FOREWORD

ELEPHANTS IN THE COURTROOM: EXAMINING OVERLOOKED ISSUES IN WRONGFUL CONVICTIONS


“The elephant in the room”: An important and obvious topic, which everyone present is aware of, but which isn’t discussed, as such discussion is considered to be uncomfortable.”1

Sometimes, those elephants lurk in courtrooms. They lumber about in the form of highly consequential legal and social issues, conspicuous, yet also largely unacknowledged and unaddressed. In
the context of wrongful convictions, and the broader domain of miscarriages of justice, such troublesome topics include the pernicious influence of racial biases within society and its justice systems, concerns about the integrity of misdemeanor convictions, and the extent to which structural and case-specific pressures and inducements might encourage innocent defendants to plead guilty. Those were among the subjects featured at a special two-day workshop co-sponsored by the National Science Foundation and the National Institute of Justice in October 2015. The gathering involved academics as well as representatives of law enforcement, prosecutors’ offices, the criminal defense bar, the judiciary, and organizations which investigate and advocate on behalf of individuals who claim to have been wrongfully convicted. Participants also focused on the data and methodological constraints which must be overcome to enable further insights into the causes and correlates of wrongful convictions. From that workshop emerged the theme of this, the sixth Miscarriages of Justice issue of the Albany Law Review in partnership with the University at Albany’s School of Criminal Justice—“Elephants in the Courtroom: Examining Overlooked Issues in Wrongful Convictions.”

Researchers, policymakers, and practitioners have devoted the lion’s share of their scholarship and reform efforts to the widely recognized “canonical list” of causes of wrongful convictions—eyewitness misidentification, false confessions, governmental

---

misconduct, ineffective defense counsel, unreliable informants, and forensic errors. Their efforts have produced significant advances in knowledge and enhancements in the administration of justice. At the same time, ironically, with attention concentrated so heavily on those familiar issues, commensurately less attention has been given to additional factors which can contribute to wrongful convictions. This skewed focus is unsettling. It both impedes gaining a fuller understanding of the precursors of wrongful convictions and diminishes prospects for identifying corresponding reforms.

The articles in the following pages help remedy this imbalance. They flesh out a number of elephants in the courtrooms (and elsewhere) which implicate the production, detection, or correction of miscarriages of justice. They combine to shed light on several issues of significance which have largely been relegated to the shadows as attention has focused on the more traditional staples of wrongful convictions research and policy. Some of the contributors participated in the NSF-NIJ co-sponsored workshop while others have submitted their articles independently. All address topics faithful to this unifying theme.

In “Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years,” Emily West and

---


Vanessa Meterko summarize important findings from the first 325 DNA-based exonerations, spanning 1989 through 2014. The article describes cases compiled by the Innocence Project, where the authors are, respectively, a former and current researcher. Although these cases represent only “a fraction of all wrongful convictions” and almost certainly include a disproportionate representation of sexual assault cases due to the focus on DNA-based exonerations, they still yield important insights. West and Meterko discuss a wide variety of issues, including several prominent “courtroom elephants,” such as wrongful convictions based on guilty pleas, how race plays a role in miscarriages of justice, and the identification of true perpetrators in cases of wrongful conviction. The authors also provide information about the contributing factors, which unsurprisingly align with the familiar “canonical list,” and offer a unique view of the relative frequency of those factors over time. Finally, the article discusses the aftermath of exonerations, with a specific focus on compensating the wrongly convicted. West and Meterko describe the diverse avenues to gaining compensation awards, the proportions of exonerees who have been successful in securing compensation, and the amount of financial compensation received.

In “These Lives Matter, Those Ones Don’t: Comparing Execution Rates by the Race and Gender of Victims in the U.S. and in the Top Death Penalty States,” Frank Baumgartner, Emma Johnson, Colin Wilson, and Clarke Whitehead expose glaring racial and gender imbalances in the executions carried out nationwide during the modern death-penalty era. They focus in particular on the most active capital punishment states: Texas, Oklahoma, Virginia, Florida, Missouri, Alabama, Georgia, Ohio, North Carolina, South Carolina, Arizona, Louisiana, and Arkansas. The authors offer straightforward comparisons involving the race and gender of all homicide victims within the respective jurisdictions, and the race and gender of homicide victims in cases that culminated with the offender’s execution. The disparities, presented in tabular form and portrayed graphically, are dramatic. With numbing regularity, their findings reveal that in each and every state the proportion of black male victim cases resulting in execution pales astonishingly in comparison to the proportion of all cases in which black males are


12 Estimated time lags between offense dates and execution dates were built into the analysis.
homicide victims. The analyses demonstrate other consistent eye-opening discrepancies between the race and gender of homicide victims generally and the victims in cases resulting in execution. The clear implication is that notwithstanding statutory reforms designed to minimize arbitrariness in its administration,13 capital punishment remains riddled with serious, systemic inequities.14

Russell Covey examines complex issues involving the acknowledgment and correction of miscarriages of justice in his article, “Recantations and the Perjury Sword.”15 Notwithstanding their sworn obligation to tell the truth, trial witnesses do not always do so. When prejudicial to the accused, false testimony can help produce a wrongful conviction. Indeed, witness perjury is a major factor contributing to wrongful convictions.16 After their testimony is used to bolster the prosecution’s case and help secure a conviction, some witnesses claim to have lied or misspoken at the defendant’s trial and thus seek to repudiate what they previously asserted was true.17 Covey probes the law’s deep-seated reluctance to credit witnesses’ recantations. He then explores the vexing dilemma confronting witnesses who risk being prosecuted for perjury if they...
come forward and admit that they lied under oath at a prior trial, in
an attempt to make amends and help overturn an innocent person’s
erroneous conviction. His provocative article offers alternative
means of reconciling the law’s interest in not condoning perjured trial
testimony and its countervailing interests in not erecting
insurmountable barriers for witnesses to come forward and admit
that they lied in an effort to correct a miscarriage of justice for which
they are partially responsible.

James Doyle’s contribution adroitly integrates the “elephants in
the courtroom” theme as it pertains to wrongful convictions and a
poignant elephant-centric essay penned by George Orwell in 1936,
“Shooting an Elephant.”18 In “Orwell’s Elephant and the Etiology of
Wrongful Convictions,”19 Doyle argues that one of the most
fundamental overlooked issues of wrongful conviction research and
policy is recognizing that the errors of justice attributed to individual
actors almost always are rooted in transcendent, systemic, or
structural conditions that must be addressed if meaningful solutions
are to be found and implemented. Thus, problems of prosecutorial
misconduct, ineffective defense counsel, unreliable informants, false
guilty pleas, and many others which are manifest in individual cases
of wrongful conviction do not begin and end with the principals
identified as the immediate causes. The deeper causes concern
societal, organizational, and institutional factors including how
resources are made available and allocated, power structures,
prevailing norms, incentive systems, and other rudiments of attitude
formation and behavior. Orwell’s short story involves his self-
indictment for killing an elephant as a young law enforcement officer
in Burma in order to save face with the local citizens. One of the
commonalities with Orwell’s essay that Doyle explores is the
importance of understanding why the regrettable choices by
individual actors in the criminal system seemed defensible to them
when made, when they are so plainly wrong when examined through
the sharper lens of justice. He also challenges the basic premise that
Orwell—or the errant criminal justice official—was in fact accurate
when assessing the apparent justification for his (or her) original
misguided choices.

18 See GEORGE ORWELL, SHOOTING AN ELEPHANT AND OTHER ESSAYS (1950),

19 James M. Doyle, Orwell’s Elephant and the Etiology of Wrongful Convictions, 79 ALB. L.
In his article, “A Nearly Perfect System for Convicting the Innocent,” renowned scholar Albert Alschuler addresses the role plea bargaining plays in wrongful convictions. The topic of plea bargaining is not new to this author. Indeed, to many, Professor Alschuler forged scholarly inquiry into this area with his seminal articles beginning in the late 1960s. The abuses he presciently noted some 40 to 50 years ago still appear to fester. What perhaps is different today is the recognition that innocent defendants are wrongly convicted through guilty pleas much more frequently than originally was known. In a manner resembling a how-to manual, Alschuler first explains “how to convict the innocent (via plea bargaining).” He argues that “convicting defendants who would be acquitted at trial is one of the principal goals of plea bargaining.” In cases involving innocent defendants as well as cases in which the government’s evidence is weak, prosecutors aim for the conviction (the win) at the risk of a miscarriage of injustice. Striving for convictions, prosecutors will offer “too-good-to-be-true” plea deals that are difficult for defendants to resist, even if they are innocent. The question then becomes whether there is any impropriety in such cases. After all, as the Supreme Court ruled in Bordenkircher v. Hayes, all defendants ultimately have the choice to accept or decline a plea offer.

In a sense, Alschuler pursues this line of reasoning by asking “is it wrong to convict the innocent (via plea bargaining)?” He acknowledges the argument that others have made that perhaps the conviction of an innocent person who accepts an offer to plead guilty is not wrongful because that person chose to do so. However, disagreeing with the majority opinion in Bordenkircher v. Hayes,

---

23 Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (“But in the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”).
Alschuler does not consider the choice to accept or decline a “too-good-to-be-true” plea offer as being voluntary. He uses the analogy of a gunman’s offering the choice of “your money or your life.” Alschuler goes on to describe the differing roles occupied by defendants, prosecutors, defense attorneys, and judges in participating in coercive plea bargaining. In effect, Alschuler labels defense attorneys as partners in crime with the hypothetical gunman noted above. “Defense attorneys are the messengers—the point men and women of a coercive system” who browbeat their clients and enlist family members to engage in persuading defendants to accept plea offers. That defense attorneys—the presumptive zealous advocates for defendants—collude in coercive plea bargains is a primary reason supporting Alschuler’s contention that a “perfect system” exists for convicting the innocent (via plea bargaining).

In “Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation,” Professors Marvin Zalman and Matthew Larson focus on what they call the “elephant in the station house”—that is, the notion that wrongful conviction scholars concentrate on discrete police investigation practices (most notably, eyewitness misidentifications and false confessions) to the near exclusion of other key elements of those investigations. In their estimation, the relative neglect of the gestalt of police investigations has largely been fueled by the strength of the dominant innocence paradigm, which focuses on the standard list of the six causes of wrongful convictions noted above. With Zalman and Larson, we italicize the word “causes” because of its multiple meanings and uses in wrongful conviction scholarship. Zalman and Larson distinguish between scientific and legal causation. To (social) scientists, the classic six factors do not cause wrongful convictions, but rather correlate with their occurrence. To attorneys, judges, and juries involved in civil litigation for damages for wrongful convictions, oftentimes one or more of the standard factors—and the person(s) responsible for

26 See supra note 4.
27 See supra note 5.
28 See supra notes 3–9 and accompanying text.
them—are the alleged cause of the harm suffered by the defendant.

Zalman and Larson argue that police investigation, broadly defined, should be given more weight by innocence scholars and in wrongful conviction lawsuits. In support of their argument, they conduct an in-depth analysis of 44 exoneration cases in which serial criminals (murderers, rapists, and one serial purse snatcher) were the true perpetrator. Through these idiographic case analyses, they demonstrate how the totality of the failed police investigation practices helped to convict the wrong person. Zalman and Larson thus contend that envisaging the entirety of police investigation practices as a principal contributing factor to wrongful convictions would help move innocence scholarship forward in important new ways.

In their article, “If Hindsight is 20/20, Our Justice System Shouldn’t Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model,”30 Justin Brooks, Alexander Simpson, and Paige Kaneb provide a telling analysis of the standards used for post-conviction relief based on newly discovered evidence, with particular focus on California. While having a process in place for innocents to secure relief based on new information is important, it is equally important to consider the nature and quality of that process. The authors frame their discussion by acknowledging the importance of balancing accuracy and finality, and in their estimation, many states fail to strike this balance appropriately. Brooks and colleagues discuss the various standards used by different states to call a conviction into question because of newly discovered evidence, ranging from “a reasonable probability” to “clear and convincing evidence” that a different outcome would be reached. They also discuss other roadblocks facing innocents seeking relief, including due diligence requirements and time limits. The authors argue that California’s standard—“the most difficult standard in the United States”—is so high that it violates due process. They conclude by offering their own recommendations for legislative standards governing relief based on claims of newly discovered evidence which, in their estimation, balance finality and accuracy more fairly.

In “Mental Competency Law and Plea Bargaining: A Neurophenomenological Critique,” Robert Schehr and Chelsea French use a critical lens to challenge the assumptions underlying mental competency for knowing and voluntary guilty pleas. Using lessons learned from psychology, the authors argue that the judicial standards relied on to accept guilty pleas as knowing and voluntary—and the assumption that defendants are reasonable and rational actors—are fundamentally at odds with the science of human cognition. The article is a thought-provoking call to embrace the findings of science and reconsider the guilty plea assembly line.

Much writing on the role of prosecutors in wrongful conviction cases centers on what prosecutors should say but sometimes do not—particularly, in their failing to disclose exculpatory evidence. In “The Prosecutor’s Duty of Silence,” Bennett Gershman examines legitimate and illegitimate prosecutor speech and the sometimes uncertain line separating them. Although the notion that prosecutors must be careful not to prejudice defendants’ fair trial rights when making public statements is not new, Gershman’s “taxonomy of prosecutor speech” based on prosecutorial role and forum provides a concise framework for understanding where the greatest risks of prejudice arise—especially in the context of prosecutors’ press conferences. Through compelling examples of illegitimate extrajudicial speech in recent high profile cases, Gershman draws attention to the critical need for enhanced attention to this overlooked area.

It is axiomatic that the role of the prosecutor is to seek justice and not simply to secure convictions. For David LaBahn and Erica McWhorter this means that prosecutors should take a holistic view of the communities they serve with an eye toward public safety instead of case disposal. Their article, “Confronting the Elephants in the Courtroom Through Prosecutor Led Diversion Efforts,” provides a fresh perspective on reducing the risk of false guilty pleas in misdemeanor cases and the collateral consequences of misdemeanor convictions. LaBahn and McWhorter call on prosecutors to develop

---

locally-tailored pre-trial diversion initiatives that “address not just the systemic issues, but also the social vulnerabilities that trigger system involvement in the first place.” Although the authors call on prosecutors to assume a leadership role, they make clear that all criminal justice stakeholders must do their part to make these community-based approaches (of which the authors provide several notable examples) succeed in reducing erroneous misdemeanor convictions and their collateral consequences.

The pathways explored in the several articles within this volume mark an ambitious departure from the common terrain of wrongful conviction research and scholarship. The identified issues merit serious attention. Some (e.g., the pervasive influence of race on the administration of justice, the importance of understanding how structural and systemic factors provide context for the decisions made by individual justice system actors) rank as fundamental progenitors of the standard “causes” of wrongful convictions. Others (e.g., the dynamics of plea bargaining, police investigative practices, the propensity for extrajudicial commentary to infiltrate decision-making within and by the courts) are so highly interwoven with the factors widely recognized as contributing to miscarriages of justice as to be inseparable from them. Still others (e.g., pre-trial diversion of cases, post-conviction consideration of recanted testimony, the need to carefully attend to lessons learned from known cases of wrongful conviction to avert their repetition in the future) highlight mechanisms for preventing and correcting errors of justice. All of the issues addressed are much too important to remain as overlooked and largely unacknowledged elephants in the courtroom.