, the more stressful and unpleasant it will become. Interrogation techniques are meant to cause the suspect to perceive that his guilt has been established with complete certainty, that therefore no one will believe his denials of guilt or assertions of innocence, and that he will only make his situation (and the ultimate outcome of the case against him) much worse if he continues to deny the detectives’ accusations. The suspect may comply with the detectives’ wishes because he is fatigued, worn down, or simply

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Fong, “I’m Innocent!” *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 *LAW & HUM. BEHAV.* 499, 500-01 (1999).

<sup>113</sup> See Gross, *supra* note 16, at 478-79 (demonstrating the intense pressure police experience when a case involves a heinous crime and/or is public).

<sup>114</sup> See Drizin & Leo, *supra* note 14, at 938-39; Gross et al., *supra* note 45, at 531.

<sup>115</sup> See Ofshe & Leo, *supra* note 108, at 214-20; see also LEO *supra* note 104, at 229-31.

<sup>116</sup> LEO, *supra* note 104, at 155-62.

sees no other way to escape an intolerably stressful experience. Commonly, suspects who falsely confess believe that they will only be able to leave if they do what the detectives say. Other suspects comply because they are led to believe that it is the only way to avoid a feared outcome (not being able to see their young children again or going to prison for life instead of just a few years). When a suspect perceives that he has no choice but to comply, his confession is coerced and involuntary.<sup>117</sup>

Although psychological coercion is the primary cause of police-induced false confessions, individuals differ in their ability to withstand interrogation pressure and, therefore, in their vulnerability to giving false confessions.<sup>118</sup> Individuals who are highly suggestible or compliant are more likely to confess falsely. So too are the developmentally disabled, cognitively impaired, juveniles, and the mentally ill—all of whom tend to be unusually suggestible and compliant. The developmentally disabled are more likely to confess falsely for a variety of reasons.<sup>119</sup> Youth is also a

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<sup>117</sup> Ofshe & Leo, *supra* note 108, at 214-20; *see also* LEO, *supra* note 104, at 229-31.

<sup>118</sup> GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 332-59 (2003).

<sup>119</sup> This is due to their subnormal intellectual functioning, resulting in low intelligence, a short attention span, poor memory, and poor conceptual and communication skills. They do not always understand statements made to them or the implications of the answers they give. Often, these people lack the ability to think in a causal way about the consequences of their actions. Their limited intellectual intelligence translates into a limited social intelligence as well, and consequently they do not always fully comprehend the context or complexity of certain social interactions or situations. This is especially relevant when in a particularly adversarial situation such as a police interrogation. Under interrogation, they are not likely to understand that the police detective who appears to be friendly is really their adversary or to comprehend the long-term consequences of making an incriminating statement. The developmentally disabled are highly suggestible and easy to manipulate. They also lack self-confidence, possess poor problem-solving abilities, and have tendencies to mask or disguise their cognitive deficits. Exacerbating the problem, the developmentally disabled tend to look to others—particularly authority figures—for appropriate cues to behavior. It is therefore easy to get them to agree with and repeat back false or misleading statements, even incriminating ones. *See* LEO *supra* note 104, at 231-34.

Additionally—as many researchers have noted—the developmentally disabled are eager to please. They are prone to being acquiescent due to their high need for approval. They compensate for their cognitive disability by learning to submit to the demands of others, even more so from authority figures. Because of this desire to please, they are easily influenced and led to comply in situations of conflict. Some observers refer to this as “biased responding,” where the developmentally disabled answer affirmatively when they perceive a response to be desirable and negatively when they perceive it to be undesirable. They will answer the person questioning them with what they believe he or she wants to hear. Similarly, the developmentally disabled exhibit the “cheating to lose” syndrome: they eagerly assume blame or knowingly provide incorrect answers in order to please and seek the approval of an authority figure. It is easy to see how their compliance and submissiveness can lead the developmentally disabled to make false confessions during police interrogations. *Id.*

significant risk factor for police-induced false confessions.<sup>120</sup> Finally, people with mental illness are also disproportionately likely to falsely confess,<sup>121</sup> especially in response to accusatorial police pressure.<sup>122</sup>

The use of psychologically coercive police methods (and how they interact with an individual's personality) usually explains how and why interrogation succeeds in moving an innocent suspect from denial to admission. But a confession consists not only of an "I did it" statement but

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Because of their cognitive disabilities and learned coping behaviors, the smallest amount of stress may overwhelm the developmentally disabled. They simply lack the psychological ability to withstand the level of pressure, distress, and anxiety that normal individuals can. As a result, they tend to avoid conflict, and situations that produce ordinary levels of stress—which is far below that felt in an accusatorial police interrogation—are overwhelming to them. They are therefore less likely to resist the pressures of confrontational police questioning and more likely to comply with the demands of their accusers, even if this results in making a false confession. The breaking point at which they are willing to falsely tell a detective what he wants to hear in order to escape an aversive interrogation is often much lower than that for a mentally normal individual, especially in prolonged interrogations. In recent years, there have been numerous documented cases of false confessions from the developmentally disabled. *Id.*

<sup>120</sup> Young children and adolescents also share many of the character traits that are present in the developmentally disabled. Juveniles especially are highly compliant to authoritative figures and tend to be immature, naïve, acquiescent, and eager to please. Thus, they are predisposed to be submissive when questioned by police. Such youth are also highly suggestible and, like the developmentally disabled, are easily pressured and persuaded to make false incriminating statements, especially when questioned by police. They lack the cognitive capacity to fully grasp the gravity of a police interrogation and cannot comprehend the long-term consequences of their actions. Juveniles, like the developmentally disabled, also have limited language skills, memory, attention span, and information-processing abilities compared to normal adults and are less capable of withstanding interpersonal stress, and thus more likely to perceive aversive interrogation as intolerable. *See id.*

<sup>121</sup> Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 *LAW & PSYCHIATRY* 19 (2004).

<sup>122</sup> The mentally ill possess a range of psychiatric symptoms that make them more likely to agree with, suggest, or confabulate false and misleading information to detectives during police interrogations. Such symptoms include faulty reality monitoring, proneness to feelings of guilt, distorted perceptions and beliefs, an inability to distinguish fact from fantasy, heightened anxiety, mood disturbances, and a lack of self-control. Additionally, the mentally ill may suffer from deficits in executive functioning, attention, and memory, may become easily confused, and may lack social skills such as assertiveness. These traits increase the risk of falsely confessing. While the mentally ill are likely to make voluntary false confessions, they also may be easily coerced into making compliant ones. As Salas points out, "[m]ental illness makes people suggestible and susceptible to the slightest form of pressure; coercion can take place much more easily, and in situations that a 'normal' person might not find coercive." Claudio Salas, Note, *The Case For Excluding the Criminal Confessions of the Mentally Ill*, 16 *YALE J.L. & HUM.* 243, 264 (2004). Thus, "the mentally ill are especially vulnerable either to giving false confessions or to misunderstanding the context of their confessions, thus making statements against their own best interests that an average criminal suspect would not make." *Id.* at 274.

also of a subsequent narrative—what researchers have referred to as the post-admission narrative<sup>123</sup>—that contextualizes and attempts to explain the “I did it” statement, transforming the admission into a confession. A detailed post-admission narrative is what makes the story appear to be a compelling account of the suspect’s guilt. The content and structure of a suspect’s post-admission narrative goes a long way toward explaining why confessions are treated as such powerful evidence of guilt and sometimes lead to the wrongful conviction of the innocent.<sup>124</sup>

Police detectives use the post-admission phase of interrogation to influence, shape, and sometimes even script the suspect’s narrative. The detective’s ultimate objective is to elicit a persuasive account of what happened that successfully incriminates the suspect and leads to his conviction. For example, in false confession cases interrogators have sometimes invented, suggested, or elicited an account of the suspect’s motivation. They often use scenario-based inducements as a method of attributing a minimizing motive to the suspect—which the suspect agrees to and then repeats back, even if it is completely inaccurate, because he comes to believe that it will reduce his culpability. Police interrogators will also encourage suspects to attribute their decision to confess to an act of conscience, to express remorse about committing the crime, and to provide vivid scene details that appear to corroborate the suspect’s guilty knowledge and thus confirm his culpability. In addition, interrogators will try to make the admission appear to be voluntarily given, portraying the suspect as the agent of his own confession and themselves merely as its passive recipients.<sup>125</sup>

Police detectives help create false confessions in the post-admission narrative phase of interrogation by pressuring the suspect to accept a particular account and suggesting crime facts to him, thereby contaminating the suspect’s post-admission narrative. Unless the suspect has learned the crime scene facts from the media, community gossip, or overheard conversations, an innocent person will not know either the mundane or the dramatic details of the crime.<sup>126</sup> Absent such contamination, the innocent suspect’s post-admission narrative should therefore be replete with errors when responding to questions for which the answers cannot easily be guessed by chance. Unless, of course, the answers are implied, suggested, or explicitly provided to the suspect—which, unfortunately, does occur in

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<sup>123</sup> Leo & Ofshe, *supra* note 14, at 496.

<sup>124</sup> LEO, *supra* note 104, at 165-94.

<sup>125</sup> *See id.*

<sup>126</sup> Leo & Ofshe, *supra* note 14, at 438-40.

many false confession cases.<sup>127</sup> When an interrogation is recorded, it may be possible to trace, step by step, how and when the interrogator implied or suggested the correct answers for the suspect to incorporate into his post-admission narrative. However, when the interrogation is not recorded—and the interrogations preceding virtually all of the documented false confession cases have not been recorded—then there may be no objective way to prove the interrogator contaminated the suspect’s post-admission narrative. The contamination of the suspect’s post-admission narrative is thus the third mistake in the trilogy of police errors that, cumulatively, lead to the elicitation and construction of a suspect’s false confession.

Although police training is important in identifying and thus avoiding an erroneous confession, research indicates that electronically recording interrogations can minimize the likelihood that a false confession will lead to a wrongful conviction.<sup>128</sup> Not only are law enforcement officers more careful in interrogating suspects when they know a jury may view the proceedings—abstaining from threats, punishment, or undue coaching—jurors also can evaluate the circumstances of the interrogation to determine the accuracy of the witness’s statements.<sup>129</sup> In the case of Earl Washington, Jr., for example, a videotape would have shown officers holding up a key piece of evidence for Washington to describe rather than creating the impression at trial that Washington had freely described a secret piece of evidence known only to the perpetrator. For that matter, electronic recording presents advantages for law enforcement officers who conduct proper interrogations. Videotaped evidence can be quite compelling for jurors, and there is reason to believe that suspects are more likely to plead guilty to a crime when a properly administered interrogation shows them confessing to the crime. Such evidence also may stave off meritless civil suits when judges and jurors can see for themselves how officers behaved in the interrogation room. It is no wonder that surveys of officers using videotape find that many “enthusiastically support this practice.”<sup>130</sup>

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<sup>127</sup> See Richard Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479; see also Brandon Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

<sup>128</sup> See LEO, *supra* note 104, at 291-305; see also Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128-30 (2005).

<sup>129</sup> Of course, the entire interrogation procedure must be recorded so that officers are not just “cherry-picking” those examples most helpful to their cause.

<sup>130</sup> Sullivan, *supra* note 128, at 1128.

### 3. Tunnel Vision

Like any of us, police officers and prosecutors are susceptible to tunnel vision. That is, the more law enforcement practitioners become convinced of a conclusion—in this case, a suspect’s guilt—the less likely they are to consider alternative scenarios that conflict with this conclusion. As Findley and Scott explain more comprehensively, when criminal justice professionals “focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt,”<sup>131</sup> they are at risk of “locking on” to the wrong suspect and inadvertently leading to his continued prosecution and conviction.

Tunnel vision can occur at any point in the criminal justice process.<sup>132</sup> An officer may be so convinced of an eyewitness’s identification that he ignores other case facts that point away from the suspect’s guilt; a forensic scientist may conduct a hair comparison and see such a close match between that of the perpetrator and a suspect that he overlooks fingerprint analysis that isn’t as compelling; a prosecutor may be so satisfied with a suspect’s confession that he discounts forensic evidence that inculpates others; or a defense lawyer may consider the prosecution’s case so airtight that he doesn’t bother to look deeper into the government’s files. Any of these possibilities may explain why innocent individuals are named as suspects and prosecuted all the way to a conviction. These are not just theoretical possibilities; the many case studies of wrongful convictions show these errors are real and have grievous consequences.<sup>133</sup>

### 4. Informant Testimony

Watch a “B movie” late at night and you stand a good chance of seeing the proverbial scene in a courtroom drama in which a police informant takes the stand to inculcate the defendant in the crime. “The defendant whispered to me over breakfast that he had committed the crime and hidden the money,” the police “snitch” may utter. Although such scenes may make for mild entertainment, the reality is that a number of wrongful convictions have turned on the testimony of police informants who themselves lied for personal gain. As scholars note, informants are often rewarded without

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<sup>131</sup> Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292.

<sup>132</sup> See Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315.

<sup>133</sup> See GOULD, *supra* note 28.

regard to the accuracy and reliability of their information,<sup>134</sup> with as many as one-fifth of wrongful conviction cases based on snitches that lied.<sup>135</sup> A classic case is that of Jeffrey Cox in Virginia. Cox's conviction for abduction and murder was made largely on the testimony of two witnesses, whose prior felony convictions and pending charges were not disclosed to the defense. Each of these facts would have undermined the credibility of the witnesses, but instead of sharing this information with the defense, the prosecution vouched for the veracity of both witnesses in its closing argument.<sup>136</sup> As a federal appellate judge has said of informant testimony, the government relies too heavily on witnesses who are "rewarded criminals," which compromises both the accuracy and the legitimacy of the criminal justice system. "Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government . . . can either contribute to or eliminate the problem," the judge notes.<sup>137</sup>

### 5. Forensic Science

Given the rise and wide acceptance of DNA testing, it is possible to forget that, for decades, law enforcement had to rely on much less accurate forensic methods. Perhaps the most famous practice is fingerprinting, a method so common that applicants for many sensitive jobs have had to submit to a series of fingerprints. But evidence is now mounting about the problems with fingerprinting analysis<sup>138</sup>—which include a lack of validity testing and an absence of validated standards for declaring a match<sup>139</sup>—and in a recent Maryland case a trial judge ruled that latent fingerprint identification is not sufficiently reliable to be admissible into evidence.<sup>140</sup> The substance behind this conclusion was bolstered by a recent National

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<sup>134</sup> See Clifford Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED*, *supra* note 15, at 72.

<sup>135</sup> See Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107 (2006).

<sup>136</sup> GOULD, *supra* note 28, at 96.

<sup>137</sup> Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *HASTINGS L.J.* 1381, 1382 (1996).

<sup>138</sup> See James E. Starrs, *There's Something About Novel Scientific Evidence*, 28 *SW. U. L. REV.* 417 (1999); see also SIMON COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* (2003).

<sup>139</sup> Jennifer Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 *LAW, PROB. & RISK* 127, 129 (2008).

<sup>140</sup> In *Maryland v. Rose*, No. K06-0545, mem. op. at 31 (Balt. County Cir. Ct. Oct. 19, 2007), the trial court held that the ACE-V method of latent fingerprint identification was "a subjective, untested, unverifiable identification procedure that purports to be infallible". See NAT'L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 105 n.78 (2009).

Research Council report on forensic evidence that echoed Haber and Haber's conclusion<sup>141</sup> that "we have reviewed the available scientific evidence of the validity of the ACE-V method [of latent fingerprint identification] and found none."<sup>142</sup>

Fingerprint analysis is hardly the most questionable forensic method employed. More troubling is hair comparison analysis, in which hairs found at a crime scene are compared under a microscope to those of a possible suspect. Although hair comparison analysis has passed the *Frye*<sup>143</sup> and *Daubert* standards in many courts and has been admitted into evidence, more recent research raises considerable doubts about its accuracy.<sup>144</sup> For example, the Law Enforcement Assistance Administration Laboratory Proficiency Testing Program, involving over 235 crime laboratories throughout the United States, found hair comparison analysis to be the weakest of all forensic laboratory techniques tested, with error rates as high as 67% on individual samples, and the majority of laboratories reaching incorrect results on four out of five hair samples analyzed. Another study found that hair comparison error rates dropped from 30% to 4% when common hair comparison methods, which compare a questioned hair to the hair samples of a suspect, were changed to a "lineup" method, in which examiners compare a hair sample from the crime scene to samples from five potential suspects.<sup>145</sup>

Another potentially problematic test has been serology analysis, which seeks to establish the probability that a perpetrator and suspect share the same blood type. By contrast to DNA testing, serology analysis does not specifically identify suspects, but jurors may not appreciate this fact, hearing testimony of similar blood types as proof of identity "with as much definitiveness as science can muster."<sup>146</sup> Of course, that is no longer the case.

DNA testing has helped to uncover the frailties of forensic methods used previously. This said, DNA is not a panacea. There is always the

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<sup>141</sup> Lyn Haber & Ralph Norman Haber, *Scientific Validation of Fingerprint Evidence Under Daubert*, 7 LAW, PROB. & RISK 87 (2008).

<sup>142</sup> NAT'L RESEARCH COUNCIL, *supra* note 140, at 136-45.

<sup>143</sup> See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding that scientific evidence is admissible if the technique is generally accepted as reliable in the relevant scientific community).

<sup>144</sup> See Larry S. Miller, *Procedural Bias in Forensic Science Examinations of Human Hair*, 11 LAW & HUM. BEHAV. 157 (1987); see also Edward J. Imwinkelried, *Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence*, 39 WASH. & LEE L. REV. 41 (1982).

<sup>145</sup> GOULD, *supra* note 28, at 176.

<sup>146</sup> Andre A. Moenssens, Foreword, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 1, 13 (1993).

small probability that the results will be inaccurate, but more importantly, few crime scenes have sufficient, specific biological evidence for DNA analysis. A robber may never touch a victim nor shed hairs or other biological markers in a spot specific to himself.<sup>147</sup> As a result, law enforcement must usually rely on other evidence, including different forms of forensic analysis that carry with them greater risks of inaccuracy.

Apart from the inherent weaknesses of various forms of forensic evidence, there have been several shocking examples of improper, indeed shoddy, laboratory practices and forensic testimony that have led to the conviction of innocent defendants.<sup>148</sup> The problem is so serious that the National Research Council concluded in 2009 that “the forensic science system [in the United States is] fragmented and the quality of practice uneven. . . . These shortcomings pose a threat to the quality and credibility of forensic science practice and its service to the justice system.”<sup>149</sup>

### 6. Prosecutorial Misconduct

For the most part, American prosecutors conduct themselves ethically, seeking to mete out justice even if it means dismissing charges against a defendant whose criminality they suspect but cannot establish. Still, prosecutors may engage in overly suggestive witness coaching,<sup>150</sup> offer inappropriate and incendiary closing arguments,<sup>151</sup> or fail to disclose critical evidence to the defense, all of which may raise the prospect of a wrongful conviction. In research on wrongful convictions, the most commonly established transgression is the prosecution’s failure to turn over exculpatory evidence. Sometimes police officers do not provide prosecutors with this evidence in order to make it available to the defense,

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<sup>147</sup> People are constantly shedding hairs or skin cells, but unless this occurs in a private space where the biological markers can be referenced only to the perpetrator, it is impossible for forensic analysis to “make a match.”

<sup>148</sup> Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009). See also Adam Liptak and Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES, Aug. 5, 2004; Debra Weiss, *NC Report: State Crime Lab Withheld or Overstated Evidence in 230 Cases*, ABA J., Aug. 19, 2010.

<sup>149</sup> “Badly Fragmented” Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques is Lacking (2009), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12589> (last visited August 30, 2010), citing NATIONAL RESEARCH COUNCIL, *supra* note 140.

<sup>150</sup> See Bennett L. Gershman, *Effective Screening For Truth Telling: Is It Possible? Witness Coaching By Prosecutors*, 23 CARDOZO L. REV. 829 (2002).

<sup>151</sup> Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at N25.

or prosecutors may not be aware that they have such information in their files. In other cases, though, the misdeeds are intentional.

Consider the case of Edward Honaker, a man convicted for rape on the basis of testimony from the victim and her boyfriend. The prosecution never turned over an officer's report that the victim had not been "allowed to clearly see the [perpetrator] during the entire sequence of events," nor, more incredulously, did it reveal that the victim and her boyfriend were hypnotized four months after the crime, at which time they first identified Honaker's photo as that of the rapist.<sup>152</sup> Instead, the prosecution's witnesses were permitted to testify at trial, identifying Honaker, without the defense aware that there were good grounds to doubt any identification. In cases like these, it is easy to see how the prosecution's failure to disclose exculpatory evidence that is material<sup>153</sup> can lead to a wrongful conviction.

### 7. Inadequate Defense Representation

Even if prosecutors fail in their duties, we expect a suspect's attorney to zealously investigate and defend his case. As Professor Bernhard explains, "[i]t [is] the defense counsel's responsibility to protect [the innocent] from the mistakes of others: from witnesses' misidentifications, police officers' rush to judgment, and prosecution's reluctance to reveal potentially exculpatory material."<sup>154</sup> Yet, as a Columbia University study of capital appeals has found, ineffective defense lawyering was the biggest contributing factor to the wrongful conviction or death sentence of criminal defendants in capital cases over a twenty-three-year period.<sup>155</sup> The central reason behind ineffective representation is inadequate funding, an absence of quality control, and a lack of motivation.<sup>156</sup> The attorney may be so rushed that he fails to communicate with his client or communicates "in a dismissive, callous or hurried manner."<sup>157</sup> He may make perfunctory attempts at discovery, if any; engage in a narrow or shallow investigation; neglect to retain needed experts or test physical evidence; fail to prepare for trial; or offer "weak trial advocacy and superficial or tentative cross-

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<sup>152</sup> GOULD, *supra* note 28, at 104.

<sup>153</sup> See e.g., *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>154</sup> Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED*, *supra* note 15, at 227-28.

<sup>155</sup> Liebman, Fagan & West, *supra* note 39.

<sup>156</sup> AD HOC INNOCENCE COMM., AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (2006); Bernhard, *supra* note 154.

<sup>157</sup> Sheila Martin Berry, *Bad Lawyering: How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 490 (2003).

examination.”<sup>158</sup> The result is a cascade of errors that dilutes or even destroys the barrier provided by an effective advocate between an innocent defendant and a wrongful conviction.

### 8. *Interrelated Themes*

Although the factors just discussed are those that appear most often in research on the sources of wrongful conviction, three other issues merit mention for, if not definitive sources, they serve as either background influences or interrelated factors. These include questions of race, inadequate postconviction remedies, and the role of the media. Any student of the criminal justice system recognizes that there are serious race effects in the identification, prosecution, and sentencing of criminal suspects. Racial and ethnic minorities are disproportionately more likely than whites to be stopped and arrested by the police,<sup>159</sup> and once convicted, they are also more likely to receive longer prison terms than do whites.<sup>160</sup> They are also more likely to be subject to some of the sources that lead to wrongful convictions.<sup>161</sup> The clearest example is mistaken eyewitness identification, in which the research indicates that errors are more likely when the victim and perpetrator are of different races. In the cases studied, the most common pattern of error is when a white victim is raped by an African-American or Hispanic man and unintentionally identifies an innocent person as the perpetrator. Another area of concern is jury decision-making; in a number of cases, all-white juries have erroneously convicted African-American men based on questionable evidence and with scant deliberation.<sup>162</sup> To be sure, these problems are hardly limited to cases of known exonerations—and, indeed, procedural justice is threatened when the trier of fact allows racial assumptions or prejudice to enter into the calculus of decision. But when jurors (and judges) operate on either known or even unconscious biases to convict the innocent, the legitimacy of the criminal justice system is threatened.

Once convicted, innocent defendants often find it extremely arduous to establish their blamelessness. Legal doctrine makes such showings difficult to prove, for in throwing out a conviction and, in some cases, ordering a

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<sup>158</sup> *Id.*

<sup>159</sup> David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 268 (1999).

<sup>160</sup> Tara L. Mitchell et al., *Racial Bias in Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005).

<sup>161</sup> Dianne Martin, *Lessons About Justice From The “Laboratory” of Wrongful Convictions: Tunnel Vision, The Construction of Guilt and Informer Evidence*, 70 UMKC. L. REV. 847 (2002).

<sup>162</sup> GOULD, *supra* note 28.

new trial, the courts must be persuaded that no reasonable juror (or judge in a bench trial) could have concluded that the defendant was guilty.<sup>163</sup> The defendant's task is even more onerous when states maintain procedures, as Virginia did for decades, that a motion for new trial based on exculpatory evidence had to be filed within twenty-one days of the order of conviction. As any criminal trial lawyer knows, it is rare to the point of unknown for important, new evidence to come to light within three weeks of sentencing.

Virginia has now replaced its twenty-one-day rule with a Writ of Actual Innocence,<sup>164</sup> a procedural outlet that other states are considering. But a promising law on the books does not necessarily translate to actual exonerations if the courts that administer the law are systematically skeptical of non-biological evidence. Indeed, it is hardly coincidental that the vast majority of exonerations were achieved not because the courts stepped in and ordered a new trial or habeas corpus relief, but because governors or other political leaders, including parole boards, intervened. In some cases, they had the active support of prosecutors, who admirably came forward to rectify what they believed had been a miscarriage of justice. But as Daniel Medwed's research also has shown, the institutional culture of some prosecutors' offices creates an environment in which "resistance to post-conviction innocence claims is an accepted and pervasive cultural norm" that helps prosecutors avoid being seen as soft on crime.<sup>165</sup> In such cases, an innocent but convicted defendant faces even greater obstacles in rectifying the error done to him.

Finally, it is important to note the role of the media in both creating the conditions for wrongful convictions and investigating doubtful cases postconviction to help defendants prove their innocence. One of the background conditions that raises the possibility of a wrongful conviction is the heinousness of the underlying crime. Brutal rapes and murders, multiple murders, and crimes against children particularly inflame the sensibilities of the public and understandably lead to calls to catch and punish the criminal as quickly as possible. When these crimes also generate press coverage—especially the sensational coverage of televised media—there arises a continuous drumbeat of pressure for authorities to "do something" to apprehend a suspect. Under these circumstances, research shows, police officers and prosecutors may feel rushed to complete their

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<sup>163</sup> Unlike in a criminal trial, where the prosecution must establish the defendant's guilt beyond a reasonable doubt, in postconviction proceedings the defendant must show that no reasonable juror (or judge in a bench trial) could have concluded that the defendant was guilty. See *House v. Bell*, 547 U.S. 548, 537-40 (2006).

<sup>164</sup> VA. CODE ANN. § 19.2-327.10 (2007).

<sup>165</sup> Daniel Medwed, *The Zeal Deal: Prosecutorial Resistant to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 130 (2004).

investigations and, resultantly, may fall prey to tunnel vision that has them pursuing the wrong suspect.

At the same time, the media, or more specifically, print reporters, have been instrumental in establishing the innocence of some defendants who otherwise would have spent years in prison if not faced the prospect of execution. Perhaps the most famous are former journalists, now Northwestern University professors, David Protess and Robert Warden, whose investigations with their students helped to uncover errors in several Illinois cases. They were aided by Ken Armstrong, Steve Mills, and Maurice Possley, all writers for the *Chicago Tribune*, whose “exposé” on erroneous capital convictions in Illinois was instrumental in convincing then-Governor George Ryan to commute the sentences of Illinois’s death row population and to issue a moratorium on further capital prosecutions until additional reforms could be considered. Warden has written about this process and the power that investigative journalism can have in raising awareness of wrongful convictions and building the constituency for reform.<sup>166</sup> As his Center on Wrongful Convictions<sup>167</sup> explains,

[i]t wasn’t that Americans didn’t care that innocent men and women were rotting in prison or on death row, but rather that most people simply couldn’t accept the fact that such miscarriages of justice could happen on a large scale. When the public and the legal profession finally did come to recognize the alarming scope of the problem, it turned out that there was a great deal of interest.<sup>168</sup>

#### IV. IMPROVING THE RESEARCH

We agree with Gross and O’Brien on the need to improve the research conducted on wrongful convictions, for very few of the studies to date have employed controls. Certainly, we know that several systemic problems are associated with wrongful convictions, but is it possible that those failings are found in criminal prosecutions as a whole, regardless of whether the defendant is innocent? Put another way, might a case of rightful conviction see the same kinds of failures as a wrongful conviction? Or, conversely, is it possible that a defendant could be rightly acquitted even when facing such problems as an erroneous identification or incomplete forensic evidence? In a perfect world of research, we would clamor for studies that employ an effective control group, but here that is difficult to obtain. Unlike in medical research, a suspect may not be randomly assigned to a

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<sup>166</sup> See Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803 (2003).

<sup>167</sup> Warden serves as executive director of Northwestern University’s Center on Wrongful Convictions.

<sup>168</sup> About Us, Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/> (last visited Mar. 22, 2010).

treatment group at the start of a criminal case. Some of this is logistical,<sup>169</sup> but more importantly, our system of constitutional rights would not permit it.<sup>170</sup>

Where controls have been employed, researchers generally have compared cases of wrongful conviction with those of rightful conviction or have examined exonerations against cases of presumed innocence in which the defendant was executed. In the first set of comparisons, researchers effectively have asked, why does the criminal justice system work properly in some cases (the rightful convictions) but not in others (the wrongful convictions)? In others, they presume that the criminal justice system has failed both sets of defendants (as all were wrongly convicted) but then ask why the system was able to correct the errors in some cases (those who were released) but not in others (cases in which a presumably innocent defendant was executed).

A classic example of the first matched comparison study is Talia Harmon's 2001 article in *Justice Quarterly*.<sup>171</sup> Harmon assembled a data set of seventy-six cases from 1970 to 1998 in which capital inmates were released from death row because of "doubts about their guilt,"<sup>172</sup> and compared them to a random sample of matched inmates who were convicted at trial and executed for their crimes. Using logistic regression, Harmon identified several independent variables that distinguished the two sets of cases. In her study, capital inmates were more likely to be released if new evidence had been discovered, if the defense alleged perjury by prosecution witnesses, if the appeal was handled by a private lawyer or one from a resource center, or if fewer forms of evidence had been introduced at trial.

Harmon's study is interesting on several levels. First, it occupies a hybrid position between predicting which sources may cause a wrongful conviction in capital cases and which factors will lead the system to correct its errors. For example, the amount of evidence introduced at trial could explain why a wrongful conviction occurred (some trial attorneys presumably not doing their job) and why an appellate court would grant a defendant's release from death row (the lawyer's ineffective assistance justifying a successful appeal). Interestingly, Harmon's work showed that

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<sup>169</sup> It would be nearly impossible to predict at the start of a case which defendants would be subject to, say, junk science, whereas others would be provided complete and accurate forensic results.

<sup>170</sup> Indeed, the Sixth Amendment would prohibit any effort to assign one group of defendants to capable lawyers and another group to incompetent counsel.

<sup>171</sup> Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 *JUST. Q.* 949 (2001).

<sup>172</sup> *Id.* at 957.

the type of lawyer at trial (public defender or privately retained) did not predict whether a defendant would be released on appeal, but the data indicated that type of appellate lawyer—and thus, either quality or available resources<sup>173</sup>—affected the chance of release.

The other curiosity about Harmon's work is that she does not fully define whether the defendants released from death row were factually innocent. In pulling from Radelet and colleagues' 1996 work,<sup>174</sup> she notes that there were "doubts" about the defendants' guilt.<sup>175</sup> To be sure, each of the defendants was released from death row, but it's not the case that each defendant was exonerated and released from prison. Thus, to some extent, Harmon's study tells us more about when and why the criminal justice system will grant capital appeals than it does about the sources of wrongful convictions. Still, it's interesting that several of her findings dovetail closely with prior case studies on wrongful convictions. In her list of statistically significant predictors, one finds variables associated with prosecutorial misconduct and snitch testimony as well as ineffective defense representation.

Harmon later teamed up with criminologist William Lofquist to compare matched sets of capital defendants that the researchers claimed were innocent.<sup>176</sup> In one set, the defendants had been released from prison; in the other, the defendants had been executed. Thus, Harmon and Lofquist sought to examine why the criminal justice system worked—or did not—in freeing the wrongly convicted from death row. Their results mirrored many of Harmon's findings in her earlier study, concluding that defendants who had a private or resource center lawyer representing them at trial (as opposed to a public defender), whose prosecutions relied on fewer forms of evidence at trial, who raised allegations of perjury on appeal, who did not have a prior felony record, or whose case involved an African-American defendant and a white victim were significantly more likely to be formally exonerated.

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<sup>173</sup> In identifying private counsel or resource center lawyers as the most successful on appeal, Harmon's work uncovers a belief widely presumed among the defense community. Lawyers from large firms who handle direct or habeas corpus appeals on a *pro bono* basis are often able to marshal substantial talent and resources for the defense. Similarly, lawyers from capital resource centers have more specialized training and experience than other attorneys who may take these cases. None of this should be seen as denigrating the work of other capital appellate attorneys; rather it is the regular experience and available resources of other lawyers that may give them a greater leg-up in appellate work.

<sup>174</sup> Radelet, Lofquist & Bedau, *supra* note 17.

<sup>175</sup> Harmon, *supra* note 171, at 957.

<sup>176</sup> Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498 (2005).

Whereas Harmon and Lofquist sought to compare the innocent-exonerated to the innocent-executed, Gross and O'Brien have compared the innocent-exonerated to the guilty-executed.<sup>177</sup> In a sense, they were asking different questions. Harmon and Lofquist were interested in why the criminal justice system failed the innocent after a capital conviction. Gross and O'Brien, by contrast, provided a more descriptive analysis of capital litigation, essentially asking what is unique about capital cases that leads to exoneration in some cases and execution in others.<sup>178</sup> Admittedly, any wrongful conviction is, by definition, a failure, but at least postconviction exoneration avoids the most tragic of possibilities—the execution of an innocent person.

Gross and O'Brien's analysis relied on chi-square tests rather than regression equations, but their results offer modest predictors for why capital cases may end in exoneration over execution. As they note, capital defendants who were exonerated were significantly less likely to be reported as mentally ill, more likely to have been tried for crimes that involved two or fewer victims or child victims, less likely to have confessed, more likely to have claimed innocence at trial, and more likely to have had an extensive criminal record (especially violent felonies) than those who were executed.<sup>179</sup>

Gross and O'Brien correctly note the limitations of studying wrongful convictions this way.<sup>180</sup> By relying on official exonerations to define the set of wrongful convictions, they leave out cases in which a defendant is actually innocent but cannot reach the heightened bar of proof postconviction.<sup>181</sup> Furthermore, they concentrate our attention on capital rape/murder, in which DNA evidence is more likely to be found than in most other types of cases and can offer better “objective” evidence of innocence or guilt. Indeed, rather than explaining why some defendants are wrongly convicted, research like that of Gross and O'Brien may tell us

<sup>177</sup> Gross & O'Brien, *supra* note 4.

<sup>178</sup> Of course, it is possible that some of the executed defendants were, in fact, innocent and should have been exonerated. But, as Gross and O'Brien note, “[f]or those who were put to death, the legal system concluded that there was no evidence of innocence sufficient to stop the executions. For those who were exonerated, the system determined there was sufficient evidence of innocence to require that the defendants be cleared and released.” *Id.* at 948.

<sup>179</sup> *Id.* at 952-57.

<sup>180</sup> As they contend, “[a]lmost everything that we do know [about wrongful convictions] is based on information about exonerations, and it is clear that exonerations are highly unrepresentative of wrongful convictions in general.” *Id.* at 958.

<sup>181</sup> Whereas the state must prove guilt beyond a reasonable doubt at trial, a convicted defendant must establish that no reasonable person would believe him guilty in postconviction proceedings. *See House v. Bell*, 547 U.S. 518, 538-40 (2006).

more about how some capital defendants are able to secure postconviction release.

Even accepting these limitations, we would hardly doubt the significance of their work. To a large extent, their research helps to explain why some capital cases “go right” in the system while others fail.<sup>182</sup> Moreover, their work needs to be read in tandem with the findings from several other studies of wrongful convictions. Although Gross and O’Brien’s study presents at least one seeming anomaly (exonerations were less likely among those considered mentally ill), their findings confirm and add more detail to the picture of wrongful convictions that has emerged from prior research. Examining their findings as a whole, one sees that capital exonerations were more likely in sensational cases, in cases investigated more hurriedly, and when police officers already presumed the suspect to have criminal proclivities.

Perhaps the most comprehensive study of wrongful convictions using a matched comparison sample methodology to date is Brandon Garrett’s analysis of the first two hundred innocent defendants to be released after postconviction DNA testing exonerated them.<sup>183</sup> Of these, Garrett selected a subset of non-capital cases in which a written decision was available and matched them to a random set of non-capital cases in which DNA evidence was not available; in the control group, then, Garrett did not know whether the defendants were innocent or guilty. His goal was to understand how the criminal justice system handled the cases of persons wrongly convicted but eventually exonerated by postconviction DNA testing.

For the most part, Garrett found that postconviction claims were raised and resolved at similar rates for both groups of defendants. Although 1% to 2% of criminal convictions are reversed on appellate review, the rate in both sets of cases was higher—9% for the DNA exonerations and 10% for the control group. These shared rates likely reflect the greater proportion of rape and murder cases in both groups, the kinds of crimes in which courts are most likely to step in and reverse a faulty conviction. But, it is distressing to the point of tragic that the court system could have missed the innocence of so many eventual exonerees. Recall that all of the defendants in Garrett’s first group were exonerated by DNA testing, yet in only 9% of the cases did the defendant win his freedom on appellate review prior to

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<sup>182</sup> Such judgments presume, of course, that capital punishment is acceptable. We leave such questions to the many other articles on the subject and note, instead, that the issue here is whether the criminal justice system works as intended. In this respect, we categorically oppose any who would claim that a wrongful execution is an acceptable cost for a system of capital punishment. See generally *Kansas v. Marsh*, 548 U.S. 163 (2006) (Scalia, J., concurring).

<sup>183</sup> Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

postconviction testing. Somewhere in this, the criminal justice system failed the innocent. Garrett's work helps to explain why. As he describes, "these exonerees could not effectively litigate their factual innocence, likely due to a combination of unfavorable legal standards, unreceptive courts, faulty criminal investigation by law enforcement, inadequate representation at trial or afterwards, and a lack of resources for factual investigation that might have uncovered miscarriages."<sup>184</sup>

Together, the studies of Harmon, Lofquist, Gross, O'Brien, and Garrett add considerably to our knowledge of wrongful convictions while confirming many of the sources previously identified that explain why wrongful convictions occur and are difficult to correct. That said, there is more that can be done to expand that knowledge base. As we have explained elsewhere,<sup>185</sup> the field will benefit from additional empirical research, continuing the pattern of matched comparison samples. These methods would allow scholars to more accurately determine which factors are uniquely present in wrongful conviction cases as well as to statistically test hypotheses about which factors may be causally related to or predict wrongful conviction.<sup>186</sup>

Wrongful conviction cases, of course, are the most dramatic examples of how the system got the crucial question—the guilt or innocence of the defendant—wrong. They illustrate a breakdown in the accuracy of human judgment at multiple levels: police investigation, prosecution, pre-trial motions, judicial rulings, and ultimately trial verdicts.<sup>187</sup> Cases of rightful acquittal, by contrast, illustrate how the criminal justice process (or at least the court system) got it right in acquitting or dismissing charges against a factually innocent person and thus sparing him the fate of being wrongfully convicted. What we want to know—and thus what dictates our matching strategy—is which factors are uniquely present in the cases that lead the system to rightfully acquit or dismiss charges against the innocent<sup>188</sup> that are not present in cases that lead the system to wrongfully convict the

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<sup>184</sup> *Id.* at 131.

<sup>185</sup> Leo & Gould, *supra* note 80.

<sup>186</sup> In the interests of full disclosure, we have just begun such a project, with funding from the National Institute of Justice, to collect data from and compare cases of wrongful conviction and rightful acquittal to understand which factors explain why innocent defendants are convicted in some cases and acquitted in others. By "rightful acquittal," we mean factually innocent defendants who were cleared of charges following indictment but before conviction.

<sup>187</sup> Except, that is, in cases of wrongful conviction by plea bargain, but those matters are comparatively rare. See Bedau & Radelet, *supra* note 13, at 55-56; Gross et al., *supra* note 45, at 537-38.

<sup>188</sup> This is arguably the most important goal of the criminal justice system.

innocent.<sup>189</sup> If we understand this, then it is a relatively short step to understanding what policy interventions can influence the justice system to get it right and acquit the innocent, thereby preventing future wrongful convictions.

#### V. THE RESPONSIBILITIES OF PROFESSIONALS, POLICYMAKERS, AND POLITICIANS

We say a “short step” to policy intervention somewhat tongue-in-cheek, for identifying the most appropriate interventions and implementing them are vastly different processes; this distinction has been noted by several of the authors who have written about wrongful convictions.<sup>190</sup> Garrett, for example, is uncertain about the prospects of reform, saying that “none will be accomplished through change in legal doctrine, but rather, through a surprising explosion in public information about the causes of the most egregious errors in our criminal justice system, this information will lead to reform through the conduit of civil rights suits.”<sup>191</sup> Zalman, while agreeing with Garrett about the difficulties of reform, doubts the power of litigation to bring about systemic change. As he says, civil suits can “initiate and highlight problems, but without other levers of change, it is unlikely that deep policy modifications will occur.”<sup>192</sup> A scholar of public administration as well as criminal justice, Zalman reminds us that the process of implementing reforms is a multifaceted mechanism, “which extends conceptually from problem perception and agenda building, to policy formulation, legitimation, adoption, and budgeting, and to implementation, evaluation, and termination or redesign.”<sup>193</sup> Indeed, as he says, the criminal justice system too often lacks the ability to “reflect on its own shortcomings and to correct them.”<sup>194</sup>

Findley extends Zalman’s critique of the criminal justice system, claiming that reform “cannot be undertaken just by gathering lawyers together to think about the rules that govern trials.” In Findley’s view, change must be seen as a “holistic” process “with input from experts and

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<sup>189</sup> This is arguably the worst possible error the criminal justice system can make short of executing the innocent.

<sup>190</sup> Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002); Garrett, *supra* note 183; Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction*, 17 CRIM. JUST. POL’Y REV. 468 (2006).

<sup>191</sup> Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 111.

<sup>192</sup> Zalman, *supra* note 191, at 483.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 485.

stakeholders involved at every step in the process.”<sup>195</sup> We agree, and indeed, the work of one of us with the Innocence Commission for Virginia, confirms Findley’s view. “Change” does not come about simply because researchers or commissions produce reports about the number or sources of wrongful convictions. Rather, as political scientist John Kingdon would explain, policy change occurs when an actor, an initiative, and a policy window all converge at the same time.<sup>196</sup> To outsiders, the process may appear as “an idea whose time has come,” but to Kingdon, policy change does not happen by chance. Actors must still pressure decision makers with a plausible proposal when that agenda is ripe for consideration.

Empirical research can help to “ripen” the agenda for reform, as the publication—and publicizing—of cases of wrongful conviction can start to create a “record” of a problem that warrants attention. In this respect, the wrongful conviction movement has been successful in marshalling the evidence of DNA exonerations to demand that the criminal justice system and policymakers respond to a problem of erroneous convictions. But the window for such reforms may be closing. Part of the reason concerns the natural flow of policy change. According to political scientists Frank Baumgartner and Bryan Jones, policy diffusion looks like a logistic S-shaped curve. “Policy adoption is slow at first, then very rapid, then slow again as the saturation point is reached.” Change tends to happen quickly, returning to long periods of equilibrium as the “attention of governmental elites” wanes, and “the apathy of those not keenly interested in the particular issue” allows problems to recede from the policy agenda.<sup>197</sup> With wrongful convictions a key part of the national policy debate for twenty years now,<sup>198</sup> we may be at a point where the issue just naturally wanes. Indeed, since the passage of the Innocence Protection Act in 2004,<sup>199</sup> Congress has shown little interest in the subject.

But there is more. Arguably, it was DNA exonerations—especially those of death row defendants—that propelled the issue of wrongful convictions to the national agenda. DNA testing made it virtually impossible to doubt the innocence of those exonerated, and the realization that several of these individuals came within months or even days of execution drew attention to the issue in a way that numerical reports could

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<sup>195</sup> Findley & Scott, *supra* note 131, at 341.

<sup>196</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1995).

<sup>197</sup> FRANK BAUMGARTNER & BRYAN JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 18 (1993).

<sup>198</sup> In many ways, the “modern era” of wrongful convictions was kicked off on August 14, 1989, when Gary Dotson was exonerated by a postconviction DNA test. GOULD, *supra* note 28, at 17.

<sup>199</sup> 18 U.S.C. § 3600 (2006).

not. However, as DNA testing has become more commonplace at the beginning of criminal investigations, it is arguable that there will be fewer indisputable cases of innocence to generate attention postconviction. On one hand, this is a tremendous accomplishment, as better forensic evidence weeds out innocent suspects before they are indicted or convicted. But at the same time, it may well be harder to establish innocence in the larger percentage of cases where biological evidence is unavailable. If judges, prosecutors, governors, and even the public have become accustomed to equating exonerations with DNA testing, will they be so willing to see and trust evidence of innocence when it is non-biological? If Virginia is a guide, the future is doubtful.<sup>200</sup>

In the end, our concern is not so much with the state of research on wrongful convictions as it is whether professionals within the criminal justice system will be willing to respond to that research with appropriate initiative. To be sure, we believe that social science research has much more it can offer to the study of wrongful convictions. But the research to date—even with some of its natural methodological limitations—has provided us considerable insight into the sources, consequences, and potential remedies for wrongful convictions. It is, instead, the professionals who staff our criminal justice system and the politicians and policymakers who employ them that may require the more significant improvement. Considering the interests at stake in a criminal prosecution and conviction—especially when the crime carries a capital charge—it is incredible to the point of embarrassing that the American system of justice has been so resistant to innocence commissions or post-exoneration review.

This recalcitrance stands in stark relief to the openness that both the medical profession and the transportation sector have brought to learning from mistakes.<sup>201</sup> In hospitals, doctors regularly meet in morbidity and mortality conferences to “investigate the reasons and responsibility for adverse outcomes of care.”<sup>202</sup> Similarly, the National Transportation Safety Board (NTSB) dispatches investigators immediately after a major transportation accident and then convenes a hearing to examine the causes of the tragedy in order to prevent future errors. As the NTSB explains,

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<sup>200</sup> In 2008, Darrell Andrew Copeland became the first petitioner in Virginia to succeed on a writ of actual innocence, when the Court of Appeals dismissed his conviction for felony gun possession. According to the appeals court, more than 120 petitions for writs of actual innocence have been rejected. Copeland is the only inmate whose petition has been supported by the attorney general. Posting of Cjay to NowPublic, Va. Court Grants First Writ of Actual Innocence in Chesapeake Case, <http://www.nowpublic.com/world/va-court-grants-first-writ-actual-innocence-chesapeake-case> (Aug. 13, 2008, 21:57).

<sup>201</sup> Doyle, *supra* note 5.

<sup>202</sup> LINDA T. KOHN, JANET M. CORRIGAN & MOLLA S. DONALDSON, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 269 (2000).

more than 80% “of its recommendations have been adopted by those in a position to effect change. Many safety features currently incorporated into airplanes, automobiles, trains, pipelines and marine vessels had their genesis in NTSB recommendations.”<sup>203</sup>

If there was a good candidate for post-error review, it would be the criminal justice system. Wrongful convictions do such harm to so many<sup>204</sup> that one would expect criminal justices to seek out the lessons from past errors in order to prevent them. And yet, experience suggests otherwise. Only a handful of states have undertaken serious and systematic review of wrongful convictions,<sup>205</sup> and when practitioners have been involved, it has often taken “kicking and screaming” to introduce new approaches or technologies to improve their work.<sup>206</sup>

This level of resistance, such astounding ignorance and fear, should not be tolerated in any profession, but nowhere is this more important than in the criminal justice system. The stakes are simply too high to put our heads in the sand and pretend that the research uncovered on erroneous convictions does not warrant attention. To be sure, few would claim that the criminal justice system fails more often than it succeeds, but success is premised to an extent on learning from past mistakes to prevent them in the future. Contrary to the claims of some detractors, we are not “demanding an impossibility—a perfect system.”<sup>207</sup> Rather, as we have explained before, wrongful convictions “demand the best from the state’s penal power.”<sup>208</sup> Not because review will lead to an error-free process, but because professionalism demands it.

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<sup>203</sup> About the NTSB, History and Mission, [http://www.nts.gov/Abt\\_NTSB/history.htm](http://www.nts.gov/Abt_NTSB/history.htm) (last visited Mar. 23, 2010).

<sup>204</sup> In addition to the innocent suspect who is convicted and imprisoned, wrongful convictions harm victims, who must relive the crime a second time if the actual perpetrator is caught and a new trial is pursued; the general public, which is at risk while dangerous criminals remain free; taxpayers, who must cover civil damages to the wrongly convicted; and police officers, prosecutors, and judges, whose reputation for fairness and professionalism may be at risk.

<sup>205</sup> Consider the North Carolina Actual Innocence Commission, North Carolina Actual Innocence Commission—Mission Statement, Objectives, And Procedures, [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Mission.html](http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html) (last visited Mar. 23, 2010), the Ryan Commission in Illinois, Executive Order as Issued by Former Governor George Ryan, Creating the Commission on Capital Punishment, [http://www.idoc.state.il.us/ccp/ccp/executive\\_order.html](http://www.idoc.state.il.us/ccp/ccp/executive_order.html) (last visited Mar. 23, 2010), and the Innocence Commission for Virginia, <http://www.icva.us> (last visited Mar. 23, 2010).

<sup>206</sup> Strange Justice, <http://stju.blogspot.com/2006/07/maximum-use-of-videotaping-indicated.html> (last visited Apr. 16, 2010).

<sup>207</sup> Marquis, *supra* note 37.

<sup>208</sup> GOULD, *supra* note 28, at 244.

Looking to the future, social science research will undoubtedly expand our understanding of wrongful convictions and system failures. But unless criminal justice professionals, policymakers, and politicians are truly open to these findings and are willing to adopt new measures in light of the research, the research threatens to become, quite literally, an academic exercise. The first century of research has taken us to a point of revelation and burgeoning reform. Whether the next stage of investigation will be as illuminating and valuable may depend more on practice than research.