

ORWELL'S ELEPHANT AND THE ETIOLOGY OF WRONGFUL CONVICTIONS

*James M. Doyle**

“And afterwards I was very glad that the coolie had been killed; it put me legally in the right and it gave me a sufficient pretext for shooting the elephant. I often wondered whether any of the others grasped that I had done it solely to avoid looking a fool.”¹

—*Shooting an Elephant*, George Orwell

Criminal justice reform is having its moment. The gatekeepers around the public square—the editors, the publishers, the producers, the bloggers, and the “most-followed” social media posters—have decided to grant criminal justice issues some attention.

In the accompanying wave of punditry familiar facts are treated as discoveries. The system’s impacts are racially biased.² The innocent are often convicted.³ Unwarranted law enforcement violence is common.⁴ Legions of unnecessary prisoners fill our prisons.⁵ Chronic mental illness has been effectively criminalized.⁶

* Of Counsel, Bassil, Klovee, & Budreau, Boston, Massachusetts. B.A. Trinity College, J.D. Northwestern University School of Law, LL.M. Georgetown University Law Center. Much of the research behind this essay was supported by a Visiting Fellowship from the National Institute of Justice. I am grateful for that support and for the numberless contributions of my colleagues on the Sentinel Event Initiative Team. Readers should be forewarned that this essay is from a practitioner’s perspective, not a scholar’s, and an old practitioner’s at that.

¹ George Orwell, *Shooting an Elephant*, in *AN AGE LIKE THIS 1920-1940: THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 235, 242 (Sonia Orwell & Ian Angus eds., 1968).

² See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 104 (2010).

³ See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 11–12 (2011).

⁴ See, e.g., Kimberly Kindy & Kennedy Elliott, *990 People Were Shot and Killed by Police This Year*, WASH. POST (Dec. 26, 2015), <https://www.washingtonpost.com/graphics/national/police-shootings-year-end/>.

⁵ See, e.g., JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* 4 (2014).

This media moment will fade; these media moments always do fade. Can something useful be left behind?

The criminal justice system is a target-rich environment for empirical study. Many factors await data-oriented examination in (and around) our courtrooms, and it seems natural to seize this opening to mobilize evidence-based inquiries analyzing a range of specific questions. As Michael Jacobson has noted, criminal justice policy is “a field that over the last several decades has been almost immune to evidence and knowledge in the face of its overwhelming politicization.”⁷ Perhaps in this new atmosphere we are ready to learn the lessons that the data teach.

Still, any exclusively data-oriented approach to wrongful convictions will face challenges as a remedial tool where preventing wrongful convictions is concerned.

No individual evidence-based exploration of the criminal justice system is likely to minimize the frequency of miscarriages of justice unless it takes place within a general etiology of wrongful conviction that recognizes the reciprocal impacts of the system’s components—including its human components—on each other, and the impact on those system components of their surrounding environment.

The potential implications of that general etiology—that is, of the *manner of causation* of criminal justice system errors—are overlooked issues.

A version of such an etiology is available for adaptation.⁸ Safety experts in aviation, medicine, and other high-risk fields would argue that, like the *Challenger* launch decision,⁹ a “wrong patient” surgery,¹⁰ or the Chernobyl meltdown,¹¹ wrongful convictions are

⁶ See Darrell Steinberg et al., *When Did Prisons Become Acceptable Mental Health Care Facilities?*, STAN. L. SCH. THREE STRIKES PROJECT 1, 2 (2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slpublic/Report_v12.pdf.

⁷ Michael Jacobson, *To Learn Something, Do Something*, in U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, *MENDING JUSTICE: SENTINEL EVENT REVIEWS* 22, 22 (2014).

⁸ I have attempted to argue this point more fully at other times. See, e.g., James M. Doyle, *An Etiology of Wrongful Convictions: Error, Safety, and Forward-Looking Accountability in Criminal Justice*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 56, 57 (Marvin Zalman & Julia Carrano eds., 2014); James M. Doyle, *Learning From Error in the Criminal Justice System: Sentinel Event Reviews*, in *MENDING JUSTICE: SENTINEL EVENT REVIEWS*, *supra* note 7, at 3, 4 [hereinafter Doyle, *Sentinel Event Reviews*]; James M. Doyle, *Criminal Law: Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 113 (2010) [hereinafter Doyle, *Learning*].

⁹ DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA*, at xi, xii, xiv (1996).

¹⁰ Mark R. Chassin & Elise C. Becher, *The Wrong Patient*, 136 ANNALS INTERNAL MED. 826, 829 (2002).

¹¹ See CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* 354 (1999).

system¹² errors: “organizational accidents.”¹³ In this conception, miscarriages of justice are not single-cause events but, rather, result from discrete, small mistakes, none of which is independently sufficient to cause the harm that combine with each other and with latent system weaknesses, and only then cause a tragedy.

Miscarriages of justice can never be fully explained by the failures of a single component or a lone operator. The right answer to the question “Who was responsible for this wrongful conviction?” is usually “Everyone involved, to one degree or another,” either by making an error or by failing to anticipate or intercept someone else’s error. In this view “everyone” includes actors far from the scene of the event who set the budgets, did the hiring, wrote the laws, developed the jurisprudence, and designed the incentives for the apparent culprits on the frontlines. “Everyone” includes those who created the environment in which the sharp-end actors operated. “Everyone” even takes account of the contributions of individuals who stood by inattentively while the frontline environment was shaped by others.

The hardest case for this approach is presented by the recurrent situation in which the miscarriage of justice seems to have resulted from a moral failure—often a spectacular one—on the part of an individual criminal justice actor. Even people who accept the organizational accident explanation as a general theory resist applying it to those events.

For example, when a prosecutor hides exculpatory *Brady*¹⁴ material, that act is a proximate cause of a miscarriage of justice even if it is not the sole cause, and there is little interest in widening the lens to account for other factors.¹⁵ Disciplining the individual actor seems to be both a sufficient response and an emergency. To give attention to other considerations in these cases seems, to many, to threaten to introduce complication and ambiguity where stark moral clarity is demanded: to generate bogus extenuation where all that is required is a plain statement of culpability.

The assumption, “Good man, good result,” once formed the basis

¹² See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 482 (2014).

¹³ Doyle, *Learning*, *supra* note 8, at 145.

¹⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁵ See, e.g., *Connick v. Thompson*, 563 U.S. 51, 85–86 (2011) (Ginsburg, J., dissenting).

of medicine's attitude towards its own tragic failures.¹⁶ Even now it characterizes much of the commentary on wrongful convictions.¹⁷ A similar dependence on good men,¹⁸ and therefore on reform strategies focused on the discovery, denunciation, and excision of the bad men, characterizes criminal justice reform discourse.¹⁹

But if wrongful convictions are “organizational accidents,” can disciplining and punishing an individual be enough to reduce future risk? Can we punish our way to safe verdicts? Is there a way to balance accountability for misconduct and the non-blaming, “forward-looking accountability”²⁰ we need in order to minimize future risk? Should we be searching for a new *practice* rather than a new structure? Can we develop a vehicle for holding the data-rich statistical findings and the complex individual narratives in permanent productive tension?

I.

A famous essay of George Orwell's, “Shooting an Elephant,” focuses on an individual's moral failure: on the bad choice of an actor who zigged when he should have zagged, and who fully understood that he was doing the wrong thing as he acted.²¹ Orwell's narrative might illuminate an issue implicit in the organizational accident etiology of error: is the challenge presented by wrongful convictions one best approached as protecting a presumptively safe system from amoral and incompetent people, or one of repairing an inherently vulnerable system that necessarily relies on ordinary human beings?

George Orwell has been regarded as the quintessential “good man” for over half a century. To V.S. Pritchett, Orwell was “the

¹⁶ Doyle, *Learning*, *supra* note 8, at 118; see Donald M. Berwick, *Sounding Board: Continuous Improvement as an Ideal in Health Care*, 320 *NEW ENG. J. MED.* 53, 53, 54 (1989); Lucian L. Leape, *Error in Medicine*, 272 *J. AM. MED. ASSOC.* 1851, 1855 (1994).

¹⁷ See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 *YALE L.J.* 154, 208–09 (2012); Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 *ALB. L. REV.* 1243, 1279 (2012).

¹⁸ See Anderson & Heaton, *supra* note 17, at 208–09 (“[T]he level of disparity in our findings shows a system in which the outcomes are highly dependent upon the individual lawyer.”).

¹⁹ See, e.g., Grometstein & Balboni, *supra* note 17, at 1278–79.

²⁰ Virginia A. Sharpe, *Promoting Patient Safety: An Ethical Basis for Policy Deliberation*, *HASTINGS CTR. REP.*, at S8, S10 (2003), http://www.thehastingscenter.org/uploadedFiles/Publications/Special_Reports/patient_safety.pdf.

²¹ See ORWELL, *supra* note 1, at 242.

wintry conscience of a generation.”²² Robert Conquest, the historian of Stalin’s purges,²³ described Orwell as “[a] moral genius.”²⁴

In 1922, at the age of nineteen, at loose ends after leaving Eton, and unlikely to obtain a university scholarship, Orwell passed the necessary examinations and followed his father into imperial service: in Orwell’s case, into the Burma Police.²⁵ Reflecting on that experience he produced “Shooting an Elephant,”²⁶ first published in *New Writing* in 1936.²⁷

“In Moulmein, in Lower Burma, I was hated by large numbers of people—the only time in my life that I have been important enough for this to happen to me,” Orwell begins.²⁸

[I]n an aimless, petty kind of way anti-European feeling was very bitter. . . . As a police officer I was an obvious target and was baited whenever it seemed safe to do so. . . . In the end the sneering yellow faces of young men that met me everywhere, the insults hooted after me when I was at a safe distance, got badly on my nerves.²⁹

By the time of the incident he describes, Orwell had “made up [his] mind that imperialism was an evil thing and the sooner [he quit his] job . . . the better.”³⁰ “Theoretically—and secretly, of course—[he] was all for the Burmese and all against their

²² V.S. Pritchett, *George Orwell*, *NEW STATESMAN & NATION*, Jan. 28, 1950, at 96, 96.

²³ William Grimes, *Robert Conquest, Historian Who Documented Soviet Horrors, Dies at 98*, *N.Y. TIMES* (Aug. 4, 2015), <http://www.nytimes.com/2015/08/05/arts/international/robert-conquest-historian-who-documented-soviet-horrors-dies-at-98.html>.

²⁴ ROBERT CONQUEST, *George Orwell*, in *ARIAS FROM A LOVE OPERA AND OTHER POEMS* 32 (1969).

²⁵ See EMMA LARKIN, *FINDING GEORGE ORWELL IN BURMA* 11, 53, 92, 292 (2004); William Grimes, *The Road to ‘Animal Farm,’ Through Burma*, *N.Y. TIMES* (June 7, 2005), http://www.nytimes.com/2005/06/07/books/the-road-to-animal-farm-through-burma.html?_r=0.

²⁶ ORWELL, *supra* note 1, at 235. The excerpts included here do not do the piece justice. For the full text, see George Orwell, *Shooting an Elephant*, *THE LITERATURE NETWORK*, <http://www.online-literature.com/orwell/887/> (last visited Mar. 26, 2016).

²⁷ ORWELL, *supra* note 1, at 242.

²⁸ *Id.* at 235. “Shooting an Elephant” is not factual journalism. There is evidence that Orwell did shoot an elephant in Burma, but there is no evidence that the circumstances were exactly those depicted in the essay. See JEFFREY MEYERS, *ORWELL: WINTRY CONSCIENCE OF A GENERATION* 70, 71 (2000). For simplicity’s sake I will refer to the first-person narrator of the story as “Orwell” but it seems probable that the incident Orwell brings to life is, like one recounted by Johann Wöller, a Dutch colonial official, in a book that Orwell reviewed during the autumn of 1936 as he was publishing “Shooting an Elephant,” “imaginary, but typical of real facts.” GEORGE ORWELL, *Review: Zest for Life by Johann Wöller*, in *AN AGE LIKE THIS 1920-1940: COLLECTED JOURNALISM, ESSAYS, AND LETTERS OF GEORGE ORWELL*, *supra* note 1, at 234, 235.

²⁹ ORWELL, *Shooting*, *supra* note 1, at 235, 236.

³⁰ *Id.* at 236.

oppressors, the British.”³¹ But that didn’t mean Orwell’s immediate situation was simple. As he explains in the essay:

All I knew was that I was stuck between my hatred of the empire I served and my rage against the evil-spirited little beasts who tried to make my job impossible. With one part of my mind I thought of the British Raj as an unbreakable tyranny . . . with another part I thought that the greatest joy in the world would be to drive a bayonet into a Buddhist priest’s guts.³²

In this state of mind Orwell is called out to deal with a rampaging elephant: a working animal that has been maddened by “must” (heat), broken its chain, and eluded its keeper.³³ Arming himself and arriving in the quarter where the elephant had been destroying everything within reach, Orwell “failed to get any definite information . . . [I]n the East; a story always sounds clear enough at a distance, but the nearer you get to the scene of events the vaguer it becomes.”³⁴ But soon he is told that the elephant has trampled an Indian coolie to death, and he is shown the corpse.³⁵ Followed by a growing crowd of Burmese, Orwell tracks the animal down.³⁶

As soon as I saw the elephant I knew with perfect certainty that I ought not to shoot him. It is a serious matter to shoot a working elephant—it is comparable to destroying a huge and costly piece of machinery—and obviously one ought not to do it if it can possibly be avoided. And at that distance, peacefully eating, the elephant looked no more dangerous than a cow. . . . Moreover, I did not in the least want to shoot him.³⁷

But at that moment Orwell looks around at the Burmese who had followed him: a crowd of “two thousand” people and “growing,” all—according to Orwell—“happy and excited over this bit of fun, all certain that the elephant was going to be shot.”³⁸ This was a turning point: “And suddenly I realized that I should have to shoot the elephant after all. The people expected it of me and I had got to

³¹ *Id.*

³² *Id.*

³³ *Id.* at 236–37.

³⁴ *Id.* at 237.

³⁵ *Id.* at 237–38.

³⁶ *Id.* at 238.

³⁷ *Id.* at 238–39.

³⁸ *Id.* at 239.

do it; I could feel their two thousand wills pressing me forward, irresistibly.”³⁹

In Orwell’s recounting, he zigged when he knew he should have zagged because his role required it:

A sahib has got to act like a sahib; he has got to appear resolute, to know his own mind and do definite things. To come all that way, rifle in hand, with two thousand people marching at my heels, and then to trail feebly away, having done nothing—no, that was impossible. The crowd would laugh at me. And my whole life, every white man’s life in the East, was one long struggle not to be laughed at.⁴⁰

Orwell shoots the elephant.⁴¹ Unable to endure the sight of the animal’s agonized death throes, Orwell leaves the scene while the elephant is still alive.⁴² Later he learns that its body has been stripped to the bone, and that:

Among the Europeans opinion was divided. The older men said I was right, the younger men said it was a damn shame to shoot an elephant for killing a coolie, because an elephant was worth more than any damn Coringhee coolie. And afterwards I was very glad that the coolie had been killed; it put me legally in the right and it gave me a sufficient pretext for shooting the elephant. I often wondered whether any of the others grasped that I had done it solely to avoid looking a fool.⁴³

In the end, the opinions of the Europeans, back in the Club, were what mattered to young Orwell.⁴⁴

II.

John Thompson was convicted of murder in New Orleans in 1985.⁴⁵ After a trial where he opted not to testify, Thompson was sentenced to death and spent the next eighteen years in prison,

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 241.

⁴² *Id.* at 241–42.

⁴³ *Id.* at 242.

⁴⁴ *See id.* at 242.

⁴⁵ *Connick v. Thompson*, 563 U.S. 51, 54, 55 (2011); *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009) (Clement, J., dissenting). For a book length treatment of the Thompson prosecution and exoneration see JOHN HOLLWAY & RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM*, at v (2010).

fourteen of them on death row.⁴⁶ A few weeks before Thompson's scheduled execution in 1999, a defense investigator learned that a cancer-stricken member of the prosecution team had confessed on his deathbed to having withheld crime lab results from the defense, as well as removing a blood sample from the evidence room.⁴⁷ In addition, Thompson's defense learned that the New Orleans district attorney's office had failed to disclose that Thompson had been implicated in the murder by a person who received a reward from the victim's family, and that an eyewitness identification did not match Thompson.⁴⁸ Thompson's conviction was overturned on appeal.⁴⁹ On retrial, a jury exonerated Thompson in thirty-five minutes.⁵⁰

Reviewing Thompson's experience with Orwell's in mind suggests that the problem we face is neither people, nor systems, but, rather, people *in* systems.

The rule that prosecutors must turn over exculpatory evidence material to guilt or punishment to defense counsel is a "best practice" that the Supreme Court held in *Brady v. Maryland* is also a minimum requirement of the Constitution.⁵¹ As *Thompson* indicates, it is a "best practice" that is not reliably followed.⁵² According to at least one noted federal judge, violations of the *Brady* rule are "epidemic."⁵³

We tend to think of the *Brady* violation cases as uncomplicated events: a prosecutor, driven by an excess of the All-American will to win,⁵⁴ is encouraged to go too far by the apparently total absence of

⁴⁶ *Connick*, 563 U.S. at 54; see HOLLWAY & GAUTHIER, *supra* note 45, at 487.

⁴⁷ *Connick*, 563 U.S. at 56 n.1; HOLLWAY & GAUTHIER, *supra* note 45, at 251, 256, 257.

⁴⁸ See *Connick*, 563 U.S. at 80–81, 86 (Ginsburg, J., dissenting); HOLLWAY & GAUTHIER, *supra* note 45, at 193, 395, 406.

⁴⁹ *Connick*, 563 U.S. at 56 (majority opinion).

⁵⁰ *Id.* at 90 (Ginsburg, J., dissenting).

⁵¹ See *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2218 (2010).

⁵² See *Connick*, 563 U.S. at 54 (citing *Brady*, 373 U.S. at 87–88).

⁵³ *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting).

⁵⁴ See, e.g., Keith L. Alexander, *Prosecutor Reflects on Wrongful Conviction in D.C. Killing*, WASH. POST (Mar. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/05/AR2010030504274.html> ("The more you win difficult cases, the more you move up the totem pole."); A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for role in Sending Man to Death Row*, SHREVEPORT TIMES (Mar. 8, 2014), <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> ("I was not as interested in justice as I was in winning. To borrow a phrase from Al Pacino in the movie 'And Justice for All,' 'Winning became everything.'"); Penn Law, *Quattrone Spring Symposium 2015: Defining Quality in Criminal Justice 3*, YOUTUBE (Oct. 8, 2015), <https://www.youtube.com/watch?v=>

accountability, and conceals exculpatory evidence. As Marvin Schechter, chairman of the criminal justice section of the New York State Bar Association and a defense attorney put it: “Prosecutors engage in misconduct because they know they can get away with it.”⁵⁵

Introducing the credible threat of punishment seems to be the simple answer to this simple problem.⁵⁶

But the *Brady* (and other misconduct) cases are, like the episode in *Shooting an Elephant*, more complicated.

Even if we put aside for the moment the fact that a wrongful conviction requires not only a *Brady* violation but also an upstream failure by the early police investigators to identify the true culprit and a downstream failure by the defenders to uncover the *Brady* violation or to compensate for its impact,⁵⁷ much remains to be explained about the prosecutors’ actions.

What if the *Brady* cases involve a problematic—but not abnormal—prosecutor who makes a faulty decision while playing, under intense pressure, the hand he has been dealt by others?

What if the problem is not the will to win, but the fear of losing and exposure; not the absence of accountability, but the distorting power of a peculiarly intense, all-embracing, and acutely local accountability that eclipses well-known general constitutional norms?

Safety experts in aviation, medicine, and other high risk fields find that these questions indicate that we should pivot from our focus on writing new rules—and punishing the violations of old ones—to a new focus on developing a culture of safety that has reducing future risk through continuous, collaborative, quality improvement as its goal.⁵⁸

No system can survive without sanctions for its conscious rule

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⁵⁵ Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 4:30 AM), <http://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

⁵⁶ See, e.g., Brandon Buskey, Opinion, *How to Prosecute Abusive Prosecutors*, N.Y. TIMES (Nov. 27, 2015), <http://www.nytimes.com/2015/11/27/opinion/how-to-prosecute-abusive-prosecutors.html> (arguing for federal criminal prosecution of abusive prosecutors under 18 U.S.C. § 242).

⁵⁷ See James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1246, 1271–72, 1330 (2010).

⁵⁸ See, e.g., Berwick, *supra*, note 16, at 53, 54, 56; Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955, 993–94, 995, 996 (2013) (discussing the application of the “bad apple approach” in criminal justice to explain how this flawed model contributes to wrongful convictions).

breakers, and advocates for “non-blaming” approaches to accountability must keep that reality in mind.⁵⁹ Still, it ought to be possible to see the young Orwells in the criminal system as potential resources, not exclusively as dangerous toxins. The most productive question could be not why prosecutors believe they can get away with cheating, but why they feel any desire to cheat in the first place.

The question that the *Thompson* narrative raises is not whether the choices of either the District Attorney’s office as an agency or the individual frontline prosecutors who hid the evidence were wrong.⁶⁰ Of course those choices were wrong. The real question is *why did the mistaken choices seem to the agency and to the individuals to be good choices at the time?* Or, at least, why did the mistaken choices seem from their perspectives to be the only, or “least bad” choices available. Exculpatory evidence has to be turned over.⁶¹ Why didn’t the prosecutors know this? (In fact, as the deathbed confession indicates, at least one *did* know it.)⁶² Why, knowing that withholding the evidence was wrong (as fully as Orwell knew shooting his elephant was wrong) did they decide not to act as the *Brady* rule required?

Safety experts reviewing “operator error” events believe that the operators’ choices may have been mistaken, may have violated rules—may even have been immoral—but they were *locally* rational.⁶³ They promised to solve, at least for a moment, a pressing local problem, and the same choices will seem rational to the operators who next face the same problems unless their circumstances are changed.

To understand why this can happen in a *Brady* exoneration case it is not enough to go “down and in” to find the broken procedural component or the rogue Assistant District Attorney. The problem

⁵⁹ See Robert M. Wachter & Peter J. Pronovost, *Balancing “No Blame” with Accountability in Patient Safety*, 361 NEW ENG. J. MED. 1401, 1401, 1402, 1403 (2009). To put my own cards on the table, a number of exoneration cases have laid out scenarios in which I would agree that the prosecutor’s conduct justifies not only bar discipline, but manslaughter prosecution. See, e.g., Allan Turner, *State Bar Accuses Prosecutor in Willingham Triple-Murder Case of Improper Conduct*, HOUS. CHRON. (Mar. 18, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/State-Bar-accuses-prosecutor-in-Willingham-6143734.php>.

⁶⁰ Five separate prosecutors had a hand in suppressing the *Thompson* evidence according to Professor Bandes’ count. Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715, 722, 725 (2011).

⁶¹ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

⁶² HOLLWAY & GAUTHIER, *supra* note 45, at 257.

⁶³ See SIDNEY DEKKER, *DRIFT INTO FAILURE: FROM HUNTING BROKEN COMPONENTS TO UNDERSTANDING COMPLEX SYSTEMS* 14 (2011).

cannot be fully encompassed within the character of any individual prosecutor. That prosecutor is reacting to the conventional demands within his office. And his office is reacting to pressures from the larger society.

What we see in the *Brady* exoneration cases are choices typical of organizations and individuals reacting to the compelling pressure to provide outputs under conditions of resource scarcity. It may be disappointing but it should not be shocking that prosecutors in the wrongful conviction cases, like workers in many production processes, adopted a “covert work system.”⁶⁴ They decided to evade well-known formal disclosure requirements and buried alternative narratives because they believed sharing the exculpatory facts would interfere with achieving the “real” production goals assigned to them by people to whom they were accountable, namely, superiors who demand “outputs” in the form of convictions, and, therefore, to the unpredictable lay jurors, who will require persuasion before those “outputs” can be generated.⁶⁵

Were the prosecutors so starved of resources by the city or state that they felt they could not successfully prosecute guilty violent offenders by following the rules? Had their caseloads crept up to a level where competent, thorough practice seemed impossible? Did they feel that they were so swamped that they needed to bluff Thompson into a guilty plea by withholding the evidence that might have demonstrated his innocence?⁶⁶ Did supervisory oversight slacken for the same reasons? Did tunnel vision and other cognitive biases set in?⁶⁷ Did the prosecutors feel acutely vulnerable to irresponsible media or political pressure? Or did the prosecutors believe that the police department was so under-resourced or ill-managed that no prosecutors could ever convict anyone, no matter

⁶⁴ David D. Woods, *Conflicts Between Learning and Accountability in Patient Safety*, 54 DEPAUL L. REV. 485, 498 (2005).

⁶⁵ See Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1013–14, 1022, 1032 (2009) (describing impacts on cognitive functioning of the criteria of output and persuasion).

⁶⁶ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 296 (2011) (“[A]s things stand now, severe docket pressure pushes prosecutors to focus their attention on indigent defendants who can be induced to plead guilty without much effort, and the pool of indigent defendants is disproportionately black.”).

⁶⁷ See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 481–83 (2006) (discussing the role that loyalty plays in prosecutors developing “tunnel vision” which leads to wrongful convictions); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WISC. L. REV. 291, 322 (discussing the cognitive biases that cause tunnel vision and they way that the criminal justice system is affected by those biases).

how guilty, if they dutifully played the woeful cards the police dealt them? Were they *right* about that? Did the see-no-evil attitude of local trial judges and the vulnerability of overwhelmed appointed defenders encourage them? Had the prosecutors moved by small increments down the inculpatory-to-exculpatory spectrum over the years, withholding progressively more exculpatory material but seeing no negative local impacts (such as exonerations) from doing so?⁶⁸ Did they learn to tolerate ever-widening margins of error in making guilt/innocence judgments? Had deviation from the *Brady* rule been “normalized”?⁶⁹

It is common to speak of the prosecutors’ offices as “black boxes,” a reference to their characteristic absence of transparency.⁷⁰ But it is important to remember that *within* that black box local norms are well-known and conveyed with great force.⁷¹ Young prosecutors learn very early their local version of “[a] sahib has got to act like a sahib.”⁷²

The prosecutors who figured in the high profile *Brady*-driven exoneration cases are not lone wolf outcasts in their offices; typically, they are the rising local stars⁷³ who had successfully managed the conflicts between the formal legal rules and their office culture and have been rewarded with progressively more visible and important case assignments. The prosecutors feel intensely accountable to the role requirements imposed by the

⁶⁸ Sidney Dekker illuminates how the decision to conceal exculpatory evidence that in hindsight after an exoneration looks like a gigantic moral failure might at the time have looked like something else when he notes that:

The organizational decisions that are seen as “bad decisions” after the accident (even though they seemed like perfectly acceptable ideas at the time) are seldom big, risky steps. Rather, there is a long and steady progression of small, incremental steps that unwittingly take an operation toward its boundaries. Each step away from the original norm that meets with empirical success (and no obvious sacrifice of safety) is used as the next basis from which to depart just that little bit more. It is this incrementalism that makes distinguishing the abnormal from the normal so difficult. If the difference between what “should be done” (or what was done successfully yesterday) and what is done successfully today is minute, then this slight departure from an earlier established norm is not worth remarking or reporting on.

SIDNEY W. A. DEKKER, LUND. UNIV. SCH. OF AVIATION, WHY WE NEED NEW ACCIDENT MODELS 6 (2005).

⁶⁹ See VAUGHAN, *supra* note 9, at xiv (“The cause of disaster was a mistake embedded in the banality of organizational life . . .”).

⁷⁰ See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

⁷¹ See *id.* at 131.

⁷² ORWELL, *supra* note 1, at 239. See generally Ronald Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1068–69 (2014) (describing the effects of “Young Prosecutors’ Syndrome”).

⁷³ See sources cited *supra* note 54.

culture⁷⁴ within their office.

Inevitably, some prosecutors will do what workers in other fields do when confronted by the end-of-process inspections. (In this case, the inspection is provided by adversary trials.) They will develop “workarounds” that allow them to get on with their “real” job,⁷⁵ no matter what the formal rules instituted by the Supreme Court at 30,000 feet (or the Board of Bar Overseers at 10,000) require.⁷⁶ As Barbara O’Brien has demonstrated, these prosecutors, driven by criteria of outputs (not processes) and persuasion (not comprehension) find themselves in a cognitive position that degrades not only their willingness to turn over *Brady* material, but their ability to recognize it.⁷⁷ A *Brady* violation seen from this perspective is a mundane workaround; a well-traveled shortcut through a thicket of rules that if meticulously followed would frustrate the attainment of “higher” goals.⁷⁸ In fact, within the prosecutors’ “black box” familiarity with these workarounds begins to seem to be the essence of veteran workmanship and professionalism.⁷⁹ Impose an improved rule without changing either the internal culture or the external demands on that culture and that new rule will be under immediate attack from its environment: new workarounds will be generated very quickly.

Encapsulation in a local black box dilutes the deterrent efficacy of punitive gestures applied to other prosecutors outside the local world.⁸⁰ The disciplining of a prosecutor in Texas will have limited impact on the conduct of prosecutors in Philadelphia. The informal sanctions for violating the local “covert work rules” and then losing a trial as a consequence are immediate, personal, and public: enforced by the people in the next office. Any official sanction for withholding *Brady* material is—and will remain even if some novel enthusiasm for disciplining prosecutors gradually takes hold in

⁷⁴ See Bandes, *supra* note 60, at 728–29.

⁷⁵ Woods, *supra* note 64, at 498.

⁷⁶ See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963); MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR. ASS’N 2013).

⁷⁷ See O’Brien, *supra* note 65, at 1010–11, 1038; Findley & Scott, *supra* note 67, at 292.

⁷⁸ See Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL. 63, 65 (2007). So, in John Thompson’s case, the prosecutor who hid the exculpatory blood test results confessed on his death bed that “[a]t the time, [he] had thought the greater good was for the guy to get convicted, and so he’d buried the evidence.” HOLLOWAY & GAUTHIER, *supra* note 45, at 257.

⁷⁹ Cf. DEKKER, *supra* note 63, at 101 (“In fact, practitioners take their ability to reconcile the irreconcilable as source of considerable professional pride. In many worlds, it is seen as a strong sign of their expertise and competence.”).

⁸⁰ See Rachel E. Barkow, *What Really Works?: Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089, 2095 (2010).

scattered jurisdictions—theoretical.⁸¹ Punishment is necessarily contingent on your concealment being discovered by an actually innocent defendant who insisted on a trial, an eventual official finding that the particular defendant really was innocent, that the withheld evidence was “material,” and that your violation was knowing.⁸² For all of the reasons that disciplinary actions against prosecutors have not become normal (to put it mildly) up until now, some skepticism about the likelihood of their multiplying any time soon is in order.

III.

We admire George Orwell because of his willingness to subject his own beliefs and actions to unsparing critical examination: a rare quality. This capacity of Orwell’s is on full display in “Shooting an Elephant,” but that essay also illuminates the limits of even Orwell’s very rigorous introspective scrutiny.

By focusing on his own experience and canvassing the “within-silo” reactions of his European peers while ignoring the Burmese community he was assigned to serve, Orwell misses the fundamental question underlying his choice: that is, whether it was ever sane to shoot the harmless elephant on the basis of an assumption that, “[t]he people expected it of me and I had got to do it; I could feel their two thousand wills pressing me forward, irresistibly.”⁸³

In fact, the first of the Five Precepts accepted by most strains of Buddhism is a requirement to abstain from killing either humans or animals.⁸⁴ Orwell’s Buddhist crowd likely never wished to see the elephant killed, and believed the killing was wrong. The members of the crowd would not have killed the elephant, or would have been ashamed if they had killed it.

But the Buddhist crowd may well have expected Orwell—or any sahib—to do something violent and stupid, and that is exactly what Orwell did, by his own account. By living down to Burmese

⁸¹ These risks may be enhanced to a degree, and made more salient, by, for example, entering discovery orders in cases, thereby mobilizing the contempt power of trial judges. See Nancy Gertner & Barry Scheck, *How to Rein in Rogue Prosecutors*, WALL ST. J. (March 15, 2012, 7:31 PM), <http://www.wsj.com/articles/SB10001424052702304692804577281852966541834>. Whether trial judges would use that power remains an open question.

⁸² See Barkow, *supra* note 78, at 2093–94; Gertner & Scheck, *supra* note 81.

⁸³ ORWELL, *supra* note 1, at 239.

⁸⁴ PETER HARVEY, AN INTRODUCTION TO BUDDHISM: TEACHINGS, HISTORY AND PRACTICES 271 (2d ed. 2013).

expectations Orwell actually undermined the legitimacy of the British colonial rule he believed he was (reluctantly) acting to bolster. He showed (or confirmed) that the best that Burmese could anticipate from the British was the destructive, uncomprehending, exercise of raw power.

Like Orwell and his colleagues, young frontline prosecutors in the United States operate in environments devised for them by others, and it is dangerous to ignore the fact that it is the larger American society, not the local district attorney's office, that has contrived a socially constructed reality in which a recognizably colonialist vision of the inner city exerts steady pressure on its frontline criminal justice actors.⁸⁵ The unwavering conventions of the news and entertainment media have turned the American inner city—especially the African-American inner city and the criminal justice system—into permanent Elsewheres: places where ordinary white Americans never go, largely because they feel supremely confident of what they would find if they *did* go.⁸⁶

Practitioners who take jobs in this distant zone share with Orwell's peers a rhetoric of isolation, service, sacrifice, burden-bearing. Both groups chose careers that "promise[d] early autonomy in exotic surroundings."⁸⁷ Their autobiographical writings recount a disorienting plunge into a world where they struggle to find a role for the values in which they were raised.⁸⁸ Similar to the young colonial officers who were thrown into strange and foreign surroundings, a young lawyer's professional life begins "alone, ignorant, and responsible."⁸⁹ Isolation and vulnerability plague the functionaries in the courthouses—not unlike Orwell's

⁸⁵ See James M. Doyle, "It's the Third World Down There!": *The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 74 (1992). I have argued that these pressures affect not only prosecutors but all of the urban criminal system's frontline operators. See, e.g., *id.* at 74, 77.

⁸⁶ See James M. Doyle, *Into the Eight Ball: The Colonialists' Landscape in American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65, 66–67 (1992). By some bleak irony this effect is produced even by artistic and literary productions such as David Simon's television series THE WIRE, or Jill Leovy's book GHETTOSIDE (2014) that are plainly directed toward improving the predicament of inner city community members. Jacob Weisberg, *The Wire on Fire: Analyzing the Best Show Ever Broadcast on American Television*, SLATE (Sept. 13, 2006, 5:44 PM), http://www.slate.com/articles/news_and_politics/the_big_idea/2006/09/the_wire_on_fire.html; Jennifer Gonnerman, *Jill Leovy's 'Ghettoside'*, N.Y. TIMES (Jan. 21, 2015), http://www.nytimes.com/2015/01/25/books/review/jill-leovys-ghettoside.html?_r=0.

⁸⁷ Doyle, *supra* note 85, at 74.

⁸⁸ See, e.g., DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* 14, 15 (1990) (describing the personal experiences of a Manhattan District Attorney).

⁸⁹ MICHAEL EDWARDES, *BOUND TO EXILE: THE VICTORIANS IN INDIA* 164 (1969).

“Kipling-haunted little clubs”⁹⁰—and they are menaced by locals and policy-makers, by editorial boards back home or “downtown,” who can wreck careers from the safety of their office desks.

They feel constrained by wild legalities and utopian standards: “Young Assistant District Attorneys, like young Assistant District Commissioners in the old empires, hurriedly seize, then vehemently defend, a conventional wisdom as protection against these threats.”⁹¹ They adopt a “professional code” that sees an environment in which people are divided into collectives.⁹² Indeed, instead of seeing individuals, they often see “races, types, and colors” instead.⁹³ Facing defendants, defenders, even (sometimes) witnesses, and communities, they gradually embrace a “rigidly binomial opposition of ‘ours’ and ‘theirs.’”⁹⁴ A defendant such as John Thompson seems, as did an individual Burmese to Orwell, a featureless face in an anonymous crowd of “them.” As William Stuntz put it:

One reason black criminals from poor city neighborhoods have been treated with so much more severity than criminals from white immigrant communities in America’s past is that the former are more easily categorized as The Other, as a people whose lives are separate from the lives of those who judge them.⁹⁵

In other words, the mental world of our criminal justice practitioners has come to have something in common with that of the White Man whom Kipling extolled and Orwell exemplified. It is not a question of race. In the criminal justice system, there are whites who are not White Men, and African-Americans (and women) who are.⁹⁶ Despite the overwhelming statistical evidence of imbalance in the system’s treatment of the races, its White Men in deny any racist intent.⁹⁷ Very few would ever sign on to an

⁹⁰ GEORGE ORWELL, *BURMESE DAYS* 69 (Harcourt Books 1974) (1934).

⁹¹ Doyle, *supra* note 85, at 74; see Miller & Wright, *supra* note 70, at 180 (“The lawyers who work as prosecutors are inclined by training to embrace a group identity, one that assures the actor of consistent and well-justified organizing principles when making troubling choices.”).

⁹² See EDWARD W. SAID, *ORIENTALISM*, 227 (1979); Miller & Wright, *supra* note 70, at 162.

⁹³ See Said, *supra* note 92, at 227.

⁹⁴ *Id.* at 227.

⁹⁵ STUNTZ, *supra* note 66, at 312.

⁹⁶ Although, in fact, minority prosecutors are scarce. See e.g., Katherine J. Bies et al., *Stuck in the ‘70s: The Demographics of California Prosecutors*, STAN. CRIM. JUST. CTR. 8–9 (2015), <https://law.stanford.edu/wp-content/uploads/2015/04/Stuck-in-the-70s-Final-Report.pdf>.

⁹⁷ See SAID, *supra* note 92, at 226–27.

explicitly racist project, and most read the aggregated figures indicating wildly disparate results for the races with bewilderment and dismay: this is not what they intended. But as Edward Said observed of Orwell's imperial generation: "[b]eing a White Man was . . . an idea and a reality. It involved a reasoned position towards both the white and the non-white worlds. It meant . . . speaking in a certain way, behaving according to a code of regulations, and even feeling certain things and not others."⁹⁸ In the criminal justice system, as on the frontiers of empire, something like this "impersonal communal idea of being a White Man rule[s;]" it becomes "a very concrete manner of being-in-the-world, a way of taking hold of reality, language, and thought."⁹⁹

This is not a situation that frontline criminal justice practitioners can easily remedy by themselves. It is not obvious that statistical studies of their "outputs" or checklists generated from those studies will remedy it for them either.¹⁰⁰ This is not a situation that more training about, or tinkering with, the *Brady* rule will resolve.¹⁰¹ The problem does not lie in our having no rule, or in the nature of the existing rule; it lies in persuading people that personally following the rule is a crucial element of their individual responsibility for a just collective outcome.

This looming environment generates perpetual pressure to clear the docket and produce convictions, as well as accelerates the routine dehumanization of the people whose lives the practitioners impact so powerfully.¹⁰² The reduction of defendants, victims, and communities into faceless crowds can allow the practice of mass incarceration to run very smoothly.¹⁰³ As bad as its consequences are in the spectacular capital felony exonerations that make news, they may be even worse in the submerged street crime dockets, where factual accuracy is treated as largely irrelevant, guilty pleas are the rule, and thousands of black lives are taken on the

⁹⁸ *Id.* at 227.

⁹⁹ *Id.*

¹⁰⁰ See Charles L. Bosk et al., *Reality Check for Checklists*, 374 LANCET 444, 445 (2009).

¹⁰¹ "Failure to train" in regard to the *Brady* rule gives rise (in theory) to a cause of action for a civil rights violation. See Bandes, *supra* note 60, at 715, 717–18. But it is impossible to believe that the prosecutors in cases such as *Thompson* had any doubt that they were withholding "material" evidence. Withholding evidence that is "not material" is not worth the effort.

¹⁰² See STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 40–41, 48 (2005) ("Under plea bargaining, . . . the focus [i]sn't on rehabilitation or even deterrence but merely on the disposal of cases, the quicker the better.").

¹⁰³ See STUNTZ, *supra* note 66, at 312.

installment plan.¹⁰⁴ Orwell's experience is replayed constantly not only in the courtrooms, but also on the streets, where people, not tame elephants, pay the price. On the streets it is enacted in humiliating stops and frisks; sometimes in fatal violence.¹⁰⁵ Exiling or punishing one erring practitioner, or even a string of erring practitioners, will not change this environment, and the environment will envelope the next practitioner who comes along.

This system is in crisis and desperately needs reform, but not because of an explicitly racist ideology. Throughout the system, in many roles, thousands of beleaguered young Orwells are trying to get through their days, doing what they believe is expected of them, with the tools at hand, oblivious to the appalling collateral damage they are inflicting.¹⁰⁶

The lesson that Orwell might have learned by seeking the perspective of the Burmese in his review of his action resonates with the lesson William Stuntz urged us to learn in the final paragraph of his magisterial *The Collapse of American Criminal Justice*:

The criminals we incarcerate are not some alien enemy. Nor, for that matter, are the police officers and prosecutors who seek to fight crime in those criminals' neighborhoods. Neither side of this divide is "them." Both sides are us. Democracy and justice alike depend on getting that most basic principle of human relations right.¹⁰⁷

The question is whether by recognizing a deeper etiology of wrongful convictions we might move in that direction.

¹⁰⁴ See, e.g., Issa Kohler-Housmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 657, 663–64 (2014) (discussing several cases where the dispositions were not driven by the legal or factual merits of the case). For a compelling narrative of such a case, see Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law#>. For a harrowing afterword on that narrative, see Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

¹⁰⁵ Jim Dwyer, *Orwell, a Chokehold and the Need to Look Like a Sahib*, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/nyregion/orwell-eric-garner-chokehold-and-the-need-to-look-like-a-sahib.html?_r=0.

¹⁰⁶ See, e.g., BOGIRA, *supra* note 102, at 7, 21 ("The courtroom staff works as it must, reflexively, not reflectively."). Cf. Woods, *supra* note 64, at 497 ("However, for the people at the sharp end of the system who actually did things, strictly following the procedures posed great difficulties because the procedures were inevitably incomplete, sometimes contradictory, and novel circumstances arose that were not anticipated in the work procedures. As a result, sometimes success could not be obtained if one only followed the procedure.").

¹⁰⁷ STUNTZ, *supra* note 66, at 312.

IV.

If it is true as a matter of fundamental etiology that even so seemingly simple an event as a wrongful conviction after a *Brady* violation is actually a complex “organizational accident” implicating many contributing factors that ultimately combined and cascaded, we are in a position to capitalize on an insight mobilized by Donald Berwick, one of the pioneers of the modern patient safety movement:¹⁰⁸ “Every defect is a treasure.”¹⁰⁹ The basic manner of causation of wrongful convictions argues that we should amend our standard criminal justice response to disasters, and say when one occurs, “Something to see here: *don’t* move along.”¹¹⁰

The recognition that there is something to be learned from past criminal justice events has begun to gather some momentum. The National Institute of Justice, borrowing a phrase¹¹¹ from the Joint Commission on Hospital Accreditation, has launched a Sentinel Events Initiative¹¹² that attempts to promote the exploration of non-blaming, all-stakeholders reviews of wrongful convictions, wrongful releases, “near misses” and other meaningful incidents.¹¹³ The National Commission on Forensic Science has recommended “Root Cause Analysis” as a standard practice in forensic laboratory error reviews.¹¹⁴ The Presidential Task Force on 21st Century Policing

¹⁰⁸ See Sabriya Rice, *Despite Progress on Patient Safety, Still a Long Way Across the Chasm*, MODERN HEALTHCARE (Dec. 6, 2014), <http://www.modernhealthcare.com/article/20141206/MAGAZINE/312069987>.

¹⁰⁹ Berwick, *supra* note 16, at 54.

¹¹⁰ James M. Doyle, *Something to See Here: Don’t Move Along*, CRIME REP. (Jan. 20, 2015, 7:02 AM) (emphasis added), <http://www.thecrimereport.org/viewpoints/2015-01-something-to-see-here-dont-move-along>.

¹¹¹ “The Joint Commission adopted a Sentinel Event policy in 1996.” *Sentinel Event Policy and Procedures*, JOINT COMM’N, (Jan. 6, 2016), http://www.jointcommission.org/sentinel_event_policy_and_procedures/.

¹¹² This initiative has produced two Special Reports. The first discusses the basic concepts and includes essays from a wide range of stakeholders. See *Introduction, in* MENDING JUSTICE: SENTINEL EVENT REVIEWS, *supra* note 7, at 1, 1–2. The second draws on the experiences of three Sentinel Event “beta sites” (Philadelphia, Milwaukee, and Baltimore) to outline the considerations that jurisdictions undertaking future Sentinel Event processes could consider. U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS 2 (2015). The National Institute of Justice has begun to actively fund explorations of Sentinel Event methodologies. *NIJ’s Sentinel Events Initiative*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx> (last modified Mar. 22, 2016). For commentary on this effort, see Douglas Starr, *A New Way to Reform the Judicial System*, NEW YORKER (Mar. 31, 2015), <http://www.newyorker.com/news/news-desk/the-root-of-the-problem>.

¹¹³ *Introduction, supra* note 112, at 1; Doyle, *Sentinel Event Reviews, supra* note 8, at 15.

¹¹⁴ NAT’L COMM’N ON FORENSIC SCI., DIRECTIVE RECOMMENDATION: ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE (2015), <https://www.justice.gov/ncfs/file/786581/download>.

has recommended the practice of Sentinel Event Reviews of critical events.¹¹⁵

These efforts share a determination to move beyond performance reviews of individuals (including searches for “bad apples”) to press for system-oriented *event* analyses.¹¹⁶ This approach aims to avoid the tendencies of the “bad apple” disciplinary review or civil lawsuit to drive reports of significant events underground and to narrow the lense to scrutinize only the conduct of a lone individual rather than the system’s various contributing weaknesses.¹¹⁷ It accepts the fact that a full understanding of what went wrong is (to at least a degree) dependent on the insights from the perspective of the “second victim;”¹¹⁸ for example, the nurse who was the last in the chain that delivered a fatal medication dose, or the defense lawyer who failed to intercept the *Brady* violation in a wrongful conviction

¹¹⁵ U.S. DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY 22 (2015).

¹¹⁶ In a recent article, Ryan A. Semerad suggests that the organizational accident etiology of criminal justice error can shape a response to the problem of “cumulative error” in federal habeas corpus proceedings, and he outlines a state post-conviction process in capital cases which could be organized along sentinel event lines. See Ryan A. Semerad, *What’s the Matter with Cumulative Error?: Killing a Federal Claim in Order to Save It*, 76 OHIO ST. L.J. 965, 1003–04 (2015). See John H. Blume & Christopher Seeds, *Criminal Law: Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1156–57, 1191 (2005). The impact of the organizational accident etiology of error on adjudicative and quasi-adjudicative proceedings (in contrast to its potential for “future-looking accountability” aimed at cutting risk) is beyond the scope of this essay, although it might be noted that explorations of, for example, the North Carolina Innocence Commission may tend in that direction. See Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648–49, 650 (2004). However, it seems likely that safety experts such as Sidney Dekker would regard traditional legal review procedures as limited by Newtonian approaches that require a discrete error and a consequent discrete harm, and are not well-adapted to recognizing and addressing “emergent” errors deriving from the marginal, “greater”, zone captured in the phrase “greater than the sum of its parts.” See DEKKER, *supra* note 63, xiii. Indeed, if “cumulative error” means simply piling up and weighing discrete errors, that phrase, because its quantitative nature inadequately captures dynamic interactions between and among errors will similarly leave many errors unaddressed.

¹¹⁷ So, for example, the civil lawsuit by exoneree Donald Gates in Washington, D.C., eventually narrowed to focus on the conduct of the investigating detectives, although Gates’ wrongful conviction also involved bogus forensic science, dubious prosecutorial decision-making, questionable judicial rulings on “prior bad acts” evidence and other features. Spencer S. Hsu, *D.C. Police Framed Man Imprisoned 27 Years for 1981 Murder, U.S. Jury Finds*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/local/public-safety/dc-police-framed-man-imprisoned-27-years-for-1981-murder-us-jury-finds/2015/11/18/7a454054-8e04-11e5-baf4-bdf37355da0c_story.html; Keith L. Alexander, *Prosecutor Reflects on Wrongful Conviction in D.C. Killing*, WASH. POST (Mar. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/05/AR2010030504274.html>.

¹¹⁸ See SIDNEY DEKKER, SECOND VICTIM: ERROR, GUILT, TRAUMA, AND RESILIENCE 1, 97–98 (2013).

case, or even—however much it may rankle—a prosecutor who after having been seduced the by local office culture has contributed to a *Brady* exoneration.

The criminal justice system is an organization which, like many others, has a lot invested in its practitioners. As Sidney Dekker argues:

Paying off the first victim and sending off the second denies the humanity and reality of the relationship that existed between the two victims. . . . Where first victims are given the impression that their lives had been entrusted to a dispensable, disposable cog in the organizational machine, what does that say about the organization's own duty ethic in relation to its patients, passengers, clients?¹¹⁹

The “second victim” focus is one particular example of a general principle of analysis more or less dictated by the organizational accident etiology of error; the need for the perspectives of all of those implicated in the event. As John Chisholm (the District Attorney of Milwaukee County, Wisconsin and a N.I.J. “Sentinel Event” participant) put it:

Creating a better justice system requires us to expand our definition of the critical actors involved in any event, from citizens, police, corrections, pretrial services, public defenders and the defense bar, as well as prosecutors and judges. And we have to create a process where everyone feels empowered to speak the truth about his or her role in any given event.¹²⁰

Chisholm does not mean by this that he plans to turn the running of his office or the education of his assistants over to outsiders; nor should he: outsiders are not well-equipped for the task.¹²¹ But he does recognize the value to him, and to all criminal justice system leaders, of a new feedback loop that can draw attention to system weaknesses and begin to prepare the way for cultural change.¹²²

The “all stakeholders” aspect of these reviews requires not only the participation of representatives of all agencies, but also of all ranks from within the implicated “silos.”¹²³ Elements of the foot

¹¹⁹ *Id.* at 98.

¹²⁰ John Chisholm, *Moving Beyond a Culture of Defensiveness and Isolation*, in MENDING JUSTICE: SENTINEL EVENT REVIEWS, *supra* note 7, at 20, 20, 21.

¹²¹ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 964–65, 968, 973 (2009).

¹²² See Chisholm, *supra* note 120, at 20.

¹²³ See Doyle, *Learning*, *supra* note 8, at 132–33.

soldiers' working environment—for example, caseloads and resource shortages—that would be shrugged off as excuses or evasions in a disciplinary or tort proceeding can be given their deserved explanatory weight in these event reviews.¹²⁴ Moreover, the potential contributions of scholars and researchers from a variety of disciplines can be mobilized in these reviews to supplement the basic narratives with insights into the role that, for example, unconscious biases or census pressures may have played. The researchers will receive in return new challenges for empirical research of increased salience: the good questions that are at the heart of the research enterprise. And although we are most concerned with the problem of wrongful convictions, we should not ignore the fact that the universe of available lessons about the sources of wrongful conviction includes not only those learned from completed exonerations, but also others, gathered from “near misses,”¹²⁵ and other “high frequency/low impact” events.

But, perhaps most importantly, the “all-stakeholders” event reviews that the logic of the organizational accident etiology requires access to the perspective of community stakeholders. Among other things, a community presence may indicate that many “low impact” events—humiliating stops and frisks, pretrial detentions, misdemeanor processing and the collateral consequences of records—are not, for defendants, families, and communities the “low impact” practices that from the practitioners' perspective they seem to be.¹²⁶

Besides, “Shooting an Elephant” also illustrates why, although the perspectives of the young Orwells at the sharp end of the criminal system are indispensable to an understanding of an event, their professional accounts—even when these seem to be confessional accounts—are not sufficient if our aim is “forward-looking accountability.”

For all of Orwell's sincere contrition for his role in the imperial project, it is not clear that Orwell's version of this particular event can be trusted. Orwell had lived in Burma for some time and his father was a career imperial civil servant.¹²⁷ Orwell was a curious

¹²⁴ See *id.*

¹²⁵ See *id.* at 135–36; Gould et al., *supra* note 12, at 479–80, 482.

¹²⁶ See Marc Mauer & Media Chesney-Lind, *Introduction*, in *INVISIBLE PUNISHMENT: THE COLLATERAL COST OF MASS IMPRISONMENT* 1, 1–2, 5 (Marc Mauer & Meda Chesney-Lind eds., 2002); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 283–84, 287, 288–89, 308 (2011).

¹²⁷ See Larkin, *supra* note 25, at 11, 53, 92, 292.

and intelligent man. Orwell probably knew very well that Buddhism abhors killing, but counted on his audience's ignorance of that fact when he enlisted "the will" of the crowd tactically as a motivator in order to mitigate, even partly obscure, his personal role.¹²⁸ If we rely solely on Orwell we will learn that imperialism was a bad thing and that one of its officers was acutely ashamed of his role.¹²⁹ We would still not know why Orwell's elephant was destroyed.¹³⁰ The presence of community stakeholders in the process can be a crucial guard against the influence of these blind spots in a review: an important tool for preventing reoccurrence.

William Stuntz believed that: "[t]he [criminal] justice system stopped working when a particular kind of local democracy—the kind in which residents of high-crime neighborhoods shape the law enforcement that operates on their streets—ceased to govern the ways police officers, prosecutors, and trial judges do their jobs."¹³¹ It may be that the determined, routine practice of including community voices in the learning from error event reviews can begin to repair this situation, and to erode the Manichean separation of "Us" from "Them."

It is very easy to sympathize with Joseph Margulies's statement that "[r]eform proposals aimed at population-cutting rather [than] principle are dangerously incomplete," that, "[h]alving the prison population is a laudable goal, but population-cutting initiatives mistake a symptom for [a cause]."¹³² If our current reform tide recedes leaving only a drop in prison census behind, we can be pretty sure that the population will soon be replenished. Something more fundamental, something such as Margulies's call for the elevation of the three principles of human dignity, thriving communities, and fair government officials and processes¹³³—something that emulates hospital medicine's paradigm shift toward a "culture of safety"¹³⁴—is called for.

¹²⁸ See *supra* notes 83, 84 and accompanying text.

¹²⁹ ORWELL, *Shooting*, *supra* note 1, at 236, 242.

¹³⁰ A similar dynamic is at work in the apologetic retrospective narratives of the prosecutors in two well-known exoneration cases involving *Brady* issues. See *supra* note 54 and accompanying text; James M. Doyle, *The Passion of "Marty" Stroud*, CRIME REP. (Oct. 27, 2015, 9:00 AM), <http://www.thecrimereport.org/viewpoints/2015-10-the-passion-of-marty-stroud>.

¹³¹ STUNTZ, *supra* note 66, at 309.

¹³² Joseph Margulies, *The Limits of Criminal Justice Reform*, BOS. REV. (Nov. 17, 2015), <http://bostonreview.net/us/joseph-margulies-criminal-justice-transformation#comment-26867>.

¹³³ *Id.*

¹³⁴ See *supra* note 58 and accompanying text.

Such a sweeping change in the world of American criminal justice cannot be imposed from the rarefied heights of the think tanks and law reviews; it must come from the bottom up. As John Griffith's observations about the early Twentieth Century's doomed attempt to impose a "Family Model" of juvenile justice on the "Battle Model" culture of criminal justice make clear, a culture change of this magnitude cannot be achieved by fiat.¹³⁵ The advantage of the practice of non-blaming, all-stakeholders event review is that it enlists the frontline practitioners in a collaborative review of processes, not only outcomes, and with researchers and community members participating as equals. In this process the map of the criminal justice process as it is appears in the vision comprised of statistical findings and the living criminal justice process as it appears in the narratives of the citizens and communities entangled in it are not simply complementary (although they are that) but dynamic and reciprocal.

"Narrative," as Edward Said observed, writing about the colonial system that enmeshed Orwell, "asserts the power of men to be born, develop, and die, the tendency of institutions and actualities to change . . ." ¹³⁶ We need the narratives of the Orwells, but also of the Burmese; of the prosecutors, police, defenders, and judges, but also of the exonerees, the crime survivors, the stopped and frisked, their families, and their communities. No "fix" is permanent. We need constantly to gather both narratives and statistical analyses and to take account of them in a continuous practice if we are going to create resilience and heal the system.

Criminal justice practitioners have to learn to allow others to learn about our lives: to suffer the pain of being known along with the pleasure of knowing.¹³⁷ We also have to learn—as Orwell did, in his dogged, imperfect way—to be willing to risk discovering uncomfortable facts about ourselves.

¹³⁵ See John Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 400–01 (1970).

¹³⁶ SAID, *supra* note 92, at 240.

¹³⁷ JOHN A. McCCLURE, KIPLING AND CONRAD: THE COLONIAL FICTION 49 (1981).