

CONTEMPORARY PERSPECTIVES
ON WRONGFUL CONVICTION:
AN INTRODUCTION TO THE 2016 INNOCENCE
NETWORK CONFERENCE, SAN ANTONIO, TEXAS

*Gwen Jordan**
*Aliza B. Kaplan***
*Valena Beety****
*Keith A. Findley*****

Innocent people have been convicted of crimes they did not commit throughout history. The exact number of wrongful convictions is unknowable. In 2014, however, the National Academy of Sciences (“NAS”) released a study of the cases of criminal defendants who were convicted and sentenced to death and concluded that 4.1% were wrongfully convicted.¹ The researchers explained that “this is a conservative estimate of the proportion of false conviction among death sentences in the United States.”² According to the U.S. Department of Justice, Bureau of Justice Statistics, 1,561,500 adults were incarcerated in federal prisons, state prisons, and county jails in 2014, with an additional 4,708,100 adults under community supervision programs such as probation and parole.³ If we apply the NAS conservative estimate to

* Innocence Network Scholarship Committee; Associate Professor of Legal Studies, Staff Attorney, Illinois Innocence Project, University of Illinois Springfield.

** Innocence Network Scholarship Committee; Professor and Director, Criminal Justice Reform Clinic, Lewis & Clark Law School.

*** Innocence Network Scholarship Committee; Associate Professor of Law, Deputy Director of the Clinical Law Program, West Virginia University College of Law.

**** Innocence Network Scholarship Committee; Associate Professor of Law, Co-Director, Wisconsin Innocence Project, University of Wisconsin Law School.

1. Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCI. U.S. AM. 7230, 7230, 7234 (2014), <http://www.pnas.org/content/111/20/7230.full.pdf>.

2. *Id.*

3. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2014, at 1 (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>; DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, at 1 (Nov. 2015), <https://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

just those who are incarcerated, there are more than 90,000 people wrongfully convicted and imprisoned in the United States.

Legal scholars began to study the phenomenon of wrongful convictions in the early twentieth century. In 1913, Edwin Borchard published a report of European approaches to righting the wrongs of erroneous convictions, the first study of wrongful convictions in the modern era.⁴ Twenty years later, Borchard published a monograph documenting sixty-five cases in which innocent persons had been convicted, asserting that the causes included “eyewitness testimony, false confessions, faulty circumstantial evidence, and prosecutorial excesses.”⁵ Additional studies were published occasionally over the next fifty years, but it was not until the late 1980s when scholars began to conceive of convicting the innocent as a distinct field of academic study.⁶ In 1987, Hugo Bedau and Michael Radelet published the first scholarship that systematically analyzed the causes of wrongful convictions.⁷ Over the last quarter century, this field has yielded numerous studies with the aims of exposing the reality and harm of wrongful convictions, assessing their common causes, and proposing reforms to address them.⁸ This Symposium continues that effort.

The articles in this Symposium were initially presented at the annual Innocence Network Conference in April 2016, in San Antonio, Texas.⁹ The Innocence Network, established in 2004, “is an affiliation of organizations from all over the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, and working to redress the causes of wrongful convictions.”¹⁰ The Innocence Project, established by Peter Neufeld and Barry Scheck at the Benjamin N. Cardozo School of Law in 1992,¹¹ was a founding member organization of the Innocence Network. In 2005, the Innocence Network had fifteen

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

5. Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1216 (2005). See generally EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).

6. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827-28 (2010).

7. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987).

8. See Gould & Leo, *supra* note 6, at 829.

9. *Innocence Network Conference*, INNOCENCE NETWORK, <http://innocentnetwork.org/networkconference> (last visited Dec. 31, 2016).

10. *About the Innocence Network*, INNOCENCE NETWORK, <http://innocencenetwork.org/about> (last visited Dec. 31, 2016).

11. INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Dec. 31, 2016).

member organizations. By 2016, the Innocence Network had grown to include sixty-eight organizational members located in the United States as well as Australia, Canada, Ireland, the United Kingdom, the Netherlands, New Zealand, Taiwan, Argentina, South Africa, Italy, and France.¹²

These organizations are leading what has been called an “[i]nnocence [r]evolution.”¹³ It began with the advent of DNA testing and its application in criminal cases in the late 1980s.¹⁴ Post-conviction DNA testing allows biological evidence retained in cases that occurred before DNA testing was available to now be tested in order to determine whether the defendant was the real perpetrator of the crime for which he or she was convicted.¹⁵ Advancements in DNA technology over the past twenty-five years continue to expand opportunities for DNA testing in post-conviction cases.¹⁶ As of December 2016, post-conviction DNA testing alone has exonerated 347 wrongly convicted individuals.¹⁷ These DNA exonerations are, however, just a fraction of the occurrences of wrongful convictions. Even with the advances in DNA technology, DNA is not available in ninety percent of criminal cases.¹⁸ According to the National Registry of Exonerations (“NRE”), a project that “collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States” for both DNA and non-DNA cases, there have been over 1900 exonerations over the past twenty-seven years.¹⁹

12. *About the Innocence Network*, *supra* note 10; *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://innocencenetwork.org/members> (last visited Dec. 31, 2016).

13. See Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency”* in *Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 268-71 (2004).

14. *Postconviction Testing and Wrongful Convictions*, NAT’L INST. JUST., <http://www.nij.gov/topics/justice-system/wrongful-convictions/pages/welcome.aspx> (last updated June 23, 2016).

15. *See id.*

16. *See id.*

17. *The Causes*, INNOCENCE PROJECT, <http://www.innocenceproject.org/#causes> (last visited Dec. 31, 2016); *see The Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases> (last visited Dec. 31, 2016).

18. *See Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocentproejct.org/causes/unvalidated-or-improper-forensic-science> (last visited Dec. 31, 2016).

19. *Our Mission*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Dec. 31, 2016). The NRE employs the following definition of exoneration:

A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all

The study of exoneration cases has allowed legal scholars to identify systemic causes that lead to wrongful convictions and to develop reforms to attempt to ameliorate these causes.²⁰ Research has identified seven primary causes and several ancillary causes:

[The] seven central categories of sources [are] . . . (1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) [criminal] informant testimony; (5) imperfect forensic science; (6) prosecutorial misconduct; and (7) inadequate defense representation. Apart from these primary sources, the literature also discusses the potential role of race effects, media effects, tunnel vision, and the failure of postconviction remedies.²¹

Other research has found additional contributing factors, including, broadly, perjury and false accusations.²² The articles in this Symposium offer new insights into several of these causes.

The current literature, which has primarily studied cases involving DNA exonerations, has established that eyewitness misidentification is the leading cause, at least among the DNA cases, occurring in seventy percent of wrongful convictions.²³ It derives primarily from psychological errors in human perception and memory and often from suggestiveness by police officers during the identification process.²⁴ Witness identifications of a defendant as the perpetrator are powerful

charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.

Glossary, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 31, 2016).

20. See, e.g., *Predicting and Preventing Wrongful Convictions*, NAT'L INST. JUST. (Mar. 8, 2013), <http://www.nij.gov/topics/justice-system/wrongful-convictions/Pages/predicting-preventing.aspx>.

21. Gould & Leo, *supra* note 6, at 841. See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (discussing "tunnel vision"). For a discussion of each of these causes, see Gould & Leo, *supra* note 6, at 841-58; Robert Schehr et al., *Contemporary Perspectives on Wrongful Conviction: An Introduction to the 2015 Innocence Network Conference, Orlando, Florida*, 3 TEX. A&M L. REV. 179, 181-83 (2015); and *The Causes*, *supra* note 17.

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

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

24. Gould & Leo, *supra* note 6, at 841-43.

evidence at trial and therefore are particularly problematic in wrongful conviction cases.²⁵

In *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*,²⁶ Professors Scott Phillips and Jamie Richardson employ empirical analysis of the NRE data to question whether “the ‘worst of the worst crimes’ produce the ‘worst of the worst evidence.’”²⁷ Their analysis examines the odds of a false confession in highly heinous murders (8.2 times greater) and then looks specifically to exonerees from death row to determine the relationship between seriousness of a crime and untruthful snitches, government misconduct, flawed forensics, and eyewitness misidentifications. Their findings vary among these different factors.²⁸ The application of empirical analysis to these wrongful convictions substantiates what many practitioners may have anecdotally seen in their own work, but we now know to be pervasive across the United States.

Brian Reichart’s article, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*,²⁹ examines the problem of tunnel vision by applying the insights of legal scholars such as Keith Findley, Michael Scott, and Dianne Martin to the case of Patty Prewitt. Reichart first explains that tunnel vision is, in essence, a combination of cognitive biases that manifest as a single-minded focus on an individual suspect or theory of a crime.³⁰ The tendency to use heuristic thinking, or cognitive shortcuts, to draw quick conclusions about unknown situations is strongly associated with tunnel vision.³¹ Investigators focusing on a single suspect or theory are often guilty of utilizing selective reasoning and confirmation bias in their investigative process.³² Thus, those operating with a tunnel vision mindset often begin their investigations with conclusions and work toward proving those conclusions correct rather than objectively drawing conclusions after all available evidence is collected.³³ The influence of tunnel vision on the way evidence is collected and interpreted lies at the heart of the problem of

25. *See id.*

26. Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417 (2016).

27. *Id.* at 421, 434-51.

28. *Id.* at 445.

29. Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 HOFSTRA L. REV. 451 (2016).

30. *See id.* at 461-62.

31. *Id.* at 455.

32. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594-99 (2006).

33. *See id.* at 1604-05.

wrongful convictions and the subsequent difficulty of correcting those convictions.

Utilizing his firsthand knowledge of the Prewitt case, Reichart then analyzes court and investigative records to identify some of the many manifestations of tunnel vision present in various stages of the case.³⁴ In doing so, he finds that negative gender stereotypes permeate the Prewitt case at almost all stages and that these stereotypes give rise to the logical fallacies inherent to tunnel vision.³⁵ Ultimately, Reichart concludes that correcting the problem of tunnel vision requires preventative measures at the educational level. Integrating clinical pedagogy into traditional curricula can interrupt the effects of cognitive biases.³⁶ By taking this preventative approach, legal agents are less prone to slip into a tunnel vision mindset when practicing as professionals.

Professor Jacqueline McMurtrie's article, *Strange Bedfellows: Can Insurers Play a Role in Advancing Gideon's Promise?*,³⁷ tackles the challenges of effective representation at trial from a new angle: insurance companies. In the pivotal decision *Wilbur v. City of Mount Vernon*, a Washington district court endorsed the Washington Defender Association's *Standards for Public Defense Services* and required indigent defenders to reevaluate existing contracts—including suggesting the adoption of caseload limits.³⁸ As the founder of the Innocence Project Northwest, Professor McMurtrie draws on her involvement with this case to provide national guidance. The caseload crisis of public defenders is well known in almost every state, and McMurtrie's proposal empowers insurance companies to partner with municipalities in addressing these systemic issues in indigent defense.³⁹

Professor Justin Brooks, along with Zachary Brooks, in their article, *Wrongfully Convicted in California: Are There Connections Between Exonerations, Prosecutorial and Police Procedures, and Justice Reforms?*,⁴⁰ take the lessons from the wrongful conviction cases and apply them at the local level “to see if there are connections between exonerations and patterns and practices” in individual counties in

34. Reichart, *supra* note 29, at 109-18, 123-25.

35. *Id.* at 118-23.

36. *Id.* at 113.

37. Jacqueline McMurtrie, *Strange Bedfellows: Can Insurers Play a Role in Advancing Gideon's Promise?*, 45 HOFSTRA L. REV. 391 (2016).

38. 989 F. Supp. 2d 1122, 1124-26, 1131-32, 1134 (W.D. Wash. 2013); *see* McMurtrie, *supra* note 37, at 409-10.

39. McMurtrie, *supra* note 37, at 112, 411-15.

40. Justin Brooks & Zachary Brooks, *Wrongfully Convicted in California: Are There Connections Between Exonerations, Prosecutorial and Police Procedures, and Justice Reforms?*, 45 HOFSTRA L. REV. 373 (2016).

California.⁴¹ While acknowledging that it is difficult to draw conclusions about rates of wrongful convictions in individual jurisdictions based upon rates of exonerations, they demonstrate that the picture of wrongful convictions and exonerations varies dramatically from county to county.⁴² From the data, they are able to extract insights into geographical differences and the impact of the various known contributors to wrongful convictions, such as eyewitness identification procedures, false confessions, perjury, flawed forensic science, official misconduct, and inadequate defense counsel.⁴³

Finally, Oleksandr Zadorozhnii's article, *Political Prosecutions in Ukraine: The Case of Yulia Tymoshenko*,⁴⁴ reflects both the increasingly international nature of the innocence movement and the reality that innocence cases outside the United States often do not fit neatly within the innocence paradigm developed in the United States.⁴⁵ There is no one-size-fits-all approach to wrongful convictions that can be easily transposed directly from the United States to other nations. Zadorozhnii, in particular, describes the politically motivated prosecution—or persecution—of former Ukrainian President Yulia Tymoshenko by her political opponents and successor government.⁴⁶ Zadorozhnii describes the way in which, as he puts it, criminal prosecution under oppressive regimes is at times used to pursue “two principal goals: (1) to suppress popular resistance to dictatorship; and (2) to neutralize the individuals that pose a major threat to the system.”⁴⁷ From a global perspective, wrongful conviction of the innocent can take many shapes. Thus, to be truly global, the innocence movement must be prepared to recognize and address all of the many manifestations of this universal problem.

41. *Id.* at 374.

42. *See id.* at 375-77.

43. *Id.*

44. Oleksandr Zadorozhnii, *Political Prosecutions in Ukraine: The Case of Yulia Tymoshenko*, 45 HOFSTRA L. REV. 479 (2016).

45. *See id.* at 484-85.

46. *Id.* at 481-87.

47. *Id.* at 497.