

One-hundred Years of Getting it Wrong? Wrongful Convictions After a Century of Research

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Almost a century ago in the predecessor to this journal,³ Yale law professor Edwin Borchard kicked off the study of wrongful convictions in the modern era⁴ when he published an article on European approaches to “unjust convictions.”⁵ Ninety-five years later, however, professors Samuel Gross and Barbara O’Brien published an indictment of the state of scholarship on wrongful conviction. Contending that researchers “do not know much about false convictions” and that “it will be difficult to learn more,” the pair concluded that the “main message is gloomy.”⁶ Essentially, they said, research had not advanced sufficiently for nearly a century’s worth of attention.

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 think their conclusion wrong about the state of knowledge. To be sure, there remain questions about the prevalence of wrongful convictions, 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 frailties found in criminal cases as a whole. But, to say we know little about the subject is to disregard decades of research on wrongful convictions, and especially some of the most insightful work that has been conducted in the last two decades.

³ Until 1932, the Journal of Criminal Law and Criminology was known as the Journal of the American Institute of Criminal Law and Criminology.

⁴ Professor Bruce Smith traces interest in wrongful convictions back to 17th Century England, “with many influential treatise writers and public officials . . . urg[ing] the courts [to] adopt stricter evidential safeguards in capital cases.” (Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1188-1189 (2005).) In America, Borchard’s article, and his later book, which is described in Part I., *infra*, are among the earliest, most-cited publications on wrongful convictions.

⁵ Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1913).

⁶ 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 (2008).

In the article that follows, we analyze a near-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 piece is divided into four sections. In Part One, we chronicle the range of research that has been conducted over the last several decades and explain how it has changed in form. Part Two is the bulk of the article where we address the challenge provided by Gross and O'Brien. We begin this section by acknowledging questions about the rate of wrongful convictions while arguing 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, that we should consider these factors as contributing sources, not exclusive causes of wrongful convictions, and second, that 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 Three 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 Four, 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 research into wrongful convictions. 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. 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.

I. A Short History of Research Into 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.⁷ Twenty years later, his book, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, created a stir when it identified 65 cases in which an innocent person had been convicted.⁸ Borchard also classified the likely "sources of error including erroneous eyewitness testimony, false confessions, faulty circumstantial evidence, and prosecutorial excesses."⁹ Yet, for the next fifty years, research into 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."¹⁰ 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, the author of fictional defense lawyer Perry Mason,¹¹ and judge Jerome Frank, who collaborated with his daughter Barbara on the book, *Not Guilty*.¹²

"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

⁷ Borchard, *supra* note 5.

⁸ EDWIN BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).

⁹ Smith, *supra* note 4, at 1216.

¹⁰ 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).

¹¹ Among other things, Gardner created the "Court of Last Resort," an unofficial body to investigate suspected cases of wrongful conviction (Weinberg, from my book).

¹² JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957).

series of unrelated and relatively infrequent articles and books.”¹³ However, in 1987, Hugo Bedeau 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.¹⁴ In addition to describing the facts of these cases, Bedeau 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 into wrongful convictions, inspiring others to research and write about the sources and consequences of wrongful conviction,¹⁵ as well as to re-analyze¹⁶ and extend their findings.¹⁷ All the while, they have continued to collect, analyze, and publish data about wrongful conviction cases.¹⁸

Bedeau and Radelet’s article was followed in the 1990s by a series of books on the subject.¹⁹ Often following a “familiar plot”²⁰ of works like Borchard’s 1932 book, these

¹³ Leo, *supra* note 10 at 204.

¹⁴ Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

¹⁵ 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).

¹⁶ James Acker, Thomas Brewer et al., *No Appeal From the Grave: Innocence, Capital Punishment, and the Lessons of History*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 154-173 (Saundra Westervelt & John Humphrey eds., 2001).

¹⁷ 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).

¹⁸ MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); Michael Radelet, William Lofquist & Hugo Bedau, *Prisoners Released from Death Row Since 1970 Because of Doubts About Their Guilt*, 13 T. M. COOLEY L. REV. 907 (1996); Michael Radelet & Hugo Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105 (1998); Hugo Bedau & Michael Radelet, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587 (2004); Michael Radelet, *The Role of Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH. L. REV. 199 (2008).

¹⁹ MARTIN YANT, *PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED* (1991); DONALD CONNERY, *CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE*

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. Once limited to such imperfect techniques as serology testing or hair comparison analysis,²¹ law enforcement officials found that they could test biological evidence for common genetic links between perpetrators and potential suspects, permitting results that were infinitesimally 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, some of the defendants even released from death row.²²

These cases rightly drew media attention to the frailties of the criminal justice system, but perhaps more important was the serious problems they revealed 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

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).

²⁰By 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 in the innocence of the wrongly convicted. These stories usually close with recommendations for “familiar policy solutions” to prevent future wrongful convictions. Leo, *supra* note 10, at 207.

²¹ These and other forensic testing methods are discussed in PART II.C., *infra*.

²² www.innocenceproject.org (last viewed February 5, 2010).

excluded by DNA testing.”²³ 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 has not only generated more attention for, and research about, wrongful convictions, but it also seems 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 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.”²⁴ The IP has led successful efforts to exonerate hundreds of innocent defendants. It also has spawned the creation of regional innocence projects or legal clinic at law schools around the country. Among the most famous is Northwestern University’s Center on Wrongful Conviction, where 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 stroke in 2000, former Governor George Ryan commuted all death sentences and imposed a moratorium on further executions until a special commission and then the General Assembly addressed the several problems in investigations and

²³ EDWARD CONNORS, THOMAS LUNDGREAN, NEAL MILLER, & TOM MCEWEN, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), xxviii.

²⁴ <http://www.innocenceproject.org/about/> (last viewed February 5, 2010).

prosecutions that saw more convicted murders released from prison upon questions of their guilt than actually executed over a 22 year period.²⁵

Illinois is not alone, for North Carolina,²⁶ Virginia, and California also have seen innocence commissions, modeled in many ways on the Criminal Case Review Commission (CCRV) 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.”²⁷ Two of the most famous examples of the commissions were those investigating the exonerations of Guy Paul Morin and Thomas Sophonow.²⁸ 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 suspected miscarriages of justice and decide if they should be referred to an appeal court.”²⁹

As we discuss in a later section,³⁰ 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 are measures to conduct eyewitness

²⁵ Thomas P. Sullivan, *Repair or Repeal: The Report of the Illinois Governor’s Commission on Capital Punishment*, 26 CHAMPION 10 (2002).

²⁶ Although Illinois’ 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 has been 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).

²⁷ Watson Sellar, *A Century of Commissions of Inquiry*, 25 CAN. BAR REV. 1 (1947).

²⁸ Barry C. Scheck & Peter J. Neufeld, *Toward the formation of “Innocence Commissions”*, 86 JUDICATURE 100 (2002).

²⁹ http://www.ccrv.gov.uk/about/about_27.htm (last viewed June 13, 2006).

³⁰ See section II.C., *infra*.

identification procedures with sequential, double-blind procedures and to videotape 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 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.³¹

³¹ Borchard, *supra* note 5.

II. 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 USC law professor Dan Simon, the “overall rate of error in the criminal justice system is unknown, and unknowable.”³² 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 three to five percent of convictions.³³

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 factual and legal innocence. The former means that someone else committed the crime, whereas the latter 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

³² Dan Simon, *Are Wrongful Convictions Episodic or Epidemic?*, Paper presented at the annual meeting of the Law and Society Association (2006).

³³ 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 Marvin Zalman, Brad Smith & Amy Kiger, *Officials’ Estimates of the Incidence of “Actual Innocence” Convictions*, 1 JUST. Q. 72-100 (2008). Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 87 J. CRIM. L. & CRIMINOLOGY 768 (2007).

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.”³⁴

In several cases, factual innocence and legal innocence coincide, where, for example, the constitutional violations that produce legal innocence 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.³⁵ In 2000, Professor James Liebman and colleagues published their research on error rates in capital cases between 1973-1995.³⁶ The researchers estimated that 68 percent of capital convictions “were thrown out because of serious flaws” in the investigation or prosecution.³⁷ But, whereas judicial reversal qualifies as at least legal innocence, 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, of which only five percent of the original total were “cleared of the capital offense.”³⁸ Even among this group, Liebman et al. were not able to estimate which defendants were factually innocent.

Such distinctions should not imply that we disregard cases of legal innocence, unconcerned, as some might imply, that such “legal technicalities” are hardly cause for alarm. Legal innocence *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

³⁴ Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005).

³⁵ See T. G. Poveda, *Research Note: Estimating Wrongful Convictions*, 18 JUST. Q. 689 (2001).

³⁶ James S. Liebman, Jeffrey Fagan, & Valerie West, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEXAS L. REV. 1839 (2000).

³⁷ *Id.* at 1853.

³⁸ *Id.*

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.³⁹ Out of a sample of nearly 200 participants, 70 percent of respondents estimated that wrongful convictions occurred less than one percent of the time, 20 percent rated the frequency at 1-5 percent of cases, two percent said errors occurred between five and ten percent of the time, and six percent of respondents denied that wrongful convictions occur.⁴⁰ 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.⁴¹

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

³⁹ Ronald Huff, Arye Rattner, & Edward Sagarin, *Guilty until proven innocent: Wrongful conviction and public policy*, 32 CRIME & DELINQ. 518 (1987).

⁴⁰ *Id.* at 522.

⁴¹In their 1996 book *Convicted But Innocent*, Huff et al estimated the error rate at .05% (1 out of every 200 convictions). See RONALD HUFF et al., *CONVICTED BUT INNOCENT* (1996). However, this estimate reflects the collective speculation of some criminal justice officials in Ohio and some state attorney generals: it has no basis in observed fact. Huff et al arrived at this figure by asking 55 Ohio county judges, 53 prosecutors, 21 public defenders, 59 sheriffs and chiefs of police, and 41 state attorney generals 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 mid-point 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 .5-1% of all felony cases in their county and 1-3% in the United States; Zalman, Smith and Kiger surveyed 467 Michigan criminal justice officials (police, prosecutors, defense attorneys and judges), who estimated that wrongful convictions occurred less than .5% in their own jurisdiction and at a rate of 1-3% in the United States. 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 Marvin Zalman, Brad Smith & Amy Kiger, *Officials’ Estimates of the Incidence of “Actual Innocence” Convictions*, 1 JUST. Q. 72-100 (2008). These findings do not reflect a precise, underlying error rate in the real world of criminal justice, as they are essentially collective guesswork.

that took place between 1989 and 2003.⁴² But raw numbers alone may not pack the punch they warrant, leading some, such as Justice Scalia, to dismiss these figures as “fairly modest.”⁴³ 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 .027 percent in felony convictions.⁴⁴

One must, of course, appreciate the process of extrapolation. For example, as Gross reminds us, the exoneration rate of 2.3 percent he uncovered with O’Brien came primarily from cases of rape and murder,⁴⁵ “which together account for only 2% of felony convictions.”⁴⁶ 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 majority of criminal prosecutions are concluded by plea bargain, 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 .027 percent error rate. As Simon explains, their analysis is “flat wrong and badly misleading. In fact, [the error rate is] much higher.”⁴⁷ 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, most known

⁴² Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery, & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 522 (2005).

⁴³ *Kansas v. Marsh*, 165 L. Ed. 429 (2006), (Scalia, J., concurring).

⁴⁴ Marquis, *supra* note 34.

⁴⁵ Gross & O’Brien, *supra* note 6.

⁴⁶ Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L & SOC. SCI. 2.1 (2008).

⁴⁷ Simon, *supra* note 32.

wrongful convictions come from rape and murder cases,⁴⁸ 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 percent of rape convictions.⁴⁹ These figures, in turn, should further shrink the denominator and thus raise the error rate.

With respect to the numerator, “most of the exonerations to date have been based on DNA testing, yet fewer than 20 percent 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.”⁵⁰ 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.”⁵¹ For that matter, these figures do not take account of plea bargaining. Presuming that most defendants who plead are truly guilty of the crime for which they are convicted,⁵² then it’s likely that those defendants who go to trial – the process from which wrongful convictions typically arise – include a higher percentage of innocent suspects than Marquis and others would acknowledge.

⁴⁸ Gross, *supra* note 46.

⁴⁹ Simon, *supra* note 32.

⁵⁰ JON GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* 19 (2007).

⁵¹ *Id.*

⁵² Of course, an innocent suspect may choose to plead guilty for other reasons – to cap jail time rather than risk further incarceration, to protect others, or out of mental incapacity or failure to understand the consequences. But, to date, exonerations have been less frequent among defendants who pled guilty than those who contested their charges. *See* Gross & O’Brien, *supra* note 6.

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 percent and potentially as high as 5 percent.⁵³ In this respect, Risinger’s estimate was higher, but not wildly so, from Gross and O’Brien’s calculation of erroneous convictions in 2.3 percent of capital murder cases.

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 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 claims that errors may be less common in “light felonies and misdemeanors,”⁵⁴ as murder cases are harder to investigate and prove, making errors potentially more prevalent even if police clearance rates are higher.⁵⁵ 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 where

⁵³ Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 87 J. CRIM. L. & CRIMINOLOGY 768 (2007).

⁵⁴ Gross, *supra* note 17, at 180.

⁵⁵ *Id.* at 178-179.

the lesser stakes of punishment do not command as many or zealous advocates to investigate cases post-conviction. It is here – where the debate moves from major felonies to lesser crimes – that Gross & O’Brien’s admonition is most relevant and where future research is especially needed. But even accepting present estimates that upwards of 3 percent of serious felonies end in a wrongful conviction, this would mean that as many as 30,000 innocent suspects are wrongly convicted each year.⁵⁶ Such estimates emphatically call out for attention and redress.

⁵⁶ There were 15 million felony convictions between 1989 and 2003, or approximately 1 million per year. See Joshua Marquis, *The Innocent and the Shammed*, N. Y. Times, Jan. 26, 2006, at A23. See also the felony sentencing data sets compiled by the Bureau of Justice Statistics, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=241> (last accessed February 27, 2010).

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 while 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 fine studies conducted in the last decade.

Westervelt and Cook, for example, have interviewed individuals exonerated of capital crimes. As they concluded, the exonerees' experiences were similar to those of "life-threatening traumas."⁵⁷ Adrian Grounds, too, has studied former prisoners, including those exonerated after as many as 19 years in prison.⁵⁸ Like Westervelt and Cook, he concludes that "those released following wrongful conviction and imprisonment may have significant psychiatric and adjustment difficulties of the kind described in other groups of people who have suffered chronic psychological trauma."⁵⁹ 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

⁵⁷ Sandra Westervelt & Kimberly Cook, *Coping with Innocence After Death Row, Contexts*, 7 CONTEXTS 33, 35 (Fall 2008, American Sociological Association).

⁵⁸ Adrian Grounds, *The Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 165 (2004).

⁵⁹ *Id.* at 178.

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.⁶⁰

Such challenges exist only if the wrongly convicted defendant can establish his innocence in the first place and earn his release. As 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.⁶¹ As Medwed explains, it can be inordinately difficult for defendants to convince a parole board that they are "rehabilitated" while maintaining their innocence when contrition and accepting responsibilities 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.⁶²

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.⁶³ In 1999, Pace law

⁶⁰ Westervelt & Cook, *supra* note 57.

⁶¹ Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

⁶² *Id.* at 548.

⁶³ Alberto Lopez, *\$10? And a Denim Jacket: A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002); 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); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); 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).

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 later exonerated.”⁶⁴ 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.⁶⁵ If anything, “several states [had] enacted legislation designed not to assist exonerees in a significant way, but only to bestow symbolic token support.”⁶⁶ 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.”⁶⁷ Furthermore, they say, just three states offer meaningful post-release services, such as reentry planning services.⁶⁸ Quite clearly, the researchers collectively conclude, the harms of wrongful conviction are not adequately compensated.

⁶⁴ Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); *supra* note 63, at 77.

⁶⁵ 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), *supra* note 63, at 705.

⁶⁶ *Id.* at 706.

⁶⁷ 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), *supra* note 63, at 107.

⁶⁸ *Id.*

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 in 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 several 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 than Margaret Edds' book, *An Expendable Man*,⁶⁹ 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 civil verdict against the sheriff's deputies whose bad actions had led to his wrongful conviction.⁷⁰

⁶⁹ MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARLY WASHINGTON, JR (2006).

⁷⁰ Editorial, *Delayed Justice for Earl Washington*, The Virginian-Pilot, May 10, 2006, at B8.

There are many more examples of works like Edds' case study, including such well-known titles as *Guilty Until Proven Innocent*,⁷¹ *A Promise of Justice*,⁷² *The Innocent Man*⁷³, and *Picking Cotton*.⁷⁴ Indeed, one of us is responsible for a book like that, chronicling the tragic multiple wrongful conviction story of the "Norfolk Four."⁷⁵ In that case, four Navy sailors eventually were coerced and worn down in multiple lengthy interrogations to confess to a rape-murder that they did not commit and that DNA and other case evidence conclusively establishes that another man – who has since provided a corroborated confession to the crime – committed alone. At this time, each of the four innocent defendants has been released from prison, but none has been granted a full pardon.⁷⁶

In other studies, 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."⁷⁷ Bedau and Radelet's first work on wrongful convictions introduced this method to the field,⁷⁸ an approach that has been

⁷¹ DONALD CONNERY, *GUILTY UNTIL PROVEN INNOCENT* (1977).

⁷² DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN* (1998).

⁷³ JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006).

⁷⁴ JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TOMEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009).

⁷⁵ TOM WELLS & RICHARD LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008).

⁷⁶ <http://www.norfolkfour.com> (last viewed February 11, 2010).

⁷⁷ Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 19 (2009).

⁷⁸ Bedau & Radelet, *supra* note 14.

replicated by others, including each of us.⁷⁹ Utilizing *pro bono* lawyers from major law firms, ICVA researchers conducted separate case studies of 11 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 similar approach when investigating erroneous convictions in capital cases.

To be sure, neither the ICVA nor the Ryan Commission relied as stringently on a coding instrument as would be commonplace in social science research, but, interestingly, the results from both commissions mirror those found in the several other studies of wrongful convictions. It is this repetition and replication that 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. Of its many important findings, perhaps the most shocking was the report's conclusion 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.⁸⁰

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

⁷⁹ See Gould, *supra* note 50. See also 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).

⁸⁰ Connors et al., *supra* note 23, at xxviii.

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. What should concern us (besides seeking to reduce any common source of error in criminal prosecutions) is understanding how tunnel vision was overcome in certain cases to prevent wrongful convictions but continued unchecked in others to contribute to a mistaken prosecution and conviction.

For this reason, we think a better way of understanding the sources of wrongful convictions is not so much as dichotomous causes – e.g., a witness misidentified the defendant or not 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 before,⁸¹ so we do not wish to replicate that here. But, 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 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.

⁸¹ Gould, *supra* note 50; Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7 (2009).

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, but even more, the prior two decades, has seen considerable research uncovering the likely sources of wrongful convictions. Together, this research has identified seven central categories of sources, including problems involving i) mistaken eyewitness identification; ii) false confessions; iii) tunnel vision; iv) informant testimony; v) imperfect forensic science; vi) prosecutorial misconduct; and vii) inadequate defense representation. Apart from these primary sources, the literature also discusses the potential role of race effects, media effects, and the failure of post-conviction remedies.

Mistaken eyewitness identification

Nationally, nearly three-quarters of known wrongful convictions owe in part to mistaken identifications, many of them in rape cases.⁸² Eyewitness misidentification is caused by natural psychological errors in human judgment. As Gary Wells and colleagues have able 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 she cannot take in and remember well the details of the perpetrator.⁸³ This problem is pronounced when the victim

⁸² BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). In fact, Gross and colleagues estimate that as many as 88 percent of wrongful rape convictions nationwide may have been based in large part on misidentifications. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery, & Sujata Patil, *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

⁸³ Gary L. Wells & Donna M. Murray, *What Can Psychology Say about the Neil vs. Biggers Criteria for Judging Eyewitness Identification Accuracy?*, 68 J. APPLIED PSYCHOL. 347 (1983).

and perpetrator are of different races.⁸⁴ Victims may believe they recall the events accurately – the crime ostensibly “stenciled into their minds – but research also indicates that there is little relationship between an eyewitness’ certainty of her identification and the accuracy of that report.⁸⁵

If anything, 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.”⁸⁶ 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 an in-court identification.⁸⁷ This can be as simple as an officer praising the witness for a “good job” in her identification or as deliberate 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 their confidence has been inflated by a reinforcing comment.⁸⁸

Law enforcement officers may also employ suggestive identification procedures that make the suspect stand out from others. Such a method was employed in the case of Marvin Anderson, in which Anderson’s photo appeared in color while the others in the array were black

⁸⁴ C.A. Meissner & J.C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: a Meta-Analysis*, 7 PSYCHOL. PUB. POL’Y & L. 3 (2001).

⁸⁵ Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

⁸⁶ *Id.* at 367.

⁸⁷ *Id.* at 366-367.

⁸⁸ Wells & Murray, *supra* note 83.

and white.⁸⁹ In line-ups, for example, 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.⁹⁰ There is almost always someone in a line-up or photo array who looks more like the actual offender than the others present, and witnesses, in turn, may be tempted to identify that person.⁹¹ Further, any initial mistaken identification may further reinforce subsequent reports, as 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.⁹²

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 1999,⁹³ these recommendations have been adopted in the State of New Jersey as well as providing the basis for best practices in law enforcement agencies around the country.⁹⁴ Among these, researchers recommend that witnesses be shown photographs or individuals in a

⁸⁹ Gould, *supra* note 50.

⁹⁰ Gary L. Wells & Amy L. Bradfield, *Good, you identified the suspect: Feedback to eyewitnesses distorts their reports of the witnessing experience* 83 J. APPLIED PSYCH. 360, 363 (1998).

⁹¹ Gary L. Wells, Mark Small et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 1 (1998); Gary L. Wells, *The Psychology of Line up Identifications*, 14 J. APPLIED PSYCHOL. 89 (1984).

⁹² Wells et al., *supra* note 91.

⁹³ NATIONAL INSTITUTE OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

⁹⁴ Gary Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003).

line up sequentially – that is, one at a time – rather than simultaneously as a group.⁹⁵

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.⁹⁶ Perhaps most importantly, identification procedures must administered “double-blind” so that the neither the eyewitness nor the person administering the line-up knows the identity of the prime suspect and thus cannot hint or guess about the correctness of the identification. In this way, suggestion and feedback effects can be minimized.

False confessions

It is difficult for the public to understand why someone would wrongly confess to a crime he did not commit,⁹⁷ but research not only indicates that false confessions occur but also explains

⁹⁵ Timothy S. Eckley, *Law versus science and the problem of eyewitness identification*, 89 JUDICATURE 230 (2006).

⁹⁶ Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Line up Presentations: A Meta-Analytical Comparison*, 25 L. & 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 line ups. 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 line ups) 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, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 L. & PSYCHOL. REV. 199 (2007).

⁹⁷ See Danielle Chojnacki, Michael Cicchini, & Lawrence White, *An Empirical Basis For the Admission Of Expert Testimony On False Confessions*, 40 ARIZ. ST. L. J. 1 (2008); Lisa A. Henkel, Kimberly A. Coffman & Elizabeth M. Dailey, *A Survey of People’s Attitudes and Beliefs About False Confessions*, 26 BEHAV. SCI. L. 555-584 (2008); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. L. 381-399 (2009); 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. 1-22 (2010); Mark Constanzo, Netta Shaked-Schroer & Katherine Vinson, *Juror Beliefs about Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. (forthcoming, in possession of authors).

how they happen.⁹⁸ Several studies of erroneous prosecutions conducted since 1987 have shown that anywhere from 14 to 25 percent of the cases reviewed involved false confessions.⁹⁹

According to the national Innocence Project, approximately two-thirds of the DNA exonerations in homicide cases involved false confessions.¹⁰⁰ This is consistent with Warden's finding that approximately 60% of wrongful homicide convictions in Illinois since 1970 involved false confessions.¹⁰¹ More concerning, 80 percent of false confession cases that went to trial ended in conviction even though the confession was later shown to be false.¹⁰²

There is no one cause, logic or type of false confession. Rather, police-induced false confessions are the product of a multi-step process of influence, persuasion and compliance. They usually involve psychological coercion.¹⁰³ There are certain conditions of interrogation under which police are more likely to elicit false confessions, and certain types and groups of individuals who are more vulnerable to interrogation pressure and thus more easily manipulated into giving false confessions. In order to understand why innocent suspects sometimes make false confessions, we must first look at the process through which police investigators identify criminal suspects and how police interrogation works as a psychological process, both in the pre-admission and post-admission stage of interrogation.

There are three errors that 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

⁹⁸ RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008).

⁹⁹ *Id.* at 244. See also www.innocenceproject.org (last viewed February 5, 2010).

¹⁰⁰ WELSH WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2003).

¹⁰¹ Robert Warden, *The role of false confessions in Illinois wrongful convictions since 1970* (2003) (unpublished paper, on file with author).

¹⁰² Drizin & Leo, *supra* note 15.

¹⁰³ Richard Ofshe & Richard Leo, *The social psychology of police interrogation: The theory and classification of true and false confessions*, 16 *STUD. L., POL. & SOC.* 189-251 (1997).

guilty. As Davis and Leo point out, “once specific suspects are targeted, police interviews and interrogations are thereafter guided by the presumption of guilt.”¹⁰⁴ Whether to interrogate or not is arguably the most critical decision point in the investigative process. It is only because police erroneously interrogate innocent people that they elicit false confessions (if all the suspects they 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 there are many cognitive errors that lead police to mistakenly classify an innocent person as a guilty suspect, perhaps the most common arises out of their investigation training. American police are erroneously taught that they can learn to become human lie detectors, able to distinguish truth from deception at extraordinarily high rates of accuracy.¹⁰⁵ 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 or cleaning one’s glasses, and chewing one’s fingernails or 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 poor human

¹⁰⁴ Deborah Davis & Richard A. Leo, *Strategies for preventing false confessions and their consequences*, in PRACTICAL PSYCHOLOGY FOR FORENSIC INVESTIGATIONS AND PROSECUTIONS 124 (Mark Kebbell & Graham Davies eds., 2006).

¹⁰⁵ The Chicago-based firm Reid and Associates, for example, claims that detectives can learn to accurately discriminate truth and deception 85 percent of the time though this rate seems to be represented in their training seminars as 100% . See Leo, *supra* note 98 at 98.

lie detectors. Studies show that most people accurately make these types of judgments at rates no better than the flip of a coin.¹⁰⁶ Moreover, studies have found 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.¹⁰⁷

Once detectives misclassify an innocent person as a guilty suspect, the next step is to subject him to an accusatorial interrogation. Getting a confession becomes especially important when there is little or no other evidence against the suspect – especially in high-profile cases because in these cases there is great pressure on police detectives to solve the crime¹⁰⁸ -- 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 confessions cases occur in homicides and high profile cases.¹⁰⁹

The primary cause of police-induced false confession is the use of psychologically coercive police interrogation methods.¹¹⁰ These include methods that were once identified with the old “third degree,” such as deprivations (of food, sleep, water or access to bathroom facilities, for example), incommunicado interrogation, and inducing extreme exhaustion and

¹⁰⁶ *Id.*

¹⁰⁷ Maria Hartwig et al., *Police officers' lie detection accuracy: Interrogating freely vs. observing video*, 7 POLICE Q. 429-456 (2004); Saul M. Kassin & Christina T. Fong, “I’m innocent!” *Effects of training on judgments of truth and deception in the interrogation room*, 23 L. & HUM. BEHAV. 499-516 (1999).

¹⁰⁸ Samuel Gross, *The risks of death: Why erroneous convictions are common in capital cases*, 44 BUFF. L. REV. 469-500 (1996).

¹⁰⁹ Samuel Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523-553 (2005); Steven Drizin & Richard Leo, *The problem of false confessions in the post-DNA world*, 82 N.C. L. REV. 891-1007 (2004).

¹¹⁰ Ofshe & Leo, *supra* note 103 . *See also* Leo *supra* note 98.

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 and/or explicit promises of leniency and implicit and/or explicit threats of harsher treatment in combination with other interrogation techniques such as accusation, repetition, attacks on denials and false evidence ploys.¹¹¹ 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 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 to 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 sees no other way to escape an intolerably stressful experience. It is not uncommon for suspects who falsely confess to believe that they will only be able to leave if they do what the detectives say. Others suspects comply because they are led to believe that it

¹¹¹ Leo, *supra* note 98.

is the only way to avoid a feared outcome (e.g., 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.¹¹²

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.¹¹³ Individuals who are highly suggestible or compliant are more likely to falsely confess. So too are the developmentally disabled or 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.¹¹⁴ Youth is also a significant risk factor for police-induced false

¹¹² Ofshe & Leo, *supra* note 103. *See also* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008).

¹¹³ Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (New York: Wiley, 2003).

¹¹⁴ 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.

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

confessions.¹¹⁵ Finally, people with mental illness are also disproportionately likely to falsely confess,¹¹⁶ especially in response to accusatorial police pressure.¹¹⁷

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 also of a

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.

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 - is 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. See Leo *supra* note 98 at 231-234.

¹¹⁵ 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. They are thus 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 also are less capable of withstanding interpersonal stress and thus more likely to perceive aversive interrogation as intolerable. See Leo, *supra* note 98 at 231-234.

¹¹⁶ Allison D. Redlich, *Mental illness, police interrogations, and the potential for false confession*, 55 L. & PSYCHIATRY 19-21 (2004).

¹¹⁷ 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, become easily confused, and 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 may also be easily coerced into making compliant ones. As Salas points out: "Mental 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." 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." See Leo, *supra* note 98 at 231-234.

subsequent narrative – what researchers have referred to as the post-admission narrative¹¹⁸ -- 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.¹¹⁹

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 and/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 – that 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 recipient.¹²⁰

¹¹⁸ Richard A. Leo and Richard Ofshe, *The consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429-496 (1998).

¹¹⁹ Leo, *supra* note 98 at 165-194.

¹²⁰ See Leo, *supra* note 98 at 165-194.

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.¹²¹ 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 many false confession cases.¹²² 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 videotaping interrogations can minimize the likelihood that a false confession will lead to a wrongful conviction.¹²³ Not only are law enforcement officers more careful in

¹²¹ Leo & Ofshe, *supra* note 118.

¹²² Richard Leo, Steven Drizin, Peter Neufeld, Bradley Hall and Amy Vatner., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, WIS. L. REV. 479 (2006).

¹²³ See Leo, *supra* note 98 at 291-305. See also Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1128-1130 (2005).

interrogating suspects when they know a jury may view the proceedings – abstaining from threats, punishment, or undue coaching – but jurors also can evaluate the circumstances of the interrogation to determine the accuracy of the witness’ statements.¹²⁴ 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, videotaping 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.”¹²⁵

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

¹²⁴ Of course, the entire interrogation procedure must be recorded so that officers are not just “cherry-picking” those examples most helpful to their cause.

¹²⁵ Sullivan, *supra* note 123 at 1128.

conviction, while ignoring the suppressing evidence that points away from guilt,”¹²⁶ 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.¹²⁷ An officer may be so convinced of an eyewitness’ 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. Nor are they theoretical possibilities. The many case studies of wrongful convictions show these errors are real with grievous consequences.¹²⁸

Informant testimony

Watch a “B movie” late at night, and you stand a good possibility of seeing the proverbial scene in a courtroom drama in which a police informant takes the stand to inculpate 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

¹²⁶ Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 293 (2006).

¹²⁷ Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 4 MICH. ST. L. REV. 1315 (2003).

¹²⁸ See Gould, *supra* note 50.

make for mild entertainment, the reality is that a number of wrongful convictions turn on the testimony of police informants who themselves are lying for personal gain. As scholars note, informants are often rewarded without regard to the accuracy and reliability of their information,¹²⁹ with as many as a fifth of wrongful conviction cases based on snitches that lied.¹³⁰ 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.¹³¹ 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.¹³²

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

¹²⁹ Clifford Zimmerman, *From the Jailhouse to the Courthouse: the Role of Informants in Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 55-76 (Saundra Westervelt & John Humphrey eds., 2001).

¹³⁰ Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107 (2006).

¹³¹ Gould, *supra* note 50, at 96.

¹³² Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *HASTINGS L.J.* 1381, 1382 (1996).

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 imprecision of some analysis,¹³³ and, in a classic case, Judge Louis Pollack of the federal court in Pennsylvania ruled that fingerprints fail the *Daubert* test¹³⁴ for the introduction of scientific evidence.¹³⁵

Fingerprints are hardly the most questionable forensic methods employed. More troubling has been 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*¹³⁶ and *Daubert* standards in many courts and has been admitted into evidence, more recent research raises considerable doubts about its accuracy.¹³⁷ 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 percent 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 thirty to four percent when common hair comparison methods – which compare a questioned hair to

¹³³ 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)

¹³⁴ *Daubert v. Merrell Dow Pharmacies, Inc.*, 509 U.S. 579 (1993).

¹³⁵ Andy Newman, *Judge Rules Fingerprints Cannot be Called a Match*, N.Y. Times, Jan. 11, 2002., <http://www.nytimes.com/2002/01/11/national/11PRIN.html?pagewanted=1> (last visited March 2, 2010).

¹³⁶ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

¹³⁷ Larry S. Miller, *Procedural Bias in Forensic Science Examinations of Human Hair*, 11 L. & HUM. BEHAV. 157 (1987); Edward J. Imwinkelried, *Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence*, 39 WASH. & LEE L. REV. 41 (1982).

the hair samples of a suspect – were changed to a "line up" method, in which examiners compare a hair sample from the crime scene to samples from five potential suspects.¹³⁸

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.”¹³⁹ 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 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.¹⁴⁰ 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.

Prosecutorial Misconduct

For the most part, American prosecutors carry themselves ethically, seeking to mete out justice even if it means dismissing charges against a defendant whose criminality they suspect

¹³⁸ Gould, *supra* note 50, at 176.

¹³⁹ Andre A. Moenssens, *Symposium on Scientific Evidence: Foreword: Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 13 (1993).

¹⁴⁰ 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.”

but cannot establish. Still, prosecutors may engage in overly suggesting witness coaching,¹⁴¹ offer inappropriate and incendiary closing arguments,¹⁴² or fail to disclose critical evidence to the defense, all of which may raise the prospects 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, or prosecutors may not be aware that they have such information in their files. In other cases, though, the misdeeds are starker.

Consider the case of Edward Honaker, a man convicted for rape on the basis of testimony from the victim and her boyfriend. But, 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 and for the first time identified Honaker's photo as that of the rapist.¹⁴³ 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, as it is required by *Brady v. Maryland*,¹⁴⁴ can lead to a wrongful conviction.

¹⁴¹ Bennett L. Gershman, *Effective Screening For Truth Telling: Is It Possible? Witness Coaching By Prosecutors*, 23 CARDOZO L. REV. 829 (2002).

¹⁴² Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. Times, March 21, 2004., <http://www.nytimes.com/2004/03/21/nyregion/when-prosecutors-err-others-pay-price-disciplinary-action-rare-after-misconduct.html?pagewanted=I> (last visited March 2, 2010).

¹⁴³ Gould, *supra* note 50, at 104.

¹⁴⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

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, "It [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."¹⁴⁵ 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 23 year period.¹⁴⁶ The central reason behind ineffective representation is inadequate funding, an absence of quality control, and a lack of motivation.¹⁴⁷ The attorney may be so rushed that he fails to communicate with his client or communicates "in a dismissive, callous or hurried manner."¹⁴⁸ 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-examination."¹⁴⁹ 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.

¹⁴⁵ Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 227-228 (Saundra Westervelt & John Humphrey, eds., 2001).

¹⁴⁶ Liebman et al., *supra* note 36.

¹⁴⁷ American Bar Association Criminal Justice Section, Ad Hoc Innocence Committee, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (2006); Bernhard, *supra* note 144.

¹⁴⁸ Sheila Martin Berry, *Bad Lawyering: How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487, 490 (2003).

¹⁴⁹ *Id.*

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 post-conviction remedies, and the role of 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,¹⁵⁰ and once convicted are also more likely to receive longer prison terms than do whites.¹⁵¹ They are also more likely to be subject to some of the sources that lead to wrongful convictions.¹⁵² The clearest example is mistaken eyewitness identification, where 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, where in a number of cases African-American men were erroneously convicted by all-white juries who found them guilty with questionable evidence and scant deliberation.¹⁵³ To be sure, these problems are hardly limited to cases of known exonerations – and, indeed, procedural justice is threatened when the triers of fact allow racial assumptions or prejudices to enter into their

¹⁵⁰ David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 268 (1999).

¹⁵¹ Tara L. Mitchell, Ryan M. Haw et al., *Racial bias in juror decision-making: A meta-analytic review of defendant treatment*, 29 L. & HUM. BEHAV. 621 (2005).

¹⁵² 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).

¹⁵³ Gould, *supra*, note 50.

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 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.¹⁵⁴ 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 21 days of the order of conviction. As any criminal trial knows, it is rare to the point of unknown for important, new evidence to come to light within three weeks of sentence.

Virginia has now replaced its 21-day rule with a Writ of Actual Innocence,¹⁵⁵ 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 Utah law professor Daniel Medwed's research also has shown, the institutional culture of some

¹⁵⁴ Unlike in a criminal trial, where the prosecution must establish the defendant's guilt beyond a reasonable doubt, in post-conviction 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*, 126 S. Ct. 2064, 2077-78 (2006).

¹⁵⁵ VA. CODE ANN. § 8.01-654 (2009).

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.¹⁵⁶ 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 also investigating doubtful cases post-conviction 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 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

¹⁵⁶ Daniel Medwed, *The Zeal Deal: Prosecutorial Resistant to Post-Conviction Claims of Innocence*, 84 B. U. L. REV. 125, 130 (2004).

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’ 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.¹⁵⁷ As his Center on Wrongful Convictions¹⁵⁸ explains:

It 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.¹⁵⁹

¹⁵⁷ Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC. L. REV. 803 (2003).

¹⁵⁸ Warden serves as executive director of Northwestern University’s Center on Wrongful Convictions.

¹⁵⁹ <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/> (last viewed Jan. 28, 2010).

III. Improving the Research

Where we agree with Gross and O'Brien is 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 treatment group at the start of a criminal case. Some of this is logistical,¹⁶⁰ but more importantly, our system of constitutional rights would not permit it.¹⁶¹

Where controls have been employed, researchers generally have compared cases of wrongful conviction against either cases of rightful conviction or cases of presumed innocence that did not lead to acquittal. 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, the work presumes that the criminal justice system has failed both sets of defendants (as all were wrongly convicted) but then asks why the

¹⁶⁰ 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.

¹⁶¹ Indeed, the Sixth Amendment would prohibit any effort to assign one group of defendants to capable lawyers and another group to incompetent counsel.

system was able to correct the errors in some cases (those who were released) but not in others (cases in which the defendant was executed).

A classic example of the first matched comparison study is Talia Harmon's 2001 article in *Justice Quarterly*.¹⁶² Harmon assembled a data set of 76 cases from 1970-1998 in which capital inmates were released from death row because of "doubts about their guilt"¹⁶³ 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 what sources may cause a wrongful conviction 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 the type of lawyer at trial (public defender or privately retained) did not predict whether a

¹⁶² Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 JUST. Q. 949 (2001).

¹⁶³ *Id.* at 957.

defendant would be released on appeal, but the data indicated that type of appellate lawyer – and thus, either quality or available resources¹⁶⁴ – 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, et al.’s 1996 work,¹⁶⁵ she notes that there were “doubts” about the defendants’ guilt.¹⁶⁶ 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. Even 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.¹⁶⁷ 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

¹⁶⁴ 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 on 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.

¹⁶⁵ Radelet, Lofquist, & Bedau, *supra*, note 18.

¹⁶⁶ Harmon, *supra* note 161, at 957.

¹⁶⁷ 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).

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.

If 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.¹⁶⁸ 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 lead to exoneration in some and execution in others.¹⁶⁹ Admittedly, any wrongful conviction is, by definition, a failure, but at least post-conviction 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, 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

¹⁶⁸ Gross & O'Brien, *supra* note 6.

¹⁶⁹ 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, "For 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." (Gross & O'Brien, *supra* note 6 at 948.)

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.¹⁷⁰

Gross and O'Brien are correct in noting the limitations of their work – and that of others – in studying wrongful convictions this way.¹⁷¹ 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 post-conviction.¹⁷² Furthermore, they concentrate our attention on cases of rape and murder, where DNA evidence is most likely to be found and which offers 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 more about how some defendants are able to secure post-conviction 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 cases “go right” in the system while others fail.¹⁷³ Moreover, their work needs to be read in tandem with the findings from the several other studies of wrongful convictions. Although Gross and O'Brien's study presents at least one anomaly (exonerations were less likely among those considered mentally ill), their

¹⁷⁰Gross & O'Brien, *supra* note 6 at 952-957.

¹⁷¹ As they contend, “Almost 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.

¹⁷² Whereas the state must prove guilty beyond a reasonable doubt at trial, a convicted defendant must establish that no reasonable person would believe him guilty in post-conviction proceedings. *See House v. Bell*, 126 S. Ct. 2064, 2077-78 (2006).

¹⁷³ 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*, 165 L. Ed. 429 (2006) (Scalia, J., concurring.)

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 wrongful convictions 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 is Brandon Garrett's analysis of the first 200 innocent defendants to be released after post-conviction DNA testing exonerated them.¹⁷⁴ 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 post-conviction DNA testing.

For the most part, Garrett found that post-conviction claims were raised and resolved at similar rates for both groups of defendants. Although one-two percent of criminal convictions are reversed on appellate review, the rate in both sets of cases was higher – nine percent for the DNA exonerations and ten percent 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

¹⁷⁴ Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

only nine percent of the cases did the defendant win his freedom on appellate review prior to post-conviction 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."¹⁷⁵

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,¹⁷⁶ 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.¹⁷⁷

¹⁷⁵ Garrett, *supra* note 175 at 131.

¹⁷⁶ Leo & Gould, *supra* note 81.

¹⁷⁷ 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.

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.¹⁷⁸ 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 innocent¹⁷⁹ that are not present in cases that lead the system to wrongfully convict the innocent.¹⁸⁰ 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.

IV. 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.¹⁸¹ Garrett, for example, is uncertain about the prospects of reform, saying that

¹⁷⁸ Except, that is, in cases of wrongful conviction by plea bargain, but those matters are comparatively rare. Gross, *supra* note 42; Bedau & Radelet, *supra* note 14.

¹⁷⁹ This is arguably the most important goal of the criminal justice system.

¹⁸⁰ This is arguably the worst possible error the criminal justice system can make short of executing the innocent.

¹⁸¹ Garrett, *supra* note 175; Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction* 17 CRIM. JUST. POL'Y REV. 468 (2006); Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002).

“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 [T]his information will lead to reform through the conduit of civil rights suits.”¹⁸² 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.”¹⁸³ 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.”¹⁸⁴ Indeed, as he says, the criminal justice system too often lacks the ability to “reflect on its own shortcomings and to correct them.”¹⁸⁵

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 stakeholders involved at every step in the process.”¹⁸⁶ 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

¹⁸² Garrett, *supra* note 175 at 112.

¹⁸³ Zalman, *supra* note 182 at 483.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 485.

¹⁸⁶ Findley & Scott, *supra* note 126, at 341.

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.¹⁸⁷ To outsiders, the process may appear as “an idea whose time has come,” but to Kingdon policy change does not happen by chance.¹⁸⁸ 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.¹⁸⁹ With wrongful convictions a key part of the national policy debate for 20 years now,¹⁹⁰ we may be at a point

¹⁸⁷ JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1995).

¹⁸⁸ <http://www.greenmediatoolshed.org/training/IsYourGroupCommunicating/TheMediaDebate.adp> (last accessed May 30, 2006).

¹⁸⁹ FRANK BAUMGARTNER & BRYAN JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 18 (1993).

¹⁹⁰ In many ways, the “modern era” of wrongful convictions was kicked off on August 14, 1989, when Gary Dotson was exonerated by a post-conviction DNA test. (Gould, *supra* note 50, at 17.)

where the issue just naturally wanes. Indeed, since the passage of the Innocence Protection Act in 2004,¹⁹¹ 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 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 post-conviction. 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.¹⁹²

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

¹⁹¹ 18 U.S.C. §3600 (2004).

¹⁹² 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. <http://www.nowpublic.com/world/va-court-grants-first-writ-actual-innocence-chesapeake-case> (last viewed February 11, 2010).

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 prevalence, sources, harms, 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. In hospitals, doctors regularly meet in morbidity and mortality conferences to “investigate the reasons and responsibility for adverse outcomes of care.”¹⁹³ Similarly, the National Transportation Safety Board 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, more than 80 percent “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.”¹⁹⁴

¹⁹³ LINDA T. KOHN, JANET M. CORRIGAN & MOLLA S. DONALDSON, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 269 (2000).

¹⁹⁴ http://www.nts.gov/Abt_NTSB/history.htm (last viewed February 11, 2010).

If there were a good candidate for post-error review, it would be the criminal justice system. Wrongful convictions do such harm to so many¹⁹⁵ 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,¹⁹⁶ and where practitioners have been involved, it has often taken “kicking and screaming” to introduce new approaches or technologies to improve their work.¹⁹⁷

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.”¹⁹⁸ Rather, as we have explained before, wrongful convictions “demand the best from the state’s penal power.”¹⁹⁹ Not because review will lead to an error-free process, but because professionalism demands it.

¹⁹⁵ 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 officer, prosecutors, and judges, whose reputation for fairness and professionalism may be at risk.

¹⁹⁶ Consider the North Carolina Actual Innocence Commission (http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (last viewed February 11, 2010)), the Ryan Commission in Illinois (http://www.idoc.state.il.us/ccp/ccp/executive_order.html (last viewed February 11, 2010)), and the Innocence Commission for Virginia (<http://www.icva.us> (last viewed February 11, 2010)).

¹⁹⁷ SHARON PRATHER, LIGHTS, CAMERA, CONFESSION (2006).

¹⁹⁸ Marquis, *supra*, note 34.

¹⁹⁹ Gould, *supra* note 50, at 244.

Looking to the future, social science research will undoubtedly expand our understanding of wrongful conviction 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 depends more on practice than research.