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Contemporary Perspectives on Wrongful Conviction: An Introduction to the 2015 Innocence Network Conference, Orlando, Florida

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INTRODUCTION

**CONTEMPORARY PERSPECTIVES
ON WRONGFUL CONVICTION:
AN INTRODUCTION TO THE 2015
INNOCENCE NETWORK CONFERENCE,
ORLANDO, FLORIDA**

The Innocence Network 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.”¹ Beginning in 1999 and 2000 in Chicago, Illinois, a small group of interested legal and social science scholars and clinic directors met at the Northwestern University School of Law to discuss ways to investigate and litigate claims of actual innocence. The first recognized National Innocence Conference took place at the California Western School of Law in 2002, and included 130 registered attendees. The Innocence Network, building upon the successful 2002 conference, formally established an advisory Board of Directors in 2005. An annual Innocence Network conference has been held each year since 2002, with the May 2015 conference in Orlando, Florida, generating more than 500 attendees, including 150 exonerees.

Currently there are sixty Innocence Network organizations in the United States and Network member organizations in Argentina, Australia, Canada, France, Ireland, Israel, Italy, the Netherlands, New Zealand, South Africa, and Taiwan.²

It is no longer disputed that innocent men and women have been convicted of crimes they did not commit and in which they played no role. According to the Innocence Project,³ DNA technology has exon-

1. *About the Innocence Network*, THE INNOCENCE NETWORK, <http://innocencenetwork.org/about/> [<http://perma.cc/7GJX-JKJ9>].

2. For more information about the Innocence Network, see THE INNOCENCE NETWORK, <http://innocencenetwork.org> [<http://perma.cc/HWB6-QJ7Y>].

3. “The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice.” *What is the Innocence Project? How did it get started?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/faqs/what-is-the-innocence-project-how-did-it-get-started> [<http://perma.cc/93TR-BSQK>]. The Innocence Project is a founding member of the Innocence Network. *What is the relationship between the Innocence Project and other organizations doing similar work?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/faqs/what-is-the-relationship-between-the-innocence-project-and-other-organizations-doing-similar-work> [<http://perma.cc/U2Y6-DR3A>].

erated 330 people and uncovered a history of wrongful convictions.⁴ The advent of forensic DNA analysis in the late 1980s provided a powerful and vital tool to ensure accuracy and fairness in the criminal justice system. The relative certainty of actual innocence generated by these DNA cases has enabled innocence scholars to identify how errors occur in criminal investigations, prosecutions, and post-conviction proceedings, in addition to developing remedies that can prevent future injustice. Nevertheless, DNA exonerations are just the tip of the iceberg because DNA testing is available in so few cases, as we now know that DNA exonerations are just a small percentage of wrongful convictions. The National Registry of Exonerations, an organization that records cases in which a wrongfully convicted person was later cleared of all the charges based on new evidence of innocence, reports that there have been 1,655 exonerations.⁵ Determining the precise number of wrongfully convicted people is not possible, but the few studies that have been conducted estimate that between 2.3% and 5% of all prisoners in the U.S. are innocent.⁶ Ninth Circuit Court of Appeals Judge Alex Kozinski puts it bluntly: “[H]ow confident [are we] that every one of the 2.2 million people in prisons and jails across the country are in fact guilty[?]”⁷ Judge Kozinski continued by saying, “We must reject out of hand the idea that the number of actual exonerations represents all of those who have been wrongly convicted.”⁸ With 2.2 million people serving time in U.S. prisons and jails, a 1% error rate in felony convictions would mean that approximately 22,000 of them are actually innocent. Thus, innocence organizations have only scratched the surface.

Before we go any further, we should define our terms. For the purposes of this publication, we will adopt the definition of “innocence” as it pertains to “exoneration” that was established by Professor Keith Findley in his 2011 *Albany Law Review* article. Professor Findley correctly observed that although innocence activists are committed to investigating and litigating cases of “factually innocent” individuals—meaning those who had nothing whatsoever to do with the planning or commission of a crime—the criteria necessary to establish innocence is grounded in established case law. Even with the absence of inculpatory DNA, or better yet, the presence of DNA evidence that

4. *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA [<http://perma.cc/A2X9-RTY4>].

5. *Exonerations by Year: DNA and Non-DNA*, THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [<http://perma.cc/5HRC-C3SK>].

6. *How Many Innocent People Are There in Prison?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/faqs/how-many-innocent-people-are-there-in-prison> [<http://perma.cc/JQN7-PXSZ>].

7. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiv (2015).

8. *Id.* at xv.

points to an alternate suspect, there can be no absolute certainty of factual innocence. Since DNA exists in fewer than 10% of all felony convictions, most defendants are convicted based upon questionable eyewitness identification, informant testimony, confessions, or dubious forensic practices.⁹ When convictions use any one or several of these practices, it becomes impossible for prisoners to establish their factual innocence with certainty. With due recognition of this fact, Professor Findley submits:

[T]he best we can or *should* do is rely on the legal standards that define guilt and, absent proof of guilt, presume innocence. Anything less than that invites endless controversy about subjective assessments of guilt and innocence, unwarranted insult and injury to the innocent who are forced to live under a continuing cloud of suspicion, and erosion of our most fundamental constitutional principles.¹⁰

To wit, Professor Findley proposes the adoption of what he, and we, consider the only workable definition of “exoneration”: “all cases in which a conviction was vacated based, in part, on evidence of innocence, by a court or executive, followed by no new trial or an acquittal at retrial.”¹¹

The known DNA and non-DNA exonerations have led to a serious examination of criminal justice procedures and uncovered several recurring causes of factual error in criminal cases. The causes include, among others, eyewitness misidentification, unvalidated or improper science, false confessions, government misconduct, jailhouse snitches, and inadequate defense.¹² These cases often involve multiple causes that produce a faulty guilty conviction.¹³

Mistaken eyewitness identification is a contributing factor in 33% of all exonerations¹⁴ (and 72% of DNA exonerations).¹⁵ While eyewitness testimony can be persuasive evidence before a judge or jury, years of strong social science research has proven that eyewitness identification is often unreliable.¹⁶ The inaccurate identifications are

9. *Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science#sthash.msqnePvx.dpuf> [<http://perma.cc/H3DB-U2CK>].

10. Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1162 (2011) (citations omitted).

11. *Id.* (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005)).

12. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> [<http://perma.cc/E4NJ-A3C7>].

13. *Id.*

14. % *Exonerations by Contributing Factor*, THE NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [<http://perma.cc/G9VW-EWQ5>].

15. *The Causes of Wrongful Conviction*, *supra* note 11.

16. Elizabeth F. Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOL. 9 (1980).

often due to human error of the witness, as well as the faulty execution of police identification procedures (such as lineups, photo spreads, or show-ups—where a suspect is identified at the crime scene),¹⁷ which can reinforce potential flaws in the original observation.

False or misleading forensic evidence is a contributing factor in 22% of all exonerations¹⁸ (and 47% of DNA exonerations).¹⁹ In addition, crime labs also experience critical problems of deficiency. These include:

(1) a lack of training of forensic examiners; (2) a lack of science in forensic “science” (i.e., certain techniques such as fingerprinting are not based on legitimate scientific principles); (3) a lack of preventative measures in forensic science that account for and minimize observer effects (i.e., subconscious effects on the examiner); (4) a lack of clear standards to counter the highly subjective nature of forensic examinations that renders them very susceptible to an assortment of errors, particularly those caused by subconscious observer effects; [and] (5) a lack of funding for the forensic science community. . . .²⁰

Additionally, other scientific evidence (such as hair microscopy, firearm tool mark analysis, and bite mark analysis) is often faulty or analyzed using incorrect or outdated methods. And yet, with all the reservations detailed above, the testimony of a “scientific expert” can be disproportionately convincing to a jury unfamiliar with the person’s area of expertise.

False confessions have been a contributing factor in 13% of all exonerations²¹ (and 27% of DNA exonerations).²² Innocent people may confess for a variety of reasons, including any combination of the following factors: duress, coercion, intoxication, diminished capacity,

17. See generally NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014), <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

18. % Exonerations by Contributing Factor, *supra* note 13.

19. *The Causes of Wrongful Conviction*, *supra* note 11. While DNA testing was developed through extensive scientific research at top academic centers, many forensic techniques—such as hair microscopy, bite mark comparisons, firearm tool mark analysis, and shoe print comparisons—have not been developed through extensive scientific research at top academic centers nor have they been subjected to sufficient scientific evaluation. Meanwhile, forensics techniques—such as serology, commonly known as blood typing—that have been properly validated are sometimes improperly conducted or inaccurately conveyed in trial testimony. *Unvalidated or Improper Forensic Science*, *supra* note 9.

20. Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 348 (2011) (citations omitted) (citing Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An “Intellectually Honest” Assessment*, 17 GEO. MASON U. C.R. L.J. 299, 303–04 (2007)).

21. % Exonerations by Contributing Factor, *supra* note 13.

22. *The Causes of Wrongful Conviction*, *supra* note 11.

mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and misunderstanding of the situation.²³

Official misconduct has been a contributing factor in 47% of all exonerations.²⁴ Common forms of misconduct by law enforcement officials include, “[e]mploying suggestion when conducting identification procedures”; “[c]oercing false confessions”; “[l]ying or intentionally misleading jurors”; “[f]ailing to turn over exculpatory evidence to prosecutors”; and “[p]roviding incentives to secure unreliable evidence from informants.”²⁵ Prosecutors can also facilitate government misconduct in a variety of ways, such as “[w]ithholding exculpatory evidence from defense”; “[d]eliberately mishandling, mistreating, or destroying evidence”; “[a]llowing witnesses they know or should know are not truthful to testify”; “[p]ressuring defense witnesses not to testify”; “[r]elying on fraudulent forensic experts”; and “[m]aking misleading arguments that overstate the probative value of testimony.”²⁶

Although the exact figure of jailhouse snitches and their effect on all wrongful convictions is unknown, snitches are a contributing factor in 15% of DNA exonerations.²⁷ These cases most commonly involve jailhouse informants, motivated by the promise of leniency in their own cases, or killers with incentives to divert attention away from themselves.²⁸

Ineffective defense counsel plays a significant role in the rate of wrongful convictions and DNA exonerations, but exact figures on the extent are unknown. In some cases, lawyers have slept in the courtroom during trial, been disbarred shortly after handling a case, failed to investigate alibis, failed to call or consult experts on forensic issues, or failed to show up for hearings.²⁹

The recent exonerations of Richard Gagnon from South Carolina and Jason Strong from Illinois highlight some of the causes of wrongful convictions. Richard Gagnon was convicted of two counts of first-

23. *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> [<http://perma.cc/74T5-82W4>].

24. % *Exonerations by Contributing Factor*, *supra* note 13.

25. *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/government-misconduct> [<http://perma.cc/AUL5-HQ8U>].

26. *Id.*

27. *The Causes of Wrongful Conviction*, *supra* note 11.

28. ROB WARDEN, NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH* ROW 3 (2004), <http://www.innocenceproject.org/causes-wrongful-conviction/SnitchSystemBooklet.pdf> [<http://perma.cc/6W8B-5SWC>].

29. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1838–39, 1843 (1994); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 785–86; Krieger, *supra* note 18, at 354.

degree murder and first-degree burglary in 2008.³⁰ At trial, Gagnon testified on his own behalf and denied committing the murders and burglary.³¹ However, the prosecution brought Robert Lee Mullins to the stand.³² Mullins had been in jail with Gagnon while Gagnon awaited trial, and Mullins testified that Gagnon had admitted to the murders and burglary.³³ In 2013, the court vacated Gagnon's convictions after new evidence revealed that Mullins had lied on the stand.³⁴ Indeed, DNA testing proved that a different man, who had been charged with home invasion and other crimes, had actually perpetrated the murders and burglary.³⁵ In 2015, the prosecution finally dismissed Gagnon's case.³⁶

Jason Strong was charged with first-degree murder and concealing a homicide after the body of an unidentified woman was found in an Illinois forest preserve.³⁷ Police believed three men were involved in the murder of the woman, and, subsequently, police offered Jeremy Tweedy, one of the accused men, a shorter sentence in exchange for testifying against Strong.³⁸ Despite evidence that Tweedy had changed his story at least six times in the course of the investigation and the presence of improper forensic science from the technician who had performed the autopsy, Strong was convicted of first-degree murder in 2000 and sentenced to forty-six years in prison.³⁹ A later examination of the body identified the victim as Kate Sunderlin, a developmentally disabled young woman who had been taken and extorted by a mother-daughter team with a history of preying on the elderly and disabled.⁴⁰ Additionally, in 2014 three independent medical examiners reviewed Sunderlin's autopsy and concluded that the evidence presented at trial regarding the time of death and injuries sustained by Sunderlin was incorrect.⁴¹ This information meant that Strong's confession was false. In 2015, U.S. District Court Judge Matthew Kennelly vacated Strong's conviction, dismissing the murder charge and releasing Strong from prison.⁴² These cases highlight the multiple causes of wrongful conviction. Those interested in further studying the contributing factors as

30. *Richard Gagnon*, THE NAT'L REGISTRY OF EXONERATIONS (June 2, 2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4698> [<http://perma.cc/QM6L-E4DH>].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Jason Strong*, THE NAT'L REGISTRY OF EXONERATIONS (May 30, 2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4697> [<http://perma.cc/9PUV-C8RE>].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

sociated with known exoneration cases should visit the National Registry of Exonerations.⁴³

In addition to exonerations, innocence organizations around the country work to improve local and national policies to better address the issues correlated with wrongful convictions. These efforts include working with members of Congress, state legislatures, and local elected officials to pass effective legislation and administrative policies that aim to prevent wrongful convictions and make it easier for the innocent to receive justice.⁴⁴ There is an inherent need to address the fundamental shortcomings of the criminal justice system while implementing specific reforms to law enforcement procedures. “All of the reforms [advocated for by innocence organizations] have been proven to increase the accuracy of the criminal justice system, often through decades of scientific research.”⁴⁵ Understanding the causes of wrongful convictions and the work done on individual cases has led to policy reform around the country. Especially important in this movement is education, changing and rewriting laws, and ultimately, preventing future wrongful convictions.

The articles presented in this edition address different aspects of wrongful convictions. Each article was selected by the 2015 Innocence Network Conference Session Organizers (Kaplan, Beety, and Schehr) for presentation at the Innocence Network Conference held in Orlando, Florida, in May of 2015.

Katherine R. Kruse’s postmortem review of DNA exonerations, entitled *Wrongful Convictions and Upstream Reform in the Criminal Justice System*, identifies points along the continuum of crime scene investigation and due process likely to generate wrongful convictions. In her contribution to this edition, Kruse argues that the most prudent way to minimize the likelihood of error leading to wrongful conviction is by focusing attention on “upstream” reforms. Specifically, Kruse addresses necessary improvements within law enforcement investigative practices, particularly eyewitness identification procedures, faulty forensic sciences, and false confessions. She recommends two “downstream” criminal procedure remedies to incentivize law enforcement to follow best practice procedures—applying the reliability rationale applicable to evidence law, and the deterrence rationale used in constitutional criminal procedure.

Wes Reber Porter’s contribution to this edition, *Threaten Sentencing Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea*, reveals the impact of sentencing enhancements on federal and state criminal trials and plea bargains.

43. *About the Registry*, THE NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<http://perma.cc/MZ3X-WY2B>].

44. *Improve the Law*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/legislative-reform> [<http://perma.cc/EA84-PA8T>].

45. *Id.*

Porter's focus is on the historical evolution of sentencing enhancements, the Supreme Court's attempts to protect criminal defendants from prosecutorial overreach and violations of fundamental fairness, the impact of motive enhancements, and the significance of bifurcated trials and sentence enhancement. To punctuate the significance of motive enhancement, Porter explains that California's Street Terrorism Enforcement and Prevention Act (STEP ACT) provides for sentencing enhancements based upon a defendant's participation in crimes that "benefit or promote" gang activities, regardless of whether the defendant was a member of a gang. California has a discretionary bifurcation statute that gives trial court judges the authority to determine whether separate trials should be held to establish beyond a reasonable doubt facts alleged by the state and facts that are associated with sentencing enhancements. With emphasis upon sentencing enhancements resulting from convictions at trial, Porter acknowledges that sentencing enhancements may induce pleas. Here, Porter provides the example of a criminal defendant facing a felony charge and motive enhancement. If one assumes that a trial judge would likely deny defense counsel's request for a bifurcated trial to determine both guilt and the motive enhancement, the defendant, now facing one trial to discern both guilt and sentencing enhancement, will likely choose to plea. Porter concludes his article with recommendations for legislatures and appellate courts.

Zieva Konvisser's article, "*What Happened to Me Can Happen to Anybody*"—*Women Exonorees Speak Out*, intimately addresses the problems particular to female exonorees. Through extensive interviews with twenty-one exonerated women, including one woman exonerated from death row, Konvisser uncovers the emotional and psychological consequences of a wrongful conviction. Konvisser begins with the systemic challenges facing female exonorees: the victim is more likely to have been a family member, the case is less likely to have exculpatory DNA evidence, and both prosecutors and media often stigmatize and demonize women in these instances. With her experience as a trauma researcher, Konvisser then asks these women about life before and after incarceration. Konvisser questions the women on their core beliefs and values, how they survived their prison sentences while fighting for their innocence, and how they have found reason and purpose in their lives—both then and now. By documenting a final message from the interviewed women to other exonorees, Konvisser gives voice to their unique experiences and encourages the innocence movement forward. In the words of one female exonoree, if anybody else is going through a wrongful conviction, they just have "to keep a positive mind and don't lose the faith. Keep fighting until you can't fight any more."⁴⁶ Konvisser's documen-

46. Zieva Dauber Konvisser, "*What Happened to Me Can Happen to Anybody*"—*Women Exonorees Speak Out*, 3 TEX. A&M L. REV. 303, 364 (2015).

tation of the struggle is a unique and necessary addition to innocence scholarship.

In *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, Marvin Zalman and Ralph Grunewald take the current trial model to task for allowing or even generating wrongful convictions. By examining American proposals for changing trial and pre-trial procedures, as well as continental inquisitorial systems, Zalman and Grunewald provide a robust analysis of possible reform for the criminal justice system. Some of the American reforms reviewed include greater prosecutorial disclosure of evidence, defendants entering initial pleas of innocence rather than not guilty, and prosecutors and defense attorneys' alternating roles. Additionally, the authors' analysis of European criminal procedure provides another lens through which to examine the American trial system, notably with the involvement of the judge in the trial and an impartial investigation. Their extensive piece opens the door to reconsidering the American trial structure.

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