

SUSTAINABILITY OF INNOCENCE REFORM*

*Marvin Zalman** and Julia Carrano****

I. INTRODUCTION

Freeing one innocent prisoner, whose conviction masked the truth, seems an ultimate act of justice, as it rectifies a palpable wrong inflicted by the very system designed to guarantee true judgments. Yet one exoneration, however welcome, is inadequate to uphold a societal sense of justice in the face of growing knowledge that wrongful convictions are widespread.¹ The disquiet caused by knowing that many prisoners have been officially exonerated is compounded by studies estimating that wrongful convictions occur at significant rates, leading to thousands of miscarriages of justice every year.² Disquiet deepens when a wealth of scholarship shows

* We wish to thank the contributors to a book we edited and which was recently published by Routledge Press, *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* (2014), whose insights provided the foundation for this article: Jim Acker, Yotam Barkai, Rose Bellandi, Elizabeth Brown, Simon Cole, Andrew Davies, Jim Doyle, Keith Findley, Laurel Gegner, Larry Golden, Jon Gould, Sam Gross, Katie Hail-Jares, Ron Keine, Richard Leo, Evelyn Malavé, Nancy Marion, Christine Mumma, Rebecca Murray, Rob Norris, Justin Pelton, Rob Warden, and Alissa Worden. Of course, we take full responsibility for all interpretations, rightful or wrongful, and any errors. Since this article was completed several institutional innovations that enhance the sustainability of innocence reform have occurred. The National Institute of Justice has established the Sentinel Events Initiative, a process to examine the underlying causes of wrongful convictions in specific cases (see J. M. Doyle, *NIJ's Sentinel Events Initiative: Looking Back to Look Forward*, 273 Nat'l Inst. Just. J. 10 (2014)); the Quattrone Center for the Fair Administration of Justice has been established at the University of Pennsylvania Law School as a national research and policy hub created to catalyze long-term structural improvements to the US criminal justice system (<https://www.law.upenn.edu/institutes/quattronecenter/> (last visited July 9, 2014)); and the Center for Prosecutor Integrity was initiated (<http://www.prosecutorintegrity.org/> (last visited July 9, 2014)), which publishes a registry of prosecutor misconduct based on final judicial decisions (<http://www.prosecutorintegrity.org/registry/database/> (last visited July 9, 2014)).

** Professor of Criminal Justice, Wayne State University; B.A., Cornell University, J.D., Brooklyn Law School; M.A., Ph.D., School of Criminal Justice, State University of New York at Albany.

*** Project Coordinator, University of Mississippi; B.A., University of Dallas, M.A., University of California-Santa Barbara, J.D., George Washington University Law School.

¹ See THE NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Apr. 19, 2014) (citing almost 1350 exonerations to date).

² Reasoned or calculated estimates range from .5 percent to five percent of all felony

that errors of justice are not inevitable results of human fallibility but are produced by systems that are correctible.³ Disquiet turns to dismay when, realizing that innocence reforms that logically reduce the number of wrongful convictions *also* create a more accurate criminal justice system that will better convict the guilty, forces of inertia continue to obstruct such reforms.⁴

Although legal scholarship tends typically to focus on doctrinal developments over time,⁵ a lesson from the innocence movement's brief history is that the extensive problem of wrongful convictions cannot be satisfactorily addressed one case at a time or by the accretion of legal doctrine. What distinguishes the Innocence Project,⁶ the Center on Wrongful Convictions,⁷ the Innocence Network⁸ and other contemporary innocence organizations from

convictions. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005) (observing that known exonerations are the tip of the wrongful conviction iceberg); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (calculating wrongful conviction in death penalties for rape-murder at 3.3 to 5 percent); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 226, 230 (2012) (arguing that reasonable estimates of general wrongful convictions range from .005 to .01 percent of all felony convictions annually, based on assessment of criminal justice process) [hereinafter Zalman, *Qualitatively Estimating*]; JOHN ROMAN ET AL., URBAN INST. JUSTICE POLICY CTR., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 7 (2012) (noting random sample of a forensic examiner's cases eliminated prisoner as source of DNA in 7.8 percent of sexual assault cases and found probative evidence of innocence in 5.3 percent of all cases).

³ The volume of writings on wrongful convictions has grown to encyclopedic proportions and will be accessed as useful in this article. A recently published encyclopedia, *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* (Gerben Bruinsma & David Weisburd eds., 2013), includes several wrongful conviction-related entries, including: *Wrongful Convictions: Causes of Wrongful Conviction*, by Shawn Armbrust; *Forensic Science, Judicial Oversight, and Wrongful Convictions*, by Carole McCartney; *False Confessions and Police Interrogation*, by Mark Costanzo and Marina Costanzo; *(Innocence) Commissions with Powers to Refer Convictions Back to the Courts*, by Kent Roach; *Summary Proceedings in the Inquisitorial System and the Impact on Wrongful Convictions*, by Gwladys Gilliéron; *Overturing Wrongful Convictions and Compensating Exonerees*, by Myrna Raeder; and *Measuring Wrongful Convictions*, by Marvin Zalman. Important wrongful conviction scholarship appears in many disciplines: law, psychology, other social sciences (e.g., criminal justice, criminology, science, technology, and law studies), and forensic sciences.

⁴ See BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES* 3–4 (2004) (stating that errors of justice can be placed on a continuum ranging from errors of impunity, the worst being wrongful acquittals, to errors of due process, the worst being wrongful convictions).

⁵ See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 34–35 (2010) (describing the “living Constitution” as an ever-growing compilation of “precedents, traditions, and understandings” of the written Constitution).

⁶ INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Apr. 19, 2014).

⁷ *Bluhm Legal Clinic: Center on Wrongful Convictions*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/> (last visited Apr. 19, 2014).

⁸ THE INNOCENCE NETWORK, <http://www.innocencenetwork.org/> (last visited Apr. 19, 2014).

earlier exoneration-only innocence groups⁹ is their realization that systemic policy reform is a necessary component of their work.¹⁰ Within two decades, innocence advocates have advanced an impressive array of criminal justice system changes that are likely to reduce the number of wrongful convictions. The centrality of innocence reform is recognized by the innocence movement's leaders as indispensable to the goal of achieving justice.¹¹ A general policy approach includes not only the traditional province of lawyers (statutes, constitutional and common-law judicial decision-making, administrative law) but also the realms of politics, public policy, and agency behaviors that are analyzed with theoretical and empirical tools of the social sciences.

Social and institutional changes do not just happen. Most institutions are resistant to structural reforms unless goaded by external forces, like competition that threatens the profits of a business enterprise or an enemy attack that threatens national security. In the world of criminal justice the investigation and prosecution functions have been insulated from structural change by the system's constitutional framework, the political power of police and prosecutorial agencies, and the general view that few

⁹ One example was the loosely organized "Court of Last Resort," conceived and directed by Erle Stanley Gardner, the creator of the fictional defense lawyer "Perry Mason." It was funded by magazine, radio, and television serialization and operated for a decade from 1948 to 1958. See ERLE STANLEY GARDNER, *THE COURT OF LAST RESORT* V (1952); Theodore Ponticelli, *The Court of Last Resort*, JUSTICE: DENIED, <http://www.justicedenied.org/courtoflastresort.htm> (last visited Apr. 19, 2014). For a more contemporary example, see CENTURION MINISTRIES, <http://www.centurionministries.org/> (last visited Apr. 19, 2014), founded in 1983 by Jim McCloskey.

¹⁰ This vision was formally expressed by Peter Neufeld and Barry Scheck in 1996 in a foreword to an influential report. See Peter Neufeld & Barry C. Scheck, Commentary, in EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii–xxix (1996). For the report's impact, see JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 130–32 (2005). The four innocence movement/project goals are exonerating wrongfully convicted prisoners, pedagogy (through law school clinics and university journalism programs), assisting exonerees, and innocence-related policy reform. Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468–69 (2011) [hereinafter Zalman, *An Integrated Justice Model*].

¹¹ JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 245–50 (2000) (presenting asserted causes of wrongful conviction and advocating a set of reforms for each); see *Fix the System: Priority Issues*, INNOCENCE PROJECT, <http://www.justicedenied.org/courtoflastresort.htm> (last visited Apr. 19, 2014) (advocating specific reforms, such as false confessions and exoneree compensation); see also Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 146 (2008) (stating how the innocence movement proposes a "Reliability Model" that is neither a prosecution- nor defense-oriented approach to criminal justice).

wrongful convictions have occurred. It took a slow-moving catastrophe, catalyzed by the advent of DNA profiling, to change this deep complacency and to begin to move the large and unwieldy adjudication system toward innocence reforms. Although a few high-profile exonerations began to raise public awareness, it is the steady reporting of individual “disasters” from across the United States, year after year, month after month, day after day, that has created awareness of an innocence crisis.¹² In this article we examine the innocence movement from a broad policy approach in order to assess the prospect of effecting meaningful criminal justice reforms designed to reduce the incidence of wrongful convictions. We ask whether the level of innocence reform thus far achieved in the justice system can be sustained and expanded.

Prognostications of social trends are risky and ought to be based on empirical evidence or special expertise. Given the multidisciplinary nature of wrongful conviction scholarship and the complexity of wrongful convictions, it would normally be foolhardy to make a broad assessment and forecast. What impelled us to assess future trends was our recent experience as co-editors of a volume authored by experts in various areas of wrongful conviction scholarship.¹³ This article draws heavily on the knowledge and insights provided by the expertise of contributing authors, and others, who are on the cutting edge of many wrongful conviction subjects, to describe the prospects for legal and criminal justice reforms stimulated by concerns about miscarriages of justice.¹⁴ Our project, however, is not simply descriptive; our goal is to articulate a policy process approach to understanding innocence reform that will complement the existing innocence paradigm that focuses on specific factors deemed to be the causes of wrongful convictions.

Part II describes and explores the dominant conceptualization of

¹² See FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 197–98* (2008) (suggesting that the news media “innocence frame” significantly lowered public support for capital punishment); Marvin Zalman et al., *Citizens’ Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. 51, 54–55 (2012) (noting that innocence stories suffused news and popular media by 2005).

¹³ The present article is an extension of the book’s epilogue, *The Prospects for Innocence Reform*. See WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 307–16 (Marvin Zalman & Julia Carrano eds., 2014) [hereinafter MAKING JUSTICE].

¹⁴ Two of the best-researched areas of wrongful conviction scholarship, eyewitness identification and confessions, are not explicitly addressed in our book. For recent anthologies on these matters, see EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION (Brian L. Cutler ed., 2009); REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES (Brian L. Cutler ed., 2013); and G. DANIEL LASSITER & CHRISTIAN A. MEISSNER, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (2010).

wrongful conviction reform—the innocence paradigm—with its focus on a list of causes and cures, by reviewing advances in eyewitness identification reforms. We value the “causes and cures” paradigm, but also believe that it has limits. Part II anchors our effort to move toward alternative and complementary ways to think about wrongful conviction.¹⁵ Part III discusses the centrality of political and public policy thinking and action, as well as concerns with public opinion and the news, to the arena of innocence reform. Part IV expands on our new model by paying explicit attention to innocence institutions, including the Innocence Network, exoneree-based organizations, prosecutors’ conviction integrity units, North Carolina’s unique Innocence Inquiry Commission, and even new ways to conceive of the judicial process. Part V discusses a number of research strategies that expand the repertoire of those used in the past in order to get a better handle on the direction and effectiveness of innocence reforms. Part VI explores ideas that have been advanced to deliberately sustain criminal justice and forensic science system change, drawing on quality-control and error-reduction strategies found in other industries. A promising suggestion is to replace the “bad apple” scapegoating reflex to wrongful convictions with an organizational accident concept that develops the ethic of learning from mistakes. Another proposal along these lines is for the peak institutions of forensic science to institute a continuous-learning subsystem to guide the different forensic science disciplines to paths of self-correction. Part VII asks whether a decline in the death penalty will lessen the intense desire that accompanies efforts to exonerate prisoners on death row, whether a potential decline in DNA exonerations will breed complacency, and whether the virtual impossibility of measuring large-scale decline of wrongful convictions will lessen the reformist zeal that animates the innocence movement. We conclude by reviewing the factors that militate against and for sustained innocence reform. Sustainability will ultimately depend on the degree to which the goals and approaches of innocence reform become internalized by the criminal justice system as indispensable to continuing professionalization. This leads us to conclude that innocence reform is not only about specific innocence reforms and innocence consciousness but is about the entire functioning of legal

¹⁵ A parallel vision of reform is found in Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013).

and criminal justice institutions.

II. THE INNOCENCE “CAUSES AND CURES” PARADIGM

The American innocence movement has been shaped to a large degree by one book, *Actual Innocence*,¹⁶ published in 2000, which established a conceptual framework—the innocence paradigm—which views wrongful convictions through the lens of a set of “causes and cures.”¹⁷ The innocence paradigm works well to organize the thinking of advocates and policy makers, as it draws on the deeply seated medical metaphor, suggesting that a pathology of some kind has caused an error and that each error must have a specific cure. The construct was inductively developed by lawyers and journalists who wrote up wrongful conviction case narratives and then conducted surface evaluations that enumerated negative factors (e.g., mistaken identification, false confession) that were obviously related to the miscarriage of justice.¹⁸ The Innocence Project’s website page that lists causes and remedies is exemplary of the innocence paradigm.¹⁹

That innocence advocates have advanced an impressive array of innocence reforms under the innocence paradigm within only fifteen or twenty years makes innocence reform sustainability plausible. Most of the reforms concern the Innocence Project’s seven priority

¹⁶ DWYER ET AL., *supra* note 11. The inductive method of *Actual Innocence* was not entirely new. It drew on a tradition of inductively deriving apparent causes of miscarriages of justice that in American literature went as far back as the 1930s. See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932); see also Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMPORARY CRIM. JUST. 201 (2005) (focusing on the history of miscarriages of justice, a critique of the distinct genres of the field, and providing suggestions for a more diverse and sophisticated system).

¹⁷ Several authors have explored the scope of the innocence paradigm, including somewhat different categories of causes, but always including the “canonical” items. See, e.g., Findley, *supra* note 11, at 147–71 (examining cases and remedies regarding eyewitness identification, false confessions, improving forensic sciences, neutralizing false jailhouse informants, and improving defense counsel); JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 77–78* (2008) (listing “nine primary factors” of wrongful convictions, including inconsistent statements by defendants); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186–87 (2008) (noting a “canonical list of factors” drawn mainly from murder and rape cases and noting those factors also appear in accurate convictions); Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 16–17 (2009) (stating that “causes” of wrongful conviction are legal constructs but are not meaningful in terms of scientific causation); Zalman, *An Integrated Justice Model*, *supra* note 10, at 1498 (noting the innocence paradigm was socially constructed). We address recent empirical research on factors correlated with wrongful convictions in Part V.

¹⁸ Leo, *supra* note 16, at 212–13; Leo & Gould, *supra* note 17, at 16.

¹⁹ See INNOCENCE PROJECT, *supra* note 6.

issues: eyewitness identification, false confessions, DNA testing, evidence preservation, forensic oversight, innocence commissions, and exoneree compensation.²⁰ Other areas in which innocence reforms have been studied in depth and/or initiated include the death penalty; the use of jailhouse snitches and other confidential informants; the organization, funding, and practices of indigent defense; the response to prosecutorial misconduct and responsibility; and the role played—or not played—by governors and executive pardon authorities in correcting injustices.²¹

Innocence reform scholarship focuses mainly on these issues. As an example, we briefly describe the research approach regarding policy responses to eyewitness misidentification. This may be the best studied and documented example for the good reason that eyewitness misidentification is first on almost every list of causes.²² The depth of study begins with the fact that eyewitness identification and its interaction with legal proof has been the subject of psychological speculation and research for more than a century.²³ The Supreme Court weighed in on the subject in the 1960s in a valiant but failed effort to lessen error,²⁴ and the Justice Department has fostered study and training on the issue.²⁵ The last

²⁰ *Fix the System: Priority Issues*, *supra* note 11.

²¹ Findley, *supra* note 11, at 147–48; Leo & Gould, *supra* note 17, at 212–13; *Fix the System: Priority Issues*, *supra* note 11.

²² See, e.g., *Eyewitness Identification Reform*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited Apr. 19, 2014).

²³ For examples of these scholarly works, see BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); DOYLE, *supra* note 10; ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979); JAMES MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* (2d ed. 1980); HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908); *REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES*, *supra* note 14.

²⁴ See *Foster v. California*, 394 U.S. 440, 442 (1969) (stating that an unfair lineup violates due process); *Simmons v. United States*, 390 U.S. 377, 384 (1968) (stating that showing single photo of suspect during investigation does not violate due process unless impermissibly suggestive); *Gilbert v. California*, 388 U.S. 263, 272 (1967) (stating that counsel is required in state post-indictment lineups); *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (same); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (stating that suggestive showup identification may be admissible if exigency prevents a formal lineup). Recent evidence indicates that state appellate courts are insensitive to misidentification claims. See Sandra Guerra Thompson, *Wrongful Conviction Issues: Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639, 641, 657–58 (2009) (reporting that not one of all ninety six appellate decisions published from April 8, 2008 through April 8, 2009 with credible claims of erroneous eyewitness identification were reversed on that ground).

²⁵ See TECHNICAL WORKING GRP. FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT* (2003) (outlining basic procedures used to obtain eyewitness information for law enforcement personnel); TECHNICAL WORKING GRP. FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A*

effort resulted in a published set of guidelines (NIJ Guides) that stood out as officially-sanctioned directives for police agencies to follow. These combined efforts generated and incorporated a number of reform proposals, based on scientific psychological research, that appear to reduce or mitigate the possibility of erroneous identifications. These include warning witnesses that the perpetrator may or may not be in the lineup; selecting fillers based on verbal descriptions of witnesses rather than the suspect's features; placing only one suspect in a lineup; conducting lineups in a double-blind and sequential (rather than simultaneous) manner; taking a "confidence statement" from a witness who makes an identification; and allowing expert testimony regarding eyewitness identification for the jury.²⁶

As the acknowledged "leading cause" of wrongful conviction, eyewitness procedures have often been the first innocence reforms adopted by various jurisdictions.²⁷ There is substantial evidence that proposed eyewitness reforms are beginning to take hold. As of 2011, ten states established advanced error-reducing eyewitness lineup procedures by statutes or statewide administrative regulations.²⁸ Several state supreme courts have required broad ranging reforms as a matter of due process,²⁹ although the United States Supreme Court declined to follow this path on a national level.³⁰ A number of police departments in Massachusetts have, on their own initiative, adopted scientifically-based lineup procedures.³¹ A commercial publication on new eyewitness identification procedures, intended for practitioners and written by a group of academics, prosecutors, police, and consultants, is

GUIDE FOR LAW ENFORCEMENT (1999) (same); *see also* DOYLE, *supra* note 10, at 169–97 (explaining the evolution of these training manuals, but noting that these manuals are self-serving).

²⁶ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 623–31.

²⁷ *See* Robert J. Norris et al., "Than That One Innocent Suffer": *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1315–20 (2011); Wells, *supra* note 26, at 616.

²⁸ Norris et al., *supra* note 27, at 1316–17. For detailed summaries of eyewitness policies in New Jersey, Wisconsin, and North Carolina, *see* POLICE EXEC. RESEARCH FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 24–26 (2013) [hereinafter PERF].

²⁹ *State v. Lawson*, 291 P.3d 673, 690–91 (Or. 2012); *State v. Henderson*, 27 A.3d 872, 918–19 (N.J. 2011).

³⁰ *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012).

³¹ Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91 MASS. L. REV. 52, 55 (2008).

available as a practical source for police departments.³²

A highly informative national survey of police adoption of eyewitness reforms conducted by the Police Executive Research Forum (PERF) provides the best assessment of the effects of all these reform efforts as of 2011.³³ The survey queried departments regarding the construction, administration, and training for photo and live lineups, showups, composites, and mugshot searches.³⁴ Fewer than half of the agencies made any changes in identification procedures after 1999, when the NIJ Guides were published, and the changes that were made were mostly instituted in 2010 and 2011.³⁵ The PERF report concluded that its survey showed “that law enforcement agencies for the most part have not implemented the full range of the 1999 NIJ guidelines.”³⁶ That is so, but a more positive evaluation is that thirty to forty percent of agencies made some changes along the lines recommended by the NIJ Guide. That, and the fact that the largest number of changes occurred in 2010 and 2011, are signs that the innocence reform agenda regarding eyewitness identification has taken hold and seems to be expanding. To forestall any belief that continuing advocacy is not essential for continuing reform, the interest in reform shown by courts, legislatures, attorneys-general, and police agencies themselves in advancing positions advocated by innocence organizations should be balanced by evidence that reform is limited, partial, and spotty.

³² See ADAPTING TO NEW EYEWITNESS IDENTIFICATION PROCEDURES: LEADING EXPERTS ON CHALLENGING TRADITIONAL PROCESSES AND INTEGRATING NEW TECHNIQUES (Nancy K. Steblay et al. eds., 2010).

³³ See PERF, *supra* note 28. The study included a mail survey of 619 randomly selected state and local police departments and sheriffs' departments and in-depth telephone interviews with thirty agencies. *Id.* at 29–30. The agencies were distributed in all regions of the nation and were drawn from departments of differing size. *Id.* The sampling procedures offer support for the conclusion that PERF's findings are representative of police agencies throughout the country. *Id.*

³⁴ See *id.* at 47–48. The most prevalent identification method was photo lineup, at 94.1 percent, followed by showup, at 61.8 percent. *Id.* at 48.

³⁵ *Id.* at 68–70. That was followed by 2005 as the next year in which changes were common. *Id.* at 69. The percentage of all agencies that made changes differed by procedure: live lineup instructions at 39.6 percent; use of computer for photo lineups at 39.3 percent; blind photo lineup administration at 38.6 percent; sequential photo lineup administration at 37.4 percent; photo lineup instructions at 33.9 percent; number of live lineup fillers at 31.3 percent; procedures for selecting fillers at 30.9 percent; showup instructions at 29.2 percent; blind lineup administration at 27.1 percent; sequential live lineup administration at 20.0 percent; number of photo lineup fillers at 17.3 percent; and other at 6.9 percent. *Id.* at 68–69.

³⁶ *Id.* at 90. For additional evidence of law enforcement laxity in adopting eyewitness reforms drawn for a one-year universe of appellate court decisions, see Thompson, *supra* note 24, at 641.

This brief review of progress toward eyewitness identification reform is an example of the “causes and cure” medical model of innocence reform. It is valuable for demonstrating the ability of the contemporary criminal justice system to respond to scientifically-based research and to strive for greater professionalism. In the area of eyewitness identification reform, the innocence movement has displayed measured success. Research and evaluation ought to continue along these lines.³⁷ Nevertheless, as we argue in the following sections, other avenues of research and speculation will enhance understanding of and action toward innocence reform. We stress that the inductively created innocence paradigm is not *wrong*; rather, we attempt to show that it is incomplete, somewhat misleading, and that an expanded vision of innocence reform will advance the movement’s goals.³⁸

III. POLITICS AND PUBLIC POLICY

The axiom that policy making is purposive activity that necessarily involves politics³⁹ was extended to innocence policies in the Integrated Justice Model (IJM), which was constructed to “examine[] the policy landscape of the innocence movement.”⁴⁰ In the IJM, policy making is centrally located in a “polity/policy domain,” surrounded by four justice-system “domains” (adversary, law enforcement, psychology, and science) that are relevant to assessing wrongful conviction policies.⁴¹ Politics in the American polity occurs in a multi-tiered system of complex formal and informal rules and is populated by competing persons and entities.⁴²

³⁷ PERF, *supra* note 28, at 93–96 (encouraging the continuation of field evaluations, as well as research on factors that led to wrongful identifications and on police-prosecutor interaction to reduce the number of culprit-absent lineups).

³⁸ A concern about the innocence paradigm is that it reflects the first DNA exonerations, mostly murder and rape cases, and that future correlates of wrongful convictions will be drawn from more varied cases and will consequently produce different sets of causes in different proportions. *See, e.g.*, THE NAT’L REGISTRY OF EXONERATIONS, *supra* note 1 (featuring examples of exonerated individuals that are varied in the causes of exoneration). Another concern is that factors identified as “causes” are not causes as the term is used in the sciences. Using terms redolent of medical science can be misleading. While the Innocence Project provides a coherent framework for understanding and action, it can also become limiting if it places innocence reform into an intellectual straightjacket.

³⁹ A social science policy-making analytic model is at the core of the public policy discipline and is an important component of political science. *See, e.g.*, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 18–19, 156–57 (1984). Much legal scholarship involves policy advocacy, relying mostly on legal analytic tools rather than social science methodology.

⁴⁰ Zalman, *An Integrated Justice Model*, *supra* note 10, at 1467.

⁴¹ *Id.* at 1520.

⁴² Politics is defined simply as the contest for power and influence among persons and

Political activity involves party contests for legislative seats, executive branch offices, courts, and positions on policy boards and public institutions. From positions of power, government policy makers work with allied interests in society to generate favorable policies and guide the myriad processes of governance.

Virtually all public policy, including criminal justice policy, is made through this complex political process that meshes work by interest groups and public policy makers.⁴³ As a consequence, innocence policy advocates have become involved at all levels in politics and policy making: legislative politics (federal, state, local), strategic litigation, working with political parties, shaping organs of influence like the news media and public opinion, working with civil society institutions that influence political, social, and policy action, and finding the funds to fuel this activity. Innocence policy advocates advance specific reforms within superordinate concepts of government (e.g., democratic theory, constitutionalism, federalism) that shape the direction of policy activity. While policy activity and legal practice differ, the lawyers who dominate the small innocence movement are quick to understand the legal ground rules of policy making. They have utilized their lawyers' skills of fact-inquiry, legal analysis, negotiation, and structured confrontation to the tasks of bill-drafting, policy advocacy (e.g., on forensic science commissions and bar association committees, before legislative committees), legislative lobbying, and, of course, writing *amicus curiae* briefs to promote innocence reform.

Nevertheless, innocence scholarship has generally focused more on the substantive content of policies (e.g., the "causes and cures" paradigm) and less on the *process* by which public policy actually advances.⁴⁴ We argue that analyzing the process of innocence policy-making provides a better understanding of the movement and might be of some use to advocates. Applying the established

groups. Primary political actors include government officials at all levels (federal, state, local) and in all branches (chief executives, legislatures, appellate courts/bureaucracies), leaders in political parties, significant civil society institutions including innocence projects, the news and the arts/entertainment media, especially documentarians and writers (fiction and non-fiction) who influence the public, the educational and research sector, and business and commerce. Individuals who do not directly participate in political action have some influence through campaign contributions, voting, and expressions of public opinion. Zalman, *An Integrated Justice Model*, *supra* note 10, at 1521.

⁴³ See, e.g., NANCY E. MARION & WILLARD M. OLIVER, *THE PUBLIC POLICY OF CRIME AND CRIMINAL JUSTICE* 67, 298 (2d ed. 2012); John P. Heinz & Peter M. Manikas, *Networks Among Elites in a Local Criminal Justice System*, 26 *LAW & SOC'Y REV.* 831, 832 (1992).

⁴⁴ See, e.g., Marvin Zalman & Nancy E. Marion, *The Public Policy Process and Innocence Reform*, in *MAKING JUSTICE*, *supra* note 13, at 24.

public policy process model, Zalman and Marion observed that innocence policy entrepreneurs operate within a system of “accommodative formalism” that requires policy actors to bargain with opposing figures within the formal structures of legislative statute-making and policy-oriented litigation.⁴⁵ This means that while policy advocacy is in theory open to all, preference goes to actors who are in favored positions. Privilege can stem both from the funding to engage in lobbying as well as a number of non-material sources (e.g., widespread public support, correlation of views between power holders and advocates). Policy making is inevitably constrained by limited knowledge, a condition known as bounded rationality, which leads to reliance on stereotypes and heuristics in policy making.

Policy analysts have observed that policy making, including within the criminal justice system, goes through a series of steps.⁴⁶ We believe that seeing how these steps have applied to the innocence movement provides a better understanding of how its policy work has evolved. The first phase of policy development is *problem identification*. A *problem* in public policy analysis is an issue that is recognized by a significant number or group of people (an *aggregate*) as one that deserves a governmental response. A significant aggregate may be the entire country (after the 9/11 terror attack), large masses of people (millions participating in the first Earth Day), or a small but powerful group that can use money and influence to gain access to policy makers (e.g., a well-funded business lobby). Prior to DNA exonerations in the early 1990s, wrongful convictions were recognized, if at all, as isolated, rare, and inevitable failings that required no organized response.⁴⁷ The innocence movement aggregate in the 1990s (and today) consisted mostly of a few hundred lawyers and law professors who saw the issue as more profound, systemic, and widespread, and thus worthy of government response.⁴⁸ The rapid expansion of innocence

⁴⁵ *Id.* at 25.

⁴⁶ CHARLES O. JONES, AN INTRODUCTION TO THE STUDY OF PUBLIC POLICY 35–36 (3rd ed. 1984); *see also* MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT 138 (2000); MARION & OLIVER, *supra* note 43, at 287. In this section, we follow and expand on Zalman and Marion’s application of Charles Jones’s eleven-step analysis of policy making: problem identification, aggregation, organization, representation, agenda setting, formulation, legitimation, budgeting, implementation, evaluation, and modification/termination.

⁴⁷ Simon A. Cole, *Forensic Science and Wrongful Convictions: From Exposer to Contributor to Corrector*, 46 NEW ENG. L. REV. 711, 712–14 (2012).

⁴⁸ *See* Zalman, *An Integrated Justice Model*, *supra* note 10, at 1489.

projects from about three or four in the late 1990s to about fifty by 2010 indicates the significant creation of an innocence policy aggregate.⁴⁹ The innocence projects quickly engaged in the next step—*organization*—not only in the very act of forming innocence projects, but also by the further development of at least two of the law-school clinical program-type innocence projects into substantial non-profit advocacy organizations, and by these organizations coalescing into the Innocence Network, with more than fifty innocence projects.⁵⁰

The success of an organized policy group in implementing favorable policies depends heavily on *representation*. This means that individuals in positions of power (e.g., legislators) adopt the goals of the policy as represented by organized groups. Normally, power-holders come to represent the issues only after a policy issue builds up and aggregates have formed organizations to advocate for policies. An example of this in the innocence movement is that once the issue of actual innocence took hold by 2000, Senator Patrick Leahy became the leading advocate for the Innocence Protection Act and shepherded it through a five year process before its enactment.⁵¹ However, in the case of innocence policy, there was at least one power-holder who championed the issue early on before aggregates and organizations concerned with actual innocence had really formed—Attorney General Janet Reno.⁵² Attuned to the issue from earlier experiences as a local prosecutor, her action and concern helped to catalyze the issue and provided a platform for the new directors of the Innocence Project to advance their ideas about wrongful convictions; their ideas would soon expand into the innocence paradigm.⁵³

Agenda setting, the next step, is a critical and well-studied matter in public policy analysis.⁵⁴ When an issue is perceived as a public problem among a sufficiently broad or influential part of the public, it is said to be on the public agenda, meaning that it is taken

⁴⁹ *Id.* at 1498–99.

⁵⁰ *Id.* The details of these organizations can be seen on their web sites. See *Bluhm Legal Clinic: Center on Wrongful Convictions*, *supra* note 7; INNOCENCE PROJECT, *supra* note 6; THE INNOCENCE NETWORK, *supra* note 8.

⁵¹ See Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 CHAMPION 28, 28–29 (2005).

⁵² Zalman, *An Integrated Justice Model*, *supra* note 10, at 1487–88.

⁵³ *Id.* at 1482–83, 1487–88; Neufeld & Scheck, *supra* note 10, at xxx–xxxi; Janet Reno, *Message from the Attorney General*, in CONNORS ET AL., *supra* note 10, at iii–iv; see also DWYER ET AL., *supra* note 11, at xv.

⁵⁴ See generally KINGDON, *supra* note 39, at 3–5 (discussing the role of agenda setting in public policy making).

seriously as a fitting matter for government action. The issue will then move to the policy agenda when it is taken up by policy-makers as a fitting subject for legislation or administrative ideas. Agenda setting is intertwined with the next step of policy *formulation*. Typically, there are a variety of ideas about how to address a public problem and competing groups or individuals on the “same side” may clash over approaches. How a policy is formulated will shape its eventual legitimation and implementation. There are typically many sources of input into policy formulation: academicians, think tanks, interested organizations, and people from within the government. The development of innocence policies related to eyewitness identification, the examination of child witnesses, and interrogation, for example, relied heavily on the studies and policy prescriptions of psychologists,⁵⁵ while forensic and other scientists have influenced policy prescriptions in their fields.⁵⁶ Innocence policy formulation in these areas was heavily influenced by the innocence paradigm that was canonized in *Actual Innocence*, and most people who think about innocence policy think in terms of the innocence paradigm. Its power is that it reduces the complexity of criminal justice issues so that policy actors can understand avenues of action without becoming so bogged down in details as to stymie reform efforts.

The next step, *legitimation*, is the creation of official policies such as favorable legislation, court rulings, or administrative actions. Legitimation typically involves a choice by policy makers among different avenues that were proposed by policy formulators to deal with a problem. Legislation is a prime form of legitimation, and it should be apparent to anyone familiar with the political process that legislation inevitably involves partisan maneuvering and calculation, lobbying, and compromise, elements that many view as unsavory. This, however, is the price of a democratic process that allows input from all involved in policies, and as a result it is inevitable that a final piece of legislation will be seen by some proponents as “watered down.” A key example was the history of how the initial version of the Innocence Protection Act of 2004 was watered down in several ways, by dropping provisions that DNA testing be considered a due process right, strong habeas corpus

⁵⁵ See Leo, *supra* note 16, at 208–10; Wells et al., *supra* note 26, at 603.

⁵⁶ See COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 2 (2009) [hereinafter NAS REPORT].

protections for prisoners, and a requirement that state capital case counsel had to meet federal standards.⁵⁷ High standards for capital case lawyers were replaced with training grants for defense and prosecution lawyers.⁵⁸ Legitimation extends beyond legislation to the formulation of all policies, including appellate court rulings and administrative agency regulations.

Legitimation typically must be supported with funds and resources to have an effect. The *budgeting* step is obviously critical, and may extend beyond Congressional appropriations. A telling example was the Justice Department's action from 2004 to 2009 that prevented the expenditure of federal funds for state DNA testing of inmates under the Innocence Protection Act.⁵⁹ Of course, some policies need no funding to be effective. A state supreme court ruling that allows a defense request for a jury instruction if the prosecution seeks to introduce a confession produced by a non-recorded interrogation is not dependent on any funding.⁶⁰

Once legitimated and funded, a policy is then implemented. A number of innocence policies have gone through the *implementation* phase and are becoming part of the criminal justice landscape, although as discussed in Part II, current knowledge about the extent of perhaps the most popular, eyewitness reform, suggests that the process has a long way to go before it can be said that error-reducing eyewitness policies are the norm in American law enforcement.⁶¹ Innocence policy implementation is particularly complex because wrongful convictions stem from every sub-process in the criminal justice system.

Once policies are in place, two other major steps in the policy process remain: *evaluation* and *adjustment or termination*. In a democracy, evaluation involves executive-branch supervision and auditing, legislative oversight, judicial control, and even investigative journalism. Some of these reviews are concerned with "waste and fraud" but most are concerned with whether programs are delivering the services or outcomes envisioned by the legitimated and implemented policies. Policy specialists advocate that social scientific methods be applied to conduct systematic policy analyses and reviews of program effectiveness. Given the

⁵⁷ Weich, *supra* note 51, at 29.

⁵⁸ *Id.*

⁵⁹ Nancy Marion & Marvin Zalman, *Towards a Theory of Innocence Policy Reform*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 186–87 (Sarah Lucy Cooper, ed., 2014).

⁶⁰ *See, e.g.*, *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533–34 (Mass. 2004).

⁶¹ *See* PERF, *supra* note 28, at xiv.

recentness of innocence reforms, few systematic program reviews appear to exist. Laboratory accreditation and proficiency testing and certification of scientists and specialists in the forensic sciences are the kinds of ongoing program reviews that should be emulated by new innocence reforms. Such effectiveness reviews are not new in the forensic sciences, but their overall quality has been questioned by the National Academy of Sciences in relation to innocence issues.⁶² Finally, the innocence movement is in its early stages and so program termination has not been widely observed, but program adjustment has been observed as to state exoneree compensation legislation.⁶³

A close look at the “steps” analysis of the policy process reveals that while the process may appear rational and systematic, in actuality it is often highly political, fraught with compromise and dealing, and deeply imbedded in social and cultural realities. The political “messiness” of innocence reform was described in Christine Mumma’s insider account of how the well-regarded North Carolina Innocence Inquiry Commission came into being.⁶⁴ The story involved the personal leadership of state Chief Justice I. Beverly Lake who was deeply concerned about wrongful convictions; the formation of a politically balanced, ongoing “blue ribbon commission” (the North Carolina Actual Innocence Commission or the “AIC”) which successfully advocated eyewitness reform training standards; and the AIC’s decision to focus on the inadequacy of the post-conviction review process for innocence claims, driven in part by a desire to relieve overburdened appellate courts. The AIC tackled the issue by bringing in executives of England and Wales’ Criminal Cases Review Commission, agreeing in principle to the idea of a review commission, and then setting to the arduous and drawn out process of ironing out the many issues involved in creating a novel quasi-legal investigatory institution. The process of study, discussion, argumentation, and bargaining, described by

⁶² See NAS REPORT, *supra* note 56, at 214. A helpful lawyers’ review of interrogation videotaping asserts general levels of satisfaction without measurement, but does include an appendix that lists police departments that have adopted videotaping interrogations. Thomas P. Sullivan & Andrew W. Vail, *Recent Developments: The Consequences of Law Enforcement Officials’ Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 228 (2009).

⁶³ Robert J. Norris, *Exoneree Compensation: Current Policies and Future Outlook*, in MAKING JUSTICE, *supra* note 13, at 294–95.

⁶⁴ See Christine C. Mumma, *The North Carolina Innocence Inquiry Commission: Catching Cases that Fall Through the Cracks*, in MAKING JUSTICE, *supra* note 13, at 250–60. Although it goes unmentioned in her essay, Ms. Mumma’s skillful public and behind the scenes efforts have been critical to shaping North Carolina’s advances in wrongful conviction policies.

Mumma as one of discord and consensus, lasted for a year. Nevertheless, a commission model was eventually developed and passed despite the opposition of a third of AIC members, and was presented to the legislature. Instead of accepting the carefully crafted conclusion “from a commission of experienced, intelligent, and respected stakeholders” the legislature picked the proposal apart.⁶⁵ A House Bill with many changes passed in 2005, but was stuck in the State Senate.⁶⁶ Among the reasons for delay was party animus against Chief Justice Lake for a redistricting opinion that harmed the Democratic Party’s political prospects. Delay pushed passage of the Innocence Inquiry Commission beyond Lake’s mandatory retirement so as not to enhance his legacy.

Another account of three innocence reforms passed in the 2000s also describes politics behind the reforms.⁶⁷ First, in Illinois a series of legislative reforms were sparked by the unexpected and almost unique action of outgoing Governor George Ryan, who placed a moratorium on executions and set up a high-visibility and high-quality commission which recommended a range of excellent reforms.⁶⁸ Yet, in the scrim of legislative politics, not all were passed and few that were enacted extended to non-capital offenses. Next, the hard-fought politics leading to the federal Innocence Protection Act of 2004 raised strenuous prosecution resistance to a proposal for effective defense counsel in capital cases, was drawn out over five years, involved a good deal of political theater, was signed by the President for apparently partisan purposes, and its implementation was effectively frustrated by the Justice Department throughout the Bush administration.⁶⁹ Finally, the politics behind a set of Ohio reforms were refreshingly bi-partisan, well informed, and actively engaged the Ohio Innocence Project.⁷⁰ Yet, a close look at the actual Ohio legislation showed that while it was extolled to the sky by politicians as the greatest crime legislation in a century, it simply enacted relatively non-controversial programs that had been widely adopted elsewhere.⁷¹

On the basis of these largely descriptive works, as well as our analysis of the steps of the policy process, it is easy to predict that

⁶⁵ *Id.* at 259.

⁶⁶ *Id.* at 260.

⁶⁷ Marion & Zalman, *supra* note 59, at 179–84.

⁶⁸ *Id.* at 180–81, 184–85.

⁶⁹ *Id.* at 181–83, 186–87.

⁷⁰ *Id.* at 183–84.

⁷¹ *Id.* at 187–88.

all innocence reforms will involve strenuous political effort, will often be met with opposition by entrenched law enforcement and prosecution agencies, will require funding to support reform campaigns, and will likely involve compromise. Logically, actual innocence should be politically neutral, but as it gains much of its strength from the defense bar, vigorously supports increased defense resources, has often opposed the death penalty and the like, it will continue to garner some opposition from prosecutors and police. And, although it seems stunning that some notable innocence reforms have been adopted in conservative or “law and order” states, a closer look should raise cautions. Thus, when Texas adopted the most-generous-in-the-nation Tim Cole Act for exoneree compensation, it simultaneously stymied a number of other laws designed to curb wrongful convictions.⁷² And North Carolina has recently repealed its four-year experiment with the Racial Justice Act, designed to eliminate racial bias in the application of the death penalty.⁷³ Nevertheless, despite real challenges, the innocence movement seems better situated than before to effectively engage with the policy realm. In particular, the increased sophistication of innocence movement activism in the public policy arena can be seen in two trends discussed in the next two sections, namely the creation of a public policy department by the Innocence Project and the establishment of a policy network within the Innocence Network, and increased social science research that attempts to understand innocence policy.

Media coverage is politically essential to advance reformist policy agendas.⁷⁴ As traditional media and other avenues of publicity and persuasion decline or shift, it will be increasingly crucial that innocence advocates pay attention to how they frame the problem and set an agenda. Criminal justice is a social enterprise heavily

⁷² Elliott Blackburn, *Wrongful Conviction Bills Die*, LUBBOCK AVALANCHE-J., June 2, 2009, available at http://lubbockonline.com/stories/060209/loc_446160583.shtml; see also Brandi Grissom, *Innocence Commission Clash Impacting Other Bills*, TEX. TRIB. (May 20, 2013), <http://www.texastribune.org/2013/05/20/fight-over-innocence-commission-gets-heated/>. State Senator Joan Huffman’s (Rep.) “very, very derogate[ory]” comments about the proposed Tim Cole Innocence Commission bill led to an angry outburst by Cory Session, brother of Tim Cole and Texas Innocence Project employee, and to the retaliation of State Representative Ruth Jones McClendon (Dem.) by stalling bills authored by Huffman. *Id.* Huffman “opposes the innocence commission bill because, she has said, lawmakers have already implemented reforms needed in the wake of Texas’ multiple exonerations and it would be unnecessary.” *Id.*

⁷³ Chris Kardish, *NC Racial Justice Repeal Leaves Questions in Its Wake*, ASSOCIATED PRESS, June 29, 2013.

⁷⁴ In relation to innocence reform, see BAUMGARTNER ET AL., *supra* note 12, at 100–01; Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 803–05 (2002).

dependent on media sources and operations for its perception of and reception by American society. This is known by justice system officials, whether elected or appointed, who must pay attention to press relations. The Innocence Project, the Center on Wrongful Conviction and other well-resourced innocence organizations have astutely used publicity as a key component in advancing reform. In fact, despite many decades as a reactionary force, more interested in publishing stories about guilty criminals than about innocence, the mainstream media became the herald of the innocence movement during the 1990s and early 2000s.⁷⁵

However, Rob Warden, a veteran journalist and director of the Center on Wrongful Conviction, predicts that the pendulum may be slowly swinging back with the decline in traditional media and investigative reporting.⁷⁶ This trend, and the increasingly “common place” nature of exonerations, means that key avenues to innocence-related publicity may decline. This can be bad news for the prospect of innocence reform, which has relied so heavily on coverage of exonerations to garner interest and support. However, there are possible new strategies that will sustain the public’s commitment to criminal justice reform, such as work by non-profit investigative organizations that have begun to delve into justice issues—ProPublica,⁷⁷ the Better Government Association,⁷⁸ the *Texas Tribune*,⁷⁹ the *Voice of San Diego*,⁸⁰ the Bay Citizen,⁸¹ and the Center for Public Integrity.⁸² It is too early to tell whether these

⁷⁵ Rob Warden, *The Role of the Media and Public Opinion on Innocence Reform: Past and Future*, in MAKING JUSTICE, *supra* note 13, at 40–41 [hereinafter Warden, *The Role of Media*].

⁷⁶ *Id.* at 51.

⁷⁷ ProPublica has carried a series of penetrating stories about a NYPD detective linked to false confessions and wrongful convictions and on the weaknesses in the Brooklyn prosecutors’ office that abetted them. See, e.g., Joaquin Sapien, *Watching the Detectives: Will Probe of Cop’s Cases Extend to Prosecutors?*, PROPUBLICA (June 21, 2013, 8:52 AM), <http://www.propublica.org/article/watching-the-detectives-will-probe-of-cops-cases-extend-to-prosecutors>.

⁷⁸ See John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTER GOV’T ASS’N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx.

⁷⁹ See Maurice Chammah, *After Drug Lab Scandal, Court Reverses Convictions*, TEX. TRIB. (Mar. 27, 2013), <http://www.texastribune.org/2013/03/27/after-drug-lab-scandal-court-reverses-convictions/>.

⁸⁰ See Keegan Kyle, *Hundreds of Kids Arrested on an Unproven Hunch*, VOICE OF SAN DIEGO (March 11, 2012), http://www.voiceofsandiego.org/data-drive/article_601ef852-6bce-11e1-b1fe-0019bb2963f4.html.

⁸¹ See Mihir Zaveri, *Prosecutors Failed to Disclose Coroner’s ‘Unreasonable’ Findings*, THE BAY CITIZEN (May 4, 2012), <https://www.baycitizen.org/news/crime/defendants-murder-case-didnt-see-report/>.

⁸² Jim Walls, *Georgia’s Troubled Effort to Reduce Juvenile Crime.*, CTR. FOR PUB. INTEGRITY (Mar. 25, 2013, 6:00 AM),

media outlets will be as successful as traditional sources of news in spreading support for reform, but it is certain that to sustain the innocence movement, advocates can no longer simply assume or rely upon normal media outlets.

In sum, it may seem axiomatic that innocence advocates need to think in policy and political terms for innocence policy reform to become self-sustaining. There is anecdotal evidence that many lawyers who first came into innocence projects were uncomfortable with legislative lobbying and the compromises that such work involves. The Innocence Project's policy office, however, has provided assistance to local innocence projects and with the expansion of the Innocence Network's activity, policy making is becoming an established feature of the innocence movement.⁸³ Through an understanding that the innocence movement advances a reliability model,⁸⁴ and a realization that the moralistic rhetoric of exoneration stories need to be tempered with the more complex stories and realities of political calculation and compromise,⁸⁵ innocence advocates have and will continue to participate in the real world of political action where bargaining and actual cost-benefit analyses are involved in the progress of a reform program.⁸⁶

IV. INNOCENCE INSTITUTIONS AND INNOCENCE REFORM

The American innocence movement originated in the 1990s, largely through Peter Neufeld and Barry Scheck establishing the Innocence Project and making policy reform as essential a task as

<http://www.publicintegrity.org/2013/03/25/12369/georgias-troubled-effort-reduce-juvenile-crime>.

⁸³ See Keith A. Findley & Larry Golden, *The Innocence Movement, the Innocence Network, and Policy Reform*, in *MAKING JUSTICE*, *supra* note 13, at 98.

⁸⁴ Findley, *supra* note 11, at 146 (discussing the reliability model, with focus on actual innocence, contrasted to ideologically-oriented "due process" or "crime control" models formulated by Herbert Packer in Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5-6 (1964)).

⁸⁵ See Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 15-16 (2008); Stephen Saloom, *Adversaries as Allies: Joining Together to Prevent Criminal Injustice*, 73 ALB. L. REV. 1235, 1239-41 (2010).

⁸⁶ See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 79-80 (2008). Allen and Laudan apply a quantitative cost-benefit analysis based on the "Blackstone ratio" (better ten guilty go free than one innocent convicted) to demonstrate that pro-innocence action will result in more serious crime. *Id.* Their conclusions do not adequately account for the fact that most criminals escape justice because of policing inadequacies, and rest on the unrealistic assumption that courts apply the Blackstone ratio as a decision tool. See D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 999 (2010).

exonerating the wrongfully convicted.⁸⁷ At that time very few criminal justice organizations were actively concerned with wrongful conviction as a policy issue, with the notable exception of Attorney General Janet Reno who played a major role in placing wrongful conviction on the policy agenda. As the movement picked up speed in the 2000s, criminal justice agencies began to adopt innocence reforms, sometimes under external pressure, but often out of a desire to become more professional and adopt best practices.⁸⁸ As the innocence movement has matured, so have the roles of its institutions. Their changing nature and functions are set to have a profound impact on the prospects for continuing reform.

Innocence Projects are the chief institutions of the innocence movement.⁸⁹ Beginning with the Innocence Project started in 1992 at Cardozo Law School in New York,⁹⁰ and Northwestern University Law School's Center on Wrongful Conviction, which was formed in 1998,⁹¹ the number of such projects has increased in recent years to more than fifty, and the projects have coalesced under the umbrella Innocence Network.⁹² Alongside the innocence projects that are mainly responsible for exonerating wrongfully convicted prisoners and advocating reforms, other innocence institutions have either been created or conceived. A most heartening trend is that exonerees are engaging in innocence related activities, with several innocence organizations established or operated substantially by exonerees. A prominent example is Witness to Innocence (WTI), as described by death row exoneree Ronald Keine.⁹³ WTI was the brainchild of Sister Helen Prejean, a leading voice in the movement to abolish capital punishment.⁹⁴ It is a non-profit corporation whose members are death row exonerees.⁹⁵ Its primary function is to

⁸⁷ *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Apr. 19, 2014); *Stopping Wrongful Convictions Before They Happen*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/> (last visited Apr. 19, 2014).

⁸⁸ *Stopping Wrongful Convictions Before They Happen*, *supra* note 87.

⁸⁹ Zalman, *An Integrated Justice Model*, *supra* note 10, at 1468.

⁹⁰ *Mission Statement*, *supra* note 87.

⁹¹ *Bluhm Legal Clinic: Center on Wrongful Convictions: About Us*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/> (last visited Apr. 19, 2014).

⁹² Zalman, *An Integrated Justice Model*, *supra* note 10, at 1499; *Other Projects Around the World*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Apr. 19, 2014).

⁹³ Ronald Keine, *Exoneree Initiatives and Innocence Reform: Witness to Innocence*, in *MAKING JUSTICE*, *supra* note 13, at 111.

⁹⁴ *Id.* at 111–12.

⁹⁵ *Id.* at 112, 115.

amplify the message that some innocent prisoners will be sentenced to death and will probably be, if they have not already been, executed.⁹⁶ Academics may be convinced by statistical proof that in the last few decades innocent people *have* been put to death,⁹⁷ but for most people, including politicians, being addressed by an innocent person who survived death row creates an indelible impression. WTI members speak on arranged tours in death penalty states, often at churches and colleges.⁹⁸ They have been pressed into service to convince wavering legislators that executing the innocent is a present reality in states moving to abolish capital punishment.⁹⁹ WTI also acts as a support group for the very exclusive club of death penalty exonerees, who suffer from the same problems that beset the larger number of exonerees who have “only” been imprisoned.¹⁰⁰

Other examples of exoneree-created organizations include the Jeffrey Deskovic Foundation for Justice,¹⁰¹ the Darryl Hunt Project for Freedom and Justice,¹⁰² and New Orleans exoneree John Thomas’s Resurrection after Exoneration,¹⁰³ which work to exonerate the innocent, expand knowledge about wrongful convictions, and provide support for exonerees. Exonerees may work with innocence projects, like Kenneth Wyniemko who serves on the board of the Cooley Innocence Project in Michigan, and Julie Rea who established a website and organized the first conference on

⁹⁶ See *id.* at 118.

⁹⁷ See Daniel H. Benson et al., *Executing the Innocent*, 3 ALA. C.R. & C.L. L. REV. 1, 18 (2013) (examining this possibility using standard statistical analysis to ascertain how often the innocent are executed in the state of Texas).

⁹⁸ See *Advocacy*, WITNESS TO INNOCENCE, <http://www.witnesstoinnocence.org/advocacy.html> (last visited Apr. 19, 2014); see also Scott Shane, *A Death Penalty Fight Comes Home: A Once-Convicted Man Is Out to Win Hearts and Minds*, N.Y. TIMES, Feb. 6, 2013, at A14 (describing Kirk Bloodsworth’s activities as a member of WTI).

⁹⁹ Shane, *supra* note 98 (describing how Kirk Bloodsworth, a death row exoneree, convinced a Maryland legislator to oppose capital punishment). WTI’s efforts helped Maryland abolish the death penalty. See *Maryland: Governor Signs Repeal of the Death Penalty*, N.Y. TIMES, May 3, 2013, at A13.

¹⁰⁰ See SAUNDRA D. WESTERVELT & KIMBERLY J. COOK, LIFE AFTER DEATH ROW: EXONEREES’ SEARCH FOR COMMUNITY AND IDENTITY 29, 139 (2012) (studying the experiences of eighteen death row exonerees).

¹⁰¹ THE JEFFREY DESKOVIC FOUND. FOR JUST., <http://www.thejeffreysdeskovicfoundationforjustice.org/> (last visited Apr. 19, 2014).

¹⁰² *Darryl Hunt Project for Freedom and Justice: About*, FACEBOOK, <https://www.facebook.com/pages/Darryl-Hunt-Project-for-Freedom-and-Justice/156407513784?id=156407513784&sk=info> (last visited Apr. 19, 2014).

¹⁰³ John Thompson, *Letter from the Founder*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/about/letter-founder> (last visited Apr. 19, 2014).

women exonerees,¹⁰⁴ while others, like Gloria Killian, work to help exonerees and others victimized by the justice system through other types of organizations.¹⁰⁵ The fact that Witness to Innocence recently officially joined the Innocence Network¹⁰⁶ points to a growing sense of cohesion and inclusivity within the movement. By restoring the voices of those society once discarded, such exoneree organizations and activities are helping to make innocence work a sustainable part of the adjudication system and society at large.

The increased organizational and functional sophistication of the Innocence Network and its member institutions suggest that these institutions are well situated to continue and even expand reform efforts. Perhaps the most important step in this direction has been the expansion of innocence projects and the Innocence Network's policy work. The Innocence Project in New York currently has a twelve-person policy department and a policy director who often assists other innocence projects with their state-level reform efforts.¹⁰⁷ In addition, the Innocence Network recently created an Innocence Policy Network, which is made up of point persons from the local innocence projects who come together through conferences and other venues to discuss, coordinate, and support policy reform efforts.¹⁰⁸ The increased ability to amplify its message to key political decision-makers and instrumental organizations such as

¹⁰⁴ *Women and Innocence Seminal Conference 2010*, OBVIOUS ANSWERS . . . SOMETIMES HIDE IN UNPLEASANT SITUATIONS (Sept. 1, 2010), <http://obviousanswers.presspublisher.org/issue/august-2010/article/women-and-innocence-seminole-conference-2010> (describing the conference organized by Julie Rea Harper, which includes Ken Winiemko as a speaker); see also Laura Caldwell, *Women and Innocence: An Interview with Exoneree, Julie Rae Harper*, THE OUTFIT: A COLLECTIVE OF CHICAGO CRIME WRITERS (Oct. 6, 2010), <http://theoutfitcollective.blogspot.com/2010/10/women-and-innocence-interview-with.html> ("Julie [Rea Harper, an exoneree,] will host the first annual Women and Innocence conference, joining together female exonerees, as well as some of their male counterparts, and the people who've worked to free them, along with law students, professors, and interested members of the public.").

¹⁰⁵ *Steering Committee Bios: Gloria Killian*, FREE BATTERED WOMEN, <http://freebatteredwomen.org/about/gloria.html> (last visited Apr. 19, 2014); see also GLORIA KILLIAN & SANDRA KOBRIN, FULL CIRCLE: A TRUE STORY OF MURDER, LIES AND VINDICATION 313 (2012) ("Gloria Killian . . . chairs the Action Committee for Women in Prison (ACWIP) full time. She lectures around the world on wrongful convictions, the death penalty and the plight of women in prison.").

¹⁰⁶ See *About Us*, WITNESS TO INNOCENCE, <http://www.witnesstoinnocence.org/about-us.html> (last visited Apr. 19, 2014) (describing Witness to Innocence as a member of the Innocence Network); see also David A. Love, *The Innocent are Executed! New Year Letter from Witness to Innocence*, JOURNEY OF HOPE . . . FROM VIOLENCE TO HEALING BLOG (Jan. 1, 2013, 9:29 AM), <http://thejourneyofhope.blogspot.com/2013/01/the-innocent-are-executed-new-year.html> (describing how Witness to Innocence joined the Innocence Network in 2012).

¹⁰⁷ Findley & Golden, *supra* note 83, at 98.

¹⁰⁸ *Id.*

the American Bar Association and state forensic science commissions are indicators the innocence projects and the Innocence Network are becoming more able to effect real change.

At the same time, the candid insider views of Keith Findley and Larry Golden alert us to real challenges confronting innocence organizations, especially their financial sustainability.¹⁰⁹ In hard economic times, it is not possible to look on this challenge with equanimity. In addition, innocence projects and the Innocence Network struggle with organizational concerns. Given the fragmentation and complexity of the American criminal justice system, a considerable number of reforms must be addressed at state and local levels. This means that local innocence projects cannot simply rely on a sophisticated policy office at the Innocence Project in New York, but must provide their own insights, research, networking, and follow-up in order to enact successful reform. Thus, while the prospects for future reforms that are initiated by innocence organizations seem bright, they are not a given.¹¹⁰

Contemplating the sustained success of these innocence projects opens up another question—namely, whether innocence organizations are an essential component of a properly functioning criminal justice system.¹¹¹ One may argue that these institutions are a sign of a broken system and that they are only necessary until the criminal justice itself can take over the role of exonerating innocent individuals.¹¹² An alternate view is that innocence organizations have established new modes of justice system thinking that will become their stock-in-trade, and that innocence organizations should evolve into a permanent part of a healthy criminal justice system.¹¹³

Aside from the possibility that innocence projects could become regular fixtures of the criminal justice system, until recently, formal government institutions dedicated to actual innocence concerns, either as entirely new programs or enhanced traditional institutions, were non-existent.¹¹⁴ Formal government

¹⁰⁹ *Id.* at 107; see also, 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, 383–84 (2011) (describing the financial challenges facing innocence projects).

¹¹⁰ See Findley & Golden, *supra* note 83, at 108.

¹¹¹ See Bandes, *supra* note 85, at 6; Findley, *supra* note 11, at 173.

¹¹² Bandes, *supra* note 85, at 6.

¹¹³ *Id.*

¹¹⁴ A few states and the federal government had sporadically enacted no-fault compensation programs for the wrongfully convicted in the twentieth century, and one might

organizations dedicated to preventing or compensating the wrongfully convicted are arguably the most robust means of sustaining innocence-oriented adjudication system reform.¹¹⁵ Only recently have a few such programs emerged; it remains to be seen whether such institutions will take hold within criminal justice and assume greater roles in dealing with the problems of wrongful conviction.¹¹⁶

An important example of a new innocence institution within the system is the conviction integrity unit (CIU), which has been established in some prosecutors' offices.¹¹⁷ These units focus on both front-end reforms to prevent wrongful convictions, such as open-file discovery and the use of best practices checklists, and back-end reforms that provide avenues of relief for people who have been wrongfully convicted.¹¹⁸ Their success has been mixed. On the one hand, in addition to exonerating several prisoners, the units have been responsible for some important reforms and have helped to make questions of innocence more "mainstream" or legitimate. On the other hand, it is unclear to what extent these units can remain objective, given that they are housed in the very department that they are asked to critique.¹¹⁹ Furthermore, to date there are only a handful of such units in existence (primarily in Dallas, New York, and Santa Clara counties, all at least relatively large jurisdictions), so it is unclear to what extent CIUs will become a common, permanent fixture in the American criminal justice system.¹²⁰ And even if they are created, there remains the possibility that some will have been established as defensive moves under the glare of negative publicity or as the result of consent decrees and without the full support of the chief prosecutors.¹²¹

argue that, in theory at least, courts that assessed actual innocence claims are formal institutions concerned with wrongful conviction. Even so, these programs were virtually invisible.

¹¹⁵ *Epilogue: The Prospects for Innocence Reform*, in MAKING JUSTICE, *supra* note 13, at 310–11.

¹¹⁶ *Id.* at 311.

¹¹⁷ See Evelyn L. Malavé & Yotam Barkai, *Conviction Integrity Units: Toward Prosecutorial Self-Regulation?*, in MAKING JUSTICE, *supra* note 13, at 189.

¹¹⁸ *Id.* at 192–93.

¹¹⁹ *Id.* at 204.

¹²⁰ *Id.* at 189–90; see generally DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 139–41 (2012) (describing the functioning of the CIU in Dallas).

¹²¹ Although a CIU was established in Cook County, Illinois, a tone-deaf national appearance on CBS' *60 Minutes* by Cook County State's Attorney Anita Alvarez suggests a lack of commitment to the unit. Peter Neufeld, *Alvarez Lacks Insight into Wrongful Convictions*, CHI. TRIB., Dec. 21, 2012, at C-37 (reporting that Alvarez neither acknowledged

All wrongful convictions are formally the products of courts, even if the errors leading to miscarriages of justice can be attributed to problems with the functioning of police, forensic scientists, defense lawyers, or prosecutors. Evaluations of the judicial process, including plea-bargaining, trials, and appeals, demonstrate weaknesses in screening out errors generated by other actors.¹²² Despite this, because of its constitutional foundation and institutional conservatism, the judiciary has made few substantial institutional changes as a result of the innocence movement, with the notable exception of the North Carolina Innocence Inquiry Commission (IIC).¹²³ The IIC, a quasi-inquisitorial process to review claims of actual innocence, is a truly radical departure for the criminal justice system, going against the grain of the deeply held notions of how courts should function in the American adversarial system. Indeed, despite its success in North Carolina, the politics of its creation, as described by Christine Mumma, suggests difficulties in transferring the concept to other states.¹²⁴ Despite the current lack of institutional change in the judicial process, a few scholars have proposed new ways to modify current adjudication practices to increase verdict accuracy.

Aside from an old and rich line of legal research comparing the adversary and inquisitorial systems,¹²⁵ recent awareness of wrongful convictions has stimulated attempts to rethink how defendants are and ought to be adjudicated.¹²⁶ In this vein, Samuel

the innocence of, nor apologized to, certain exonerees). Nevertheless, there is some evidence that the unit is operating. See Steve Mills, *Inmate Penned Ticket to Freedom*, CHI. TRIB., Aug. 31, 2012, at C-10 (“Alvarez said that more than 100 cases had been forwarded to the Conviction Integrity Unit since she formed it this year.”).

¹²² See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 270 (2011); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60–61 (2008) [hereinafter Garrett, *Judging Innocence*].

¹²³ Mumma, *supra* note 64, at 249.

¹²⁴ *Id.*

¹²⁵ See, e.g., MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3 (1986).

¹²⁶ See, e.g., D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1283 (2004) (demonstrating one of the earliest of such attempts, by reviewing convictions under an “unsafe verdict” standard); Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 548–49 (2008) (demonstrating another early attempt, by proposing that defendants should be able to plead “innocent,” effectively shifting the government’s burden to investigate innocence rather than guilt). A more recent symposium advanced this theme. See Symposium, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825, 826 (2012) (proposing formal innocence bureaus and procedures in an effort to force the government into more enhanced investigations); see also Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV.

Gross makes a powerful argument for the introduction of the new “investigative trial” between plea negotiations and full trials.¹²⁷ Though merely a thought experiment, the idea of injecting inquisitorial procedures into a professedly adversarial system and re-conceiving the role of the judge has substantial potential for making the criminal justice system more reliable from within. The proposal would begin with a professedly innocent defendant waiving a jury trial as well as certain rights that normally mask facts from the prosecution in the war-mimicking adversarial process. In return, the defendant gains not only a more truth-observing initial trial with unlimited discovery and an episodic rather than compact process, but the right to retrial if the process uncovers a substantial doubt of innocence but results in a guilty verdict. To make the proposed system work, Gross attended to the sentencing incentives that drive plea bargaining by proposing, in general terms, that a “trial penalty” less onerous than that imposed on defendants found guilty at full trials be imposed on defendants found guilty after an investigative trial, with the ability of the defendant to drop out during the intermediate process and plead guilty.¹²⁸

Gross astutely raised the issue of the legal culture of judges and litigators, whose resistance to change may make the thought experiment remain just that.¹²⁹ Any serious attempt to tinker with procedures that are more truth-seeking than the present adversary system will have to consider the professional postures that are instilled in the intense crucible of law school education and are part of our national culture. For example, Gross suggests that when investigative trials generate clear evidence of innocence, prosecutors will likely dismiss the cases rather than proceeding to trial.¹³⁰ Perhaps, but we think that this would require a substantial shift in attitude among many prosecutors, who seek guilty pleas as a quid pro quo for the release of prisoners whose innocence is not really in doubt, or who force prisoners with convincing evidence of innocence to undergo a second trial.¹³¹ Gross acknowledged that

1009, 1011 (2012) [hereinafter Gross, *Pretrial Incentives*].

¹²⁷ Samuel R. Gross, *Investigative Procedure and Post-Conviction Review: Resetting Incentives to Separate the Innocent from the Guilty*, in MAKING JUSTICE, *supra* note 13, at 237 [hereinafter Gross, *Investigative Procedure*].

¹²⁸ *Id.*

¹²⁹ *Id.* at 241.

¹³⁰ *Id.* at 242.

¹³¹ A notable example of a prosecutor leading the way to exoneration is the action taken by Assistant District Attorneys Nancy Ryan and Peter Casolaro under the leadership of New York County District Attorney Robert Morgenthau in reinvestigating the case of the Central

acceptance of the investigative trial could “drive out other criminal trials”—a threat to the very essence of the adversary trial is hardly likely to be welcomed with open arms by the legal system.¹³²

Will such ideas ever be translated into structural change in the courts? As Gross recognized, the barriers to this type of reform are substantial, and in many ways, they echo the difficulties introduced with the creation of North Carolina’s Innocence Inquiry Commission. As is so often the case, the devil is in the details, and these details would have to be hammered out in a long, laborious process that would involve partisan politics, funding concerns, and bureaucratic inertia. In addition, the challenge of rethinking the role of the American judge is formidable and might involve herculean tasks like reforming legal education. Currently, therefore, proposals such as Gross’s will likely remain purely intellectual exercises.

In sum, it appears that some existing criminal justice institutions have taken on new roles as a result of the innocence movement, but that generally the adversary system has been resistant to major structural changes. It would seem that at this stage of the innocence movement, much of the leadership for reform will continue to be located in new, independent institutions like the innocence projects and the Innocence Network, while institutions within the criminal justice system itself are gradually acclimating themselves to a more substantial role. The question of whether innocence projects are or will become a necessary part of our adjudication structure remains unanswered.

V. INNOCENCE REFORM RESEARCH AND METHODOLOGY

Because reform programs often rest on underlying ideas generated by research and scholarship, concerns about the effectiveness and sustainability of innocence reform must also be concerned with the kinds of research relied upon. The American

Park Five and presenting detailed findings to the court. See SARAH BURNS, *THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING* 194–95 (2011). A prominent guilty plea extorted from prisoners for whom the evidence of innocence was more than substantial occurred in regard to the “West Memphis Three”—Damien Echols, Jason Baldwin, and Jessie Misskelley Jr. See Campbell Robertson, *Rare Deal Frees 3 in ‘93 Arkansas Child Killings*, N.Y. TIMES, Aug. 20, 2011, at A1. A shaken baby case in which a prisoner was forced to undergo a second trial involved Julie Baumer. See Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES MAG., Feb. 6, 2011, at 46–47; Jameson Cook, *New Trial in Baby Abuse*, MACOMB DAILY (Nov. 27, 2009), <http://www.macombdaily.com/article/20091127/NEWS/311279986/new-trial-in-baby-abuse>.

¹³² Gross, *Investigative Procedure*, *supra* note 127, at 242.

innocence movement owes a great deal to the scientific research and technology that led to DNA profiling and eyewitness identification reforms.¹³³ Most wrongful conviction research and writing has taken a subject-matter approach to innocence reform. That is, journalists, legal scholars, and other advocates have relied heavily on narratives to illuminate individual causes of wrongful conviction (e.g., false confessions and eyewitness misidentification), and then sought a “solution” to that cause. This approach leads to technological fixes (e.g., videotaping interrogations, which may be effective to a point), but such solutions are often limited without an understanding of the greater structural, cultural, or environmental factors at work in the criminal justice system and society.¹³⁴ Innocence scholarship has been gradually expanding to advance beyond the kinds of descriptive causal research that has supported the “causes and cure” innocence paradigm. New research methodologies and novel scholarship addresses concerns about the limits of the innocence paradigm and advances more comprehensive views of reform, for example, by re-conceiving wrongful convictions as organizational accidents, focusing on *process* rather than static causes, and explicitly addressing the role of culture.

In this vein, a curious aspect of innocence scholarship has been the paucity of involvement by criminologists and criminal justice scholars, with some exceptions.¹³⁵ One would think that more criminologists would have engaged this significant policy issue, utilizing their applied sociological methodologies.¹³⁶ This lack of

¹³³ Leo, *supra* note 16, at 205–06, 208–09.

¹³⁴ As an example, a videotaped interrogation that occurs without violence or psychological aggression may pass muster, but the confession may still be in danger of being false if the psychological state of the particular suspect is not taken into account. See GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* 219–31 (2012) (explaining that if juries could see the circumstances under which a confession was made, many guilty confessions would be suppressed).

¹³⁵ See FORST, *supra* note 4, at xiv (proposing a system for error management from a statistical background); C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY passim* (1996) (focusing on wrongfully convicted persons by surveying data and highlighting major factors in wrongful convictions); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 *passim* (1987) (analyzing miscarriages of justice through research done by Philosophy and Sociology professors); Leo & Gould, *supra* note 17, at 9–10 (discussing the lack of involvement of criminologists in the study of wrongful convictions).

¹³⁶ Leo, *supra* note 16, at 208 (“Disappointingly, criminologists have been largely missing in action from the research in these subfields.”). This lack of involvement may be explained by the investment of social scientists in their set areas of research, the difficulty of obtaining quantitative data related to wrongful convictions, the lower status of non-quantitative research, the lack of interest and general ignorance of criminal justice scholars about legal issues, and the relatively small number of criminal justice scholars. The study of police

involvement is beginning to change as a few criminal justice scholars have begun writing about wrongful convictions, as have a few doctoral students.¹³⁷ We now perceive a flowering of social scientific exploration of wrongful conviction issues, including the reliability of expert testimony,¹³⁸ jury and judge decision-making,¹³⁹ and the potential effects of an adversarial versus inquisitorial setting on adjudication.¹⁴⁰

Empirical studies can make their greatest contribution in assessing whether and to what degree supposed “causes” of wrongful conviction are shown to affect miscarriages of justice, that is, to measure the relationship between likely causal variables and wrongful convictions.¹⁴¹ Yet, to the best of our knowledge, only five studies have addressed this central question, and because they have varied considerably in their approaches, the resulting knowledge is relatively thin. One study compared DNA exonerations and a matched set of non-exoneration cases to examine how the appellate process failed to screen wrongful convictions.¹⁴² Three studies focused on statistically predicting death row exonerations, two by comparing exonerees to executed prisoners,¹⁴³ and one by explaining

investigation and the adjudication process was of more interest to criminal justice scholars in the early days of the new discipline in the 1970s.

¹³⁷ See, e.g., GOULD, *supra* note 17, at 76–77; Andrea Bingham et al., *Public Support for Preventive/Corrective Remedies Against Miscarriages of Justice in Capital Cases*, 30 JUST. Q. 594, 594 (2013) (writings from a student and faculty at the Departments of Public Health and Criminology, University of South Florida); Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1087 (2011) (writing by Associate Professor from the University at Albany School of Criminal Justice); Norris et al., *supra* note 27 (writings on wrongful convictions by Ph.D. students and faculty from the SUNY Albany School of Criminal Justice); Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1289–90 (2005); Amy M. Shlosberg, *Post Exoneration Offending and Assessing the Reliability of Exonerations 2* (2012) (unpublished Ph.D. dissertation, City University of New York & John Jay College of Criminal Justice); Kim E. Schnurbush, *Wrongful Convictions: A Conceptual Framework for Understanding Police and Prosecutor Misconduct* (2012) (unpublished Ph.D. dissertation, Sam Houston State University).

¹³⁸ Michael F. Cassidy & Dennis Buede, *Does the Accuracy of Expert Judgment Comply with Common Sense: Caveat Emptor*, 47 MGMT. DECISION 454, 454 (2009).

¹³⁹ DANIEL GIVELBER & AMY FARRELL, *NOT GUILTY: ARE THE ACQUITTED INNOCENT?* xxi–xiii (2012).

¹⁴⁰ Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146 (2011).

¹⁴¹ See Leo & Gould, *supra* note 17, at 7–9 (discussing wrongful conviction research with regards to the innocence movement and DNA exonerations).

¹⁴² Garrett, *Judging Innocence*, *supra* note 122, at 69–71.

¹⁴³ See Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 927 (2008); Talia Roitberg Harmon, *Race for Your Life: An Analysis of the Role of Race in Erroneous Capital Convictions*, 29 CRIM. JUST. REV. 76, 77 (2004).

why putatively innocent prisoners were executed by comparing them to death row exonerees.¹⁴⁴

We focus on the most recent empirical study into the causes of wrongful convictions, by Jon Gould and associates, a national study of serious felony cases (not just death penalty cases) designed to statistically predict which initial justice system errors led to later exonerated wrongful convictions, and which resulted in release or acquittal after indictment (i.e., “near misses”).¹⁴⁵ The research design of this study allowed the researchers to break out of the mold of focusing on each type of error as a static cause of wrongful conviction and instead consider the *process* that allows one case to diverge from another.¹⁴⁶ A consideration of why negative factors found in wrongful convictions are not complete causes begins with the knowledge that some of the static “causes” of wrongful conviction, such as false confessions or the use of informants, do not always result in a conviction.¹⁴⁷ Gould et al. then discussed the question of what happened subsequent to the initial error that allowed it to go undetected or confounded in some cases, but was uncovered and corrected in others.

Their conclusion is a multi-faceted model that enunciates how factors such as a weak defense, young defendant, and withholding of exculpatory evidence can confound initial errors in identification or interrogation.¹⁴⁸ Gould et al. found that although wrongful convictions and near misses started in similar ways, certain mitigating factors statistically predicted why some cases heading toward wrongful convictions diverged to near misses in the adjudication process.¹⁴⁹ Some of the causal factors are

¹⁴⁴ See Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498, 498 (2005).

¹⁴⁵ JON B. GOULD ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE ii–iii (2012). The results of this study are also available in Jon B. Gould, et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471 (2014).

¹⁴⁶ Jon B. Gould et al., *Innocent Defendants: Divergent Case Outcomes and What They Teach Us*, in MAKING JUSTICE, *supra* note 13 (substantially summarizing GOULD ET AL., *supra* note 145).

¹⁴⁷ In fact, we know from several studies that a substantial number of false confessions, misidentifications, and forensic errors do not lead to wrongful convictions but instead are uncovered before final judgment. See, e.g., Eric Colvin, *Convicting the Innocent: A Critique of Theories of Wrongful Convictions*, 20 CRIM. L. FORUM 173, 191 (2009); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894 (2004); Chisun Lee et al., *The Child Cases*, PROPUBLICA (June 27, 2011, 11:00 PM), <http://www.propublica.org/special/the-child-cases>.

¹⁴⁸ GOULD ET AL., *supra* note 145, at iii.

¹⁴⁹ *Id.*

environmental or static (and therefore largely uncontrollable), such as the defendant's age, number of prior offenses, and the state's level of punitiveness (measured by the use of the death penalty).¹⁵⁰ Dynamic factors, directly dependent on the actions of people in the adversarial system, included the strength of the prosecution and defense cases and whether there is error in forensic testing.¹⁵¹ An interesting finding was that while misidentifications were common to both sets of cases, honest misstatements by eyewitnesses were more difficult to detect during the pretrial or trial process and thus more often led to a wrongful conviction, while intentional misidentification predicted near misses.¹⁵² Another counterintuitive factor was that a weak prosecution case predicted wrongful conviction.¹⁵³ A panel of experts explained this anomaly by pointing out that weak facts may encourage the state to engage in certain questionable practices designed to bolster the case, leading to an erroneous conviction.¹⁵⁴ Thus, in several erroneous convictions in the study, prosecutors convinced of defendants' guilt despite a lack of conclusive proof, failed to recognize and turn over exculpatory evidence, or enlisted a snitch or other non-eyewitness to provide dubious corroborating testimony.¹⁵⁵

The study concluded that erroneous convictions are more about *system failure* than individual causes.¹⁵⁶ Erroneous convictions represent complex breakdowns in the adversarial process, which occur when errors are compounded rather than rectified, often as a result of tunnel vision.¹⁵⁷ Most cases in the study, especially erroneous convictions, involved more than one error, sometimes as many as four or five.¹⁵⁸ Gould et al. provided empirical validation for prior studies, mostly descriptive, that examined how an initial error (such as a mistaken eyewitness identification) leads to cross-contamination or nonindependence of subsequent evidence, revealing how one mistake can create another.¹⁵⁹ This emphasis on

¹⁵⁰ *Id.* at xviii, xx.

¹⁵¹ *Id.* at xix–xxi.

¹⁵² *Id.* at xx.

¹⁵³ *Id.* at xix.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at xxi.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 84.

¹⁵⁹ See George Castelle & Elizabeth F. Loftus, *Misinformation and Wrongful Convictions*, in *WRONGFULLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 17, 31 (Saundra D. Westervelt & John A. Humphrey eds., 2001); see also Saul Kassin et al., *Confessions That Corrupt: Evidence From the DNA Exoneration Case Files*, 23 *PSY. SCI.* 41, 41 (2012).

process, organization, and cascading errors has the potential to increase the scope and effectiveness of innocence reforms, a point we consider in Part VI.

Another critical issue regarding any reform program is the degree to which reforms are accepted and effectuated. Of all the social science research on wrongful convictions, studies that explore the openness and barriers within institutional practices and attitudes towards reform are perhaps the most essential to the continuing impact of the innocence movement in the policy realm. Without an understanding of why and how reforms are received, implemented, and spread in real institutions, there is always a risk that innocence reforms will not take root, will become too divisive, will be impractical or unjust, or most importantly, will fail to accomplish the real change that they envision. While the research on this has been sparse, Robert Norris has examined past trends and future prospects of exoneree compensation law reforms through the lens of the diffusion-of-innovation research model with its “tipping point” concept.¹⁶⁰ Exoneree compensation is the oldest innocence-related reform in the United States, having first been proposed and adopted a century ago.¹⁶¹ Stimulated by innocence movement concerns, additional state legislatures adopted no-fault compensation programs. The number of adopting states, however, appears to have recently slowed. Norris described variations in compensation amounts and other assistance provided in the laws of the twenty-seven states, along with the federal government and the District of Columbia, that authorize it.¹⁶² His application of diffusion-of-innovation analysis to trends in the passage of compensation laws included both the passage of new compensation laws and amendments to earlier laws. He found an increase “from 0.6 actions per year from 1989 to 1993 to 3.2 actions per year from 2004 to 2008.”¹⁶³ Changes occurred in both conservative and liberal states. He did not venture a prediction as to whether compensation laws

¹⁶⁰ See Norris, *supra* note 63, at 300.

¹⁶¹ The concept was first proposed by Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684, 705–06 (1913), and soon after compensation laws were passed in Wisconsin and California based on his model statute. See Marvin Zalman, *Edwin Borchard and the Limits of Innocence Reform*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 329, 329 (C. Ronald Huff & Martin Killias eds., 2013).

¹⁶² Norris, *supra* note 63, at 291. Since Norris wrote, another state adopted a compensation program for the wrongfully convicted. See Molly Hennessy-Fiske, *Colorado Will Pay Cleared Inmates*, L.A. TIMES, June 9, 2013, at A-20.

¹⁶³ Norris, *supra* note 63, at 295.

reached a tipping point that will lead to adoption in most states, but instead noted that the economic recession following 2008 might be slowing adoption, while the general growth of the innocence movement creates continuing pressure toward the adoption and improvement of exoneree compensation laws.¹⁶⁴

This research provides a sounder basis for considering how and why exoneree compensation laws have spread throughout the United States and for speculation on the progression of these reforms in the future. Interestingly, Norris concludes that a states' political ideology and its tradition of criminal justice does not appear to have a substantial influence on the adoption of compensation statutes, while the number (and publicity) of exonerations in a state does.¹⁶⁵ He also discusses a possible trickledown effect from key states in a region and the federal government.¹⁶⁶ While Norris predicts that the adoption of these reforms may slow down in the current difficult economic times, based on his research he remains optimistic about the growth of compensation laws in the future.¹⁶⁷

Moving beyond informed speculation, Rebecca Murray, Laurel Gegner, and Justin Pelton have conducted original research, based on standard social science research methodology, to explore the predisposition of law enforcement agencies to adopt an array of innocence reforms that have been advanced by advocates and scholars.¹⁶⁸ No matter how effective a technique may be in the laboratory, it will have no effect if not adopted by police agencies, and policy advocates need information about the acceptability of policies.¹⁶⁹ Murray et al. sent a survey to virtually all agencies in

¹⁶⁴ See *id.* at 300. Exoneree compensation laws are typically administered by having existing justice institutions or courts address innocence concerns rather than creating entirely new institutions. Exoneree-compensation and other issues will come to the attention of appellate courts, courts of claim, administrative law judges, and other institutions that determine innocence claims. In so doing, innocence consciousness will spread among these high-level decision makers, making the idea of actual innocence a more routine part of justice-system thinking, rather than being seen as a rare event. These new roles for old institutions may be more instrumental in helping to anchor factual innocence as a necessary concern of the adjudication system than entirely new institutions within the criminal justice system.

¹⁶⁵ *Id.* at 296.

¹⁶⁶ *Id.* at 297.

¹⁶⁷ *Id.* at 300.

¹⁶⁸ Rebecca K. Murray et al., *Policies, Procedures and the Police: An Assessment of Wrongful Conviction Risk in Nebraska*, in *WRONGFUL CONVICTIONS*, *supra* note 13, at 130.

¹⁶⁹ See generally Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 *PERSPECTIVES ON PSYCH. SCI.* 238 (2012) (examining eyewitness identification reform proposals and research they are based upon, concluding that innocence movement must make better effort to acknowledge and respond to practitioners' concerns about the costs of reforms, rather than ignoring costs).

Nebraska ($n=225$) and received back only seventeen, nine from county sheriffs' offices and eight from municipal agencies.¹⁷⁰ Most were from small agencies.¹⁷¹ The low rate of return may reflect the rural nature of the state, as the return rate from small agencies was lower than from large police agencies,¹⁷² as well as a general unfamiliarity with, and even dislike of, innocence reforms. Their survey instrument asked about policies related to identification, evidence collection, and interrogation procedures, especially the existence of formal or informal procedures in each of these categories.¹⁷³ The assumption is that departments with formal policies in all three areas are better able to implement innovations.

About half the municipal agencies had formal written procedures related to all three functions but only one county agency had formal procedures for all three.¹⁷⁴ Even in agencies with formal policies and procedures, often these were not provided to individual officers but posted centrally, such as on bulletin boards.¹⁷⁵ The large agency-small agency distinction yielded an eyebrow-raising observation, with large agencies disallowing the threat of the death penalty during interrogation (being deterred by legal consequences), while small agencies allowed the threat if deemed useful.¹⁷⁶ Although the low response rate undercuts the generalizability of Murray et al.'s findings, the replies are nonetheless revealing. Their research suggests that among the 13,000 municipal police departments in the United States, many of which are small, attempts to introduce innocence policy will encounter established current policies (or non-policies) and practices that will present barriers to reform.¹⁷⁷ In short, devising programs is not enough.¹⁷⁸ At some point, agencies with credibility will have to become involved in the technology transfer of innocence reforms. Peer credibility is a central message of diffusion-of-innovation research,¹⁷⁹ and was key to the spread of eyewitness reforms among Massachusetts law enforcement departments.¹⁸⁰

¹⁷⁰ Murray et al., *supra* note 168, at 135.

¹⁷¹ *Id.*

¹⁷² See PERF, *supra* note 28, at 44.

¹⁷³ Murray et al., *supra* note 168, at 134.

¹⁷⁴ *Id.* at 135–36.

¹⁷⁵ *Id.* at 141.

¹⁷⁶ *Id.* at 140–41.

¹⁷⁷ See *id.* at 142.

¹⁷⁸ *Id.*

¹⁷⁹ See EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 27 (5th ed. 2003).

¹⁸⁰ See Fisher, *supra* note 31, at 57–58.

Another innovative type of innocence scholarship focuses on the role that culture plays in wrongful conviction, rather than individual causes; this kind of research requires closer examination of justice agencies and to date, such studies have largely concentrated on examining the culture of police¹⁸¹ and prosecutor's offices.¹⁸² For example, Marvin Zalman reviewed three bodies of literature that assessed the role and culture of police investigators:¹⁸³ social scientific surveys and studies,¹⁸⁴ narratives of police work written by journalists and social scientists,¹⁸⁵ and analyses of police investigation by authors writing from an "innocentric" posture.¹⁸⁶ The wrongful conviction literature is, as expected, the most critical of investigators and investigation.¹⁸⁷ Narratives tend to laud police investigators, while social science studies disclose the mundane realities as well as the institutional and resource limitations of police investigation.¹⁸⁸ Zalman suggested that the innocence paradigm focuses too narrowly on certain slices of police investigation work, especially conducting lineups, interviewing suspects, and handling confidential informants.¹⁸⁹ Improving the basic function of police investigation to make it more accurate requires a more rounded appreciation of the entire investigation function based on research that goes beyond that conducted by innocence-oriented researchers.¹⁹⁰ Such an approach is hobbled by the innocence paradigm. A promising basis for investigation policies based on competent and relevant research was provided by Dan Simon's comprehensive survey of psychological literature pertaining to the investigation function.¹⁹¹

¹⁸¹ Seumas Miller, *Integrity Systems and Professional Reporting in Police Organizations*, 29 CRIM. JUST. ETHICS 241, 243 (2010).

¹⁸² See Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 402-03 (2011).

¹⁸³ Marvin Zalman, *The Detective and Wrongful Conviction*, in MAKING JUSTICE, *supra* note 13, at 147.

¹⁸⁴ See, e.g., FRANK HORVATH ET AL., A NATIONAL SURVEY OF POLICE POLICIES AND PRACTICES REGARDING THE CRIMINAL INVESTIGATION PROCESS: TWENTY-FIVE YEARS AFTER RAND (2001).

¹⁸⁵ See, e.g., ROBERT JACKALL, STREET STORIES: THE WORLD OF POLICE DETECTIVES (2005).

¹⁸⁶ See, e.g., DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE (2012); see also Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1551-52 (2008). Medwed coined this neologism to mean "the evolving focus on actual innocence in the criminal law discourse and advocate[ing] the passage of legislative reforms geared toward curtailing the factors that contribute to wrongful convictions." *Id.* at 1552.

¹⁸⁷ See, e.g., Murray et al., *supra* note 168, at 142.

¹⁸⁸ Zalman, *The Detective and Wrongful Conviction*, *supra* note 183, at 153, 155.

¹⁸⁹ *Id.* at 160.

¹⁹⁰ *Id.*

¹⁹¹ DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 17 (2012).

Lastly, Zalman briefly surveyed the subject of “tunnel vision” that is rightly viewed as a psychological process that helps produce wrongful convictions.¹⁹² Innocence-oriented scholarship that has explored the cognitive biases popularly labeled “tunnel vision” has tended to provide solutions to this common psychological process based on legal rules.¹⁹³ An alternative view, based on the inherent limitations confronting police investigators and on a research-oriented appreciation of how to investigate the psychological biases that underlie so-called tunnel vision, provides a more sympathetic understanding of police investigation.¹⁹⁴ In sum, Zalman’s analysis argued that the innocence paradigm places limits on further research and policy related to police investigation, which, ironically, will come to hamper the goals of the innocence movement.¹⁹⁵

Jennifer Laurin’s analysis of the missing element of the National Academy of Science (NAS) report¹⁹⁶ argues for the necessity of *systemic* reform to accomplish the goals of improving the use of forensic science, closely paralleling Zalman’s conclusion¹⁹⁷ and the approach we take in this article.¹⁹⁸ She argues that by focusing on the forensics laboratory and not paying attention to “upstream *users* of forensic science[,] police and prosecutors,” the “truth-facilitating function” of forensic science will be thwarted.¹⁹⁹ The reason is that the

upstream users . . . will select priorities, initiate investigations, collect and submit evidence, choose investigative techniques, and charge and plead cases in ways that have critical and systematic, though poorly understood,

A further observation drawn from Zalman’s survey is that in England a robust line of research into how police interview ordinary witnesses has explored the technique of the cognitive interview (CI), which apparently produces more accurate information. Zalman, *The Detective and Wrongful Conviction*, *supra* note 183, at 158. On the basis of CI research, English police departments have instituted policies to encourage the method. *Id.* This suggests a deficiency in American research and policy development designed to make police investigation more accurate. *See id.*

¹⁹² Zalman, *The Detective and Wrongful Conviction*, *supra* note 183, at 157.

¹⁹³ *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 354–55 (2006) (proposing doctrinal reform, education, training, improved evidence collection and investigation techniques, increased management and supervision practices, and greater transparency as some solutions).

¹⁹⁴ Brent Snook & Richard M. Cullen, *Bounded Rationality and Criminal Investigations: Has Tunnel Vision Been Wrongfully Convicted?*, in CRIMINAL INVESTIGATIVE FAILURES 72 (2009).

¹⁹⁵ Zalman, *The Detective and Wrongful Conviction*, *supra* note 183, at 160.

¹⁹⁶ NAS REPORT, *supra* note 56.

¹⁹⁷ Zalman, *Edwin Borchard and the Limits of Innocence Reform*, *supra* note 161, at 351.

¹⁹⁸ Laurin, *supra* note 15, at 1118.

¹⁹⁹ *Id.* at 1055 (emphasis added).

influences on the accuracy of forensic analysis and the integrity of its application in criminal cases.²⁰⁰

In short, Laurin builds a brief for forensic science reformers to study the criminal justice system, at the cost of otherwise undermining recommended NAS reforms. Indeed, she suggests that implementing some NAS reforms may undermine accuracy, by locking investigators with limited training into reliance on second-best forensic evidence to confirm the results they have reached based on their interviews and interrogations.²⁰¹ Even adopting the signature reform of laboratory independence can have negative consequences if critical questions about the actual conduct of investigations using forensic evidence are not examined.²⁰² These issues are more acute in the context of America's decentralized criminal justice system.²⁰³

Laurin's call for criminal justice system research needs to be expanded to analyses of specific innocence reforms and to other interactions within the criminal justice system.²⁰⁴ To date, innocence scholars and advocates have done little to examine the culture, organization, and daily practices of defense attorneys, judges, and forensic scientists, continuing to focus on technological fixes within these fields or increased funding.

Our review of new approaches to wrongful conviction research demonstrates that older, static research models are giving way to inquiries that seek to explain wrongful conviction in dynamic ways and to better understand the policy changes associated with wrongful conviction concerns. In a society that places increased importance on evidence-based approaches to social problems, and is experiencing budget cuts in most areas of government, policy reforms are virtually impossible without social science research to back up them up. Thus, from a purely practical standpoint, the innocence movement has been increasingly under pressure to embrace empirical analysis. In addition, the many processes that

²⁰⁰ *Id.* The discretion of law enforcement officers and prosecutors regarding the collection and use of forensic evidence, and the ways in which mundane practices weaken the effective use of such evidence to generate accurate and just results, is also described. *Id.* at 1072–1100.

²⁰¹ *Id.* at 1101–02.

²⁰² For example, details of laboratory independence could cause delays in evidence processing and engender dysfunctional working relations. *Id.* at 1103.

²⁰³ *See id.* at 1104–05.

²⁰⁴ There are many examples. One example of an interaction node that relates to wrongful convictions is the relationship between a prosecutor's office and police investigators in accepting evidence. *See, e.g.,* Sapien, *supra* note 77.

operate within the adjudication system are each complex social sub-systems subject to a host of factors, not simply a legal framework; from an intellectual standpoint, therefore, some innocence scholars and justice system practitioners have begun to argue that attempts to reform the system without sound social scientific studies are inherently flawed. While to date the number and extent of such empirical evaluations has been limited, current trends seem to indicate that additional research will be forthcoming. More generally, it appears that it will be mutually beneficial for innocence advocates to foster and consume reform-oriented social science research and for criminal justice researchers to advance inquiry regarding wrongful convictions. We conclude that the increase in such collaboration cannot help but increase the longevity and ultimate success of innocence reforms.

VI. INNOCENCE REFORM SUSTAINABILITY MODELS

In the last two Parts of this article we more directly confront the idea that *real* sustainable reform will require rethinking the criminal justice system, a tall order. It may be that the “innocence crisis” will not last forever even if exonerations continue indefinitely, as this (or any) issue’s ability to capture the public imagination and create a sense of urgency will eventually decrease. Ultimately, therefore, to sustain reform efforts the innocence movement must climb out of the crisis model and embrace a different paradigm, one that envisions a continual process of evaluation and improvement within the criminal justice system. This paradigm must have as its goal reshaping the way the criminal justice system (and each of its parts) envisions its work, so that the system recognizes the need for continuous self-evaluation and embraces a professional model of learning from error. Reforms must seek to move the system toward greater professionalization and integrity, rather than simply to reduce the number of errors in forensic science, eyewitness identifications, etc. Thus, ironically, the most sustainable innocence reforms may be those that tackle the most difficult task—transforming the system itself.

A crucial component of the new approach to reform is the challenge for criminal justice practitioners and academics to shift their mental focus regarding errors from blame to risk.²⁰⁵ In the

²⁰⁵ See James M. Doyle, *Learning From Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 131 (2010) [hereinafter Doyle, *Learning From Error*]. The gist of this article was reported in James M. Doyle, *An Etiology of Wrongful Convictions: Error, Safety,*

traditional model of error, ironically shared by both the early members of the innocence movement and the practitioners they critiqued, errors occur because someone has done something wrong. At times, the errors were clearly honest mistakes (i.e., most misidentifications made by victims) while in other cases, the error seemed to stem from misconduct or abuse (i.e., coerced confessions).²⁰⁶ While innocence advocates often disagreed with practitioners on whether an error was intentional or not, or on whether the person legally could be held accountable, they agreed on the basic premise that *someone* was to blame and that without that, no error could have occurred. James Doyle refers to this as the bad apple approach.²⁰⁷

The bad apple approach has only limited utility in explaining why wrongful convictions occur, and more importantly for our purposes, it produces little in the way of prospects for ongoing reform. To begin with, the approach stigmatizes and isolates the bad apples, driving errors underground and reducing incentives for practitioners to identify and discuss mistakes. It often creates flat denial within the practitioner community or institution and little interest in innocence reforms, while fostering distrust between those in the innocence movement and those in the system that appear to be harboring these bad apples. This dynamic does not bode well for future prospects of reform.

By contrast, the learning from error approach starts with the premise that errors occur in any human institution, and that these errors only become major tragic incidents when the system does not detect the errors or address them in a timely manner. Furthermore, unethical choices are generally made because something in the system makes them seem like good ideas at the time. This is known as the *organizational accidents* approach.²⁰⁸ Doyle has suggested re-conceiving wrongful convictions in these terms, with an emphasis on understanding the *process* by which miscarriages of justice occur and improving the reliability of the *system*.²⁰⁹ Traditionally, the innocence movement has “concentrate[d] on a strategy of pursuing overall system reliability

and *Forward-Looking Accountability in Criminal Justice*, in MAKING JUSTICE, *supra* note 13, at 56 [hereinafter Doyle, *An Etiology of Wrongful Convictions*].

²⁰⁶ Doyle, *Learning From Error*, *supra* note 205, at 118–19.

²⁰⁷ *Id.* at 118.

²⁰⁸ See SIDNEY DEKKER, JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY 80–81 (2007); CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 62–66 (1984).

²⁰⁹ Doyle, *An Etiology of Wrongful Convictions*, *supra* note 205, at 58–59.

by optimizing individual system components.”²¹⁰ In reality, however, a close examination of wrongful conviction cases reveals that “[n]o single error is independently sufficient to cause an organizational accident; the errors of many individuals (‘active errors’) converge and interact with system weaknesses (‘latent conditions’), increasing the likelihood that individual errors will do harm.”²¹¹ This is the same conclusion that was drawn by experts in the medical and aviation fields, who realized that attempting to perfect any particular part of the system was an inadequate response to system weaknesses.²¹²

Thus, a more sophisticated study of wrongful convictions will emphasize how a combination of errors played out in a system and an environment in which the errors were not corrected or were encouraged.²¹³ This, in turn, requires further investigation into what extent the adjudicative process actually corrects errors in the investigative sector.²¹⁴ Thus, the job of the innocence movement is less about ferreting out bad apples or trying to reduce all possible avenues of error (an impossible task), but instead about analyzing how the system can be reformed to ensure that good choices are rewarded and inevitable errors are uncovered and mitigated. In other words, the emphasis is on risk-reduction, rather than on blame. Thus, this model not only reduces the “them” versus “us” mentality that often invades innocence reform, it also encourages practitioners to confront and learn from error.

This kind of approach has been used in other fields and industries, such as aviation and medicine. In aviation, organizations have created incident systems that allow practitioners to report errors in confidence and give employees a greater role in reducing and managing organizational error.²¹⁵ In medicine, the concept of grand rounds and the teaching hospital facilitates learning from error, and Doyle has suggested similar institutions might be possible in the criminal justice field.²¹⁶ Thus,

²¹⁰ *Id.* at 59.

²¹¹ *Id.* at 58.

²¹² *See, e.g.*, ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 13 (2009); PERROW, *supra* note 208, at 63; Lucian L. Leape, *Error in Medicine*, 272 J. AM. MED. ASS’N 1851, 1852 (1994).

²¹³ Colvin, *supra* note 147, at 191–92.

²¹⁴ *See* SIMON, *supra* note 191, at 17, 44–49.

²¹⁵ GLOBAL AVIATION INFORMATION NETWORK (GAIN) WORKING GROUP E, *A ROADMAP TO A JUST CULTURE: ENHANCING THE SAFETY ENVIRONMENT* 30 (2004) [hereinafter GAIN WORKING GROUP].

²¹⁶ Doyle, *Learning From Error*, *supra* note 205, at 147.

while the learning from error or “Just Culture” is quite new to the adjudication system, there are precedents in other fields that should facilitate adoption.²¹⁷

Given the fragmentation and multi-faceted nature of the criminal justice system, early attempts by scholars and practitioners to adopt this new approach on a system-wide scale have been met with significant struggles. The learning from error approach was systematically applied at a Cardozo Law School symposium on *Brady* that brought together justice system officials, innocence advocates, management experts, and experts in medical harm reduction,²¹⁸ and there have been other round-table discussions and expert panels that set a similar tone.²¹⁹ While these attempts have started many important conversations and are crucial to moving the field forward, they have not proven to be sustainable on a system-wide scale. As yet, there is no on-going structure by which the system evaluates itself and learns from error.

By contrast, small but practical steps have been made in this direction by individual components of the system, namely prosecutor’s offices, police departments, and the field of forensic science. Within prosecutor’s offices, Conviction Integrity Units, discussed above, could take on a teaching hospital function. For example, CIUs could encourage near miss reporting (a case with an innocent defendant that was dismissed before conviction) and prosecutors could analyze what went wrong (i.e., why the defendant was indicted) as well as what went right (i.e., what caused the state to recognize the defendant’s innocence). Currently, CIUs rarely function in this way, but the existence of such a unit within a department suggests potential. CIUs can also serve as an oversight mechanism for the prosecutor’s office when it comes to questions of innocence, highlighting areas of concern and instituting reforms when necessary.

Within policing, there are no clear organizations or systems set up to institute a learning-from-error culture. Nonetheless, there have been several interesting forays into this world that focus on the culture of blame and learning from near misses. For instance, Waring looks at the impact of accountability and blame in police decision making.²²⁰ We have discussed Gould et al.’s comparative

²¹⁷ GAIN WORKING GROUP, *supra* note 215, at 5.

²¹⁸ Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1943–48 (2010).

²¹⁹ GOULD ET AL., *supra* note 145, at ii–iii.

²²⁰ Sara Waring, *An Examination of the Impact of Accountability and Blame Culture on*

research on near misses previously. Other examples include a recent monograph that was published by former police officer and professor, Jon Shane, which examines a wrongful arrest resulting from an initial show-up identification after a robbery.²²¹ Shane explicitly takes an organizational accident perspective and shows that even a rather routine mistake can be mined for very valuable lessons about how to increase system reliability.²²² Likewise, after a high-profile near miss case in Will County, Illinois, the Sheriff's Department hired a consulting group to investigate what went wrong; the investigative report moves beyond blame to provide a valuable discussion of system weaknesses.²²³ These types of post-hoc evaluations of error are important because they encourage police departments to stop considering wrongful convictions as completely unique aberrations, and instead learn from how the ever-present risk of convicting the wrong person is reduced or averted in certain cases but not in others. However, to date such efforts have not resulted in continuing, established methods by which police officers can report, investigate, and learn from error; as evidenced by the heated lawsuits surrounding many of the near misses, a culture of blame remains tenacious.

The innocence revolution probably generated a greater crisis of confidence in the forensic sciences than in any other adjudication system institution,²²⁴ and perhaps because of this it may be poised, despite real obstacles, to take the lead when it comes to learning from error. Forensic science has traditionally been divided into disciplines, such as latent fingerprint examination, firearms and toolmark examination, and forensic toxicology, and thus, with the advent of the innocence challenge, the immediate focus was on failures within a particular discipline (e.g., questioning the scientific basis for bitemark analysis). Furthermore, the tendency simply to focus on technological fixes is strong in a field where technological errors do occur and scientific advancements can clearly lead to better results.

Nevertheless, as the innocence movement has matured, so has

Police Judgements [sic] and Decisions in Critical Incident Contexts (Sept. 2011) (unpublished Ph.D. dissertation, University of Liverpool).

²²¹ JON SHANE, LEARNING FROM ERROR IN POLICING: A CASE STUDY IN ORGANIZATIONAL ACCIDENT THEORY 1–4 (2013).

²²² *Id.* at 2–3.

²²³ See ANDREWS INT'L, COMPREHENSIVE OPERATIONAL ASSESSMENT: CRIMINAL INVESTIGATIVE UNIT: SHERIFF'S OFFICE—WILL COUNTY, ILLINOIS (2010).

²²⁴ Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892, 893 (2005).

the response from the scientific community. The touchstone for the new approach is the National Academy of Sciences report, which put forth a pan-disciplinary forensic science reform agenda that draws together the deficiencies made observable by wrongful convictions.²²⁵ While acknowledging that specific correctives would still be applied based on the contours of a particular forensic science sub-discipline, for the first time this report gave voice to deeper concerns within the forensic science community and proffered the goal of creating a more rigorous, self-critical field in the future. Recently, Simon Cole has linked this to a “learning from error” approach that attempts to pull forensic science out of a mode that relies on external crisis to institute vital reforms.²²⁶

In line with public policy analysis,²²⁷ Simon Cole proposed that in the future concerned academicians, activists, and officials should think in terms of a forensic science *policy* subsystem, including the realms of media,²²⁸ government, courts, and academe, to form an “advocacy coalition framework” directed by peak scientific institutions.²²⁹ Forensic science would advance on the basis of continuous empirical and scientific research.²³⁰ This approach could result in new innocence institutions, or innocence-stimulated institutions within the forensic sciences, with the goal of “detect[ing] when future reforms are necessary.”²³¹ In tandem with Doyle’s proposal that adjudication organizations adopt a “normal accidents” perspective to error, Cole advanced the idea of self-aware organizational learning (“forensic science meta-reform”) that could ultimately transform the forensic sciences.²³² In support of the sustainability of his vision, Cole cited the recent decision to create a National Commission on Forensic Science as a signal by the federal government to advance a permanent error-reduction institution in the forensic sciences.²³³

The challenges of fully realizing a new approach to miscarriages of justice are still substantial. There is the perpetual difficulty of locating the mechanisms of reform within the system that must be

²²⁵ NAS REPORT, *supra* note 56, at 1–2, 19–20, 22–33.

²²⁶ Simon A. Cole, *The Innocence Crisis and Forensic Science Reform*, in MAKING JUSTICE, *supra* note 13, at 181.

²²⁷ Zalman & Marion, *supra* note 44, at 25.

²²⁸ Warden, *The Role of Media*, *supra* note 75, at 39.

²²⁹ Cole, *supra* note 235, at 168, 170.

²³⁰ *Id.* at 181.

²³¹ *Id.*

²³² *Id.* at 180.

²³³ *Id.* at 179–80.

reformed; endogenous forces of change are often slow, heavily compromised, and less than transparent. In many instances, it may seem easier and cleaner simply to rely on exogenous crises and legislated “fixes.” Furthermore, there are social costs to adopting this approach. For example, in order to develop the teaching hospital concept within institutions in the criminal justice system, immunity may have to be granted to police officers, prosecutors, or other officials who come forward with cases or errors, and such information may have to be excluded from traditional discovery requests.²³⁴ Are innocence advocates, the American people, and most importantly, the victims of these errors okay with such an outcome? Finally, given the fragmentation of the criminal justice system, the logistics are complicated, and in order to function, there will need to be buy-in from local institutions as well as state and federal-level systems.

VII. CONCLUSION: TOWARD SUSTAINABLE INNOCENCE REFORM?

There are reasons, then, to doubt the sustainability of innocence reform. James Acker and Rose Bellani noted that support for innocence reform has been driven in part by concerns for executing an innocent prisoner and by the certainty provided by DNA exonerations.²³⁵ They suggested that the moral fervor for innocence reform may decline if capital punishment continues to decline and if DNA exonerations become fewer as DNA is applied at the police stage to screen out innocent defendants.²³⁶ Their observation that “the prospect of an execution vitalizes efforts to preempt and expose error with noticeably greater intensity than when death is not in the offing” is supported by the high proportion of murder cases among exonerations.²³⁷ Likewise, the fact that at the present time about one-fourth of all exonerations involve DNA-testing,²³⁸ when

²³⁴ See, e.g., GAIN WORKING GROUP, *supra* note 215, at 33, 36.

²³⁵ James R. Acker and Rose Bellani, *Deadly Errors and Salutory Reforms: The Kill that Cures?*, in MAKING JUSTICE, *supra* note 13, at 269.

²³⁶ *Id.* at 277. “[D]oubts about the integrity of capital punishment systems have correspondingly called attention to the problem of wrongful convictions and helped fuel reforms designed to safeguard innocents.” *Id.* at 279. Sandra Guerra Thompson, in reviewing a universe of one year’s appellate cases in which eyewitness identification was an issue, reports that “DNA evidence has essentially eliminated sexual assault cases from the mix of cases in which eyewitness identification testimony is critical.” Thompson, *supra* note 24, at 650. Four out of ninety six appeals involved sexual assaults. *Id.*

²³⁷ Acker & Bellani, *supra* note 235, at 277–78.

²³⁸ See *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Apr. 19, 2014).

biological evidence is only available in perhaps ten percent of all felonies, speaks to the traditionally heightened importance of DNA testing in the effort to exonerate the innocent.²³⁹ Thus, the reciprocal relationships between capital punishment and DNA exonerations, on the one hand, and support for the innocence movement, on the other, which has supported innocence reform efforts, may not hold up if DNA exonerations and death sentences decline in number.²⁴⁰ “With progressively fewer DNA exonerations in the offing in capital and non-capital cases alike, the perception may arise that wrongful convictions, and the problems contributing to them, must also be disappearing.”²⁴¹

Acker and Bellandi note that “[s]uch a conclusion would be badly flawed,” as most unsolved felonies do not involve biological evidence and yet are prone to the errors uncovered by wrongful conviction scholarship.²⁴²

One unhappy possibility is that waning interest in the death penalty and attendant diminished concerns about erroneous executions will alleviate public pressure and dampen policymakers’ motivation to enact reforms that are important in helping to forestall wrongful convictions generally. Concomitantly, declining DNA exonerations may create the impression that innocents cease to be at risk of wrongful conviction and execution, thereby robbing reformers who have targeted capital punishment of a vital inroad for change. The prospect of the wind being taken out of the sails of both the innocence movement and those who would reform capital justice is paradoxical yet plausible.²⁴³

This gloomy scenario may be further darkened by the possibility that some prosecutors or politicians will take any weakness as an opportunity to block the advance of or undo established innocence reforms.²⁴⁴ While the National Registry of Exonerations reported that in 2012 prosecutors and police initiated or cooperated in fifty four percent of exonerations, an increase from a prior figure of

²³⁹ *Understand the Causes: Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Apr. 19, 2014).

²⁴⁰ Acker & Bellandi, *supra* note 235, at 279.

²⁴¹ *Id.* at 279.

²⁴² *Id.*

²⁴³ *Id.* at 280 (citations omitted).

²⁴⁴ John Wilkens, *Reforms Aim to Reduce Faulty IDs by Eyewitnesses*, SAN DIEGO UNION-TRIBUNE, July 14, 2013, at A-1 (noting that legislation to create commission to study and adopt eyewitness identification reforms passed twice in California and were twice vetoed by Governor Schwarzenegger).

thirty percent,²⁴⁵ and while we may be heartened by the advance of eyewitness identification reforms in police stations and conviction integrity units in some prosecutors' offices, it is a mistake to think that the entire criminal justice community will fall into happy lockstep at seemingly progressive reforms. The long prosecution trend in constitutional criminal procedure by the Supreme Court has not been strongly affected by innocence consciousness.²⁴⁶ If the number of death sentences and executions continue to drop, and the proportion of DNA exonerations decline, those who believe that wrongful convictions are too few to matter can be expected to oppose innocence reforms that have not been firmly institutionalized, especially those that benefit all defendants, like improved funding for indigent counsel.

Another potential area of concern, raised by Zalman and Marion, could come to weaken a resolve in favor of innocence reform:

The very nature of wrongful convictions—the fact that it is virtually impossible for the criminal justice system to identify the conviction of an innocent person until well after a plea has been taken or verdict delivered—and the very small numbers of exonerations in relation to the likely numbers of wrongful convictions make it nearly impossible to identify a random set of wrongful convictions. This, in turn, makes it impossible to measure the degree to which any implemented innocence policy has measurably reduced wrongful convictions.²⁴⁷

²⁴⁵ THE NAT'L REGISTRY OF EXONERATIONS, UPDATE: 2012, 2–3 (2013). This is encouraging news; however, because exonerations are a small if indeterminate proportion of wrongful convictions, it is impossible to say whether the 2012 cooperation data represents a significant change in law enforcement and prosecutor behavior. Based on an assumption that bureaucratic routines are generally stable, it is safest to assume that the unknown proportion of cases in which police facilitate exonerations and prosecutors dismiss cases on actual innocence grounds has not suddenly exhibited a massive upswing.

²⁴⁶ See *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) (holding that no hearing is required by due process to explore suggestive eyewitness identification unless suggestion caused by police); *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 72 (2009) (holding that access to DNA evidence is not mandated by due process). The Burger-Rehnquist-Roberts Court's counterrevolution in criminal procedure is the subject of a prolific body of legal analysis. For recent explorations, see STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 122–25 (2012); GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 160, 165 (2008); THOMAS & LEO, *supra* note 134, at 188–89 (2012). Progressive policies can be reversed, as seen in the repeal of North Carolina's Racial Justice Act. Kardish, *supra* note 73 (reporting the repeal of the Act after just four years on the books, passed along party lines).

²⁴⁷ Zalman & Marion, *supra* note 44, at 34–35 (citing Zalman, *Qualitatively Estimating*, *supra* note 2, at 230). As a contrast, consider crime rates. Criminologists know that reported

If it is not possible to ultimately report on the overall effectiveness of innocence reforms, at some point, critics may use this as a basis to attack innocence reforms generally. One counter-argument is that since *every* proposed innocence reform would have to be enacted and effectively implemented before one could be sure that *all* of the suspected causes of wrongful convictions are not infecting the criminal justice process, a proper evaluation is not possible until a fully reformed system is in place for a number of years for a reduced number of exonerations to be felt to be having an effect. It is also possible, given estimates of large numbers of wrongful convictions (even if the rates are small), that innocence projects could continue to help exonerate prisoners in large number and in fact be reducing the number of wrongful convictions, without this being noticeable. We will never know. Further, the distinction between wrongful convictions and official exonerations will permanently cloud what we know about wrongful convictions since the best data apply to exonerations.²⁴⁸

Other impediments to the sustainability or feasibility of certain innocence reforms include the lack of funding and significant political opposition to taxes, even if some innocence reforms are relatively low cost,²⁴⁹ and the general difficulty in achieving endogenous change in the criminal justice system. It is also worth noting that many innocence reforms are still in experimental stages or are singularities. It is too early to tell whether they may die out or prove to be ineffective over time.

Why, then, do we express cautious optimism for the prospects of continuous innocence reform in the criminal justice system? In just a few years, innocence scholarship has increased in sophistication and breadth, as more robust innocence institutions have emerged from a crisis mode towards a sustainable model. Without claiming that the innocence movement has achieved permanence, a real cause for optimism must be the inherent rightness of the cause to lessen the incidence of wrongful convictions. No one is *for* wrongful

crime rates are approximations of actual crime, but they are based on two large-scale and carefully monitored active data collection efforts: the Uniform Crime Reports, measuring crimes reported to and recorded by police agencies, and the National Crime Victimization Survey, which surveys random samples of Americans to assess criminal victimization. See Zalman, *Qualitatively Estimating*, *supra* note 2, at 242.

²⁴⁸ See *Learn More: The Registry, Exonerations and False Convictions*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx> (last visited April 19, 2014).

²⁴⁹ Most eyewitness identification reforms cost relatively little and mostly involve changes in procedures.

2013/2014]

Sustainability of Innocence Reform

1003

convictions or miscarriages of justice. Of course, that does not mean that everyone agrees on what to do about it. The challenge for the innocence movement is to show that the good of reducing wrongful convictions through reform is not outweighed by other valid considerations, such as convicting the guilty, keeping communities safe, or retaining respect for government institutions. It is this perceived balancing act that causes resistance to innocence reforms. That is why the re-conception of the innocence movement as a way of making the criminal justice system more professional, efficient, and safe is so powerful—it shows that with few exceptions, there really is no balancing act. Reducing the number of wrongful convictions and exonerating innocent defendants will generally also mean increased efficiency in convictions, safer communities, and a more professional and respected system.

Since the founding of the United States, the structures and institutions of our democratic republic have faced many challenges, made many missteps, and caused much injustice. But history has also shown that over time, system reform is possible, change happens, and injustices have been corrected. Given the moral and social imperative of many innocence reforms, it seems possible that policies designed to reduce wrongful convictions may be established that will move the criminal justice system in a direction that is more professional, efficient, and self-critical. Our cautious optimism is not an invitation to complacency, but rather a call to further, renewed action by an innocence movement that is more sophisticated, complex, and attuned to the realities of public policy reform.