

CHAPTER ONE

INNOCENCE IGNORED

Our mode of trials is often most unfair. It will . . . continue to be, until everything feasible has been done to prevent avoidable mistakes.

—JEROME FRANK

AMERICAN JUSTICE FAILED RAY KRONE

At 8:10 in the morning on December 29, 1991, a female bartender was found, dead, in the men's room of the C.B.S. Lounge in Phoenix. She was nude. The killer left behind no physical evidence save bite marks on her breast and neck. The victim had told a friend that Ray Krone was going to help close the bar that night. Based only on that evidence, police asked Krone to make a bite impression. An expert witness prepared a videotape that purported to show a match by moving Krone's bite impression onto the marks on the victim. According to the Arizona Supreme Court, the videotape "presented evidence in ways that would have been impossible using static exhibits."¹ Although defense counsel had been given the opportunity to examine the dental expert, counsel was not informed of the existence of the videotape until the eve of trial.²

The only other evidence against Krone was that he was "evasive

with the police about his relationship” with the victim.³ Of course, without the bite mark identification, being “evasive” about a relationship is practically worthless as evidence. The case thus turned on the bite mark, and the court-appointed defense expert had no experience in video production. Accordingly, counsel moved for a continuance to obtain an expert who could evaluate the videotape. Alternatively, counsel moved to suppress the videotape or to allow testimony about an earlier case in which the same expert’s testimony was successfully challenged as not sufficiently scientific. The trial court overruled all defense motions. The prosecution expert used the videotape in his testimony without challenge from a defense expert. The jury convicted Krone of murder and kidnaping. The trial judge sentenced Krone to death.

On appeal, the Arizona Supreme Court held that the trial judge had acted improperly in refusing to allow a continuance. The jury had not yet been selected when the motion was made, the court noted, and the state would have suffered little prejudice.⁴ If substantial prejudice would have been caused, the right course of action, according to the supreme court, was to preclude use of the videotape. What the trial judge could not do was what he did—allow use of the tape without giving defense counsel ample opportunity to prepare a defense.

So far, so good. The case was remanded for a new trial, the defense secured an expert, and the jury convicted again. This time, though, the judge sentenced Krone to life in prison, “citing doubts about whether or not Krone was the true killer.”⁵ This borders on the unbelievable. A trial judge who had “doubts about whether or not Krone was the true killer” *sentenced him to life in prison*. Krone served over ten years in prison before DNA testing conducted on the saliva and blood found on the victim excluded him as the killer. The DNA matched a man who lived close to the bar but who had never been considered a suspect in the killing.

Ray Krone’s case is an example of how the current system fails innocent defendants. Police seized on the first plausible suspect and looked no further. The prosecution built a case on a Styrofoam bite impression and mumbo-jumbo scientific evidence. That the case was so weak perhaps explains why the prosecutor did not want the defense to be able to challenge the videotaped “expert” testimony. If

true, that violates the first rule of prosecution—to do justice rather than try to win cases. “Doing justice” in Ray Krone’s case meant allowing the defense to challenge the prosecution’s expert testimony.

The first trial judge failed to give Krone a chance to demonstrate his innocence, and the second one sentenced him to life in prison even though he had doubts about his guilt. These are fundamental failures. To be sure, some parts of the system worked. Krone received what appears to have been effective representation by his counsel, and the Arizona Supreme Court recognized the errors of the first trial judge. Nonetheless, despite these successes, Ray Krone would have spent the rest of his life in prison for a crime he did not commit were it not for DNA testing and the Innocence Project founded by Barry Scheck and Peter Neufeld.

What has gone wrong? In a work published in 1713, Matthew Hale acclaimed the English common-law jury trial as the “best Trial in the World.”⁶ Several commendable qualities that Hale noted have truth as the goal, and three mention truth specifically. For example, Hale said that having witnesses testify in person—subject to being questioned by the parties, the judge, and the jury—was the “best Method of searching and sifting out the Truth.”⁷ Today, as chapter 2 will seek to show, any rational system of justice should care more about protecting innocent defendants than any other value. But DNA testing has made plain that our modern adversary system isn’t very good at protecting innocent defendants. Or, to be more precise, DNA has made plain that the state adversary criminal systems are not very good at protecting innocent defendants. One of the little-noted features of the DNA revolution is how it is almost completely limited to state convictions.

THE FEDERAL SUCCESS STORY?

All of the 207 exonerations accomplished by the Scheck-Neufeld Cardozo Innocence Project benefited state prisoners. All 340 exonerations uncovered by Samuel Gross and his coauthors were of state prisoners.⁸ The Northwestern Center on Wrongful Convictions lists two federal exonerations but provides no details as to either.⁹ The Cardozo Innocence Project reports no wrongful convictions in cases

tried in federal district courts.¹⁰ What are we to make of the virtual nonexistence of federal wrongful convictions?

Perhaps not too much. Federal criminal law is very different from state criminal law. For example, the Gross study found that 96 percent of the known exonerations were either of murder or a sexual offense, usually rape.¹¹ Rape is not a federal crime at all and only a few specific kinds of homicide are federal crimes (for example, murdering a federal judge with intent to interfere with his judicial duties¹²). In 2002, the states convicted almost 45,000 defendants for criminal homicide, sexual assault, and rape.¹³ In the same year, only 161 federal homicide convictions were entered.¹⁴ Thus, the low number of the offenses most prone to wrongful convictions suggest that federal wrongful convictions should be very rare.

Yet there may be features of the federal system that reduce the likelihood of a wrongful conviction even when we control for the type of offense. The caseloads of the federal public defenders and federal prosecutors are, on average, far lower than their state counterparts. For example, state public defenders typically handle hundreds of cases at a time while the average caseload in at least one federal district is about 30.¹⁵ Even assuming that federal criminal law is more complex and time-consuming than state criminal law, the difference in caseloads is a significant difference in workload. Finally, federal investigating agencies, including the FBI, are probably superior to most state police and thus less likely to settle on innocent suspects.

In sum, much of the federal success in avoiding wrongful convictions is probably attributable to the different types of crimes that concern the federal prosecutors. For that reason, what follows in the book will be addressed exclusively to state prosecution and defense of crime. Still, the federal experience gives us reason to believe that lower caseloads for prosecutors and defenders, as well as better quality investigators, would help reduce the error rate in state courts.

AMERICA'S BEDTIME STORY

In the twentieth century, many criticisms were leveled against the American criminal law process. From the left side of the political

spectrum came criticism that criminal justice treated the middle class with kid gloves while targeting the lower classes, particularly those who were racial minorities. Judges had too much discretion in sentencing, for example, and police used their discretion to target and harass the powerless in our society.

From the right side of the political spectrum, we heard that the liberal Supreme Court had tied the hands of the police with rules limiting investigations and suppressing evidence of guilt. The problem was not that too much attention was focused on the powerless. Quite the contrary: The real risks to the fabric of society were those who raped, robbed, and murdered. They should receive the most severe punishments. If it turned out that most were poor and many were racial minorities, so be it.

But in this cacophony of bitter debate, one complaint was rarely heard: that the system was routinely convicting innocent defendants. After all, America has an adversarial system, with procedural protections, unlike the European systems where defendants have to answer questions from judges who seem to assume guilt. We have, in the main, honest police, prosecutors, and judges. Honest police, prosecutors, and judges do not want to convict innocent people. And we provide free lawyers to indigent defendants, lawyers who can achieve an acquittal or a dismissal by deploying the vaunted procedural, adversarial protections—presumption of innocence, right to cross-examine prosecution witnesses, right to call favorable witnesses, right to have the prosecutor turn over favorable evidence, and the right to a jury trial where (in all but two states) if even one juror cannot be convinced of guilt beyond a reasonable doubt, there can be no conviction.

So what's not to like about that story? It is a very soothing story, a bedtime story really. We can lock away 2.5 million people, as of 2006,¹⁶ most of whom are poor and many of whom are racial minorities, and yet we can go to bed at night and sleep soundly—feeling both safe in our beds and justified at taking millions of years of freedom from fellow citizens.

The only problem is that the bedtime story is not true. Over half a century ago, Jerome Frank noted convictions of innocent defendants due to “avoidable court-room errors.”¹⁷ Some of these errors result from the very adversary system that many consider a tool for un-

covering the truth. As Frank demonstrated, truth is often obscured by our rigid rules of evidence, partisanship of lawyers, and the strait-jacket of examination and cross-examination. “[T]he lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts.” Because advocates want *their version of the truth*, the adversary trial system is “the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.”¹⁸

Darryl Brown lodges a deeper critique of our criminal process. A system that admits it routinely convicts the innocent might face a challenge to its legitimacy. Thus, American “trial adjudication intentionally conceals some uncertainties in fact-finding to strengthen conflict resolution and the appearance of institutional legitimacy.”¹⁹ The principal way our process conceals uncertainties is by assuming that juries are virtually infallible as lie detectors. But, as we will see, juries are all too fallible.

The deepest critique of all is given by John Langbein, who demonstrates that the adversarial system that evolved in England created no institutions whose function it was to seek the truth. Thus, the “well-meaning reforms” in English law that produced our modern adversarial system “had the effect of perpetuating the central blunder of the inherited system: the failure to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.”²⁰

The discovery in the last decade of numerous wrongful convictions demonstrates that Frank, Brown, Langbein, and other critics of our adversarial system were correct. So what are the causes of wrongful convictions? As counterintuitive as it may be to imagine an innocent person confessing, data from the Innocence Project show that 24 percent of wrongful convictions include a false confession.²¹ Problems with scientific evidence appear in 39 percent of the Innocence Project wrongful convictions. And the little-known problem of jailhouse snitches and other informants was a cause in 24 percent of wrongful convictions. Perhaps most surprising is that 84 percent of wrongful convictions include a mistaken eyewitness identification. Gate Germond reports a similar finding for cases taken by the Centurion Ministries.²²

Andrew Leipold has identified other causes of wrongful convictions—denying bail, delaying trials, trying codefendants together,

and forcing defendants to defend in courts far from much of the evidence.²³ But, as Leipold shows, the problems are pervasive and deeply embedded. Given that the criminal process accommodates interests other than seeking truth—“most notably, the conservation of judicial resources”—we have developed a process where each pre-trial step “will *explicitly* tolerate a modest amount of error.”²⁴ Darryl Brown agrees, finding that “every major component of criminal adjudication compromises fact-finding to serve competing commitments to government restraint, efficient case disposition, and law enforcement effectiveness.”²⁵

Our system too often fails. The ultimate problem is a failure to screen weak cases, many of which will involve innocent defendants, out of the system. Moreover, we permit prosecutors free rein to offer very favorable plea bargains to get convictions when the case is weak. Perversely enough, American plea bargaining thus creates huge incentives for innocent people to plead guilty. Our “acceptance of this risk evinces a priority for case resolution over truth-finding.”²⁶

When prosecutors pursue innocent defendants, they must, by definition, possess false and misleading evidence that can move an innocent defendant to plead guilty. If the case goes to trial, juries will hear this evidence. It is a variation of the GIGO phenomenon first noted when computers were in their infancy: Garbage In, Garbage Out. The “garbage” evidence is part of what the jury hears because of deeper failures—failures of defense counsel, overzealous prosecutors, and judges who are too passive.

I will develop a series of categories of causes of wrongful convictions, cognizant of the ultimately artificial nature of categories. As Siegel has noted, “Like an unhappy family, every wrongful conviction is unique.”²⁷ Richard Leo urges criminologists to develop a criminology of wrongful convictions.²⁸ In the meantime, I offer categories that are, admittedly, artificial constructs.

INVESTIGATIVE FAILURES

A Department of Justice study of twenty thousand DNA tests of arrested suspects found that one in four of the conclusive tests exonerated the person under arrest.²⁹ In this sample, the police arrested the wrong person *25 percent of the time*. To be sure, any sample based

on DNA testing will overstate the error rate in arrests overall. In many cases, the identity of the actor is known to the police, and there is no reason to conduct a DNA test. On the other hand, DNA tests are used, presumably, only in cases of serious crimes where police have incentive to do a better job of investigation.

In the end, it is impossible, I think, to estimate the wrongful arrest rate. But a 25 percent failure rate in a sample of serious crime cases should give us reason to inquire into how police investigations fail. Though stories of corrupt or evil police surface—and Sam Pillsbury has one of the best accounts³⁰—it is unlikely that bad motives cause many of the failures. If police as a group do not care whether they arrest the guilty or the innocent, the system is in chaos and nothing anyone can recommend can help. Thus, I assume that almost all police, like almost all prosecutors and judges, want to convict guilty people and avoid convicting innocent people. So what goes wrong?

EYEWITNESS FAILURES

We have long known that eyewitness identification produces a high degree of error. “The identification of strangers is proverbially untrustworthy,” wrote Felix Frankfurter in 1927.³¹ Under the best of circumstances, humans are just not very good at remembering faces and picking the right one from a lineup or photo array. To make matters worse, police routinely conduct identifications in ways that enhance their unreliability.

Consider the Clark McMillan case in Memphis, Tennessee, in 1979.³² A black man accosted a white couple in a park, forced them to strip, and raped the girl. She was sixteen years old and a virgin. The girl and her boyfriend gave descriptions of the assailant. Neither mentioned a limp. The police arrested McMillan, a black man who had a profound limp and wore a leg brace. At the first photo array, which included a picture of McMillan, the girl said the assailant was not among the photos, and the boyfriend picked a “filler” (a photo added to fill out the array). The police held a lineup despite these failures. At the lineup, the girl picked McMillan, and the boy again selected a filler.

At trial, the victim testified that her attacker had a limp. She and

her boyfriend identified McMillan from a lineup conducted in the courtroom. That the male victim had never identified him in any procedure prior to trial makes one wonder how he came to identify him in court. Perhaps he was coached, by the other victim if not by the police or prosecutors. Clark McMillan served twenty-two years in a Tennessee prison before he was conclusively exonerated by DNA testing. And the Tennessee prosecutors? They admitted a mistake on *this rape charge* but suggested that McMillan was nonetheless a dangerous rapist who must be kept off the street. One prosecutor said that he might “resurrect two other rape charges for which McMillan was indicted but never brought to trial” because of the wrongful conviction.³³

The unreliability of eyewitness identifications is heightened when the eyewitness is a child. Researchers Cohen and Harnick found that nine-year-old children were almost four times as likely as college students to be led to an incorrect selection by suggestive questions.³⁴ In 1987, an intruder raped an eight-year-old child. Jimmy Ray Bromgard was a suspect in the case but was not under arrest. His act of agreeing to appear in a lineup was thus the act of a probably innocent man. While the child victim picked Bromgard, she said she was not sure, perhaps only 60 or 65 percent sure. “When asked at trial to rate her confidence in the identification without percentages, she replied, ‘I am not too sure.’”³⁵ What system would permit the jury to hear a child identify a man as her attacker when her certainty was so low? The answer: The one we have today in the United States.

It is not only defendants whose lives are damaged by identification errors. After Jennifer Thompson identified Ronald Cotton as her rapist, he served eleven years in prison. Then Thompson was visited by a detective and the district attorney—“good and decent people who were trying to do their jobs—as I had done mine, as anyone would try to do the right thing. They told me: ‘Ronald Cotton didn’t rape you. It was Bobby Poole.’” DNA had exonerated Cotton, the “man I had identified so emphatically on so many occasions,” but he “was absolutely innocent. . . . I live with constant anguish that my profound mistake cost him so dearly.”³⁶

We now know that mistaken identifications contribute to far more wrongful convictions than any other cause. It is time for a radical solution. Chapter 9 will deliver that radical solution.

THE “FLAT EARTH” THEORY OF POLICING AND THE FAILURE TO PURSUE OTHER SUSPECTS

Police investigators are, after all, human like the rest of us. When they put together a theory of the crime, and identify the likely perpetrator, they often close their minds to other theories and to other suspects. And if they discover new data, they are tempted to force it into their preexisting theory. When Galileo’s observations confirmed the Copernican theory that the earth rotated around the sun, the church “police” ignored the new data and forced Galileo, under threat of torture, to renounce his belief in the Copernican theory of the solar system.

Radelet and his coauthors call this phenomenon “making the defendant fit the crime.”³⁷ Deborah Davis and Richard Leo refer to it as a “presumption of guilt.”³⁸ The Manitoba Department of Justice, in a report chronicling the wrongful conviction of Thomas Sophonow (to which I shall return), called it “tunnel vision”:

Tunnel Vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer’s thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer’s thinking. Anyone, police officer, counsel or judge can become infected by this virus.³⁹

The case of Michael Crowe is a good example of police holding on for dear life to their flat-earth theory.⁴⁰ Only hours after discovering Michael’s twelve-year-old sister, Stephanie, murdered in her bedroom, the police seized on fourteen-year-old Michael as the murderer. The inept police investigation led them to conclude that it was impossible for anyone to have broken into the house. Once that flawed assumption was in place, it led quickly to Michael because of remarks he had made about being angry with his sister. Remarkably, the police rejected Raymon Tuite as a suspect even though they knew he was a drifter with “a prior criminal record and a history of

mental problems” and that he had been seen “knocking on doors and peering in windows in the Crowe neighborhood on the night of the killing.”⁴¹

Michael repeatedly denied killing his sister during day after day of interrogation while in police custody. He offered to take a lie detector test. It was, at worst, inconclusive, but the police lied and told him he had failed. Despite his denials, a weak motive at best, and no evidence that he was lying, the police stuck to their theory. They chose to believe Tuite when he admitted being in the Crowe neighborhood but denied entering any homes. The myopic police investigation that focused too quickly on Michael began a seven-month ordeal in which Michael and two of his friends were incarcerated awaiting trial for murder. The boys, all fourteen years old, were to be tried as adults. I will return to the Crowe case in the next subsection, dealing with false confessions. The boys were ultimately saved from wrongful convictions by a test that found Stephanie’s DNA on the clothes of—you guessed it—Raymond Tuite.

THE “FLAT EARTH” THEORY OF POLICING AND FALSE CONFESSIONS

Until the advent of sophisticated DNA testing, many lawyers, judges, and academics believed that false confessions from mentally competent suspects were extremely rare. We now know otherwise. About a quarter of all wrongful convictions in the Innocence Project data include false statements of innocent suspects. As Mark Costanzo and Richard Leo write, “We might hope that judges and jurors could easily tell the difference between true and false confessions. Unfortunately false confessions often *look and sound true*.”⁴²

Perhaps the best-known case is that of the young men, then fourteen to sixteen years old, who confessed to the brutal rape and beating of the so-called Central Park Jogger. Four of these confessions were videotaped. Yet we now know that someone else committed this brutal crime and that the young men were completely innocent.⁴³ Why would an innocent person confess to committing a crime?

The mechanisms that produce false confessions are not fully understood. A critical component, as Leo has observed, is the increas-

ing use of police trickery as the interrogation tool of choice.⁴⁴ Facing what appears to be a certain conviction, even an innocent suspect—perhaps *particularly an innocent suspect*—can falsely confess in exchange for lenient treatment. For example, when police questioned Jackson Burch about a murder, he maintained his innocence for hours.⁴⁵ Police then fabricated incriminating evidence against him to “lever a confession,” including a phony lie detector test that he, naturally, “failed.” The detective told Burch that it was up to him whether he got charged with capital murder or second-degree murder. If he confessed, and explained the circumstances, he might be charged with second-degree murder and serve as few as seven years. Burch confessed to being present at the scene but said he could not remember the assault that killed the girl.

After Burch incriminated himself, the state charged him with capital murder, of course, not second-degree murder. He was convicted and sentenced to die, but the state supreme court overturned the death sentence. As Alex Wood described the situation faced by Burch, the police told him, “We’ve got you, and you could face the death penalty. But if you confess, you may be able to persuade us to send you to prison for as little as seven years.” Wood asks, “Why should that kind of pressure work only on a guilty person?”⁴⁶ It is a very good question.

Return to the Crowe case. Fourteen-year-old Michael was repeatedly interrogated while in police custody. The interrogators told him over and over that there was no doubt as to his guilt and all that remained was to “get down to why it was done.”⁴⁷ The interrogators lied to him repeatedly about various tests they did that indicated he was engaging in deception. They told him over and over that if he cooperated with the police and confessed, he would receive help and not jail time. They said if he didn’t confess, he would go to an adult prison and perhaps be raped. As Leo described the police strategy, “Through the use of multiple lies, relentless pressure, threats and promises, the interrogators succeeded in breaking down Michael Crowe’s confidence in his memory: ‘I don’t remember. That’s the truth. I can’t remember what happened. The very fact anything happened—the only reason I know is you’ve been telling me I did this. That’s the only way.’”⁴⁸

Crowe eventually “confessed,” though he did not reveal any de-

tails of the crime. How could he? He was innocent. His pathetic confessions all resembled the following: "I know I did it, but I don't know how."⁴⁹ Based on the manufactured, unbelievable "confessions," the prosecutors charged him with murdering his sister. He was incarcerated in juvenile hall for seven months, awaiting trial. But for DNA, he would be in a California prison today.

The picture here is clear even if the psychological mechanism is still shrouded in mystery. Ofshe and Leo describe a two-step process by which police move a suspect "from denial to admission: The first stage culminates in a state of hopelessness and despair produced by the realization that denying involvement in the crime is futile." The second step involves offering the hopeless suspect inducements "to motivate the suspect to perceive that it is in his self-interest to comply with the interrogator's wishes and confess."⁵⁰

The Michael Crowe case is a perfect example of what Ofshe and Leo describe. Crowe was fourteen years old, in shock over the murder of his sister, removed from his home and family, and subjected to relentless interrogation from adults who were certain of his guilt. When the interrogators repeatedly lied to him about the evidence against him and then promised to help him rather than jail him, Michael could no longer sort the truth from what the adults believed was the truth. Two friends of Michael's were arrested and also ultimately gave incriminating, and false, accounts of their involvement in Michael's murder of his sister.

It is a mystery why Michael was viewed as a better suspect than the drifter seen looking in windows in the very neighborhood and on the very night Stephanie was murdered. Perhaps the police thought that the crime would be more sensational, and thus draw more attention to their work, if the killer was the victim's brother. Perhaps the answer is found in the dark psyches of the police. Or perhaps the answer is as simple as that their first theory had Michael as the killer.

I agree with Richard Ofshe that, in most cases, police do not want to produce a false confession. Of course, there are exceptions. Susan Bandes has written movingly about the willingness of police to use brutality to get confessions.⁵¹ But I think those are outliers. In the typical case, as Ofshe notes, police "manage to keep themselves believing" that the suspect is guilty. And "the passion, the pursuit, the

desire to finish the case that takes over interrogators when they interrogate blinds them to what they are doing in some cases, and they blunder into making a horrible mistake that they did not want to make and they will never admit that they made once it's over."⁵²

We have so far seen stories of how the investigation and arrest process can misfire. Now I consider how the prosecution and adjudication of criminal cases is flawed.

PROSECUTION AND ADJUDICATION FAILURES

The vaunted adjudicative process that gave Matthew Hale so much pride is not very good at screening out innocent defendants today. The parts that are adversarial—the courtroom drama—are not very good at uncovering truth. And the parts that are not adversarial are under control of the prosecutor. What we have today, Gerry Lynch demonstrates, is an “administrative system” of criminal justice where the prosecutor’s office is more important than the courtroom.⁵³ The value of the procedural protections in the eighteenth century was to keep the king and his cronies from fabricating cases against their political opponents. But errors today are routine and difficult to detect. Defense counsel failures make routine errors even harder to detect and correct. I begin with these failures.

DEFENSE COUNSEL FAILURES: A “TRUE CONSTITUTIONAL CRISIS”

The Constitution Project and the National Legal Aid and Defender Association will soon issue a major report on the provision of defense counsel to indigent defendants in the United States. Two of the reporters have just published an article concluding that the present provision of counsel is a constitutional crisis. Mary Sue Backus and Paul Marcus comment: “The pervasiveness of this failure is particularly shocking in light of the decades of repeated attempts to call attention to and repair the deep flaws in the indigent defense systems across the nation.”⁵⁴

And while the guilty as well as the innocent deserve competent counsel, the profound failure to create a functional system falls more heavily on the innocent. “If defense counsel are juggling hundreds

of cases, clients' claims of innocence will not likely receive the attention they deserve."⁵⁵ While one should not confuse fiction with reality, Perry Mason provides an aspirational model of what defense counsel could accomplish in the service of the innocent. His clients were, of course, always innocent, and he always believed their protestations of innocence. One problem faced by defense lawyers in the real world is that they, like the judicial system itself, lack an epistemology to separate the guilty from the innocent. If the defendant looks guilty to the prosecutor, she probably looks guilty to the defense lawyer as well.

In addition to his steadfast belief in his client's innocence, Perry Mason had other advantages over those who labor in the real world of indigent defense. He had Paul Drake, a private investigator who conducted his own fact investigation and developed alternative theories of the case. This was an effective antidote to "flat earth" policing. Second, Drake and Mason appeared to have only one case at a time and thus vast quantities of time and energy to devote to proving the client's innocence. Compare this to data collected by the American Bar Association showing that lawyers for indigent defendants in four Alabama counties failed even to request investigators or experts in 99.4 percent of the cases.⁵⁶

While the Perry Mason model is unattainable, the reality is often so far removed as to be unrecognizable as criminal defense. Kent Roach notes that the "battle theory does not work well when one of the gladiators is inexperienced, incompetent, woefully under-resourced, drunk or asleep."⁵⁷ Return to Jimmy Ray Bromgard, who spent fifteen and a half years in a Montana prison for a crime he did not commit. Despite an extremely thin prosecution case, Bromgard's lawyer "did no investigation, hired no expert to debunk the state's forensic expert, filed no motions to suppress the identification of a young girl who was, according to her testimony, at best only sixty-five percent certain, gave no opening statement, did not prepare a closing statement, and failed to file an appeal after Bromgard's conviction."⁵⁸ To say that Bromgard's lawyer provided the "assistance of counsel" guaranteed by the Sixth Amendment is to make a mockery of the words.

What might explain the lawyer's indifference to his innocent

client? Consider a picture of indigent clients meeting their lawyer for the first time in New York City:

In disgusting pens holding as many as forty prisoners, I would interview clients. I was the first person many prisoners saw after they had spent up to four days waiting to appear before the court.

The holding pens were filled with huddling defendants, most of whom were standing because there was only one bench. Virtually the entire population of the pens was nonwhite and poor, without the resources or stable families to allow them bail. Most were in shock or panic, yelling questions and begging for help. "What am I charged with?" "When will I ever get out?" "Can you call my mother?" "What if I didn't do it; will they still keep me?" "Will you call my boss because if I don't show up I'll lose my job?"

I came to see that most of them were not really represented at all. Not only would they not make bail, *but most would ultimately plead guilty to something, anything, just to move out of the system.* I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition.⁵⁹

The Supreme Court in *Gideon v. Wainwright* said that providing counsel to a "poor man charged with crime" made him "equal before the law."⁶⁰ But as Corinna Barrett Lain puts it, *Gideon* is just a "piece of storybook Americana."⁶¹ The huddled masses in holding pens will be surprised to learn that they are "equal before the law." Indigent defendants are lucky to have a warm body and even a few minutes to discuss their case with that warm body. Some public defenders handle seven hundred cases a year—almost three dispositions per working day.⁶² A caseload of this magnitude means that even the most able and dedicated defense lawyer has insufficient time to investigate a client's innocence, insufficient time to file motions to discover the state's case, insufficient time to develop alternative theories of the case or do the barest investigation.

Backus and Marcus conclude that by "every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."⁶³ The *New York Times* reported in 2003 that five states pay nothing toward indigent defense, relying on counties to provide funds.⁶⁴ In one county in Mis-

Mississippi, appointed lawyers are paid next to nothing and sometimes coerce clients into pleading guilty. Most states pay public defenders less than prosecutors, and both groups make far less than private lawyers. Many lawyers who represent indigent defendants seem uninterested, drugged, burned out, incompetent, crushed by the workload, or all of the above.

As Susan Bandes puts it, for some defense lawyers the “time arrives when the lawyer simply can no longer continue to do the work effectively.”⁶⁵ Michael Mello describes his book about death cases as “rife with exhausted sadness.” Part of his sadness is “that our criminal justice system and the law itself, so noble in theory, are so shabby and seedy in practice.”⁶⁶

The very person who should be laboring to prove her client innocent may be throwing up her hands and pressuring him to plead guilty. Indeed, though criminal procedure has “many of the trappings associated with confrontation and contest,” in reality, it is not “adversarial in theory nor adversarial in fact.”⁶⁷ Instead, “a major objective of all participants is to achieve a settlement without recourse to contested trial.”⁶⁸ A pivotal role played by defense lawyers is to “transmit to the client the system’s imperatives” that include “cooperation with the police or the administrative convenience of a guilty plea.”⁶⁹

To be sure, a study from the early 1970s found no difference between outcomes obtained by appointed counsel and retained counsel.⁷⁰ But this study suggests that the problem is deeper than indigent defense. Because rich people are statistically irrelevant among criminal defendants, the clients who retained lawyers in the study were of modest means. Clients of modest means cannot generally afford to pay for a lengthy trial and would likely face greater temptation to take a plea bargain deal than defendants represented by public defenders. Thus, rather than give us confidence in the quality of appointed counsel, the study makes me wonder how flawed is the provision of criminal defense to all but the wealthy.

Does it matter if the client says he is innocent? Probably not, or at least not very much. In addition to the epistemological problem shared by all others in the criminal justice process, defense lawyers are burdened with an attitude problem. Over time, most defense lawyers become cynical if not jaded. Professor Alan Dershowitz has

“discerned a series of ‘rules’ that seem—in practice—to govern” the criminal system: “Rule I: Almost all criminal defendants are, in fact, guilty. Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.”⁷¹ We are beginning to understand that Rule I is an exaggeration, but it is unclear how effectively this message has percolated through the criminal justice system.

Defense lawyers thus face relentless caseload pressure with a cynical mask firmly in place and a myopic focus on getting a plea deal. Is it any wonder that defense lawyers are not inclined to believe the client who protests his innocence? Is it any wonder that defense lawyers who have hundreds of cases are exasperated when a few clients reject a very favorable plea bargain on the ground that they are innocent? And given their very own lawyer’s impatience with their plight, is it any wonder that innocent defendants are tempted to take plea offers if the “deal” is good enough?

I do not mean to say that most defense lawyers are incompetent. Nor do I mean to say that most defense lawyers become jaded or burned out. As Andrew Taslitz pointed out to me, big-city public defender offices have relatively large numbers of “ideologically passionate left-wing libertarians who view prosecution as a dirty, evil business, aiding state oppression of powerless groups.”⁷² But with millions of criminal cases each year, if only a small percentage of the low-paid defense bar provide poor representation, hundreds of thousands of defendants are poorly served by their lawyer. Poor representation increases significantly the risk that an innocent defendant will plead guilty or be found guilty after a trial in which her lawyer will not provide the adversarial testing that the Sixth Amendment is meant to require.

PROSECUTOR FAILURES: IGNORING INNOCENCE

Kent Roach observes that “[w]rongful convictions inevitably implicate multiple stages of the criminal process. Mistakes made during the initial investigation by the police or witnesses are repeated in subsequent proceedings.”⁷³ Precisely. When the system fails, the police give the prosecutor a case file that contains evidence, and the prosecutor sees only that evidence. She does not see, unless she grills the police, the tentative or flawed investigative procedure. Belloni

and Hodgson report the same phenomenon in England: Prosecutors remain “dependent upon the information provided by officers” and do not probe that evidence for weakness.⁷⁴ In sum, once a case file is created that makes an innocent defendant look guilty to the prosecutor, the appearance of guilt tends to intensify at every stage of the process.

Moreover, even if the prosecutor asks probing questions, she is unlikely to uncover the flat-earth failure to follow other leads or develop other theories. The prosecutor has no epistemology by which she can access the truth about guilt. It is difficult to prove a negative, and roads not taken rarely announce themselves to the prosecutor when she reviews the file.

As Susan Bandes has demonstrated, “tunnel vision” is not limited to police officers. Prosecutors also have a “tendency to develop a fierce loyalty to a particular version of events: the guilt of a particular suspect or group of suspects.”⁷⁵ This helps explain what otherwise is inexplicable: Prosecutors sometimes continue to insist on the guilt of suspects who have been conclusively exonerated by DNA testing.⁷⁶ The prosecutor’s “[l]oyalty to a particular version of events may develop at a very early stage, and may prove mightily resistant to reconsideration.”⁷⁷

As stories of wrongful death-row convictions mounted in Illinois in the late 1990s, the Illinois Supreme Court explicitly recognized the problem of tunnel vision and amended the ethical rules governing the conduct of prosecutors. The first paragraph now states, “The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.”⁷⁸ The committee report notes that the duty to seek justice has been an explicit part of Illinois law at least since 1924. That the state supreme court saw fit in 1999 “to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably”⁷⁹ reveals the depth of the court’s concern with prosecutorial tunnel vision.

Beyond the problem of tunnel vision, most state prosecutors are burdened with too many cases. The incentive to dig into the police work looking for flaws or for other suspects is muted by the constant need to get cases plea bargained or ready for trial. In addition, McConville and coauthors note that the close working relationship be-

tween police and prosecutors creates a “desire to achieve a result which legitimates police action in the case.”⁸⁰

The biggest problem may be the job we ask prosecutors to do. The goals of serving justice and being an advocate are in tension, if not downright contradictory, as Susan Bandes, Daniel Medwed, Fred Zacharias, and others have noted.⁸¹ The career incentives for prosecutors are also in tension with protecting innocence. Prosecutors typically have ambitions that transcend their current position—to advance in the ranks of prosecutors, to become a judge, to run for political office. The current system rewards conviction rates and either ignores or penalizes dismissals and acquittals. In short, we have failed “to develop an incentive structure for prosecutors that rewards the pursuit of justice rather than the pursuit of competitive advantage.”⁸²

The adversary system and the American method for selecting prosecutors aggravate the problem with incentives and the tension of being an advocate while seeking justice. In France, prosecutors receive additional education and training and go directly into prosecuting when their internships end. They never practice law as an advocate. The French believe that practice “at the bar could produce a cast of mind which would be a defect” in seeking truth. “The lawyer, whose duty is to win the case for his client, is often led not to favor the emergence of the truth.”⁸³ In the United States, prosecutors are chosen, often for political reasons, after years or decades of practicing law and honing their skills as a dogged advocate. Michael Tonry would remedy some of these problems by having the states adopt a career civil servant model for prosecutors, in essence moving us toward the French system.⁸⁴

Laboring under these tensions and burdens, prosecutors can influence the process in a variety of ways and at many points. If she does so fairly, striking (in the Supreme Court’s words) “hard blows,” the adversarial process is served, and the prosecutor is not to be blamed for inherent flaws in our adversarial approach. But the prosecutor can aggravate these flaws by striking what the Court calls “foul blows.” This is forbidden. It is as much the prosecutor’s “duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”⁸⁵

The difference between “hard blows” and “foul blows” is often a difficult call, but prosecutors sometimes go far over the foul line. The prosecutor in the rape case against the Duke lacrosse players, Mike Nifong, offers a good example. The state attorney general investigated the case after Nifong dismissed the rape charges, but not the charges of kidnaping and sexual assault. The attorney general concluded that the defendants were innocent of all charges.⁸⁶ An ethics panel found Nifong guilty of misleading defense lawyers and a judge about a lab report that showed DNA evidence from four unidentified men on the alleged victim.⁸⁷

What is unusual about the Nifong case is not the presence of foul blows. It is the response of the legal community. “There is no discipline short of disbarment that would be appropriate in this case,” said F. Lane Williamson, a Charlotte lawyer who led the ethics panel.⁸⁸ I will return to the issue of sanctions for foul blows later in the chapter.

An example of foul blows noticed by the Supreme Court appears in the Lloyd Eldon Miller case. It appears that police and prosecutors made “the defendant fit the crime”—the authorities “needed a suspect and quickly convinced themselves of Miller’s guilt.”⁸⁹ The case also involved flawed science that defense counsel failed to challenge. Because this case took place in 1955, we do not know whether Miller was an innocent defendant convicted in part because of foul blows of the prosecutor. But his case remains a good example of police and prosecutorial tunnel vision.

Two days after Thanksgiving, Janice May was raped and brutally murdered in Canton, Illinois. Settled in 1825, halfway between St. Louis and Chicago on the Chicago, Burlington, and Quincy railroad, Canton was a small, sleepy Midwestern town. The horrible crime in the small Midwestern town gave rise to a “manhunt” that the local newspaper called “the most intensive” in the county’s history.⁹⁰

The family dog led two boys to their sister, who was moaning and bleeding from multiple wounds about the head. The day was bright and very cold—the high of ten degrees was reached at noon—but she had set out to meet her brothers at a playground. She apparently decided to take a short-cut through the rail yard, where she was apprehended. She died in a local hospital three hours after her brothers found her. Her mother was a nurse, her brothers were twelve and

fourteen years old, and the dog that found her was named Cuddles.⁹¹ Her father worked for the International Harvester Company⁹²—a business so important to Canton that four years later an “International Harvester Appreciation Week” was held in the town.⁹³

Early the next morning, suspicion settled on twenty-nine-year-old Lloyd Miller because he did not return his cab to the taxi company the night of the murder and could not be found at his home. The police questioned a waitress who had ridden in Miller’s cab shortly after the murder. The interrogators over several sessions kept “endlessly” asking her whether Miller said he did it. She later testified, “By this time I was very confused and crying, and I said, ‘I guess he did.’ . . . And from that moment on, I told lies.”⁹⁴

Miller agreed to take a lie detector test. Though the results were inconclusive, the police polygraph operator told Miller that the machine said he was lying. He insisted on his innocence during an eight-hour interrogation. He insisted on his innocence even when the police told him, falsely, that a pubic hair was found on the victim that matched his. He insisted on his innocence even when police showed him the waitress’s statement in her presence. He said to her, “Tell these people I didn’t say no such thing to you.”⁹⁵

According to Miller, he finally signed a written statement that he did not read because the interrogating officer said that it was the only way he could avoid the electric chair.⁹⁶ At trial, the lie detector results were not introduced. The pubic hair “match” was not introduced. These phony pieces of evidence were used to get a confession. When the phony or inconclusive evidence did not do the trick, the police moved to the next stage. They threatened the electric chair.

However persuasive Miller’s confession might have been, the prosecutors had a technical problem. Anglo-American law requires corroboration of a confession, and the waitress had repudiated her original accusation in a written statement in possession of the defense. The defense was permitted to read to the jury the portion of her statement denying that Miller confessed.⁹⁷ At trial, she changed her story again, and testified that Miller told her that he committed the crime.⁹⁸ While her testimony provided corroboration if the jury chose to believe what she said on the stand rather than what she told the defense, it was hazardous to rely on the testimony of someone who changes her story repeatedly.

That brings us to the bloody undershorts, found not far from the murder scene. In his statement to the police, Miller said that he had abandoned the shorts because they were bloody.⁹⁹ The existence of the shorts and the presence of blood on the shorts would serve as physical corroboration of the confession and would probably send Lloyd Miller to the electric chair.

Later investigation, in preparation for Miller's habeas corpus hearing, revealed that the shorts were almost certainly not his. Moreover, it is unclear whether there was any blood on the shorts. Sophisticated tests performed eight years later found no blood.¹⁰⁰ As the police and prosecutor knew at the time, at least some of the stain was brown paint. But the way the prosecutor questioned the expert on the witness stand, and the way he answered the questions, made it seem as though *all* of the stain was blood.¹⁰¹

The prosecutor referred to the bloody shorts in his closing argument. The testimony that the shorts were stained with blood corroborated Miller's confession and ensured a conviction. Was the use of shorts stained with brown paint a hard blow or a foul blow? The Supreme Court of the United States, unanimously, took the view that it was foul, concluding that the "prosecution deliberately misrepresented the truth."¹⁰²

The Court's conclusion was rejected by the Grievance Committee of the Illinois Bar Association. In a defiant report completely at odds with the ethics investigation of Mike Nifong in the Duke case, the committee accused the Court of "misapprehend[ing] the facts of the case."¹⁰³ The committee concluded that the prosecutor violated no ethical duties when he failed to inform the defense, the court, or the jury of the existence of paint stains on the shorts.

The report would make the Pharisees proud. The committee correctly noted that the presence of paint on the shorts was not inconsistent with the presence of blood and thus the testimony was not a lie. But the critical question for my purpose is whether the prosecutors served justice by hiding from the defense that the stains were mostly paint.¹⁰⁴ Consider the effect on the jury when the prosecutor presented shorts that appeared to have been soaked in the blood of an innocent child. The committee's conclusion that justice was served by hiding the paint stain is simply incredible.

Now compare the response to the foul blows in the Miller case

with those in the Duke lacrosse players case. Perhaps times have changed in the last fifty years. I hope that is the explanation. But knowing the way our justice system routinely underserves and even oppresses the marginal suspect and defendant, I am doubtful. I think the Illinois ethics commission vindicated the Miller prosecutors because Miller was an itinerant drifter with no powerful family or friends. The Duke lacrosse players were white, upper-middle-class college students.

Leaving aside notions of fair play and propriety, prosecutors who abuse their power threaten the innocent, as the Duke case makes clear. Perversely, prosecutorial abuses are likely to be found more often in cases of innocent defendants than guilty ones because cases against innocent defendants will be, on balance, weaker than cases against a guilty defendant. The attitude of the Illinois Grievance Committee helps create the climate in which some prosecutors feel justified in overreaching. Willard J. Lammers concluded that the “Miller case has a fearful message” for America. He then asked very hard questions about the conduct of the authorities. Miller’s

confession was inconsistent with, and indeed contradicted, known facts. Even convinced as they were of Miller’s guilt, one would have expected the authorities to be troubled by this, but they made little or no effort to resolve the inconsistencies or contradictions. When they learned, for example, that the hair on the vaginal swab did not match Lloyd’s, they should (one thinks) have had profound doubts about the confession and bent every effort to study the matter. Yet they did not. On the contrary, at the trial, they misrepresented key evidence and suppressed evidence favorable to the accused. Why did they behave in this fashion?

It is my view that the answers to these questions lie in the nature of the criminal process. . . .¹⁰⁵

The state’s conduct in the Miller case can only be understood as the by-product of an adversarial process that emphasizes winning the case rather than achieving justice. It is one kind of problem if a party in a civil suit fails to investigate or present its case fairly. We can safely leave those cases to the adversary system, confident that in a universe of cases civil justice will be done. We cannot afford to take such a *laissez-faire* approach to criminal cases. We need to find

a way to encourage prosecutors to seek justice as their principal goal. In chapter 9, I will propose a radical change that I believe will have that effect.

FAILURE OF JUDICIAL SCREENS

Screening innocent suspects and defendants out of the justice system depends initially on police and prosecutors. But flat-earth policing and tunnel vision prosecuting suggest the need for a meaningful judicial screen. In most states, and in the federal system, a preliminary hearing before a judge takes place a week or two after arrest. The defendant has a right to have his lawyer present evidence, and to cross-examine prosecution witnesses. Unfortunately, the prosecutor need only show probable cause to believe the defendant is guilty—a very low standard that is almost always met. The prosecutor would not proceed with the preliminary hearing if she did not have probable cause. When the defendant is innocent, the case file necessarily contains evidence that falsely implies guilt. But it will still *look* like probable cause. Indeed, the standard is so easily met that few savvy defense lawyers present evidence at the hearing, contenting themselves with probing the state's case through cross-examination of prosecution witnesses.

Some states do not require a preliminary hearing, permitting a prosecutor's sworn information to bring the case before a grand jury. Forty-eight states make use of grand juries in some fashion,¹⁰⁶ and the Fifth Amendment requires grand juries in federal felony prosecutions. This nationwide embrace of grand juries suggests that they are an important protection. They are not. Grand juries are very unlikely to screen for innocence. The grand jury hears only the state's side of the case. The defendant and defense lawyer are not present. Nor is there a judge in the room. The prosecutor presents the evidence and answers any questions that the grand jurors might ask. A grand jury controlled by a prosecutor who believes the defendant is guilty is not an effective screen for innocence. As a chief judge of New York's highest court is reported to have said, any prosecutor worth his salt can get a grand jury to "indict a ham sandwich."¹⁰⁷

But what about the trial—Hale's "best Trial in the World"? What about the presumption of innocence and the requirement that guilt

must be proved beyond a reasonable doubt? What about the requirement, in almost all jurisdictions, that no conviction can be entered unless all members of the jury vote guilty? Surely all (or almost all) innocent defendants will insist on a trial and will benefit from powerful procedural protections. Surely a guilty verdict from a jury against an innocent defendant is a truly rare occurrence.

This is what most observers of the American criminal justice system believed until DNA testing proved us wrong. Upon reflection, we were naive to believe that procedural protections will catch almost all the mistakes made by police and prosecutors. Our justice system is like our world—viewed from the inside, it looks different than when viewed from the outside. When we see a piece of granite, for example, it looks solid. Little did we know until the discovery of atoms and subatomic particles that even a piece of granite is mostly empty space. It remains difficult to comprehend at an intuitive level that a solid object is 99.99 percent empty space.¹⁰⁸

It is the same with the justice system. The procedural protections look solid when viewed from outside but contain far more empty space than we thought. The fundamental point here is that, when the system fails, the case of an innocent defendant *will look like any other case throughout the entire criminal process*. The “garbage in, garbage out” problem leaves juries pretty much in the dark.

JURIES AND THE GIGO PROBLEM

The Framers would be surprised to learn that the jury system they so valued is sometimes part of the reason innocent defendants are convicted. To the Anti-Federalist Framers, the proposed central government was oppressive and dangerous. The jury was to stand between the citizen and the tyrannical central government. The right to counsel, to free speech and religion, to be free of unreasonable searches and seizures were all potential nullities if the government could bring its case before corrupt or biased judges. Thus, the principal focus of the debate over the Constitution was directed at assuring trial before an impartial jury drawn from the defendant's community.

But by the nineteenth century, juries were viewed by some as a joke. Mark Twain said in 1873: “We have a criminal jury system

which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read."¹⁰⁹ Criticism mounted in the twentieth century. Historian Carl Becker said in 1945 that trial by jury was "antiquated" and "inherently absurd."¹¹⁰ Present-day critics abound. The common refrain is that jurors are amateurs too easily fooled by lawyers, unable to get the facts right or apply the law fairly.

Juries also have their contemporary, and eloquent, defenders. Jeffrey Abramson uses political theory to demonstrate that, while the jury is not without flaws, it is the best way for a deliberative democracy to decide criminal culpability. On Abramson's view, the various jury criticisms are not just wrong, but incoherent. When the jury fails, it is because we as Americans have failed.

The direct and raw character of jury democracy makes it our most honest mirror, reflecting both the good and the bad that ordinary people are capable of when called upon to do justice. The reflection sometimes attracts us, and sometimes repels us. But we are the jury, and the image we see is our own.¹¹¹

Or as Scott Sunby puts it, in the death penalty context, "At bottom, a jury's effort to decide between life and death is a distinctly human endeavor infused with emotion and moral judgment."¹¹²

On the question of how well juries find facts, Jonakait's thoughtful book persuades that jury verdicts are determined by the evidence presented.¹¹³ Hans and Vidmar reached a similar conclusion, based on a study of British judges taken after jury verdicts in their courts.¹¹⁴ The classic and rigorous Kalven and Zeisel study found that the judges found the jury verdict without merit in 9 percent of the cases.¹¹⁵ Pizzi describes the judge-jury difference in the Kalven and Zeisel data as "substantial,"¹¹⁶ but given the drumbeat of criticism of juries, 9 percent does not sound all that high.

The jury's role in creating criminal culpability out of facts crucially depends, of course, on an accurate presentation of the facts. If the jury is presented facts that falsely imply guilt, the jury is not to be blamed for a false conviction. Four categories of false evidence can be usefully constructed—erroneous eyewitness identifications, false confessions, perjury, and failed science.

I discussed false confessions and eyewitness misidentifications in the subsection about police failures. Here I discuss perjury and failed science. We know little about police perjury. As Morgan Cloud observed, “No one can know with certainty the extent of the problem, but no one familiar with the criminal justice system would deny its existence.”¹¹⁷ Pizzi argues that the Warren Court’s penchant for creating rules that exclude reliable evidence made police perjury more likely and the justice system more cynical.¹¹⁸

Whatever the scope of the problem, it is extremely difficult to remedy. Lawyers who suspect that a witness is giving false testimony will attack it during cross-examination, a type of questioning where lawyers are permitted to attempt to confuse or discredit the witness, to show inconsistencies in the testimony, and even to suggest motives for its falsity. But a veteran police officer who decides to risk discipline, and his pension, to tell a smooth and coherent, but false, story at trial is a difficult target for cross-examination. In the current American criminal justice system, where the trial is viewed more as a contest than a careful search for the truth, not much can be done. My reformed criminal justice process, described in chapter 9, will indirectly create a greater disincentive for police to lie on the stand.

Informants and accomplices are another source of perjury. One commentator argues that the amount of “fabrication” that results from deals with the government “is potentially staggering.”¹¹⁹ Stephen Trott, a former federal prosecutor who now sits on the Ninth Circuit Court of Appeal, said that informants’ “willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor.”¹²⁰

The problem is not so much that those charged with or convicted of crimes are willing to lie to get a benefit, but that prosecutors are so willing to believe the lies. Begin with Saul Kassin’s proof that humans are just not very good at detecting lies.¹²¹ A study by Paul Ekman and Maureen O’Sullivan demonstrated that police detectives and FBI and CIA agents could detect lies only 56 percent of the time, which is only marginally better than flipping a coin.¹²² Ellen Yaroshefsky conducted interviews with assistant United States

attorneys and concluded that several, overlapping factors contribute to the willingness to believe informants—a lack of corroboration of the informant's story; lack of investigation; naive belief that the prosecutor could trust the informant and could tell who was telling the truth; lack of experience as a prosecutor; and the prosecutor's belief in the guilt of the defendant.¹²³

While jailhouse informants do not carry the credibility of police officers, and can be savagely attacked on cross-examination, juries too often believe informants who are lying. The Canadian justice system was shocked by the revelation of two wrongful convictions based, in large part, on false informant testimony. In one, Thomas Sophonow was tried three times for the brutal murder of a sixteen-year-old girl. The jury could not reach a verdict in the first trial. The second trial ended in conviction, but the Canadian Court of Appeal directed a new trial.¹²⁴ When he was convicted a second time, the Canadian appellate court acquitted him.¹²⁵ Here is how the prosecution used informants at Sophonow's three trials:

In addition to the three jailhouse informants called in the case, police had offers from nine other jailhouse informants, including Terry Arnold, who is currently the prime suspect in the killing, to testify against Sophonow. In the end, one of the three called [to testify], Thomas Cheng, had twenty-six counts of fraud withdrawn. While proclaiming the best of motives for his testimony, a police report from a polygraph operator, which was not disclosed to the defence, confirmed Cheng's primary motive was to secure his liberty and have his charges dropped. After testifying at the first and second trials, he was released and never seen again. The Crown read in his evidence at the third trial.¹²⁶

The commission that later investigated the failures of justice in the Sophonow case described another informant witness as "a prime example of the convincing mendacity of jailhouse informants. He seems to have heard more confessions than many dedicated priests."¹²⁷

After his acquittal Sophonow continued to insist that he was innocent. The Winnipeg Police Service reinvestigated the murder, ultimately announcing that Thomas Sophonow "was not responsible for the murder and that another suspect had been identified. On

that same day, the Manitoba Government issued a news release which stated that the Attorney General had made an apology to Thomas Sophonow as he 'had endured three trials and two appeals, and spent 45 months in jail for an offence he did not commit.'"128

It is not just "flat earth" or "tunnel vision" policing that can lead prosecutors to put forth jailhouse informants. What if an ambitious, zealous young attorney general became convinced that the Teamsters' union leader was involved with organized crime? If Robert Kennedy believed in his heart that Jimmy Hoffa was damaging the fabric of the union movement, would he not use whatever tools at his disposal to get Hoffa? And if federal prosecutors heard rumors that Hoffa was trying to bribe jurors in his trial for, ironically enough, accepting bribes as head of the Teamsters, wouldn't the prosecutors welcome a jailhouse informant and make a very generous offer to encourage him to join Hoffa's entourage and become a spy? That, or something close, is how Robert Kennedy finally got Jimmy Hoffa.

The jailhouse informant was Edward Partin. He was languishing in a Louisiana jail, facing indictments for state and federal crimes of embezzlement, kidnapping, and manslaughter, when he apparently conceived a plan to save his own skin. He told his cellmate, "I know a way to get out of here. They want Hoffa more than they want me."¹²⁹ It is impossible to argue with Partin's logic, however much we may condemn his ethics or lack of honesty. He contacted federal authorities and offered to seek to become part of the Hoffa inner circle as the bribery case was about to begin. Chief Justice Warren, in dissent, explained why Partin cooperated with the federal prosecutors:

A motive for his doing this is immediately apparent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. . . . [H]e has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.¹³⁰

That the federal authorities found a way to shield Partin from state as well as federal charges tells us how badly they wanted him inside the Hoffa circle. And why would a man charged with embez-

zling, kidnapping, and manslaughter (and about to be charged with perjury) not be willing to lie to save himself? I am not suggesting that Partin did lie, or that Hoffa was innocent, only that if the government wants a conviction badly enough, the price for jailhouse informants can reach the point where lies about innocent people become a very real possibility. As Chief Justice Warren put it,

This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here.¹³¹

But Chief Justice Warren dissented alone, and the Court has done nothing in the intervening forty years to solve the problem of jailhouse informants or to warn jurors that the testimony might be false. As lying jailhouse informants were a factor in 16 percent of the wrongful convictions, it is a problem that needs addressing.

Another problem for juries is failed science. Some writers refer to this as “junk” science, but that allows us to feel too smug about the problem. If the problem were only the fraudulent or completely indefensible expert testimony, the fix would be easier. But it extends even to evidence that we have long accepted on faith as good science. One writer called failed science the “most insidious and least noted” of the problems facing the legal system today.¹³²

For example, it now appears that fingerprint matches are not the gold standard that we have been assured. Even if it is true that no two fingerprints are the same—and how can that proposition be proven?—when the FBI computerized identification system cannot produce a definitive answer, “human analysts make the determination, and their conclusions often differ.”¹³³ The reader might recall the high-profile FBI mistake that led to the arrest of Brandon Mayfield, a Portland lawyer, who was incorrectly linked to one of the Madrid terrorist bombings in March 2004. Although three FBI examiners and an external expert agreed that the prints were May-

field's, Spanish authorities eventually matched the prints to an Algerian, and the FBI agreed with the Spanish experts.¹³⁴

Moreover, even evidence that is "bulletproof," such as DNA, can be produced or stored in ways that undermine its accuracy. If fingerprints and DNA evidence can sometimes produce false results, the label *junk science* does not completely contain the category of failures. I prefer the term *failed science*, which is broad enough to cover reliable tests that misfire as well as the fraudulent and incompetent science.

Because most juries want to believe expert testimony and because juries lack the training to distinguish good science from bad science, juries are at the mercy of expert witnesses. If the defense lawyer is incompetent or the state does not give the defense a chance to counter the expert testimony, failed science can lead to a conviction and a death sentence. We saw in Ray Krone's case a prosecutor who so badly wanted a conviction that he did not give the defense a fair chance to rebut the failed science that was being served the jury. The prosecutor was aided and abetted by a judge who refused to give the defense time to rebut the new type of testing that was revealed to the defense, literally, on the eve of the trial.

Failed science can cross-contaminate other errors, such as overzealous prosecutors and incompetent defense lawyering, to create a truly foul mixture. Return to Jimmy Ray Bromgard's case. The state called a forensic expert who had examined hairs found on the sheets where the young victim was raped. (The semen found on the victim's underwear did not yield results from then-available testing.) The expert "testified that there was less than a one in ten thousand (1/10,000) chance that the hairs did not belong to Bromgard." But this testimony was fraudulent because "there has never been a standard by which to statistically match hairs through microscopic inspection. The criminalist took the impressive numbers out of thin air."¹³⁵ Bromgard's incompetent defense lawyer did not challenge the expert's methodology or seek funds for a defense expert. Recall the Alabama data showing that defense counsel failed to request investigators or experts in 99.4 percent of cases.¹³⁶

Belloni and Hodgson report failed science in the British "Birmingham Six" case, where six men served seventeen years each for a

pub bombing before their convictions were overturned.¹³⁷ The prosecution's forensic expert reported the results of a "Greiss test" on the hands of the defendants for which he claimed a 99 percent certainty that two of them had handled nitroglycerine. But on the same night, a scientist in the same laboratory dismissed positive results from a Greiss test in two cases because the suspects had handled adhesive tape.¹³⁸ A test that can be fooled by adhesive tape cannot be very reliable. More troubling, the scientist who testified about the Greiss test failed to testify about (and the prosecution failed to disclose to the defense) the negative results from other sensitive tests for nitroglycerine residue on the defendants' hands.

In 1993, prosecutor William C. Forbes asked the West Virginia Supreme Court to investigate "the willful false testimony of Fred S. Zain, a former serologist with the Division of Public Safety" who had testified for the state in many cases.¹³⁹ That a prosecutor would allege willful false testimony by a scientist the state had frequently used shows the seriousness of the problem.

Two independent investigations followed, one by the American Society of Crime Laboratory Directors. Both found numerous acts of fraud that included "misreporting the frequency of genetic matches," "reporting inconclusive results as conclusive," "repeatedly altering laboratory records," and "reporting scientifically impossible or improbable results."¹⁴⁰ Though no one knows how many innocent defendants were convicted because of Zain's subversion of the justice system, a state police investigation "identified as many as 182 cases that might have been affected by Zain's work."¹⁴¹

Was Fred Zain an evil man? Was he an avenging devil, aka Charles Bronson's vigilante character? The truth is apparently more about mendacity and incompetence than evil. Zain claimed to be a chemist when he was, in fact, a mediocre student who had failed organic chemistry. Incredibly, "no one looked at his transcripts until the house of cards he had built came tumbling down."¹⁴²

The Zain saga is a good example of cross-contaminating errors. A flawed bureaucracy hired Zain without examining his credentials. Overzealous prosecutors used him without checking his qualifications. Lax judges did not demand much from the prosecutors who qualified him as an expert. Most disturbingly to those who embrace the adversarial system, *not a single defense lawyer from the hundreds of*

cases even bothered to challenge his credentials. It is easy, too easy, to dismiss Zain as a spectacular failure that we can avoid by careful screening of experts. But that is a mistake because experts do not have to be utter failures to interject false science into criminal cases.

In sum, we have a problem with police perjury, jailhouse informants, false confessions, eyewitness misidentifications, and failed science. I agree with the conclusion Jonakait reaches in his study of the American jury system. It is the too frequent failure of the adversary system itself that produces wrongful convictions.¹⁴³

ESTIMATING THE FREQUENCY OF CONVICTIONS OF INNOCENT DEFENDANTS

So far, we have innocent defendants arrested, charged, and convicted of crimes they did not commit. These cases cause immeasurable harm to the innocent people, to their families, and to the public trust in government. But they cause another harm that should not be ignored. In every case in which an innocent person is convicted, the real criminal remains free to prey on victims yet again. Thus, the interests of all “sides” in the debate over crime control are in confluence on this issue. Whether you believe we are “soft” on crime or that our criminal laws cover too much conduct with insanely severe sanctions, you do not want an innocent defendant sitting in jail while the real criminal goes unpunished.

We have known for centuries that an occasional failure in the system convicts an innocent person. We now know they are far too common. But how common? Is there any way to estimate the frequency of convictions of innocent people? Radelet and his co-authors documented four hundred cases of wrongful convictions of crimes punishable by death, which they suggest merely scratches the surface of wrongful convictions.¹⁴⁴

A statistical model developed by Gelfand and Solomon estimates a 2.21 percent probability that a jury of twelve will convict an innocent person.¹⁴⁵ Baldwin and McConville studied actual English cases and concluded that 5 percent of the convictions were of doubtful validity.¹⁴⁶ I will use 2 percent as a conservative estimate. Of course, not very many defendants go to trial, so perhaps the problem of innocents being convicted is serious, unforgivable really, but not wide-

spread. Only thirty thousand felony convictions result from a trial each year.¹⁴⁷ Two percent of that universe gives us six hundred innocent defendants convicted of felony.

What about plea-bargained convictions? The 1993 Royal Commission on Criminal Justice “acknowledged that ‘it would be naive to suppose that innocent persons never plead guilty because of the prospect of the sentence discount.’”¹⁴⁸ I agree. Perversely, as noted earlier, the weaker the case, the more favorable the plea deal is likely to be. Even an innocent defendant who has never committed a crime must be tempted to take a deal in which a felony is reduced to a misdemeanor and the sentence will be the time served before bail was arranged or, if the defendant was out on bail, a suspended sentence.

McConville and Baldwin concluded that 2 percent of the guilty pleas in their study were of doubtful validity.¹⁴⁹ If we halve that estimate, to be conservative, and apply it to the roughly one million felony convictions each year,¹⁵⁰ it gives us ten thousand guilty plea felony convictions of innocent defendants. Moreover, there are roughly eight million nonfelony convictions each year.¹⁵¹ Prosecutors with weak misdemeanor cases will probably offer steeper discounts and thus induce a greater percentage of innocent defendants to plead guilty to lesser penalties. But if we stick with a rough estimate of 1 percent, we get eighty thousand wrongful misdemeanor convictions. We are thus close to one hundred thousand wrongful convictions each year.

Andrew Leipold’s estimate of wrongful convictions is more conservative than mine.¹⁵² But even if my estimate is too high by a factor of ten, it is intolerable that ten thousand innocents are convicted each year. It is impossible to prove the rate of erroneous convictions with any precision. But the number is ultimately beside the point. I seek to defend, in the next chapter, the proposition that due process requires a set of procedures that protect innocent defendants, at a reasonable cost. However many innocent defendants are saved by these procedures, if due process requires the procedures, then states must make them available.

In chapter 9, I will propose dramatic changes in the pretrial screening of cases, plea bargaining, the way the counsel is used to prosecute and defend, and the appeal of criminal cases. These will be revolutionary, not incremental, changes. I believe these procedures

will save many innocent defendants from conviction at the same time they satisfy due process.

History will, I believe, see the early years of the twenty-first century as an inflection point in the protection of innocent defendants. DNA is the best, but not the only, example of how science is now offering us a partial epistemology of innocence. In a book generally critical of the way the Supreme Court has handled scientific evidence in the past, David Faigman nonetheless concludes that “there is reason to be hopeful. Science and technology today are so pervasive that the Court cannot continue its slapdash ways.”¹⁵³

With science and technology as our trusted lieutenants, it is time to declare war on the convicting of innocent defendants, which brings me to “narcoanalysis.”

ERNIE TRIPLETT AND “NARCOANALYSIS”

Jimmy Bremmer was raped and murdered in Sioux City, Iowa, on August 31, 1954, but his body was not found for almost a month. The case was eerily similar to the Lloyd Miller case that would occur a year later in the adjoining state of Illinois. Both victims were eight years old; both were raped; and both were brutally murdered. The suspect in the Sioux City case was, like Lloyd Miller, a drifter.

Ernie Triplett was an itinerant laborer who worked different jobs—including carnival worker—for a few weeks and moved on.¹⁵⁴ He was AWOL from the army in 1922 when someone told him that the army could not take action against him if he were married. So he married a prostitute with whom he was living. He tried to convince her to stop prostituting herself and, sometime during the Great Depression, left her because she would not stop. He eventually married again, without bothering to get a divorce. His second wife threw him out of the house in 1952. By the time of his contact with police in 1954, he had tertiary syphilis.¹⁵⁵

In August 1954, Triplett went to work for the Flood Music Company in Sioux City selling music lessons.¹⁵⁶ We do not know what drew the police to question Triplett, but it is possible that he had been in the Bremmer neighborhood while soliciting buyers for music lessons. The police interviewed Triplett two days after Jimmy disappeared, and he admitted seeing a boy matching Jimmy’s descrip-

tion on August 31. He told several versions of his encounter with Jimmy, always denying that he touched or harmed him. In the weeks that followed, “he continued to give the police evasive and inconsistent answers to their questions.”¹⁵⁷ When he was interviewed twenty years later, Triplett said he purposely told different stories because he wanted to stay in jail.¹⁵⁸ Indeed, he bragged about outsmarting the police to get free food, cigarettes, and coffee. It is also possible that his tertiary syphilis was causing memory loss. And it is possible that he killed Jimmy Bremmer and was clumsily trying to cover up the truth.

At some point in September, the police persuaded Triplett to admit himself to the State Mental Health Institute in Cherokee, Iowa, for a psychiatric evaluation and treatment. After finding Jimmy’s body, the police conferred with the clinical director until midnight about Triplett’s possible involvement in Jimmy’s murder.¹⁵⁹ A couple of weeks later, and presumably in response to a communication from the hospital, two Sioux City police drove to the hospital to interview Triplett. In the morning, he told the same basic story he had told a hundred times: After getting out of Triplett’s car, Jimmy had “gone into his house, returned briefly, and then disappeared around the side of the house.”¹⁶⁰

But a completely different story emerged in the afternoon session, with one of the psychiatrists taking the lead in the questioning. Triplett now admitted that he had made a sexual advance, that Jimmy had run from him, and that he knocked him down. What changed? While it is possible that Triplett’s conscience finally moved him to tell the truth when he had been telling a different story for a month, a more likely explanation is found in the doctor’s notes. They had, for some time, been subjecting Triplett to “narcoanalysis”—questioning him while he was under the influence of powerful drugs. The doctors gave him barbiturates that caused drowsiness and euphoria, as well as LSD, a powerful and unpredictable hallucinogen. Triplett would later tell his lawyers of “fabulous pictures” he saw while at the mental hospital.¹⁶¹ He was sometimes given a combination of barbiturates and a stimulant that could produce delirium.

Prior to and during the October 6 afternoon interrogation, the doctors gave Triplett large dosages of Seconal (a barbiturate) and Desoxyn (a stimulant commonly known as “speed”). The intra-

venous dosages of Desoxyyn were so large, an expert witness would later testify, that they could have been lethal, “but apparently were not, as he is alive.”¹⁶² Even swimming in this sea of powerful drugs, Triplett denied killing Jimmy. Indeed, his choice of words at one point shows the control of the doctors and their narcoanalysis: “Nobody told me I killed the Bremmer boy.”¹⁶³ The head of the mental hospital, seventeen years later, concluded after his study of the records that “the likelihood was that Triplett said whatever his interrogators wanted him to say.”¹⁶⁴

Triplett’s lawyer was a former schoolteacher who had never attended law school but who had “read for the law.” He made no effort to inspect the doctors’ notes even though Triplett told him he had been drugged at the hospital. The confession was admitted into evidence. The jury convicted of second degree murder—evidently his confused confession persuaded the jury that there was no premeditation. The judge sentenced to the maximum permitted, life in prison. Just before he entered the Iowa State Penitentiary, he turned to the sheriff and said, “This thing didn’t turn out the way I thought it would.”¹⁶⁵

At some point during his seventeen years in prison, Triplett began writing letters insisting on his innocence. Unfortunately, his letters were bizarre, nonsensical, and mostly sent to people who were not in a position to help him, such as the president, the secretary general of the United Nations, and the “Poster Master General.” One of his letters, however, reached the legal clinic at the University of Iowa College of Law. It said that his legal problem was “Fraud Contract—Pinkerton Dects Real Murder Case.” Helpful information, he said, could be found in the “Anglo Saxion American Law Contract Poaster General’s Office at Sioux City, Iowa.” In an almost comprehensible part, the letter read, “Judge Vanp Pelt of Lincoln Neb. Absent the confession would not support the conviction.”¹⁶⁶

Two years out of Stanford Law School, Robert Bartels joined the Iowa law faculty in July 1971, “to take over and develop a fledgling ‘clinical legal education’” program begun by Professor Philip Mause.¹⁶⁷ By now, Triplett had been in prison seventeen years. How the Iowa legal clinic proceeded in court and how the lawyers and law students unearthed the notes about the “narcoanalysis” is a good read but beside the point for my project. I am, however, inter-

ested in the strategic decision the Triplett defense team made after discovering the narcoanalysis.

A hearing had been scheduled on the question of the voluntariness of Triplett's confession. The defense could wait and spring the information on the state at the hearing. Another possibility was to show the evidence to the prosecutor beforehand, in the hopes that he would join, or at least not resist, the motion to vacate the conviction. The danger in the second course was that, once warned, the state lawyer might find counterevidence.

Complicating the decision was that the state's lawyer was William Sturges, who had been one of the prosecutors at Triplett's trial. Might Sturges feel that he needed to vindicate the verdict by seeking opposing expert witnesses? Ultimately, Bartels decided to show Sturges what the defense had found. It was the right thing to do. And the evidence of involuntariness was so strong, it would be hard to rebut.

But still Bartels fretted about Sturges's reaction. He needn't have. After examining the defense evidence, and doing some investigation of his own, Sturges "conceded that the October 6, 1954 confession was involuntary and that the conviction should be reversed."¹⁶⁸ He would join the motion to vacate and, because without the confession there was not enough evidence to convict on retrial, he would dismiss the indictment. At the close of the hearing, Sturges rose and said, "On this the State moves for a dismissal." His voice cracked and tears welled up in his eyes.¹⁶⁹

Ernie Triplett was a free man. He later won a modest amount of money from Iowa as partial compensation for the seventeen years of freedom he had lost. He lived out the rest of his life in Iowa City, getting around on his bicycle. Robert Bartels managed the modest sum of money and did what he could to help Triplett.

I end what is mostly a tragic chapter with the Triplett story because we have heroes here. Professors Robert Bartels and Philip Mause recognized a valid claim beneath the haze of Triplett's confusion. Bartels and the Iowa law students spent countless hours investigating the case. Without the notes about "narcoanalysis" that they uncovered, it is unlikely that Triplett would have won his freedom. Bartels decided to trust that prosecutor William Sturges would do the right thing when he saw the evidence. And Sturges did.