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## Innocence Lost ... and Found: An Introduction to The Faces of Wrongful Conviction Symposium Issue

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INNOCENCE LOST . . . AND  
FOUND:  
  
AN INTRODUCTION TO *THE  
FACES OF WRONGFUL  
CONVICTION* SYMPOSIUM ISSUE

DANIEL S. MEDWED\*

In April 2006, seventeen people who had been wrongfully convicted and later exonerated of their crimes assembled to share their experiences at a conference on the UCLA campus,<sup>1</sup> representing a small portion of the approximately 200 prisoners exonerated in California since 1989. Billed as the largest gathering of the wrongfully convicted ever held in the state,<sup>2</sup> the conference opened with brief addresses by these men and women to scores of academics, lawyers, students, activists, journalists, and other concerned citizens in attendance. A veteran of numerous conferences of this nature, I sat in the audience mesmerized as always, captivated by the stories and inspired by the people telling them. And not for the first time I

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\* Associate Professor of Law, University of Utah-S.J. Quinney College of Law. J.D. Harvard Law School, 1995; B.A., Yale College, 1991. I am honored to have been asked by Erin Frazor, editor in chief of the *Golden Gate University Law Review*, to introduce the articles published in this symposium issue. Special thanks as well to Stefanie Faucher and Natasha Minsker for inviting me to participate in *The Faces of Wrongful Conviction* conference at UCLA in April 2006.

<sup>1</sup> Henry Weinstein, *Victims of the Justice System; A Conference at UCLA Brings Together the State's Wrongfully Convicted to Share Their Experiences and Push for Legal Changes*, L.A. TIMES, Apr. 9, 2006, at B1.

<sup>2</sup> *Id.* See also Press Release, Death Penalty Focus, Men and Women Wrongfully Convicted Speak Out at UCLA Conference (Mar. 23, 2006), [http://www.deathpenalty.org/pdf\\_files/ConferencePressAdvisoryRevised.pdf](http://www.deathpenalty.org/pdf_files/ConferencePressAdvisoryRevised.pdf).

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reflected on the peculiar nature of working in the field of wrongful convictions, which I have done both as a litigator and an academic, and the capacity of this work to simultaneously evoke feelings of despair and optimism.

Whereas each wrongful conviction signifies an acute failure of the criminal justice system, a loss of innocence for those of us who want to believe in its merits, each exoneration constitutes an affirmation of the system's potential value – not so much in the sense that the post-conviction system “works” (given that it often does not)<sup>3</sup> but that learning about the uniquely human details of individual exonerations serves as a powerful motivating force to revamp the process through which guilt or innocence is adjudicated. Our criminal justice system is changeable, its flaws possibly remediable, and it is this prospect of a revised, superior method of charging and trying those accused of crimes that encourages many of us concerned with this issue to have hope. Conceivably, through legislative reform, education, and litigation, a more accurate criminal justice system may emerge over time.

Indeed, the articles published as part of this symposium share this theme of reform: a desire to alter the criminal justice system so as to guard against the conviction of the innocent.<sup>4</sup> First, Simon Cole, Alexandra Natapoff, and Thomas Sullivan each focus on the need for change with respect to particular problems that contribute to wrongful convictions and, in the process, build upon their impressive canon of scholarship.<sup>5</sup> Cole examines the use of faulty forensic science in wrongful

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<sup>3</sup> See, e.g., Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 675-686 (2005) (discussing the array of perplexing and burdensome state procedures governing post-conviction innocence claims, specifically in cases lacking biological evidence); Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 377-380 (2002) (citing, among other things, some of the weaknesses in many state post-conviction DNA testing procedures).

<sup>4</sup> Last year, *American Criminal Law Review* published a series of articles that also grappled with the issue of systemic reform and wrongful convictions. See, e.g., Daniel S. Medwed, *Looking Foreword: Wrongful Convictions and Systemic Reform*, 42 AM. CRIM. L. REV. 1117 (2005) (introducing the symposium and describing the articles published in the volume).

<sup>5</sup> See, e.g., Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

convictions by pinpointing some of the failings with one such law enforcement scientific tool: latent fingerprint identification.<sup>6</sup> Once viewed as infallible, fingerprinting has faced attack (and rightfully so) for its susceptibility to error, and in his contribution to this symposium Cole elaborates on his important 2005 study of wrongful convictions produced through flawed fingerprint evidence.<sup>7</sup> As a result of his analysis, Cole demonstrates that – while erroneous fingerprinting may be a more prominent factor in wrongful convictions than originally thought – the full extent of this phenomenon remains something of a mystery.<sup>8</sup> Natapoff, in turn, explores the prominent role that informants or “snitches” play in the conviction of the innocent when they receive leniency in exchange for information.<sup>9</sup> After describing the disturbing relationship between snitches, police, and prosecutors, Natapoff recommends a distinct litigation strategy for defense attorneys in the form of requesting a *Daubert*-style reliability hearing to assess the credibility of each informant;<sup>10</sup> such an inquiry undoubtedly would assist in exposing potentially perjurious informants and disallowing their participation in the case. As an Appendix, Natapoff includes a sample defense motion for seeking this type of hearing.<sup>11</sup> Sullivan then tackles a different, oft-cited feature of wrongful convictions, that of false confessions.<sup>12</sup> To address this problem, Sullivan advocates the electronic recording of police interrogations to monitor the possibility of false inculpatory statements by suspects.<sup>13</sup> Discounting the concerns raised by police and prosecutors about the financial costs and adminis-

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<sup>6</sup> Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, 37 GOLDEN GATE U. L. REV. 39 (2006).

<sup>7</sup> *Id.* See also Cole, *More Than Zero*, *supra* note 5.

<sup>8</sup> Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, *supra* note 6.

<sup>9</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175 (2006); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. REV. 891 (2004); cf. 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 (1999).

<sup>13</sup> Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, *supra* note 12.

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trative obstacles posed by electronic recording, Sullivan notes that over 450 police departments across the country currently record interrogations, with little if any deleterious effect yet an array of salutary ones.<sup>14</sup> The benefits of electronic recording, based on Sullivan's study, include protecting not only innocent suspects from false charges but also police detectives from phony claims of misconduct.<sup>15</sup>

Second, Susan Rutberg and Lynn Damiano each examine the tragedy of wrongful convictions through the lens of a particular case and shed light primarily on the issue of prosecutorial misconduct. Rutberg's article de-constructs the case of Pete Rose, a man wrongfully convicted of rape and kidnapping in Lodi, California whose conviction was overturned by Rutberg and her law students at Golden Gate University School of Law.<sup>16</sup> Dissecting what occurred in Rose's case reveals a host of missteps by the prosecution and defense alike, including false identifications by the victim, the use of porous forensic science by law enforcement, lackluster defense lawyering, and most notably prosecutorial misconduct.<sup>17</sup> In light of the egregious behavior by numerous participants in the Rose case, Rutberg endorses the creation of an Innocence Commission in California, an independent investigative body with the power to hold the pertinent players in the criminal justice system – police officers, prosecutors, and defense attorneys – accountable for their actions.<sup>18</sup> Lynn Damiano's case note further probes one of the topics raised by Rutberg's paper, that of prosecutorial misconduct, by assessing the 2005 Ninth Circuit decision in *Hayes v. Brown*.<sup>19</sup> On the whole, Damiano praises the Ninth Circuit for undertaking a meaningful, fact-intensive review of the prosecutor's errors in that case and endorses the court's analysis as an approach well-worthy of consideration by other

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Susan Rutberg, *Anatomy of a Miscarriage of Justice: The Wrongful Conviction of Peter J. Rose*, 37 GOLDEN GATE U. L. REV. 7 (2006).

<sup>17</sup> *Id.* For another recent case study of a wrongful conviction, see Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337 (2006).

<sup>18</sup> Rutberg, *supra* note 16.

<sup>19</sup> Lynn Damiano, Note, *Taking a Closer Look at Prosecutorial Misconduct: The Ninth Circuit's Materiality Analysis in Hayes v. Brown and Its Implications for Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 191 (2006).

courts.<sup>20</sup>

Third, Craig Haney discusses one consequence of the DNA revolution and the related rise in the number of exonerations, namely, its impact on the death penalty debate.<sup>21</sup> Although the risk of convicting the factually innocent and sentencing them to death is an important issue to consider in weighing the propriety of capital punishment, Haney maintains that other aspects of death penalty jurisprudence must not be overlooked.<sup>22</sup> In Haney's view, miscarriages of justice also occur upon the conviction of a defendant who, while factually guilty, may be neither legally nor morally guilty.<sup>23</sup> These more nuanced errors trouble Haney, and he recommends that scholars and participants in the criminal justice system keep a watchful eye on these cases, "ones in which capital defendants, although they have not been 'wrongly convicted,' have been 'wrongfully condemned.'"<sup>24</sup>

In sum, the articles contained in this symposium edition take an important step in advancing the scholarship in the field of wrongful convictions. Equally important, their shared emphasis on improving the criminal justice system substantiates the hope instilled in the audience during the opening plenary session at *The Faces of Wrongful Conviction* conference upon listening to the tales of the seventeen exonerees present on that occasion and signals that, ideally, the suffering experienced by those exonerees and numerous others will not be in vain.

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<sup>20</sup> *Id.*

<sup>21</sup> Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131 (2006).

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.* at 141.