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## A Review of The Wrongful Convictions Reader: A Comprehensive Resource for Students, Faculty, and Practitioners

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CARDOZO LAW REVIEW

# *de•novo*

A REVIEW OF *THE WRONGFUL CONVICTIONS READER*: A COMPREHENSIVE RESOURCE FOR STUDENTS, FACULTY, AND PRACTITIONERS

*Stephanie Roberts Hartung*<sup>†</sup>

As the Innocence Movement enters its second quarter-century and exoneration numbers continue to rise, popular interest in wrongful convictions has increased, as well. A review of course catalogs at law schools and universities around the country reveals ever-expanding offerings related to innocence work and wrongful convictions. While there is a robust body of scholarship in the field, up to now faculty teaching these courses have largely resorted to assembling their own reading materials. *The Wrongful Convictions Reader*,<sup>1</sup> edited by Professors Russell D. Covey and Valena E. Beety, provides a long-overdue alternative. Covey and Beety have mined the scholarship on wrongful convictions for rich and varied material relating to both historic and emerging themes. As a whole, the text presents the landscape necessary for law students, undergraduates, social scientists, and practitioners in the field to explore the many facets of the wrongful conviction problem in the United States.

Fundamentally, what is unique about this text is its interdisciplinary approach to the study of wrongful convictions. In addition to thoughtfully assembling critical works of influential scholars in the field, Covey and Beety also include suggestions for multimedia programming such as videos, blogs, and podcasts. Each chapter ends with proposed interactive exercises for students, ranging from drafting a motion for post-conviction

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<sup>1</sup> RUSSEL D. COVEY & VALENA E. BEETY, *THE WRONGFUL CONVICTIONS READER* (2019).

DNA testing to reading a transcript from an actual witness identification procedure and assessing whether or not police followed best practices. Each chapter also incorporates a “current law” section highlighting the relevant judicial opinions and legal standards for the topic discussed. In this way, *The Wrongful Conviction Reader* differs from the other primary texts often assigned in wrongful convictions courses. For example, *Actual Innocence*,<sup>2</sup> the bible of the Innocence Movement, co-written by Innocence Project founders Barry Scheck and Peter Neufeld, holds profound emotional power as a compilation of wrongful conviction narratives. Alternatively, in *Wrongful Convictions: Cases and Materials*,<sup>3</sup> Justin Brooks has created a casebook that focuses almost exclusively on the relevant legal standards impacting the study of wrongful convictions. And most recently, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*,<sup>4</sup> a collection edited by Daniel Medwed, gathers the collective wisdom of an array of scholars opining about the past and future of the Innocence Movement. However, *The Wrongful Convictions Reader* offers something new. It draws on all three of these approaches to create a collection that is at once comprehensive, complex, compelling, and digestible for a wide array of audiences.

The opening chapters examine the legal and philosophical underpinnings of the Innocence Movement. Chapter 1, *Prologue to Wrongful Convictions*, begins with the story of Levon Brooks and Kennedy Brewer, whose wrongful convictions in Mississippi highlight some of the more prevalent factors giving rise to conviction of the factually innocent, including poor lawyering and forensic fraud.<sup>5</sup> Chapter 2, *Defining Innocence and Miscarriages of Justice*, highlights the works of renowned legal philosophers and scholars,<sup>6</sup> including Hugo Adam Bedeau and Michael L. Radelet,<sup>7</sup> whose comprehensive survey of “miscarriage of justice” cases in the United States predates the Innocence Movement. Bedeau and Radelet’s struggle to delineate legal versus factual innocence still resonates today, as the numbers of no-crime exonerations relating to crime lab scandals, Shaken Baby Syndrome, and

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<sup>2</sup> BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* (Doubleday, 2000).

<sup>3</sup> JUSTIN BROOKS, *WRONGFUL CONVICTIONS: CASES AND MATERIALS* (Vandeplas, 2nd ed. 2014).

<sup>4</sup> *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION* (Daniel S. Medwed ed., Cambridge Univ. Press 2017).

<sup>5</sup> COVEY & BEETY, *supra* note 1, at 3–24.

<sup>6</sup> *Id.* at 25–42.

<sup>7</sup> Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 39–47 (1987), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 26–31.

arson remain steady.<sup>8</sup> For example, the issue of whether a post-conviction forensic testing access statute applies in self-defense and other no-crime cases is currently pending before the Supreme Judicial Court of Massachusetts.<sup>9</sup> Ultimately, Bedeau and Radelet cite to the Edwin Borchard tradition of “convicting the innocent” in limiting the scope of their study to scenarios where no crime was committed or the defendant was not physically involved in the crime.<sup>10</sup>

Further, in Chapter 2, D. Michael Risinger and Lesley C. Risinger explore circumstances where new post-conviction evidence undermines the prosecution’s theory of guilt presented at trial but falls short of affirmatively establishing innocence.<sup>11</sup> The authors argue that under such circumstances, prosecutors should not be allowed to revise or alter the original trial theory of the crime.<sup>12</sup> Acknowledging the “haystack” challenge of identifying and remedying viable innocence claims,<sup>13</sup> they further advocate for the creation of an innocence commission in every state<sup>14</sup> along with a policy of privileging post-conviction innocence claims raised by individuals who are represented by “innocence lawyers.”<sup>15</sup> Additionally, in this chapter, materials from Emily Hughes<sup>16</sup> and Daniel S. Medwed<sup>17</sup> further explore how factual innocence and exoneration are defined. Hughes acknowledges that the emphasis on factual innocence may have had the unintended consequence of creating a “supercategory of innocence” and reinforcing a popular view of the criminal justice system as the good guys (innocent) versus the bad guys (guilty).<sup>18</sup> Finally, this chapter explores data from James R. Acker’s study

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<sup>8</sup> According to data from the National Registry of Exonerations, 76 of the 150 exonerations in 2014, 89 of the 171 exonerations in 2015, 102 of the 177 exonerations in 2016, and 84 of the 159 exonerations in 2017 were no-crime exonerations. See NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [https://perma.cc/U6US-FUKW] (last visited Mar. 30, 2019) (filter by year in “Exonerated” column; then filter by “NC” in “Tags” column).

<sup>9</sup> See *Commonwealth v. Williams*, SJC-12560 (Mass. argued Dec. 3, 2018) (decision pending), *Commonwealth v. Putnam*, SJC-12596 (Mass. argued Dec. 3, 2018) (decision pending).

<sup>10</sup> Bedeau & Radelet, *supra* note 7, at 45, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 31.

<sup>11</sup> D. Michael Risinger & Lesley C. Risinger, *Miscarriages of Justice: A Theoretical and Practical Overview*, 7 J. MARSHALL L.J. 373, 389–404 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 32–37.

<sup>12</sup> *Id.* at 393.

<sup>13</sup> *Id.* at 399.

<sup>14</sup> *Id.* at 400.

<sup>15</sup> *Id.*

<sup>16</sup> Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084–85 (2011), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 38–39.

<sup>17</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1560–63 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 39–41.

<sup>18</sup> *Id.* at 1555.

of additional crimes committed when the real perpetrator in a wrongful conviction case is not initially identified and prosecuted.<sup>19</sup>

Chapter 3, *Overview of the Causes of Wrongful Convictions*, broadly introduces the now well-known wrongful conviction factors—eyewitness misidentification, false confessions, faulty and flawed forensics and professional misconduct—to be further discussed in the chapters below.<sup>20</sup> This chapter includes a description of the pioneering work of Samuel R. Gross and others at the National Registry of Exonerations.<sup>21</sup> While the data is a helpful starting point in understanding the landscape of wrongful convictions based on innocence in the United States, it is notable that the excerpted article included in the chapter is nearly fifteen years old. As a result, the numbers are out of date and much lower than what we know to be true today.<sup>22</sup> The chapter also identifies categories of cases that likely involve factual innocence but were not included in the data, i.e. mass exonerations based on large-scale police perjury or corruption, or sexual abuse and satanic ritual cases.<sup>23</sup> As a complement to the Gross article, Brandon L. Garrett’s *Judging Innocence* provides more up-to-date data on the subset of exonerations based on post-conviction DNA testing.<sup>24</sup> Finally, the work of Jon B. Gould and Richard A. Leo, which provides a short history of the study of wrongful convictions, rounds out the chapter.<sup>25</sup> Gould and Leo begin with Edwin Borchard’s study of wrongful convictions in 1913 and culminate with the pioneering work of Barry Scheck and Peter Neufeld, who founded the Innocence Project in 1992.

Chapter 4, *The Innocence “Myth” and the Cost of Preventing Wrongful Convictions*, explores the debate as to present and future error rates based on known exoneration data.<sup>26</sup> The chapter begins with a 2006 *New York Times* article articulating a backlash against the Innocence Movement and suggesting that exoneration numbers are grossly

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<sup>19</sup> James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1629–31 (2013), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 41–42.

<sup>20</sup> COVEY & BEETY, *supra* note 1, at 25–73.

<sup>21</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–54 (2005), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 43–59.

<sup>22</sup> See NAT’L REGISTRY EXONERATIONS, *supra* note 8.

<sup>23</sup> *Id.* at 533–41.

<sup>24</sup> Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56–93 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 59–69.

<sup>25</sup> Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 827–32 (2010), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 69–71.

<sup>26</sup> COVEY & BEETY, *supra* note 1, at 75–101.

exaggerated in the media.<sup>27</sup> Further, excerpts from Justice Souter and Scalia opinions weigh in on the debate regarding the depth of the wrongful conviction problem.<sup>28</sup> The chapter also presents excerpts from study of wrongful conviction rates by D. Michael Risinger, which concludes that the error rate for felony convictions is at least twelve times greater than the rate projected by Scalia.<sup>29</sup> Larry Laudan's article provides a counterpoint, presenting what he characterizes as a "politically correct answer to this morally delicate question."<sup>30</sup> In Laudan's estimation, the rate of wrongful convictions should be tempered by data about the likelihood that a falsely convicted individual would otherwise have committed another crime.<sup>31</sup>

Chapter 5, *Eyewitness Misidentifications*, provides a comprehensive introduction to eyewitness identification and the role it has played in wrongful convictions to date.<sup>32</sup> It opens with the well-known story of Jennifer Thompson, a rape victim who ultimately befriended Ronald Cotton, whom she erroneously identified as the man who brutally raped her.<sup>33</sup> Renowned eyewitness identification experts Gary L. Wells<sup>34</sup> and Nancy K. Steblay<sup>35</sup> present an overview of systemic reforms of police identification procedures, along with the scientific realities of human memory that make misidentifications so common. Collectively, these articles explain how identifications can go awry, while also advocating to reform police practices to help minimize the problem. Further, Steven E. Clark's article discusses the reform efforts in an economic context, relative to the costs of remedying wrongful convictions when

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<sup>27</sup> Joshua Marquis, *The Innocent and the Shamed*, N.Y. TIMES, Jan. 26, 2006, at A23, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 75–77.

<sup>28</sup> Excerpts from Justice Souter's dissent and Justice Scalia's concurrence in *Kansas v. Marsh*, 548 U.S. 163 (2006) are reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 77–81.

<sup>29</sup> D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 761–800 (2007), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 81–93. Justice Scalia projected that the wrongful conviction rate was 0.027 percent while Risinger concludes that it is between 3.3 and 5 percent. *Id.*

<sup>30</sup> Larry Laudan, *The Elementary Epistemic Arithmetic of Criminal Justice*, 5 EPISTEME 282–94 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 93–101.

<sup>31</sup> *Id.*

<sup>32</sup> COVEY & BEETY, *supra* note 1, at 103–133.

<sup>33</sup> Mike Celizic, *She Sent Him to Jail for Rape; Now They're Friends*, TODAY CONTRIBUTOR (Mar. 10, 2009), <https://www.today.com/news/she-sent-him-jail-rape-now-theyre-friends-1C9016956> [<https://perma.cc/XQ84-DWB7>], as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 103–06.

<sup>34</sup> Gary L. Wells, *Eyewitness Identifications: Systematic Reforms*, 2006 WIS. L. REV. 615, 615–20 (2006), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 106–09.

<sup>35</sup> Nancy K. Steblay, *Scientific Advances in Eyewitness Identification Evidence*, 41 WM. MITCHELL L. REV. 1090, 1102–11 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 109–19.

identification procedures go untested.<sup>36</sup> Finally, Timothy E. Moore, Brian L. Cutler, and David Schulman discuss how police coercion can influence an eyewitness identification.<sup>37</sup>

Chapter 6, *False Confessions*,<sup>38</sup> begins with an article by Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, and more, recounting the facts of the “Central Park Five,” the notorious New York City case where five men confessed to a horrific, high-profile crime they did not commit and were later exonerated of with DNA evidence.<sup>39</sup> The article identifies confessions as “among the most powerful forms of evidence introduced in a court of law,” and notes that juror overreliance on this kind of evidence is partly to blame for its role in so many wrongful convictions.<sup>40</sup> Another article in this chapter, by Saul M. Kassin, Steven A. Drizin, Richard A. Leo, and others, includes recommendations for reforming police procedures and legal standards to prevent false confessions from occurring and getting admitted into evidence.<sup>41</sup> The chapter also includes a *New Yorker* article by Douglas Starr criticizing the Reid Method, a widely-adopted approach to police interrogation practices.<sup>42</sup> The article contrasts this method with alternative inquisitorial methods used in Europe, which have been proven to be less likely to lead to false confessions.<sup>43</sup> An article by Samuel R. Gross and colleagues highlights the particular risk factors for false confession, including youth and mental disability.<sup>44</sup> And Brandon L. Garrett introduces the concept of confession contamination, where police intentionally or inadvertently provide details of the crime to the suspect during the interrogation, thereby seeming to give the confession an aura of credibility.<sup>45</sup>

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<sup>36</sup> Steven E. Clark, *Costs and Benefits of Eyewitness Identifications Reform: Psychological Science and Public Policy*, 7 PERSP. ON PSYCHOL. SCI. 238–259 (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 119–25.

<sup>37</sup> Timothy E. Moore et al., *Shaping Eyewitness and Alibi Testimony with Coercive Interview Practices*, CHAMPION, Oct. 2014, at 34, 35, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 125–26.

<sup>38</sup> COVEY & BEETY, *supra* note 1, at 135–185.

<sup>39</sup> Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 479–86 (2006), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 135–39.

<sup>40</sup> *Id.* at 485.

<sup>41</sup> Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6–18 (2010), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 140–50.

<sup>42</sup> Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKERS, Dec. 9, 2013, at 42, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 150–54.

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

<sup>44</sup> Samuel R. Gross et al., *supra* note 21, at 544–46, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 154–56.

<sup>45</sup> Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1052, 1052–1118 (2010), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 156–68.

Chapter 7, *Scientific Standards, Statistical Evidence, and the Future of Forensic Science*, explores a fundamental irony in the Innocence Movement: the chapter includes readings that expose forensic science as both a contributing factor in wrongful conviction cases and the central means of remedying them.<sup>46</sup> Vanessa Meterko's article begins with the alarming statistic that forty-six percent of the first 343 DNA exoneration cases involved the misapplication of forensic science.<sup>47</sup> Meterko's article, along with a second piece by Michael J. Saks and Jonathon J. Koehler,<sup>48</sup> highlights serology, hair microscopy, bite mark, ballistics, and fingerprint analysis as some of the fields of forensics most susceptible to error or misapplication. Several other authors weigh in: Jennifer L. Mnookin reflects on the future of forensic science;<sup>49</sup> William C. Thompson and Edward L. Shumann challenge the use of statistical evidence in criminal trials;<sup>50</sup> and Boaz Sangero and Mordechai Halpert propose reforms to prevent flawed forensics from leading to wrongful convictions.<sup>51</sup> The chapter also includes a pair of articles by Jonathan J. Koehler discussing the potential for errors in DNA and fingerprint analysis interpretation and application.<sup>52</sup> Finally, the chapter contains a discussion of,<sup>53</sup> and excerpt from,<sup>54</sup> the National Academy of Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward*, published in

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<sup>46</sup> COVEY & BEETY, *supra* note 1, at 187–249.

<sup>47</sup> Vanessa Meterko, *Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go from Here*, 119 W. VA. L. REV. 639, 646 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 187–89.

<sup>48</sup> Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identifications Science*, 309 SCIENCE, Aug. 5, 2005, at 892–95, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 189–98.

<sup>49</sup> Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 BROOK. L. REV. 1209, 1217–30 (2010), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 198–204.

<sup>50</sup> William C. Thompson and Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 LAW & HUM. BEHAV. 167, 167–85 (1987), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 204–08.

<sup>51</sup> Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 44–45 (2007), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 208–12.

<sup>52</sup> Jonathan J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial*, 34 JURIMETRICS J. 21, 21–39 (1993), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 212–21; Jonathan J. Koehler, *Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter*, 59 HASTINGS L.J. 1077, 1077–1100 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 221–25.

<sup>53</sup> Mnookin, *supra* note 49, at 1235–36, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 225–26.

<sup>54</sup> COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 226–29.



2009, highlighting the problems with forensic evidence and suggesting reforms. Articles by John M. Butler<sup>55</sup> and Jennifer E. Laurin<sup>56</sup> discuss additional recommended systemic reforms, with an emphasis on oversight and international standards.

Chapter 8, *DNA and Junk Science*, focuses on the particular benefits and challenges of DNA testing—the subset of forensics widely regarded as “the gold standard.”<sup>57</sup> Simon A. Cole’s article characterizes DNA testing as all at once an “exposer,” “contributor,” and “corrector” of wrongful convictions and discusses the evolving historical role of DNA within the Innocence Movement.<sup>58</sup> Additional articles in this chapter highlight issues relating to DNA testing including technological advances (Jessica Gabel Cino<sup>59</sup>) and the inherent subjectivity of DNA analysis (Erin Murphy<sup>60</sup>). The chapter further examines the role of other forensic disciplines in wrongful convictions, such as Shaken Baby Syndrome (Deborah Tuerkheimer;<sup>61</sup> Deborah W. Denno<sup>62</sup>) and arson (Deborah Tuerkheimer;<sup>63</sup> Caitlin M. Plummer and Imran J. Syed;<sup>64</sup> John J. Lentini<sup>65</sup>). Some of the readings focus on the notorious case of Cameron Todd Willingham, widely believed to have been wrongly executed for arson murder based on a Texas fire resulting in the death of his children.

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<sup>55</sup> John M. Butler, *U.S. Initiatives to Strengthen Forensic Science and International Standards in Forensic DNA*, 18 FORENSIC SCI. INT. GENET. 4–20 (Sept. 2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 229–30.

<sup>56</sup> Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1076–79 (2013), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 239–42.

<sup>57</sup> COVEY & BEETY, *supra* note 1, at 251–301.

<sup>58</sup> Simon A. Cole, *Forensic Science and Wrongful Convictions: From Exposer to Contributor to Corrector*, 46 NEW ENG. L. REV. 711, 712–19 (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 251–55.

<sup>59</sup> Jessica Gabel Cino, *Tackling Technical Debt: Managing Advances in DNA Technology That Outpace the Evolution of Law*, 54 AM. CRIM. L. REV. 373, 377–82, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 255–57.

<sup>60</sup> Erin Murphy, *The Art in the Science of DNA: A Layperson’s Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489, 492–96 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 257–68.

<sup>61</sup> Deborah Tuerkheimer, *Science-Dependent Prosecutions and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 513–69 (2011), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 268–70.

<sup>62</sup> Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 349, 341–43 (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 270–72.

<sup>63</sup> Tuerkheimer, *supra* note 61, at 553, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 275–77.

<sup>64</sup> Caitlin M. Plummer and Imran J. Syed, “*Shifted Science*” Revisited: *Percolation Delays and the Persistence of Wrongful Convictions Based on Outdated Science*, 64 CLEV. ST. L. REV. 483, 483–518 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 277–81.

<sup>65</sup> John J. Lentini, *Confronting Inaccuracy in Fire Cause Determinations*, FORENSIC SCIENCE REFORM: PROTECTING THE INNOCENT 66, 81–82, 86, 90 (Wendy Koen et al. ed., 2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 281–83.

Articles by Rachel Dioso-Villa<sup>66</sup> and Sandra Guerra Thompson and Nicole Bremner Cásarez<sup>67</sup> discuss the Willingham case as both a catalyst for reform and a wake-up call about widespread forensic reliance on an outdated understanding of fire science among investigators.

Chapter 9, *Informants and Snitches*, focuses on the prominent role that incentivized testimony has played in wrongful conviction cases.<sup>68</sup> This chapter includes scholarship discussing the many perils of incentivized testimony along with proposals for reform. It opens with a sobering statistic: over 45% of documented wrongful capital convictions “have been traced to false informant testimony.”<sup>69</sup> The opening articles by Alexandra Natapoff<sup>70</sup> and Robert P. Mosteller<sup>71</sup> explore the inherent problems with “snitch” testimony, including the potential motive to lie, facility of access to information, and lack of oversight, and discusses law enforcement reliance on this type of evidence. In a related article, Russell D. Covey discusses the propensity of jurors to rely heavily on this kind of evidence and the inherent difficulty in refuting it.<sup>72</sup> Even more problematic is that prosecutors tend to rely more heavily on snitch testimony when the evidence is otherwise weak, further contributing to wrongful convictions of the innocent. Jessica A. Roth suggests reforms including more rigid disclosure requirements on prosecutors, *in limine* reliability hearings, and limited admissibility subject to substantial corroboration.<sup>73</sup> The chapter ends with a series of exercises relying on materials from *Kansas v. Ventris*,<sup>74</sup> a 2009 Supreme Court case allowing the admission of unconstitutional snitch testimony as impeachment.

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<sup>66</sup> Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 MINN. J.L. SCI. & TECH. 817, 817–48 (2013), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 283–85.

<sup>67</sup> Sandra Guerra Thompson & Nicole Bremner Cásarez, *Building the Infrastructure for “Justice Through Science”: The Texas Model*, 119 W. VA. L. REV. 711, 711–48 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 285–88.

<sup>68</sup> COVEY & BEETY, *supra* note 1, at 303–42.

<sup>69</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U.L. REV. 107, 107–12 (2006), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 303–05.

<sup>70</sup> *Id.*

<sup>71</sup> Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 554–57 (2009), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 305–07.

<sup>72</sup> Russel D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375–1429 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 307–17.

<sup>73</sup> Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 743–4 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 317–24.

<sup>74</sup> 556 U.S. 586 (2009).

Chapters 10 and 11 explore the role that the most powerful stakeholders in the criminal justice system—police, prosecutors, and defense attorneys—have played in sending innocent men and women to prison. Chapter 10, *Police and Prosecutorial Misconduct*, examines how conduct of law enforcement and prosecutors can contribute to wrongful convictions.<sup>75</sup> In the opening article, Russell Covey sets the stage with a discussion of some of the most notorious police scandal rings in recent history, including Rampart in Los Angeles and Tulia in West Texas, both of which resulted in numerous exonerations.<sup>76</sup> These cases illustrate the depth of misconduct in some jurisdictions, ranging from planting evidence and coercing witnesses to filing false charges. Peter A. Joy suggests that prosecutorial misconduct is the product of institutional norms including vague ethical obligations, unchecked discretion, and lack of recourse for misconduct.<sup>77</sup> Further, Kara MacKillop and Neil Vidmar discuss the ways that prosecutors’ pre-trial decisions about disclosure of *Brady* materially impact jury verdicts and lead to wrongful convictions.<sup>78</sup> Notably, the results of a study published by Jon B. Gould, Julia Carrano, Richard A. Leo, and Katie Hail-Jares, excerpted in the chapter, support the conclusion that weak prosecution cases are more likely to lead to wrongful convictions.<sup>79</sup> Valena Beety also discusses recommendations for reform including imposing prosecutorial disclosure requirements both pre-trial and post-conviction.<sup>80</sup> Jacqueline McMurtrie advocates for applying the equitable doctrine of judicial estoppel to prosecutors who respond to post-conviction exculpatory DNA evidence with “unindicted co-ejaculator” scenarios or other comparable theories.<sup>81</sup> Finally, Dan Simon addresses a systemic issue he names “excessive adversarialism” and advocates for a system that centers on truth and

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<sup>75</sup> COVEY & BEETY, *supra* note 1, at 343–73.

<sup>76</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1137–61 (2013), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 343–49.

<sup>77</sup> Peter A. Joy, *The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 399–427 (2006), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 349–56.

<sup>78</sup> Kara MacKillop and Neil Vidmar, *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI.-KENT L. REV. 957, 970–72 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 356–58.

<sup>79</sup> Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 494–502 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 358–60.

<sup>80</sup> Valena Beety, *Changing the Culture of Disclosure and Forensics*, 73 WASH. & LEE. REV. ONLINE 580, 581–82 (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 360–63.

<sup>81</sup> Jacqueline McMurtrie, *The Unindicted Co-Ejaculator and Necrophilia: Addressing Prosecutors’ Logic-Defying Responses to Exculpatory DNA Results*, 105 J. CRIM. L. & CRIMINOLOGY 853, 854–76 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 363–66.

accuracy.<sup>82</sup> The exercises at the end of the chapter invite the reader to examine various examples of extreme police or prosecutorial misconduct,<sup>83</sup> where there has been reluctance to hold responsible parties accountable.

Although it is difficult to quantify the role of incompetent counsel in wrongful convictions, the National Registry of Exonerations identifies “inadequate legal defense” as playing a role in about one quarter of exoneration cases.<sup>84</sup> Chapter 11, *Incompetent Lawyering*, illuminates how the very individuals who are charged with zealously representing those accused of grave criminal charges all too often play a role in securing a wrongful conviction of a factually innocent person.<sup>85</sup> In an excerpt from *Actual Innocence*, the authors recount a series of early DNA exoneration narratives involving profound incompetence and misconduct by defense counsel.<sup>86</sup> In a related article, Meghan J. Ryan and John Adams emphasize the importance of highly-skilled, well-trained, and conscientious defense counsel in properly litigating criminal cases in the modern era and preventing wrongful convictions, while noting the systemic problem of underpaying public defenders and other court-appointed counsel.<sup>87</sup> Despite the prevalence of poor lawyering in criminal cases, Jacqueline McMurtrie points out that the current legal standard for overturning a conviction based on ineffective assistant of counsel is extraordinarily high and difficult to establish.<sup>88</sup> Eve Brensike Primus discusses how the problem is exacerbated by the systemic realities facing public defenders including underfunding, excessive caseloads, insufficient training, and lack of independence from the judiciary.<sup>89</sup> Finally, in this chapter, several other prominent legal scholars address additional aspects of inadequate counsel and its impact on wrongful

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<sup>82</sup> Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 437–39 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 366–67.

<sup>83</sup> COVEY & BEETY, *supra* note 1, at 368–73.

<sup>84</sup> See National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [<https://perma.cc/675N-LUYX>] (last visited Mar. 30, 2019) (filter by “ILD” in “ILD” column).

<sup>85</sup> COVEY & BEETY, *supra* note 1, at 375–402.

<sup>86</sup> BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 237–41 (Signet, 2000), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 375–77.

<sup>87</sup> Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1096–99 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 377–79.

<sup>88</sup> Jacqueline McMurtrie, *Strange Bedfellows: Can Insurers Play a Role in Advancing Gideon’s Promise*, 45 HOFSTRA L. REV. 391, 395–97 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 379–80.

<sup>89</sup> Eve Brensike Primus, *Defense Counsel and Public Defense*, ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM, 121–45 (Erik Luna, ed. 2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 380–84.

convictions, including: the structural imbalance between the resources available to the prosecution and defense bar (Mark Godsey);<sup>90</sup> the inherent incentive among public defenders to minimize expenditure of work per case in light of payment structure and extreme caseloads (Tigran W. Eldred);<sup>91</sup> the particularly egregious historic failures of the defense bar in death penalty cases, particularly when the accused are poor (Stephen B. Bright);<sup>92</sup> and the role of prosecutors in mitigating poor defense counsel performance in light of their ethical duties that surpass the traditional role of advocate (Bruce A. Green).<sup>93</sup>

In Chapter 12, *Cognitive Bias and Tunnel Vision*, the authors explore the subtler ways that the stakeholders in the criminal justice system can inadvertently and unknowingly contribute to the wrongful conviction of an innocent person.<sup>94</sup> Keith A. Findley and Michael S. Scott discuss the ubiquity of “tunnel vision” in criminal prosecutions, which can exacerbate other factors, such as professional misconduct, eyewitness misidentification, coerced confessions, and forensic error or fraud.<sup>95</sup> The authors acknowledge tunnel vision as a natural human instinct that leads players in the criminal justice system to “focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.”<sup>96</sup> Prominent social science researchers Sherry Nakhaeizadeh, Itiel E. Dror, and Ruth M. Morgan discuss the various types of cognitive bias and their contributions to wrongful convictions.<sup>97</sup> For example, the authors define confirmation bias as “the tendency to selectively gather and process information to confirm a hypothesis or preconception by looking for evidence that would validate existing beliefs and expectations . . . [while] rejecting, excusing,

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<sup>90</sup> MARK GODSEY, *BLIND JUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS* 84 (2017), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 384–85.

<sup>91</sup> Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 344–51 (2013), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 385–88.

<sup>92</sup> 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, 1841–62 (1994), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 388–95.

<sup>93</sup> Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors*, 3 TEX. A&M L. REV. 515, 522–31 (2016), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 395–400.

<sup>94</sup> COVEY & BEETY, *supra* note 1, at 403–430.

<sup>95</sup> Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291–397 (2006), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 403–09.

<sup>96</sup> *Id.* at 292.

<sup>97</sup> Sherry Nakhaeizadeh et al., *The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations*, 4 BRIT. J. AM. LEGAL STUD. 527, 534–42 (2015), as reprinted in *THE WRONGFUL CONVICTIONS READER*, *supra* note 1, at 409–14.

or ignoring evidence that could contradict the current assumption.”<sup>98</sup> It should come as no surprise that these behaviors apply in the criminal justice system among police, prosecutors, defense lawyers, judges, and forensic analysts alike.

Studies support that cognitive bias among the stake holders in the criminal justice system plays a critical role in wrongful convictions.<sup>99</sup> Yet, the best way to address the impact of this unavoidable human tendency remains the subject of debate. For example, Alafair S. Burke poses the rhetorical question: “If prosecutors fail to achieve justice not because they are bad, but because they are human, what hope is there for change?”<sup>100</sup> Burke goes on to emphasize the critical role of prosecutorial discretion at every phase of a criminal prosecution and the inevitability of cognitive bias but does not propose any particular reforms to address this reality.<sup>101</sup> Perhaps in the context of forensic analysis, where experts frequently have access to information about a case that goes beyond what is relevant to the requested testing, the best way to address cognitive bias is more obvious. For example, Jennifer L. Mnookin argues that blind forensic analysis, shielded from the influence of non-relevant facts about the case, could directly address the issue.<sup>102</sup> In the context of defense counsel—particularly where public defenders are involved—Molly J. Walker Wilson argues that the ubiquity of plea deals in the criminal justice system results in defense counsel encouraging guilty pleas from their factually-innocent clients without the benefit of investigation or close examination of the prosecution’s case.<sup>103</sup>

The collection of readings in Chapter 13, *Guilty Pleas, Pretrial Procedure, and Innocence*, explores a historically-overlooked aspect of wrongful convictions.<sup>104</sup> Although over ninety-five percent of defendants in the American criminal justice system currently resolve their cases through a plea deal,<sup>105</sup> only nine of the first two-hundred people

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<sup>98</sup> *Id.* at 537.

<sup>99</sup> See, e.g., Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. APPLIED RES. MEMORY & COGNITION 42 (2013).

<sup>100</sup> Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1592 (2006).

<sup>101</sup> *Id.* at 1588–613, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 414–25.

<sup>102</sup> Mnookin, *supra* note 49, at 1230–32, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 425–26.

<sup>103</sup> Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 273–76 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 426–27.

<sup>104</sup> COVEY & BEETY, *supra* note 1, at 431–464.

<sup>105</sup> Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–86 (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 431.

exonerated by DNA evidence initially pled guilty.<sup>106</sup> In recent years, legal scholars have begun to focus their research more directly on the “innocence problem” in the guilty plea context. Studies have shown that the rate of wrongful conviction in guilty plea cases is extraordinarily high—ranging from estimates of 3.3–27 percent.<sup>107</sup> An article by John H. Blume and Rebecca K. Helm discusses the related problem of the *Alford* plea phenomenon, where a wrongfully convicted person opts to plead to a lesser offense in the wake of post-conviction evidence of innocence rather than risk another jury trial.<sup>108</sup> Lucian E. Dervan and Vanessa A. Edkins present the results of their research on the impact of “the plea-bargaining machine” and the forces leading innocent defendants to plead guilty rather than relitigate their cases.<sup>109</sup> Russell Covey examines how the mass exoneration cases, including Rampart in Los Angeles and Tulia in Texas, illustrate why actually innocent defendants plead guilty.<sup>110</sup> Covey analyzes data suggesting that the overwhelming majority of factually innocent people resolve their cases by pleading guilty.<sup>111</sup>

Other issues raised in this chapter include the relationship between overburdened public defender offices and the proliferation of guilty pleas (Lisa Kern Griffin)<sup>112</sup> and entering a plea agreement without admitting guilt via a *nolo contendere* or *Alford* plea (Judge Stephanos Bibas).<sup>113</sup> The chapter ends with recommendations for reform such as: creating an “investigative trial” track for criminal defendants who claim factual innocence and are willing to waive certain constitutional rights prior to trial (Samuel R. Gross);<sup>114</sup> involving judges more directly in the plea-

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<sup>106</sup> Garrett, *supra* note 24, at 74.

<sup>107</sup> Dervan, *supra* note 105, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 431.

<sup>108</sup> John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 158–61 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 432–37.

<sup>109</sup> Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 2–48, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 437–40.

<sup>110</sup> Covey, *supra* note 76, at 1166–74, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 440–43.

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

<sup>112</sup> Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS. 83, 88–95 (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 443–46.

<sup>113</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1370–87 (2003), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 446–49.

<sup>114</sup> Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1022–24 (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 449–51.

bargaining process (Judge Jed S. Rakoff);<sup>115</sup> and minimizing the “direct connection” rule as applied to evidence of a third-party culprit (David Schwartz and Chelsey Metcalf).<sup>116</sup>

Chapters 14 and 15 collectively address the direct appellate and post-conviction procedural landscape in innocence cases. Chapter 14, *Appellate and Post-Conviction Review of Innocence: The Cases*,<sup>117</sup> presents excerpts from a series of significant Supreme Court cases governing post-conviction review, including *Jackson v. Virginia*,<sup>118</sup> *Herrera v. Collins*,<sup>119</sup> *Schlup v. Delo*,<sup>120</sup> *House v. Bell*,<sup>121</sup> *In re Davis*,<sup>122</sup> and *McQuiggin v. Perkins*.<sup>123</sup> Taken as a whole, these cases illustrate the Supreme Court’s historic approach to federal habeas corpus petitions based on actual innocence and its increasing reliance on procedural bars to deny relief to petitioners in the wake of AEDPA. Chapter 15, *Appellate and Post-Conviction Review of Innocence: An Assessment*, discusses the impact of post-conviction jurisprudence on claims of innocence.<sup>124</sup> The chapter begins with an excerpt from the influential 1970 Article by Judge Henry J. Friendly, *Is Innocence Irrelevant?*, arguing that federal habeas petitions should be limited to those raising claims of factual innocence.<sup>125</sup> It also includes the troubling data from Brandon L. Garrett’s study of the first 250 DNA exonerations, establishing the rate of reversal based on new evidence of innocence as fourteen percent—roughly equal to a control group of defendants who’d been adjudicated as guilty without DNA evidence.<sup>126</sup> In a related article, Keith A. Findley examines the systemic reasons why the appellate process fails to address claims of innocence, noting the focus on process as opposed to factual innocence, along with the extreme deference to trial courts as fact finders, as central

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<sup>115</sup> Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW OF BOOKS, Nov. 20, 2014, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 451–54.

<sup>116</sup> David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 338–39 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 454–57.

<sup>117</sup> COVEY & BEETY, *supra* note 1, at 465–509.

<sup>118</sup> 443 U.S. 307 (1979).

<sup>119</sup> 506 U.S. 390 (1993).

<sup>120</sup> 513 U.S. 298 (1995).

<sup>121</sup> 547 U.S. 518 (2006).

<sup>122</sup> 557 U.S. 952 (2009).

<sup>123</sup> 569 U.S. 383 (2013).

<sup>124</sup> COVEY & BEETY, *supra* note 1, at 511–43.

<sup>125</sup> Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142–44 (1970), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 454–57.

<sup>126</sup> Garrett, *supra* note 24, at 96–116 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 512–23.



to the problem.<sup>127</sup> Finally, an article by Todd E. Pettys recounts the notorious Supreme Court case and ultimate execution of Robert Coleman, who was procedurally barred from raising claims of factual innocence after his appointed counsel missed the filing deadline by one day.<sup>128</sup> The case illustrates the Court's reliance on the notion of finality in justifying its unwillingness to review post-conviction innocence claims.

Chapter 16, *Intersections: Race, Gender, Sexual Orientation, and Innocence*, includes a collection of readings that focus on wrongful convictions' disproportionate impact on historically marginalized groups.<sup>129</sup> The chapter opens with data supporting the clear historic race disparity in prosecution of drug crimes, and highlights that the most prominent "mass exoneration" cases, including Rampart and Tulia, overwhelmingly impacted Black defendants.<sup>130</sup> The readings explore broad themes recently popularized by Michelle Alexander's *The New Jim Crow*, in particular the idea of the criminal justice system as a means of social control deliberately developed in the wake of the abolition of slavery.<sup>131</sup> A short excerpt from an book by critical race theorist Ian F. Haney Lopez introduces the concept of race as a social construct, as illustrated by the historic need to legally define "Negro" for the purpose of imposing Jim Crow segregation and other explicitly race-based laws.<sup>132</sup> Other readings on the issue of race and criminal justice focus on Parchman Farm, the notorious prison relying on convict labor in Tennessee in the post-Civil War Era (David Oshinsky),<sup>133</sup> the realities of modern criminal defense practice in the deep south (Bryan Stevenson),<sup>134</sup> and the impact of implicit bias in the criminal courtroom (L. Song

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<sup>127</sup> Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 601–08 (2009), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 523–26.

<sup>128</sup> Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313 (2007), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 526–43.

<sup>129</sup> COVEY & BEETY, *supra* note 1, at 545–76.

<sup>130</sup> SAMUEL R. GROSS ET AL., NAT'L REGISTRY EXONERATIONS, RACE AND WRONGFUL CONVICTIONS (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 545–47.

<sup>131</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

<sup>132</sup> IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 111, 118–19 (1996), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 547–48.

<sup>133</sup> DAVID OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 56–57, 63, 71 (1996), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 547–48.

<sup>134</sup> BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 23–24, 58–60 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 550–51.

Richardson).<sup>135</sup> As a whole, these readings meaningfully explore the evolution from the explicitly racially discriminatory laws and systems of the Jim Crow era to the more subtle, yet equally discriminatory and oppressive realities of our racist criminal justice system today. However, the theme of historical racial oppression and systemic inequities in our criminal justice system, while fully addressed here, could be woven more meaningfully into the rest of the text. Discussing these issues for the first time in Chapter 16, toward the end of this long compilation, has the potential impact of presenting them as a discrete and finite issue—even an after-thought—rather than recognizing them as the underlying fabric of the wrongful conviction epidemic and the need for criminal justice reform more broadly.

The second half of the chapter focuses on the role of gender and sexual orientation in wrongful convictions. Passages from the influential book, *Queer (In)Justice: The Criminalization of LGBT People in the United States* by Joey Mogul, Andrea Ritchie, and Kay Whitlock introduce the notion of crime as a social construction established by the privileged and influential heteronormative faction of society.<sup>136</sup> This reality, the authors argue, results in overincarceration of women and LGBTQ people, along with an institutional bias that acts to criminalize homosexuality by equating it with deviance and extreme violence.<sup>137</sup> The readings further illuminate this theme through discussions of the history of criminalizing same-sex sodomy (Jordan Blair Woods),<sup>138</sup> the inherent anti-LGBTQ bias in the “Romeo and Juliet” laws providing an exception to statutory rape punishment for certain categories of consensual heterosexual relationships (Carrie L. Buist and Emily Lenning),<sup>139</sup> and the history of criminalization of cross-dressing (Bennett Capers).<sup>140</sup> Finally, an excerpt from an article by Andrea L. Lewis and Sara L. Sommervold explores the role of gender stereotyping and cultural perceptions in the wrongful convictions of women.<sup>141</sup> Notably, sixty-four

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<sup>135</sup> L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 882 (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 551–52.

<sup>136</sup> Joey Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* 69–70, xi, xii (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 554–57.

<sup>137</sup> *Id.*

<sup>138</sup> Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 674, 681, 684 (2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 557.

<sup>139</sup> CARRIE L. BUIST & EMILY LENNING, QUEER CRIMINOLOGY: NEW DIRECTIONS IN CRITICAL CRIMINOLOGY 76–77 (2016).

<sup>140</sup> Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 8–10, 18–19, 21 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 562–64.

<sup>141</sup> Andrea L. Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1035 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 564.

percent of exonerated women were convicted under circumstances that were later determined to be no-crime scenarios.<sup>142</sup> In related article, Elizabeth Webster and Jody Miller discuss the prevalence among exoneration cases of women accused of killing or harming a loved one in their care.<sup>143</sup>

Finally, Chapter 17, *Reconsidering Innocence: Rethinking Causes and Addressing Consequences*,<sup>144</sup> begins with an overview of the debate about the impact of the Innocence Movement on criminal defense practice. In the opening article, Abbe Smith makes the argument that an overemphasis on the work of innocence organizations and factual innocence results in detracting attention from the larger need for criminal justice reform more broadly.<sup>145</sup> Related pieces by Carol S. Steiker and Jordan M. Steiker<sup>146</sup> and David Feige<sup>147</sup> highlight these concerns, as well. An excerpt from Daniel S. Medwed's Article *Innocentrism* presents the counterpoint that a focus on innocence can operate to advance criminal justice reforms rather than diminish them.<sup>148</sup> Medwed argues, for example, that media attention on wrongful convictions help educate judges and jurors about the flaws in the system and that the innocence movement helps advance reforms that benefit all criminal defendants, not just the innocent ones.<sup>149</sup> The readings in this chapter also present a series of suggestions for reform including: using organizational theory to review crime lab misconduct from a systemic rather than an individual perspective (William C. Thompson);<sup>150</sup> approaching wrongful

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<sup>142</sup> *Id.* at 1036.

<sup>143</sup> Elizabeth Webster & Jody Miller, *Gendering and Racing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriages of Justice*, 78 ALB. L. REV. 973, 1000–1007, 1030–31 (2015), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 565–68.

<sup>144</sup> COVEY & BEETY, *supra* note 1, at 577–630.

<sup>145</sup> Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 323–26 (2010), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 577–79.

<sup>146</sup> Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 619–21 (2005), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 579–80.

<sup>147</sup> David Feige, *The Dark Side of Innocence*, N.Y. TIMES MAG., June 15, 2003, at 15, as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 581–82.

<sup>148</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1566–70 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 582–85.

<sup>149</sup> *Id.*

<sup>150</sup> William C. Thompson, *Beyond Bad Apples: Analyzing the Role of Forensic Science in Wrongful Convictions*, 37 SW. L. REV. 1027, 1028–30 (2008), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 585–89.

convictions as “organizational accidents” (James M. Doyle);<sup>151</sup> and using statistical and comparative social science methodologies to compare wrongful conviction cases and “near miss” cases where an innocent person was indicted but the charges were dropped pre-trial (Jon Gould, Julia Carrano, Richard Leo, & Katie Hail-Jares).<sup>152</sup> Further, Paul Cassell raises concerns about reforming the system in a way that ensures convictions of guilty defendants while exonerating the innocent, for example, by limiting federal habeas corpus to claims of factual innocence and eliminating the exclusionary rule.<sup>153</sup> And finally, Michael Leo Owens and Elizabeth Griffiths examine the various state wrongful conviction compensation statutes, noting the vast disparities from state to state.<sup>154</sup>

In sum, *The Wrongful Conviction Reader* is a welcome addition to the existing literature in the field. The editors present a comprehensive, interdisciplinary collection of legal and social science scholarship and popular media accounts. As a whole, this compilation effectively introduces the reader to the primary wrongful conviction themes of the era. The structure of the book also lends itself nicely to curricular organization for purposes of serving as a course textbook. At the same time, the depth and breadth of the research and commentary presented will offer new perspectives to seasoned practitioners and scholars in the field, as well.

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<sup>151</sup> James M. Doyle, *Orwell’s Elephant and the Etiology of Wrongful Convictions*, 79 ALB. L. REV. 895, 897–98 (2016), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 589–95.

<sup>152</sup> Gould et al., *supra* note 79, at 471, 475–77 (2014), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 595–99.

<sup>153</sup> Paul Cassell, *Can We Protect the Innocent without Freeing the Guilty? Thoughts on Innocence Reforms That Avoid Harmful Tradeoffs*, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT, 264–341 (Daniel S. Medwed ed., Cambridge Univ. Press 2017), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 600–10.

<sup>154</sup> Michael Leo Owens & Elizabeth Griffiths, *Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation*, 75 ALB. L. REV. 1283, 1283–1305 (2012), as reprinted in THE WRONGFUL CONVICTIONS READER, *supra* note 1, at 611–17.