Wrongful Convictions and Their Causes: An Annotated Bibliography

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This Annotated Bibliography directs attorneys to relevant, select legal periodical articles written from 2010 to date on wrongful convictions and their causes. The authors focus on five major causes that lead to wrongful convictions, as evidenced by the literature. Part I of the Annotated Bibliography focuses on resources that discuss false confessions as a cause of wrongful convictions. Part II discusses resources that address the role of police and prosecutorial practices, including misconduct, in wrongful convictions. Part III provides articles on eyewitness and jailhouse informant issues related to wrongful convictions. Part IV contains articles that deal with how forensic evidence errors may lead to wrongful convictions. Part V provides miscellaneous articles in which other relevant issues related to wrongful convictions and their causes are addressed.

I. INTRODUCTION

Although Netflix's "Making a Murderer" series and popular podcasts have recently reignited the public's interest in wrongful convictions and their

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causes, legal scholars, authors, and institutions have been steadily considering these issues for years.[1] Additionally, various government entities and other organizations have examined the issues related to wrongful convictions in an attempt to pin down their specific causes and to determine the rates of wrongful convictions.[2] This Annotated Bibliography directs the reader to recent, select legal periodical articles examining wrongful convictions and the causes or factors that frequently lead to those convictions. All works selected for inclusion in this article were published in January 2010 or later. Newspaper and popular magazine articles are not included in this bibliography.

The works referenced in this Annotated Bibliography have been categorized by the wrongful conviction cause or factor highlighted in each work. Because several works referenced include a substantial discussion of more than one wrongful conviction cause or factor, each article is organized by the type of the wrongful conviction cause or factor discussed in the most detail within the work. Due to the extensive number of articles available on the topic of wrongful convictions, only a limited number of articles are included in this bibliography.[3] The exclusion of an article from this bibliography should not be considered a judgment on the quality or importance of that article.

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1. *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), http://www.ncjrs.gov/pdffiles/dnaevid.pdf; Adele Bernhard, *When Justice Fails, Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 Ohio St. J. Crim. L. 7 (2009).

2. *See generally* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/; *Predicting and Preventing Wrongful Convictions*, NAT'L INST. OF JUSTICE (2013), https://nij.gov/topics/justice-system/wrongful-convictions/Pages/predicting-preventing.aspx.

3. The authors of this bibliography included only those relevant articles published in 2010 or later within journals ranked within the Top 50 U.S., English-language Criminal Law and Procedure law journals (2008-2015, by combined score) and the Top 50 U.S., English-language law journals for all subjects (2008-2015, by combined score), according to the Washington and Lee Law Journals Submissions and Ranking index at http://lawlib.wlu.edu/LJ/. At the time this article was written, the 2009-2016 ranking data was unavailable from the site.

II. FALSE CONFESSIONS

John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

In this essay, Mr. Blume and Ms. Helm address the phenomena of "factually innocent defendants" who plead guilty to crimes. Beginning with the example of the "West Memphis Three" defendants and examining similar cases involving wrongful conviction, the essay focuses primarily on innocent defendants who plead guilty in order to be released from prison (*i.e.*, the "unexonerated"). After briefly summarizing the history of plea bargaining and referencing relevant statistics, the authors enumerate three factors that primarily contribute to the prevalence of guilty pleas by innocent defendants. The authors also provide an overview of the academic debate over the plea bargaining process, including both critiques and justifications of the process. They then examine the role that *Alford* pleas (as opposed to nolo contendere, or "no contest" pleas) have played in increasing the number of innocent defendants who plead guilty. The essay concludes with suggestions for reducing the number of innocent defendants who plead guilty.

Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The "Guilty As Hell" Rule in State Courts*, 36 AM. J. TRIAL ADVOC. 233 (2012).

In this article, Mr. Braithwaite examines the 1991 U.S. Supreme Court case *Arizona v. Fulminante*. In *Fulminante*, the defendant unknowingly befriended an FBI informant while in jail for possession of a firearm as a felon. The informant promised Fulminante protection from other inmates who believed Fulminante had murdered his young stepdaughter, but only in return for details about the alleged murder. Fulminante confessed to the informant, who shared the confession with the jailhouse authorities. Fulminante was subsequently convicted of the murder based on the confession to the informant. Although the Supreme Court found that Fulminante's confession was coerced, the Court also determined the admission of the coerced confession was subject to a "harmless error" analysis, and that the admission of a coerced confession does not automatically result in a reversal of the conviction and a new trial. Instead, the Court categorized the coerced confession as a "trial error" because it could be "quantitatively assessed" against the other evidence, as opposed to a "structural defect" that would not be subject to a harmless error analysis. In response to the *Fulminante* case, the author conducts an analysis of state court cases to determine whether courts follow the rule in *Fulminante* or whether they also provide additional protections to defendants under their states' own harmless error rules. The author finds that some states follow *Fulminante* while also applying a separate harmless error test that examines whether the other admitted evidence in the case is enough

to determine the defendant's guilt. The author asserts that these types of harmless error analyses are "inconsistent with a defendant's [Sixth Amendment] right to trial by jury" because of the role that appellate courts play in making a determination of guilt when coerced confession evidence is involved. Mr. Braithwaite suggests that the courts should discard this separate test (which he calls the "guilty as hell rule") and instead adopt an automatic reversal rule due to the unique effect that confession evidence has in a case. The article also recommends that an "effect-on-the-verdict" test be used to determine whether the admission of the coerced confession is harmless error.

Mark Costanzo et al., *Juror Beliefs About Police Interrogations, False Confessions, and Expert Testimony*, 7 J. EMPIRICAL LEGAL STUD. 231 (2010).

This empirical study measures potential jurors' beliefs about false confessions obtained during the police interrogation process. Noting a dearth of research on the topic, the authors assert the importance of studying jurors' beliefs on these topics for three reasons: 1) because jurors make determinations about the truthfulness of an allegedly false confession when deciding on a case; 2) because judges' assumptions about jurors control their decisions about the expert testimony that is allowed at trial; and 3) because expert testimony can be used to challenge a false confession. In this study, participants matching the demographics of jury pools in several states were questioned about their views on the following: 1) permissible police interrogation tactics; 2) detecting lies and false confessions; 3) whether they would ever make a false confession themselves; 4) expert testimony; and 5) rates of false confessions. The article also includes a short literature review of laboratory studies about false confessions and wrongful convictions, as well as statistics and findings from actual case analyses on the topic.

I. B. Frumkin, *Expert Testimony in Juvenile and Adult-Alleged False Confession Cases*, 50 CT. REV. 12 (2014).

This brief article addresses expert testimony and its role in helping the courts to evaluate defendants' confessions after a *Miranda* waiver. Experts, typically psychologists or mental health professionals, usually testify either about general police interrogation tactics and their psychological effects, or about a specific interrogation and its effect in eliciting a specific defendant's confession. The author argues that certain psychological factors may make some defendants more susceptible to making a false confession than others, and that expert testimony about such factors is critical to helping courts determine how much weight to place on a potentially false confession. The author includes exoneration statistics and reviews the types of false confessions at issue. He also discusses police interrogation procedures, contrasting the

more aggressive Reid technique of interrogation with the PEACE (Planning and Preparation, Engage and Explain, Obtain an Account, Closure, and Evaluation) method.

Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L. J. 529 (2010).

In this article, Mr. Gallini argues that "nearly all confessions obtained by interrogators nationwide are inadmissible, but nonetheless admitted" and it is because of this that many suspects are wrongfully convicted of crimes. The author examines the Reid technique of interrogation, a method that has been used by police officers since the 1940's. In explaining the Reid technique, the author focuses in detail on the steps of the technique, as well as the backgrounds of the individuals credited with creating it, particularly John E. Reid and Fred E. Inbau. The author then turns to a discussion of the problems with confessions from criminals who were subjected to the Reid technique, making two arguments: 1) that since the Reid technique is designed to "accomplish the same goal as the polygraph" and since polygraph results are not admissible in court, neither should be confessions elicited from the Reid technique; and 2) that in order for a confession elicited through the Reid technique to be admissible in court, the interrogator certified in the technique should have to be qualified as an expert. Mr. Gallini concludes by suggesting that the Reid technique be replaced with more reliable, collaborative interrogation methods.

Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395 (2015).

In this essay, Mr. Garrett examines twenty-six additional false confession cases that were discovered due to DNA exonerations between 2009 and 2014. These cases were discovered after the forty DNA exoneration cases that Mr. Garrett discussed in his 2010 article "The Substance of False Confessions." The author analyzes the cases and determines that "confession contamination" is a prevalent factor in a majority of these cases. Other relevant characteristics of the exonerees include the following: 1) ten of the twenty-six exonerees were juveniles; 2) the exonerees in one-third of the cases had a mental illness or intellectual disability; 3) the majority of the cases involved allegations of murder, with three of the exonerees having been sentenced to death; 4) most of the exonerees were interrogated for long periods of time; and 5) all exonerees had waived their *Miranda* rights. Mr. Garrett reiterates the need to prevent wrongful convictions through false confessions by implementing changes such as recording the entirety of police interrogations, using scientific methods to ensure the reliability of confessions,

implementing pretrial judicial review of confession evidence, utilizing expert testimony to address confession evidence at trial, drafting appropriate jury instructions regarding confession evidence, and properly addressing confession evidence on appeal and in post-conviction proceedings.

Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

This article focuses on the issue of "confession contamination" by examining the content of false confessions and how those confessions are handled at trial and in the post-conviction phase. The author focuses on forty DNA exoneration cases that are tied to convictions caused by false confessions. The author emphasizes the level of detail contained within the majority of these confessions, arguing that the level of detail of "inside information" contained in each confession reflects likely problems with the police interrogation process in each of those cases. In other words, the confessions contain details that only someone who had committed or investigated the crime would know, indicating that those details were possibly provided by interrogators in some way during a problematic interrogation process. It is through this process that the confessions become contaminated. The author suggests reforms to address the reliability of confessions, such as providing complete recordings of police interrogations and modifying interrogation techniques to prevent the disclosure of facts unknown to the suspect.

Sydney Schneider, Comment, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering* Alford *Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279 (2013).

The author examines the use of *Alford* pleas in cases where the main piece of evidence used against the defendant is a confession. With the significant increase in the use of plea bargaining in the legal system, the author focuses on when "attorneys should not recommend that their clients utilize the plea." The author bases her argument, in part, on the greater awareness today of the factors leading to false confessions and how that has played a role in wrongful convictions. The article begins by describing how *Alford* pleas came to be, followed by a brief review of the acceptance and use of the *Alford* plea across the states. The author uses two separate cases to analyze the use of *Alford* pleas when confessions are the main evidence. The first case is known as the "West Memphis Three" and the second as "Robert Davis." These two cases provide insight into how *Alford* pleas can provide near-term benefits to the defendant, but long-term detriment to post-conviction remedies. The author outlines the issues that attorneys and defendants must contemplate when considering an *Alford* plea. Ultimately, the author argues

that no *Alford* plea should be entered given the success of the Innocence Movement and greater awareness of false confessions, if the prosecution's evidence rests on a confession with no corroborating evidence. The author recommends this course of action based on the fact that most states treat *Alford* pleas as guilty pleas, thereby waiving some of a defendant's post-conviction options.

III. POLICE AND PROSECUTORIAL PRACTICES

Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013).

This article discusses in great detail two early-2000's mass exonerations that resulted from wrongful convictions: the Trulia, Texas exonerations and the exonerations involving the Rampart Community Resources Against Street Hoodlums (CRASH) unit of the Los Angeles Police Department. By comparing the Trulia and Rampart exonerees with the exonerees from prior wrongful conviction studies, the author examines the following: 1) the factual innocence of the Trulia and Rampart exonerees; 2) the demographics of the exonerees; 3) the offenses of which the exonerees were wrongfully convicted; 4) the causes of the wrongful convictions; and 5) the method by which the exonerees had been convicted (*i.e.*, guilty plea versus conviction after a trial). The author finds that in the Trulia and Rampart exonerations, police and prosecutorial misconduct—especially perjury— led to the wrongful convictions. The author also finds that there were an unusually high number of guilty pleas among the Trulia and Rampart exonerees, as compared to exonerees in prior studies. The author determines that fear of the ramifications of not pleading guilty ("trial penalty"), a lack of trial strategies, and the lack of sympathetic forums led to this high number of guilty pleas. The author concludes by discussing procedural and substantive perjury, as well as other forms of police corruption. He suggests that reform is needed to reduce police misconduct.

Timothy Fry, Comment, *Prosecutorial Training Wheels: Ginsburg's* Connick v. Thompson *Dissent and the Training Imperative*, 102 J. CRIM. L. & CRIMINOLOGY 1275 (2012).

In this Comment, Mr. Fry discusses Justice Ginsburg's dissent in the 2011 U.S. Supreme Court case *Connick v. Thompson*. In *Connick*, the Court determined that a prosecutor's office could not be held liable in a Section 1983 suit for failure to train for a *Brady* violation made by a member of its staff. In her dissent, Justice Ginsburg examined the training issue, stating that the lead prosecutor was responsible for making sure his staff members were provided with on-the-job *Brady* training. The author uses Justice Ginsburg's

dissent as a basis for discussing the potential problems with prosecutorial discretion, and the ease with which such discretion may lead to prosecutorial misconduct. He proposes several policy changes to deter prosecutorial misconduct, including the following: 1) shifting the costs of state wrongful conviction funds to the counties of the prosecutors responsible for wrongful convictions; 2) changing state law to require training programs on the *Brady* requirements; and 3) creating national guidelines for prosecutors' offices to use to guide their performance.

Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193 (2013).

In this article, the author attempts to uncover why police interrogation contamination occurs given that it is universally condemned by police in their training. Interrogation contamination occurs when the interrogator either "knowingly or unknowingly" provides non-public facts to a suspect while also coercing the suspect into using that information in his or her post-admission narrative. These facts are known as "misleading specialized knowledge" and research has shown that it is the presence of these details that people often rely on to determine the accuracy of someone's statements. However, the "misleading specialized knowledge" that leads to these rich details can make false confessions difficult to distinguish from true confessions. The author argues that interrogation contamination occurs because of the "American method of guilt-presumptive accusatory interrogation." Interrogations are not a neutral fact-finding process, but rather a "guilt-presumptive" conviction process. Interrogations are only carried out once the police are reasonably certain of someone's guilt. As such, the goal is to move a suspect from denial to admission. The author then outlines the typical process of interrogation that police use. The danger this poses to the criminal justice system is that police interrogation contamination is difficult to detect given that many interrogations are not taped which increases the risk of false confessions and wrongful convictions.

Kate McClelland, Comment, *"Somebody Help Me Understand This": The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under §1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323 (2012).

This article examines the Supreme Court's case law up to and including *Connick v. Thompson* regarding district attorney liability under 42 U.S.C. § 1983. The author argues that the confusion surrounding the Supreme Court's ruling in *Connick* is attributable to the fact its reasoning relies on two different lines of case law. The first line of case law deals with prosecutorial immunity; the Supreme Court found there to be two roles that prosecutors fill, and that their immunity depended upon which role they were engaged in

when the violation took place. The author cites several Supreme Court cases to illustrate this. The second line of case law deals with municipal liability under § 1983, and analyzes the issues of constitutional torts caused by municipal policies and the circumstances under which a § 1983 claim can be made (*e.g.*, a pattern of "failure to train" or "failure to supervise").

Laurent Sacharoff, *Miranda's Hidden Right*, 63 ALA. L. REV. 535 (2012).

When the U.S. Supreme Court decided *Miranda v. Arizona,* it created confusion by saying that the "right to remain silent" must be both waived and invoked. The author argues that the Court actually was describing two subrights with that phrase: the right not to speak and the right to end police questioning. One must be waived and the other invoked, respectively. The author traces the history of the writing of the *Miranda* opinion to show that even at this stage the Justices recognized that there were two rights inherent in the "right to remain silent." Further analysis of subsequent cases decided by the Court lends credence to this interpretation culminating in *Berghuis v. Thompkins*. Throughout the oral arguments in *Thompkins*, there was confusion as to what was being waived and what was being invoked. Although Justice Scalia briefly sought to clarify what the Court and counsel were discussing when speaking of waivers and invocations, the final decision written by Justice Kennedy did not clarify or distinguish. The author argues that the two subrights ought to be labeled separately and that police should be required to warn suspects they have the right to end police questioning.

Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1 (2010).

The author argues that the criminal justice system has an incorrect understanding of the role police play in our legal system. Instead of viewing police as "impartial fact gatherers," we should view them as "biased advocates attempting to disprove innocence." Because of this misunderstanding, the author believes that the criminal justice system lacks mechanisms to deter police misconduct, in particular, police lies. The article begins by providing evidence of police lies and the effects that these lies have had on the outcomes of trials, namely, innocent people being wrongfully convicted. The author then moves on to examine U.S. Supreme Court precedent regarding police lies, finding that the Court discourages police lies in some circumstances while also showing indifference towards them at other times. As a result, the author argues that police lies should be categorized as either "those that expose the truth" or "those that distort it." For those instances where police lies expose the truth, the author argues for maintaining the status quo. However, for those instances where police lies distort the truth, the author

argues for a modified exclusionary rule. This modification is seen as essentially codifying what many judges are already doing with regards to police lying in reports or under oath. The author believes that this change would provide a deterrent to police lies that can lead to wrongful convictions while also shifting "the benefit of the doubt to the innocent defendant."

IV. EYEWITNESS AND INFORMANT ISSUES

Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381 (2010).

This article addresses the lack of reliability of eyewitness identification evidence and its role as a "leading cause of wrongful convictions." The authors focus specifically on show-up identification procedures, which they deem the "least reliable of all the identification procedures" due to their suggestive nature. The authors examine the majority and minority approaches to determining the admissibility of show-up evidence at trial. The majority approach, as determined by *United States v. Biggers* and later cases, asks courts to look at the facts and the totality-of-the-circumstances surrounding the show-up evidence to determine its admissibility in court. The minority approach, on the other hand, disallows show-up evidence from being admitted at trial unless two factors are met: 1) exigent circumstances must prevent the police from using a lineup or photo array at the time of the show-up; and 2) the police must not have probable cause to arrest the defendant at the time of the show-up (and therefore be unable to conduct a lineup or photo array). Citing social science research as well as problems with models in states like Utah and Kansas that merely modify the majority approach, the authors argue that the minority rule should be adopted by the U. S. Supreme Court. However, the authors suggest that the minority approach be modified to tighten the exigency and probable cause requirements to further reduce the likelihood of "judicial distortion" leading to the improper admission of show-up evidence in court.

Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375 (2014).

In this article, the author argues that "jailhouse snitch" testimony is one of the least reliable and least credible types of criminal evidence, but yet is also one of the most persuasive types of evidence to jurors. The author discusses the "inherent bias" of and opportunity for possible perjury created by jailhouse informant testimony, as well as the conflicts of interest at issue with such testimony. He then explains the connection between jailhouse informant testimony and wrongful convictions, and discusses why such testimony tends to be so convincing to jurors. He uses both anecdotal evidence and data from

exoneration studies to examine the problems with relying on cross-examination and post-conviction review as mechanisms to weed out unreliable informant testimony. Ultimately, the author calls for the "strict exclusion" of such testimony, encouraging jurisdictions to eschew lesser attempts to ensure the reliability of jailhouse informant testimony.

Mai E. Naito et al., *Eyewitness "Misidentification": Analyzing the Application of the* Manson *Criteria in Homicide Cases*, 50 CRIM. L. BULL. 850 (2014).

Eyewitness evidence is used frequently in courts. However, it has been shown that over 75% of wrongful convictions overturned by DNA evidence are attributable to eyewitness misidentification. Given this high number, it is important for those working in the criminal justice system to understand the practices and legal procedures associated with eyewitness evidence. One such example is the two-prong test set forth by the U.S. Supreme Court in *Manson v. Braithwaite* for determining reliability of eyewitness testimony. The author addresses the flaws of the *Manson* criteria and how this criterion has been applied by the U.S. Courts of Appeals in murder cases. The first prong of the *Manson* criteria was established in *Stovall v. Denno* when the U.S. Supreme Court established the per se exclusion rule which finds eyewitness evidence inadmissible if it is suggestive. The second prong developed from *Neil v. Biggers* and *Manson*. In *Biggers*, the U.S. Supreme Court established five criteria to evaluate reliability: (1) eyewitness's opportunity to view the perpetrator at the time of the crime; (2) degree of attention the eyewitness focused on the perpetrator; (3) accuracy of the witness's description of the perpetrator; (4) time elapsed between the witness's identification of the suspect; and (5) witnessing the crime and certainty of the witness's identification of the suspect. However, these criteria have been criticized by numerous sources as being inadequate. The author then provides an analysis of how some of the U.S. Courts of Appeals have dealt with eyewitness identification. The author's search of LexisNexis and Westlaw found twenty-six cases matching the criteria she set forth. These cases focus on the biggest issues related to "the reliability of eyewitness evidence: lineup construction issues, suggestive police procedures, characteristics of witnesses, and other identifications made." Summaries of the cases are available in the appendix to the article.

Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737 (2016).

Citing a lack of research into the use of informant testimony and a lack of judicial checks, the author argues that evidence-based best practices should be created matching those that exist or are under development for the

three other main areas of suspect evidence: confessions, eyewitness identifications, and forensic science. The article begins by discussing how individuals may become an informant witness, whether they be jailhouse or non-jailhouse informants. The author then summarizes the ways in which informant testimony lacks internal or external review, either before it is gathered or before it is introduced at trial. This, in many ways, sets it apart from other categories of suspect evidence that have been linked to wrongful convictions. Of special importance is the lack of disclosure required of prosecutors regarding informant witnesses pre-trial and the lack of motions that defense counsel can file to exclude informant witness testimony at trial. The author moves on to describe the various risks associated with informant witness testimony. The author argues that both prosecutors and juries are inadequately equipped to detect false informant testimony, due in part to "fundamental attribution error." The author concludes by recommending certain reforms to regulate the use of informant witnesses in trials.

Sandra G. Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329 (2012).

In looking at lay witness testimony as it relates to wrongful convictions, the author focuses on police-generated testimony (*e.g.*, confessions, police informants, eyewitness identification, etc.) as a leading cause of wrongful convictions. These forms of evidence are likened to trace evidence which must be handled carefully lest they become contaminated by the investigator. The author explores ways in which police-generated testimony can become contaminated, especially for certain populations of psychologically disadvantaged individuals such as juveniles and the mentally disabled. The author then moves on to provide an overview of suggested best practices for law enforcement officials. In concluding, the author also argues for judges to serve as gatekeepers by holding pretrial hearings where the reliability of the police-generated testimony can be evaluated. Four issues are discussed as they relate to reliability.

George Vallas, *A Survey of Federal and State Standards for Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97 (2011).

Eyewitness testimony serves an important role in the criminal justice system. However, it has also proven to be highly unreliable. The author argues that expert eyewitness testimony can serve two functions: 1) to educate jurors on the unreliability of eyewitness testimony; and 2) to educate jurors about current research regarding human memory and variables that affect it. The author then briefly discusses the standards used for the admissibility of expert testimony in both federal and state courts. The article then classifies

the directions that the courts take towards expert testimony into four categories: 1) unlimited discretion; 2) favoring admission (sometimes referred to as the "modern trend"); 3) *per se* exclusion; and 4) favoring exclusion. The author concludes by offering critiques of some of the reasons why expert testimony is excluded and offers suggestions for the proper use of expert testimony.

V. FORENSIC EVIDENCE ERROR

M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science's Overdue Evolution from Magic to Law*, 4 VA. J. CRIM. L. 1 (2016).

In this article, the authors examine the connection between errors in forensic evidence, particularly forensic odontology (*i.e.*, bite-mark analysis) and forensic hair microscopy, and wrongful convictions. The article uses empirical data and discussions of prior exoneration cases to argue that these forensic errors are major causes of wrongful convictions. The authors explain the events that led to a call for reform by the scientific and legal communities to improve the "validity and reliability" of forensic evidence. A significant history of bite-mark matching and hair evidence is included. The authors conclude with suggestions for the bench and the bar to improve the situation, including the use of Conviction Integrity Programs.

Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283 (2014).

In this article, the author argues the benefits of reforming existing forensic science models to prevent wrongful convictions rather than undertaking the costly creation of a new forensic science regime. The author criticizes the "top-down mentality" of many of the forensic reform ideas that have been considered and promotes a collaborative effort to improve the reliability of forensic evidence. The author suggests increased levels of cooperation between relevant stakeholders, including forensic labs, government entities, and research institutions. The article briefly highlights incidents of forensic error and the reasons for such error. It then discusses prior attempts to reform forensic science in the U.S. and the obstacles to such reform on a national level. The article concludes with a discussion of existing forensic reform efforts and partnerships that could be replicated or considered in reforming the U.S. forensic science system.

Catherine E. White, Comment, *"I Did Not Hurt Him . . . . This is a Nightmare": The Introduction of False, but Not Fabricated, Forensic Evidence in Police Interrogations*, 2015 WIS. L. REV. 941 (2015).

Pseudoscientific methods of forensic science, such as bite-mark, microscopic hair, and handwriting analysis, have been used for years in the criminal justice system. Many within the scientific community and the courts now dispute their reliability. Many of these pseudoscientific methods have also been shown to have produced false confessions when the results were introduced during an interrogation. The author argues that when a defendant is convicted based on pseudoscientific evidence and a pseudoscientific-induced confession, the courts should overturn the conviction, and if a retrial is given, the courts should suppress both forms of evidence. The author begins by discussing ways in which pseudoscience and false confessions lead to wrongful convictions. Both are briefly discussed individually followed by an explanation of how introducing pseudoscientific evidence during interrogation is likely to lead to false confessions and wrongful convictions. Next, the author looks at ways in which courts can overturn convictions that were based on pseudoscientific evidence and induced confessions. The author discusses ways in which exclusion could be achieved.

VI. MISCELLANEOUS

Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO. ST. J. CRIM. L. 771 (2010).

The authors examine whether a prosecutor has an obligation to remedy a wrongful conviction by supporting the reopening of the conviction, while recognizing that "institutional disincentives" lessen the likelihood that a prosecutor would be able to fully serve as a "neutral minister of justice" on post-conviction claims. They argue that it is lack of financial resources, lack of time, political concerns, the desire to maintain the confidence of the public, and cognitive biases that may all negatively affect a prosecutor's vigorous pursuit of the exoneration of a wrongfully-convicted defendant rather than inherent malice on the part of the prosecutor. The authors provide four factors that a prosecutor should consider when determining whether to disclose information as potentially exculpatory or whether to investigate such information. They suggest that prosecutors follow one of three models for deciding whether a conviction should be re-opened.

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

This article addresses the concept of using the "near miss" case, in which an innocent defendant goes through the criminal justice process after being wrongfully accused of a crime, but is not convicted at trial or is released at some point before a trial occurs, as a control group for wrongful conviction

research. The authors conduct a study to compare wrongful conviction cases with near miss cases, in an attempt to determine the factors that make a difference in the outcome of the two types of cases. The authors note that this is a novel approach to wrongful conviction research, as past studies have focused on approximately eight "causes" of wrongful convictions, but have not examined how those cases differ from cases in which there was no conviction of a wrongfully-accused defendant. The authors find that some of the previously-studied causes of wrongful convictions were also contributing factors in their study. However, the authors also find additional factors (*e.g.*, the defendant's age, the state's "punitiveness," the defendant's criminal history, etc.) that played a role in the wrongful conviction. Some of these factors may exacerbate other factors. The authors note that overall "system failure" in the criminal justice system may be more to blame for wrongful convictions than any one factor. The authors make several policy recommendations to improve the criminal justice system and reduce the frequency of wrongful convictions.

Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825 (2010).

In this article, the authors revisit wrongful conviction research from the early twentieth century forward. Particular focus is given to the work of Samuel Gross and Barbara O'Brien, two eminent wrongful conviction researchers. The authors argue that because of limitations in methodologies for researching wrongful convictions, it may not be possible to find an accurate number to represent the extent of the wrongful conviction problem. Research in error rates varies depending on the type of error being examined (*e.g.*, procedural error versus factual innocence). The authors suggest that wrongful conviction research should focus on the "contributing factors" that lead to a wrongful conviction, as opposed to "exclusive sources" of the errors. The authors identify seven specific "categories of sources" to be examined in this way. The authors conclude by reiterating the need to improve wrongful conviction research, in particular by using controls as part of the methodology. They also emphasize that the criminal justice system must be willing to implement changes based on the research if true improvements are to be made.

Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011).

In this article, Ms. Hughes addresses the plight of the "legally innocent" defendant: one who has been wrongfully convicted of a crime because of a violation of constitutional rights, not because he or she is factually innocent of that crime. The author points out that the Innocence Movement has tradi-

tionally focused on factually innocent defendants, while legally innocent defendants have been, to some extent, neglected or "devalu[ed]." The author also analyzes the U.S. Supreme Court's decision in *Iowa v. Tovar*, arguing that the case reflects the "prioritization of actual innocence over a broader conception of innocence." The author suggests that the modifiers, "actual" and "legal," be removed from the discussion of innocence in wrongful conviction cases, thereby allowing the focus to remain on the protection of the constitutional rights of all defendants.

Evan J. Mandery et al., *Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013).

The effect of victim-compensation statutes on post-exoneration offending is examined based on a study of the behavior of 118 exonerees following their release. The authors essentially ask: are these statutes an effective crime-prevention tool? The study found that exonerees who were "compensated above a threshold amount of $500,000 commit[ted] [post-exoneration] offenses at a significantly lower rate than those" who were not compensated or who were compensated at a rate lower than the threshold. The study also found that there is little difference in the post-exoneration offense rate of those who were compensated below the threshold versus those who were not. There are three paths by which the wrongfully convicted may pursue compensation: tort claims, private bills, and compensation statutes. At the time of writing, only twenty-seven states and the District of Columbia have compensation statutes for the wrongfully convicted, though only about 41% who apply receive compensation. No matter which path exonerees take, they rarely prevail. The study's findings suggest that exonerees who do not need to worry about money are the least likely to commit post-exoneration offenses.

Myles F. McLellan, *Compensation for Wrongful Convictions and the Innocence Continuum*, 52 CRIM. L. BULL. 346 (2016).

The author argues that those who are exonerated by means other than that of factual innocence will continue to feel the effects of the criminal proceedings post-release. The means by which exonerees can seek financial restitution for their wrongful convictions is purposefully designed to limit the exposure of the criminal justice system to damages or liability. In fact, only exonerations based on factual innocence or pardon are eligible for financial compensation in those states that have wrongful conviction compensation statutes. These limitations further victimize the wrongfully convicted. The author argues that the presumption of innocence should be used in the test of factual innocence in cases of compensation for wrongful conviction.

Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353 (2014).

As part of a larger study on wrongfully convicted individuals from four states (*i.e.*, New York, Florida, Illinois and Texas), the authors analyze the number of exonerees between 1999 and 2009 who had their records expunged. Only about one-third of the 118 individuals were found to have had their records expunged. Reasons given for this low rate include the inability to expunge federal records, as well as the general restrictiveness of expungement law in various states. Forty-five states and the District of Columbia provide some way in which records can be expunged or limit the disclosure of a criminal record. The statutes are all different, but there are some commonalities. Juveniles who commit minor offenses are allowed to seek expungement in almost every state, as are individuals not convicted who have arrest and court records. Only in a few states is expungement treated as a right, and then only in limited circumstances. The authors go on to describe various scenarios in which expungement is either allowed or disallowed. As a consequence, the study found that 31.6% of the exonerees who had their records expunged committed post-exoneration offenses compared to 50% of those who did not have their records expunged. One explanation given for this is what is called "labeling theory," in which the exoneree's status as a former criminal acts as a barrier to reintegration into society.

Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143 (2011).

The author asserts that trials serve a diagnostic function in that they distinguish between "compelling prosecutions and those that do not meet the requisite certitude." This diagnostic function is left to factfinders, usually juries. The author seeks to answer the question: "How good are factfinders in determining facts?" The means for answering this question are sought by focusing on the psychological aspects associated with the trial process. Namely, the author focuses on facts associated with human testimony presented in trials and the courtroom environment itself. The scope of the article is focused on those cases which are considered difficult and more complex, relying heavily on human testimony. First, the author examines a lay person's ability to draw correct (*i.e.*, rational) inferences from the testimony of witnesses where other corroborating evidence is non-existent. Second, the author examines non-evidentiary influences that jurors must deal with during the course of a trial. Issues such as courtroom persuasion, exposure to impermissible information, emotional arousal, and racial prejudice are discussed. A final area of interest is called the "coherence effect." Suggested practical measures are given to help alleviate some of the diagnostic shortcomings outlined in the article.

Vanessa J. Szalapski, Comment, *Losing Our Innocence: The Illinois Successive Postconviction Actual Innocence Petition Standard After* People v. Edwards, 104 J. CRIM. L. & CRIMINOLOGY 195 (2014).

Illinois has long allowed prisoners to file post-conviction actual innocence petitions with the Illinois Supreme Court, essentially declaring that the Illinois constitution would provide greater protection than does the Federal Constitution. However, the author argues that since the decision of *People v. Edwards*, the Illinois Supreme Court has actually imposed greater restrictions for successive post-conviction actual innocence petitions that now mirrors "the federal habeas actual innocence gateway standard." The author begins by describing the three stages of review according to the Illinois Post-Conviction Hearing Act. Following this, the author describes the federal standard as set forth in *Herrera v. Collins* and *Schlup v. Delo* and claims that "the federal standard for actual innocence gateway claims is difficult to meet and is not petitioner friendly." The author then describes the language used in *Edwards*, focusing on the two statements that create the standard for successive post-conviction petitions. Supporting the author's argument is the interpretation by lower courts of the existence of a higher standard to meet successive post-conviction actual innocence petitions than before *Edwards*. Example cases decided by the Illinois appellate courts are discussed focusing on those unaffected by *Edwards*, those that demonstrate the stricter standard, and those that demonstrate the higher burden placed upon petitioners.

Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952 (2012).

Just as forty-eight states, the District of Columbia, and the federal government have created statutes guaranteeing the right to DNA preservation, access, and testing, prosecutors have begun using a new plea bargaining technique to bypass these statutes. Prosecutors are obtaining waivers to "the right to DNA testing and/or the preservation of DNA evidence," what the author calls "DNA waivers." To begin, the author focuses on the problems with DNA waivers. Of paramount importance is the fact that many people still falsely confess to crimes they never committed. This has been shown through the various exoneration cases made possible by DNA evidence. Factors contributing to these false confessions still exist and so there is little reason to believe that false confessions will not still be made in the future. Furthermore, the author argues that by denying access to DNA evidence and even allowing its destruction, the criminal justice system is focused more on convenience than truth. The author then moves on to describe the practice of using DNA waivers, especially by United States Attorneys' offices. The Innocence Protection Act of 2004 provides the federal vehicle by which convicted individuals can seek to be exonerated by DNA evidence, as well as waive that right. Shortly after its passage, the Justice Department sent a

memo to the nation's U.S. Attorneys' offices "urging them to use the waivers." Because of this, many standard plea bargaining agreements after 2004 contain DNA waivers including the Southern and Northern Districts of Illinois. By 2010, this practice was curtailed by Attorney General Holder. There is, however, no guarantee that a future Attorney General will not reverse the current federal practice or that states will not implement the waivers, citing strained resources in prosecutor's offices. As of the time of writing, no court has "determined whether criminal defendants may validly waive their right to DNA testing through plea bargains . . . ." The author argues that, based on *District Attorney's Office v. Osborne*, the U.S. Supreme Court would likely uphold DNA waivers with few exceptions. The author moves on to describe some possible challenges to DNA waivers, including the following: 1) the "knowing and voluntary" requirement; 2) the "miscarriage of justice" exception; and 3) withdrawing the plea. The author concludes by discussing the likelihood of DNA waivers being enforced within a number of factual scenarios and by making arguments for and against DNA waiver usage.