

AN INTEGRATED JUSTICE MODEL OF WRONGFUL  
CONVICTIONS

*Marvin Zalman\**

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\* Professor of Criminal Justice, Wayne State University; J.D., Brooklyn Law School; M.A., Ph.D., School of Criminal Justice, State University of New York at Albany; B.A., Cornell University. I wish to thank the participants at the National Institute of Justice, International Perspectives on Wrongful Convictions Workshop (September 2010), who commented on an early draft of the Integrated Justice Model.

## INTRODUCTION

*There is a lot of noise about miscarriages. We attempt to understand what this noise is all about.*<sup>1</sup>

The inauguration by the *Albany Law Review* of an annual symposium issue dedicated to the subject of miscarriages of justice, which are criminal justice *system* errors, both recognizes and constructs the reality that a distinct subject area has emerged.<sup>2</sup> However this area is denominated—“wrongful convictions” or “innocence studies”—it not only fits within legal scholarship and teaching, but is an inherently interdisciplinary subject. That this inaugural issue is a joint project of the Albany Law School and the School of Criminal Justice at the State University of New York at Albany is conceptually important and personally significant.<sup>3</sup> As a lawyer and a graduate of the School of Criminal Justice, I will offer an interdisciplinary model of the innocence movement—the Integrated Justice Model (“IJM”)—which complements, rather than supplants, the innocence paradigm that emerged from and has shaped the innocence movement. The IJM views wrongful convictions from a public policy perspective.<sup>4</sup> It offers a more complete picture of the policy environment of justice reforms, keyed to the specific concerns of the innocence movement, in the hope that such understanding will allow for better planning of justice system

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<sup>1</sup> RICHARD NOBLES & DAVID SCHIFF, *Preface to UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, THE MEDIA, AND THE INEVITABILITY OF CRISIS* xiii (2000).

<sup>2</sup> Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 204 (2005) (“Until the late 1980s, it might have seemed bizarre, if not incoherent, to suggest that the study of miscarriages of justice constituted a field or area of academic study rather than merely a series of unrelated and relatively infrequent articles and books.”). Daniel Medwed coined the term “innocentrism” to describe a “transformation” in American criminal law in which issues relating to actual innocence have gained “increasing centrality . . . in courtrooms, classrooms, and newsrooms.” Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549–50 (2008). He posited that “the effort to free the innocent has become the civil rights movement of the twenty-first century.” *Id.* Unless criminal law was meant as a metonym for the criminal justice system, this characterization may be too narrow.

<sup>3</sup> For the intellectual and programmatic development of the School of Criminal Justice, see Donald J. Newman, *The American Bar Foundation Survey and the Development of Criminal Justice Higher Education*, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 279 (Lloyd E. Ohlin & Frank J. Remington eds., 1993). See also Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47–76 (1992).

<sup>4</sup> See Kathryn M. Campbell, *Policy Responses to Wrongful Convictions in Canada: The Role of Conviction Review, Public Inquiries and Compensation*, 41 CRIM. L. BULL. 145, 164–66 (2005); see also Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. L. BULL. 169, 170–71 (2005).

reform.

Part I provides a brief overview of the innocence movement and the related issues of defining a wrongful conviction and estimating the size of the problem. Parts II A and B present a historical sketch of the innocence movement's development in the United States from a social constructivist perspective. Many law review articles describe the rise of the innocence movement in a flattened way before getting on to the meat of their studies. A simplified standard version of this history is that DNA happened, innocent prisoners were exonerated, and innocence projects sprung up. These accounts, in their brevity, downplay the role of human agency. The account herein explores the actions and inferred motives of key innocence movement actors. Their actions and writings created an intersubjective understanding of the innocence paradigm that shaped the movement. This perspective illuminates the agenda-setting and policy-driven nature of the movement.<sup>5</sup>

Most accounts take the innocence paradigm for granted. I argue in Part II that the innocence paradigm was fashioned so as to bring together disparate elements of an innocence puzzle, viewed as causes of wrongful convictions, into a synergistic whole. As a human, intellectual construct, the innocence paradigm created a unified foundation and strategy for viewing wrongful convictions as an area for policy reform. This paradigm provided an intellectual framework for the innocence movement's policy agenda. The contours of the innocence paradigm are sketched in Part II C. Part III presents the IJM, which examines the policy landscape of the innocence movement. It draws a picture of the innocence movement's domains, and their ideals, institutions, actors, operating constructs, and problem areas. It is a heuristic device intended to make explicit the innocence movement's policy context. The IJM does not seek to supplant the innocence paradigm, which continues to serve a useful function.

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<sup>5</sup> The only writer, to the best of my knowledge, who has perceived the importance of key actors' agency is James M. Doyle. See JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* (2005). My account, which draws heavily on his, is far from a true history of the innocence movement, which has yet to be written. An example of a model account is the work of Jay Aronson. JAY D. ARONSON, *GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING* 76 (2007) (providing a history of the introduction of DNA profiling). The present article is limited in that it relies only on available written sources. A proper history of the innocence movement would rely on interviews, a broad range of external sources, and would explore state or regional innocence projects.

## I. THE INNOCENCE MOVEMENT

The innocence movement refers to a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States. Concerns about innocence are seen in other nations, but the timing and flavor of innocence-related programs, policies, and ideas differ in different places.<sup>6</sup> The movement is characterized by innocence consciousness—the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place.<sup>7</sup> Innocence consciousness replaces a belief that the justice system almost never convicts an innocent person.<sup>8</sup> When translated into public opinion, innocence consciousness becomes one of the forces generating policy change.<sup>9</sup>

The innocence movement has several goals. The first is to rescue falsely convicted men and women from prisons and death rows.<sup>10</sup> Pedagogy is a related function because the primary innocence movement institutions are law school-based innocence projects, where law students provide much of the labor necessary to carefully review cases.<sup>11</sup> A third function, which was not contemplated by the

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<sup>6</sup> See C. Ronald Huff & Martin Killias, *Introduction to WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 7 (C. Ronald Huff & Martin Killias eds., 2008); see also MICHAEL NAUGHTON, *RETHINKING MISCARRIAGES OF JUSTICE: BEYOND THE TIP OF THE ICEBERG* 1–2 (2007) (innocence issues in the United Kingdom arose earlier and were generated by political miscarriages of justice in IRA bombing cases; issues closely intertwined with appellate jurisdiction of Court of Appeals to review miscarriages).

<sup>7</sup> Zalman, *supra* note 4, at 170–71.

<sup>8</sup> The classic statement is a quote by Judge Learned Hand in *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923): “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.” Hand was a great jurist with a progressive temperament and a penetrating mind. That he would issue a dictum dismissing the possibility of wrongful convictions in the era of the third degree shows the power of social context on one’s thinking. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 333–34 (2011). For recent expressions, see Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 519–21 (2005). See also Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 668 (2007).

<sup>9</sup> See Marvin Zalman, Brad Smith & Matthew J. Larson, *Citizens’ Attitudes Toward Wrongful Convictions* (2010) (unpublished manuscript).

<sup>10</sup> See generally BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

<sup>11</sup> Not all innocence projects are based in law schools. See *Innocence Network Member Organizations*, THE INNOCENCE NETWORK, <http://www.innocencenetwork.org/members.html>

first innocence project's founders, is to provide assistance and lobby for compensation for exonerees.<sup>12</sup> The last function, which *was* contemplated by innocence movement protagonists from a very early stage, is to promote innocence-related policy reforms.<sup>13</sup> These reforms are shaped by the innocence paradigm, which is the organizing heuristic for the innocence movement. The paradigm consists of a list of wrongful conviction "causes," along with policies to assist exonerees.<sup>14</sup> Absent from the paradigm, from a criminal justice perspective, are analyses and policy initiatives addressed to the plight of innocents while in prison.<sup>15</sup> Although the innocence

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(last visited Mar. 20, 2011); *see also* Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002) (describing the pedagogical function of innocent projects); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003); *see generally* Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231 (2006).

<sup>12</sup> *See* Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008); *Life After Innocence*, LOY. U. CHI. SCH. OF L., <http://www.luc.edu/law/lifeafterinnocence/index.html> (last visited Mar. 20, 2011); THE LIFE AFTER EXONERATION PROGRAM, <http://www.exonerated.org/content/> (last visited Mar. 20, 2011). The exoneree assistance component emerged from experience, as explained by Peter Neufeld, Co-Founder of the Innocence Project, in the Frontline Documentary, *Burden of Innocence*:

I would have to say that when we first started the Innocence Project, most of what we now realize, we didn't begin to think about back then. We thought it would be enough to just get people out, and they would be so pleased that they get out that everything would be great. Obviously, that was incredibly naive of us. Most of the people we've gotten out have had, you know, very, very difficult times adjusting emotionally, financially, work-wise, sexually. You name it, those are the problems they've had.

*Frontline: Burden of Innocence* (PBS Home Video, 2003), *transcript available at* <http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/script.html> (last visited Mar. 20, 2011).

<sup>13</sup> *See Frontline: Burden of Innocence*, *supra* note 12 (discussing the Innocence Project).

<sup>14</sup> The innocence paradigm and the various causes and associated reforms are discussed *infra* Part II.C. Legal readers should be aware that the use of the word "cause" (as in "false confessions cause wrongful conviction") is highly problematic to social scientists. No social scientist would write or subscribe to such a statement unless it was supported by empirical research that went beyond even statistical correlations, to eliminate spurious causes, and to specify a causal order. For example, cases in which police investigations produce false confessions may be dismissed before trial or juries may acquit, in which case the false conviction does not cause a wrongful conviction. Leo and Gould explain the difference between the "simplified model of cause and effect" used by lawyers, and the approach to causation utilized by social scientists. Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 18-9 (2009). Nevertheless, it has become common to refer to elements of the innocence paradigm as "causes" of wrongful conviction. In this paper I will not put scare quotation marks around every such use of "cause," even when they belong there.

<sup>15</sup> Legal scholars have begun to grapple with the catch-22 of innocent prisoners denied parole because they refuse to admit guilt. *See generally* Daniel S. Medwed, *The Innocent*

paradigm has been, and continues to be, a helpful way to think about wrongful convictions, the growing complexity of the innocence movement's policy agenda requires a complementary way to view the process, which is presented in the Integrated Justice Model ("IJM") herein.<sup>16</sup>

Two basic issues that engender confusion and controversy are how to define a wrongful conviction and the size of the problem. Several scholars, myself included, have written at length on these issues, so I will be brief. As for the definition, the innocence movement focuses on wrongful convictions in the factual sense, where the wrong person is convicted of a crime, or is convicted of a crime that did not occur.<sup>17</sup> The term "wrongful conviction" also includes convictions marred by serious constitutional or other procedural or due process errors, which are foundations of our civilized legal system and are not "legal technicalities."<sup>18</sup> While much can be written about the relation between procedural justice and false convictions, the focus of the innocence movement is on actual or factual innocence.<sup>19</sup> An intermediate issue that has not been entirely resolved is whether to include the convictions of defendants who have committed the act of a crime, but whose justification was not accepted by a jury. The most difficult cases of this kind involve rejected claims of self-defense. Forensic science

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*Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

<sup>16</sup> Erik Luna's essay, which filters innocence through a systems analysis perspective of criminal justice, is suggestive of this paper's perspective. Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005). The first true systems analysis of the criminal justice process was completed by the Institute for Defense Analyses. INSTITUTE FOR DEFENSE ANALYSES, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY (U.S. Gov't Printing Office 1967).

<sup>17</sup> Leo & Gould, *supra* note 14, at 11–12.

<sup>18</sup> *Understanding the Causes*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Mar. 20, 2011).

<sup>19</sup> Regarding the definition, see EDWIN MONTEFIORE BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (Da Capo Press 1970) (1932) (analyzing criminal cases where the defendant was prosecuted despite being "completely innocent"); see generally SCHECK ET AL., *supra* note 10, at xvii (discussing various cases of wrongful convictions); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 n.2 (2007) (using "factual innocence" to mean that no crime was committed, or that it was committed by someone other than the defendant); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 39 (1987) (excluding mistake of law and "psychological" errors from the definition of "wrongful conviction"); Tony. G. Poveda, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 690–91 (2001) (discussing the difference between factual and legal innocence); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 5 n.13 (2002) (stating that a factually innocent person is one who did not commit the actus reus of a crime); Medwed, *supra* note 2, at 160 (distinguishing between factual and legal innocence).

evidence can be marshaled to support claims of innocence in self-defense cases.<sup>20</sup> But generally, there is no easy way to detect a factually wrongful conviction. An *objective* standard for “exonerations” is applied in capital cases by the Death Penalty Information Center, even though this means that a few defendants who were factually involved in the crime, and probably wrongly acquitted, are included.<sup>21</sup> An exoneration “is an *official act* declaring a defendant not guilty of a crime for which he or she had previously been convicted.”<sup>22</sup> According to *Exonerations in the United States, 1989 Through 2003*, there are four sources of exonerations: pardons or similar executive actions that free prisoners based on innocence grounds; dismissals of convictions by courts “after new evidence of innocence emerged”; acquittals in retrials granted by appellate courts “on the basis of evidence that [defendants] had no role in the crimes for which they were originally convicted”; and posthumous acknowledgments by the state that prisoners who died in prison were factually innocent.<sup>23</sup> It is worth noting that this definition of exoneration, applied by *Exonerations in the United States, 1989 Through 2003*, relies on a mixed objective-subjective definition so as to include only *factually* innocent defendants, which was appropriate for the goals of that study, which identified three hundred and forty such exonerees in the years between 1989 and 2003.<sup>24</sup> Yet, the term exoneration generally applies to all defendants who are acquitted at trial. It is therefore important for studies dealing with wrongful conviction and exoneration to define the terms, and to explain how the innocence statuses of the subjects are determined.

Even more controversy surrounds the question of the number of wrongful convictions. Is the problem large enough to engender serious reform efforts? Most innocence advocates assume the problem is large, but do not specify its size. One reason why a

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<sup>20</sup> Joseph Neff & Mandy Locke, *SBI Bloodstain Analysis Team Had No Guidelines for 21 Years*, NEWS OBSERVER (Charlotte, N.C.), Sept. 9, 2010, <http://www.newsobserver.com/2010/09/09/v-print/671509/sbi-bloodstain-analysis-teamwent.html> (scientific evidence to support self-defense claim suppressed by state forensic scientists).

<sup>21</sup> See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CENTER (Jan. 24, 2011), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>; see also Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 946 (2008) (noting the likelihood that some exonerated defendants were not factually innocent).

<sup>22</sup> Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 523–24.

precise figure cannot be given is that, aside from DNA exclusions, there is no exacting test for defining a wrongful conviction short of painstaking case reconstruction. Also, no government agency or private organization maintains a comprehensive census of wrongful convictions.<sup>25</sup> Therefore, “[w]ithout investigation of every conviction *there is no way to know* what proportion of those presently imprisoned are factually innocent.”<sup>26</sup> On this basis, a few critics have argued that wrongful convictions almost never occur.<sup>27</sup> A few studies based on actual cases, however, have estimated wrongful *death sentence* rates at between 1.5% and 5%.<sup>28</sup> The rate of death penalty error suggests an upper limit for a rate of wrongful convictions for other felonies. Unanchored estimates of wrongful convictions by justice professionals, in the neighborhood of about 0.5% to 2%, provide another strand for a general estimate of a

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<sup>25</sup> See Leo, *supra* note 2, at 216. The list of DNA exonerations maintained by the Innocence Project is a small proportion of all exonerations, and an even smaller proportion of wrongful convictions. See Gross et al., *supra* note 22, at 523–24 (finding that fifty-eight percent of three hundred and forty exonerations were revealed by means *other than* DNA testing).

<sup>26</sup> Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1291 (2005).

<sup>27</sup> See Marquis, *supra* note 8, at 518, 521 (arguing that death sentences are rarely overturned on the basis of “actual innocence”); see also Hoffman, *supra* note 8, at 668 (arguing against the belief that wrongful convictions are a “regular occurrence”); Joshua Marquis, Op-Ed., *The Innocent and the Shamed*, N.Y. TIMES, Jan. 26, 2006, at A23 (arguing that wrongful convictions are rare); *Kansas v. Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring) (observing the inexistence of a case of an innocent person executed); see generally Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67 (2006), available at <http://students.law.umich.edu/mlr/firstimpressions/vol1105/gross.pdf> (discussing the concurring and dissenting opinions of *Kansas v. Marsh*).

<sup>28</sup> See Poveda, *supra* note 19, at 697 (estimating a wrongful murder conviction rate of 1.4%); see also Risinger, *supra* note 19, at 762 (estimating a “maximum factual error rate” of approximately five percent); see also Gross & O’Brien, *supra* note 21, at 944–45 (estimating a 1.5% wrongful conviction rate). The estimated rates calculated by these studies are viewed as caps on the general rate of wrongful convictions because it is likely that error rates are higher in capital crimes and homicide cases than in other felony investigations and prosecutions. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 470 (1996). There is strong evidence that innocent defendants have been executed in recent years. See William S. Lofquist & Talia R. Harmon, *Fatal Errors: Compelling Claims of Executions of the Innocent in the Post-Furman Era*, in WRONGFUL CONVICTIONS: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 93, 95 (C. Ronald Huff & Martin Killias eds., 2008). Two more recent cases from the state of Texas suggest the risk of legally executing the factually innocent. See Craig L. Beyler, *Analysis of the Fire Investigation Methods and Procedures Used in the Criminal Arson Cases Against Ernest Ray Willis and Cameron Todd Willingham 1* (Aug. 17, 2009) (unpublished report) (submitted to the Texas Forensic Science Commission, Sam Houston State University); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42, available at [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann?](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?); Allan Turner & Mike Tolson, *Questionable Capital Cases Raise Hopes for Reform*, HOUS. CHRON., Nov. 12, 2010, <http://www.chron.com/dispatch/story/mpl/metropolitan/7292521.html>.

wrongful conviction rate.<sup>29</sup> Examining these studies, and based on a qualitative analysis of the criminal process, I have estimated that it is “almost certainly” the case that wrongful felony convictions, for all felonies across the United States, occur at a rate of at least between 0.5% and 1% each year. Extrapolating from about one million convictions annually, and a 40% conviction rate, results in 5000 to 10,000 wrongful convictions and 2000 to 4000 wrongful prison sentences each year. I also concluded that an error estimate is probably correct against higher estimates. The primary basis for my conclusions was a review of reportorial and observational studies of criminal justice practice. My conclusion is that the criminal justice system suffers from serious weaknesses which make routine errors highly likely.<sup>30</sup>

Some may believe that sending *at least* 2000 innocent defendants to prison every year is simply the result of human fallibility. They might argue that efforts to reduce this number are either not worth the effort, will reduce the system’s crime detection efforts, or are beyond the present knowledge or capacity of researchers, agency leaders, or government policymakers. I believe that the cost-benefit critique of the innocence movement is unconvincing.<sup>31</sup> Promising support for the innocence agenda comes from preliminary empirical research, suggesting that factors viewed as causes of wrongful convictions are statistically associated with wrongful death sentences.<sup>32</sup> After reviewing much scholarship, an American Bar Association committee has backed the innocence agenda as likely to reduce wrongful convictions.<sup>33</sup> In my opinion, even if the causes of

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<sup>29</sup> See C. Ronald Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 521 (1986); see also Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQ. 436, 440–41 (2007); see also Marvin Zalman, Brad Smith & Angie Kiger, *Officials’ Estimates of the Incidence of “Actual Innocence” Convictions*, 25 JUSTICE Q. 72, 83–86 (2008).

<sup>30</sup> See generally Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. (forthcoming 2012).

<sup>31</sup> See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008) (questioning the validity of wrongful conviction rates, and criticizing the innocence movement on a cost-benefit basis); Marvin Zalman, *Is Innocence a Myth?* (2011) (unpublished manuscript) (on file with author) (critiquing this cost-benefit analysis).

<sup>32</sup> See Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 JUST. Q. 949, 964–67 (2001); Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498, 511 (2005); see also Gross & O’Brien, *supra* note 21, at 927.

<sup>33</sup> See generally AM. BAR ASS’N, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (Paul C. Giannelli & Myrna S. Raeder eds., 2006), *reprinted in* Paul C. Giannelli & Myrna S. Raeder, *Achieving Justice: Freeing the Innocent, Convicting the Guilty Report of the ABA Criminal Justice Section*, 37 SW. U. L. REV. 763 (2008).

wrongful convictions—such as those resulting from factors like inadequate assistance of counsel—have not been established by the canons of social scientific research, there are moral and programmatic reasons to vigorously pursue innocence research and reforms.

This paper addresses the innocence movement's policymaking goals and activities. From a criminal justice perspective, the innocence movement is one of those rare events with the potential to motivate significant progressive reform in the criminal justice system's crime detection and prosecution function,<sup>34</sup> especially as many of these reforms would likely strengthen law enforcement and prosecution.<sup>35</sup> From a policy and justice system perspective, however, there are many reasons why continual innovation is not built into the criminal justice system, as governmental agencies, police, prosecution, and courts cannot initiate and sustain large-

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<sup>34</sup> The constant tendency in American justice policy is toward punitive approaches that are more often counterproductive of crime control, and expensive in monetary and social costs. This may result from cultural factors. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 45 (2003). At least two events have generated or initiated progressive reforms. In 1931, the first national criminal justice commission, the Wickersham Commission, published a report on police brutality in obtaining confessions. It apparently shocked the public and was a turning point in the long road to replacing physically coercive police interrogations with psychological techniques of interrogation. See ZECHARIAH CHAFEE, JR. ET AL., *THE THIRD DEGREE: REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT* (1931). See also RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 82–85 (2008). A wider ranging set of events were the concomitant concerns with crime rates and police brutality in the 1960s that raised criminal justice to a major policy concern. This coincided with the second national crime commission, the President's Commission on Law Enforcement and Administration of Justice, and the establishment of a justice system research arm in the Justice Department, which played a significant role in the professionalization of criminal justice, especially the police. See SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 202 (2d ed. 1998).

<sup>35</sup> See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 *TEX. TECH L. REV.* 133, 139 (2008). Activists tend to be impatient with the pace of reform. According to Jones, there are four kinds of perspectives and actors in public policy work: (1) the "rationalist" style of *planners* who value methods, discoverable goals, take a comprehensive style, and often fail to acknowledge the limits of rationality; (2) the "technician" role of the *experts*, who value training, have explicit styles of work, work within goals set by others, and generally have a narrow view of their roles; (3) "incrementalists," whether elected officials or high agency personnel, who act in the role of *politicians*, value the status quo, respond to goals set by new demands, have bargaining styles, and are conservative regarding change; and (4) the "reformists," including *citizen lobbyists*, who value change, whose goals are set by substantive concerns, who take an activist style, and who may be unrealistic in their demands. CHARLES O. JONES, *AN INTRODUCTION TO THE STUDY OF PUBLIC POLICY* 30–32 (3d ed. 1984). Innocence projects are somewhat unusual as social movements in that their chief actors, as experienced lawyers, combine activists' values with a rationalist mindset that is essential to the successful practice of law.

scale innovations without government ratification and funding.<sup>36</sup> Reform actors, who wish to stimulate change, must enter into the complexities of public policymaking, which inevitably involves competing with many astute, well-financed, and well-connected competitors for scarce public resources. Even with a compelling innocence message, agency leaders, legislators, and other policymakers have just so much time and resources with which to address the concerns of innocence activists. In our democratic governing system of incrementalism and preferential pluralism, change does not come easily.<sup>37</sup> Creating change within police departments raises all of the challenges and constraints that confront private as well as public bureaucracies.<sup>38</sup> Policy change in prosecutors' offices is complicated by their political nature.<sup>39</sup> Reform in state judicial systems requires leadership roles by supreme courts and consensus, which may be made difficult by the growing politicization of some courts.<sup>40</sup> All criminal justice system change is confounded by the multiplicity of agencies, and the problems flowing from government fragmentation.<sup>41</sup>

This negative view can be balanced by some positive themes. National professional organizations have promulgated research and standards that promote more professional, effective, and fair procedures. The profession of court administration, dating back only to the 1970s, has brought a measure of rational administration and planning to what is essentially a medieval institution.<sup>42</sup> Since the 1970s, the police executive has gone from a seat-of-the-pants political patronage post in many jurisdictions, to a university-

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<sup>36</sup> This opens a large, unavoidable, and endemic question of how to measure the effectiveness of public functions that are not measured by private sector profits or marketing needs.

<sup>37</sup> See JONES, *supra* note 35, at 35–36. An idea of the complexity of policymaking in American government is conveyed by the title of a chapter in JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 122 (1984): “The Policy Primeval Soup.”

<sup>38</sup> See CHRIS AGYRIS, *REASONING, LEARNING, AND ACTION: INDIVIDUAL AND ORGANIZATIONAL* 21–26 (1982). The literature on organizational change is monumental. For a recent book on justice system problems with a theme that the justice system needs to adopt organizational understandings and approaches, see AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

<sup>39</sup> Ric Simmons, *Elections of Local Prosecutors*, in *THE E-BOOK ON ELECTION LAW*, [http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections\\_prosecutors.html](http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections_prosecutors.html) (last visited Mar. 20, 2011).

<sup>40</sup> Maimon Schwarzschild, *Courts of Politics or Courts of Justice?*, *RIGHT COAST* (Jan. 13, 2007), [http://rightcoast.typepad.com/rightcoast/2007/01/courts\\_of\\_polit.html](http://rightcoast.typepad.com/rightcoast/2007/01/courts_of_polit.html).

<sup>41</sup> See FRANK R. BAUMGARTNER & BRYAN D. JONES, *Chapter 11: Federalism as a System of Policy Venues*, in *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 216, 230–31 (2d ed. 2009).

<sup>42</sup> See Clifford P. Kirsch, *A History of Court Administration—The American Experience*, 55 *JUDICATURE* 329, 331 (1972).

educated, professionally-trained, and managerially-oriented professional.<sup>43</sup> These kinds of changes establish a substrate of professionalism that makes it possible for agencies to adopt innocence reforms when it suits their goals, fits within their budgets, and appeals to their ideals of fairness.

Other reasons why innocence reforms are slow to advance or limited in scope are grounded in the specific concerns and cultures of police, prosecution, and courts. Although crime detection, prosecution, and adjudication capture the public imagination as the central function of criminal justice, it is worth recalling that police agencies devote more staff and energies to public safety and crime prevention.<sup>44</sup> Crime detection remains an important function, but it is one of several that police departments and their managers have to handle. Policing research has been more oriented to community policing, the role of local police in immigration and terror enforcement, and targeted crime detection, like hot-spot policing, than on the detective function generally.<sup>45</sup> Lower interest in police investigation may have led to complacency about routine errors. As always, the lack of funding and detective case pressures have created disincentives to maintaining the highest professional investigation standards. Prosecution, the only agency which is almost entirely devoted to the crime detection-prosecution-adjudication function, filters reforms through the adversarial culture of winning or losing trials. Any reform that might lower conviction rates is automatically suspect.<sup>46</sup> The world of indigent defense is in a long-running budgetary crisis that undermines effective defense.<sup>47</sup> Courts are inherently conservative about adopting procedural changes. Sensible changes, like allowing jurors to take notes—which has been known, studied, and scientifically validated for decades<sup>48</sup>—was still being adopted in courts in the late

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<sup>43</sup> See *Police: Organization and Management—Managing Police Organizations*, NET INDUSTRIES, <http://law.jrank.org/pages/1670/Police-Organization-Management-Managing-police-organizations.html> (last visited Mar. 20, 2011).

<sup>44</sup> A brief overview of recent changes and concerns in policing focuses on crime prevention and public safety, and barely mentions the detection of criminal perpetrators. DAVID A. BAYLEY & CHRISTINE NIXON, *THE CHANGING ENVIRONMENT FOR POLICING, 1985–2008* 2 (2010), available at <http://www.ncjrs.gov/pdffiles1/nij/ncj230576.pdf>.

<sup>45</sup> *Id.* at 3–4, 7–8.

<sup>46</sup> See DOYLE, *supra* note 5, at 6.

<sup>47</sup> AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *HASTINGS L.J.* 1031, 1045–46 (2006); Bach, *supra* note 38, at 28.

<sup>48</sup> See, e.g., David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 *L. & HUM.*

2000s, and only when local judges had personal experiences with the technique that convinced *them* that it would not subvert justice.<sup>49</sup> While a measure of caution and procedural regularity is important in adopting procedural or structural changes, the slow pace of the adoption of this one reform speaks to the radical fragmentation of the American justice system, the hit-or-miss nature of continuing judicial education, and the imperial (and often imperious) posture of judges.

At this stage of the innocence movement, the IJM of wrongful convictions has two additional benefits. First, it offers a more complex, complete, and robust view of the kinds of criminal justice reforms that are emerging out of the innocence paradigm. Second, by exposing a few criminal justice areas overlooked by innocence activists whose frame of reference is the innocence paradigm, like the prison conditions of innocent prisoners, it may harness the energy of the innocence movement to shape reforms that could help make American criminal justice more rational and humane.

## II. TO THE INNOCENCE PARADIGM

### A. *Before Innocence*

A criminal justice policy perspective on wrongful convictions, concerned with the proper functioning of the investigation-prosecution-adjudication function, provides a somewhat different slant on how justice system errors are viewed compared to most innocence-oriented research. For example, Richard Leo has ably documented and analyzed the pre-1990 wrongful conviction literature,<sup>50</sup> identifying Edwin Borchard's book as the first major attempt to firmly establish that wrongful convictions routinely occur, and link them to various "causes."<sup>51</sup> "[D]iagnostic and reform-minded books . . . motivated by moral outrage," following Borchard's lead, tended to be duplicative.<sup>52</sup> Other scholars

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BEHAV., 53, 59–60 (1994).

<sup>49</sup> Michael F. McKeon, *How Experience Changed My Practice on Juror Note Taking*, DAILY REC. (Rochester, N.Y.), Apr. 29, 2005, available at [http://www.nyjuryinnovations.org/materials/Hon.\\_Michael%20McKeon,\\_How\\_Experience\\_Changed\\_My\\_Practice\\_on\\_Juror\\_Note-Taking.pdf](http://www.nyjuryinnovations.org/materials/Hon._Michael%20McKeon,_How_Experience_Changed_My_Practice_on_Juror_Note-Taking.pdf); Peter Vaira, *Juror Note-Taking: Courts Weigh Benefits and Concerns*, LEGAL INTELLIGENCER, July 13, 2010 ("Note-taking by jurors, similar to permitting jurors to ask questions, once was generally discouraged but it is now becoming widely accepted.").

<sup>50</sup> See generally Leo, *supra* note 2.

<sup>51</sup> *Id.* at 203.

<sup>52</sup> *Id.* Following in Borchard's footsteps, some authors also included the noted jurist Jerome Frank and his daughter, and Erle Stanley Gardiner, the famed mystery writer and

identified Borchard's main policy prescription of enacting state compensation for the wrongly convicted.<sup>53</sup> Other wrongful conviction articles ritually cite Borchard, and quickly pass over this early work with an obligatory nod so as to move on with the urgent job of exploring problems that need fixing. A concern with the policy *process*, however, leads to a more extensive concern with early reform efforts. It is curious from this perspective that over a half-century of exposés about wrongful conviction, from 1930 to 1990, stimulated very little policy activity. An exploration of Borchard's papers in the Yale archives has uncovered a trove of sources, demonstrating that he was a one-man policy juggernaut whose lobbying led to the passage of the federal compensation act in 1938.<sup>54</sup> But aside from this lone effort, American policy in that era is devoid of advances designed to reduce justice errors.<sup>55</sup> There is something to be learned from the dog that did not bark.

This lack of American reform legislation contrasts sharply with England, where, throughout the twentieth century, "the history of the criminal justice system [was] peppered with high profile media campaigns for alleged victims of wrongful convictions who were believed to be innocent, which have helped to shape some of the most significant changes to the structures that govern how the system operates."<sup>56</sup> The various reforms, stimulated in part by

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creator of the fictional defense lawyer Perry Mason. See generally ERLE STANLEY GARDNER, *THE COURT OF LAST RESORT* (1952); JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957).

<sup>53</sup> Borchard advocated this approach in *Convicting the Innocent: Errors of Criminal Justice*, which was preceded two decades earlier by his comparative legal analysis with the same argument, and he was still at it a decade after his book was published. BORCHARD, *supra* note 19, at xxiv; Edwin Montefiore Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. CRIM. L. & CRIMINOLOGY 684, 705 (1913); Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 202 (1941); see also John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property,"* 59 HASTINGS L.J. 515, 538 (2008); Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 233 (2008).

<sup>54</sup> I have collected materials from the Borchard papers at Yale University and plan to write on the subject.

<sup>55</sup> Aside from its eyewitness rulings, the Warren Court's criminal procedure jurisprudence did not place innocence at its core. See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609, 615–16 (2005); see also Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate Over Capital Punishment in the United States*, 34 L. & SOC. INQUIRY 603, 608 (2009); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1418 n.222 (1991) (citing Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986* 143, 147 (Herman Schwartz ed., 1987)).

<sup>56</sup> Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, in *THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT?* 17 (2010).

wrongful conviction stories, included: establishing a Court of Criminal Appeals with power to reverse convictions on the grounds of a miscarriage of justice in 1907; the first step toward permanently abolishing the death penalty in 1965; a 1985 statute that required the videotaping of entire interrogations; and establishing the Criminal Cases Review Commission, an independent, quasi-governmental body funded and staffed to review cases of excessive sentences, convictions on legally inappropriate legal grounds, and factually wrongful convictions in 1996.<sup>57</sup> Despite what seems like a cornucopia of progressive criminal justice legislation to an American reader, especially abolishing the death penalty,<sup>58</sup> Michael Naughton viewed this critically. He criticized the United Kingdom for responding to narrow issues rather than to the “general issue of miscarriages of justice.”<sup>59</sup> The different policy responses to wrongful convictions in the US and the UK call for greater analysis, especially whether differences in the political structures and cultures of these English-speaking countries with common law justice systems can shed light on their approaches to justice policymaking. Such analysis can shed light not only on why wrongful conviction reform was not part of the American socio-political landscape before 1990, but can also create a better understanding of why innocence reform has achieved a relatively prominent status since that time.

In the United States, a turn in thinking and action about actual innocence occurred around 1990. A deeper analysis of what happened in the last two decades provides the basis for appreciating the IJM of wrongful conviction.

## *B. Innocence Comes of Age*

### 1. Beginnings: The 1980s

In 1990, very few Americans thought of wrongful convictions as a problem. Most would have said that criminal justice was deficient

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<sup>57</sup> NAUGHTON, *supra* note 6, at 80.

<sup>58</sup> The death penalty in America taps into such profound cultural and ideological roots that it has been partly immune from the abolitionist trend among liberal democracies. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 148–49 (1986); see also FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 17–18 (2003). There is evidence that public opinion and action has responded to wrongful capital conviction. See FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 197–98 (2008).

<sup>59</sup> NAUGHTON, *supra* note 6, at 80.

in not catching, convicting, imprisoning, and executing enough criminals.<sup>60</sup> A handful of scholars and writers had in previous decades suggested that wrongful convictions might be a systemic problem calling for reform.<sup>61</sup> Aside from these, a few significant studies and events occurring in the 1980s laid a foundation for changes to come.

An article about the death penalty, published in 1987 in a prestigious law journal and noticed within the world of law professors and anti-death penalty activists, estimated that three hundred and fifty innocent Americans were convicted of capital or potentially capital cases between 1900 and 1985, and twenty-three were executed.<sup>62</sup> From the imperial center of the American legal establishment, Edwin Meese III, President Reagan's attorney general, dispatched two lieutenants to snuff out this minor rebellion against the legal orthodoxy of a nearly perfect criminal justice system.<sup>63</sup> A ripple of interest in the legal community did not dent the world of popular and political opinion, as the capital punishment train rolled on into the 1990s with increasing numbers of death sentences, executions, and laws designed to speed execution.<sup>64</sup> A criminological survey of state attorneys general and Ohio justice officials and defense lawyers, whose opinions suggested that as many as 6000 innocent prisoners may be incarcerated every year for all felonies, apparently made less of a stir in the social science community than did the death penalty study among legal

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<sup>60</sup> See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237–38 (2006).

<sup>61</sup> See, e.g., EDWARD D. RADIN, *THE INNOCENTS* 14 (1964) (recounting a number of wrongful convictions); see also WILLARD J. LASSERS, *SCAPEGOAT JUSTICE: LLOYD MILLER AND THE FAILURE OF THE AMERICAN LEGAL SYSTEM* (1973) (providing an account of Lloyd Miller's wrongful conviction written by his appellate attorney); JOAN BARTHEL, *A DEATH IN CANAAN* (1976) (journalist's account of Peter Reilly's wrongful conviction, which drew the attention of playwright Arthur Miller and other notables); CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 17–18 (2d ed. 1981) (discussing that the execution of innocent defendants is a possibility).

<sup>62</sup> Bedau & Radelet, *supra* note 19, at 35–36, 73. Hugo Bedau is a philosopher and Michael Radelet is a sociologist. Twenty-two were executed between 1905 and 1960, and one was convicted in 1974 and executed in 1984, under state procedures found constitutional in *Proffitt v. Florida*, 428 U.S. 242 (1976), a companion case to *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>63</sup> Stephen J. Markman & Paul G. Cassell, Commentary, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988) (stating that the risk of executing an innocent person "is too small to be a significant factor in the debate over the death penalty"). The original authors replied. Hugo A. Bedau & Michael Radelet, Commentary, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

<sup>64</sup> See Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 157–59 (1999).

scholars.<sup>65</sup> At the same time, a law professor, alert to then recent trends in psychological eyewitness research, examined one hundred and thirty-six known misidentifications, of which over seventy percent (ninety-seven) resulted in wrongful convictions.<sup>66</sup> He believed it was paradoxical that a small number of wrongful convictions were detected when the chief evidence in many cases was eyewitness identification, known to be a “notoriously unreliable type of evidence.”<sup>67</sup>

Also below the surface of popular notice, a critical component of what would become the innocence movement had gathered strength by 1990. As early as 1932, mistaken identification was known to be a leading factor in wrongful convictions.<sup>68</sup> Earlier in the century, a leading experimental psychologist correctly established that human perception and recall is highly variable, that witness confidence exceeds accuracy, and that suggestiveness is an important key to eyewitness error.<sup>69</sup> By the 1960s, the legal and psychological communities had a rather sophisticated understanding of these matters, but neither could provide effective and workable solutions.<sup>70</sup> Cross-examination, the traditional adversary “engine” to ascertain the truth, was a crude sieve, and the novel, liberal legal reform of injecting defense attorneys into the lineup room to report on gross irregularities did little to prevent errors in routine lineup practice.<sup>71</sup> Psychologist expert witnesses, who could testify that

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<sup>65</sup> Huff et al., *supra* note 29, at 521–23 (justice officials’ survey suggesting that 0.005 (i.e., 0.5%) of convicted felons may be actually innocent, which extrapolates to nearly 6000 per year).

<sup>66</sup> See Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 413 (1987). A close examination of the cases generated a detailed understanding of how wrongful identifications occurred, and how such cases were processed and exonerated. The author also specified sound prescriptions for reducing errors based on knowledge then available.

<sup>67</sup> *Id.* at 396. The studies discussed at this point: Bedau & Radelet, *supra* note 19, Huff et al., *supra* note 29, and Gross, *supra* note 66, are discussed at greater length (or to different effect) in Zalman, *supra* note 30.

<sup>68</sup> BORCHARD, *supra* note 19, at xiii (finding that mistaken identification existed in twenty-nine out of sixty-five cases).

<sup>69</sup> See HUGO MÜNSTERBERG, ON THE WITNESS STAND 18–19 (1923). For a zesty and revealing analysis of Münsterberg’s influence and limits, see DOYLE, *supra* note 5, at 9–34.

<sup>70</sup> See JAMES MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 158–59 (2d ed. 1980); see DOYLE, *supra* note 5, at 49–81, 152.

<sup>71</sup> This innovation, adopted by the United States Supreme Court in *United States v. Wade*, 388 U.S. 218 (1967), at the behest of defense lawyers pushing the outer envelope of the liberal spirit of the 1960s, caused revulsion among more conservative justices who neutered the reform in the 1970s in *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel limited to pre-indictment lineup), and *Manson v. Brathwaite*, 432 U.S. 98 (1977) (suggestive show-up evidence admissible if procedure used was fair). See FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT’S IMPACT ON CRIMINAL LAW 221–46 (1970); see also Jules

eyewitnesses are often inaccurate, could not provide guides for jurors in assessing the credibility of specific eyewitnesses. Such testimony could undermine valid prosecutions. The critical turn came when a group of cognitive psychologists, led by Elizabeth Loftus, focused their studies not on holistic recreations of crime scenes observed by real witnesses, but on scientific laboratory experiments that isolated and measured the effect of factors, like the presence of a weapon, on eyewitness accuracy.<sup>72</sup> By 1979, enough scientific research existed for Loftus to publish a still-foundational book on the subject.<sup>73</sup> And by 1990, a generation of psychologists, now led by Gary Wells, had published articles based on thousands of experiments that were ready to point the way to more accurate identification procedures in police stations.<sup>74</sup> A 1989 survey of sixty-three experts showed the growing salience of eyewitness research in the law: “Before 1980, trial judges’ decisions to exclude eyewitness experts nearly always were upheld. Since then, however, the research literature has grown at a rapid rate, and an increasing number of appellate courts have held that such experts should be allowed to testify.”<sup>75</sup>

Some developments were more visible to the public. Florida’s governor appointed Janet Reno, then Dade County State Attorney, as a special prosecutor to investigate the allegation that James Richardson, sentenced to death for poisoning seven of his children in 1967, was innocent.<sup>76</sup> Reno’s investigation concluded that DeSoto County’s prosecutor withheld crucial “exculpatory evidence” that

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Epstein, *The Great Engine That Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 760 (2007) (finding cross-examination is not a more effective tool for testing eyewitness reliability and courts are slow to adopt eyewitness reforms based on scientific findings); Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 113 (2006) (arguing that the *Manson* rule undermines reliability).

<sup>72</sup> DOYLE, *supra* note 5, at 93–95; Elizabeth F. Loftus et al., *Some Facts About “Weapon Focus,”* 11 L. & HUM. BEHAV. 55, 61 (1987) (describing how an experiment showed that eye movement is drawn to the presence of a weapon and there is less memory of a mock crime when a weapon is present).

<sup>73</sup> ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979). In an editorial with a jocular title, the editor of *Law and Human Behavior* reported in 1986 that the journal received more papers on the subject of eyewitnesses than any other subject. Michael J. Saks, *The Law Does Not Live by Eyewitness Testimony Alone*, 10 L. HUM. BEHAV. 279, 279 (1986).

<sup>74</sup> See DOYLE, *supra* note 5, at 163–64.

<sup>75</sup> Saul M. Kassir et al., *The “General Acceptance” of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOLOGIST 1089, 1090 (1989).

<sup>76</sup> PROF’L STAFF OF THE JUDICIARY COMM., FLA. SENATE BILL ANALYSIS & FISCAL IMPACT STATEMENT, SB 654, at 6 (2010).

undermined a motive for the crime and pointed to the real killer.<sup>77</sup> The case was tainted by the use of patently unreliable jailhouse snitches, who were pressured into giving false testimony, and by other evidentiary problems.<sup>78</sup> Reno, convinced of Richardson's innocence, moved that the case be dismissed rather than commuted.<sup>79</sup> The dismissal made the national news.<sup>80</sup> Reno would later say that freeing James Richardson was "one of the greatest moments in her life."<sup>81</sup>

Another development that was closely tracked by the criminal law and forensic science communities was a major challenge to the admissibility of DNA profiling, for criminal forensic purposes, by two obscure Bronx criminal defenders, Peter Neufeld and Barry Scheck.<sup>82</sup> In a twelve-week pretrial hearing in Bronx Supreme Court (a felony trial court), they drew on the services of high caliber scientific witnesses to seriously challenge methods used for forensic testing, and the quality of the actual tests performed for the prosecution.<sup>83</sup> In *People v. Castro*, the judge ruled that basic DNA science was sound, and that the methods used by the company for the prosecution were capable of producing reliable results.<sup>84</sup> The judge also ruled, based in part on an extraordinary out-of-court meeting of the prosecution and defense experts, that in this specific case the testing was unreliable.<sup>85</sup> The result was a partial victory for the defense. While not eliminating the use of DNA profiling, it provided defense counsel with a potential challenge to prosecution-

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<sup>77</sup> *Id.*

<sup>78</sup> See *Poisoning Conviction Overturned*, CHI. TRIB., Apr. 26, 1989.

<sup>79</sup> See Lucy Morgan & Karl Vick, *Clemency Hearing Sought in 21-Year-Old Murder Case*, ST. PETERSBURG TIMES (Fla.), Feb. 2, 1989, at 1.B; see also Lucy Morgan, *Poisoning Case Flawed, Attorney Finds*, ST. PETERSBURG TIMES (Fla.), Mar. 30, 1989, at 1.B; Karl Vick & Jeffrey Good, *Convicted Killer Gets New Chance*, ST. PETERSBURG TIMES (Fla.), Apr. 1, 1989, at 1.A; Karl Vick, *Richardson Must Stay in Jail for Now*, ST. PETERSBURG TIMES (Fla.), Apr. 6, 1989, at 6.B; Karl Vick, *Prosecutor Strongly Agrees Conviction Should Be Erased*, ST. PETERSBURG TIMES (Fla.), Apr. 12, 1989, at 2.B; Karl Vick, *Prisoner in Poisoning Case Freed; Father Convicted in 1968 "Did Not Receive Fair Trial,"* ST. PETERSBURG TIMES (Fla.), Apr. 26, 1989, at 1.A.

<sup>80</sup> *Convict Freed in 1967 Child-Poisoning Case*, N.Y. TIMES, Apr. 26, 1989, at A19; *Father in Prison for Poisonings Is Freed*, L.A. TIMES, Apr. 26, 1989, at 16; *Poisoning Conviction Overturned*, CHI. TRIB., Apr. 26, 1989, at 12; *Man Freed after 21 Years Celebrates: "Free at Last,"* ST. LOUIS POST-DISPATCH, Apr. 27, 1989, at 11A.

<sup>81</sup> Victor Greto, *NSU'S "Life 101" Presents Personal View of Reno*, SUN SENTINEL (Fla.), Nov. 28, 2001; see DOYLE, *supra* note 5, at 122 (noting that Reno did not engage in political grandstanding).

<sup>82</sup> *People v. Castro*, 545 N.Y.S.2d 985, 985 (Sup. Ct. 1989).

<sup>83</sup> *Id.* at 986.

<sup>84</sup> *Id.* at 999.

<sup>85</sup> *Id.*

introduced DNA evidence, by showing that laboratories failed to perform at the high standards required for results to be reliable. An important study concluded that the “*Castro* case received a tremendous amount of publicity and put the issue of the validity and reliability of DNA typing in the national spotlight.”<sup>86</sup> This may have been so, but it was viewed as a green light for prosecution use of DNA profiling, with some scope for defense challenge, but not as a basis for exonerations.

As of 1990, these occurrences and developments remained unrelated and scattered. They did not form an innocence consciousness in society or even in the legal community.<sup>87</sup> Yet, by 2000, such a consciousness existed among significant policy-literate segments of the population. In 2000, the justice community was poised to advance an innocence-related program of reforms.<sup>88</sup> In terms of public policy studies, wrongful conviction had gained a place on the public agenda by 2000 and was ready to advance to the governmental agenda.<sup>89</sup>

Most commentators see DNA exonerations as the key factor that led to the rise of the innocence movement and of innocence consciousness.<sup>90</sup> While the importance of DNA profiling cannot be

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<sup>86</sup> ARONSON, *supra* note 5, at 76.

<sup>87</sup> See Medwed, *supra* note 2, at 1549–51. “Innocentrism” is a reflection of innocence consciousness.

<sup>88</sup> Examples of reforms include, among others: (1) passage of some legislation as a result of recommendations of the Illinois Governor’s Commission on Capital Punishment (see STATE OF ILLINOIS, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf); Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 408 (2005)); (2) passage of the Innocence Protection Act of 2004, Title IV of the larger Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3600(a)(3)(A)(i) (2006)) (see Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 CHAMPION 28, 28 (Mar. 2005)); (3) a package of Ohio legislation in 2010, Senate Bill 77, including greater access to DNA testing (see Janice Morse, *Ohio’s New Criminal Court Rules Kick In*, CINCINNATI INQUIRER (July 1, 2010)). These reforms were the products of different kinds of political activity, and were more limited in practice than appeared from public pronouncements. For more information, a manuscript is available from the author.

<sup>89</sup> Zalman, *supra* note 4, at 172–73.

<sup>90</sup> An exemplary statement: “But by 2000, the climate began to change. The advent of DNA technology demonstrated with scientific precision the fallibility of the criminal justice system.” Weich, *supra* note 88. For the view that DNA profiling is the key cause to change, see Leo, *supra* note 2, at 205–06; see also Steven B. Duke et al., *A Picture’s Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 3 (2007); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 686–87 (2005); Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 439 (2007); Rosen, *supra* note 60, at 238–39. For the view that DNA testing is one factor among others in generating an innocence consciousness, see BAUMGARTNER ET AL., *supra* note 58, at 5, 19.

underestimated, especially in shattering the complacency of justice system defenders, a focus on DNA exonerations alone fails to account for other factors, events, and personalities that helped form contemporary innocence consciousness. To date, most sketches of the innocence movement's rise unveil the rabbit (innocence consciousness) from the magician's hat (DNA exonerations), with an air of inevitability. Perhaps so. I suggest, however, that the way in which we understand DNA exonerations is a socially constructed idea. For example, most commentaries refer to Gary Dotson's 1989 DNA exoneration as the origin of innocence consciousness. There were two DNA exonerations that year: David Vasquez and Dotson.<sup>91</sup> Rob Warden counted Vasquez as the first exoneree, and suggested that his case was ignored by the national media because of the prosecution media bias regnant at that time.<sup>92</sup> Although a DNA test did exonerate David Vasquez, the focus of police, prosecutors, and the public was on the use of DNA, a growing phenomenon by 1989, to convict the vicious serial rapist-murderer for whose crimes the hapless Vasquez was sentenced.<sup>93</sup> In fact, the case had to be correctly solved before any consideration would be given to exonerating Vasquez, and it was solved not by a DNA match, but by a detective's recollection, correct as it turned out, of the actual killer.<sup>94</sup> Only after this successful application of a detective's "shoe leather" and intuition was DNA profiling used to confirm his investigation of the circumstances surrounding the crimes.<sup>95</sup>

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<sup>91</sup> *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Mar. 20, 2011) (sorted by year of exoneration).

<sup>92</sup> Warden, *supra* note 88, at 396; see Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 803-04 (2002) (describing the shift in media coverage favoring defendants as a result of widespread exonerations).

<sup>93</sup> PAUL MONES, *STALKING JUSTICE* (1995) is a well-written and researched "true crime" analysis. The frontcover blurb, announcing that *Stalking Justice* is "The Dramatic True Story of the Detective Who First Used DNA Testing to Catch a Serial Killer," supports the notion that DNA exoneration was not yet a media staple.

<sup>94</sup> See generally *id.*

<sup>95</sup> *Id.* at 295-96. A LexisNexis search (Library: News & Business > Combined Sources > Major Newspapers; search terms: david w/2 vasquez and date = 1989) produced only nine items, and all but one (a snippet in *USA Today* about a bill to compensate Vasquez) appeared in the *Washington Post*, which was essentially a local newspaper for the Arlington, Virginia story. The first story by Dana Priest mentioned DNA only once, as evidence linking Timothy Spencer, the real killer, to one of the victims. Dana Priest, *Va. Man Pardoned After Five Years in Prison; Baliles Acts After Evidence Links Murder to Arlington Killer*, WASH. POST, Jan. 5, 1989, at A1. A letter by a Legal Aid & Defender Association director opposing the death penalty did not mention DNA. Mary Broderick, Letter to the Editor, *The Death Penalty: Not in the U.S.A.*, WASH. POST, Jan. 12, 1989, at A18. Nor did an anti-death penalty opinion article by liberal columnist Colman McCarthy, although he did refer to the study by Bedau and Radelet, *supra* note 19. Colman McCarthy, *The Victims of Death Row*, WASH.

The general public and most reporters were probably confused by the implications of DNA exonerations and needed time to assimilate the phenomenon.<sup>96</sup> Gary Dotson's exoneration might have eluded public notice in 1989 had the bizarre case not already become a cause célèbre. Dotson was convicted of rape in 1977 on the testimony of sixteen-year-old Cathleen Webb, who presented evidence of a violent rape to the police, provided information for an artist's sketch, and picked Dotson out of a police mug book.<sup>97</sup> Dotson's alibi was disbelieved.<sup>98</sup> A serologist failed to properly testify that Webb's vaginal discharges expressing B-type blood could have masked the presence of any semen deposited by a B-secretor, which included Dotson.<sup>99</sup> Even worse, the serologist improperly testified and explained away the presence of Type A antigens found in stains on Webb's clothes.<sup>100</sup> The case had already exploded onto the national news scene in 1985 when Webb, then married and named Crowell, recanted out of a deep, religiously-based sense of remorse.<sup>101</sup> Public opinion, fed by a media blitz, strongly supported her recantation. But the experienced trial judge, who thoroughly reviewed the recantation, disbelieved that Webb's injuries were self-inflicted and denied Dotson's request for a new trial, thus reflecting the law's skepticism.<sup>102</sup> The resulting public uproar was so great that Illinois Governor James Thompson conducted a televised

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POST, Jan. 29, 1989, at F2. In three later lengthy reviews of the case by reporter Dana Priest, DNA testing was mentioned only once in passing, and not mentioned in a story about the introduction of a private compensation bill in the Virginia General Assembly. See Dana Priest, *Trickery Can Be Part of Police Arsenal in Investigations, Experts Say*, WASH. POST, July 16, 1989, at A16; see also Dana Priest, *At Each Step, Justice Faltered for Va. Man*, WASH. POST, July 16, 1989, at A1; Dana Priest, *Wrongly Jailed Man Endures Ordeal by Fear*, WASH. POST, July 17, 1989, at A1; Dana Priest, *Va. Senator to Propose Bill To Help Pardoned Prisoner; Compensation Urged for Manassas Man*, WASH. POST, July 23, 1989, at B2.

<sup>96</sup> The true-crime type book about David Vasquez's exoneration focused more on solving the case by the dogged detective work of Joe Horgas, and the early use of DNA to find the actual killer, Timothy Spenser. See MONES, *supra* note 93. The book demonstrates that Horgas's experience and commonsense led him to conclude that Vasquez was innocent.

<sup>97</sup> Edwin Black, *Why Judge Samuels Sent Gary Dotson Back to Prison*, 71 A.B.A. J. 56, 58 (1985).

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

<sup>99</sup> Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 467-68 (1997).

<sup>100</sup> Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 44 (2009).

<sup>101</sup> Black, *supra* note 97, at 56.

<sup>102</sup> *Id.* (close description of recantation hearing); see Jay Sharbutt, *Network TV's Year of the Takeover*, L.A. TIMES, Dec. 31, 1985 (televised encounter of Crowell and Dotson was notable, if risible, TV event of 1985). A Lexis search of the "News, All (English, Full Text)" Library for the search terms "(Crowell or Webb) and Dotson and date = 1985" resulted in 432 hits.

clemency hearing before an audience of five hundred.<sup>103</sup> Although saying he believed that Dotson raped Webb, he commuted the sentence anyway.<sup>104</sup> In 1987, Dotson, an alcoholic, was reimprisoned as a parole violator for a relatively minor domestic battery, which set the stage for a DNA-testing request.<sup>105</sup> A 1988 test was deemed inclusive, but another was finally accepted by the state.<sup>106</sup> Dotson was released in 1989 in the glare of national media publicity.<sup>107</sup>

DNA testing by prosecutors was increasing by 1989, and so it seems inevitable that testing would be used to exonerate prisoners in the more contentious and contested post-conviction arena. It is possible, however, that without the fact that the Dotson-Crowell Webb case was *already* a media sensation, Dotson's DNA exoneration would not be seen as a turning point and nationally reported.<sup>108</sup> Indeed, Rob Warden speculated that "Dotson's ultimate definitive exoneration by DNA was brushed off by prosecutors and major media, with the exception of the *Los Angeles Times*, as nothing more than the dropping of charges in a case where guilt could not be proven beyond a reasonable doubt."<sup>109</sup> The Dotson vindication alone did not raise the profile of DNA as an exoneration tool. A more plausible thesis is that a conjunction of the events of the 1980s paved the way to the innocence consciousness that retrospectively elevated Dotson's exoneration to landmark status.

## 2. Convergence: The 1990s

In the 1990s, a series of events brought the actors and ideas of the 1980s together in a convergence that laid the foundation for the innocence movement as we know it. Janet Reno became the

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<sup>103</sup> See E. R. Shipp, *Governor of Illinois Gets a Double Test of His Political Mettle*, N.Y. TIMES, May 20, 1985, <http://www.nytimes.com/1985/05/20/us/governor-of-illinois-gets-a-double-test-of-his-political-mettle.html>.

<sup>104</sup> Julie Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 70 (1987) (discussing reasons for commutation, such as the fact that the case cast a cloud over the justice system and that Dotson served enough time); Mike Royko, *Dotson a Loser, But Is He a Criminal?*, CHI. TRIB., Dec. 29, 1987, at 3.

<sup>105</sup> EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 52 (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *Prosecutors Drop Charges of Rape 4 Years After Accuser Recanted*, N.Y. TIMES, Aug. 15, 1989, at A14 (reporting the evolution of the Dotson-Crowell Webb case).

<sup>109</sup> Warden, *supra* note 88, at 397 (footnote omitted).

accidental attorney general after President Clinton's first two women nominees were disqualified by embarrassing immigration law violations in hiring nannies.<sup>110</sup> A republican attorney general might have ignored DNA exonerations. But even another democratic attorney general may not have reacted to the trickle of exoneration cases appearing in the newspapers in the same way as Janet Reno, given her experience in the Richardson case.<sup>111</sup> In James Doyle's almost novelistic account, Reno expressed her concern about DNA exonerations with National Institute of Justice Director Jeremy Travis, who in turn engaged a research group to analyze the first twenty-eight DNA exonerations.<sup>112</sup> *Convicted by Juries, Exonerated by Science*, demonstrating faulty eyewitness identification in each of the twenty-eight rape and murder cases described in the report, was obviously designed to be as much a popular policy tract as a scholarly study. Twenty pages of commentary by system professionals—prosecutors, a judge, a police chief, and a forensic science professor—preceded the report's text.<sup>113</sup> The longest commentary, by Peter Neufeld and Barry Scheck, can be viewed as the most public, and perhaps the first clarion call, of an innocence paradigm manifesto: "Postconviction DNA exonerations provide a remarkable opportunity to reexamine, with greater insight than ever before, the strengths and weaknesses of our criminal justice system and how they bear on the all-important question of factual innocence."<sup>114</sup>

Neufeld and Scheck came to the attention of the attorney general as a result of their continuing work as defense lawyers in the ongoing "DNA Wars."<sup>115</sup> The 1989 *Castro* litigation raised their profile as leading defense figures in challenging prosecution use of DNA.<sup>116</sup> In 1991, they were called into a Cleveland, Ohio federal

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<sup>110</sup> Ruth Marcus, *Clinton Nominates Reno at Justice; Clinton Picks Florida Woman to Be Attorney General*, WASH. POST, Feb. 12, 1993, at A1.

<sup>111</sup> See DOYLE, *supra* note 5, at 127–29.

<sup>112</sup> See CONNORS ET AL., *supra* note 105.

<sup>113</sup> The book "quickly became one of the most talked about publications in the criminal justice system. Travis had seen to it that this new 'Green Book,' as it was called, became an event rather than one more list." DOYLE, *supra* note 5, at 129.

<sup>114</sup> Peter Neufeld & Barry Scheck, *Commentary*, in CONNORS ET AL., *supra* note 105, at xxviii. Doyle reviewed their statement to note that they saw the DNA exonerations as raising fundamental issues about the causes of factually erroneous convictions. They also "pried loose from the FBI laboratory, which was doing most of the law enforcement DNA analysis in the country, the fact that in about 25 percent of the FBI comparisons of the DNA of 'prime suspects' submitted by state and local investigations, the prime suspect was *eliminated*." DOYLE, *supra* note 5, at 133.

<sup>115</sup> ARONSON, *supra* note 5, at 141 (citation omitted).

<sup>116</sup> *Id.* at 76.

case that generated a major review of a central issue in forensic DNA: calculating the probability of a random match between a crime scene DNA sample and the suspect's DNA, which relied on abstruse details of population genetics.<sup>117</sup> Given their growing prominence in the defense bar, Neufeld and Scheck "set about bringing together a collection of the nation's top academic researchers" to debate other experts called on by the FBI.<sup>118</sup> Although they lost on the admissibility issue in this case, their expert handling of the issues helped to advance the ultimate resolution of forensic DNA issues, pushed the technical community toward acceptable quality control standards, and did nothing to diminish their standing as defense experts.<sup>119</sup> Indeed, while the general public knew next to nothing about these matters, Neufeld and Scheck's involvement in the O.J. Simpson prosecution, one of the most hyped trials in American history, made them household names.<sup>120</sup> It is worth reflecting that their great institutional innovation, the Innocence Project law student clinic, which focuses on freeing innocent prisoners through DNA testing, flowed not from a priori deductions of a way to attack wrongful convictions, but grew out of their all-consuming experiences in the DNA wars. James Doyle identified the scope of their ambition: "Working with lawyers, law schools, law teachers, and journalists around the country, Neufeld and Scheck began to piece together a network of people and institutions who were prepared to dedicate the time and effort necessary to begin to litigate claims of innocence with the new tool that DNA presented."<sup>121</sup> Several other innocence projects were created in the 1990s, most significantly the Center on Wrongful Convictions at Northwestern Law School in 1998, as the innocence movement was growing.<sup>122</sup>

Janet Reno's initiative did more than link DNA inextricably to the idea of exonerations. The ferment generated by DNA exonerations and *Convicted by Juries, Exonerated by Science* helped bring the eyewitness identification research that began in the 1970s to the forefront of the budding innocence movement. This was due in part to the enterprise of Gary Wells. As a young scholar he

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<sup>117</sup> *Id.* at 124.

<sup>118</sup> *Id.* at 123; *see also id.* at 120–45. The case is *United States v. Yee*, 134 F.R.D. 161 (N.D. Ohio 1991).

<sup>119</sup> ARONSON, *supra* note 5, at 129–130.

<sup>120</sup> *Id.* at 173.

<sup>121</sup> DOYLE, *supra* note 5, at 132.

<sup>122</sup> *See generally* CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Mar. 20, 2011).

generated a powerful way of viewing misidentification as the result of *estimator variables*, or factors of a criminal encounter that cannot be controlled by the criminal justice system, and *system variables*, or lineup factors under police control.<sup>123</sup> This was a core concept around which thousands of research experiments were conducted.<sup>124</sup> Two decades later, as an acknowledged leader of cognitive psychologists studying lineups, he led the effort to publish a group-authored, peer-reviewed scientific review paper summarizing the research to date. It was adopted “as an official Scientific Review Paper of the [American Psychology/Law Society],” a division of the American Psychological Association.<sup>125</sup> More importantly, it was also “a careful political document, which by design offered the criminal justice system a menu limited to four simple, concrete ‘best practices,’ supported by a substantial body of system variable research.”<sup>126</sup> His work came to Reno’s attention and generated an invitation to participate in another Travis-Reno brainstorm, a working group of thirty-four (seventeen police, seven psychologists, six prosecutors, and four defense lawyers) to develop law enforcement guidelines based on psychological findings.<sup>127</sup> The year-long travails and product of this group, told in fascinating detail by member James Doyle, produced a guide (not a “guideline” as a compromise to fractious prosecutors), which, while limited in some respects, generated a tremendous amount of attention in criminal justice.<sup>128</sup>

One of the more curious features of the innocence movement is that, unlike many social movements where ferment from the bottom manages to place a problem on the public agenda, “Janet Reno’s Justice Department helped identify wrongful conviction as a systemic problem and simultaneously put it on the policy agenda by” initiating *Convicted by Juries, Exonerated by Science*, and by convening the eyewitness technical working group enforcement lineups.<sup>129</sup> “The government in a sense ‘primed’ the agenda setting

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<sup>123</sup> Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1546 (1978).

<sup>124</sup> See DOYLE, *supra* note 5, at 152.

<sup>125</sup> Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 603 (1998).

<sup>126</sup> DOYLE, *supra* note 5, at 164.

<sup>127</sup> *Technical Working Group for Eyewitness Evidence: Training Teams*, NAT’L INST. JUSTICE, [http://www.ncjrs.gov/nij/eyewitness/tech\\_working\\_group.html](http://www.ncjrs.gov/nij/eyewitness/tech_working_group.html) (last visited Mar. 20, 2011).

<sup>128</sup> NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* 1 (1999); DOYLE, *supra* note 5, at 185–87.

<sup>129</sup> Zalman, *supra* note 4, at 173.

‘pump.’”<sup>130</sup>

By the late 1990s, the innocence theme was gaining traction in the news and popular media. A comprehensive study of death penalty news frames identified 1992 as the year of the rise of the innocence frame, which has been the dominant motif about death penalty coverage to the present.<sup>131</sup> Before 2000, the Bill Kurtis American Justice series on the A&E Network produced at least four hour-long documentaries on cases of actual innocence.<sup>132</sup> The HBO cult classic, *Paradise Lost: The Child Murders at Robin Hood Hills*, aired in 1996.<sup>133</sup> Ofra Bikel produced the first of a string of highly informative and emotionally powerful PBS Frontline documentaries on innocence in 1997.<sup>134</sup> And around the country, between 1989 and 1999 the news media reported at least 171 *official* exonerations, like that of James Richardson, who were cleared by governors’ pardons and court dismissals on the basis of innocence.<sup>135</sup> Innocence was in the air.

Although many have contributed to generating innocence consciousness, it is widely accepted that Neufeld and Scheck were central to the effort. An appreciation of their contribution includes not only their actions, but the influence of *Actual Innocence*.<sup>136</sup> They brought their litigation skills and experiences to bear at the precise moment that DNA came to the fore as a forensic issue. The challenge they took on, plunging into a forbiddingly recondite science, led to their becoming leading defense experts on DNA. Founding the Innocence Project in 1992 cannot be fully understood in isolation from their intense study of forensic science and interaction with leading scientists in the *Castro*, *Yee*, and *Simpson*

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<sup>130</sup> *Id.*

<sup>131</sup> See BAUMGARTNER ET AL., *supra* note 58, at 149; see Warden, *supra* note 92, at 845.

<sup>132</sup> *American Justice: Presumed Guilty* (A&E television broadcast), available at [http://www.aetv.com/american\\_justice/aj\\_episode\\_guide.jsp?episode=145286](http://www.aetv.com/american_justice/aj_episode_guide.jsp?episode=145286); *American Justice: Framed* (A&E television broadcast), available at [http://www.aetv.com/american\\_justice/aj\\_episode\\_guide.jsp?episode=136607](http://www.aetv.com/american_justice/aj_episode_guide.jsp?episode=136607); *American Justice: False Witness* (A&E television broadcast), available at [http://www.aetv.com/american\\_justice/aj\\_episode\\_guide.jsp?episode=136358](http://www.aetv.com/american_justice/aj_episode_guide.jsp?episode=136358); *American Justice: Justice Denied: The Hurricane Carter Story* (A&E television broadcast), available at [http://www.aetv.com/american\\_justice/aj\\_episode\\_guide.jsp?episode=137921](http://www.aetv.com/american_justice/aj_episode_guide.jsp?episode=137921).

<sup>133</sup> *Paradise Lost: The Child Murders at Robin Hood Hills* (HBO 1996), available at [http://www.berlinger-sinofsky.com/#/berlinger/films/paradise\\_lost\\_the\\_child\\_murders\\_at\\_robin\\_hood\\_hills\\_1996](http://www.berlinger-sinofsky.com/#/berlinger/films/paradise_lost_the_child_murders_at_robin_hood_hills_1996).

<sup>134</sup> *Frontline: Innocence Lost: The Plea*. (PBS television broadcast May 27, 1997).

<sup>135</sup> Gross et al., *supra* note 22, at 527 n.10; see also BAUMGARTNER ET AL., *supra* note 58, at 72–74. Even Clint Eastwood produced an innocence-themed film at this time, although it was critical, and a box-office flop. TRUE CRIME (Warner Brothers, 1999).

<sup>136</sup> For an encomium, see DOYLE, *supra* note 5, at 130–34.

cases.<sup>137</sup> By 1992, they clearly understood the importance of DNA profiling as an exoneration tool. By 1996, their short contribution to the preface of *Convicted by Juries, Exonerated by Science* displayed a wider sense of what was possible through DNA exonerations.<sup>138</sup>

Their vision of the possible was fleshed out four years later in *Actual Innocence*, the foundational document of the innocence paradigm.<sup>139</sup> While the importance of Neufeld and Scheck's work is recognized by many commentaries, they do not quite explain the way in which *Actual Innocence* laid the foundation for the innocence paradigm as a framework for policy research and analysis.<sup>140</sup> To explain its impact and the importance of timing on historical events, we should step back and contrast it with other wrongful conviction

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<sup>137</sup> ARONSON, *supra* note 5, at 195–96 (discussing the founding of the Innocence Project). The Institute for Law and Justice report does not purport to be more than a quick survey, based primarily on press clippings and summary interviews, of postconviction DNA exoneration cases, and it does not undertake any systematic analysis of them. Since we have been, through the Innocence Project at Cardozo Law School, either attorneys of record or assisting counsel in the vast majority of these cases, we have attempted to investigate, with care and in detail, some of the factors that have led to the conviction of the innocent.

Neufeld & Scheck, *supra* note 114, at xxix–xxx.

<sup>138</sup> The contrasting attitudes of prosecutors who commented are enlightening. At that time, many prosecutors around the country fought tooth and nail to prevent DNA testing to exonerate prisoners, while eagerly using DNA profiles to convict. In their comments, San Diego County Deputy District Attorneys George W. Clarke and Catherine Stephenson displayed an ambivalent attitude by admitting that pretrial DNA testing excluded one-quarter of all sexual assault charges (a fact that Doyle, *see supra*, note 5, at 133, claims was unearthed by Scheck & Neufeld, *supra* note 114), while hinting that the lack of DNA evidence in a rape case does not necessarily exonerate a suspect (the so-called “unindicted co-ejaculator” specter). George W. Clarke & Catherine Stephenson, *Commentary, in* CONNORS ET AL., *supra* note 105, at xxix–xxx. The comment by Rockne Harmon, Senior Deputy District Attorney of Alameda County, is a study in damage control, noting that DNA tests “occasionally exonerate a suspect or suspects,” and that such instances show that “both the science and the legal system worked in these cases!” Rockne Harmon, *Commentary, in* CONNORS ET AL., *supra* note 105, at xix–xx. Assistant District Attorney Clarke later went on to spearhead a prosecutorial initiative to do DNA testing of prisoners prosecuted by his office, GEORGE “WOODY” CLARKE, JUSTICE AND SCIENCE: TRIALS AND TRIUMPHS OF DNA EVIDENCE (2007), while Harmon was described as the most aggressive prosecutor defending the use of DNA to prosecute, and publicly criticized defense expert witnesses for accepting fees to testify. ARONSON, *supra* note 5, at 142–43, 168. Nevertheless, these opponents appeared to have become friends after the O.J. Simpson trial, as Neufeld and Scheck came to rely on DNA testing in the Innocence Project as “a form of proof that was so credible and so convincing that prosecutors and law enforcement agents would be unable to disagree with them.” *Id.* at 195.

<sup>139</sup> See SCHECK ET AL., *supra* note 10.

<sup>140</sup> John B. Gould & Richard A. Leo, *One-Hundred Years of Getting It Wrong? Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 823, 830 (2010) (“The advent of DNA testing has not only generated more attention for, and research about, wrongful convictions, but it also seems to have pushed academicians from “pure” research to research/advocacy. Here, the influence of Barry Scheck and Peter Neufeld cannot be underestimated. Two former Legal Aid attorneys, the pair founded the Innocence Project in 1992 at Benjamin N. Cardozo School of Law.”).

books that appeared at about the same time. Richard Leo usefully categorizes three genres of wrongful conviction literatures from 1932: (1) so called “big-picture books”; (2) the true crime genre—books about a single miscarriage of justice incident written for a general audience; and (3) the specialized literatures of social scientists, including studies of eyewitness misidentification, child suggestibility, and false confessions.<sup>141</sup> The “big-picture books” served the useful function of cataloguing and beginning to analyze miscarriages of justice, and recommending necessary reforms.<sup>142</sup> They had “become the standard reference guides in the field of wrongful conviction.”<sup>143</sup> But they outlived their usefulness, were repetitive, and did not advance a better theoretical understanding of wrongful convictions.<sup>144</sup>

Leo included three books: (1) *Actual Innocence*; (2) *Convicted But Innocent* by social scientists C. Ronald Huff, Arye Rattner, and Edward Sagarin;<sup>145</sup> and (3) *Innocent: Inside Wrongful Conviction Cases* by investigative reporter and academic Scott Christianson,<sup>146</sup> as the latest of the “big-picture books,” while recognizing that they were different in some respects.<sup>147</sup> To this could be added Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam’s *In Spite of Innocence*.<sup>148</sup> *In Spite of Innocence* and Christianson’s *Innocent* belong in the big-picture category. While none of the four books advanced the kind of theory Leo contemplated, he painted over variations in *Actual Innocence* and *Convicted But Innocent* with too

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<sup>141</sup> Leo, *supra* note 2, at 218. Big picture books “followed a familiar structure” by establishing the American due process legal ideology of a presumption of innocence, followed by “a number of wrong-man cases (often a parade of ‘horribles’), the seeming causes of wrongful conviction (from eyewitness misidentification to police and prosecutorial misconduct to ineffective assistance of counsel), and the reforms that should be implemented to lessen or eliminate the problem of wrongful conviction in American society.” *Id.* at 203.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 206.

<sup>144</sup> *Id.* at 207–08.

<sup>145</sup> C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996).

<sup>146</sup> SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (2004).

<sup>147</sup> Leo, *supra* note 2, at 206 (stating that they reveal “little substantive differences in the methods, analysis, or message. The same wheel is reinvented each time, more or less”). Christianson’s book seems to fit the big-picture category, but the other two differ in several respects.

<sup>148</sup> MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE* (1992). This book was a continuation of the work of Bedau & Radelet, *supra* note 19. It advanced their timeframe and identified 416 wrongful convictions in capital and potentially capital cases. In form, this book is more like a big-picture book in that it consists mostly of narrative accounts of miscarriages of justice. It was written for a popular audience and does not include the analytical apparatus of Bedau & Radelet, *supra* note 19.

broad a brush. A closer analysis is instructive.

Of these valuable books published between 1992 and 2000, only *Actual Innocence* had a measurable impact on social action. A consideration of why the other two had limited impact, while *Actual Innocence* has become the bible of the innocence movement, illuminates the innocence paradigm. Neither *In Spite of Innocence* nor *Convicted But Innocent* received much press attention. The first was mentioned only five times in major American newspapers between 1992 and 1999,<sup>149</sup> and the latter only once between 1996 and 1999.<sup>150</sup> In contrast, *Actual Innocence* was reviewed in at least seven major North American newspapers in 2000, and was deemed an important book to a wide general audience.<sup>151</sup> This acceptance depended on the public's receptivity to the message. *In Spite of Innocence*, while consisting of case narratives, is forbiddingly long for the casual reader (almost 400 pages), and is not the kind of book to be read through from cover to cover. It is a valuable resource for anti-death penalty advocates, but was published too early to spark an innocence revolution.

*Convicted But Innocent* was published in 1996, but the research agenda of its criminologist authors was conducted in the 1980s.<sup>152</sup> In some ways it is a transitional work, in part harking back to the linkage of wrongful convictions to political trials and causes célèbres, but also linking wrongful convictions to the mundane processing of criminal suspects, as there are separate chapters on eyewitness error and false confessions. The book includes the authors' survey work, conducted in the 1980s, in which justice system personnel estimated a general wrongful conviction rate at 0.05%. One chapter offered eight major factors related to wrongful convictions. Three factors matched the innocence paradigm's canonical list of causes (eyewitness error, prosecutorial and police

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<sup>149</sup> Based on the following search in LexisNexis: follow "News & Business" hyperlink; then follow "Combined Sources" hyperlink; then follow "Major Newspapers" hyperlink; then search these terms: "Radelet and Bedau and Putnam and date aft 1991 and date bef 2000."

<sup>150</sup> Based on the following search in LexisNexis: follow "News & Business" hyperlink; then follow "Combined Sources" hyperlink; then follow "Major Newspapers" hyperlink; then search these terms: "Huff and Rattner and Sagarin and date aft 1995 and date bef 2000."

<sup>151</sup> Based on the following search in LexisNexis: follow "News & Business" hyperlink; then follow "Combined Sources" hyperlink; then follow "Major Newspapers" hyperlink; then search these terms: "Actual Innocence" /s scheck and review."

<sup>152</sup> See Huff et al., *supra* note 29; C. Ronald Huff & Arye Rattner, *Convicted but Innocent: False Positives and the Criminal Justice Process*, in *CONTROVERSIAL ISSUES IN CRIME AND JUSTICE* 130-44 (Joseph E. Scott & Travis Hirschi eds. 1988); Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 *LAW. & HUM. BEHAV.* 283 (1988).

misconduct and errors, and inadequacy of counsel). One factor (accusations against the innocence by the guilty) overlapped with the paradigmatic causes of jailhouse snitches and forensic fraud, and four factors do not fit the current catalogue of “causes” (plea bargaining, community pressure for conviction, criminal records, and race).<sup>153</sup> A factor such as a “tough-on-crime mentality” might indeed have impact on wrongful convictions, but it is impossible to link the two in any scientifically meaningful way. Perhaps more telling, over-criminalization and over-punishment do not lend themselves to a simple remedy. The last chapter in *Convicted But Innocent* did propose remedies, but a prescription like reducing “[t]he current reliance on imprisonment”<sup>154</sup> in effect calls for a massive transformation of American culture with no suggestion of how to accomplish such transformation. Also, the parts of the book devoted to eyewitness identification did not assess the very specific reform agenda that was being developed by Gary Wells and the cohort of cognitive psychologists that caught the eye of Janet Reno.<sup>155</sup> Also, this earnest book was published by an academic press and while quite readable, was not designed for a mass audience. Most tellingly, *Convicted But Innocent* did not discuss DNA exonerations.

It is too easy to criticize *Convicted But Innocent* with the benefit of hindsight; the authors could be faulted for not picking up the DNA exonerations, although the NIJ report, *Convicted by Juries, Exonerated by Science*, had not yet been published, and the “DNA wars” was in the province of the legal and forensic science worlds. As a work perhaps more properly located in the pre-DNA era, it (along with *In Spite of Innocence*) is a remarkable achievement, having challenged the deeply entrenched aura of the perfection of American justice, especially when considering that the pre-1980 popular literature reviewed by Richard Leo was not widely known.<sup>156</sup> An interesting example of how difficult it was to gain

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<sup>153</sup> The racial factor has been reviewed by a number of innocence scholars. See, e.g., Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006). Race seems to play a role in some cases, but appears to be systematic only in rapes by black offenders against white victims, and might result from the psychology of cross-racial perception, as well as racist factors. See Gross et al., *supra* note 22. The racism-wrongful conviction link is not entirely proven, and might be thought of at present as a “quasi-canonical” element of the innocence paradigm. Race may play a larger role, but may not be detectable by the social scientific methods in wrongful conviction studies.

<sup>154</sup> HUFF, RATTNER & SAGARIN, *supra* note 145, at 146.

<sup>155</sup> See *supra* note 123 and accompanying text.

<sup>156</sup> Leo, *supra* note 2, at 203–04.

traction on a subject that was not on any criminal justice research agenda before the mid-1980s is a little-known analysis of the “falsely accused” by the Israeli-educated criminologist David Shichor.<sup>157</sup> In 1975 he published a theoretical probe of the likely sources, incidence, and consequences of wrongful convictions based on the best criminal justice research of that era.<sup>158</sup> While strikingly prescient in many ways, without any data or even case examples it was a shot in the dark, not hitting a real but hidden problem.<sup>159</sup>

*Actual Innocence* is a gripping page-turner. The pathos of those trapped for years by a crummy justice system in grim prisons smacks the reader in the opening pages as Marion Coakley, a decent guy with a slightly below-average IQ and a real sense of right and wrong, physically deteriorates in prison before he pulverized his jail cell, sink and all.<sup>160</sup> Very few big picture books tell the stories of the wrongly convicted with the punch that journalist Jim Dwyer brought to the job. Looking at the book in its entirety, it becomes obvious that each chapter is designed to also tell the story of a particular wrongful conviction *cause or issue*: a porous adversary process prone to a cascade of errors, eyewitness misidentification, false confessions, forensic fraud, jailhouse snitches, junk science, prosecutorial misconduct, inadequate assistance of counsel, racial bias, shrinking opportunities to get post-conviction review from death row, and the lack of adequate compensation or assistance for the exonerated.

One thing that *Actual Innocence* had that previous books lacked was DNA. Each exoneration described in the book was an Innocence Project victory. The book briefly described the Project in an oblique and entertaining way in the first chapter,<sup>161</sup> and provided an entirely un-technical mention of DNA testing in the second.<sup>162</sup> At the end of *Actual Innocence*, a simple map and graphs,

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<sup>157</sup> David Shichor, *The Wrongfully Accused and the Criminal Justice System*, in 3 VICTIMOLOGY: A NEW FOCUS 121 (Israel Drapkin & Emilio Viano eds., 1975).

<sup>158</sup> *Id.* at 123–30.

<sup>159</sup> *Id.* at 121–33. An earlier article did identify news stories. See Donald E. J. MacNamara, *Convicting the Innocent*, 15 CRIME & DELINQ. 57 (1969). The invisibility or low-visibility of factual innocence resembles the non-visibility of plea bargaining in some ways. Plea bargaining was not kosher in American law until probed by sociologist Donald Newman brought the practice to light, forcing the legal establishment to accept, and the Supreme Court to constitutionalize, the practice between 1968 and 1971. Marvin Zalman, *The Influence of the Courts Task Force Report*, in THE 1967 PRESIDENT'S CRIME COMMISSION REPORT: ITS IMPACT 25 YEARS LATER 57–79 (John A. Conley ed., 1994).

<sup>160</sup> SCHECK ET AL., *supra* note 10, at 1–3.

<sup>161</sup> *Id.* at 4–9.

<sup>162</sup> *Id.* at 35–40.

not complex enough for a social science master's thesis, but at the level of an undergraduate paper, displayed the distribution of the first seventy-four DNA exonerations by state and by the factors associated with wrongful convictions in the cases.<sup>163</sup> Sources—interviews, law cases, newspaper articles, and a smattering of scholarly articles and books—were provided. Compared to the scholarship of *Convicted But Innocent*, *Actual Innocence* could be seen as a rough account that does not provide a wealth of technical knowledge. Like the frontiersman's muzzle-loading rifle, however, it was crude but effective.

*Actual Innocence* fired the imagination of thousands of readers, perhaps making the process of exoneration seem far easier than it was. But what really helped to make it holy writ for the innocence paradigm was "Appendix 1—A Short List of Reforms to Protect the Innocent."<sup>164</sup> Written with the force of Strunk and White's directives for effective writing,<sup>165</sup> Scheck, Neufeld, and Dwyer told the world of criminal justice exactly what to do. "All lineups, photo spreads, and other identification processes should be videotaped."<sup>166</sup> "Crime laboratory budgets should be independent from the police, and police officials should not be able to exercise supervisory responsibility over the scientists."<sup>167</sup> There was no commentary. In seven pages, forty-two directives covering twelve areas were issued. Although not every proposal was on the mark, it was truly important for the future of the innocence movement's policy agenda that every proposal was based on research or on more recondite analysis. This wish list had no vague prescriptions, but it did have a vision:

Create and fund innocence projects at law schools that will represent clients in DNA and non-DNA cases. . . .

. . . .

A Network of Innocence Projects should be established at law and journalism schools around the country to investigate claims of wrongful convictions, especially in cases where DNA testing is not possible but there are serious doubts about the reliability of the conviction. This Network should also promote interdisciplinary research into the causes of wrongful convictions, remedies, and public

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<sup>163</sup> *Id.* at 262–65.

<sup>164</sup> *Id.* at 255–60.

<sup>165</sup> WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. Longman 2000).

<sup>166</sup> SCHECK ET AL., *supra* note 10, at 76.

<sup>167</sup> *Id.* at 257.

awareness of the problem.<sup>168</sup>

There it is: a national network that has become a reality in the “age of innocence.” By 2000, a few innocence projects had been created and the number swelled throughout the 2000s.<sup>169</sup> This easy-to-digest manifesto has created a more or less coherent public policy vision of actual innocence—the innocence paradigm in which wrongful convictions result from a number of causes, which are tied to a reform agenda.<sup>170</sup> To the credit of social scientists like Ronald Huff, the lessons of the innocence paradigm were quickly assimilated, broadcast, and amplified.<sup>171</sup>

What was written in *Actual Innocence*, when connected to Neufeld and Scheck’s public careers before and after 2000, suggests that they constructed an innocence paradigm out of their work and understanding of the issues that were stated in rudimentary form in their comment in *Convicted by Juries, Exonerated by DNA*. This paradigm is not based on explicit sociological or scientific analyses of wrongful convictions or designed to withstand academic critiques. Instead, it is an inductive program that built slightly on a tradition of innocence writings, but more specifically on the authors’ experiences. It was also a product of their professional training and had the eclectic structure of a law school seminar organized around the concerns of practicing lawyers, rather than around a legal theory.<sup>172</sup>

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<sup>168</sup> JIM DWYER, PETER J. NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 357 (2003).

<sup>169</sup> See *Innocence Network Member Organizations*, THE INNOCENCE NETWORK, <http://www.innocencenetwork.org/members.html> (last visited Mar. 20, 2011) (listing about fifty innocence projects in the United States).

<sup>170</sup> The analysis of Leo & Gould, *supra* note 14, at 13, is close to my view (writing, of *Actual Innocence*, that it “may be the signature document of the modern innocence movement” and is “the rare book that has been both an influential work of legal scholarship and a popular best-seller”). I differ in being more emphatic about the centrality of *Actual Innocence*, and seeing it as a *blueprint for action* that was intended by Neufeld and Scheck to foster the growth of national innocence movement. My account sees *Actual Innocence* as an extension of the authors’ prior experiences, and a projection of their plans.

<sup>171</sup> See C. Ronald Huff, *Wrongful Conviction and Public Policy*, 40 *CRIMINOLOGY* 1 (2002) (highlighting the innocence paradigm in his presidential address to the American Society of Criminology). Huff went on to expand the field of wrongful conviction studies to encompass a comparative and international perspective. See C. Ronald Huff, *What Can We Learn from Other Nations About the Problem of Wrongful Conviction?*, 86 *JUDICATURE* 91 (2002); Huff & Killias, *supra* note 6.

<sup>172</sup> Legal education, as professional education that prepares students for practice, is structured around that concern more than around a classical scheme, jurisprudence, or scientific paradigm. Law students’ basic first year courses are, to a degree, based upon jurisprudentially coherent areas of law (e.g., contracts, torts, property, criminal law, civil procedure, constitutional law). Upper year electives are often designed to match the practice issues that confront legal specialists. Thus, a course on sports law could include a

### 3. The Age of Innocence: The 2000s

The “age of innocence,” which came to the fore around 2000, can be discerned in a number of ways. Most apparent was the increase in the number of innocence projects to more than fifty, mostly affiliated with the Innocence Network. The average number of annual DNA exonerations, listed by the Innocence Project, grew from 6 per year between 1989 and 1999, to 18.1 per year from 2000 to 2009.<sup>173</sup> Scholarship on every element of the innocence paradigm formed deep wells of learning from which reforms specific to each particular issue (lineups, use of snitches, interrogations, etc.) were shaped.<sup>174</sup> Reforms, such as legislation establishing post-appeal jurisdiction for DNA testing, is emblematic of the gradual acceptance of an innocence reform agenda.<sup>175</sup> The Justice Project, a Washington-based non-profit organization, hired Kirk Bloodsworth with Pew Foundation funding to spearhead a campaign to promote innocence reforms.<sup>176</sup> Its staff published several reports on the elements of the innocence paradigm, ready made for legislative staffers and interested citizens.<sup>177</sup> This organization and many of

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hodgepodge of issues based on different areas of law confronting sports lawyers, like labor law (regarding unions), players’ contracts, tax law, the duties of agents, antitrust, negligence law (relating to injuries), issues relating to fans and gamblers, the regulation of college sports, copyright in regard to game broadcasts, criminal law and sports violence, and more. Similar collations of topics are found in such courses as entertainment law, elder law, and environmental law, just to cover the letter “e.”

<sup>173</sup> *Know the Cases: Browse Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Mar. 20, 2011).

<sup>174</sup> The scholarship has grown too voluminous to catalogue in a note. As early as 2001, a high-quality college level anthology was published. See *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (Saundra D. Westervelt & John A. Humphrey eds., 2001).

<sup>175</sup> Rachel Steinback, Comment, *The Fight for Post-Conviction DNA Testing Is Not Yet Over: An Analysis of the Eight Remaining “Holdout States” and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM L. & CRIMINOLOGY 329, 336 (2007). For other examples of innocence-related reform legislation passed in the 2000s, see *supra* note 88 and accompanying text.

<sup>176</sup> TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 269* (2004) (“Kirk got a call from Wayne Smith, executive director of the Justice Project. . . . Smith offered to hire Kirk as a consultant, with a yearly stipend, if Kirk would assist in strategic planning, attend speaking engagements, and let the world know more about his experience. Kirk signed on.”).

<sup>177</sup> See, e.g., *Eyewitness Identification: A Policy Review*, JUSTICE PROJECT, available at [http://www.thejusticeproject.org/wp-content/uploads/polpack\\_eyewitnessid-fin21.pdf](http://www.thejusticeproject.org/wp-content/uploads/polpack_eyewitnessid-fin21.pdf) (last visited Mar. 20, 2011). Each report is about twenty-five pages, well-written, and in addition to a footnoted report on an issue, tells a few stories of innocent individuals convicted because of the factor, suggests reforms and model statutes, and includes suggested readings and a bibliography. *Id.* For additional examples, see, e.g., *Improving the Practice and Use of Forensic Science: A Policy Review*, JUSTICE PROJECT, available at <http://www.thejusticeproject.org/wp-content/uploads/forensics-fin.pdf>; *Electronic Recording of Custodial Interrogations: A Policy Review*, JUSTICE PROJECT, available at

the innocence projects, notably the original Innocence Project and the Center on Wrongful Conviction, maintain blogs and news coverage relating to innocence issues. For a while the Innocence Project provided college-level course materials. Although there is no comprehensive list, wrongful conviction seminars have been taught in several criminal justice departments, and a leading criminal justice text includes a section on wrongful conviction.<sup>178</sup> In the realm of popular culture, documentary films and case studies continue to appear, and the best-selling lawyer-novelist, John Grisham, published his first non-fiction book about the exoneration of wrongly convicted defendants.<sup>179</sup> Above all, these events and publications reflected innocence consciousness, or even an “innocence revolution,” which, in the terminology of public policy, denoted the arrival of actual innocence on the public agenda in criminal justice, not only in regard to the death penalty, but to felony convictions in general.<sup>180</sup>

### C. *The Innocence Paradigm*

The innocence paradigm can be seen as a list of factors deemed to cause wrongful convictions, along with reforms to prevent the errors and to alleviate the suffering of exonerees, and to establish an innocence network. Like items on an agenda, the list cuts through each item’s complexity by summarizing it in a word.<sup>181</sup> The innocence paradigm did two things. First, it disconnected wrongful

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[http://www.thejusticeproject.org/wp-content/uploads/polpack\\_recording-fin2.pdf](http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf); *Expanded Discovery in Criminal Cases: A Policy Review*, JUSTICE PROJECT, available at [http://www.thejusticeproject.org/wp-content/uploads/polpack\\_discovery-hirez-native-file.pdf](http://www.thejusticeproject.org/wp-content/uploads/polpack_discovery-hirez-native-file.pdf); *Implementing Standards for Admissibility of Jailhouse Informant: A Policy Review*, JUSTICE PROJECT, available at <http://www.thejusticeproject.org/wp-content/uploads/pr-in-custody-informant-testimony.pdf>; *Improving Access to Post-Conviction DNA Testing: A Policy Review*, JUSTICE PROJECT, available at <http://www.thejusticeproject.org/wp-content/uploads/post-convictiondna-fin.pdf>; John F. Terzano, Joyce A. McGee, & Alanna D. Holt, *Improving Prosecutorial Accountability: A Policy Review*, JUSTICE PROJECT (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf>.

<sup>178</sup> LARRY SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 514–15 (12th ed. 2010).

<sup>179</sup> JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006) (the Ron Williamson and Dennis Fritz cases).

<sup>180</sup> Aronson & Cole, *supra* note 55, at 604 (citing Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237 (2006); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. L.J. CRIM. L. 573 (2004); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. LAW & CRIMINOLOGY 587 (2005)).

<sup>181</sup> From the other side of the telescope, a checklist can also break down a complex task into specific steps. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009).

convictions from the complacent or pessimistic view that human error is inevitable and nothing can be done to correct conditions that lead to wrongful convictions; instead, it linked them to “obvious” justice system problems and reforms. Second, it provided intellectual support for movement actors—the lawyers and law students who would look for evidence about junk science or suggestive lineups in their case reviews—and especially for innocence projects making system reform an important part of their work.

The innocence paradigm’s factors were derived inductively from case descriptions. There is actually no single authoritative list of “causes”—they vary depending on the source. Borchard, for example, included convictions based on “circumstantial evidence exclusively,” having detected this in eleven of his actual innocence cases.<sup>182</sup> The Virginia study led by Jon Gould identified nine primary factors, split misidentification into two (“honest mistaken identification” and “suggestive identification procedures”), labeled “[t]unnel vision by police” as a separate factor, and found that, in Virginia capital cases at least, “inconsistent . . . statements by defendants” led to wrongful convictions.<sup>183</sup> Every study could generate outlier explanations and could, on reflection, ramify general headings into numerous sub-causes. The chapters in *Actual Innocence* seem to create a ten-cause list.<sup>184</sup> Its appendix, however, does not specifically include the messy adversary process described in the first chapter, but does include the death penalty, which may indeed generate a disproportionate number of wrongful convictions because it creates undue pressure to convict. This game could be continued with different lists of “causes” derived from different wrongful conviction studies. Clearly, a short list of more or less agreed-upon causes is helpful in organizing thoughts about wrongful convictions among activists. A longer list would be counterproductive. Most lists include eyewitness misidentification (including lineup procedures), false confessions, forensic science and

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<sup>182</sup> BORCHARD, *supra* note 19, at 368.

<sup>183</sup> *A Vision for Justice*, INNOCENCE COMMISSION FOR VIRGINIA, at xvi (2005), available at [http://www.exonerate.org/ICVA/full\\_r.pdf](http://www.exonerate.org/ICVA/full_r.pdf).

<sup>184</sup> As noted above, each chapter in SCHECK ET AL., *supra* note 10, is written around a “cause”: (1) a porous adversary process prone to a cascade of errors; (2) eyewitness misidentification; (3) false confessions; (4) forensic fraud; (5) jailhouse snitches; (6) junk science; (7) prosecutorial misconduct; (8) inadequate assistance of counsel; (9) racial bias; (10) shrinking opportunities to get post-conviction review from death row; and (11) the lack of adequate compensation or assistance for the exonerated. Also included is the non-cause of assisting exonerees.

examination issues, jailhouse snitches, prosecutorial misconduct, and inadequate assistance of counsel. The conclusion that a core wrongful conviction list exists, but has a vague perimeter, is evidence that the innocence paradigm is socially constructed.

As noted above, the innocence paradigm was constructed by lawyers passionately engaged in describing miscarriages of justice to a hitherto unaware public. At its simplest, the paradigm says that innocents are convicted because unfair justice procedures produce unreliable results. It provides an intellectual framework for a band of legal brethren absorbed in the thrilling enterprise of rescuing innocent captives. As an idea, the innocence paradigm has served as an emblem for a small group of reformers, like an army amassed under the banner of a revolutionary doctrine,<sup>185</sup> which has rapidly swept across the legal landscape, especially among criminal law professors, with allies in the news media and policy institutions.<sup>186</sup> Under this banner, an impressive number of reforms have been legislated or adopted by police departments, prosecutors' offices, and crime labs. Although the overall effect of these reforms is uncertain at present, it is fair to say that the reform enterprise is just beginning. As a socially constructed concept, it was designed to advance the goals of the innocence movement. Its core idea has engendered a paradigm shift by changing the comfortable view that the criminal justice process is close to flawless, and unconnected to procedural or structural flaws in the criminal justice process.<sup>187</sup> As the innocence movement matures, it will need to pay more attention to the institutional landscape in which its reforms have been planted.<sup>188</sup>

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<sup>185</sup> A more nuanced explanation should note that the goal of not convicting the innocent is an ancient prescript embedded in the adversary system's due process foundation. See Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 180–85 (1997). Yet, given the powerful pro-prosecution tilt of the criminal justice system in practice, actually enforcing the ideals of the presumption of innocence can be seen as revolutionary.

<sup>186</sup> See, e.g., ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY (Paul Giannelli and Myrna Raeder eds., 2006) (Report of ABA Criminal Justice Section's Ad Hoc Committee to Ensure the Integrity of the Criminal Process).

<sup>187</sup> See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970) (describing the way that scientific rules and paradigms change). Closely related to the innocence paradigm change, and perhaps caused by it, has been a tremendous upheaval in forensic science that has been described as a coming paradigm shift. Michael J. Saks & Jonathan Koehler, *The Coming Paradigm Shift in Forensic Identification*, 309 SCI. 892 (2005). Leo & Gould, *supra* note 14, at 9–10 (A "new paradigm may be emerging" in the criminal law and its administration. This new innocence paradigm in criminal law may or may not threaten the ideological foundation of criminal law's due process-based defense, but it speaks to the recognition of a criminal justice systemic understanding that is central to the criminal justice discipline.).

<sup>188</sup> This is the point of departure for the IJM and its dual focus on the innocence movement

The innocence paradigm continues to be useful, but has its limits. It has grown inductively and is tied to its immediate practical goals.<sup>189</sup> To the degree that it is grounded in the perspectives of legally trained practitioners and scholars, it: (a) tends to be parasitic of the work of psychologists and scientists that form the basis of important innocence reforms;<sup>190</sup> (b) has generated original ideas about the law of evidence, which has significant practical implications, but is rooted in esoteric theorizing;<sup>191</sup> (c) is opportunistic in the way in which it has constructed an innocence paradigm, similar to how law school courses combine a potpourri of subjects relevant to law practice (e.g., sports law); and (d) has a blinkered understanding of the criminal justice apparatus that it seeks to reform.

One limitation of the paradigmatic list, when going from the big picture to creating workable reform, is the underlying complexity of each issue. A “big cause,” like forensic science errors, has to be broken down into smaller “causes,” such as fraudulent forensic analysts, errors in offering testimony,<sup>192</sup> deficient laboratories, subjective methods, and junk science. Serious reform efforts require expert analysis on more specific issues, as noted by the significant report of the National Academy of Sciences.<sup>193</sup> When policy specialists study each “cause” in detail as a basis for recommending workable reforms, the task becomes complicated. This is recognized by leading innocence activists. Keith Findley, for example, writing

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*and* the criminal justice system. Most innocence-oriented law review articles accurately analyze relevant parts of the criminal justice system. My point has to do with the breadth of vision of these efforts, and also the tone of the prescriptions (i.e., whether they are unconcerned or antagonistic to the perspectives of police and prosecutors who enforce the law by apprehending criminals), or whether they try to understand the work of system actors in a more understanding light. For an important analysis of “tunnel-vision” from the latter perspective, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

<sup>189</sup> The four main goals of innocence projects are exonerating innocent prisoners, pedagogy, advocating for innocence reforms, and assisting exonerees return to normal lives. Not every program engages in each goal. For example, many “innocence projects are not clinical programs and have no formal affiliation with a law school or university, and hence do not have an explicit teaching mission.” Findley, *supra* note 11, at 234 n.10. This was not a program developed by deduction from research about wrongful convictions, but one that evolved from experience. The first innocence project at Cardozo Law School can be said to have “dawned on” its founders, based on reflections of their law practice and work as clinical professors. See SCHECK ET AL., *supra* note 10, at 4–9.

<sup>190</sup> This suggests that effective reform must be tied to an accurate understanding of the underlying disciplines.

<sup>191</sup> See *infra* notes 194–97 and accompanying text.

<sup>192</sup> Garrett & Neufeld, *supra* note 100, at 3–12.

<sup>193</sup> NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 37–39 (2009).

about lineup reforms recommended by psychological research, noted that most jurisdictions had not yet adopted best practices.<sup>194</sup> As a result, he recommended changes within evidence law and practice, including freer admissibility of expert witnesses, and modified jury instructions to educate jurors about issues of identification reliability. He explained that “[t]hese kinds of reforms look more like the typical adjudication focused process rights that are typically associated with the Due Process Model. But even these reforms are designed solely to improve the process’s truth-finding accuracy, and they do not serve values inconsistent with truth-finding.”<sup>195</sup> Findley seemed to step out of the innocence paradigm (psychological) and into the due process paradigm (legal), as if these mental constructs and practice worlds should normally be kept apart.<sup>196</sup> But it may very well be that a real, workable, and effective policy to make identifications more reliable will require a complex mix of evidentiary changes and lineup fixes.<sup>197</sup> This suggests that at the level of reform implementation, the innocence paradigm will lose some of its clarity and power as guidelines for criminal justice system reform.

Finally, the innocence paradigm is not “wrong” and continues to be a useful organizing framework. It would be a mistake to seek to replace it or even tweak it very much. It is based on a sufficiently accurate understanding of why innocent people are convicted to generate beneficial policy reform action. But to the extent that it misses important aspects of the reform process, an IJM, described below, provides a way of thinking about innocence reform that assists people working on pieces of the larger innocence problem.

### III. AN INTEGRATED JUSTICE MODEL OF WRONGFUL CONVICTIONS

Two cutting-edge law review articles called for broadening the innocence paradigm’s horizons. Wisconsin Innocence Project Co-Director Keith Findley observed that the innocence movement is transcending the legal and ideological two-model understanding of criminal justice<sup>198</sup> toward a *reliability* paradigm, seeking to protect

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<sup>194</sup> Findley, *supra* note 35, at 158.

<sup>195</sup> *Id.* at 158–59.

<sup>196</sup> Findley has a point about dividing truth-advancing policies from fairness policies that may or may not advance truth-finding in relation to the goals of his article. *See id.* This is a complex question about theories of the adversary process and the relationship between fairness and truth in the justice system, which is beyond the scope of the present paper.

<sup>197</sup> Indeed, the IJM goes further to factor professional cultures into the mix.

<sup>198</sup> *See, e.g.*, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149–73 (1968)

the innocent *and* public safety.<sup>199</sup> He reviewed themes under the innocence paradigm and concluded that the “most promising venue for criminal justice reform is in the local police departments, sheriff’s offices, and district attorneys’ offices that form the frontline of America’s criminal justice system.”<sup>200</sup>

Law professor Susan Bandes posits that the innocence movement is at a “critical juncture.”<sup>201</sup> Its “enormous success” was due in part to the “simplicity and clarity” of the innocence story.<sup>202</sup> “[P]eople tend to prefer simple ideas to complex ones” because they provide reassuring promises of “stability and verity,” and “align[] neatly” with “the media’s approach to crime coverage.”<sup>203</sup> The “incredible

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(analyzing the criminal procedure opinions of “liberal” and “conservative” Supreme Court justices in an effort to understand the underlying attitudes they held about the working of the administration of criminal justice, especially at the prosecutorial and judicial level). In so doing, Professor Packer refashioned the way in which most legal and criminal justice scholars frame ideological differences. *See id.* at 149–246. One strength of his “two models” approach, which has helped to make it an indispensable intellectual construct a half-century later, is that he took both sides seriously, and explained why the “crime control” and “due process models” are both essential and locked together in a never ending tension. Packer’s analysis, which focused on the detection-prosecution-adjudication function of criminal justice, did not necessarily encompass all fundamental approaches to criminal justice. *See* John Griffiths, *Ideology in Criminal Procedure or a Third “Model” of the Criminal Process*, 79 YALE L. J. 359 (1970) (Packer’s model is a “battle model,” and Griffith proposes a statist and rehabilitative “family model.”).

<sup>199</sup> Findley, *supra* note 35, at 139–47.

<sup>200</sup> *Id.* at 147 (quoting JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 104 (2008)). More than twenty years before Gould, referring to changes needed to improve eyewitness identification, Sam Gross came to the same conclusion, but he struggled to assimilate the implications:

Some reforms in trial procedure might be useful, but primarily those designed to force the police and prosecutors to improve their investigations rather than those aimed at improving the accuracy of courtroom judgments. The major impetus for change, however, must come from the law enforcement community itself.

This conclusion leaves me uneasy. Like most American lawyers of my age and background, I was brought up to see the criminal justice system from a due process perspective. It cuts against the grain to argue that prosecutors and police officers should have primary responsibility for protecting innocent defendants. But reality, it seems, is at odds with the due process heritage, at least in this context.

Gross, *supra* note 66, at 449.

<sup>201</sup> *See* Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5 (2008). Lawyers favorable to the innocence paradigm are expected to be more evenhanded and less combative toward police and prosecutors because their work makes them more understanding of the pressures on all system actors, and because they need to work with law enforcement to advance the policy goals of the innocence movement. Thus, Bandes wrote, the “more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even wholly conscious.” *Id.* at 7. In this regard, Bandes was critical of a criminologist who attributed wrongful convictions to malicious law enforcement acts. A potential benefit of the innocence movement is a more sophisticated awareness of the psychological dynamics of action.

<sup>202</sup> *Id.* at 9.

<sup>203</sup> *Id.* at 9–10; *see* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in*

hunger” for a simple test of guilt or innocence elevated DNA testing into a talisman of the idea that guilt can be easily and absolutely determined.<sup>204</sup> On reflection, however, there are dangers in “the false promise of simplicity, moral clarity, and scientific infallibility.”<sup>205</sup> Stories told to motivate innocence reform work are better when there are “malevolent villains” at work,<sup>206</sup> but the story model breaks down when we consider systemic, organizational change.

The story of systemic governmental misconduct is harder to tell in every respect because it defies narrative expectations. It does not tend to be uncomplicated. It does not necessarily involve malevolence on the part of any individual. It often involves complex causal chains, multiple actors, failures to act rather than actions, or actions taken in good faith rather than with malicious intent. It cannot be neatly resolved by punishing the bad guys. To the contrary, punishing the most obvious bad guys, when that is portrayed as the end of the story, might mean leaving the deeper sources of the problem unaddressed.<sup>207</sup>

This is a point of departure for the innocence movement’s reform project, where the storytelling craft of lawyers and journalists who elevated the innocence paradigm to public prominence becomes too narrow to sustain its goals. Findley and Bandes sense this. The IJM is directed to this perceived need. As noted earlier, the IJM is oriented as much toward the reform of the criminal justice system for its own legitimate goals, as it is oriented toward the ends of the innocence movement. The IJM is a fairly detailed and complex model, grounded in the particularities of the justice system, and those domains that I believe critical to innocence reform. It is not designed for a casually interested general public, but for an audience seriously concerned with understanding the major sources of justice action and innocence reform. To this end, the IJM demands some attention, but is nevertheless a schematic overview. The overview enables policymakers and observers to better understand the whole, although the detailed work of reform must

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*Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004).

<sup>204</sup> Bandes, *supra* note 201, at 10–11; *see also* Margaret Talbot, *Duped: Can Brain Scans Uncover Lies?*, NEW YORKER, July 2, 2007, at 52 (quoting Steven Hyman, who has identified the same “incredible hunger to have some test that separates truth from deception”).

<sup>205</sup> Bandes, *supra* note 201, at 13.

<sup>206</sup> *Id.* at 19.

<sup>207</sup> *Id.* at 20 (citations omitted).

take place within the narrower confines of whatever process is being considered. The model is sufficiently complex to alert readers to all of the necessary aspects of innocence reform, while being reasonably parsimonious.

This broader, interdisciplinary way of looking at the reform landscape initiated by innocence consciousness should be congenial to innocence project lawyers. The movement began with the intellectual heavy-lifting displayed by Peter Neufeld and Barry Scheck in the “DNA wars.”<sup>208</sup> Scheck served as a “Commissioner of the Forensic Science Review Board for New York State, an organization that oversees all state crime labs including DNA labs.”<sup>209</sup> Innocence reformers have become familiar with recondite cognitive and social psychology knowledge that undergirds proposed changes to eyewitness identification practices, as well as with forensic science. The original Innocence Project has well-staffed policy and research departments; its leaders testify before Congress; state innocence project lawyers work to pass innocence reform legislation at state and local levels; and innocence network members work with a variety of organizations to study innocence issues and to advance reforms. Advancing the innocence movement toward a reform agenda has been a complex job that to date has been handled well by innocence project lawyers. But the original “map” of the campaign, the innocence paradigm, is too limited to describe the overall picture of where the innocence movement’s reforms can go.

The IJM is a functional, organizational, and ideational map that includes the innocence movement’s reform efforts (Figure 5), but goes beyond them to propose a way of “seeing” justice system reform keyed to innocence issues.<sup>210</sup> Like the early cartographers who mapped the Atlantic rim during Europe’s age of discovery, this map may miss some significant features, but hopefully no continents. In this age of GPS devices, it may be necessary to remind some (younger) readers that a good map can be helpful in giving the map

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<sup>208</sup> William C. Thompson, *Lessons from the “DNA Wars,”* 94 JUDICATURE 1, 1–2 (2010).

<sup>209</sup> *Barry Scheck: Biography*, ROYCE CARLTON, INC., <http://www.roycecarlton.com/speaker/Barry-Scheck-Biography> (last visited Mar. 20, 2010).

<sup>210</sup> The idea for the IJM is drawn in part from Thomas Janoski’s conceptual depiction of the four spheres of society: state, public, market, and private, THOMAS JANOSKI, CITIZENSHIP AND CIVIL SOCIETY: A FRAMEWORK OF RIGHTS AND OBLIGATIONS IN LIBERAL, TRADITIONAL, AND SOCIAL DEMOCRATIC REGIMES 13 (1998), and also from John Heinz and Peter Manikas’s empirically generated map of the relationships between criminal justice elites in Chicago, John P. Heinz & Peter M. Manikas, *Networks Among Elites in a Local Criminal Justice System*, 26 L. & SOC. REV. 831, 842 (1992).

reader an idea of the overall geographical space within which he or she stands or seeks to enter. A model, as Herbert Packer explained in his two-model construct of the criminal process, must in some ways distort reality in order to create a certain clarity of thinking.<sup>211</sup> Different maps or models can be drawn to achieve different purposes, and to complicate matters, the IJM, like Packer's two-model construct, is normative as well as descriptive.

The text boxes containing the five domains (Adversary, Law Enforcement, Polity/Policy, Psychology, and Science) are drawn for ease of viewing. It is of prime importance to bear in mind that the boundaries are permeable (i.e., domain values and operations interpenetrate one another), and sometimes blur into one another (e.g., courts occupy space in the Adversary and Polity domains; forensic science labs occupy figurative space in the Law Enforcement and Science domains). The ideals, institutions, activities, ideas, ideologies, and pathologies of each domain influence one another. A reform vision implicit in the innocence movement is not only that improvements within each domain will improve the whole, but that the ideals and positive ideas within each domain will come to influence actors in the other domains.<sup>212</sup>

The complete IJM includes Figures 1 through 5. Each figure lists domain elements in layers, exposing aspects of their wholes. This includes the institutions that carry out the functions of each domain and are carriers of its ideals (Figure 2), along with the theories, concepts, and ideologies which operate on many levels to guide, inform, and check the activities of actors within domain institutions (Figures 3 and 4). Figure 5 lists some of the activities, issues, and concerns that are central to the innocence movement, which are located within domains. Figure 5 also includes the core elements of the innocence paradigm. In its entirety, the IJM should not surprise any reader, but should make explicit what is already known.

The first goal of the IJM is to provide an overall picture of the "space" within which the innocence movement operates.<sup>213</sup> The justice system works on so many levels that it is easy to lose the big picture in the details. The multilevel IJM helps observers to consider the various aspects of each domain separately, although in reality, ideals, actions, roles, and concepts operate simultaneously

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<sup>211</sup> PACKER, *supra* note 198, at 153.

<sup>212</sup> At the very least, actors need to understand and accommodate the views of others in their respective domains, as happens now for anything to get done.

<sup>213</sup> See Campbell, *supra* note 4, at 146.

and seamlessly in any given endeavor. Figure 1 identifies five domains of the IJM and the ideal that each espouses.<sup>214</sup> This is entirely different from the list of causes and reforms characterizing the innocence paradigm. Those who work within a paradigm surely assume the existence of the various domains and their ideals, institutions, activities, and concepts. The IJM makes these assumptions explicit. The domains at the top of Figure 1, Adversary and Law Enforcement, conveniently divide the major functions of adjudication and investigation. This highlights the obvious point that there are distinct organizational and operational differences between them. The separation is somewhat misleading in that prosecution occupies space in the Adversary and the Law Enforcement Domains, and law enforcement personnel play essential roles in adjudication.<sup>215</sup> The operational interactions between these domains are part of the routine prosecution of offenders. Specific policy interactions will occur with less frequency, and can take various shapes as when, for example, prosecutors urge police to adopt new lineup methods.<sup>216</sup>

The Policy/Polity Domain occupies center space. The IJM is organized around the policy work of the innocence movement, and policy change and ratification ultimately takes place in or through institutions of government. Action by an attorney general, or legislation, or a Supreme Court case can be a stimulus or an impediment to reform.<sup>217</sup> While policy is generated and made in all domains, it must eventually be ratified in the Polity Domain. If, for example, a police department restructures its procedures, at some point civilian oversight groups (mayor/city manager, town/city

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<sup>214</sup> See *id.* at 152.

<sup>215</sup> This was demonstrated by Heinz & Manikas, who studied communications between leaders in Chicago's criminal justice community. Heinz & Manikas, *supra* note 210, at 842. A graphic summarizing their empirical research located the prosecution between the courts and the police. See *id.*

<sup>216</sup> See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 300–01 (2006); Susan Gaertner & John Harrington, *Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol*, POLICE CHIEF (April 2009), [http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1776&issue\\_id=42009](http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1776&issue_id=42009); Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1 (2005).

<sup>217</sup> See Brandon Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2938 (2010) (arguing that *District Attorney's Office v. Osborne*, 128 S. Ct. 2783 (2009), has been misunderstood as denying a constitutional right to DNA testing, when, in fact, the Supreme Court majority recognized "a right to access postconviction DNA testing"). The unique influence of Attorney General Reno is an example of the ability of an attorney general to impact reform efforts. See *supra* notes 76–81 and accompanying text.

council, review bodies) will have some knowledge and ability to comment. It is more likely that major administrative changes would be made in consultation with the government agencies that fund them.<sup>218</sup> In more democratic, community policing agencies, the public may be consulted. The Polity Domain includes the civil society institutions, including innocence projects and supporters, and the news media whose opinion drives, and is driven by, innocence consciousness.

One of the great impediments to meaningful reform is the radical fragmentation of government and criminal justice in the United States, as depicted in Figure 5: Polity/Policy Domain. This structural problem is often missing from policy prescriptions in justice system studies, which limits the likelihood or scope of policy implementation. Furthermore, empirical criminal justice studies addressing policy issues, even if analyzing problems brilliantly, typically propose reform measures with little or no thought given to the political world and policy process by which reforms are implemented. All justice policy studies, including innocence studies, need better grounding in the policy sciences to better advance effective policy implementation. Figure 3 expresses the need for domain practices to be analyzed by all relevant academic disciplines, including political science and policy analysis.<sup>219</sup>

The ideals associated with each domain are subject to debate. A case can be made, for example, that the dispute resolution ideal better characterizes the American judicial process, as it is cogently argued that truth has a higher value in modern inquisitorial systems.<sup>220</sup> Still, even if the adversary model is more often ignored than applied, it almost palpably is the professed ideal of criminal adjudication, and needs to be considered in an integrated model that seeks to illuminate the policy dynamics surrounding the

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<sup>218</sup> For example, police often object to videotaping interrogation requirements on budgetary grounds. See Jon Murray, *State Raising the Bar on Taped Interrogations*, INDIANAPOLIS STAR, Sept. 23, 2009 at A1.

<sup>219</sup> I believe that schools of criminal justice, including my alma mater, have drifted away from the “system change” component that was part of the original vision for why higher education should fund such programs. That said, departments of political science and public policy have, with a few notable exceptions, entirely avoided criminal justice issues. Political sociologists have included criminal justice within their purview. See David Jacobs, *The Political Sociology of Criminal Justice*, in HANDBOOK OF POLITICS: STATE AND SOCIETY IN GLOBAL PERSPECTIVE 543 (Kevin T. Leicht & J. Craig Jenkins eds., 2010); see also Marvin Zalman, *Criminal Justice System Reform and Wrongful Conviction: A Research Agenda*, 17 CRIM. JUST. POL’Y REV. 468 (2006) (drawing parallels between political science agenda research and sociology social movements research).

<sup>220</sup> See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997).

innocence movement. There is, no doubt, tension between the jury trial adversary ideal and the practice of plea bargaining (Figure 4) in the Adversary Domain, and the voluminous scholarship on this issue is one of many questions related to wrongful convictions.<sup>221</sup>

Each ideal is related to its central operative modality, which tends to narrow the play or scope of the ideal. Justice unbridled could mean almost anything, but corralled by due process in American law, it clearly focuses on legal and procedural justice achieved by the existing, but continually changing, adversary system. Likewise, security, the Law Enforcement Domain ideal, must be achieved under, and constrained by, substantive and procedural law. Locating the ideals of security in the Law Enforcement Domain and justice in the Adversary Domain tends to displace Packer's insight that the ideal and the ideologies of the two models (crime control and due process) exist in the minds of trial and appellate judges.<sup>222</sup> It is useful to recall that both models express ideals that are *shared* by those who tend to lean in the opposite direction (i.e., prosecutors uphold the rule of law, while defense attorneys desire order and just convictions), even if the models cannot fully describe the way in which the ideological tension is resolved by individuals. The main job of the Polity/Policy Domain is to use all of the legitimate levers of power and authority in our imperfect democratic system to govern. Innocence projects, to be successful policy players, have to learn the "art of the possible," based on cooperation, compromise, democratic constraints, and authorized processes, in advancing their reform agendas. The IJM, by locating domain ideals on one "level," makes the point that ideals are important, but need to be considered in conjunction with other categories, which are specified on other levels.<sup>223</sup>

The IJM's normative aspect is why psychology and science are identified as domains. Psychologists who conducted experimental

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<sup>221</sup> Compare Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998), with Edward L. Rubin, *Trial by Battle. Trial by Argument*, 56 *ARK. L. REV.* 261 (2003) (penetrating and original analyses come to a similar conclusion via different analytic strategies, noting the reality and efficacy of administrative forms of adjudication).

<sup>222</sup> See PACKER, *supra* note 198, at 154.

<sup>223</sup> For a multi-factor historical analysis that took morale and ideals into account, along with material explanations, see RICHARD OVERY, *WHY THE ALLIES WON* (1997). Broad analyses using the methodology of history, while congenial to legal scholars, tend to be displaced in criminology and empirical criminal justice analysis that valorizes narrow quantitative studies. Such studies are valuable, but need to be combined with studies employing a wider angle lens to better explain social phenomena.

lineup studies, and forensic scientists who created and applied forensic DNA profiling, have had an outsized influence on the innocence movement.<sup>224</sup> Indeed, the innocence movement in the United States would not have been possible without the work of these groups.<sup>225</sup> Their work allowed policymakers interested in innocence issues, like Attorney General Reno who recognized their systemic implications, to begin to break the complacent mold in which the Adversary and Law Enforcement Domains had been stuck for most of the twentieth century, at least with regard to the fundamental question of prosecution and conviction accuracy. The IJM posits that the ideals, and much of the work of psychologists and forensic scientists, ought to influence the way in which judges, detectives, prosecutors, defense attorneys, legislators, and other policymakers think. Just as (mostly liberal) research psychologists need to be concerned with the public security goals of the Law Enforcement Domain, detectives ought to be imbued with the insight that comes from appreciating the effects of confirmatory bias on their work in solving crimes. And just as forensic scientists need to adhere to the requirements of due process when testifying in court, prosecutors ought to be more scrupulous in treating facts and inferences, and think with greater objectivity about how they construct their (adversarial) theories of the behaviors that result in the facts of a crime. The larger goal of the IJM is that the interpenetration of domain knowledge among justice system actors will produce a more astute, and therefore a more accurate and fair, justice system.

Psychologists are social scientists whose work is grounded in the scientific method. Their domain is elevated to a prominent position in the IJM because the insights of psychologists have made a new generation of police, prosecutors, defense lawyers, judges, legislators, and concerned civilians far more thoughtful about the mental processes that go on during an interview, lineup, interrogation, investigation, decision to prosecute, and trial. Beyond the specific technological “fixes” for these problem areas, such as double-blind lineups and videotaped interrogations, which are proceeding apace, the work of psychologists has the capacity to make criminal justice operatives far more insightful about the

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<sup>224</sup> See John M. Collins & Jay Jarius, *The Wrongful Conviction of Forensic Science*, 1 FORENSIC SCI. POL'Y & MGMT. 17, 20 (2008).

<sup>225</sup> The innocence movement in the United Kingdom tends to be more legalistic in its orientation, and was sparked by miscarriages of justice in high profile political trials of IRA terror bombers. See NAUGHTON, *supra* note 6, at 12.

cognitive processes that are always at work. Likewise, the truth values that are fundamental to all scientific (and scholarly enterprises) need to penetrate all levels of forensic practice (not all of which are based on science), and from thence to the rest of the criminal justice process. A recent study by Garrett and Neufeld about the ways in which the testimony of forensic scientists and examiners has gone astray in exoneration cases demonstrates the need for learning across domain boundaries.<sup>226</sup>

A feature of the IJM seen in Figures 2, 3, and 4, is the research and scholarship activity conducted by legal scholars and social and natural scientists and their institutional settings. Research and scholarship has been essential to advance innocence movement reform.<sup>227</sup> As noted above, a wealth of work by social and cognitive psychologists has generated a good deal of insight about the handling of child witnesses and how to conduct lineups, which is rapidly becoming the received wisdom in criminal justice.<sup>228</sup> The acceptance of reforms has alerted police and prosecutors to a more sophisticated understanding of the role played by suggestion at various stages of the criminal justice process. There is work to be done on many fronts. Police, for example, have not been as quick to accept the implications of research on suggestion in the area of interrogation, perhaps because the proprietary training programs that most detectives attend have had a vested interest in presenting their version of the process.<sup>229</sup>

The IJM cannot specify all of the many interactions that occur within and between the domains. Much is implied. The function of prosecuting cases, for example, requires interactions between defense lawyers and prosecutors in the complex pretrial process (bail requests, motions, conferences), plea negotiation, and in trials. They will interact with judges at many pretrial stages, and will present cases to judges and/or juries in the adjudication phase.

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<sup>226</sup> Garrett & Neufeld, *supra* note 100, at 10–11.

<sup>227</sup> A complete working out of the implications of this research is beyond the scope of this article, but I have discussed it elsewhere. See Zalman, *supra* note 219.

<sup>228</sup> See STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (Olin J. Nettles ed., 1995). This American Psychological Association publication advanced many of the ideas and techniques for interviewing child witnesses without distortion. *Id.* It followed on the heels of the Salem witch trial-like wave of convictions of falsely accused day care center workers and parents in the 1980s and 1990s. See DEBBIE NATHAN & MICHAEL SNEDEKER, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* (1995).

<sup>229</sup> Charles D. Weisselberg, *Saving Miranda*, 84 *CORNELL L. REV.* 109 (1998); Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Practices*, 97 *J. CRIM. L. & CRIMINOLOGY* 873, 918–20 (2007).

Prosecutors routinely interact with police investigators, and effective attorneys seek out crime scene information from the police if it is not forthcoming from the prosecutors. Forensic scientists interact with police, prosecutors, and defense counsel by explaining their results before trial, possibly sharing samples with defense experts, and by testifying. Depending on the issues, psychological expert witnesses may be called to testify. Each interaction can be quite complex and driven by substantive issues and tactical considerations. All of these interactions are guided to some extent by formal rules promulgated by legislatures, Supreme Court rulings, or court rules. In short, the IJM incorporates the criminal justice process.

The IJM does not list the so-called “causes” of wrongful convictions (i.e., the innocence paradigm) separately. They are included or implied in Figure 5—the layer that identifies the specific issues most closely related to wrongful convictions. Listing them within their major domain areas reminds us that understanding the problems, and fashioning solutions, must take into account their institutional settings, and the ideas and ideals that motivate justice actors within them.

A component of criminal justice missing from the innocence paradigm is the correctional treatment of innocent prisoners.<sup>230</sup> The innocence movement’s agenda and innocence consciousness has been driven and shaped by the primary goals of proving innocence, rescuing innocents from incarceration, and providing for their assistance upon release.<sup>231</sup> Innocence project lawyers are trained to achieve the first goals and have lobbied for more generous, and just, compensation. They have recently extended their interest to the juvenile courts.<sup>232</sup> As attorneys, however, they have limited tools to alleviate the plight of innocent prisoners, however aware they may be of their plight. The very idea of innocent inmates seems incoherent to a system that must assume that all prisoners are guilty in order to function. To date, some thinking has gone into the catch-22 of the innocent prisoner needing to admit guilt to a parole board to gain release.<sup>233</sup> Admitting that some prisoners are indeed

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<sup>230</sup> Although law enforcement and corrections occupy separate spheres within criminal justice, Figure 5 includes parole and prison issues within the Law Enforcement Domain.

<sup>231</sup> *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Mar. 20, 2011).

<sup>232</sup> Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007) (discussing the lack of attention paid to wrongful convictions in juvenile courts).

<sup>233</sup> See Medwed, *supra* note 15.

innocent—even if the specific individuals cannot be determined without judicial proceedings, and even if calculating the prevalence of such prisoners is fraught with conceptual difficulties—would require a rethinking of the calculated harshness that is so much a part of the American penal regime, as compared to that of Western Europe.<sup>234</sup> Penologists have the skills to explore the issue of imprisoned innocents, and may be able to suggest workable solutions to modifications in penal regimes, including the politically fraught parole and commutation processes, to somehow absorb the reality that some prisoners are factually innocent of the crimes for which they have been convicted.

As a normative model, the IJM advocates cross-fertilization of domain knowledge as a way to advance innocence reforms. This hope confronts the reality that people who have devoted their professional lives to gaining domain knowledge, experience, and wisdom, hold their domain knowledge dear. A good judge, homicide investigator, forensic scientist, or prosecutor ought to have legitimate pride in an accomplished career based on years of education and experience. Resistance to adopting cross-domain knowledge is not simply a matter of provincialism. A busy professional has enough to do without undertaking the deep study of another field. Nevertheless, a good deal of domain-sharing occurs because of professional needs. Psychologists studying lineups, confessions, and jury decision-making have learned the dynamics of police investigation, the peculiarities of the adversary system, and the Talmudic complexity of doctrinal law. Judges, propelled by the *Daubert* trilogy,<sup>235</sup> have gone to “science school” in the guise of specialized training sessions. Astute lawyers have always striven to master technical arcana related to their practices, with medical malpractice and patent law as obvious models. Innocence project lawyers take CLE courses on the latest advances in DNA science and profiling at annual meetings of the Innocence Network. Detectives, likewise, need to understand enough about forensic science to properly preserve crime scenes and gather testable evidence. Forensic scientists who testify need better education and training than the kind of “defensive” training believed to be necessary to shield against what may be viewed as the truth-

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<sup>234</sup> See WHITMAN, *supra* note 34.

<sup>235</sup> The “*Daubert* trilogy” is a series of three Supreme Court cases that discuss the rule of evidence regarding the admissibility of expert testimony during federal proceedings. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Gen. Elec. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

thwarting tactics of defense lawyers. Politicians and their staffs, who come to represent certain interests, draw on information from their own prior professional experiences, and on information provided by lobbyists, academics, and all manner of experts.

Thus, although domain knowledge-sharing exists in good measure, it is oriented toward standard domain functions. Domain cross-fertilization oriented to innocence issues would require some reorientation of issues, and some thickening of lines of communication. For example, innocence consciousness would have to become part of the learning sets of justice professionals through instruction at law schools, university departments of criminal justice, and in various training venues. This is critical if changes generated by the innocence movement are to go beyond technical fixes, and become part of professional cultures. Leo, for example, not content to recommend only the electronic recording of interrogations, advocated improved police training that would incorporate new knowledge about the myth that psychological interrogation cannot produce false confessions.<sup>236</sup> Videotaping requirements that are imposed on detectives might be accepted, especially as they more often benefit from getting the goods on guilty defendants, but they might be tempted to take unauthorized “breaks” when suspects go against the “true” script. Better training that explains *why* caution is needed in conducting interrogations should cause more officers to internalize the knowledge, and to develop a more professional, and less routine, approach toward this one reform.

The IJM presented in this paper is only a first step to understanding innocence policy reform and focuses on structure. A missing element is a broader and deeper analysis of policy reform efforts in the light of relevant concepts of policymaking and policy analysis (Figure 3: Polity/Policy Domain). Specific innocence reforms are grounded in pertinent practices, concepts, and research. Lineup reform, for example, draws on psychological research grounded in cognition theory and applied to police practices. Understanding the broader movement of innocence reform that has occurred, and may be likely to occur (i.e., its scope and tempo), requires that relevant analytic tools drawn from the policy sciences be applied.<sup>237</sup> This is a task to occupy future analysis. A caveat

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<sup>236</sup> LEO, *supra* note 34, at 305–07.

<sup>237</sup> See FRANK R. BAUMGARTNER & BRIAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 239–41 (1993) (identifying multiple frameworks for analyzing public policy and its effectiveness).

that needs be raised—to the extent that the IJM appears to be a plausible map of the justice practice and reform world relevant to innocence issues—is not to conflate ease of understanding with ease of reform. Even if the IJM were a perfect map of the system, it shows where lines of resistance, as well as of change, lie.

#### IV. CONCLUSION

In the last twenty years, something new has arisen in the realm of criminal justice—the idea that system mistakes leading to wrongful convictions happen often enough to be a real worry. One could say this is a very old concern. Hundreds of years ago, English lawyers expressed the fear of convicting, and most likely hanging, innocent defendants. To prevent this, adversary trial procedures were developed, such as not hanging a person on the basis of an uncorroborated confession. In reality, the justice meted out by American courts, and by the bureaucratic police and prosecutorial justice system that came into being in the nineteenth century, was mainly a rough sort of justice.<sup>238</sup> In the twentieth century, satisfaction with a number of advances, like the greater availability of defense lawyers for indigent defendants and the use of forensic science techniques, made judges, police, prosecutors, and sometimes even defense lawyers, complacent. The justice community was shocked into the realization that mistakes are not rare events by the advent of DNA profiling technology. Actually, evidence of miscarriages of justice could have been found even without DNA exonerations, but after the 1970s, the American criminal justice apparatus became so politicized and harsh, that very few wanted to hear about such flaws. The problem in the mind of most was leniency, not error.

The spreading stories of innocence in the 1990s began to move influential people—reporters, scholars, lawyers, and even an attorney general—to concern and to action. Most notable were the growing number of exonerations, especially those generated by DNA testing of evidence, decades after convictions were obtained. To a large extent, exonerations occurred because of the painstaking work of a growing cadre of innocence projects, often in the face of strenuous opposition by prosecutors. The first new kind of innocence project, established by Barry Scheck and Peter Neufeld at

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<sup>238</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993); WALKER, *supra* note 34, at 75–77.

Cardozo Law School in New York, reached out to help kindred spirits in other law school clinics establish similar programs. Almost from the beginning Neufeld and Scheck had in mind a broader agenda of policy change. The agenda is seen in their brief introductory note in the 1996 report, *Convicted by Juries, Exonerated by Science*.<sup>239</sup> That report was itself a policy document meant to justify and stimulate change. By 2000, when Scheck, Neufeld, and Dwyer published *Actual Innocence*, their policy agenda—which became the innocence paradigm—was spelled out in detail.<sup>240</sup> In the following decade, the original activists were joined by a growing and dedicated group of innocence lawyers to unearth as many innocent prisoners as their limited resources and small numbers would allow. And they soon learned that simply releasing exonerees was not enough—disrupted lives and broken spirits needed to be pieced back together and healed.

This enterprise alone deserved a good deal of attention. But the innocence paradigm had a larger vision: reforming a large swath of the criminal justice process. Although statements of innocence movement activists at times took on somewhat unreal and visionary tones, when it came to action, they used their intellectual skills and energies, honed mostly in courtrooms, with good effect in places where public policy is fashioned: in relations with the press, in professional organizations, in legislative corridors and committee rooms, and in courtrooms. The policy side of the innocence movement is not the often heartbreaking and thrilling story of freeing men and women who became enmeshed in the tenacious grip of a less than fully competent criminal justice system. It is the side which, if successful in achieving reforms, will give greater meaning to the unnecessary suffering caused by wrongful convictions.

The innocence reform agenda is complex and challenging. Part of this agenda has been achieved, but a review of reforms to date makes clear that there is much more to do.<sup>241</sup> In fact, any complex enterprise, like a bridge needing infrastructure repair at regular intervals, requires continual scrutiny and renewal. As noted before, the IJM is as much about the criminal justice system as it is about the innocence movement. The actors in this story are not only the outnumbered innocence project lawyers who have been moving a

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<sup>239</sup> See Commentary by Peter Neufeld & Barry C. Scheck, in CONNORS ET AL., *supra* note 105.

<sup>240</sup> See SCHECK ET AL., *supra* note 10.

<sup>241</sup> See Gross & O'Brien, *supra* note 21.

large and fragmented system to bend to the arc of justice, but also leaders in police departments and prosecutors' offices, judges, legislators, research scholars, citizen activists, and others who are moving the system in that direction.

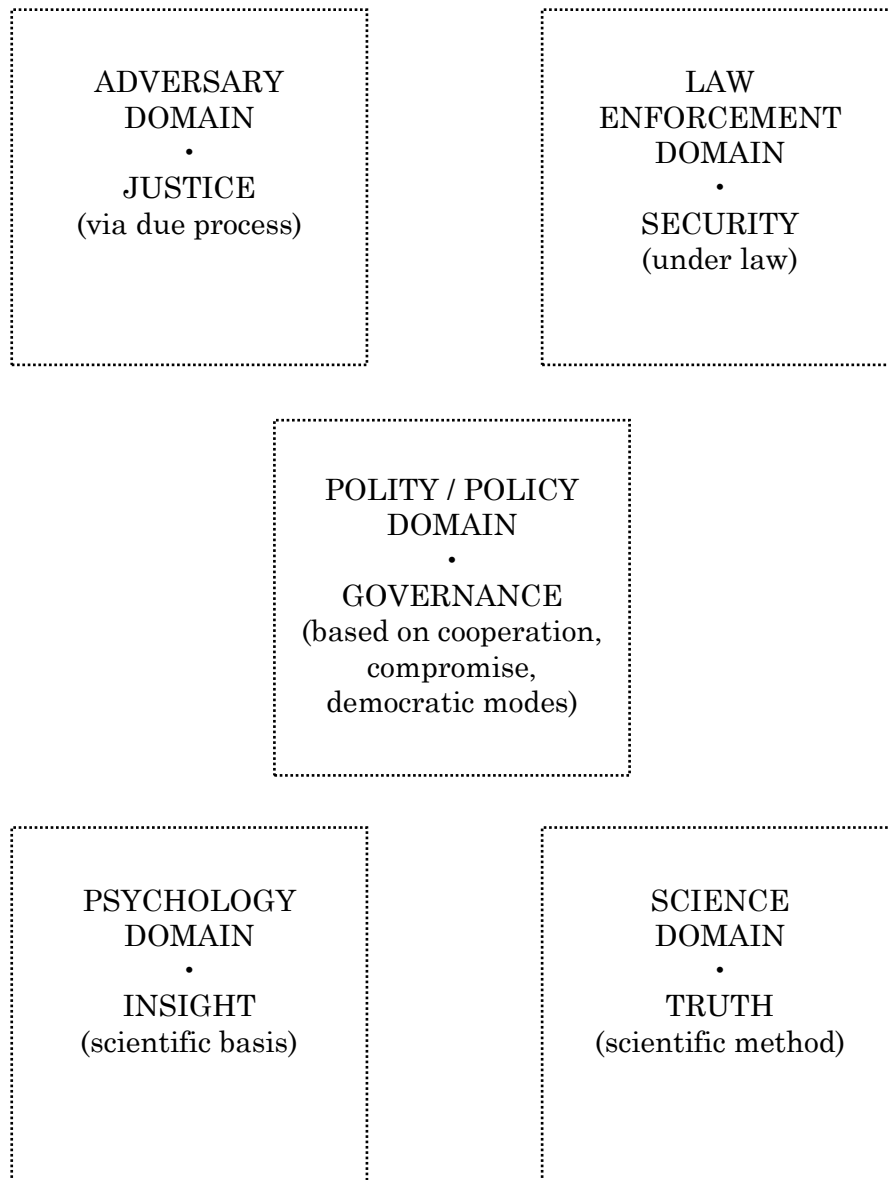
Indeed, a premise of my thesis, which may seem discordant with the implications of a flawed justice system, is that innocence-oriented justice system reform is possible because there is much that is positive in the criminal justice system. If, as noted earlier, factually innocent defendants are convicted in 0.5% to 1% of all felony convictions in the United States, this indicates a flawed system, but not a justice system that is out of control.<sup>242</sup> If it were otherwise, the kinds of measured reforms that have emerged from the innocence movement would have no impact; only root-and-branch reform would work. Along these lines, justice agencies are more professional and transparent than in the past, open to scrutiny by public oversight bodies, and willing to entertain independent research. Indeed, a thesis to be explored in the future is that the kind of justice reform posed by the innocence movement could not have happened earlier in the twentieth century, at least in the United States. This is not simply because DNA testing was not available, but for a number of structural reasons. The criminal justice system prior to the 1960s was deficient in so many ways, compared to the present, that the innocence reform agenda would have been inconceivable.

The Integrated Justice Model is a heuristic offered to help anyone interested in criminal justice, not only those concerned with wrongful convictions, to see criminal justice in ways that facilitate justice system reform. Whether it will help to facilitate improvements in the efficiency, effectiveness, and the justice of criminal justice will depend on the will and ingenuity of those who operate and lead the justice system.

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<sup>242</sup> Zalman, *supra* note 30. A possibility is that in some jurisdictions, police and prosecutors make very few errors, while in others, the accuracy of the system is compromised by a number of problems, and in a few places agencies are out of control. Given the fragmentation of the American justice system, it is difficult to make broad generalizations that apply to all agencies.

FIGURE 1. INTEGRATED JUSTICE MODEL:  
DOMAINS AND THEIR IDEALS



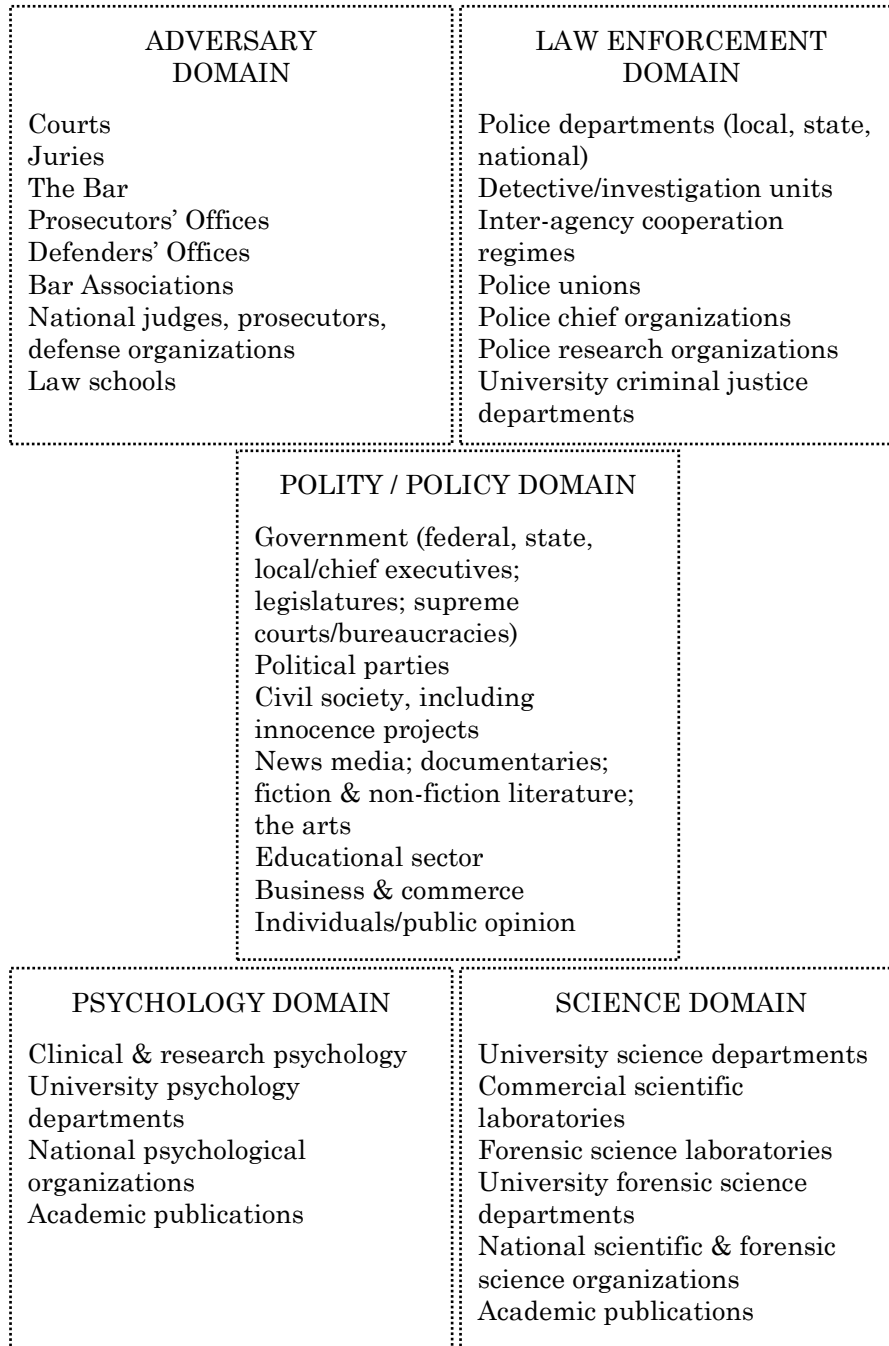
Note: Each domain interacts reciprocally with all other domains;  
boundaries are permeable and may overlap.

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FIGURE 2. INTEGRATED JUSTICE MODEL: DOMAIN INSTITUTIONS



Note: Each domain interacts reciprocally with all other domains;  
boundaries are permeable and may overlap.

FIGURE 3: INTEGRATED JUSTICE MODEL: DOMAIN THEORIES, CONCEPTS, AND IDEOLOGIES

<p style="text-align: center;"><b>ADVERSARY DOMAIN</b></p> <p><u>Adversarial ideology</u>: truth via clash of party-presented evidence; storytelling model; passive judge; passive jury; truth subordinate to dispute resolution  <u>Evidence law</u>: admissibility versus weight; hearsay rule  <u>Forensic use</u>: of all knowledge domains (cultural, scientific) for case resolution goals  <u>Legal scholarship</u>: doctrinal</p>	<p style="text-align: center;"><b>LAW ENFORCEMENT DOMAIN</b></p> <p><u>Organizational theories</u>: police bureaucracies; quasi-military; production models  <u>Professional knowledge</u>: experiential, training, and education-based  <u>Legal knowledge</u>: instrumental  <u>Forensic science knowledge</u>: applied  <u>Criminal Justice Research</u>: social scientific research in criminal justice, sociology, etc.</p>
<p style="text-align: center;"><b>POLITY/POLICY DOMAIN</b></p> <p><u>Democratic theory</u>: consensus vs. conflict theories  <u>Rule of law &amp; constitutionalism</u>  <u>Federalism</u>: central vs. local tension; conflict and cooperation  <u>Policymaking</u>: preferential pluralism; interest groups; iron triangles; agenda building  <u>Policy research</u>: canons of social scientific research in policy/political science; diffusion of innovation</p>	
<p style="text-align: center;"><b>PSYCHOLOGY DOMAIN</b></p> <p><u>Knowledge</u>: social scientific research in social psychology; cognition; heuristics and biases; memory, perception, suggestion  <u>Applications</u>: eyewitnesses; lineups; interrogations; jury; deception; child witnesses  <u>Research</u>: psychology</p>	<p style="text-align: center;"><b>SCIENCE DOMAIN</b></p> <p><u>Rationalism</u>  <u>Questioning attitude</u>: continuous challenge to knowledge base  <u>Empiricism and theory</u>  <u>Forensic science</u>: uniqueness  <u>Ideology</u>: truth (validity and reliability) based on replicable &amp; falsifiable procedures  <u>Research</u>: criminalistics; physical &amp; biological sciences</p>

Note: Each domain interacts reciprocally with all other domains; boundaries are permeable and may overlap.

FIGURE 4: INTEGRATED JUSTICE MODEL: CORE DOMAIN ACTIVITIES



Note: Each domain interacts reciprocally with all other domains; boundaries are permeable and may overlap.

FIGURE 5: INTEGRATED JUSTICE MODEL: INNOCENCE-RELATED  
ACTIVITIES AND CONCERNS

<p style="text-align: center;"><b>ADVERSARY DOMAIN</b></p> <p>Tunnel vision Prosecutorial misconduct/ immunity Ineffective assistance of counsel Case pressures Judge-Juror errors/biases Perjury (all actors) Appellate limits/finality Legal education limitations</p>	<p style="text-align: center;"><b>LAW ENFORCEMENT DOMAIN</b></p> <p>Investigation: tunnel vision/ partisan; case pressure; ignore exculpatory evidence; ignore forensic science; informants/snitches Witness interviews: not cognitive Lineups: biased Interrogations: coercive Prisons/Parole: innocence a potential issue Criminal justice education/ research: innocence low priority</p>
<p style="text-align: center;"><b>POLITY / POLICY DOMAIN</b></p> <p>System fragmentation Legislation: low criminal justice priority; police/prosecutors veto innovations Chief Executives: reactive on criminal justice issues News media: declining to or less able to report miscarriages Innocence projects: small, poorly resourced Justice bureaucracies: influence pub. opinion; lobby for budget priorities Market sphere: limits government expenditures &amp; abilities Public opinion: innocence support and burnout Innocence issues: compensation</p>	
<p style="text-align: center;"><b>PSYCHOLOGY DOMAIN</b></p> <p>Heuristics and biases approach Cognitive coherence approach Research on lineup, memory, interview &amp; interrogation techniques; child witnesses; deception detection; investigator perception Admissibility issues Psychological consequences of wrongful conviction</p>	<p style="text-align: center;"><b>SCIENCE DOMAIN</b></p> <p>DNA testing; effective forensic science Insufficient funding; pressures; backlogs; supervision issues Bias: arm of law enforcement Laboratory supervision Forensic fraud Subjective testing methods: fingerprint; handwriting; etc. Forensic science lags research science</p>

Note: Each domain interacts reciprocally with all other domains;  
boundaries are permeable and may overlap.