FOREWORD

Alissa Pollitz Worden*

Five years ago, the Albany Law Review invited a distinguished group of legal scholars, social scientists, policy advocates, and justice practitioners to address the problematic issue of wrongful convictions. The symposium issue that resulted, Wrongful Convictions: Understanding and Addressing Criminal Injustice, set the stage for a conversation among the original participants about a more extensive agenda of research and legal inquiry. That conversation culminated in a partnership between the Albany Law Review and the University at Albany’s School of Criminal Justice and a commitment to collaboration on the publication of an annual law review issue devoted to both legal and social science scholarship on topical themes involving miscarriages of justice of many kinds.2

This issue is the fifth book in that series, which is cause for some reflection on the value of the enterprise as well as the challenges of maintaining it. Legal scholars study the law by tracing its origins, tracking its evolution, comparing its philosophical and practical underpinnings, and speculating on the ways in which it may (or ought to) be changed. They typically write for audiences of other legal scholars but quietly hope that a judge, an appellate justice, or a legislator may find their work useful and informative. Social scientists study human behavior by systematically analyzing data about how individuals make decisions, how groups interact, how organizations evolve, and how politicians make laws. They typically write for other social scientists, perhaps quietly hoping that their findings may someday be useful to policy makers or practitioners in

* Associate Professor, School of Criminal Justice, University at Albany; Ph.D., University of North Carolina at Chapel Hill
their fields. Law scholars have permission, indeed invitation, to investigate the values underlying legal debates; social scientists are, on most days, expected to stick to high standards of objectivity rather than advocacy. Legal researchers tend to finish their papers with firm conclusions, but social scientists nearly always wrap things up by qualifying their findings and telling their readers that “more research is needed.”

These two genres of scholarship would seem therefore to have different audiences, customs, styles, and even intellectual dialects. Yet the questions that the Miscarriages of Justice issues have examined over the past five years transcend differences in academic traditions and conventions. Without an understanding of the law, we cannot confidently understand the formal contexts within which criminal justice agencies make policies and adopt practices, within which offenders’ culpability is judged, within which victims experience justice or injustice, and within which mistakes are (or are not) remedied. At the same time, without an understanding of the behavioral patterns that result from social, economic, and political opportunities and constraints, we cannot develop informed recommendations for practices or forecast the likely outcomes of legal reforms.

The articles in this book illustrate this diversity of research conventions, as well as the potential payoff from continuing to list these different types of scholarship in the same tables of contents. The publication of our fifth book seems like an appropriate moment to think about how these differences inform the development of knowledge and the implications of what we learn from these genres for social change. Hence, I speak to the articles published in the first section of this issue, those addressing miscarriages of justice that reflect potentially problematic social, cultural, and legal definitions of gender. (My colleague Andrew Davies addresses this point in his introduction to the second section, which focuses on the challenges of maintaining high standards of justice in the realm of indigent defense.)

The authors in this issue address the alignment (or misalignment) of sex, gender, identity, and sexuality with law and adjudication. They come from diverse academic and practice backgrounds. Sara Sommervold and Andrea Lewis are lawyers and advocates from Northwestern University School of Law’s Center on

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Wrongful Convictions. Jody Miller and Bonita Veysey are sociologists and feminist theorists at Rutgers University’s School of Criminal Justice; Elizabeth Webster is a doctoral student in that program. Vanessa Panfil was a postdoctoral associate in the same program at Rutgers before recently accepting an assistant professorship at Old Dominion University’s Department of Sociology and Criminal Justice; she holds a doctorate in criminal justice and specializes in the study of gangs, gender, and sexuality. Her collaborator, Aimee Wodda, is completing her doctorate in Criminology, Law, and Justice at the University of Illinois at Chicago. Luis Rivera is on the Department of Psychology faculty at Rutgers; Cynthia Nadjdowski is a psychologist with the University at Albany’s School of Criminal Justice. Meagen Hildebrand is pursuing her doctorate at that program as well. Joseph Williams is a Katharyn D. Katz Fellow for The Legal Project and recently earned his juris doctor from Albany Law School, where he served as an executive editor for the Albany Law Review.

These authors not only occupy different niches in the intellectual world; they also investigate their questions using very different data sources and theoretical perspectives. Veysey, Webster and Miller, and Lewis and Sommervold tap large national datasets that have been carefully curated in university settings. Rivera and Veysey collected original experimental data. Wodda and Panfil, Williams, and again, Webster and Miller, develop detailed case narratives to illustrate and document their findings. This body of work also presents readers with questions about an array of populations: people who are victims and people who are suspects and defendants; people who are straight, people who are gay, and people who are transgender.

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7 Luis M. Rivera & Bonita M. Veysey, *Criminal Justice System Involvement and Gender Stereotypes: Consequences and Implications for Women’s Implicit and Explicit Criminal Identities*, 78 ALB. L. REV. 1109 (2014/2015).
While this book presents a diverse set of research questions, data, methodological approaches, and research subjects, one powerful observation ties the set together: deeply rooted cultural stereotypes inhabit the law, and these stereotypes create and enforce not only inequality but also disparate assumptions about individuals’ responsibility for their fates in the legal system. Taken together, these seven studies suggest that what we have come to call “heteronormativity” or the “gender binary” creates deeply rooted assumptions about identities, social and family roles, and responsibilities. These assumptions are baked into people’s perceptions of themselves, the law itself, criminal justice agents’ performance of their jobs, and the structural processes of adjudication and corrections. Here are some examples.

Both Lewis and Sommervold and Webster and Miller investigate wrongful convictions of women. While it is challenging to generalize about the legal process from the known wrongful conviction data, it is nonetheless notable that their research uncovers evidence that when women are accused of crimes, the criminal process itself is driven, albeit almost invisibly, by practitioners’ and laypersons’ assumptions about gender. Webster and Miller refer to “tunnel vision” (a term coined by Jon Gould and colleagues)\(^\text{10}\): the tendency to prejudge women’s level of culpability in criminal matters based on assumptions about their roles as mothers, girlfriends, and wives. They conclude that mothers, in particular, may be held to unreasonably high standards for children’s protection and care, so high that their failure to prevent children’s injury or death, even at the hands of other adults, makes them criminally responsible. Lewis and Sommervold document instances of these gendered assumptions in interrogations, field manuals for identifying suspects, and prosecution strategies. Veysey approaches this question of gender assumptions and stereotypes somewhat differently: she estimates women’s and men’s likelihood of being found not guilty by reason of insanity. She concludes that the data suggest that successful insanity defenses for women are associated with homicides of their children or other family members (not including spouses): surely any sane woman would never kill a child, so one who does so must be, or have been, insane or mad at the time of the incident.

Rivera and Veysey ask a somewhat different question: Are women more, less, or equally likely to identify themselves as criminally

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involved? Using a sample of known offenders, these authors compare subjects’ extrinsic identification as criminally involved (acknowledging criminal behavior or involvement with police) with their “implicit identity” as criminally involved. They conclude that while women and men are, in the privacy of their own minds, equally inclined to acknowledge criminal behavior, women are less likely to portray or acknowledge themselves as criminally involved to others; from this they infer that the dissonance between private and public identities signals recognition that “being a criminal” is more difficult to reconcile with women’s, compared with men’s, publicly prescribed roles.

Turning from alleged offenders to victims, Hildebrand and Najdowski\textsuperscript{11} comprehensively review a body of research on society’s reactions to victims of sexual assault; they observe that not only did the evidentiary standards for processing these cases entail special requirements for victims’ behavior in order to be credible for prosecution, but also that these standards may continue to live in the minds of jurors and the expectations and strategizing of prosecutors (and probably defense lawyers). Complainants who could not demonstrate nearly immaculate standards of preassault behavior and decorum are at risk, in both the professional process and the public mind, of forfeiting their claims as victims or survivors.

Lastly, both Williams’s and Wodda and Panfil’s studies likewise explore the implications of victims’ gender roles and identities for the possible exculpation of offenders. The “gay panic defense” and the “trans* panic defense” are, as any contemporary law scholar would note, extensions of very old notions of self-defense, provocation, and heat of passion arguments that can mitigate or even negate charges of criminal liability. These defenses seldom, we learn, hold up in court and are not widely used. But when they are in play, they offer a glimpse into defense lawyers’ efforts to redeem their clients in jurors’ eyes: surely a gay man who approaches a straight man in a bar, or a trans woman who follows up an online-dating invitation, should expect fear, outrage, and even violence when what appear to be their overtures are rebuffed or their nonconforming gender identity becomes known. The fact that these defenses seem at all like clever defense lawyer strategies

speaks directly to those lawyers’ assumptions about what is normal and abnormal and how a reasonable person might react to someone who does not fit into the gender binary. These defenses, when put before a court, call directly upon social stereotypes and assumptions about nonconforming individuals. More troubling, still, is that these stereotypes place an unmeasurable burden on potential victims to avoid triggering rage or hatred.

So we learn from these authors that assumptions about gender and identity may be threaded through the justice process. Why is that true? Why is the law not, in practice, blind to sexuality and gender? Based on the research reported in this issue, there are at least three answers to this question. First, and most important, is the role of narrative in law. Law claims to look at facts, but as Jerome Frank observed long ago, “[f]acts are guesses.”\textsuperscript{12} Facts about decisions, behavior, and motive are seldom made plain and are often contested, and hence the “facts” that are constructed during pretrial and trial procedures—the bases for verdicts and sentences—reflect contests over alternate versions of history. If the people who do the work of criminal justice buy into cultural stereotypes about appropriate male and female behavior and about the essential dualism of male and female identities, we should hardly be surprised when the outcomes of those processes entail narratives that make sense of incomprehensible violence or tragedy by way of gendered story lines. For example: rape complainants lie to protect their virtuous reputations; only evil or profoundly psychologically disturbed mothers might kill their children; the attention or interest of a gay or transgender person is, reasonably, to be met with indignation, anger, or uncontrolled fear. The court processes, from interrogation to parole hearings, are built on narratives, and gender stereotypes help to develop character descriptions that lead to logical plot outcomes.

Second, criminal justice does not function in a vacuum. Hildebrand and Najdowski, Lewis and Sommervold, Williams, and Wodda and Panfil argue that media, as much as the jury trial process, seeks and creates these narratives, which serve to validate and reinforce gender stereotypes. From newspaper reports to music, those who deal in popular culture capitalize on and reinforce expectations about gender roles and identity. It is worth noting here, of course, that popular media also gets some credit for breaking down the gender binary; the Internet and television

\textsuperscript{12} Jerome Frank, Courts on Trial: Myth and Reality in American Justice 14 (1973).
programs have introduced Americans to gay couples, trans men and trans women, and battered partners in ways that are sympathetic, though sometimes simplistic.

Third, the law as it is written will seldom trump the law as it is understood if those two versions of law diverge. The law is usually silent on issues of gender and identity, and it presupposes an indifference that, in fact, dates back to the very assumptions we now address. But that silence can veil fundamental social understandings. A useful (if limited) parallel can be found in early court decisions on the practical definition of rape. Common law established a cynical set of tests to establish guilt, most of which centered on interrogations of complainants. These protocols were premised, of course, on the assumption that virtuous women could successfully avoid assaults, so most rape complainants were seeking to avoid social stigma or to exact revenge. It is worth noting that these beliefs are not just curious historical relics, as Congressman Todd Akin demonstrated in 2012. Until recently, gay members of the military have been instructed to publicly and socially conceal their identities as the price for serving their country. Today, transgender people face denial, skepticism, and the burden of outsider status; cultural fears of difference have served to deny them the same level of protection and humanity that society believes it affords everyone. Indeed, during the 2012 election campaign, Vice President Joseph Biden identified transgender discrimination as “the civil rights issue of our time.”

The articles in this issue do not resolve these problems, and we did not expect them to. Some of them call for more data and more research; some conclude with explicit recommendations for reform. But readers of this issue may come away with the following observations.

First, law comes from culture and history; it may adapt more slowly than society does itself. There is no foolproof way to monitor

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14 See John Eligon & Michael Schwirtz, In Rapes, Candidate Says, Body Can Block Pregnancy, N.Y. TIMES, Aug. 20, 2012, at A13 ("In an effort to explain his stance on abortion, Representative Todd Akin, the Republican Senate nominee from Missouri, provoked ire across the political spectrum on Sunday by saying that in instances of what he called ‘legitimate rape,’ women’s bodies somehow blocked an unwanted pregnancy.").
social change, but social scientists are adept at taking the
temperature of public opinion and knowledge. Nobody supposes
that twelve jurors (or nine Supreme Court Justices) are a
representative sample of the public, however. So legal scholarship
might benefit from social scientists’ discoveries about public
opinion—particularly on dramatic shifts across generations on
issues such as gender equality, marriage equality, and
transgender civil rights. Second, the courts are reactive, and they make law from familiar
ingredients—precedent, doctrine, and principles of legal reasoning.
They do not make law from scratch. So legal scholarship is often
restricted to what has been discussed or decided, leaving out what
has not made it onto the agendas of important courts. If stereotypes
and assumptions about gender and identity do, as these articles
suggest, find their way into decisions, we might benefit from a
better understanding of how judges themselves think about these
identity issues.

Third, data, and the quality of data, matters. Several of the
articles in this issue rely on national datasets; one relies on a team’s
original data collection; several relied on data that are made up of
detailed descriptions of key cases. Social scientists might argue for
hours over which types of data are more or less valuable, reflective
of reality, and amenable to sophisticated analysis. These are fun
debates and they provide the basis for improvement in researchers’
measurements and methods. But they also reflect important
discussions about our levels of confidence in what we call
knowledge. It is in the interests of legal scholars, social scientists,
and reform advocates to build bullet-proof and data-driven
observations and conclusions. Policy making is a contest, not a
recital. The people who have the most solid knowledge base and
plausible inferences about their subjects should have the best
chance of influencing policy.

To conclude, the study of sex and gender and, particularly, gender
identity is a relatively new area of inquiry in institutions of higher

17 See generally David Cotter et al., The End of the Gender Revolution? Gender Role
Attitudes from 1977 to 2008, 117 AM. J. SOCIOLOGY 259 (2011) (discussing the shifts in gender
egalitarianism over several generations).
18 See, e.g., Jocelyn Kiley, 61% of Young Republicans Favor Same-Sex Marriage, PEW RES.
CENTER (Mar. 10, 2014), http://www.pewresearch.org/fact-tank/2014/03/10/61-
of-young-republicans-favor-same-sex-marriage/.
19 See Roerven, Transgender Acceptance, DAILY KOS (Dec. 17, 2013), http://www.dail ykos.co
m/story/2013/12/18/1263463/-Transgender-Acceptance (summarizing research data available
from a United Technologies and National Journal Congressional Connection Poll).
education. Right now, these are hot topics: classes are offered; students are recruited into projects; and articles are written as the research agenda on gender, sexuality, and identity comes together. Over the past twenty years, law has told us this: gender and sexual identity don’t matter—except when they do. Over the past twenty years, social science research has told us that ordinary people (and the people they elect and whose media they consume) continue to build their notions of accountability and blame around gendered lines. And in the past twenty years, we have learned that some—importantly, not all—criminal justice practitioners practice these stereotypes at work or even capitalize on them in the courtroom.

Without a continually developing inventory of law and legal arguments and a growing body of empirical knowledge about how decisions and behaviors are really made in those settings, those who perceive miscarriages of justice in gendered judgments will have little intellectual capital with which to challenge unjust and unwitting assumptions. In other words, to move forward into the realm of policy, legal scholars need the results of social science, and social scientists need the bright clarity of legal decision making. We must trust that these aims are not incompatible. In crossing the lines between legal scholarship and empirical social science, this little experiment in interdisciplinary publication highlights some compelling questions and the promise of answers.

As the *Albany Law Review*’s *Miscarriages of Justice* issue is completed, I thank the authors for their contributions. I also gratefully acknowledge the remarkable contributions of four people (there are many more, but these four stand out): Meredith Dedopoulos, executive editor for this year’s *Miscarriages of Justice* issue; Joseph O’Rourke, editor-in-chief for the *Albany Law Review* this year; Professor James Acker of the University at Albany’s School of Criminal Justice and past chair of the Professional Board of Editors for the *Miscarriages of Justice* issue; and Professor Vincent Bonventre of Albany Law School and faculty advisor for the *Albany Law Review*. The tireless work and investment of these four account for the continuation for this unique cross-disciplinary enterprise.