Book Reviews

Still Convicting the Innocent

CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG. By Brandon L. Garrett. Cambridge, Massachusetts: Harvard University Press, 2011. 367 pages. $39.95.

Reviewed by Jennifer E. Laurin*

> *"Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."*[1]

> *"The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice."*[2]

Introduction

It is somewhat remarkable to contemplate that only two decades ago, the fundamental reliability of the American criminal process and its exemplary protections for innocent defendants could still be blithely expressed as a widely held article of faith. In that short space of time, the figure of the innocent wrongly convicted has moved from peripheral invisibility to looming centrality in understanding and discourse about the criminal justice system. It is a collective consciousness shift that is unimaginable—certainly in so short a timeframe—without the advent of DNA technology and its deployment to very publicly establish the innocence of more than 270 convicted individuals over the past two decades.[3] None of the traditional error-detection mechanisms that our criminal justice system features—jury acquittals, appellate reversals, even executive pardons—compare to the DNA exoneration in terms of the scientific certainty it projects or the public spectacle it generates. In the pre-DNA dark ages of the American criminal justice

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1. Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring).

2. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009).

3. *See Innocence Project Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know (providing statistics of DNA exonerations).

system, the innocent prisoner wrongly convicted was, in the words of Judge Learned Hand, a "ghost"[4]—a specter revealed through largely unseen mechanisms, its existence contested by nonbelievers.

It was against the backdrop of that far more skeptical attitude toward the phenomenon of wrongful convictions that Yale Law School professor Edwin M. Borchard published his 1932 study, *Convicting the Innocent*. Presenting sixty-two instances of American wrongful convictions culled from media reports or other chance encounters with an account of erroneous conviction, the book boldly aimed to prove the existence of Judge Hand's ghost in the face of widespread "supposition" that "'[i]nnocent men are never convicted.'"[5] Borchard brought to light the stories of innocents ensnared, of investigations and prosecutions gone bad, and of the near indifference of society to the issue of recompense for the wrongly imprisoned. Moreover, he identified patterns of contributory factors identifiable across the dataset—eyewitness misidentification, unreliable physical and testimonial evidence, false confessions, investigative and prosecutorial overreaching, and poor defense lawyering—and offered recommendations for criminal justice reform.[6] As the first systematic attempt to document and explain the capacity for breakdown in the criminal justice system, the book is a classic in its field, a touchstone for future examination of the criminal justice system's capacity for error.[7]

Our criminal justice system today is, by important measures, better calibrated for reliable and fair outcomes than the one reviewed by Borchard: criminal defendants enjoy dramatically expanded procedural protections, mechanisms of social stratification relevant to criminal enforcement and punishment—including de jure racial discrimination—have at least formally receded, and scientific advances permit more accurate assessments of guilt and innocence. But as the continuing stream of DNA exonerations reflects, these advances have not rid the criminal justice system of error. And so, three-quarters of a century after Borchard first aimed to illuminate and explain the most dire of criminal justice system failures, University of

4. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.").

5. EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at v (1932) (quoting the reported words of a Massachusetts prosecutor).

6. *Id.* at 367–77.

7. *See* Joseph D. Grano, Kirby, Biggers, *and* Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 723 (1974) (asserting four decades after the publication of *Convicting the Innocent* that the book "still constitutes the best graphic study of the problem" of wrongful conviction); Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 11 (2009) ("Borchard, in effect, created the template that would be used to study wrongful convictions for many years to come: identify wrongful conviction cases, describe their legal causes, and propose reforms to prevent future miscarriages."); *see also* Francis A. Allen, Book Review, 24 U. CHI. L. REV. 779, 779 (1957) (reviewing JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957)) (asserting that the later work on innocence by Judge Jerome Frank and his daughter "necessarily invite[d] comparison with Borchard's classic work").

Virginia School of Law professor Brandon Garrett offers his own volume of the same title[8] with similar goals—but in the context of the new world of DNA technology.

Garrett examines the first 250 cases in which convictions were overturned based on postconviction DNA testing that excluded the prisoner as the source of biological evidence attributable to the perpetrator of the crime.[9] The sheer existence of these cases, and the very public way in which each came to light, has undeniably put to rest any controversy surrounding Borchard's threshold question of *whether* wrongful convictions occur. Today, Garrett contends, the critical inquiries concern *why* conceded miscarriages of justice take place and what, if anything, can be done by way of prevention.[10] More particularly, a crucial, gnawing question is posed by the wave of DNA exonerations of the last two decades: whether "the first 250 DNA exonerations result[ed] from unfortunate but nevertheless unusual circumstances" or rather were "the result of entrenched practices that criminal courts rely upon every day."[11] Garrett convincingly argues that the answer is unquestionably the latter. The characteristics of these failed prosecutions that caused errors to be committed *and* to go undetected—until the fortuitous event of DNA testing—are representative rather than idiosyncratic, systemic rather than episodic.

In substantiation of this contention, *Convicting the Innocent* reports exhaustive research into the background of each exoneration—including review of some 207 complete trial transcripts[12]—in the most detailed portrait to date of the individual and shared characteristics of wrongful convictions. It is a portrait that reveals pervasive patterns of upstream missteps and misconduct that systematically compromised the reliability of guilt assessments as defendants moved through the processes of investigation, charging and arrest, and trial. It is a portrait also of the structures and dynamics that, again systematically, serve to shield those upstream errors from downstream scrutiny by prosecutors, defense attorneys, or courts. And it is a portrait, according to Garrett, that should give us every reason to believe that similar errors are infecting other criminal cases in which DNA evidence will never surface as an arbiter of truth and that counsels a bold path forward for reliability-enhancing reforms to the criminal justice system—in particular, to mechanisms by which law enforcement and prosecutors investigate and shape cases.

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8. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

9. *See id.* at 285 (defining the parameters of "exoneration").

10. *Id.* at 6–7; *see also id.* at 270 (describing the problems within the criminal justice system that lead to wrongful convictions).

11. *Id.* at 6.

12. *Id.* at 286.

Given the stature of Borchard's work, Garrett's titular appropriation is bold. But it is deserved. The era of DNA has moved conversations about error in the criminal justice system from "whether" to "why." In the context of that contemporary inquiry, Garrett's *Convicting the Innocent* deserves to occupy—as it arguably already does[13]—the place of prominence that Borchard's did in the debates of old.

On the other hand, *Convicting the Innocent* enters the fray at a time of significant public cognizance of DNA and the phenomenon of wrongful conviction. Even the Supreme Court, with its often-glacial tendencies toward currents of change, has begun to confront the reliability challenges raised by DNA. Yet to date, as the epigraph from *District Attorney's Office for the Third Judicial District v. Osborne*[14] exemplifies,[15] the problem has been treated as raising more of a management problem than a fundamental challenge to legal doctrine. And while in most policy quarters there is far greater awareness of the risk factors associated with wrongful conviction, little action has been taken in response. There is a sense in which generating momentum for reform requires not so much—or at least not only—more information about *how* error is created but novel and specific ideas about how to generate change. And whatever advantages DNA might hold as a conversation starter in this regard, it offers little assistance in generating and bringing to fruition a workable agenda for criminal justice reform. Or so this Review will suggest.

Part I of this Review sketches a brief overview of *Convicting the Innocent* and identifies and contextualizes the book's major contributions to the extant literature on wrongful convictions. In sum, the book offers the most empirically rich and conceptually nuanced descriptive account to date of the machinery of wrongful conviction. And to ongoing debates over the direction of criminal justice reform, it offers a persuasive and sustained

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13. Garrett's larger project—this book and its precursor law review articles—has already attained a level of influence, at least as measured by Supreme Court citations, that rivals his progenitor. *See* Perry v. New Hampshire, 132 S. Ct. 716, 738–39 & n.6 (2012) (Sotomayor, J., dissenting) (citing findings of GARRETT, *supra* note 8, with respect to the role of eyewitness-identification evidence in wrongful convictions); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2537 (2009) (citing Garrett's work on forensic science as supporting the importance of the right of confrontation with respect to potentially flawed scientific evidence); Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009) (citing Garrett for the proposition that state-level legislative efforts provide an adequate opportunity for postconviction DNA testing in the absence of a constitutional right to such testing); *id.* at 2337 n.9 (Stevens, J., dissenting) (citing, in support of the proposition that DNA exonerations counsel that due process embrace finality over accuracy, Garrett's demonstration that "in 50% of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in 10% of the cases had described the evidence supporting conviction as 'overwhelming'"); Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in judgment) (citing, in connection with Justice Stevens's own reconsideration of the constitutionality of the death penalty, Garrett as demonstrating "the exoneration of an unacceptable number of defendants found guilty of capital offenses").

14. 129 S. Ct. 2308 (2009).

15. *See supra* text accompanying note 2.

critique of the position, embodied by the epigraphs above, that the "unparalleled" procedural protections of the American jury system are effective checks on substantive accuracy as well. And yet, *Convicting the Innocent* does not offer quite as powerful an explanatory lens as Garrett sometimes claims, and it does not advance the ball of criminal justice policy reform as far as it might. Part II of this Review suggests that the project is hampered in fulfillment of its descriptive and prescriptive agendas by constraints intrinsic to the data at Garrett's disposal and by limitations that Garrett's own framing and methodology impose. Part II further offers that modest but important qualifiers and additions to Garrett's agenda could enhance the prospect that his worthy contribution to criminal-justice-reform conversations will translate into positive and much-needed change.

I. *Convicting the Innocent*: Summary and Context

Convicting the Innocent presents the fruits of an exhaustive examination of the process by which 250 individuals were investigated, prosecuted, convicted, and ultimately exonerated in criminal cases. The sources assembled by Garrett for the study are as impressive as the rigor he brings to assessment of them: complete trial transcripts in almost 90% of the 234 cases that went to trial; confession statements, interrogation transcripts, laboratory reports, and other investigative documents; and additionally—in the cases of sixteen of the exonerees who pleaded guilty—pretrial hearings, testimony in co-defendant trials, and other evidence that likely would have been presented at these defendants' trials.[16] Garrett also analyzed all written judicial decisions from the appeals and postconviction proceedings in these cases.[17] In addition to marshalling primary materials, Garrett filled in missing dates, demographic details, and other information with news reports and interviews with attorneys.[18] Garrett and a veritable army of research assistants[19] extracted and coded details concerning defendant and victim demographics, the character of the evidence amassed, legal arguments made, and a litany of other variables, which then were analyzed and aggregated.[20] The book is organized around what that work revealed to be the most prevalent error-generating factors in these cases, with separate chapters discussing postconviction proceedings in the exonerees' cases and surveying the prospects for reform aimed at preventing future wrongful convictions.

Convicting the Innocent stands against the backdrop of a substantial body of historical and contemporary efforts to document and explain wrongful convictions generally and the phenomenon of DNA exonerations in

16. GARRETT, *supra* note 8, at 286–87.
17. *Id.* at 287.
18. *Id.* at 286–87.
19. *See id.* at 352–53 (acknowledging more than two dozen former research assistants).
20. *Id.* at 287.

particular.[21] A critical question, therefore, is whether it tells us anything that we did not already know about wrongful convictions or, inferentially, the criminal justice system that produces them.

On this score, it must be said that the results of Garrett's study, at least in broad outline, essentially confirm what the reader familiar with *any* prior analysis of wrongful convictions already knew. The key evidentiary pathologies that emerge from the dataset and that frame the first five substantive chapters of *Convicting the Innocent*—eyewitness misidentification, flawed scientific evidence, informant testimony, false confessions, and weak defenses[22]—are consistent with the "canonical" list of factors that featured in Borchard's work and that of every subsequent scholar of wrongful convictions.[23] Equally resonant with prior wrongful conviction scholarship is Garrett's critique of the post-trial adjudicatory mechanisms that failed to detect and correct the miscarriages of justice that occurred in these cases, discussed in Chapters Seven and Eight.[24] And, at the prescriptive level, the array of proposed fixes that Garrett entertains in Chapter Nine—full recording of interrogations, implementation of eyewitness-identification procedures that comport with the findings of contemporary scientific research on minimizing suggestiveness, overhaul of a neglected forensic science infrastructure, and the development of institutional capacity to investigate the causes of system breakdown when wrongful convictions occur[25]—tracks a template of proposals in circulation at least since DNA

21. *See supra* note 7 and accompanying text; *infra* note 23 and accompanying text.

22. GARRETT, *supra* note 8, at 8–10, 279–83.

23. The "canonical" characterization is Samuel Gross's. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008). For evidence of the consensus, see, for example, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, at xv–xxviii (2006) [hereinafter ABA REPORT]; BORCHARD, *supra* note 5, at 367–78; EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 15–19 (1996); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246–50 (2000); FRANK & FRANK, *supra* note 7, at 31; C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 64 tbl.3.3 (1996); and Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) [hereinafter Gross et al., *Exonerations*]. In fact, the consensus is so secure that a recently released casebook on wrongful convictions—the first of its kind—is organized around this diagnosis. JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION: LAW, SCIENCE, AND POLICY, at viii–xi (2011) (describing Part II of the book, titled "Leading Correlates and Causes of Wrongful Convictions," as being divided into chapters focused on eyewitness identification, false confessions, police and prosecutorial conduct, defense inadequacy, forensic evidence, and informants).

24. GARRETT, *supra* note 8, at 178–240; *see also* BORCHARD, *supra* note 5, at 375–78 (advocating for review by appellate courts on issues of fact as well as law, arguing that "[a]ppeals for errors of law only often defeat the interests of justice"); DWYER ET AL., *supra* note 23, at 218–20 (describing the problem of "courts at every level . . . being pressured to shut their doors to death row appeals").

25. GARRETT, *supra* note 8, at 241–74.

technology and the "innocence movement" seized center stage in criminal justice reform efforts.[26]

But while the broad outlines of *Convicting the Innocent*'s substantive contributions are familiar, its deeper aims are neither duplicative nor derivative. The book seeks not simply to describe wrongful convictions but also to explain their genesis—a task that prior work has either not attempted or has executed only at the level of anecdote.[27] Garrett leverages the rich descriptive data available to him to generate statistics about not only the presence of certain problematic forms of evidence across cases but also the operation of dynamics underlying the generation and use of that evidence. To these ends, *Convicting the Innocent* makes two particularly distinctive contributions to the wrongful-conviction literature. First, the volume and transparency of the empirical data that it excavates and analyzes, and the role that this data plays in framing the book's argument, distinguish the book from nearly all of its predecessors in the field and greatly enhance its current and enduring value as a scholarly resource. Second, the portrait that Garrett adeptly paints of the systemic dynamics that produce and then occlude accuracy breakdowns in the criminal justice system adds specificity, nuance, and a powerful theoretical framework to our understanding of the causes of wrongful convictions. These contributions will be explored in turn.

A. Advancing Our Empirical Understanding

Garrett's work with these 250 cases represents the most comprehensive published empirical analysis that has been done on DNA exonerations. Other scholars have long bemoaned the general information deficit in this arena and the significant difficulties entailed by any systematic effort to analyze and quantify error in the criminal justice system.[28] These challenges

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26. *See* ABA REPORT, *supra* note 23, at xvii–xxix (detailing issues with wrongful convictions and suggested reforms); DWYER ET AL., *supra* note 23, at 255–60 (listing proposed reforms to protect the innocent similar to those proposed by Garrett); *Priority Issues*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Priority-Issues.php (identifying seven areas of reform to help prevent future wrongful convictions).

27. *See infra* Part II.

28. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 29 (1987) (describing underappreciated practical hurdles in identifying and analyzing wrongful convictions); Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 587 n.392 (1999) (describing prohibitive difficulty in obtaining primary source materials for a group of twenty-nine cases); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 5 (2010) ("[E]ven if one could identify a nonrandom set of hotly contested and possibly false confessions, it is often difficult if not impossible as a practical matter to obtain the primary case materials (e.g., police reports; pretrial and trial transcripts; and electronic recordings of the interrogations) . . . ."); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 216–17 (2005) (discussing barriers to the empirical study of wrongful convictions including difficulty in locating cases, proving innocence, and obtaining "primary case materials such as police reports, pretrial and trial transcripts, medical records, and other forms of physical evidence"). I personally encountered these difficulties in individual cases

include not only the obvious difficulty of identifying an appropriate metric for establishing innocence (the nasty problem of proving the negative) but also the equally daunting tasks of locating and assembling the primary source materials that would be necessary for such an analysis. Trial transcripts are not routinely produced, and they are stored such that accessing them often requires access to resourceful court clerks, trial or appellate attorneys, or even individual court reporters. Likewise, records like police reports, physical evidence, laboratory reports, and witness or defendant statements are not uniformly maintained in any one location, particularly once cases have made the rounds through state and federal court in appellate and postconviction litigation. Add to this the complication that each of the thousands of federal, state, and local criminal justice actors and institutions follow independent practices governing retention, tracking, and access to criminal case records.

Garrett possesses a number of advantages in staring down these obstacles. DNA is, at least in the cases that have resulted in convictions being vacated, far less contestable than any other available metric for assessing innocence. DNA exonerations are unusual, discrete, and well-documented events in the life cycle of a criminal case. And a substantial institutional infrastructure has developed for collecting the information necessary for fielding DNA-based claims of innocence—namely, the sixty-odd innocence projects that now exist around the country.[29] As a result of leveraging these advantages, the breadth and nuance of the data collection and analysis on display in *Convicting the Innocent* is unprecedented and a stand-alone contribution to the field. Garrett has made both his raw data and the full results of his analysis publicly available through online archives containing scanned transcripts and investigative documents as well as aggregate and case-by-case analyses of the variables examined in his study.[30] The archives present opportunity not only for independent review of Garrett's analysis and conclusions but also for future efforts to assess and learn from wrongful convictions.

As the outgrowth of a quantitative empirical study, *Convicting the Innocent* stands apart from the predominant approach of prior examinations

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when, as a practicing attorney, I represented wrongly convicted individuals—some of whom are included in Garrett's dataset—in civil rights actions. In the interest of full disclosure, Garrett practiced at the same firm, though our tenures did not overlap. Others have noted that the significant effort required to obtain the type of data that Garrett has managed to assemble has to date posed a barrier to the systematic analysis of wrongful convictions.

29. *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 364, 367–70 (2011) (identifying a number of innocence projects and describing the typical process of case evaluation, including assessment of transcripts, police reports, appellate opinions, and other primary sources).

30. *See "Convicting the Innocent": Data and Materials*, U. VA. SCH. LAW, http://www.law.virginia.edu/html/librarysite/garrett_innocent.htm (providing links to detailed chapter-by-chapter data, research appendices, and resources).

of wrongful convictions that are fundamentally narrative driven.[31] Garrett argues his case first and foremost from the strength of his data and, in so doing, avoids some of the downsides that accompany more anecdotal and dramatic accounts of miscarriages of justice—in particular, the lack of a mechanism for contextualizing idiosyncrasy in the cases, and an underanalyzed and underparticularized account of the complex causal links among various evidentiary, procedural, and structural features of cases and their outcomes.

Nevertheless, Garrett is not immune to the power of a good story, which is skillfully deployed in a supporting role. Extended case descriptions introduce each chapter, and shorter narrative snippets pepper the development of his argument to exemplify trends that the data reveals. Garrett's discussion of exoneree Kennedy Brewer's case is illustrative. The case is first noted briefly in Garrett's chapter on forensic evidence as one of seven convictions resting on bite-mark comparison, or forensic odontology—a forensic methodology that has long been alleged to lack scientific validation or standards for practice but that remains in use in criminal investigations.[32] Brewer's story is revisited in fuller form to introduce Chapter Seven's discussion of how exonerees' cases fared in appellate and postconviction proceedings, exemplifying the many instances in which courts rejected claims of trial error and actual innocence, and in which prosecutors resisted DNA testing of evidence that could establish innocence.[33] Significantly, the bite-mark evidence makes a troubling reappearance in this postconviction context. Despite its importance in Brewer's trial, it occupied only a minor place in the litany of claims advanced in appellate and habeas proceedings, exemplifying the trend identified by Garrett of substantive evidentiary and innocence-based claims taking a backseat to procedural grounds for error.[34] More disturbing, it was that very evidence—scientifically dubious even by contemporary standards—that courts and prosecutors consistently pointed to as providing overwhelming evidence of guilt to countermand Brewer's assertions of innocence.[35] Garrett thus humanizes and makes three-dimensional the argument substantiated in drier form by the aggregate descriptive statistics he has assembled: that "once central evidence is contaminated at the earliest stages of a case, the damage cannot be easily discovered or reversed."[36]

Not insignificantly, the interweaving of data- and narrative-driven argument in *Convicting the Innocent* also positions the book to reach a

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31. *See* Leo & Gould, *supra* note 7, at 14–17 (noting and critiquing the primarily narrative focus of wrongful-conviction scholarship).

32. GARRETT, *supra* note 8, at 102–05; *see also* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 173–76 (2009) (describing the methodology of and the lack of scientific validation for forensic odontology).

33. GARRETT, *supra* note 8, at 178–80.

34. *Id.* at 182–94.

35. *Id.* at 178–80.

36. *Id.* at 272.

broader audience than might consume more traditional legal-academic work. To be sure, the book is a work of serious legal scholarship, and certainly it lacks the dramatic narrative character of nonfiction wrongful-conviction titles that have gained currency among the popular readership—think Jim Dwyer, Peter Neufeld, and Barry Scheck's *Actual Innocence*, or more recently John Grisham's *The Innocent Man*. But Garrett's light footnoting, his helpful explanations of legal technicalities and investigative techniques, and his accessible explanations of relevant criminal procedure doctrine are just some of the features of *Convicting the Innocent* that will make the volume accessible to nonlegal academics, policy makers, and students.[37]

It is well to note on this score that *Convicting the Innocent* is not Garrett's first published study of this dataset. Several prior law review articles have presented subsets of Garrett's analysis, treating (albeit with a smaller number of available exonerations) the issues of false confessions, forensic science, and appellate review that *Convicting the Innocent* takes up in Chapters Two, Four, and Seven.[38] In addition to updating those prior studies to include intervening exonerations, Garrett's book-length analysis gives sustained attention to important factors that were not the subject of prior articles—in particular, eyewitness identification, informant testimony, and the trial-level decisions of defense counsel.[39] And there are analytical advantages to presenting Garrett's full analysis in a comprehensive volume that cuts across the subcategories of cases and evidence contained within the DNA-exoneree group. The collection of chapters in this unified treatment of Garrett's study highlights the extent to which the causes of any one wrongful conviction are multivariate, mutually reinforcing, and structural.

B. Contamination and Contagion

In claiming that the dataset of DNA exonerations opens a "unique window on the underside of our criminal justice system,"[40] Garrett directly challenges a diverse array of commentators who have expressed strong skepticism that the cases where we have demonstrably "gotten it wrong" offer any lessons for run-of-the-mill American criminal justice. Staunch defenders of the adequacy of status quo safeguards are fairly represented by Justice

37. *See, e.g.*, *id.* at 194–96 (explaining the stages of review of criminal convictions).

38. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 11–12 (2009) (summarizing the role that flawed forensic science played in exonerees' convictions); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60–61 (2008) [hereinafter Garrett, *Judging Innocence*] (describing and assessing overwhelmingly unsuccessful legal challenges to convictions advanced by exonerees in appellate and postconviction proceedings); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1053 (2010) (examining the role that false confessions played in exonerees' convictions).

39. *See* GARRETT, *supra* note 8, at 280–83 (presenting charts related to factors including types of flawed evidence, reliability of identifications, and types of eyewitness misidentifications); *id.* at 351 (listing the subjects of prior articles).

40. *Id.* at 13.

Scalia's expressed confidence that wrongful-conviction studies demonstrate only the happy fact that errors in the criminal justice system are statistical outliers—dividing putative exonerations by total convictions in the relevant time period yields "a success rate of 99.973 percent"[41]—and that the system "works" to identify them before they are irrevocable.[42] But even those who concede the prevalence and problem of wrongful convictions, who suspect that error is pervasive rather than episodic, and who apply themselves to the study of the characteristics of such cases, have grown introspective about the limited ability of that dataset to yield reliable accounts of causation or other information that could ever reliably be generalized to criminal convictions generally. Representative is the "gloomy" message of Sam Gross and Barbara O'Brien: because "exonerations are highly unrepresentative of wrongful convictions in general" and because no reliable data exists to permit comparison between wrongful and rightful convictions, "[w]e do not know much about false convictions, and it will be difficult to learn more."[43] A separate chorus of voices, equally cognizant of the need for criminal justice reform, has nevertheless expressed significant skepticism that reasoning from the lessons of exonerations is a helpful or strategically sound path, cautioning that elevating accuracy as the preeminent value in criminal justice has for a variety of reasons not redounded to the benefit of most criminal defendants—innocent or guilty.[44]

The totality of these critiques generates the concern that the utility of Garrett's project might be quite limited. Indeed, Garrett's data reveals even more vividly than prior studies that, far from a "random audit,"[45] DNA exonerations are highly unrepresentative of the broader universe of criminal convictions. All but four of the 250 exonerees were men, 70% of which

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41. Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (quoting Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23).

42. *See id.* at 199 ("[W]ith regard to the punishment of death in the current American system, [the possibility of wrongful execution] has been reduced to an insignificant minimum.").

43. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 937–40, 958 (2008); *see also* Simon A. Cole, *Cultural Consequences of Miscarriages of Justice*, 27 BEHAV. SCI. & L. 431, 445 (2009) ("[T]he crucial issue that faces serious social scientific scholarship on miscarriages of justice is the problem of generalizability . . . .").

44. *See, e.g.*, Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 455 (2001) ("[T]he prevalent display of [postconviction DNA testing] has the potential to send an enduring and unrealistic message: that criminal defendants can and, perhaps, should offer substantial, convincing, and irrefutable proof of their own innocence, ideally, evidence that is as substantial, convincing, and irrefutable as DNA evidence."); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609–18, 621–23 (2005) (cautioning that innocence focus leads to harmless error and other reliability-based bars to appellate and postconviction litigation, and to erosion of political support for reforms enjoyed by guilty defendants such as access to counsel).

45. *See* Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 69–70 (2003) (arguing that "DNA testing has provided what can best be described as a random audit of convictions" that "had previously been obtained by legally sufficient evidence").

were men of color, convicted in only thirty-three states.[46] Ninety-eight percent of defendants in Garrett's dataset were convicted of either rape, murder, or both crimes;[47] these offenses account for less than 2% and less than 1% of state convictions, respectively.[48] Nearly all exonerees were convicted following trials;[49] felony plea rates generally are at 94%, and even among rapes and murders, the percentage of negotiated resolutions is 84% and 61%, respectively.[50] Seventeen exonerees (7%) were sentenced to death and eighty (32%) were sentenced to life in prison[51]—again, significantly higher proportions than capital and life sentences among all convicted murderers.[52] And of course, these cases are outliers along their most significant unifying dimension: a DNA exoneration requires physical evidence to test, evidence that is collected in a small minority of criminal cases; in an even smaller minority is such evidence retained over the years and decades; and in an even smaller minority does such evidence have the factual capacity to illuminate with any precision the identity of the crime's perpetrator.[53]

Nevertheless, Garrett wants to challenge the views of "hardened souls" who view wrongful convictions as either uninformative or untroubling.[54] To the most ardent skeptics, he argues—quite rightly—that the calculations that permit Justice Scalia a restful night's sleep use far too large a denominator: precisely because cases concluding in DNA exoneration are not representative, the relevant comparison group should be, at its largest, rape and murder cases—a small subset of total prosecutions in the United States

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46. GARRETT, *supra* note 8, at 6. *But see* SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 17 tbl.3.2 (2009) (describing the gender and race of persons convicted of felonies in state courts in 2006 and reporting that 83% of all offenses were committed by males and 60% of all offenses were committed by whites).

47. GARRETT, *supra* note 8, at 278 fig.A.2.

48. *See* ROSENMERKEL ET AL., *supra* note 46, at 3 tbl.1.1 (reporting the estimated number of felony convictions in state courts in 2006 and reporting that rape accounted for 1.3% and murder accounted for 0.6% of all of these convictions).

49. *See* GARRETT, *supra* note 8, at 286 (indicating that 234 of the 250 exonerees had a criminal trial).

50. ROSENMERKEL ET AL., *supra* note 46, at 25 tbl.4.1.

51. GARRETT, *supra* note 8, at 5.

52. ROSENMERKEL ET AL., *supra* note 46, at 28 tbl.4.4 (reporting that 2% of felons convicted of murder or nonnegligent manslaughter were sentenced to death and 23% were sentenced to life in prison).

53. *See* JOSEPH PETERSON ET AL., NAT'L INST. OF JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 3–7 (2010), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf (finding that there was physical evidence collected in 30% of aggravated assaults, 20% of burglaries, 25% of robberies, 97% of homicides, and 64% of rapes, with lower percentages in each category representing DNA or other biological evidence); David A. Schroeder & Michael D. White, *Exploring the Use of DNA Evidence in Homicide Investigations: Implications for Detective Work and Case Clearance*, 12 POLICE Q. 319, 327 & tbl.1 (2009) (reporting that physical evidence was collected in only between half and two-thirds of Manhattan homicide investigations surveyed).

54. GARRETT, *supra* note 8, at 262.

that also disproportionately relies on the problematic categories of evidence that Garrett assesses.[55] Furthermore, viewing exonerations as evidence of a system that "works" blinks reality. In the overwhelming majority of DNA exonerations, ordinary appellate and postconviction processes failed to "detect" innocence; the right outcome followed only from the fluke of testable biological evidence being available and the good luck of clearing the gauntlet involved in obtaining DNA testing and release based on exculpatory results—stringent statutory requirements and prosecutorial and judicial resistance among them.[56] There is nothing about such idiosyncratic dynamics that should reassure us that the system is working to reliably identify and remediate error.[57]

But the major thrust of Garrett's argument, and the chief contribution of *Convicting the Innocent*, is directed at those who doubt that yet more detail about the nature of wrongful convictions can advance general understanding of how well our criminal justice system works. Though readily conceding the limits of statistical generalizability from his study,[58] Garrett rests on good old analytic skills as well as the quantity and qualitative nuance of his data to significantly enhance our understanding of *how* factors long known to be prevalent in wrongful convictions lead to erroneous results. Garrett makes the case that the dynamics driving that process are fundamentally "systemic" in nature—generated not by individual decision making or idiosyncrasies of particular cases but rather by processes endemic to how criminal cases are investigated, prosecuted, and adjudicated.[59] The appropriate metaphor for errors that come to infect wrongful convictions is not the "bad apple" but rather the "Whack-a-Mole": removing a particular case or actor from the equation will not prevent the error from popping up farther up or down the road.[60]

Central to Garrett's case in support of this thesis, and an independent conceptual contribution of the book, is the dynamic of "contamination" that he identifies and traces.[61] The idea underlying the term as he uses it is that the probative value we assign to evidence in a criminal case rests on a set of assumptions about the integrity of its production, which can themselves be undermined by certain influences. In scientific testing, of course, the results of a test involving introduction of a reagent to a substance—say, to urine being evaluated for the presence of illegal drugs—are informative and reliable only if the substance tested is unadulterated by foreign material that could

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55. *Id.* at 264.

56. *See id.* at 225–31 (describing statutory and procedural barriers to postconviction DNA testing).

57. *Id.* at 263.

58. *Id.* at 288.

59. *Id.* at 265–68.

60. *Id.* at 265–66.

61. *Id.* at 21.

trigger a positive result. Analogously, police are trained to evaluate the relevance of reliability of suspect confessions largely on the basis of their substantive content and the likelihood that someone who had not committed a crime would know the details provided. If a suspect learned details through media accounts, street gossip, or (most troublingly) from investigators, this introduction of a foreign substance—a source other than that which would indicate the suspect's independent knowledge of the crime—"contaminates" the confession or statement and undermines its probative value. Similarly, eyewitness-identification procedures are designed to test a witness's memory, to evaluate the strength of the identification based upon an implicit estimate of the odds that the witness was drawing on something *other than* a memory generated when viewing criminal conduct. That evaluation is contaminated by express or implicit encouragement to select a particular suspect on the basis of a poorly constructed procedure or direct suggestion from police.

The cases in Garrett's dataset were rife with contamination of this sort. For example, in all but two false confessions and all but two instances of inculpatory testimony from jailhouse informants, exonerees were alleged to have revealed significant details concerning the crime[62]—details that, DNA now shows, could not have been independently known by them. And in 78% of examined cases involving eyewitness evidence, there was evidence that police administering the identification procedures had contaminated the results with conduct that scientific research and legal doctrine alike recognize as suggestive, such as making remarks indicating who should be selected from a lineup or composing a lineup in a way that made the defendant stand out from other individuals.[63]

Even more troubling is the occluded and contagious nature of contamination that Garrett's analysis reveals. At the investigative stage, contamination in one respect often spreads to falsely bolster other evidence in the case. This occurred in the Central Park Jogger case—notorious first for the brutal crime that gave rise to the case and later for the circumstances underlying the wrongful conviction of young men for the crime.[64] The defendants were told in their interrogations about weak fingerprint evidence found on a victim's "satin" jogging shorts and were thereby not only convinced to confess but also provided with a nonpublic detail that came to appear in, and falsely strengthen the credibility of, their statements.[65] Moreover, in this case and others, contamination repeatedly evaded detection

62. *Id.* at 20, 130–34.

63. *Id.* at 49; *see also* United States v. Wade, 388 U.S. 218, 232–35 (1967) (describing suggestive practices).

64. McCray v. City of New York, Nos. 03 Civ. 9685(DAB), 03 Civ. 9974(DAB), 03 Civ. 10080(DAB), 2007 WL 4352748 (S.D.N.Y. 2007); *see* Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 213–16 (2006) (describing the attack and summarizing the subsequent investigation).

65. GARRETT, *supra* note 8, at 22, 153.

because no contemporaneous documentation was available to permit scrutiny of the processes by which the problematic evidence was generated.[66] Thus, even assuming competent and adequately resourced counsel—a generous assumption at best[67]—defendants' ability to challenge seemingly damning evidence at trial (or at the charging and plea bargaining stages[68]) was highly compromised.[69]

Following conviction, a perverse synergy between contamination and doctrines of criminal procedure and appellate review further shielded error from detection. Garrett's data reveals that few exonerees even challenged the most troubling evidentiary features of their convictions on appeal.[70] Whether or not they did, contamination often operated to block judicial scrutiny of the troublesome evidence. Thus, for example, appellate and postconviction challenges to eyewitness-identification evidence were made in approximately half of the cases where such evidence was presented.[71] Those claims that were brought almost uniformly foundered on application of the Supreme Court's *Manson v. Brathwaite*[72] test for applying the Due Process Clause to identification testimony, whereby even the use of suggestive identification procedures does not preclude admissibility of the eyewitness evidence so long as other factors—"indicia of reliability"[73]—corroborate the identification.[74] But Garrett demonstrates that, far from indicating reliability, the corroborative factors considered by courts are in fact *themselves* likely to have been affected by contamination.[75] So, too, did contamination thwart challenges to confessions, as courts repeatedly pointed to a defendant's apparent recounting of nonpublic facts as evidence that the

66. *See, e.g.*, *id.* at 43, 68, 142–43 (providing examples such as the failure to record interrogations from start to finish, the failure to record eyewitnesses' initial description of the culprit, and the failure to require prosecutors to disclose information regarding informants).

67. *See, e.g.*, Eve Brensike Primus, *Structural Reform in Criminal Defense: Reallocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686–87 (2006) (discussing prevalence and causes, individual and structural, of deficiencies in defense-counsel representation).

68. *See* GARRETT, *supra* note 8, at 150 (reporting that nineteen exonerees pleaded guilty). Garrett does not recount the number of exonerees who discussed pleas at any point in their prosecutions—information that would be nearly impossible to reliably assemble. But given that rapes and murders have far lower plea rates than most crimes, *see supra* note 50 and accompanying text, it is plausible to suspect that many exonerees were not offered the opportunity to consider this disposition of their cases.

69. *Id.* at 272–73.

70. *Id.* at 184.

71. *Id.*

72. 432 U.S. 98 (1977).

73. *See* Perry v. New Hampshire, 132 S. Ct. 716, 720 (2012) ("But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.").

74. *See Manson*, 432 U.S. at 110–14 (rejecting a "per se" bar to identification evidence procured with suggestive procedures).

75. GARRETT, *supra* note 8, at 62–63, 188.

statements were, in their totality, uncoerced and reliable.[76] More broadly, the courts' application of harmless-error doctrines to an array of asserted trial errors—a feature of some 50% of cases[77]—led them to place emphasis on the apparent strength of contaminated evidence to affirm convictions in spite of procedural error.[78]

Garrett's analysis thus moves beyond the "tautological" account of causation that is a feature of much of the wrongful-conviction literature.[79] While Garrett's data is significant, an equally great contribution is the explanatory account he weaves to reveal how the introduction of error in a criminal case cannot readily be undone and why traditional reliance on court-centered error-correction devices—either at trial or in multiple iterations of appellate and postconviction review—is therefore misplaced. And while the 250 DNA exonerations are in some respects extraordinary, Garrett makes the case that nothing about their uniqueness was causally relevant to erroneous outcomes. The cogent and disturbing inference is that "[t]he problems that occurred in these cases," as Garrett contends, "are just as likely to infect" other cases "where DNA will never be available."[80]

II. The Limitations of *Convicting the Innocent*

Notwithstanding the significant contributions of *Convicting the Innocent*, there are limitations to Garrett's study and the extent to which it in fact advances our "understand[ing] [of] why criminal prosecutions can go wrong—and how we can avoid convicting the innocent."[81] To a large extent, these limitations reflect not failures of execution but rather constraints that are intrinsic to the project. That is to say, if *Convicting the Innocent* goes as far as one can in using wrongful convictions as a lens into the criminal justice system, it may unintentionally make the case that this distance is ultimately modest and the tools it deploys of limited assistance in diagnosing accuracy-based criminal justice failures. But at the same time, there is a sense of disappointment to be felt by those sympathetic to the project's normative agenda, stemming from the book's failure to chart a more novel and ambitious course for reform. This part takes each category of criticism in turn.

A. Limited Diagnostics

Convicting the Innocent enhances our understanding of how wrongful convictions are produced in our criminal justice system. But to what extent does it truly reveal causes of error, in the sense of being able to predict that

76. *Id.* at 39–40.
77. *Id.* at 185, 201–02.
78. *Id.* at 202, 211.
79. Gross & O'Brien, *supra* note 43, at 932.
80. GARRETT, *supra* note 8, at 265.
81. *Id.* at 13.

reforms aimed at altering or eradicating certain factors will enhance accuracy? Garrett advances fairly strong claims in this regard.[82] But there are at least three reasons to doubt that *Convicting the Innocent* is really positioned to deliver on that promise.

First, however persuasive Garrett's causal account may be, it is ultimately unproven—and likely unprovable—from the data available to him. As others have catalogued, there are numerous barriers to rigorous application of social science methodologies in this arena, most notably the lack of comparators: we have no idea how frequently the variables isolated by Garrett (and others) are present in accurate acquittals of the innocent—or for that matter, accurate convictions of the guilty.[83] If suggestive identification procedures were prevalent in cases in which we had as much confidence in the accuracy of their outcomes as we have in the inaccuracy of the DNA exonerees' trials, one would be hard-pressed to characterize this factor as a likely cause of errors in the latter group.[84] To be sure, there is good reason that Garrett does not pursue this line of inquiry: detailed information concerning the evidence that features in most criminal cases, whether ending in acquittal or conviction, is practically unobtainable, and the outcomes in such cases are not ordinarily susceptible to confirmation via mechanisms like DNA testing. To his credit, Garrett attempted to make use of a fascinating dataset: the approximately 50% of individuals for whom the Innocence Project has obtained DNA testing whose DNA tests *confirm guilt*.[85] This small dataset, however, ultimately proved inadequate to construct a comparison to the exoneree group.[86] Perhaps over time this unusual sample of identifiable guilt "confirmations" will grow to the point that it can be exploited for more probative causal analyses. But for now, in the absence of

82. *See, e.g.*, *id.* (positioning the book to explain "why criminal prosecutions can go wrong—and how we can avoid" error); *id.* at 201 (suggesting that the fact of DNA exoneration reveals incorrect determinations of "harmless error" and shows that the errors in trials in fact played a role in convictions); *id.* at 274 ("The errors in these exonerees' cases were . . . caused by systemic failures.").

83. *See* Leo & Gould, *supra* note 7, at 18 (making this point with regard to wrongful-conviction literature generally).

84. *See id.* at 20–24 (discussing the limited causal conclusion that can be drawn in the absence of comparisons of variable prevalence among varied case outcomes).

85. *See* GARRETT, *supra* note 8, at 233–34.

86. Garrett, *Judging Innocence*, *supra* note 38, at 141 & n.293. Garrett does exploit what points of statistical comparison *are* fairly available to him. In previously published work that is described in *Convicting the Innocent*, Garrett compared the success rates of DNA exonerees in appellate and postconviction litigation with those of randomly selected litigants convicted of rape and murder in cases with no DNA testing; this "matched-comparison" technique established that innocent defendants raised comparable claims and fared no better in litigation as compared to their presumptively non-innocent counterparts. *See* GARRETT, *supra* note 8, at 198 (reporting results of the study); Garrett, *Judging Innocence*, *supra* note 38, at 69–116 (describing the study and reporting results); Leo & Gould, *supra* note 7, at 22–23 (calling Garrett's study the "most comprehensive" available matched-comparison analysis of wrongful convictions).

comparators, we cannot meaningfully test the proposition that the factors Garrett isolates are generating error.

Even assuming that the dynamics described in *Convicting the Innocent* are, as a group, predictive of erroneous outcomes, Garrett's data reveals the near impossibility of isolating and assessing the significance of any *single* factor in a given case. Illustrative on this score is the Jeffrey Deskovic case. As Garrett describes in Chapter Two, the sixteen-year-old Deskovic gave false inculpatory statements that were introduced against him in his trial for the rape and murder of his high school classmate.[87] Garrett describes how the trial transcripts revealed the "central[ity] [of] Deskovic's alleged admissions . . . to the State's case," noting that it was "the only evidence connecting Deskovic to the crime."[88] But there is even more to this story than what Garrett tells—as revealed by, among other sources, a postexoneration case review conducted at the behest of the district attorney's office that convicted Deskovic.[89] Delving deeper problematizes the premise that Deskovic's confession drove the tragic outcome in his case.

At the time of the investigation, DNA testing was performed on semen recovered from the victim. Remarkably, the results excluded Deskovic as a potential source, and the jury in his case heard this evidence.[90] (Microscopic hair examination also revealed, and the jury learned, that hairs found on the victim's body could not have been shed by Deskovic.)[91] But the state also introduced "questionable" forensic evidence designed to establish circumstantially that the fifteen-year-old victim might have had consensual sex prior to her death and that this partner was the source of the semen.[92] In a sense, this strand of the narrative reveals the hydraulic force that Deskovic's confession had in the case: once obtained, it set the prosecution on a course from which even DNA evidence did not prompt reexamination—except to pursue investigative avenues to reconcile the science with the admission.[93] But on the other hand, it is clear that to understand what went wrong in Deskovic's case, one must examine not only the pathologies of false confessions but also issues concerning faulty forensic science and investigative tunnel vision—among other factors.

But there also are more idiosyncratic features of the case. Garrett does not discuss that Deskovic's criminal trial was marred by the loss of evidence in the state's custody: the victim's bra, a description of which had been an

87. GARRETT, *supra* note 8, at 14–18.

88. *Id.* at 16.

89. To view this review, please see LESLIE CROCKER SNYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (2007), *available at* http://truthinjustice.org/Jeffrey-Deskovic-Comm-Rpt.pdf. From 2006 to 2009, I was one of several lawyers representing Deskovic in ongoing civil litigation stemming from his conviction.

90. *Id.* at 32.

91. *Id.* at 33.

92. *Id.* at 21–24.

93. GARRETT, *supra* note 8, at 16–17.

important, allegedly corroborative detail in Deskovic's confession.[94] Had that evidence been available to the defense at trial, Deskovic's lawyer might have been able to argue to the jury that the actual bra made Deskovic's account of the crime impossible. And then there was the suspect "profile" developed by police early on in the investigation—a profile that matched Deskovic in important respects and that ultimately, once the true perpetrator was identified, proved to be grossly inaccurate.[95] Had the profile not been developed, Deskovic might never have become a suspect in the first instance.

The Deskovic case thus highlights the extent to which errors in criminal adjudications might well be fueled by factors other than those that Garrett highlights on the basis of their patterned recurrence. What of the erroneous suspect profile that may have strengthened investigators' commitment to focus on Deskovic in the first instance, or the lost evidence that limited the defense's trial strategy? To what extent were these aspects of the investigation and prosecution independently significant forces that might have generated error even in the absence of a false confession? The fact that some features of the 250 exonerations are amenable to categorization across the dataset does not in and of itself make those features more causally significant in any given case; and conversely, the fact that other dynamics in any given case are idiosyncratic does not render them less consequential.

As Garrett undoubtedly appreciates, Deskovic's trial was surely far from unique in featuring multilayered and convergent decisions and errors by stakeholders as well as mundane and uncategorizable but potentially consequential events.[96] Indeed, as the previous part argued, one of *Convicting the Innocent*'s most notable contributions is its effort to document and explain some of the forces driving this overdetermination. But at the same time, Garrett repeatedly points to discrete categories of evidence as material to the erroneous outcomes in these cases: confessions, eyewitness identifications, forensic analysis, and informant testimony all independently have their turn as the "central" evidence in cases where they appear.[97] And in further service of his causal account, Garrett emphasizes that which can be categorically grouped and deemphasizes that which is idiosyncratic.

There is thus a tension between Garrett's effort to generate a nuanced, descriptive portrait and his interest in asserting broader claims about the independent significance of the factors that he highlights. At the theoretical level, it necessarily undermines the extent to which *Convicting the Innocent* can explain causal relationships even within its dataset, much less within the

94. SNYDER ET AL., *supra* note 89, at 29–30.

95. *Id.* at 10–11.

96. *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 66–67 (discussing the "high burden" faced by defendants who have to argue against many pieces of significant evidence).

97. *See* GARRETT, *supra* note 8, at 16, 79, 91, 139 (describing cases in which the respective factors were essential to acquiring false convictions).

larger universe of criminal prosecutions. In a practical sense, and as the next subpart will explore more fully, the tension begs a remedial question: if we want to ensure that there are no more Jeffrey Deskovics, do we accomplish this goal through reform (either at the individual-department level or more broadly) of interrogation practices? Or will a more comprehensive reexamination of investigative and prosecutorial tools and tactics be required? At times, Garrett's isolation of purported "causes" appears to suggest confidence in the former proposition, but more contextual reflection on cases like Deskovic's suggests the latter is the necessary course.

Finally, just as Garrett gives short shrift to causes that, although idiosyncratic, might well be highly explanatory, he pays little attention to upstream forces that drive the causal events he does identify. *Why* do police engage in suggestive identification practices or feed facts to suspects and witnesses? *Why* do forensic scientists—even those practicing in sound and validated disciplines—overstate the probative value of their conclusions? We lack an understanding of what might be termed "root cause" in Garrett's dataset or more generally. With the exception of the final chapter's brief assertion that psychological research into cognitive biases held by police and prosecutors may have explanatory value,[98] *Convicting the Innocent* does not develop its causal analysis in this respect.

In spite of these holes in its causal account, it must be said that *Convicting the Innocent* does no worse than prior studies of wrongful convictions[99]—and in many respects, as argued above, does much better. But the limitations that the book displays in this regard are nevertheless important in that, for at least two reasons, they impede fulfillment of Garrett's announced agenda of "better understand[ing] why criminal prosecutions can go wrong—and how we can avoid convicting the innocent."[100]

First and most generally, to unqualifiedly designate the factors analyzed in *Convicting the Innocent* as "causes" falsely suggests that we possess a deeper understanding than we do of the nature of wrongful convictions. Of course, that Garrett does not fully answer all questions on the table does not itself undermine the ambitious and valuable work he does undertake. But the impressive fact that his project is already something of a touchstone for conversations in this field[101] means that misapprehension of the work it leaves undone might impede sustained examination of the criminal justice system beyond the parameters that Garrett specifies. This is particularly a concern given the susceptibility among all stakeholders (law enforcement, lawyers, judges and juries, policy makers, the media, the general public, and even scholars) to the allure of DNA, to statistical overclaiming, and to addressing

98. *Id.* at 266–67.

99. *See* Leo & Gould, *supra* note 7, at 19–21 (criticizing the entire field of wrongful-conviction literature for the thinness of its causal analysis).

100. GARRETT, *supra* note 8, at 13.

101. *See supra* note 13 and accompanying text.

the low-hanging fruit of reform—i.e., deficiencies in criminal investigations and adjudications that we *can* see, name, categorize, and explain. Consider on this score the frequency with which Garrett's work (among others') is cited in support of the proposition that "eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'"[102] Increasing attention to identifying and addressing risk factors in wrongful convictions is, undoubtedly, to be cheered. But such (certainly inadvertent) overclaiming about the extent of our causal understanding could well divert attention from less obvious and even more structural factors than what wrongful-conviction scholarship has commonly highlighted—in the former category, a variety of "facially unobtrusive" procedural rules,[103] and in the latter, dynamics such as cognitive limitations of jurors, or more fundamentally forces of racial and class inequality[104]—factors that might operate independent of, or even drive, the variables Garrett identifies.

Legal scholars and social scientists alike are attempting the challenging task of assessing the causes of criminal adjudicative error, including through application of social science methodologies to data other than that offered by

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102. Perry v. New Hampshire, 132 S. Ct. 716, 738–39 & n.6 (2012) (Sotomayor, J., dissenting) (quoting State v. Henderson, 27 A.3d 872, 885 (2011), and citing additional state court decisions as well as GARRETT, *supra* note 8); *see also* Gross et al., *Exonerations*, *supra* note 23, at 542 ("The most common cause of wrongful convictions is eyewitness misidentification. This is not news. It was first shown in 1932 by Professor Edwin Borchard in his classic book *Convicting the Innocent*, and it is apparent again in our data: In 64% of these exonerations (219/340), at least one eyewitness misidentified the defendant. The pattern, however, is heavily lopsided. Almost 90% of the rape cases (107/121), but only half of the homicides (102/205), included at least one eyewitness misidentification." (footnote omitted)); Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2928 & n.199 (2009) (describing eyewitness identification, non-DNA forensic evidence, informant testimony, and confessions as "the leading causes of wrongful convictions" and citing Garrett's prior work in support).

103. *See, e.g.*, Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1226 (2005) ("[F]acially unobtrusive procedural guidelines and structuring provisions operate to distort incentives, obscure relevant information, and bias results."); *see also* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124 (2005) (examining the impact of pretrial procedural rules on the rate of wrongful convictions); Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1187 (2010) (arguing that raising the burden of proof in pretrial evidentiary hearings "to beyond a reasonable doubt . . . [is] perhaps the most effective means of minimizing wrongful convictions").

104. *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (arguing that structural racism and inequality undermine administration of criminal justice); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (pointing to structural racism and inequality in administration of criminal law but asserting ultimately that evisceration of local democratic control over the criminal justice system is the root cause of these failures); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146 (2011) (assessing a variety of structural limitations that cause the criminal trial to "fall[] short of delivering the level of diagnosticity that befits its epistemic demands and the certitude that it proclaims").

known exonerations.[105] And there is every indication in *Convicting the Innocent* that Garrett himself is hopeful that further research along these lines will continue and that our understanding of wrongful convictions will grow in the aftermath of his study.[106] For that to occur, it is critical that his audience also know that Garrett's work has not occupied the field.

A second worry about the limited explanatory reach of Garrett's analysis is potentially more concerning. Garrett is clear-eyed about the unrepresentative nature of the prosecutions that he studies.[107] He nevertheless contends, with some persuasive force, that the lessons to be learned from these 250 cases are broadly applicable—at least to other rape and murder prosecutions, and perhaps as well to other crimes such as robberies that rarely feature dispositive biological evidence (and so are poor candidates for DNA exoneration) but that frequently feature reliance on identifications, confessions, and non-DNA forensic science.[108] But even this broader universe is still a tiny fraction of all criminal prosecutions, the overwhelming majority of which are (1) unlikely to proceed past the earliest stages of investigation (and thus do not entail the gathering of forensic evidence, taking of suspect and witness statements, conducting of identification procedures, and so forth) and (2) likely to resolve in plea bargains.[109] Assuming that wrongful convictions are also to be found within this broader set of cases—and ample circumstantial evidence supports that premise[110]—the "causes" that Garrett isolates and aims to remediate bear little relevance.

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105. *See generally, e.g.*, Karl Ask & Pär Anders Granhag, *Motivational Sources of Confirmation Bias in Criminal Investigations: The Need for Cognitive Closure*, 2 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 43 (2005) (examining the source of investigative tunnel vision); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (describing cognitive bias in the work of prosecutors); Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT'L 74 (2006) (analyzing cognitive bias with regard to forensic scientists); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (discussing cognitive biases affecting actors at all stages of criminal investigation and adjudication). For an explanation of how social scientists use aggregated case studies, matched-comparison samples, and path analysis to understand causation in wrongful convictions, see Leo & Gould, *supra* note 7, at 19–25.

106. GARRETT, *supra* note 8, at 289.

107. *Id.* at 288–89.

108. *Id.* at 262–65.

109. *See supra* notes 48, 50, 53 and accompanying text.

110. Garrett points to a Department of Justice study finding that when DNA testing was conducted in federal criminal investigations 25% of primary suspects were eliminated prior to trial. GARRETT, *supra* note 8, at 12 (citing CONNORS, *supra* note 23, at 20). Other scholars have examined various manifestations of accuracy concerns in guilty pleas, with different critical frameworks. *See, e.g.*, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60–66 (1968) (examining systemic pressure on innocent defendants to plead guilty); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1134 (2008) (acknowledging the prevalence of wrongful convictions pursuant to guilty pleas in low-level offenses and questioning the premise that such events must be eliminated); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 965–67 (1989) (exploring and seeking to ameliorate accuracy concerns in plea bargaining); Robert E. Scott & William J. Stuntz, *Plea Bargaining as*

Conversely, these 250 cases almost certainly feature their own distinctive etiology of error. Thus, for example, while informant testimony featured in only 21% of the trials in Garrett's study, dwarfed by the percentages of trials that included forensic evidence and identification testimony,[111] this category of evidence is almost certainly significantly more prevalent in drug cases—cases that are absent from Garrett's set, that are virtually unamenable to illumination through DNA testing, and that comprise 33% of felony sentences in state courts.[112] Also largely uncaptured by Garrett's study are convictions procured through plea, which scholars have long asserted may exhibit a particular set of risks for innocent defendants.[113]

That the nature of the dataset that Garrett works with places these far more typical criminal cases beyond the scope of his study is not in and of itself a deficiency of the work. But it is all too easy to let run-of-the-mill injustice fall off the radar screen of reform. For many of the same reasons that they do not feature in Garrett's analysis, *most* criminal investigations lack distinguishing features or adequate stakes to attract attention. The plight of defendants who plead guilty to crimes is unlikely to garner the personal or political sympathy necessary to rally policy makers or, for that matter, advocates around their cause.[114] Given limited resources—fiscal, political, and otherwise—reform priorities are likely to be zero-sum, and efforts that redound to the benefit of cases typified by Garrett's study may decrease the likelihood that more common and less attractive issues will be addressed. And yet, from the standpoint of sheer numerosity, the extent of the "innocence problem" among these convicts may well dwarf not only Garrett's dataset but also any analogous convictions not yet identified as erroneous. Again, given the current and prospective profile of *Convicting the Innocent*, it is a shame that the volume does not say more to shine a light on the more workaday ills that will remain unaddressed even in a universe where the lessons of Garrett's study are fully internalized.

Contract, 101 YALE L.J. 1909, 1911 (1992) (developing the argument that structural features of plea bargaining lead innocent defendants to be offered and accept the same deals as the guilty).

111. GARRETT, *supra* note 8, at 279 fig.A.5.

112. *See* ROSENMERKEL ET AL., *supra* note 46, at 3 tbl.1.1. To the author's knowledge, no empirical data exists quantifying the prevalence of informant testimony in drug cases. The proposition that it is prevalent, however, would seem uncontroversial. *See* ALEXANDRA NATAPOFF, SNITCHING 25–26 (2009) (asserting in comprehensive work on informants that drug enforcement is a primary arena in which informant evidence is used and that it is uniquely occluded and unregulated in this field).

113. *See, e.g.*, Bowers, *supra* note 110, at 1119–21 (discussing typical characteristics of innocent defendants who plead guilty); Gross & O'Brien, *supra* note 43, at 931 ("[I]t may well be that a major cause of these comparatively low-level miscarriages of justice is the prospect of prolonged pretrial detention by innocent defendants who are unable to post bail."); Scott & Stuntz, *supra* note 110, at 1911 (assessing "strategic impediments to efficient bargains [that] lead to a pooling of guilty and innocent defendants" and to members of both categories "being offered (and taking) the same deals").

114. *Cf.* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1089–92 (2011) (arguing that the innocence movement has neglected important concerns surrounding guilty pleas).

B. Limited Prognostics

The prescriptive vision of *Convicting the Innocent* is corollary to its diagnoses and in particular its focus on the introduction and obfuscation of investigative error in criminal cases. As Part I of this Review suggested, Garrett's proposals—from the recording of interrogations, to the adoption of scientifically grounded eyewitness-identification protocols, to an overhaul of forensic science—are as familiar as they are extensive, tracking what is essentially the standard reform package advanced in the DNA era.[115] Importantly, Garrett shares with that innocence-driven reform paradigm the view that priority must be placed on "reforming criminal investigations to prevent wrongful convictions in the first instance,"[116] and a tendency to deemphasize courts and judicial doctrine as important staging grounds for reform. That *Convicting the Innocent*'s prescriptions are not innovative is, again, not in itself a deficiency. Garrett aims in part to demonstrate that the smattering of states and localities that have reexamined their criminal justice practices in the wake of DNA exonerations have largely adopted precisely the proposals he advances, such that while reform may effect a "sea change,"[117] it is neither unprecedented nor infeasible. What emerges as a briefly sketched portrait of a decade and a half of sporadic but nevertheless substantively radical criminal justice reform is both illuminating and refreshingly optimistic, particularly in showcasing the extent to which political actors, and not just courts, have sidestepped ordinary barriers to taking on police and prosecutorial practices.[118]

But, given that what little remedial action has been spurred by the DNA-driven revelation of wrongful convictions is largely consistent with what Garrett would hope to see, the question is how *Convicting the Innocent* advances the reform agenda beyond simply exhorting less ambitious jurisdictions to step up to the plate. With the issues that Garrett tackles already on the radar screen of the major players in a conceptual sense, the current juncture calls for drilling down on the details—both substantive, such as the specifics of best practices that should be adopted, and strategic, such as whether reformers should be concentrating their efforts on legislatures, courts, the voluntary goodwill of law enforcement, or elsewhere. Furthermore, any change will occur in a context of limited political and financial capital, and in a climate where most defense-friendly reforms are the product of hard-fought political compromise with powerful opposing interests. Therefore, the path forward calls for principled and information-driven decisions about the inevitable prioritizations and trade-offs that will

115. *See supra* notes 22–26 and accompanying text.

116. GARRETT, *supra* note 8, at 211.

117. *Id.* at 252.

118. *Id.* at 241–62. *See generally* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (describing legislative incentives toward easing rather than heightening the state's burden in prosecution).

be necessitated, and for consideration of a range of second-best alternatives to the full menu of regulation and reform that Garrett would ideally envision. Unfortunately, in three critical respects, *Convicting the Innocent* sidesteps clearly presented opportunities to wade more deeply into those most relevant currents.

First, Garrett's account of reforms already undertaken eschews the pointillist technique that makes his descriptive account of the problem so rich and instead paints with a decidedly broad brush. He aims, of course, simply to give an aggregate sense of the terrain. But a consequence is that he glosses over variations that are highly salient within the terms of his own framework for analysis and critique. So, for example, Garrett points to the fact that 18 states and the District of Columbia, along with some 500 police departments, require or encourage full or partial recording of interrogations.[119] But an important lesson of Garrett's study is that *partial* recording of interrogations is likely not only to be insufficient but also counterproductive in ensuring that only voluntary and reliable statements are taken: permitting police to interview or question a suspect "off tape" and then record subsequent statements by the suspect—a situation that occurred in the Deskovic case discussed above[120]—risks generating a record that strengthens the credibility of the final product via "contamination" *and* insulates contamination from scrutiny.

Similarly, in the context of eyewitness identification, Garrett identifies several states that have enacted reform either by judicial action, statute, agency decision, or some combination thereof. But the book does not discuss important differences among these jurisdictions. Thus, New Jersey's path toward "landmark reform" is described in detail, from the state attorney general's promulgation of guidelines requiring police departments to adopt identification procedures tracking the current social science research on eyewitness fallibility, to the New Jersey Supreme Court's subsequent moves toward requiring electronic recording of identification procedures and cautionary jury instructions, and then implementing wholesale revision of judicial eyewitness-identification doctrine.[121] We then learn that six additional states have passed statutes in response to misidentification. But Garrett's shout-out to these jurisdictions does not disclose that among them only North Carolina approaches New Jersey's level of comprehensiveness, while West Virginia and Illinois declined to address the critical issue of how witnesses view and select suspects during a lineup—a core feature of Garrett's recommendations.[122] Had Garrett's book gone to press just months

119. *See* GARRETT, *supra* note 8, at 248.

120. *See supra* notes 87–95 and accompanying text.

121. *See* GARRETT, *supra* note 8, at 250–51.

122. *Id.* at 248–52; *see* 725 ILL. COMP. STAT. ANN. 5/107A-5 (West 2006) (detailing a lineup and photo-spread procedure that omits instructions on how witnesses view and select suspects); N.C. GEN. STAT. § 15A-284.52 (2009) (specifying extensive lineup procedures, including how witnesses are to view and select suspects); W. VA. CODE ANN. § 62-1E-2 (LexisNexis 2010)

later, it could also have noted the example of Texas's legislatively enacted reforms. Consistent with Garrett's recommendations, Texas now requires police departments to develop and adopt "a detailed written policy regarding the administration of photograph and live lineup identification procedures" and further requires that those policies be "based on . . . credible field, academic, or laboratory research on eyewitness memory" and "best practices designed to reduce erroneous eyewitness identifications."[123] Unlike New Jersey, however, the details are left ultimately to the discretion of individual departments, and admissibility of eyewitness testimony is expressly *not* contingent on compliance with a department's adopted policies.[124]

It seems clear that Garrett does not view all of these approaches as equally exemplary. However, he does not say so, and in presenting them without elaboration or critique he misleadingly advances incomplete reform efforts as models. On the other hand, it may be that Garrett is willing to concede that incremental measures short of the ideal may be tolerable—as a matter of the social science research, as a matter of political feasibility, or for some combination of these or other reasons. In that case, the relevant tradeoffs are well worth discussing. In either event, there is a missed opportunity to provide more nuanced guidance for a path forward.

A closely related criticism stems from Garrett's inattention to the puzzle of what conditions are necessary to spur and sustain reform of the sort that he seeks. Garrett asserts that "exonerations"—and DNA exonerations in particular—"are reshaping criminal procedure."[125] One might think the path forward is as "simple" as generating dramatic revelations of error and then standing and watching the reform percolate (in which case the most direct path to reform might be greater access to postconviction innocence review, a notion that Garrett does entertain[126]). But of course this is not the case.

Thus, we learn that a spate of seven DNA exonerations pushed North Carolina down a radical path, leading first to the creation of a permanent body to investigate wrongful convictions and propose responsive systemic

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(itemizing the state's eyewitness-identification procedures—a set of procedures that does not include a standardized process through which witnesses view and select suspects during a lineup). Both Illinois and West Virginia authorized further study on these issues. *See* INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 23 (2009), *available at* http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (finding that West Virginia created a task force in 2007 to "study and identify additional best practices for eyewitness identification"); SHERI H. MECKLENBURG, ILL. STATE POLICE, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 8–9 (2006), *available at* http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf (stating that the Illinois Legislature mandated a "Pilot Study on 'the effectiveness of the sequential method for photograph and live lineup procedures'"). To my knowledge, neither jurisdiction has acted on that research.

123. TEX. CRIM. PROC. CODE ANN. art. 38.20, § 3(a), (c) (West Supp. 2011).

124. *Id.* § 5(b).

125. GARRETT, *supra* note 8, at 244.

126. *See id.* at 239, 241–44 (advocating for expansion of postconviction DNA testing and endorsing innocence commissions as a path to greater exoneration opportunities).

reforms, and subsequently to the formation of the Innocence Inquiry Commission to review prisoners' claims of innocence and make recommendations for exoneration outside the procedural limitations imposed by ordinary judicial review.[127] In Texas, by contrast, the response to forty-four DNA exonerations has been far more halting[128]: a statutorily created body to review the causes of wrongful conviction has generated eleven recommendations largely tracking Garrett's own;[129] only one, eyewitness-identification reform, has been acted upon by the legislature.[130] Are there intractable differences that account for this disparity in the track record of reform? Are there any lessons to be gleaned from the North Carolina example and translated to the distinctive political and institutional contexts presented by other jurisdictions?

There are occasions, too, when Garrett does not simply sidestep but in fact glosses over fascinating and important strategic dynamics. For example, in the context of discussing eyewitness-identification reform, he asserts that following a spate of exonerations, "New Jersey began a project of revamping its criminal procedure rules."[131] The statement suggests a kind of deliberate and consensus-driven effort when in fact the substance, course, and pace of reform in New Jersey were quite contested—particularly between prosecutors and law enforcement on the one hand and the trailblazing judiciary on the other.[132] Though full exploration of the dynamics and trajectory of these conflicts is certainly beyond Garrett's inquiry, recognition of them, at least, is called for in the context of his otherwise-nuanced account.

These are difficult questions, but they are as susceptible to interrogation as the difficult systemic dynamics that much of *Convicting the Innocent* is devoted to untangling. The generality of Garrett's narrative on this front must not cloud the critical presence of these issues on the radar screens of scholars and reformers. Those who seek the overhaul of criminal justice practices in response to revealed systemic deficiencies in reliability are not

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127. *Id.* at 241–44.

128. *Exonerations by State*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/StateView.php.

129. TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE, at ii (Aug. 2010), *available at* http://www.courts.state.tx.us/tidc/pdf/FINALTCAPreport.pdf. More radical reform took place voluntarily in Dallas County, the locality that has produced the overwhelming bulk of Texas's exonerations, and which has now institutionalized open-file discovery, cold-case review, and a variety of investigative reforms as a matter of district-attorney policy. GARRETT, *supra* note 8, at 259.

130. Tex. H.B. 215, 82d Leg., R.S. (2011); *see supra* notes 123–24 and accompanying text.

131. GARRETT, *supra* note 8, at 250.

132. *See, e.g.*, State v. Henderson, 27 A.3d 872, 884–85, 912–15 (2011) (recounting that notwithstanding the Attorney General's adoption of eyewitness-identification guidelines, the state "argue[d] vigorously" against judicial imposition of a "presumption of impermissible suggestiveness" for breach of guidelines and likewise opposed judicial revision of eyewitness-admissibility factors and maintained opposition through several rounds of litigation).

short on ideas but rather on tactics, and application of Garrett's analytical rigor to that pressing challenge would have been welcome.

But the most significant hole in *Convicting the Innocent*'s prescription for reform may lie in its too-offhanded treatment of courts and legal doctrine. To be sure, this is not an inadvertent oversight. One of the lessons of Garrett's diagnostic account is that adjudication can serve only as a "backstop" accompanying direct reform of the primarily investigative practices that generate error, and so it is to that latter task that Garrett directs his primary prescriptive attention.[133] Moreover, it is understandable that Garrett would aim to push back on the tendency of legal scholarship to be overly attuned to the work of courts and insufficiently attuned to the work of other institutions that critically shape legal outcomes. In this sense, *Convicting the Innocent* is of a piece with, and indeed advances, a new generation of criminal law scholarship that has questioned the descriptive accuracy and normative desirability of court-mediated, procedurally oriented notions of criminal "justice" inherited from the Warren Court's constitutional-criminal-procedure legacy.[134] Garrett's analysis of the tendency of error to evade judicial detection provides further reason to reject the centrality of adjudicatory mechanisms in understanding the most salient dynamics of criminal justice.

But even as peripheral players, it is important that the contribution of courts be synergistic with—or at a minimum not undermining of—upstream reliability-enhancing reforms. It is this sentiment that leads Garrett to urge that courts refocus the lens of criminal procedure doctrine to screen critical evidence—confessions, identifications, informant testimony, and expert testimony—for substantive reliability.[135] In this respect, again, Garrett's proposal is resonant with the remedial agenda around which much of the innocence-focused reform movement has already coalesced[136]—though for the reasons set forth in Part I of this Review, *Convicting the Innocent* provides an important and persuasive grounding of that call in the empirical realities of the criminal process. But if the final chapter of *Convicting the Innocent* makes a plausible case for the feasibility of even seemingly radical

133. GARRETT, *supra* note 8, at 211.

134. *See, e.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 750–51 (2003) (describing the "growing recognition that the road to criminal justice reform lies not through the battleground of defendant rights . . . but through attention to . . . 'administrative-inquisitorial structures that in fact process most American criminal cases'" (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2151 (1998))); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818–19 (2006) (arguing that Warren Court criminal procedure doctrine had perverse effects on substantive accuracy).

135. GARRETT, *supra* note 8, at 248, 252, 255–56.

136. *See, e.g.*, Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134, 147–72 (2008) (reviewing scholarship and reform proposals that reflect how "the Innocence Movement alters our understanding of the criminal justice system by giving us a new paradigm—a Reliability Model based on best practices").

investigative reforms, the same is not so in regard to this proposed judicial agenda. Garrett himself concedes that two decades of DNA exonerations have left us still with a Supreme Court that seems "complacent" in the face of evidence that should alarm.[137] A number of data points from recent Supreme Court history suggest that this characterization is too generous.

In fact, the Court has all but affirmatively rejected the perspective that Garrett urges and has done so in the face of express invitations (including through amicus briefs from the Innocence Project and related organizations[138]) to consider whether the phenomenon of DNA exoneration challenges the normal presumption that provision of fair procedures rather than substantive evidentiary scrutiny is adequate to ensure constitutionally fair criminal adjudication. Two terms ago, in *District Attorney's Office for the Third Judicial District v. Osborne*, the Court rejected the due process claim of a convicted prisoner challenging Alaska's refusal to permit him access to available biological evidence in order to substantiate his claimed innocence with DNA testing.[139] The Court squarely resisted the premise that DNA evidence and its capacity to conclusively resolve questions of factual truth should upend the long-standing value of legal finality or the long-standing aversion of federal courts to second-guessing the adequacy of state criminal procedures.[140] More recently, and more relevantly, this term in *Perry v. New Hampshire*,[141] the Court resoundingly, by an eight-to-one margin, ruled against a defendant's claim that the Constitution demands inquiry into the reliability of eyewitness-identification evidence obtained under unreliable conditions that were not orchestrated by the police.[142] Justice Ginsburg's opinion for the majority squarely rejected the notion of a constitutional principle of reliability in a context—that of eyewitness identification—where the innocence movement has arguably made the most headway in generating data to support the dangers of judicial permissiveness toward admissibility.

In light of these fairly clear signals that constitutional-criminal-procedure doctrine will meet the challenge of DNA and innocence as, in the spirit of the epigraphical quote from *Osborne*,[143] a management problem rather than a revolution, there is an emptiness to Garrett's call. To urge a wholesale judicial rethinking of doctrinal premises in a climate with such dim prospects for success risks leaving reformers empty-handed with respect

137. GARRETT, *supra* note 8, at 262, 269.

138. *E.g.*, Brief of Amicus Curiae The Innocence Network in Support of Petitioner, Supporting Reversal at 7–10, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974), 2011 WL 3439922; Brief for the Respondent at 48, 51–52, Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6), 2009 WL 208117.

139. 129 S. Ct. at 2315, 2323.

140. *Id.* at 2322.

141. 132 S. Ct. 716 (2012).

142. *Id.* at 730.

143. *See supra* text accompanying note 2.

to judicial reform. There are, however, ways in which Garrett's analysis might inform doctrinal innovations that could feasibly be urged even within the context of the prevailing conservatism of courts vis-à-vis legal responses to accuracy concerns raised by wrongful convictions.

Consider, for example, the doctrine of structural error, which in federal habeas proceedings exempts certain fundamental trial deficiencies from the most stringent level of harmless-error review.[144] Currently, these structural errors are found only in a "very limited class of cases"[145] reflecting "defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[146] By contrast, as to the vast majority of constitutional claims in postconviction proceedings, the state has the opportunity to establish that any error was "'harmless beyond a reasonable doubt'"[147]—a test that, under any standard, is often met by courts pointing to substantively convincing evidence of guilt. Indeed, Garrett identifies harmless-error doctrine as a mechanism by which investigative contamination is currently occluded, and reliability-suppressing missteps are left unremedied in the postconviction process.[148] But Garrett's analysis of the systemic nature of error also points to a potential wedge to expand structural-error doctrine. The dynamics of contamination that Garrett documents and describes arguably create "defect[s] [that] affect[] the framework within which the trial proceeds,"[149] either categorically or in particular cases.[150] Garrett's analysis thus suggests, and provides an avenue for arguing to courts, that certain categories of error currently treated as potentially "harmless" might in fact be properly analyzed as structural error, thus permitting greater accuracy-based scrutiny in postconviction review.[151]

Second, and thinking more strategically than doctrinally, Garrett's account points to ways in which criminal justice reformers can, have, and should focus on the courts as part of a coordinated strategy that includes other actors who generate criminal justice policy. The history of eyewitness-identification evidence reform in New Jersey is exemplary. There, reform began internally to law enforcement, with the attorney general mandating that law enforcement agencies adopt identification-procedure policies, though specifying that its mandate "should in no way be used to imply that

144. Fulminante v. Arizona, 499 U.S. 279, 308–10 (1991).

145. Johnson v. United States, 520 U.S. 461, 468 (1997); *see also* Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (finding that an error in a reasonable-doubt instruction was a structural error).

146. *Fulminante*, 499 U.S. at 310.

147. *Id.* at 295 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

148. GARRETT, *supra* note 8, at 200–02.

149. *Fulminante*, 499 U.S. at 310.

150. *Cf.* Commonwealth v. Durand, 931 N.E.2d 950, 966 (Mass. 2010) (reserving the question of whether coercion of a confession is structural error under the Massachusetts constitution).

151. Garrett himself has gestured toward this possibility in prior work. *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 422–24 (2007) (arguing that systemic misconduct is wrongly conceptualized within individualized harmless-error frameworks).

identifications made without [the] procedures are inadmissible or otherwise in error."[152] The New Jersey Supreme Court subsequently, over objection from the State, exercised its supervisory authority to require recording of identification procedures as a condition of admissibility[153] and later to adopt model instructions cautioning jurors on the reliability of eyewitness identification.[154] Critically, the court noted and commended the laudable steps taken by the attorney general but concluded that its own duty and authority permitted it to supplement (and enhance) oversight in this realm.[155] Of course, the New Jersey Supreme Court ultimately went even further and, following the appointment of a special master, issued a decision that "established a comprehensive social science framework for regulating eyewitness identifications in the courtroom"[156]—i.e., just the sort of fundamental reliability-based reform that Garrett would (rightly) urge be more broadly pursued. But even if New Jersey had stopped short in its more incremental steps of requiring recording and jury charges, it would have been an important judicial advancement and reinforcement of more limited and piecemeal reform undertaken by other institutions.

Interestingly, there is evidence that a similar dynamic might be at play in Texas's still-evolving experiment with eyewitness-identification reform. Subsequent to the legislature's adoption of an eyewitness-identification bill,[157] the Court of Criminal Appeals issued its first decision reversing a conviction based on the exclusion of a defense expert on eyewitness identifications—citing not only the New Jersey Supreme Court and Garrett but also, more to the point, the Texas Legislature's then-recent enactment.[158] Indeed, some have argued that in light of the legislature's failure to provide for a sanction for departments that fail to comply with the mandated eyewitness-identification policies, the Court of Criminal Appeals' decision amounts to a critical oversight mechanism, providing a previously unavailable opportunity for defendants to present evidence concerning the importance of compliance with best practices in identification procedures.[159]

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152. Letter from John J. Farmer, Jr., Attorney Gen., State of N.J., to All County Prosecutors et al. 3 (Apr. 18, 2001), *available at* http://www.innocenceproject.org/docs/NJ_eyewitness.pdf.

153. State v. Delgado, 902 A.2d 888, 896–97 (N.J. 2006).

154. State v. Romero, 922 A.2d 693, 702–03 (N.J. 2007).

155. *Id.* at 702; *Delgado*, 902 A.2d at 896.

156. Brandon L. Garrett, *Trial and Error: Learning from Patterns of Mistakes*, 26 CRIM. JUST. 30, 35 (2012) (citing State v. Henderson, 27 A.3d 872 (2011)).

157. *See supra* notes 123–24, 130 and accompanying text.

158. Tillman v. State, 354 S.W.3d 425, 436 (Tex. Crim. App. 2011) (citing *Henderson*, 27 A.3d 872; GARRETT, *supra* note 8, at 8–9, 279); *id.* at 442 (citing TEX. CRIM. PROC. CODE art. 38.20, § 1).

159. *See Chiefs' Push to Weaken Eyewitness ID Improvements Could Boost Market for Defense Experts*, GRITS FOR BREAKFAST (Jan. 30, 2012), http://gritsforbreakfast.blogspot.com/2012/01/chiefs-wish-to-weaken-eyewitness-id.html (arguing that *Tillman* created a penalty to incentivize police departments to conform with the best practices in identification procedures by allowing expert witnesses for defendants if they failed to comply); *see also Tillman*, 354 S.W.3d at 442

The critical insight in both the New Jersey and Texas examples is that something less than wholesale judicial reassessment of constitutional or evidentiary doctrine can, in concert with movement by other criminal justice stakeholders, build upon or reinforce other steps toward reform. In this respect, it is worth highlighting that the most effective site of focus is likely to be the oft-neglected (at least in scholarly accounts) state courts rather than their federal counterparts. Indeed, state courts have proven more receptive to broader conceptualization of structural error along precisely the dimensions described above.[160] But as Garrett's analysis reminds us, because the difficulties of error detection inevitably grow more intractable over the lifetime of a criminal case, accuracy-enhancing doctrine will have the greatest effect at the earliest possible stages of litigation—which, in the overwhelming majority of instances, occurs in state court.

These are just two examples, sketched at high levels of generality, of ways in which Garrett's diagnostic account might helpfully guide court-based reform efforts along nonstandard lines. Given Garrett's past scholarship exploring innovative jurisprudential reform in the arenas of criminal and civil procedure,[161] I have no doubt that *Convicting the Innocent* and the debates it seeks to influence could have benefitted substantially from deployment of Garrett's considerable creativity and lawyerly chops to the project of moving beyond what seems increasingly to be a moribund reliability-based doctrinal-reform agenda.

Conclusion

Garrett asks, "Should we be pessimistic or optimistic about actually fixing the flaws in our criminal justice system?"[162] He does not directly answer the question, and *Convicting the Innocent* is replete with well-founded ambivalence on this score. In the final analysis, Garrett adopts a distinctively hopeful tone—though one that at times may lead him to be too unqualified in presenting the compelling evidence he adduces of broad-based failings in our system of criminal adjudication and too confident that the lessons of DNA exonerations will ultimately advance the practical agenda for criminal justice reform. But these limitations do not diminish the significant and timely contribution that *Convicting the Innocent* makes. Indeed, it is *because* Garrett is correct that we are at a crossroads in charting a path forward from internalizing the potential for error in criminal adjudication,

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(noting that expert witnesses would be able to testify concerning law enforcement compliance with standard eyewitness-identification procedures).

160. *See, e.g.*, Connecticut v. Johnson, 460 U.S. 73, 91 (1983) (Powell, J., dissenting) ("A State, of course, may apply a more stringent *state* harmless-error rule than *Chapman* would require.").

161. *See, e.g.*, Garrett, *supra* note 151, at 424–49 (developing models of aggregated claim adjudication in criminal law); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1699–715 (2008) (developing an analytical framework for a constitutional innocence claim).

162. GARRETT, *supra* note 8, at 273.

and *because* of breadth, quality, and stature of *Convicting the Innocent*, that there is at times a worrisome sense that the effort might not intervene in the march toward reform at the most relevant point. Nevertheless, Garrett's contributions are significant. His elucidation of the machinery of criminal justice error and the extent to which we are systemically compromised in correcting the mistakes it generates is illuminating, paradigm shifting, and generative of further questions that are now prominently positioned for future scholarship to probe. Ultimately, it is work that admirably carries Borchard's torch into a new era of criminal justice debate.