

## THE MULTIPLE DIMENSIONS OF TUNNEL VISION IN CRIMINAL CASES

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### INTRODUCTION

The discovery of hundreds of wrongful convictions in the last fifteen years has shaken up the criminal justice world. Since the advent of postconviction DNA testing around 1990, more than 170 people convicted of serious crimes have been exonerated by DNA, a number off of death row, and most after serving many years in prison.<sup>1</sup> Literally hundreds of additional exonerations in the last fifteen years alone have been based on evidence other than DNA.<sup>2</sup> Because DNA evidence exists in only a small minority of all cases—and is preserved and available for postconviction testing in an even smaller proportion of cases—and because innocence is so very difficult to prove postconviction without DNA, these known exonerations almost surely reflect only the tip of a very large iceberg.<sup>3</sup> These exonerations have challenged the traditional assumption that the criminal justice system does all it can to accurately determine guilt, and that erroneous conviction of the innocent is, as the Supreme Court has assumed,

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1. Innocence Project, [www.innocenceproject.org](http://www.innocenceproject.org) (last visited Feb. 22, 2006).

2. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523-24 (2005).

3. *Id.* at 529.

“extremely rare.”<sup>4</sup> Further, they have opened a window for scholarly and institutional inquiry into the causes of wrongful convictions and the reforms that might prevent such miscarriages of justice in the future.

This burgeoning inquiry has identified many of the recurrent causes of error, including fallible eyewitness identification evidence and flawed eyewitness identification procedures, false confessions, jailhouse snitch testimony, police and prosecutorial misconduct, forensic science error or fraud, and inadequate defense counsel.<sup>5</sup> A theme running through almost every case, that touches each of these individual causes, is the problem of tunnel vision.

Tunnel vision is a natural human tendency that has particularly pernicious effects in the criminal justice system. By tunnel vision, we mean that “compendium of common heuristics and logical fallacies,” to which we are all susceptible, that lead actors in the criminal justice system to “focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.”<sup>6</sup> This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.<sup>7</sup> Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative.<sup>8</sup> Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.<sup>9</sup> Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.

Tunnel vision both affects, and is affected by, other flawed procedures in the criminal justice system. For example, mistaken eyewitness identifications—the most frequent single cause of wrongful convictions<sup>10</sup>—can convince investigators early in a case that a

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4. Schlup v. Delo, 513 U.S. 298, 321 (1995).

5. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).

6. Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

7. See, e.g., Myrna Raeder, *What Does Innocence Have to Do With It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327-28.

8. See, e.g., Martin, *supra* note 6, at 848.

9. See *id.*

10. In various studies of wrongful convictions, eyewitness error has been cited as a contributing factor in anywhere from 60 to 85 percent of all wrongful convictions.

particular individual is the perpetrator. Convinced of guilt, investigators might then set out to obtain a confession from that suspect,<sup>11</sup> producing apparently inculpatory reactions or statements from the suspect, or leading investigators to interpret the suspect's innocent responses as inculpatory. The process of interrogating an innocent suspect might even produce a false confession. Police and prosecutors, convinced of guilt, might recruit or encourage testimony from unreliable jailhouse snitches, who fabricate stories that the defendant confessed to them, in hopes that they will benefit in their own cases from cooperation with authorities.<sup>12</sup> Forensic scientists, aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data or fabricate results to support the police theory.<sup>13</sup> All of this additional evidence then enters a feedback loop that bolsters the witnesses' confidence in the reliability and accuracy of their incriminating testimony and reinforces the original assessment of guilt held by police, and ultimately by prosecutors, courts, and even defense counsel.<sup>14</sup>

Tunnel vision, in a general sense at least, is a well-recognized phenomenon in the criminal justice system. Most official inquiries into specific wrongful convictions have noted the role that tunnel vision played in those individual cases of injustice.<sup>15</sup> For example, former

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*See* SCHECK ET AL., *supra* note 5, at 246 (finding eyewitness error in 84 percent of the first sixty-two postconviction DNA exonerations); Gross et al., *supra* note 2, at 542 (finding eyewitness error in 64 percent of the cases identified in their study of 340 wrongful convictions between 1989 and 2003).

11. When investigators believe a suspect is the perpetrator, their inquiry shifts from a fact-gathering “interview” to a confession-seeking “interrogation.” In many departments, police are taught to “interrogate” suspects only when they are satisfied the suspect is guilty; at that point the objective is obtaining a confession. Various stratagems are then employed to break the suspect down psychologically and to induce a confession. *See infra* Part II.C.1.

12. Martin, *supra* note 6, at 861.

13. *See* Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S111 (2005) (noting that “examiner bias” produces skewed results in forensic laboratories where, as is common, “police . . . offer a detailed narrative of the crime and an inventory of whatever other inculpatory evidence they have against the suspect on the request form used to order a particular scientific test”); *see generally* D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002).

14. *See* Martin, *supra* note 6, at 848; George Castelle & Elizabeth F. Loftus, *Misinformation and Wrongful Convictions*, in *WRONGLY CONVICTED* 17, 18-19, 24, 29-30 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

15. Both scholarly and popular accounts of wrongful convictions have also observed the problem of tunnel vision: “Perhaps the most common fault with criminal investigations is their failure to explore all the possible suspects. When attention begins to focus on a single individual, too often the detectives are called off the general hunt to

Illinois Governor George Ryan's Commission on Capital Punishment concluded that tunnel vision played a significant role in most of the thirteen Illinois cases studied in which an innocent person was sentenced to death before being exonerated and released from death row.<sup>16</sup> The official investigation of the wrongful convictions in Chicago's "Ford Heights Four" case also concluded that tunnel vision was largely to blame.<sup>17</sup> Official Canadian governmental inquiries, held after high-profile exonerations,<sup>18</sup> have repeatedly identified tunnel vision as a significant problem in those cases.<sup>19</sup> And the Innocence

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go after the single target. Tunnel vision sets in." BILL KURTIS, *THE DEATH PENALTY ON TRIAL: CRISIS IN AMERICAN JUSTICE* 33 (2004); *see also* Martin, *supra* note 6, at 849; James McCloskey, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989). Even before the problem of wrongful convictions was widely recognized, the American Bar Association (ABA) and the Association of American Law Schools (AALS) described the process that can lead to tunnel vision. In a 1966 joint report, the two organizations observed:

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevancy by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

AM. BAR ASS'N & ASS'N OF AM. LAW SCH., *Report of the Joint Conference of the American Bar Association and the Association of American Law Schools on Professional Responsibility*, 44 A.B.A. J. 1159, 1160 (1958) *reprinted in* THE LAWYER IN MODERN SOCIETY 188, 189 (V. Countryman & T. Finman eds., 1966).

16. *See* STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 20 (2002), *available at* [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/complete\\_report.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf).

17. Steve Mills & John Biemer, *Ford Heights 4 Inquiry Clears Cops, Prosecutors*, CHI. TRIB., Aug. 22, 2003, at 1.

18. In Canada, unlike most jurisdictions in the United States, the government has responded to exonerations by holding extensive inquiries into what went wrong and what might prevent such errors in the future. For a discussion contrasting that response to the typical response in the United States, in which the exonerated are released without official comment or inquiry, *see* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Study Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 338-39, 342-44 (2002).

19. *See* FPT HEADS OF PROSECUTION COMM. WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 35 (2004), *available at* <http://canada.justice.gc.ca/en/dept/pub/hop/>; Province of Manitoba, The Inquiry Regarding Thomas Sophonow, <http://www.gov.mb.ca/justice/publications/sophonow/arnold/recommend.html> (last visited Feb. 25, 2006).

Commission for Virginia issued a report finding that tunnel vision played a significant role in many of Virginia's thirteen proven wrongful convictions.<sup>20</sup>

Most discussions of tunnel vision have focused on its effects in the initial stages of criminal cases—during the police investigation.<sup>21</sup> That is indeed where tunnel vision begins, and in many respects where it can be most damaging, because all later stages of the process feed off the information generated in the police investigation.<sup>22</sup> But tunnel vision in the criminal justice system is more pervasive than that. Considerable literature also examines various pressures on prosecutors that can cause them to act in ways that subvert justice, whether intentionally or, as is more often the case, unintentionally.<sup>23</sup> That literature also depicts a form of tunnel vision. But the problem is more pervasive than even that literature suggests. In this Article, we explore the ways in which tunnel vision infects all phases of criminal proceedings, beginning with the investigation of cases and then proceeding through the prosecution, trial or plea-bargaining, appeal, and postconviction stages. We seek to expose some of the myriad expressions of this tunnel vision, and to come to some understanding of its multiple causes. We examine the roots of the problem in cognitive biases, institutional pressures, and deliberate policies reflected in rules and training throughout the system. In the end, we attempt to draw from this inquiry some understanding of the measures that might be taken to mitigate the harmful effects of tunnel vision.

Part I begins with a discussion of several case studies in wrongful convictions that help demonstrate how tunnel vision can derail the search for the truth. Part II seeks to identify sources of tunnel vision in three domains. First, it draws on the cognitive sciences to seek an understanding of the cognitive biases that can produce tunnel vision, even in well-meaning participants in the process. Second, it turns to an analysis of other institutional pressures, many of which are products of the adversary system and the feedback loops inherent in that system, that magnify the natural, cognitively based tendency toward tunnel vision. Third, it examines normative features of the criminal justice system that exacerbate the problem of tunnel vision—rules and

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20. INNOCENCE COMM'N FOR VA., *A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA* 10 (2005), available at [http://www.wcl.american.edu/innocenceproject/ICVA/full\\_r.pdf?rd=1](http://www.wcl.american.edu/innocenceproject/ICVA/full_r.pdf?rd=1).

21. See Martin, *supra* note 6, at 850 (describing an example of tunnel vision during the police investigation stage).

22. *Id.* at 849.

23. See *infra* Part II.B.2.

deliberate practices that reinforce the natural cognitive biases and institutional pressures. Finally, Part III discusses possible reforms that might counter the tendencies toward tunnel vision, and that might thereby help the system perform more accurately and reliably.

## I. CASE STUDIES IN TUNNEL VISION

### A. *Marvin Anderson*

After a trial that lasted less than five hours, Marvin Anderson was convicted of robbery, forcible sodomy, abduction, and two counts of rape of a twenty-four-year-old woman in Hanover, Virginia, in 1982.<sup>24</sup> In 2002, DNA testing proved that he did not commit the crime.<sup>25</sup> Police investigators had focused on Anderson because the rapist, who was African American, had mentioned to the victim that he had a white girlfriend, and Anderson was the only black man police knew of who was living with a white woman.<sup>26</sup>

Anderson did not fit the victim's description of her attacker in several respects; Anderson was taller than the man the victim described and, unlike the attacker, Anderson had a dark complexion, no mustache, and no scratches on his face.<sup>27</sup> Nonetheless, investigators obtained a photo of Anderson from his employer (he had no prior record and hence no mug photo) and presented it to the victim in an array of six to ten photos. Anderson's photo was the only one in color, and the only one with his social security number printed on it.<sup>28</sup> The victim selected Anderson's photograph. Thirty minutes later, police put together a live-person lineup that again included Anderson.<sup>29</sup> Anderson was apparently the only person in the lineup whose photo had

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24. Innocence Project, Case Profiles: Marvin Anderson, [http://www.innocenceproject.org/case/display\\_profile.php?id=99](http://www.innocenceproject.org/case/display_profile.php?id=99) (last visited Mar. 28, 2006). Anderson was sentenced to 210 years in prison, was paroled after fifteen years in prison, and was serving lifetime parole at the time of his exoneration. *Id.*

25. *Id.*; see also Demme Doufekias Joannou & W. Hunter Winstead, A Report on the Case of Marvin Anderson 8-9, 15 (unpublished report prepared for the Innocence Commission of Virginia, on file with authors).

26. INNOCENCE COMM'N FOR VA., *supra* note 20, at 13; Joannou & Winstead, *supra* note 25, at 4, 6.

27. INNOCENCE COMM'N FOR VA., *supra* note 20, at 13, 70; Joannou & Winstead, *supra* note 25, at 6.

28. INNOCENCE COMM'N FOR VA., *supra* note 20, at 13; Joannou & Winstead, *supra* note 25, at 5.

29. It is unclear whether the true perpetrator was included in either the photo array or the lineup because police did not keep track of the names of the individuals included. Joannou & Winstead, *supra* note 25, at 8.

also been included in the photo array.<sup>30</sup> Police told the victim to “go in and look at the people in the line up to see if she could pick out the suspect,” and she again picked Anderson.<sup>31</sup> Many of the procedures used in Anderson’s identification process are now widely recognized as suggestive or flawed in ways that can lead an eyewitness to mistakenly identify an innocent person.<sup>32</sup>

There were other reasons to doubt the identification as well. DNA testing was not yet available at the time, but a forensic scientist testified that she had performed blood typing on swabs from both Anderson and the victim and was unable to identify Anderson as the source of semen samples collected in the rape kit.<sup>33</sup> In addition, Anderson presented four alibi witnesses, including his mother, his girlfriend, and two neighbors, who all testified that they saw him outside his mother’s house washing his car at the time of the attack.<sup>34</sup> None of this evidence, however, was enough to overcome the eyewitness identification.<sup>35</sup>

Tunnel vision infected Anderson’s case from the beginning, leading police, prosecutors, defense counsel, and eventually the jury

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30. *Id.* at 20-21.

31. *Id.* at 7.

32. The flawed procedures used in this case included using a photograph of the suspect that stood out as distinctive; showing the photographs and individuals simultaneously rather than sequentially; leading the victim to believe that the suspect was included among the photographs and individuals presented and that her task was “to see if she could pick out the suspect”; using officers who knew that Anderson was the suspect to conduct the identification procedure; and showing the suspect to the victim in multiple proceedings, especially when he was the only one included in each of those proceedings. *See, e.g.,* John Turtle, R.C.L. Lindsay & Gary L. Wells, *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 CAN. J. POLICE & SECURITY SERVICES 5 (Spring 2003) (explaining “recommended” policies and procedures for eyewitness identification), available at <http://www.psychology.iastate.edu/faculty/gwells/CJPSSarticle.pdf>; WIS. DEP’T OF JUSTICE, OFFICE OF ATTORNEY GEN., MODEL POLICY & PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005), available at <http://www.doj.state.wi.us/dles/tns/eyewitness.asp>.

33. INNOCENCE COMM’N FOR VA., *supra* note 20, at 13.

34. Joannou & Winstead, *supra* note 25, at 10-11.

35. It is not uncommon for juries to reject alibi evidence—even true alibi evidence—particularly when the alibi witnesses are perceived as motivated to protect the defendant. *See* Elizabeth A. Olson & Gary L. Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, LAW & HUM. BEHAV. 157, 157-58 (2004) (noting that, even for individuals later exonerated by DNA testing, alibi evidence is often ineffectual and that indeed “‘weak alibis’ [are] often exploited by prosecutors and used as incriminating evidence”); R.C.L. Lindsay et al., *Mock-Juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 15 J. APP. SOC. PSYCHOL. 447 (1986) (finding that only alibi witnesses who were not relatives of the defendant were effective at reducing convictions in cases where an eyewitness identified the defendant as the perpetrator).

and reviewing courts, to minimize and discredit the alibi evidence, the mismatch between the victim's description of the perpetrator and Anderson's appearance, and the absence of physical evidence. Even more significantly, the premature focus on Anderson meant that no one pursued evidence that was available before trial that pointed toward the true perpetrator.<sup>36</sup> As the Virginia Innocence Commission concluded, "[o]nce the victim identified Anderson, . . . the police did not pursue additional leads."<sup>37</sup>

The DNA testing that exonerated Anderson in 2002 identified the true perpetrator—a man named Otis "Pop" Lincoln.<sup>38</sup> The match to Lincoln should not have come as a surprise. Lincoln's name had been circulating in the community as a likely suspect for some time prior to Anderson's conviction, but no one investigated him.<sup>39</sup> Two friends of the Anderson family said before trial that just before the rape they saw Lincoln riding a bicycle toward the shopping center where the attack occurred—a fact of particular significance because the attacker rode a bicycle.<sup>40</sup> Moreover, these witnesses heard Lincoln make sexually suggestive comments to two young white girls, and then boast as he rode past that he would force himself onto a woman if she refused his advances.<sup>41</sup> The owner of the bicycle that was used by the assailant also said that Lincoln had stolen it from him approximately thirty minutes before the rape.<sup>42</sup> After Anderson was arrested, others in the community reported to Anderson's mother that Lincoln drove by her house one day because he wanted to see "the young boy who was taking his rap."<sup>43</sup> Moreover, unlike Anderson, Lincoln had a criminal record for sexual assault and was awaiting trial for another sexual attack at the time.<sup>44</sup> Nonetheless, even Anderson's defense lawyer declined to investigate or call any witnesses who could have linked Lincoln to the crime at trial.<sup>45</sup>

Eventually, six years later, at proceedings on Anderson's application for habeas corpus, Lincoln confessed fully to the crime in court under oath and provided details of the attack.<sup>46</sup> Nevertheless, the

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36. INNOCENCE COMM'N FOR VA., *supra* note 20, at 13.

37. *Id.*

38. *Id.* at 14.

39. *Id.* at 70.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 13.

45. Innocence Project, *supra* note 24.

46. *Id.*; Joannou & Winstead, *supra* note 25, at 13.



same judge who presided over the original trial refused to credit Lincoln's confession, finding that it was untruthful.<sup>47</sup> The Governor subsequently refused to intervene and denied clemency.<sup>48</sup> Anderson remained in prison, and then on parole, for several more years until DNA testing confirmed that Lincoln, not Anderson, was the attacker.<sup>49</sup>

Other aspects of the case also reveal just how stubborn erroneous beliefs in guilt can be. Despite the weakness of the case against Anderson, and the abundance of evidence that should have alerted authorities to investigate Lincoln, the original prosecutor in the case claimed that, from his perspective and until the exoneration, the Anderson case was "the clearest case he had ever had."<sup>50</sup> Although Anderson's trial lawyer made numerous egregious errors, the trial court was unwilling to grant a new trial on a claim of ineffective assistance of counsel. The court concluded that it made no difference that: (1) counsel had a conflict of interest because he had previously represented Lincoln on a previous attempted rape charge; (2) although the lawyer knew there was evidence against Lincoln, and admitted that he suspected Lincoln, he failed to disclose his prior representation of Lincoln, his suspicions about Lincoln, and his conflict of interest to Anderson; (3) despite Anderson's mother's repeated pleas, the lawyer failed to call Lincoln or the other witnesses who had watched Lincoln harass the young women, make threats, and ride off on a bicycle toward the crime scene just before the attack in this case; and (4) the lawyer failed to ask that the bicycle ridden by the attacker on the day of the rape be fingerprinted or introduced into evidence, even though the bicycle was in police custody. The trial court found that all of this was insufficient to meet the two-pronged test for ineffective assistance of counsel.<sup>51</sup>

### *B. Steven Avery*

Like Marvin Anderson, Steven Avery was convicted of a brutal rape primarily on the strength of the victim's eyewitness identification.<sup>52</sup> Like Anderson, Avery was convicted despite strong alibi evidence, and even though the true perpetrator was well known to

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47. Innocence Project, *supra* note 24.

48. *Id.*

49. *Id.*

50. Joannou & Winstead, *supra* note 25, at 18.

51. *See Strickland v. Washington*, 466 U.S. 668, 669 (1984).

52. Memorandum from Peggy A. Lautenschlager, Attorney General, State of Wisconsin, to Mark Rohrer, District Attorney, Manitowoc County, Wisconsin (Dec. 17, 2003), *available at* [http://www.doj.state.wi.us/newsarchive/rep121803\\_DCI.asp](http://www.doj.state.wi.us/newsarchive/rep121803_DCI.asp).

police and prosecutors and should have been a prime suspect.<sup>53</sup> Also like Anderson, Avery was wrongly convicted because tunnel vision prevented system actors from considering alternative theories about the crime until DNA evidence finally proved in 2003 that Avery was innocent, and that another man, Gregory Allen, was guilty.<sup>54</sup> By then, Avery had served more than eighteen years in prison.<sup>55</sup>

The rape and attempted murder in Avery's case was committed in broad daylight on a beach in Manitowoc County, Wisconsin, in 1985.<sup>56</sup> While being treated in the hospital after the attack, the victim gave police a description of her attacker and helped create a composite sketch.<sup>57</sup> Based on that description and sketch, local sheriff's deputies thought the attacker might be Avery.<sup>58</sup> Law enforcement knew Avery because Manitowoc was a small community, he had relatives who worked in the sheriff's department, he had previously been convicted of two counts of burglary and one count of cruelty to an animal, and he was being prosecuted at the time for allegedly forcing the wife of a deputy off the road at gunpoint as part of an ongoing feud.<sup>59</sup>

The sheriff presented Avery's photo to the victim as part of a nine-photo simultaneous array, telling her that "the suspect might be in there."<sup>60</sup> The victim later said that the sheriff's statement led her to "believe[] that the suspect's photograph was included in the group of nine photos."<sup>61</sup> However, a photograph of Allen, the true perpetrator, was not included in the array and the victim instead selected Avery's photo.<sup>62</sup> Three days later, after the victim had been informed that police had arrested the man she identified, police conducted a live-person lineup to confirm her identification.<sup>63</sup> Avery was the only

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53. *Id.*

54. *Id.*

55. *Id.* Two years later, Avery was charged with a subsequent rape and murder of a young woman committed in October 2005. As of this writing, Avery has not yet been tried on those charges. The new charges raise no questions about the validity of the previous exoneration. Regardless of the outcome of the pending trial, Avery's wrongful conviction in 1985 remains an important case study in the problem of tunnel vision.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Hearings of the Wisconsin Assemb. Judiciary Comm. Avery Task Force*, 2003-2004 Leg., Reg. Sess. (Wis. 2004) (statement of Penny Beerntsen) [hereinafter Beerntsen Statement].

62. *Id.* at 1.

63. Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

person in the lineup whose photo had also been in the previous photo array.<sup>64</sup> Avery was also the shortest, youngest, and fairest person in the lineup.<sup>65</sup> Unlike Avery, a few of the people in the lineup wore professional attire such as neck ties, and some wore glasses.<sup>66</sup> Records from the lineup indicate that one lineup member looked at Avery during most of the lineup.<sup>67</sup> Again, the victim picked Avery.<sup>68</sup>

The State bolstered its eyewitness evidence with circumstantial evidence. Deputies swore that the night of the arrest they told Avery only that he was being arrested for attempted murder, yet they claimed Avery told his wife that he was being accused of attempting to murder a “girl.”<sup>69</sup> Despite the ambiguous nature of that evidence, the deputies, the prosecutor, and, ultimately, the courts thought it was highly incriminating that Avery seemed to know the gender of the victim.<sup>70</sup> In addition, to rebut Avery’s alibi—his claim that he had spent the day pouring concrete with his extended family and friends—the State offered evidence that the State Crime Laboratory could find no traces of concrete dust on his clothing.<sup>71</sup> The State also offered evidence that a hair found on Avery’s tee shirt was microscopically similar to the victim’s head hair.<sup>72</sup>

Avery’s defense was unusually strong. He presented sixteen alibi witnesses who confirmed that he had been pouring concrete during the day and then had taken his wife and five young children—including six-day-old twins—to Green Bay, more than an hour’s drive away, for

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* State v. Avery, 213 Wis. 2d. 228, 245, 570 N.W.2d 573, 581 (Ct. App. 1997) (referring to the “powerful” evidence that Avery referred to the victim as a female prior to being told the gender of the victim by the police).

71. *Id.*; Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

72. Microscopic hair analysis has been roundly criticized in recent years as “junk science.” Postconviction DNA testing has shown that microscopic hair analysis is frequently misleading or inaccurate. *See* Neufeld, *supra* note 13, at S107-8; Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227 (1996) (discussing the questionable scientific foundation of microscopic hair analysis). The Wisconsin State Crime Laboratory no longer performs microscopic hair analysis, in part because DNA testing is so much more reliable. Telephone interview by Keith Findley with Jerome Geurts, Director, Wis. State Crime Laboratory (April 27, 2006).

supper and to shop for paint.<sup>73</sup> Instead of taking pause from this evidence, the State sought a way to minimize its significance. The prosecutor impeached the testimony of Avery's family and friends as biased.<sup>74</sup> When Avery presented the testimony of unbiased witnesses—the clerk and the manager at the Shopko store where Avery purchased his paint in Green Bay—sheriff's deputies sought a way around their testimony. The clerk and the manager, who had not known Avery previously, remembered him checking out because it was unusual to see a family with five young children, including twins who were less than a week old. And they produced the cash register tape showing that Avery and his family had checked out at 5:13 p.m.—a little over an hour after the victim claimed the attack had begun.<sup>75</sup> Sheriff's deputies countered that they had done a timed drive from the location of the assault to the Green Bay Shopko and had been able to make it to the checkout line in fifty-seven minutes.<sup>76</sup> But, as the Attorney General concluded after investigating Avery's wrongful conviction in 2003:

[T]he officers admitted that they went ten miles per hour over the speed limit to reach those numbers and the officers did not account for potential delays resulting from the presence of five children, including six-day old twins, all of whom were seen with Avery and his wife at the Shopko. Moreover, the reenactment did not allow any time for picking up Avery's family and would therefore assume that Avery's wife and five children were at the beach somewhere or in the car while he committed the assault.<sup>77</sup>

Simply put, tunnel vision prevented the deputies, the prosecutor, the judge, and the jury from appreciating the implausibility of that scenario.

Even more startling, however, the sheriff's department and prosecutor refused to consider or investigate the true perpetrator, even though he was in their sights all along. Allen, who was identified as the true perpetrator by a cold hit in the DNA database in 2003, was a known sexual offender in Manitowoc County prior to this offense, and his offenses were escalating.<sup>78</sup> Two years earlier, the same prosecutor

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73. Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

74. *See Avery*, 213 Wis. 2d. at 245, 570 N.W.2d at 581.

75. Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

76. *Id.*

77. *Id.*

78. *Id.*

who prosecuted Avery had convicted Allen of a very similar attempted sexual assault—Allen masturbated while walking behind a woman and then lunged at her—on the same beach as the site of the attack in 1985.<sup>79</sup> At the time of the 1985 offense, Allen was a chief suspect in the murder of a fifteen-year-old girl in North Carolina, and was suspected of a series of attempted sexual assaults, attempted burglaries, window peepings, and acts of exposing himself in Manitowoc County.<sup>80</sup> Allen was considered such a threat to commit a sexual assault that Manitowoc police maintained daily surveillance on him, checking on his whereabouts as many as fourteen times each day, during the two weeks prior to the 1985 assault for which Avery was wrongly convicted.<sup>81</sup> The day of the attack, police were called away to other duties and were only able to check on Allen once.<sup>82</sup> In fact, before Avery was convicted, at least two employees in the district attorney's office expressed concern that they believed Allen, not Avery, was responsible for the assault for which Avery stood charged.<sup>83</sup>

Nonetheless, the sheriff's department and prosecutor steadfastly refused to consider that Avery might not be guilty, or to investigate Allen. When the police department suggested to the sheriff's department that Allen might be the perpetrator, the sheriff simply responded that Allen had been ruled out as a suspect.<sup>84</sup> When the victim inquired about the police department's concerns regarding Allen, the sheriff's department told her, "Do not talk to the Manitowoc Police Department. It will only confuse you. We have jurisdiction."<sup>85</sup> and all "other suspects ha[ve] been looked at and were ruled out . . ."<sup>86</sup>

The resilience of the view that Avery was guilty also infected the postconviction and appellate stages of the case. On direct appeal, the court of appeals rejected challenges to the out-of-court identifications, concluding that, despite the now-apparent deficiencies in the

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79. *Id.*

80. *Id.* Finally, ten years after the 1985 assault, Gregory Allen was convicted of a subsequent sexual assault of a woman in Green Bay, and was sentenced to sixty years in prison. Meg Jones, *Man Linked to Sexual Assault Transferred to Waupun*, MILWAUKEE J. SENTINEL, Sept. 26, 2003, at 3B, available at <http://www.jsonline.com/news/state/sep03/172525.asp>.

81. Tom Kertscher, *Police Were Watching Man Now Linked to Avery Case*, MILWAUKEE J. SENTINEL, Oct. 20, 2003, at 1A, available at <http://www.jsonline.com/news/state/oct03/178587.asp>.

82. *Id.*

83. Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

84. *Id.*

85. Kertscher, *supra* note 81.

86. Beerntsen Statement, *supra* note 61, at 7-8.

identification procedures that were employed, “the photo array constitute[d] one of the fairest ones this court ha[d] seen.”<sup>87</sup> Subsequently, in 1995, Avery obtained postconviction DNA testing in an attempt to prove his innocence.<sup>88</sup> Unfortunately, the technology was not advanced enough at that time to produce dispositive results.<sup>89</sup> The DNA taken from the victim’s fingernail scrapings (she said she had scratched at her attacker) showed the presence of DNA from the victim and an unknown third person, but could not conclusively exclude (or include) Avery.<sup>90</sup> Avery argued that the third-party DNA had to be the real attacker’s, but the courts denied relief, concluding that the foreign DNA could have gotten under the victim’s fingernails innocently.<sup>91</sup> Despite the now-apparent weaknesses in the State’s case, including Avery’s sixteen alibi witnesses, the court of appeals asserted that it did not “view this case as ‘extremely close,’” and accordingly concluded that the new DNA evidence was not enough to warrant a new trial.<sup>92</sup>

In September 2003, the Wisconsin State Crime Laboratory was able to use previously unavailable technologies to extract a DNA profile from the victim’s pubic hair combings.<sup>93</sup> That DNA profile conclusively excluded Avery.<sup>94</sup> Moreover, when laboratory analysts ran that profile through the State DNA Databank, they obtained a cold hit on Allen, whose profile was in the databank because he had subsequently committed another sexual assault, for which he was by then serving sixty years in prison.<sup>95</sup> By stipulation of the parties and order of the court, Avery was exonerated and released the following day.<sup>96</sup>

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87. State v. Avery, No. 86-1831-CR, 1987 WL 267394, \*5 (Wis. Ct. App. Aug. 5, 1987) (unpublished opinion).

88. Wisconsin Innocence Project, Case Profiles: Steven Avery, [http://www.law.wisc.edu/fjr/innocence/avery\\_Summary2.htm](http://www.law.wisc.edu/fjr/innocence/avery_Summary2.htm) (last visited Mar. 28, 2006).

89. *Id.*

90. The tests done at that time could not exclude or include Avery because they revealed genetic markers consistent with both the victim and Avery. *See id.*

91. State v. Avery, 213 Wis. 2d 228, 243, 570 N.W.2d 573, 580 (Ct. App. 1997).

92. *Id.* at 245, 570 N.W.2d at 581.

93. Tom Kertscher & Jesse Garza, *DNA Clears Prisoner 17 Years Into His Term*, MILWAUKEE J. SENTINEL, Sept. 11, 2003, at 1A, available at <http://www.jsonline.com/news/racine/sep03/168842.asp>.

94. *Id.*

95. Memorandum from Peggy A. Lautenschlager to Mark Rohrer, *supra* note 52.

96. *See* Kertscher & Garza, *supra* note 93.

*C. The Central Park Jogger Case*

To say that tunnel vision has affected the investigation and prosecution of a case is not necessarily to say that police were motivated improperly, or that their initial suspicions about the defendant were unfounded. Rather, it is simply to observe that police (and eventually prosecutors and courts) might have focused too quickly or exclusively on a suspect or suspects. It is to caution everyone in the criminal justice system to be receptive to, and make inquiry into, alternative possibilities, even when the evidence against a given suspect looks powerful.

The Central Park Jogger case serves as an example. On an April evening in 1989, around 9:15 p.m., a young woman was attacked, beaten, sexually assaulted, and left nearly dead in New York City's Central Park.<sup>97</sup> Remarkably, she survived despite the loss of nearly 80 percent of her blood.<sup>98</sup> But she retained no memory of the attack.<sup>99</sup>

Quickly, and with good reason, police and prosecutors focused their attention on a group of youths who had been "wilding" in the park that night. This group of teenage boys, estimated at up to forty or fifty in number, spent the evening roaming the park, harassing, physically beating, and attempting to rob joggers, cyclists, and others in the park.<sup>100</sup> Responding to complaints about these attacks, several police officers spotted fifteen to twenty boys in the park around 10:15 p.m. and caught several of them as they fled.<sup>101</sup>

Later that night, around 1:00 a.m., two men discovered the female jogger's nearly lifeless body in the park.<sup>102</sup> Because she was found near the location where several other victims had been attacked that night, police suspected the boys were also responsible for the attack on the female jogger.<sup>103</sup> Throughout the rest of that night and the next day, police and prosecutors interrogated the fourteen- to sixteen-year-old suspects (including several who were arrested the next day).<sup>104</sup> Ultimately, after interrogations that ranged from fourteen to thirty hours,<sup>105</sup> police and prosecutors succeeded in obtaining confessions

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97. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894 (2004).

98. *Id.*

99. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUB. INT. 33, 34 (2004).

100. Drizin & Leo, *supra* note 97, at 894-95.

101. *Id.* at 895.

102. *Id.*

103. *Id.* at 895-96.

104. *Id.* at 896.

105. Kassin & Gudjonsson, *supra* note 99, at 60.

from five boys to the rape of the Central Park Jogger.<sup>106</sup> Four of those five confessions were videotaped.<sup>107</sup> But only the confessions were recorded; the hours of interrogations that led up to the confessions were not.<sup>108</sup>

Precisely what happened during the hours of unrecorded interrogations was a matter of contention both before and at trial. The boys and their parents claimed coercion, alleging that the police slapped, yelled, and cursed at the boys, called them liars, and suggested they would be released if they confessed.<sup>109</sup> Police admitted lying to the boys about fingerprint evidence, but denied any coercive tactics.<sup>110</sup> The trial court credited the police version and held that the boys' confessions were admissible at trial.<sup>111</sup> Regardless of where the truth about those interrogations lay, two things are clear: police and prosecutors were focused on the boys as suspects, and they succeeded in getting the boys to confess.

At trial, prosecutors also introduced evidence that hair consistent with the victim's hair was found on one of the boys' clothing, along with a bloody rock that prosecutors claimed the boys used to bludgeon the jogger.<sup>112</sup> All five boys were convicted of participating in the rape of the jogger and other attacks committed in the park that night.<sup>113</sup>

In 2002, evidence began to emerge that the boys were innocent.<sup>114</sup> In January of that year, a man named Matias Reyes confessed to authorities that he raped the Central Park Jogger, and that he had acted alone.<sup>115</sup> It turned out that Reyes "was one of New York City's most notorious serial rapists."<sup>116</sup> In the months following the Central Park attack, until his apprehension in August 1989, he had "terrorized the Upper East Side, raping four women, one of whom, a pregnant woman, he killed after raping her in front of her children."<sup>117</sup> DNA subsequently confirmed the confession: Reyes's DNA matched semen on the jogger's sock.<sup>118</sup> Mitochondrial DNA testing of the hair found on one of the boys' clothing also showed that it probably was not the

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106. Drizin & Leo, *supra* note 97, at 896.

107. *Id.*

108. *Id.*

109. *Id.* at 896-97.

110. *Id.* at 897.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 898.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*



jogger's, and additional testing on the bloody rock showed the blood and hair on the rock were not hers either.<sup>119</sup> A subsequent investigation by the district attorney's office found no link between Reyes and any of the five defendants.<sup>120</sup> Moreover, the district attorney's office concluded that the confessions from the five boys were inconsistent with one another on "virtually every major aspect of the crime,"<sup>121</sup> were inconsistent with the objectively verifiable evidence, and were demonstrably false in significant respects.<sup>122</sup> Accordingly, the district attorney's office joined in a motion to vacate the convictions and the court set aside all five convictions in December 2002.<sup>123</sup>

Despite this new evidence, former prosecutors and police involved in the case sharply criticized the district attorney's office for joining in the motion to vacate the convictions.<sup>124</sup> The police department conducted its own investigation and issued a report that ultimately supported the decision to vacate the convictions, but disputed many of the district attorney's conclusions, sought to discredit Reyes's detailed confession, and offered several theories to explain how the boys might have committed the crime with Reyes.<sup>125</sup>

## II. THE SOURCES OF TUNNEL VISION

### A. *Tunnel Vision as a Function of Cognitive Biases*

The tendency toward tunnel vision is partly innate; it is part of our psychological makeup. Tunnel vision is the product of a variety of cognitive distortions that can impede accuracy in what we perceive and in how we interpret what we perceive. Psychologists analyze tunnel vision as the product of various cognitive "biases,"<sup>126</sup> such as

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119. *Id.* at 899.

120. Affirmation in Response to Motion to Vacate Judgment of Conviction ¶ 46, *New York v. Wise*, No. 4762/89 (N.Y. Sup. Ct. Dec. 5, 2002), *available at* <http://files.findlaw.com/news.findlaw.com/hdocs/crim/nywiseetal120502aff.pdf>.

121. *Id.* ¶ 86.

122. *Id.* ¶¶ 91-93.

123. Drizin & Leo, *supra* note 97, at 899.

124. *Id.*

125. *Id.* at 899-900; *see also* NEW YORK POLICE DEP'T, CENTRAL PARK JOGGER CASE PANEL REPORT (2003), *available at* [http://www.nyc.gov/html/nypd/html/dcp/executivesumm\\_cpjc.html](http://www.nyc.gov/html/nypd/html/dcp/executivesumm_cpjc.html).

126. It should be kept in mind that in the social sciences the term "bias" is value neutral. It merely describes a situation in which any errors that might be made are skewed in one direction or another, as opposed to a situation of random error, where errors have no directionality. In some contexts, biases may be desirable when they run in the direction of errors that are less costly than their opposites.

confirmation bias, hindsight bias, and outcome bias. These cognitive biases help explain how and why tunnel vision is so ubiquitous, even among well-meaning actors in the criminal justice system. Understanding these biases offers some insight into the reforms or remedies that might be implemented to try to counteract tunnel vision, as well as insight into reforms that are likely to be futile.

The cognitive biases to which we refer have been the subject of substantial study by experimental psychologists over the course of many decades,<sup>127</sup> but the tendency of humans toward such biases has been obvious to careful observers since time immemorial.<sup>128</sup> What has not been so obvious prior to the investigation of modern science is the extent to which such biases can operate without conscious recognition, and the variety of circumstances that can intensify the effects of the underlying biases.

Different researchers use slightly different labels for related and sometimes overlapping conditions and effects. The foundational tendency is probably best understood as an expectancy bias, which is a form of confirmation bias.<sup>129</sup> When people are led by circumstances to expect some fact or condition (as people commonly are), they tend to perceive that fact or condition in informationally ambiguous situations.<sup>130</sup> This can lead to error biased in the direction of the expectation.<sup>131</sup> When what a person expects to see is the result of the person's own generation of hypotheses, theories, or scenarios about what must be the case, the personal investment in those hypotheses will reinforce the tendency to perceive or overvalue confirming information

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127. See THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 33 (1991); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (James J. Jenkins et al. eds., 1980); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 8 (2006); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998); Yaacov Trope & Akiva Liberman, *Social Hypothesis Testing: Cognitive and Motivational Mechanisms*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 239, 239-70 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

128. Julius Caesar, for example, observed that "people easily believe that which they want to be true." Risinger et al., *supra* note 13, at 6 (quoting G. JULIUS CAESAR, *CAESAR'S COMMENTARIES ON THE GALLIC WAR* 155 (Frederick Holland Dewey ed., Translation Publishing Co. 1918) (51 B.C.E.) ("[H]omines fere credunt libentur id quod volunt.")).

129. Risinger et al., *supra* note 13, at 12-26.

130. *Id.*

131. *Id.*

and to miss or irrationally undervalue disconfirming information.<sup>132</sup> Similarly, when such hypotheses are provided by a person of superior status in a team effort, or when self-worth and role-success contribute to emotional investment, the confirmation bias can be amplified, so that even the most obvious and unambiguous “disconfirming” information may remain undiscovered, or be dismissed.<sup>133</sup>

In a sense, cognitive biases are a byproduct of our need to process efficiently the flood of sensory information coming from the outside world. Without some system of categories or “schemata” to organize that information, it would remain, in the imagery of noted psychologist and philosopher William James, a “blooming, buzzing confusion.”<sup>134</sup> It is likely that most of the cognitive biases and heuristics that appear to be wired into us were adaptive to the conditions under which we evolved as a species. But as a result of this necessary system of categorization, interpretation, and selective attention, we can be subject to error. The effects can be pernicious, whether the investigators involved are scientists or homicide detectives, unless the biasing tendencies are recognized and steps are taken to control or correct for them.

#### 1. CONFIRMATION BIAS

Confirmation bias, as the term is used in psychological literature, typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses.<sup>135</sup> The bias has several expressions. In part, the bias reflects that, when testing a hypothesis or conclusion, people tend to *seek* information that confirms their hypothesis and to avoid information that would disconfirm their hypothesis.<sup>136</sup>

For example, a classic study asked people to find the rule that was used to generate a series of triplets of numbers (that is, a series such as 4-6-8).<sup>137</sup> The experimenter presented the triplet and asked the subjects

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132. *Id.*

133. *Id.*

134. *Id.* at 14 (quoting WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY, 1890, ch. 13, *reprinted in* 53 GREAT BOOKS OF THE WESTERN WORLD 318 (Robert Maynard Hutchins ed., 1952)).

135. NISBETT & ROSS, *supra* note 127, at 169-71; Nickerson, *supra* note 127, at 175; Trope & Liberman, *supra* note 127, at 239-70.

136. GILOVICH, *supra* note 127, at 33; Burke, *supra* note 127, at 8; Lord et al., *supra* note 127, at 2098; Nickerson, *supra* note 127, at 177.

137. CATHERINE FITZMAURICE & KEN PEASE, THE PSYCHOLOGY OF JUDICIAL SENTENCING 30 (1986); Nickerson, *supra* note 127, at 179.

to hypothesize a rule that explained the sequence.<sup>138</sup> The subjects then tested their hypotheses by proposing additional triplets; the experimenter then told them whether the proposed sequences fit the rule.<sup>139</sup> The subjects typically tested their hypotheses only by proposing triplets that fit their hypotheses.<sup>140</sup> Because the subjects rarely proposed triplets that did not fit their hypotheses, they were precluded from ever discovering that their hypotheses were wrong and that they had merely proposed triplets that *also* fit the actual rule.<sup>141</sup> In essence, subjects showed a preference for evidence that would *confirm* their hypothesis over evidence that would *disconfirm* it, even though the latter would have been more probative.<sup>142</sup>

In another experiment, subjects were given four cards, each with a different letter or number—an A, B, 2, or 3—on the side facing up.<sup>143</sup> They were then given a hypothesis, that any card with a vowel facing up had an even number on the reverse side, and were asked which card or cards they would turn over first to test that hypothesis.<sup>144</sup> The most common response was to turn over the A and 2 cards—cards that could offer evidence consistent with the hypothesis.<sup>145</sup> Turning over the 2 card, however, was actually uninformative because it could only confirm the hypothesis—a vowel on the other side would be consistent with the hypothesis, but a consonant would neither confirm nor disprove the hypothesis.<sup>146</sup> Turning over the 3 card potentially could have been very informative because a vowel on the other side would have disproved the hypothesis.<sup>147</sup> But subjects rarely turned over the 3 card because they naturally sought confirming, not disconfirming, evidence.<sup>148</sup>

Studies show that this preference for confirming information prevails in a social context as well.<sup>149</sup> For example, in a study that has been repeated numerous times in different ways, subjects were asked to

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138. Nickerson, *supra* note 127, at 179.

139. *Id.*

140. *Id.*

141. *Id.*

142. Burke, *supra* note 127, at 7.

143. GILOVICH, *supra* note 127, at 33.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.*; P.C. Wason, *Reasoning*, in *NEW HORIZONS IN PSYCHOLOGY* 135, 139-41 (B.M. Foss ed. 1966).

149. Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148, 156 (1978).

interview a target person to determine whether that person was an introvert or an extrovert.<sup>150</sup> In one study, the interviewers were given a list of questions to select from to probe the target's personality.<sup>151</sup> Half of the interviewers were told to choose questions that would test whether the person was an extrovert, and the other half were told to choose questions that would test whether the person was an introvert.<sup>152</sup> Consistently, interviewers chose questions that would prove, but never disprove, the implicit hypothesis.<sup>153</sup> Hence, subjects told to ask questions to test for extroversion chose questions like, "What would you do if you wanted to liven things up at a party?" while subjects testing for introversion asked questions like, "What is it about large groups that make you feel uncomfortable?"<sup>154</sup>

Numerous studies have repeatedly shown this confirmation bias, and have found that people seek information in ways that increase their confidence in prior beliefs or hypotheses—as in the studies cited here—even when they have no vested interest in those hypotheses.<sup>155</sup> Consistently, studies also confirm that people prefer to test a hypothesis or rule "by choosing only examples that would be classified as instances of the sought-for concept if the hypothesis were correct."<sup>156</sup> People disfavor choices that would disprove the hypothesis.<sup>157</sup> Ironically, this confirmation preference not only inhibits discovering the incorrectness of a particular hypothesis, but "this strategy would not yield as strongly confirmatory evidence, logically, as would that of deliberately selecting tests that would show the hypothesis to be wrong,

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150. *See id.* at 151-52.

151. Miriam Bassok & Yaacov Trope, *People's Strategies for Testing Hypotheses About Another's Personality: Confirmatory or Diagnostic?*, 2 SOC. COGNITION 199, 202 (1984).

152. *Id.*

153. *Id.* at 210.

154. Burke, *supra* note 127, at 9; Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1202-12 (1978); GILOVICH, *supra* note 127, at 34-35.

155. Nickerson, *supra* note 127, at 178; GILOVICH, *supra* note 127, at 33.

156. Nickerson, *supra* note 127, at 178.

157. In part, we have a natural preference for confirmatory information because "it is easier to deal with cognitively." GILOVICH, *supra* note 127, at 31. Confirming information tends to be directly relevant to the proposition at issue, whereas information that fails to confirm a proposition can be only indirectly relevant, and accordingly requires additional cognitive steps "to put the information to use." *Id.* at 31-32. In addition, nonconfirmatory information is typically framed as a negative, "and we sometimes have trouble conceptualizing negative assertions." *Id.* at 32. To illustrate, Gilovich has noted how much easier it is to conceptualize the statement, "All Greeks are mortals," than the negative of that statement, "All non-mortals are non-Greeks." *Id.*

if it is wrong, and failing in the attempt.”<sup>158</sup> Although such confirmation-biased information is often less probative than disconfirming information might be, people fail to recognize the weakness of the confirming feedback they receive or recall.<sup>159</sup> In this sense, the data “suggest that feedback that is typically interpreted by participants to be strongly confirmatory often is not logically confirmatory, or at least not strongly so. The ‘confirmation’ the participant receives in this situation is, to some degree, illusory.”<sup>160</sup>

Empirical research also demonstrates that people not only *seek* confirming information, they also tend to *recall* information in a biased manner. Experiments show that, when revisiting information previously obtained, people search their memories in biased ways, preferring information that tends to confirm a presented hypothesis or belief.<sup>161</sup> For example, in one study participants were read a story about a woman who behaved in a number of both introverted and extroverted ways.<sup>162</sup> Two days later, half the participants were asked to assess the woman’s suitability for a job that obviously required extroversion; the other half were asked to assess the woman’s suitability for a job that would presumably demand introversion.<sup>163</sup> Those asked to assess the woman’s suitability for the extroverted job recalled more examples of the woman’s extroversion, and those asked to assess her suitability for the introverted job recalled more instances of her introversion.<sup>164</sup> The hypothesis at issue—the woman’s suitability for the particular job—biased the way participants searched their memories for confirming evidence.<sup>165</sup>

In addition to seeking and recalling confirming information, people also tend to give greater weight to information that supports existing beliefs than to information that runs counter to them;<sup>166</sup> that is to say,

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158. Nickerson, *supra* note 127, at 179. All writers on the general theory of investigation appear to agree that looking for disconfirming evidence is the preferable way to structure an investigation if the goal is to maximize accuracy. See Risinger et al., *supra* note 13, at 6. As Sir Frances Bacon wrote in 1620, “it is the peculiar and perpetual error of the human understanding to be more moved and excited by affirmatives than negatives, whereas it ought duly to be impartial; nay, in establishing any true axiom, the negative instance is the most powerful.” *Id.* (quoting FRANCIS BACON, NOVUM ORGANUM, BOOK I, 109, point 46 (1620), *reprinted in* 30 GREAT BOOKS OF THE WESTERN WORLD 110 (Robert M. Hutchins ed., 1952)).

159. *See id.*

160. *See* Nickerson, *supra* note 127, at 179.

161. Burke, *supra* note 127, at 9-10.

162. GILOVICH, *supra* note 127, at 36.

163. *Id.*

164. *Id.*

165. *See id.*

166. Nickerson, *supra* note 127, at 178.

people tend to *interpret* data in ways that support their prior beliefs.<sup>167</sup> Empirical research demonstrates that people are “incapable of evaluating the strength of evidence independently of their prior beliefs.”<sup>168</sup> This process of selective information processing has been studied extensively, and the findings have been replicated in many contexts.<sup>169</sup> In part, the research shows a general tendency to “overweight positive confirmatory evidence” and “underweight negative disconfirmatory evidence.”<sup>170</sup> In other words, “people generally require less hypothesis-consistent evidence to accept a hypothesis than hypothesis-inconsistent evidence to reject a hypothesis.”<sup>171</sup>

Social scientists have attributed this phenomenon, at least in part, to motivational factors.<sup>172</sup> When presented with information that challenges their beliefs, people are motivated to defend those beliefs in a way that reinforces their initial viewpoint.

[People] will search internally for material that refutes the disconfirming evidence, and, once that material is retrieved from memory, there will be a bias to judge the disconfirming evidence as weak. In contrast, when presented with information that supports prior beliefs, people allocate fewer resources to scrutinizing the information and are more inclined to accept the information at face value.<sup>173</sup>

Indeed, studies show that, in some circumstances, people do not respond to information at variance with their beliefs by simply ignoring it, but rather by working hard to examine it critically so as to undermine it.<sup>174</sup> “The end product of this intense scrutiny is that the contradictory information is either considered too flawed to be relevant, or is redefined into a less damaging category.”<sup>175</sup> Moreover, people tend to use different criteria when they evaluate data or conclusions that they desire than when they evaluate conclusions they disfavor.<sup>176</sup> For preferred conclusions, “we ask only that the evidence not force us to

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167. *See id.*

168. Burke, *supra* note 127, at 10.

169. *Id.* at 11.

170. Nickerson, *supra* note 127, at 180.

171. *Id.*

172. Burke, *supra* note 127, at 11.

173. *Id.* at 12 (footnotes omitted).

174. GILOVICH, *supra* note 127, at 55-56.

175. *Id.*

176. *Id.* at 83.

believe otherwise . . . .”<sup>177</sup> For disfavored conclusions, however, “we ask whether the evidence *compels* such a distasteful conclusion—a much more difficult standard to achieve.”<sup>178</sup> Thus, “[f]or desired conclusions . . . it is as if we ask, ‘*Can* I believe this?’ but for unpalatable conclusions we ask, ‘*Must* I believe this?’”<sup>179</sup>

Accordingly, when considering data, people sometimes see patterns they are looking for even when those patterns are not really there.<sup>180</sup> On a social level, numerous studies have shown that descriptions provided in advance (expectations) about a person’s qualities can affect how others assess that person.<sup>181</sup> For example, observers who were told in advance that a person had particular personality characteristics tended to see those qualities in that person, whether or not those characteristics were objectively present.<sup>182</sup> This phenomenon can be particularly significant in criminal cases, where an individual is being judged—by police, prosecutors, defense lawyers, judges, and jurors—and where the initial working hypothesis presented to each actor in the system is that the defendant is guilty (despite the theoretical presumption of innocence).

While biases thus affect the acquisition and interpretation of information, and thereby impede rational or logical adjustment of hypotheses or conclusions to reflect new information, natural tendencies also make people resistant to change even in the face of new evidence that wholly undermines their initial hypotheses.<sup>183</sup> This phenomenon, known as *belief perseverance* or *belief persistence*, can render a belief or opinion very intractable.<sup>184</sup> People are naturally disinclined to relinquish initial conclusions or beliefs, even when the bases for those initial beliefs are undermined.<sup>185</sup> Thus, people are more likely to question information that conflicts with preexisting beliefs, and are more likely to interpret ambiguous information as supporting rather than disconfirming their original beliefs.<sup>186</sup> People “can be quite facile

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177. *Id.*

178. *Id.* at 84.

179. *Id.*

180. Nickerson, *supra* note 127, at 181; see GILOVICH, *supra* note 127, at 15-18.

181. Nickerson, *supra* note 127, at 181.

182. *Id.*

183. *Id.* at 187.

184. *Id.*; Burke, *supra* note 127, at 13; Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 691 (2000).

185. Nickerson, *supra* note 127, at 187.

186. *Id.*



at explaining away events that are inconsistent with their established beliefs.”<sup>187</sup>

For example, empirical research has shown that people find it quite easy to form beliefs that generally explain an individual’s behavior, and to persevere with those beliefs even after the premise for the initial belief is shown to be fictitious.<sup>188</sup> In a classic study, subjects were asked to distinguish between authentic and fake suicide notes.<sup>189</sup> At various points, subjects were given feedback about how they were performing.<sup>190</sup> The feedback was in fact independent of the choices they made; researchers randomly informed the participants that they were performing far above average or far below average.<sup>191</sup> Researchers then debriefed the participants, explicitly revealing to them that the feedback had been false, predetermined, and independent of their choices.<sup>192</sup> Yet, when later asked to rate their ability to make such judgments, those who had received positive feedback rated their ability much higher than those who had received negative feedback, even though they had all been told that their feedback was arbitrary.<sup>193</sup>

A follow-up experiment found similar perseverance effects for people who did not perform the tasks themselves, but who observed others performing the tasks as well as the debriefing sessions.<sup>194</sup> In other words, observers also maintained their beliefs about the subject’s ability to perform the assigned task, even after learning that the bases for their beliefs were false.<sup>195</sup>

The belief perseverance phenomenon is apparent in many of the wrongful conviction cases.<sup>196</sup> For example, even when presented with DNA evidence proving that semen taken from a sexual assault victim could not have come from the defendant, prosecutors sometimes persist in their guilt judgments and resist relief for the defendant.<sup>197</sup> As

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187. *Id.*

188. *Id.* at 188.

189. *Id.* at 187-88.

190. *Id.* at 188.

191. *Id.*

192. *Id.*

193. *Id.* at 181; Burke, *supra* note 127, at 13; Lee Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 882 (1975).

194. Nickerson, *supra* note 127, at 188.

195. *See id.*; Burke, *supra* note 127, at 14.

196. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004).

197. *See id.* According to Medwed, empirical evidence shows that prosecutors have consented to DNA tests in less than 50 percent of the cases in which testing later proved innocence. *Id.* Medwed has expressed alarm at the “qualitative evidence of

Professor James Liebman has observed, “prosecutors have become . . . sophisticated about hypothesizing the existence of ‘unindicted co-ejaculators’ (to borrow Peter Neufeld’s phrase) to explain how the defendant can still be guilty, though another man’s semen is found on the rape-murder victim.”<sup>198</sup>

Thus, these cognitive biases help explain what went wrong in many wrongful conviction cases, including the cases of Anderson, Avery, and the Central Park Jogger defendants. Convinced by an early—although plainly flawed—eyewitness identification, police and prosecutors in the Anderson and Avery cases sought evidence that would confirm guilt, not disconfirm it. They searched for incriminating evidence against their suspects, but never looked at viable alternative perpetrators. When confronted with ambiguous or inherently weak evidence—such as the microscopic hair “matches” and Avery’s statement that police had accused him of killing a “girl”—police and prosecutors interpreted it as powerfully incriminating. When confronted with contrary evidence—such as the many alibi witnesses in Avery and Anderson’s cases, the inconsistencies and inaccuracies in the confessions in the Central Park Jogger case, and the perpetrator’s confessions in Anderson’s case and the Central Park Jogger case—they sought to discredit or minimize that evidence. In Avery’s case, for example, the prosecution even hypothesized that Avery committed the rape while his wife and five children waited for him in the car; that Avery then collected his family and made a mad dash to the Shopko store in Green Bay, exceeding the speed limit the entire way; toted his children, including two infants, through the store; and raced to the checkout line with paint in time to checkout within the time frame permitted by the evidence. The stubborn assessment of guilt in these cases persisted on appeal and through postconviction proceedings, tainting perspectives on the relative strength of the States’ and defendants’ cases and even leading authorities to reject a full confession by the true perpetrator in Anderson’s case.<sup>199</sup>

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prosecutorial indifference and, on occasion, hostility to even the most meritorious of post-conviction innocence claims.” *Id.*

198. James S. Liebman, *The New Death Penalty Debate: What’s DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 543 (2002).

199. While confirmation bias is typically associated with the investigation stages of cases, the same phenomenon is present throughout the criminal justice system, and is even encouraged as a matter of policy. See *infra* Part II.C.

## 2. HINDSIGHT BIAS AND OUTCOME BIAS

Tunnel vision is reinforced by other cognitive distortions as well, including hindsight bias, or the “knew-it-all-along effect.”<sup>200</sup> Cognitive research has repeatedly shown that, in hindsight, people tend to think that an eventual outcome was inevitable, or more likely or predictable, than originally expected.<sup>201</sup> Hindsight bias essentially operates as a means through which people project new knowledge—outcomes—into the past, without any awareness that the perception of the past has been tainted by the subsequent information.<sup>202</sup>

Hindsight bias is a product of the fact that memory is a dynamic process of reconstruction.<sup>203</sup> Memories are not drawn from our brains fully formed, but are assembled from little bits and pieces of information as we recall an event.<sup>204</sup> Those little pieces of information about an event or situation are constantly being updated and replaced in our brains by new information.<sup>205</sup> The updated information is then used each time we reconstruct a relevant memory, making the ultimate conclusion appear preordained, or more likely than we could have known at the outset.<sup>206</sup> Understood another way, the process is one in which an individual reanalyzes an event so that the early stages of the process connect causally to the end.<sup>207</sup> “During this process, evidence

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200. Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311, 311 (1990); Ulrich Hoffrage, Ralph Hertwig & Gerd Gigerenzer, *Hindsight Bias: A By-Product of Knowledge Updating?*, 26 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 566, 566 (2000); Erin M. Harley, Keri A. Carlsen & Geoffrey R. Loftus, *The “Saw-It-All-Along” Effect: Demonstrations of Visual Hindsight Bias*, 30 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 960, 960 (2004); FITZMAURICE & PEASE, *supra* note 137, at 32.

A host of other psychological phenomena are also at work in ways that interfere with rational assessment of data. Those phenomena include “anchoring effects” (referring to the fact that estimates people make of points along a continuum are influenced by preexisting or predetermined but task-irrelevant data); “role effects” (referring to the fact that asking people to adopt a particular function or perspective affects the way they seek and perceive information); “conformity effects” (reflecting that people tend to conform to the perceptions, beliefs, and behavior of others); and “experimenter effects” (referring to the tendency of subjects in an experiment to alter their behavior in response to an experimenter’s behavior). For a discussion of these and related phenomena, see Risinger et al., *supra* note 13, at 12-21.

201. Harley, Carlsen & Loftus, *supra* note 200, at 960.

202. Hawkins & Hastie, *supra* note 200, at 311.

203. Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 800 (2003).

204. *Id.*

205. *Id.*

206. *Id.* at 800-01.

207. Harley, Carlsen & Loftus, *supra* note 200, at 960.

consistent with the reported outcome is elaborated, and evidence inconsistent with the outcome is minimized or discounted. The result of this rejudgment process is that the given outcome seems inevitable or, at least, more plausible than alternative outcomes.”<sup>208</sup>

Hindsight bias might reinforce premature or unwarranted focus on an innocent suspect in several ways. First, once a suspect becomes the focus of an investigation or prosecution—that is, once police or prosecutors arrive at an outcome in their own quest to determine who they believe is guilty—the hindsight bias would suggest that, upon reflection, the suspect would appear to have been the inevitable and likely suspect from the beginning.<sup>209</sup> Moreover, events supporting a given outcome are typically better remembered than events that do not support that outcome.<sup>210</sup> Hence, once police and prosecutors conclude that a particular person is guilty, not only might they overestimate the degree to which that suspect appeared guilty from the beginning, but they will likely best remember those facts that are incriminating (thereby reinforcing their commitment to focus on that person as the culprit).<sup>211</sup>

Second, hindsight bias has implications for the quality of the evidence used to convict.<sup>212</sup> For example, hindsight bias helps explain one way that eyewitness identification errors can contribute to tunnel vision, and ultimately to conviction of the innocent.<sup>213</sup> It is well recognized that eyewitness confidence is highly malleable.<sup>214</sup> Confirming feedback offered after an eyewitness identification can dramatically inflate not only the witness’s confidence in the ultimate identification, but also the witness’s assessment of the conditions surrounding the identification.<sup>215</sup> For example, if an eyewitness had a poor view of a perpetrator or paid little attention to the incident at the time, the witness likely had a poor memory of the perpetrator.<sup>216</sup> But if the witness nonetheless were to attempt an identification by examining a clear picture of a suspect in a photo spread, or a good view of the

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208. *Id.*

209. *See* Lieberman & Arndt, *supra* note 184, at 692.

210. *Id.*

211. *See* Harley, Carlsen & Loftus, *supra* note 200, at 960.

212. *See* Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 112-13 (2002).

213. *Id.* at 113.

214. *Id.*

215. *See id.* at 112-13; Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 360-62 (1998).

216. Harley, Carlsen & Loftus, *supra* note 200, at 966.

suspect in a live lineup, the witness would likely replace the original, low-quality memory of the suspect with a clearer image from the identification procedure.<sup>217</sup> Given that the witness really had a very poor memory of the perpetrator, the witness very well could be mistaken in the identification.<sup>218</sup> But, especially if given confirming feedback, the witness might then draw on the cleaned-up memory of the perpetrator together with the confirming feedback to overstate both the quality of the original viewing conditions and the confidence—the inevitability—of the ultimate identification.<sup>219</sup> In hindsight, the identification will appear as if it was always inevitable and was based upon clear memories and an excellent opportunity to view the suspect.<sup>220</sup>

Third, a *reiteration effect* is also linked to hindsight bias.<sup>221</sup> Studies have established that confidence in the truth of an assertion naturally increases if the assertion is repeated.<sup>222</sup> This increase in confidence from repetition is independent of the truth or falsity of the assertion.<sup>223</sup> Accordingly, the longer that police and prosecutors (and witnesses) live with a conclusion of guilt, repeating the conclusion and its bases, the more entrenched their conclusion becomes, and the more obvious it appears that all evidence pointed to that conclusion from the very beginning.<sup>224</sup> As a result, the reiteration effect makes it increasingly difficult for police and prosecutors to consider alternative perpetrators or theories of a crime.<sup>225</sup>

Closely related to hindsight bias is outcome bias.<sup>226</sup> Like hindsight bias, outcome bias involves a process in which people project new knowledge—outcomes—into the past without any awareness that the outcome information has influenced their perception of the past.<sup>227</sup> But outcome bias differs from hindsight bias in that outcome bias does not refer to the effect of outcome information on the judged probability of an outcome, but to its effect on the evaluations of *decision quality*.<sup>228</sup>

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217. *Id.* at 966-67.

218. *Id.*

219. *See id.* at 967.

220. *See id.* at 966-67.

221. Ralph Hertwig, Gerd Gigerenzer & Ulrich Hoffrage, *The Reiteration Effect in Hindsight Bias*, 104 PSYCHOL. REV. 194, 194 (1997).

222. *Id.*

223. *Id.*

224. *See id.*

225. *See id.*

226. Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 570 (1988).

227. *See id.*

228. *Id.*

In other words, outcome bias does not reflect hindsight judgments about how likely an event appears to have been, but hindsight judgments about whether a decision was a good or bad one.<sup>229</sup> For example, in a medical context, subjects are more likely to judge the decision to perform surgery as a bad decision when they are told that the patient died during surgery than when told that the same patient survived the surgery.<sup>230</sup> While at a naïve level this might seem intuitively reasonable, decision analysts teach that, rationally,

[i]nformation that is available only after a decision is made is irrelevant to the quality of the decision. Such information plays no direct role in the advice we may give decision makers ex ante or in the lessons they may learn. The outcome of a decision, by itself, cannot be used to improve a decision unless the decision maker is clairvoyant.<sup>231</sup>

Even when people understand that outcome bias is inappropriate, it is difficult to overcome; as with hindsight bias, people tend to show an outcome bias “even when they think they should not, and . . . even though they think they do not.”<sup>232</sup>

Hindsight bias and outcome bias have particularly serious implications for appellate and postconviction review by judges, especially in the application of harmless error and related doctrines such as the prejudice prong of the ineffective assistance of counsel analysis and the materiality prong of *Brady v. Maryland*.<sup>233</sup> Hindsight bias and outcome bias, together, should be expected to have an affirmance-biasing effect in postconviction and appellate review because the outcome of the case—conviction<sup>234</sup>—tends to appear, in hindsight, to have been both inevitable and a “good” decision. Empirical data appear to support that conclusion, as reversals in

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229. *See id.*

230. *Id.* at 571.

231. *Id.* at 569.

232. *Id.* at 572.

233. 373 U.S. 83 (1963). *Brady* and its progeny hold that a prosecutor violates due process by failing to disclose to the defense exculpatory evidence if that evidence is material—that is, if disclosure of the evidence would have created a reasonable probability of a different outcome. *Id.* at 87.

234. In criminal cases, the appellate review almost always focuses on challenges to convictions brought by criminal defendants because the double jeopardy clause prohibits government appeals of acquittals. *United States v. Sanges*, 144 U.S. 310, 312-13 (1892). States’ appeals are typically limited to interlocutory appeals of evidentiary rulings or a limited range of sentencing issues. URSULA BENTELE & EVE CARY, *APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE* 63, 69, 76 (4th ed. 2004).

criminal cases are quite rare.<sup>235</sup> Even where courts find error, they frequently forgive the error under the harmless error doctrine.<sup>236</sup> With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings.<sup>237</sup> To some extent, placing the burden of proving the harmless nature of an error on the beneficiary of the error—in criminal cases, requiring the government to prove harmless error beyond a reasonable doubt<sup>238</sup>—might be intended to mitigate the effects of hindsight and outcome biases. Nonetheless, courts routinely find significant errors harmless,<sup>239</sup> and that is partly because hindsight bias and outcome bias work in tandem with other values, such as a desire to respect finality and avoid wasteful retrials of obviously guilty defendants.

All of these cognitive distortions help to explain the reluctance of the appellate courts in Avery's case to recognize the flaws in the eyewitness identification procedures used in his case, or even to recognize that the evidence against him was weak and his alibi defense was unusually strong.<sup>240</sup> Now, in hindsight, with the benefit of both greater understanding of the nature of eyewitness identification error and the knowledge from DNA testing that Avery was actually innocent, it seems apparent that the eyewitness procedure was flawed, that the conviction was suspect, and that the case was close from the beginning. (Of course, in fairness, we cannot overlook the fact that hindsight bias likely makes Avery's innocence look all the more apparent to us now than it might have at the time. But that does not negate the fact that hindsight bias appeared to impair the judgment of the courts that reviewed Avery's case before his exoneration.)

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235. See *infra* notes 353-60, 428-31 and accompanying text.

236. See *infra* notes 358-60 and accompanying text.

237. The harmless error doctrine has received considerable scholarly attention, including significant criticism that it unduly focuses on the guilt of a defendant. See, e.g., Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 58-61; Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995). Hindsight and outcome bias provide another basis for questioning the wisdom of a doctrine that turns on after-the-fact, guilt-based assessments of the effects of an error on the outcome of a case.

238. *Chapman v. California*, 386 U.S. 18, 24 (1967).

239. See Garrett, *supra* note 237, at 38 (stating that harmless error analysis "all but bar[s] relief in criminal appeals").

240. See *supra* notes 87-92 and accompanying text (noting that the court believed the photo array used in Avery's case to be one of the fairest the court had seen, and subsequently denied postconviction relief, in part upon the conclusion that the case against Avery had not been close).

The effect of hindsight bias on appellate and postconviction review is likely to be even more pronounced in situations where the burden of persuasion is placed on the defendant. Yet many of the innocence-based challenges to convictions do just that. Claims that the government withheld exculpatory evidence, or that trial counsel provided ineffective assistance, require the defendant to show affirmatively that those errors might have made a difference in the outcome of the proceedings.<sup>241</sup> Given the combination of those burdens of persuasion and the cognitive biases that affect hindsight review, it is not at all surprising that ineffective assistance of counsel claims were denied in cases like *Anderson's* and *Avery's*. We consider these burden-shifting doctrines in greater detail later in this Article when we address rulebound dimensions of the tunnel vision problem.<sup>242</sup>

In sum, with an understanding of the natural cognitive biases and distortions that we are all susceptible to as human beings, it becomes clear that tunnel vision in criminal investigations and prosecutions is to an extent inevitable. To suggest that tunnel vision infects police investigations, prosecutions, and judicial proceedings is not necessarily to make a value judgment about the nature or qualities of police and prosecutors and judges, but, to some degree at least, merely to acknowledge the natural tendencies that can and do influence *anyone's* access to and interpretation of data. In this sense, police, prosecutors, and judges are not bad people because they are affected by tunnel vision; they are merely human. But the innateness of these cognitive biases and distortions does not absolve actors in the criminal justice system from responsibility to try to overcome tunnel vision; to the contrary, it demands that we become aware of these cognitive processes and the tunnel vision they produce, and that we search for ways to neutralize them. Unfortunately, the criminal justice system fails to do that. Rather, both institutional pressures inherent in the adversary system and explicit policy choices reinforce and exacerbate the natural tendencies toward tunnel vision.

### *B. Institutional Pressures that Reinforce Tunnel Vision*

The adversary system has many virtues, but one byproduct of an adversary model is that it polarizes the participants, imposing pressures

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241. See *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (holding that errors by defense counsel that constitute both deficient performance and prejudice to the defense violate the Sixth Amendment right to counsel); *Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (holding that due process is violated when the government withholds exculpatory, material evidence).

242. See *infra* Part II.C.3.b.



on them to dogmatically pursue their own perceived interests or their own assessments of the proper outcome of a case. In contrast, advocates of an inquisitorial system maintain that one advantage of that model is that, because it posits neutrality and a search for the truth rather than advocacy and a quest for victory, it avoids many of these biasing pressures.<sup>243</sup> Whether that is true or not, one thing is clear: biasing pressures that exacerbate our natural cognitive biases do exist in our adversarial system. Tunnel vision is a product not just of the psychological tendencies discussed above, but also of multiple external forces imposed by the adversary system at various stages of the process.

### 1. INSTITUTIONAL PRESSURES ON POLICE

As noted above, tunnel vision in criminal investigations typically originates during the initial police investigation of a crime.<sup>244</sup> When police investigators are under pressure—from victims, the community, the media, elected officials, and their supervisors—to solve cases quickly, the resulting stress may contribute to investigative tunnel vision.<sup>245</sup> That is, investigators' thought processes may become distorted by the desire to alleviate the pressure that comes from not being able to assure the public that the offender has been caught and the community is safe. Highly publicized unsolved crimes foster public

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243. See, e.g., Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 142-51 (1996) (comparing the truth-seeking strengths of the adversarial and inquisitorial models). Others have also observed that adversarial adjudication places a high priority on dispute resolution and party participation, while inquisitorial systems place a higher priority on accuracy. See Darryl K. Brown, *The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585 (2005); Daniel Givelber, *The Adversary System and Historical Accuracy: Can We Do Better?* in *WRONGLY CONVICTED* 253, 253-54 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

244. Police are also concerned with a more literal form of tunnel vision: in officer-involved shootings, officers commonly experience a sort of tunnel vision that manifests itself by blocking out of the officer's sensory realm some sights and sounds other than those immediately surrounding the threat, usually a weapon. See WILLIAM A. GELLER & MICHAEL S. SCOTT, *DEADLY FORCE: WHAT WE KNOW* 325 (1992). The officer's mind concentrates its attention on the immediate threat, to the exclusion of any possible distractions. *Id.* This may or may not work to the officer's advantage, depending on what else is occurring outside the "tunnel." *Id.* This sort of tunnel vision is an intense and immediate psychological reaction to life-threatening stress. *Id.* Accordingly, when discussing tunnel vision with police or reviewing the police literature on tunnel vision, it is important that one recognize the distinction between the figurative form with which this Article concerns itself and the literal form associated with police use of force.

245. See NAT'L RESEARCH COUNCIL, *FAIRNESS & EFFECTIVENESS IN POLICING: THE EVIDENCE* 227-28 (2004).

fear of crime, which in turn undermines public confidence in and support for police, thereby generating significant pressure on police to solve high-profile cases quickly. Contrary to popular impressions that are often reinforced by police, their capacity to solve crimes is more limited than is commonly understood. Most property crimes, and even a large proportion of violent crimes, that are reported to police are never solved.<sup>246</sup> Police find it difficult to live up to their nearly mythical image as highly competent crime solvers.<sup>247</sup> Unrealistic public and media expectations can and have resulted in police administrators pressuring police investigators to solve (or in the technical parlance of police, to “clear”) as many cases as possible so that the case clearance rates that are ultimately reported to the Federal Bureau of Investigation and the public are not so low as to erode public confidence in police.

Police bear multiple, and at times competing, obligations in a criminal investigation: to care for the victim (part of which might mean not traumatizing the victim by expressing disbelief in the victim’s account of the crime), to identify and apprehend the offender, and to safeguard suspects’ constitutional rights. Indeed, police and prosecutors have devoted increasing resources to assisting crime victims, often establishing special units for just this purpose. While much good has come of the victims’ rights movement, it also constitutes another source of pressure on police that can contribute to tunnel vision if left unchecked. Investigators can become too willing to take at face value all of a victim’s statements—even those statements that are distorted by the sorts of psychological biases at issue in this Article—if they worry excessively that disbelieving a crime victim will reflect poorly on the police. It is understandably difficult for investigators to appear to accuse a purported crime victim—particularly a violent-crime victim—of lying, even when police have some reasonable doubts about the accuracy of the victim’s statement.<sup>248</sup>

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246. See *id.*; Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1159 (2005).

247. See Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness* 10 J. CRIM. JUST. & POPULAR CULTURE 109, 111 (2003). For a broader exploration of the nature and consequences of the police-media relationship, see JARRET S. LOVELL, GOOD COP/BAD COP: MASS MEDIA AND THE CYCLE OF POLICE REFORM (2003); Jerome H. Skolnick & Candace McCoy, *Police Accountability and the Media*, 1984 AM. B. FOUND. RES. J. 521, 522.

248. By way of example, Madison (Wis.) Police Department detectives were widely criticized for disbelieving a rape victim whose account ultimately proved likely to be truthful. See Patricia Simms & Barry Adams, *Abduction Story a Fake*, WIS. ST. J., Apr. 3, 2004, at A4. That criticism reportedly influenced police decisions in a subsequent missing person case in which police detained a suspect in spite of reasons to

In particularly heinous and harmful crimes, police investigators can naturally become emotionally affected by the crime in spite of their best efforts to remain dispassionate. Police are particularly vulnerable because they often witness the most viscerally disturbing aspects of crime. Emotion serves a productive purpose in that it can give investigators greater resolve to solve the case, but it also constitutes another source of psychological pressure that can foster tunnel vision.

The sheer volume of reported crimes begging for police investigation constitutes yet another source of pressure on police investigators that reinforces tunnel vision. Police investigators are often under constant pressure to complete their assigned cases by solving the case and arresting an offender or determining that there is insufficient evidence to warrant further investigation. Investigative supervisors must constantly make judgments about how much time and investigative resources each case deserves.<sup>249</sup> Newly occurring crimes awaiting investigation perpetually pressure investigators to dispose of older cases. Moreover, in many jurisdictions where the volume of serious crime investigations is high and many cases compete for limited resources, police investigators might be reluctant to request time-consuming and expensive forensic testing of evidence, particularly in cases where police already believe they have sufficient testimonial evidence (eyewitness identification or suspect confession) to establish probable cause against a particular suspect.

The standards of performance by which police investigators are measured, most significantly by their supervisors and administrators, also significantly influence investigative practices and can potentially reinforce tunnel vision. The most common measure of investigator performance—at both the organizational and the individual level—is the so-called “clearance rate,” the rate at which crimes reported to the police are deemed satisfactorily closed.

The rules for calculating clearance rates are set by the Federal Bureau of Investigation through its Uniform Crime Reporting program.<sup>250</sup> According to the FBI rules, cases can be cleared either by arresting an offender and turning the case file over to prosecutors for prosecution<sup>251</sup> or by so-called “exceptional means” (a variety of

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believe that the purported victim had concocted the crime, a belief ultimately proven to be true. *Id.*

249. See JOHN E. ECK, *MANAGING CASE ASSIGNMENTS: THE BURGLARY INVESTIGATION DECISION MODEL REPLICATION* 71-72 (1979).

250. FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTING HANDBOOK* 78-81 (2004). Although participation in the Uniform Crime Reporting program is voluntary, most police agencies do participate and, consequently, are held publicly accountable to its figures.

251. *Id.* at 79.

circumstances under which police can be deemed to have identified the offender, but through no fault of their own are unable to take the offender into custody).<sup>252</sup> The not-unreasonable assumption that the police can only be held accountable for so much is built into this performance measurement system; police investigators and police agencies should not be penalized for circumstances beyond their control, including the case filing decisions of prosecutors.<sup>253</sup>

Where this principle is applied loosely, the net effect can lead police to conclude that their responsibility ends with the arrest of an offender, after only meeting the threshold probable cause standard. To the extent that a police agency measures its investigators' performances by such minimal standards (many police agencies apply more stringent standards), investigators might conclude that arresting a plausible offender constitutes the beginning and the end of their responsibility. Where that occurs, concern for other performance standards—such as whether the case was subsequently dismissed by prosecutors or courts for insufficiency of evidence or violation of evidence-collection rules, or more to the point of this Article, that a different offender was ultimately determined to be the true perpetrator—assume a lesser significance than the fact that a legally plausible arrest was made. The performance standards to which individual police investigators and investigative units are held—beyond the minimal legal standards—are largely a matter of administrative policy and practice. The performance standards to which an entire police agency is held are largely a matter of political judgment and public expectations. Accordingly, the stringency of performance measurement standards for police investigations constitutes a potential source of institutional pressure contributing to tunnel vision.

Police investigators can become emotionally attached to their preferred theory of the case, including which suspect is the most likely offender. Under such conditions, the criminal investigation objective shifts, perhaps subtly, from an open search for evidence to proving that the preferred theory of the case is correct.<sup>254</sup>

Moreover, some have argued that “tunnel vision” can be self-reinforcing: police, once persuaded that an individual is the offender, employ questionable investigative methods to further substantiate their

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252. *Id.* at 80-81.

253. *See id.*

254. *See* C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 111 (1996).

belief.<sup>255</sup> They might even rationalize doing so as merely helping the truth along.<sup>256</sup>

A detective's preferred theory of the case might also influence the collection of physical evidence: deciding where and what type of evidence to look for is significantly influenced by the theory of how the crime unfolded, including the sequence of actions taken by the offender. Important physical evidence, either confirmatory or exculpatory, might also be overlooked if the theory of the case prevailing at the time of evidence collection later proves wrong.<sup>257</sup>

In addition, empirical research shows that the pressures and culture that bear upon police officers can increase investigator bias: in clinical studies, investigator biases in "judgments of truth and deception [are] positively correlated with [police] experience and training. It is also important to realize that these biases are unlikely to self-correct as a result of feedback, which is seldom available to permit a diagnostic evaluation of their beliefs."<sup>258</sup>

## 2. INSTITUTIONAL PRESSURES ON PROSECUTORS

While police bear institutional pressure to solve crimes, the adversary process imposes pressure on prosecutors to ensure conviction of the suspects apprehended by police. The public pressure on prosecutors to convict may even be more acute than the public pressure on police to arrest because the prosecutor's role in society is widely perceived even more narrowly than is the police role in society. While broad-minded prosecutors and legal scholars might envision the proper prosecutorial role to be something like "to do justice on behalf of the people," it is more likely that prosecutors, and citizens alike, perceive the prosecutor's role more narrowly as limited to prosecuting offenders via the criminal law.<sup>259</sup> Although arresting offenders is widely

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255. *See id.*

256. This phenomenon is part of the larger phenomenon of "ratification of error" in which subsequent phases of a criminal investigation and prosecution serve not to detect and correct prior errors, but rather to reinforce the correctness of the prior errors. *See id.*

257. See Robert B. Bates, *Curing Investigative Tunnel Vision*, 54 POLICE CHIEF 41, 41-43 (1987), for a discussion of the risks of tunnel vision in physical evidence collection.

258. Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 99 (G. Daniel Lassiter ed., 2004).

259. *See* Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* (Harvard Univ. Program in Criminal Justice Policy & Mgmt., Working Paper No. 00-02-04,

perceived as the dominant police role, the broader functions of police also include such tasks as maintaining order, controlling traffic, assisting persons in danger, and so forth.<sup>260</sup>

Extensive scholarly work has focused on the role of prosecutors and the pressures that induce them to seek convictions, even when doing so may subvert justice. While the role of a prosecutor is often described as that of “minister of justice,”<sup>261</sup> in reality that idealized role often conflicts with the prosecutor’s rough-and-tumble role in the adversarial process.<sup>262</sup> Others have noted, for example, that prosecutors’ offices often place an emphasis on conviction rates, as a matter of pride, as confirmation of the justness of their work, and as a “quantifiable method for superiors in the office to measure that prosecutor’s success in an occupation where job performance, aside from anecdotal evidence, is otherwise difficult to gauge.”<sup>263</sup> This emphasis, combined with public pressure to convict the guilty,<sup>264</sup> can engender what has been called a “conviction psychology”—an emphasis on obtaining convictions over “doing justice.”<sup>265</sup> Evidence that institutional and cultural pressures in prosecutors’ offices contribute to

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2000), available at [http://www.ksg.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.ksg.harvard.edu/criminaljustice/publications/community_prosecution.pdf).

260. See HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 24-25 (1977).

261. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2001) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301-02 (1996); Medwed, *supra* note 196, at 132.

262. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198-99 (1988). As one former prosecutor noted of his own office, in which prosecutors took pride in “doing justice,” “there have always been cross-cutting themes in the prosecutor’s office. Most significantly, there was a tradition of machismo, of the prosecutor as aggressive trial lawyer facing down the lawbreaking adversary.” Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 609 (1999).

263. Medwed, *supra* note 196, at 134; see also George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 99, 114 (1975).

264. Prosecutors also feel pressure to convict from the relationships they develop with crime victims and with law enforcement colleagues who have invested in developing the case against a defendant. See Medwed, *supra* note 196, at 145.

265. See Fisher, *supra* note 262, at 198; Felkenes, *supra* note 263, at 108-12. According to Felkenes,

[t]he prosecutor who displays ‘conviction psychology’ thinks of the defendant as guilty, and reasons that an innocent person would not be introduced into the system. He sees the judicial system as the means through which he must work in order that the guilty might receive their proper punishment. . . . The result of these attitudes is a deterioration of the ideal purpose of the prosecutor—to seek justice.

*Id.* at 110.

conviction psychology can be seen in empirical data showing that it increases over time; the more experience a prosecutor has, the more likely he or she is to express an interest in obtaining convictions over an interest in doing justice.<sup>266</sup>

Ironically, even for the most ethical prosecutors, those most committed to the ideal of doing justice, the prosecutorial role inevitably fosters tunnel vision. Unlike a defense attorney, an ethical and honorable prosecutor *must* be convinced of the righteousness of his position; “[t]he honorable prosecutor simply cannot believe that he is prosecuting the blameless.”<sup>267</sup> Indeed, prosecutors motivated to do justice “must satisfy themselves of an individual’s guilt as a precondition to determining that the conviction of an individual is an end to be sought on behalf of the state or the federal government.”<sup>268</sup>

But prosecutors’ assessments of guilt can be flawed both by the information provided to them and the feedback they receive. Prosecutors are particularly vulnerable to distortions based on the types of information to which they have access. The problem of absent or hidden data, which is recognized in studies of cognitive error,<sup>269</sup> can lead actors in the criminal justice system astray. As we have seen, various cognitive biases impede a person’s ability to rationally and accurately assess the significance of information, or to use all available information. This tendency is worsened in situations where important information is unavailable—where it is hidden or absent for various reasons. For example, company personnel directors might conclude that their hiring criteria are highly effective because the people they hire perform well on the job. But, because they do not have a control group to study—they do not have access to data on how well people who do not meet their criteria might perform because those people are never given a job—their conclusions might be flawed. The same process applies to the criminal justice system.

First, prosecutors receive only incomplete pictures of their cases. Tunnel vision that might have led police investigators to focus on a

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266. *Id.* at 111 (reporting survey data revealing that “[t]hose district attorneys expressing a concern for conviction had, on the average, about twice as much experience on the job as those who mentioned a concern for justice”).

267. Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 551 (1997).

268. Green, *supra* note 262, at 641; *see also* Felkenes, *supra* note 263, at 113 (noting that most prosecutors cannot presume innocence because they believe it is morally wrong to prosecute a person unless they are personally convinced of guilt); Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 530 (1993) (arguing that prosecutors must be morally certain of the defendant’s guilt).

269. *See* GILOVICH, *supra* note 127, at 37-44.

suspect, and to develop evidence against that suspect and disregard inconsistent or disconfirming evidence, shapes the information upon which prosecutors base their judgments. Prosecutors see the evidence generated by the police investigation, but often do not see the evidence about alternative suspects who were rejected too quickly, about eyewitnesses who failed to identify the defendant, or about other disconfirming evidence that police dismissed as insignificant. As Professor Randolph Jonakait has observed, “Not surprisingly, the picture presented to the prosecutor almost always shows a guilty defendant.”<sup>270</sup>

Second, like the personnel director who only sees evidence that confirms the wisdom of the company’s hiring criteria, prosecutors very rarely receive feedback inconsistent with their assessments of guilt. Most people whom the prosecutor charges admit guilt and plead guilty.<sup>271</sup> Even where the prosecutor has a weak case, the prosecutor can usually induce a plea by offering the defendant a generous deal. Hence, plea-bargaining teaches prosecutors that the defendants they prosecute are guilty, even if the evidence is weak.<sup>272</sup> Trials confirm those judgments about guilt because the vast majority of trials result in convictions.<sup>273</sup> And, in most cases, there is no way to obtain data proving the opposite—that an innocent person was wrongly convicted.<sup>274</sup> The problem of hidden or absent data thus amplifies in significant ways the cognitive biases that contribute to tunnel vision.

In those rare cases where a defendant is acquitted, the conclusion that ethical prosecutors, convinced that they would only prosecute a guilty person, must reach is not that the defendant was truly innocent, but that the system failed, that the truth did not prevail, that justice miscarried.<sup>275</sup> Jonakait has argued that, under these circumstances,

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270. Jonakait, *supra* note 267, at 553; *see also* Medwed, *supra* note 196, at 142.

271. Ninety-five percent of all convictions in both state and federal court are obtained by way of a guilty or no contest plea. U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2000: STATISTICAL TABLES tbls.4.1 & 4.2 (2003); U.S. DEP’T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2001 tbl.5 (2003). The trend toward resolving cases through guilty pleas is increasing. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005).

272. *See* Jonakait, *supra* note 267, at 553.

273. Recent data indicates that 84 percent of federal criminal trials result in guilty verdicts. *See infra* note 329.

274. Even with the advent of postconviction DNA testing, the vast majority of innocent people go undetected, if for no other reason than the simple reality that most criminal cases have no biological evidence that can yield dispositive DNA test results. *See* Gross et al., *supra* note 2, at 531.

275. *See* Jonakait, *supra* note 267, at 554-55.



even ethical prosecutors feel a pressure to push hard to obtain convictions, because only a conviction serves the interest of justice.<sup>276</sup> Thus, role pressures naturally incline prosecutors to investigate in ways that confirm guilt, to fail to recognize and hence fail to disclose to the defense exculpatory evidence, to coach and prepare witnesses in ways that make their testimony more compelling or consistent with the theory of guilt,<sup>277</sup> or to discourage witnesses from talking to defense counsel or investigators.<sup>278</sup> The result is an even stronger picture of guilt, whether accurate or not. The process of being a prosecutor, even an ethical prosecutor, thus exacerbates general cognitive biases and contributes to tunnel vision.

### 3. INSTITUTIONAL PRESSURES ON DEFENSE LAWYERS

Defense lawyers are also susceptible to institutional pressures that contribute to tunnel vision. Defense lawyers, like prosecutors, quickly learn that most people charged with crimes are guilty.<sup>279</sup> They see that most of their clients plead guilty, and most of the remainder who go to trial are convicted. Defense lawyers learn that, more often than not, their clients fare much better in the criminal justice system if they plea-bargain rather than go to trial. To take an adversarial posture in a case—to investigate aggressively, file discovery motions for access to evidence from police and prosecutor's files, and file motions to suppress—not only requires an investment of scarce resources, but also often comes at a cost in terms of the ultimate resolution of the case. Experienced defense lawyers learn that better deals can be obtained by being cooperative: "Prosecutors and judges alike thus indoctrinate defense attorneys into the plea bargain process by communicating to attorneys that time-consuming motions should be forsaken in favor of plea negotiation."<sup>280</sup>

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276. *Id.* at 556 ("Since the prosecutor 'knows' that the right result is a conviction, conduct that helps the jury reach a guilty verdict is appropriate."). Defense attorneys are in a different position; defense attorneys also know that most of their clients are guilty, so for them a conviction is not always, or even frequently, viewed as a miscarriage of justice. *Id.* at 555.

277. *Id.* at 559-62.

278. David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights*, 17 GEO. J. LEGAL ETHICS 103, 105 (2003).

279. See F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B.Y.U. J. PUB. L. 189, 211 (2002).

280. *Id.* at 213.

The case of a Texas man, Christopher Ochoa, reveals just how much even defense counsel can be compromised by tunnel vision, and how disastrous the consequences can be. Ochoa and his codefendant, Richard Danziger, were convicted of a brutal rape and murder of a young Pizza Hut employee committed in 1988 in Austin, Texas.<sup>281</sup> After observing Ochoa and Danziger asking questions about the murder at the restaurant where the murder occurred, detectives picked up the men for questioning. After two twelve-hour interrogation sessions, detectives broke Ochoa down by threatening him with physical harm, fabricating evidence against him, convincing him he would be convicted, and threatening him that he would be executed if he did not confess. Ochoa, who was twenty-two at the time and had never before been in trouble with the law, was coerced into signing a lengthy confession filled with details of the crime that detectives wrote for him.<sup>282</sup>

Despite Ochoa's subsequent protestations to his attorney that he was innocent and that the confession was false, his attorney refused to investigate and counseled him that his only option to avoid execution was to accept the State's plea offer. Under that offer, not only would Ochoa have to plead guilty to the rape and murder, but he would have to testify against Danziger as well. Seeing no options, Ochoa did just that and both men were convicted and sentenced to life in prison. Both served over twelve years in prison before DNA testing in 2000 proved that another man, who by then was confessing to the crime, was in fact the source of DNA found in the dead woman.<sup>283</sup> Defense counsel was so convinced of his own innocent client's guilt that not only did he refuse to investigate and present a defense, but when postconviction counsel contacted him to inquire about obtaining postconviction DNA testing, he told counsel not to waste time on this case because there was "not a chance" that Ochoa [was] innocent."<sup>284</sup> Defense counsel went so far as to either concoct or misremember facts that would support his judgment of guilt: he asserted erroneously that there had been an eyewitness who saw Ochoa at the scene and that Ochoa's fingerprints had been found on the murder weapon.<sup>285</sup>

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281. Keith A. Findley & John Pray, *Lessons from the Innocent*, WIS. ACAD. REV., Fall 2001, at 33, 33.

282. *Id.* at 34; Ronald Earle & Carl Bryan Case, Jr., *The Prosecutorial Mandate: See That Justice Is Done*, JUDICATURE, Sept.-Oct. 2002, at 69, 72.

283. *Id.*

284. Memorandum from Wendy Seffrood to John Pray, Wisconsin Innocence Project (Nov. 9, 1999) (on file with authors).

285. *Id.* After his exoneration and release from prison, Ochoa completed his undergraduate education, and then enrolled at the University of Wisconsin Law School, where he worked for a year with the Wisconsin Innocence Project, the project that

Unfortunately, Ochoa's experience is not unique.<sup>286</sup> Empirical evidence indicates that meaningful investigation by defense counsel is rare. One study found that appointed defense attorneys in New York City conducted an investigation in only 27 percent of all homicide cases, 12 percent of all felonies, and less than 8 percent of all misdemeanors.<sup>287</sup> Appointed counsel interviewed witnesses in only 4 percent of nonhomicide cases and 21 percent of homicides.<sup>288</sup> And defense counsel employed experts in only 2 percent of felony cases (17 percent of homicides).<sup>289</sup>

### *C. Prescribed Tunnel Vision*

To a surprisingly large extent, tunnel vision in the criminal justice system exists not despite our best efforts to overcome these cognitive biases and institutional pressures, but because of our deliberate systemic choices. Those choices are reflected in training that is provided to police officers and express rules of law that limit the inquiry, both in trial and on appeal, to considerations that will confirm guilt. Some of these rules reflect service to other values, such as finality and efficiency. But, to the extent that they institutionalize tunnel vision and impede the search for the truth, such rules and their effects should be exposed and understood so that the adequacy of the justifications can be measured. Examples of a few of these normative dimensions of the phenomenon follow.

#### 1. PRESCRIBED INVESTIGATIVE TUNNEL VISION: POLICE INTERROGATION TRAINING AND TECHNIQUES

Law enforcement training rarely includes any instruction on recognizing or overcoming tunnel vision, or on the dangers of tunnel vision. Worse, in some significant respects, law enforcement training *affirmatively teaches* police investigators to engage in practices that encourage tunnel vision. Most dramatically, this troubling message is prevalent in law enforcement training on interrogation tactics.

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helped secure his freedom. He graduated in May 2006. See Diane Molvig, *Chris Ochoa*, 1*L*, WIS. LAW., May 2004, at 12.

286. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (recounting recurrent inadequacies in attorneys provided for the indigent).

287. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986-1987).

288. *Id.*

289. *Id.* at 764.

Most police in the United States are trained in what is known as the “Reid Technique” of interrogation. The most influential of the police training manuals that teach this method is Inbau, Reid, Buckley, and Jayne’s *Criminal Interrogation and Confessions*<sup>290</sup>—“the bible of the American interrogator”<sup>291</sup>—which was first published in 1962 and is now in its fourth edition.<sup>292</sup> Under what is known as the Reid Technique, law enforcement investigators are taught to distinguish between “interviews” and “interrogations.” An interview is designed to elicit information, to learn what the interviewee knows about the crime. An interrogation, on the other hand, is designed to elicit a confession. As the Inbau manual puts it, “an interrogation is conducted only when the investigator is reasonably certain of the suspect’s guilt.”<sup>293</sup>

Once police commit to an interrogation as opposed to an interview, the Reid Technique advocates a nine-step interrogation process designed to break suspects down, convince them that they are doomed, and then make a confession appear to be a rational or risk-reducing choice.<sup>294</sup> The first steps of the process are designed to overcome resistance by isolating the suspect and confronting him or her with assertions of guilt; in these stages, officers are taught to interrupt any denials of guilt, and to convince the suspect both that police *know* he or she is guilty and that they have the evidence to prove it.<sup>295</sup> Often, this process involves confronting suspects with false evidence of guilt, such as false claims that police have an eyewitness, the suspect’s DNA, or a

290. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (2001).

291. AMINA MEMON, ALDERT VRIJ & RAY BULL, *PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY* 63 n.4 (2d ed. 2003) (quoting K. McKenzie, *Regulating Custodial Interviews: A Comparative Study*, 22 INT’L J. SOC. L. 239, 249 (1994)).

292. Fred Inbau first published an interrogation manual—the first sophisticated interrogation manual for police in this country—in 1942. That manual, entitled *Lie Detection and Criminal Interrogation*, was eventually rewritten into two series—*Truth and Deception*, and the more recently updated *Criminal Interrogation and Confessions*. Leo, *supra* note 258, at 63-64; *see also* GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 7 (2003).

293. INBAU ET AL., *supra* note 290, at 8.

294. For summaries and critiques of the Reid Technique’s nine-step process, *see* MEMON, VRIJ & BULL, *supra* note 290, at 58-65; Leo, *supra* note 258, at 72-73; Gudjonsson, *supra* note 292, at 10-21. While most police in the United States profess to follow this technique, there are indeed multiple manuals, and various interpretations of the general technique, which vary the specific techniques and the degree of persuasion recommended. *See, e.g.*, Gudjonsson, *supra* note 292, at 7.

295. *See* Saul M. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCHOL. 215, 220 (2005); Leo, *supra* note 258, at 72-73.

surveillance video catching the suspect in the act.<sup>296</sup> These stages of the process are then followed by offers of sympathy, understanding, and an alternative “theme” that minimizes the moral seriousness of the act, and that are designed to make the “doomed” suspect believe that confessing is the most attractive option.<sup>297</sup>

The very notion of a Reid “interrogation,” therefore, expressly embraces the foundational problems with tunnel vision—a premature conclusion of guilt, and an unwillingness to consider alternatives.<sup>298</sup> In this context, however, the tunnel vision is not inadvertent, but deliberate; police are taught that this is the way to advance their investigation. Cognitive biases are openly encouraged.

This approach is problematic on multiple levels.<sup>299</sup> To start, the conclusion of guilt at this stage is necessarily tentative, and hence potentially inaccurate. Police typically attempt to obtain confessions because a confession is powerful evidence,<sup>300</sup> and police are most motivated to seek confessions in cases where they lack other sufficient

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296. One study that examined 182 actual police interrogations concluded that police used trickery involving false evidence roughly 30 percent of the time. See Elizabeth F. Loftus, *Editorial: The Devil in Confessions*, 5 PSYCHOL. SCI. IN THE PUB. INT., at i, i (2004).

297. See Saul M. Kassir, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188 (2003).

298. As one experienced police interrogator has put it, “When an interrogator becomes married to a theory, he risks ignoring all contrary evidence or indications that he could be wrong.” WARREN D. HOLMES, CRIMINAL INTERROGATION: A MODERN FORMAT FOR INTERROGATING CRIMINAL SUSPECTS BASED ON THE INTELLECTUAL APPROACH 4 (2002).

299. In addition to the problems discussed here, critics of the Reid Technique have identified numerous other concerns, including that it encourages trickery and deceit, which are illegal in many Western European countries and considered unethical (even if justified) elsewhere; the tricks and deceit and high-pressure approach can cause innocent as well as guilty people to confess; pressing suspects to confess may create a “boomerang effect,” in which suspects who might otherwise confess might become resistant if they feel they are being rushed or treated unfairly; bluffing can backfire when police are caught fabricating evidence by a suspect who knows the purported evidence cannot be true; by cutting off denials and explanations and asking questions that can be answered in a few words, police risk that the confession reflects more what they believe has happened than what actually has happened; and suspects who have been pressured to confess may retain strong feelings of resentment towards police, even afterwards. MEMON, VRIJ & BULL, *supra* note 291, at 63-64.

300. Mock jury studies show that confessions are among the most powerful types of evidence, more persuasive to jurors than other evidence, including such potent evidence as eyewitness identifications. Kassir, Goldstein & Savitsky, *supra* note 297, at 187; Saul M. Kassir & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 27 (1997).

evidence to ensure a conviction.<sup>301</sup> Police therefore have the strongest incentives to push hard for a confession where, based on the other evidence, the confession is least likely to be truthful.

Moreover, the process of assessing an interview is likely to produce misjudgments about the suspect's veracity and guilt. Police are trained to look for signs of deceit in the interview process to help them determine whether to shift from an interview to an interrogation. Police also use their interpretations of guilty responses to help them shape the remainder of their interrogation, and the content of their testimony at trial. Yet, considerable research indicates that people are poor intuitive judges of truth and deception.<sup>302</sup> In clinical studies, people consistently perform at only slightly better than chance levels (with typical accuracy rates of about 45 to 60 percent, when chance is 50 percent) at distinguishing lies from truth.<sup>303</sup> Some studies suggest that some professionals, including secret service agents, CIA agents, sheriffs, and police officers, perform somewhat better than other people.<sup>304</sup> But even in those studies these professionals made significant and frequent errors.<sup>305</sup> Indeed, most studies indicate that trained detectives and others with relevant on-the-job experience "perform only slightly better than chance, if at all,"<sup>306</sup> and do not perform more

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301. In addition to relying on traditional interrogation techniques, police also turn to polygraph examinations before evidence sufficient to convict has been developed. This, in turn, can lead to what has been termed "Othello Error." MEMON, VRIJ & BULL, *supra* note 291, at 29-30. Polygraph examinations (and other purported lie detectors, like voice stress analyzers) do not measure veracity directly, but rather physiological responses to the fear engendered by lying. Leo, *supra* note 258, at 61. But, "both guilty and innocent suspects might be afraid during police interviews: guilty suspects because they are afraid of getting caught, and innocent suspects because they are afraid that they will not be believed. Therefore, because of that fear, guilty and innocent suspects may show the same nervous behaviours." MEMON, VRIJ & BULL, *supra* note 291, at 29. Thus, innocent people subject to polygraph examinations can be like Desdemona in Shakespeare's *Othello*, whose emotional response upon realizing that she could not prove her innocence to false accusations of infidelity led Othello to misinterpret her reaction as a sign of guilt—the "Othello Error." Consistent with this theory, a recent literature review of polygraph field studies "revealed that 21 percent of innocent suspects failed the polygraph test and were wrongly accused." *Id.* at 30.

302. Kassin, Goldstein & Savitsky, *supra* note 297, at 188.

303. Samantha Mann, Aldert Vrij & Ray Bull, *Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies*, 89 J. APPLIED PSYCHOL. 137, 137 (2004).

304. *Id.*

305. "[E]xperts' who make [lie detection] judgments for a living—such as psychiatrists, police investigators, judges, customs inspectors, and polygraphers for the FBI, CIA, and military—are highly prone to error." Kassin, Goldstein & Savitsky, *supra* note 297, at 188.

306. Leo, *supra* note 258, at 90.

reliably than untrained individuals.<sup>307</sup> Research also suggests that neither prosecutors nor judges are any more adept than police in detecting lies or in understanding the science of lie detection.<sup>308</sup>

Additionally, the signs that police officers are trained to believe indicate lies are not empirically related to lie detection. Police manuals, including the Inbau book, teach police to look for deception cues; according to interrogation dogma, liars show gaze aversion, display unnatural posture changes, exhibit physical self-manipulations, and cover their mouths or eyes with their hands while speaking.<sup>309</sup> Research confirms that most police officers rely on such indicators.<sup>310</sup> But research also convincingly shows that such cues are not indicative of fabrication,<sup>311</sup> and can actually reduce accuracy.<sup>312</sup> Indeed, research suggests that “looking at Inbau et al.’s . . . cues is counterproductive.”<sup>313</sup>

To compound these lie-detection errors, trained detectives and interrogators tend to be more confident in their judgments than untrained individuals, and tend to have a deception bias such that their errors in judging veracity are biased towards finding deception.<sup>314</sup> More precisely, trained investigators tend to err by accepting false confessions, not by rejecting true confessions. “Hence, the bias is not to see lies per se, but to presume guilt.”<sup>315</sup> As a consequence, “the

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307. Kassin, Goldstein & Savitsky, *supra* note 297, at 189; Christian A. Meissner & Saul M. Kassin, “*He’s Guilty!*”: *Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469 (2002).

308. Leif A. Strömwall & Pär Anders Granhag, *How to Detect Deception: Arresting the Beliefs of Police Officers, Prosecutors and Judges*, 9 PSYCHOL. CRIME & LAW 1, 19-36 (2003).

309. Mann, Vrij & Bull, *supra* note 303, at 144; INBAU ET AL., *supra* note 290, at 143-53.

310. Mann, Vrij & Bull, *supra* note 303, at 142, 144.

311. *Id.* at 144; DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003); MEMON, VRIJ & BULL, *supra* note 291, at 30-31 (stating that a review of more than 100 studies reveals that “a typical nonverbal response during deception does not exist”).

312. Mann, Vrij, & Bull, *supra* note 303, at 139; Saul M. Kassin & C.T. Fong, “*I’m Innocent!*”: *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 499 (1999).

313. Mann, Vrij, & Bull, *supra* note 303, at 144.

314. Kassin, Goldstein & Savitsky, *supra* note 297, at 189; Meissner & Kassin, *supra* note 307, at 478.

315. Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, “*I’d Know a False Confession if I Saw One*”: *A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 222 (2005).

pivotal decision to interrogate a suspect may well be based on prejudgments of guilt confidently made but frequently in error.”<sup>316</sup>

For example, a common questioning technique is to employ hypotheticals, asking an alcoholic, for instance, if it was possible to have committed the crime during a blackout that left the suspect with no memory of the crime.<sup>317</sup> Such questioning puts the suspect in a box: virtually any answer is susceptible to being viewed as incriminating. Denying the possibility of a blackout is implausible and could be viewed as defensiveness that indicates a guilty conscience. At the same time, admitting the *possibility* of a blackout is viewed as an admission that the suspect might have committed the crime. Confirmation bias would likely lead the interrogator to see either response as confirming his or her operative theory that the defendant was guilty.<sup>318</sup>

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316. Kasson, Goldstein & Savitsky, *supra* note 297, at 189; *see also* Leo, *supra* note 258, at 91.

317. The case of Evan Zimmerman, a former client of the Wisconsin Innocence Project, offers an example of questioning of this type that contributed to the murder conviction of an individual whose conviction was subsequently reversed, and against whom all charges were eventually dismissed at the prosecutor’s request. *State v. Zimmerman*, 2003 WI App 196, ¶¶ 11-20, 266 Wis. 2d 1003, ¶¶ 11-20, 669 N.W.2d 762, ¶¶ 11-20. In another case, Gary Gauger was convicted of murdering his parents and sentenced to death based in part on evidence gathered after police persuaded him that it was hypothetically possible he had committed the double murder during an alcoholic blackout. *See* Center on Wrongful Convictions at Northwestern University School of Law, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/gauger.htm>. Gauger was subsequently exonerated after a federal grand jury in Milwaukee indicted two members of a Wisconsin motorcycle gang known as the Outlaws for thirty-four acts of racketeering, including the murder of Gauger’s parents. One of the Outlaws, James Schneider, was caught in a secretly recorded conversation admitting to the murder of the Gaugers. *Id.*

318. Other types of responses to questioning are similarly likely to be interpreted by police as inculpatory if police begin with a presumption of guilt. In the *Zimmerman* case, for example, police told Zimmerman (falsely) that they had an eyewitness who saw him with the victim on the night of her murder. *Zimmerman*, 2003 WI App 196, ¶ 11. According to one detective, Zimmerman responded by saying: “Nobody saw us.” Transcript of Trial at 166, *State v. Zimmerman*, No. 2001CF63 (Circuit Court Branch 2, Eau Claire County, May 16, 2001). A second detective remembered Zimmerman as saying, “Who saw me?” *Id.* at 70. The detectives interpreted Zimmerman’s response as an incriminating admission. On cross-examination, the detectives conceded that, in fact, Zimmerman actually said, “Nobody saw us because we weren’t together.” *Id.* at 172. They nonetheless minimized the significance of the latter part of that statement, because they insisted that there was a suspicious “pause” between the third and fourth words of that sentence. *Id.* at 173. The detectives’ testimony raises significant questions about what in fact Zimmerman said, and whether there was any real pause, or what any such pause, if it existed, might have signified. To officers who presumed guilt, confirmation bias inevitably led them to see a facially exculpatory statement as an incriminating response.



Other forms of too-readily embraced evidence can also lead police astray. Warren D. Holmes, a former investigator in the Miami Police Department's Lie Detection Bureau and an experienced interrogator, has observed that police can be misled into believing a suspect is guilty by relying too readily on "witness identification, forensic lab reports and expert testimony."<sup>319</sup> He explains:

I once interrogated a murder suspect for more hours than I should have. I was convinced of his guilt based on the ballistics report. The exasperated suspect finally looked at me and said, "Tell me what you want me to say and I'll say it." I knew then that something was wrong. I suggested that the investigator take the suspect's gun and have it tested in another department. Their report indicated that the suspect's gun was not the murder weapon. I had placed so much faith in the initial ballistics report, that I had ignored my own polygraph test results.<sup>320</sup>

When interrogators approach an interrogation with a firmly held presumption of guilt, confirmation biases can be particularly pronounced. Clinical studies show that interrogators who approach an interrogation with a perception or presumption of guilt typically choose guilt-presumptive questions and use high-pressure tactics (such as presentation of false evidence and promises of leniency), even when not trained in the Reid Technique.<sup>321</sup> Presumably, training in the Reid Technique would only amplify this natural tendency. At the same time, guilt-presuming interrogators are significantly more likely than those with innocent expectations to perceive suspect responses in incriminating terms.<sup>322</sup> Paradoxically, and troublingly, interrogators in one study employed the most aggressive interrogation behavior when they were questioning actually innocent suspects, even when the innocent suspects told denial stories judged plausible by neutral observers.<sup>323</sup> The researchers in this study concluded:

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319. HOLMES, *supra* note 298, at 4.

320. *Id.*

321. Kassir, Goldstein & Savitsky, *supra* note 297, at 199. This inclination reflects what researchers have referred to variously as the self-fulfilling prophecy, interpersonal expectancy effect, and behavioral confirmation—the tendency people have, once they form a belief, to "unwittingly create behavioral information that verifies that belief." Leo, *supra* note 258, at 94.

322. Kassir, Goldstein & Savitsky, *supra* note 297, at 199.

323. *Id.* at 200.

Interrogators who approached the task with a guilty base-rate expectation never stopped to reevaluate this belief—even when paired with innocent suspects who issued plausible denials. Rather, it appears that they interpreted the denials as proof of a guilty person’s resistance—and redoubled their efforts to elicit a confession.<sup>324</sup>

The investigator bias infects neutral observers of such interrogation sessions as well. In studies, observers who listened to tapes of interrogations by guilt-presuming interrogators perceived the suspects in that condition as more defensive and somewhat guiltier than suspects interrogated by innocence-presuming interrogators.<sup>325</sup> In other words, “the presumption of guilt, which underlies all interrogation, sets in motion a process of behavioral confirmation by which expectations influence an interrogator’s behavior, and ultimately the judgments of judges, juries, and other neutral observers.”<sup>326</sup>

Through this process, therefore, police training that encourages guilt-presumptive interrogation tactics contributes to tunnel vision.

## 2. PRESCRIBED TUNNEL VISION AT TRIAL

Normative dimensions of tunnel vision are not limited to the investigation stages. In some respects, trials also institutionalize the tendency toward tunnel vision. In an idealized sense, trials seek to neutralize guilt-presumptive cognitive biases by bringing in neutral decision-makers (jurors) and instructing them that the defendant is presumed innocent and that the state must prove guilt beyond a reasonable doubt. There are reasons to doubt the efficacy of these measures, however. Despite the formal constitutional demand for a presumption of innocence, many observers have noted that there in fact appears to be a “presumption of guilt.”<sup>327</sup> After all, it is neither

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324. *Id.*

325. Leo, *supra* note 258, at 96; *see also* Kassin & Gudjonsson, *supra* note 100, at 42 (noting that “laboratory experiments have . . . shown that behavioral confirmation is the outcome of a three-step chain of events in which (a) a perceiver forms a belief about a target person; (b) the perceiver unwittingly behaves toward that person in a manner that conforms to that belief; and (c) the target responds in turn, often behaving in ways that support the perceivers belief . . .”).

326. Leo, *supra* note 258, at 96. For a discussion of how this “interviewer bias” can distort the results of an interview or interrogation, *see* STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN’S TESTIMONY* 79-80, 87-92 (1995).

327. *See* Michael J. Saks & D. Michael Risinger, *Baserates, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1056; *see also* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 160

irrational nor unusual to believe that the defendant is likely guilty, or at least that there is significant evidence of guilt; otherwise, why was the defendant charged? Empirical research reveals that prior to trial mock jurors predict a 50 percent chance of voting to convict—a probability significantly higher than if jurors took the presumption of innocence seriously.<sup>328</sup> The outcomes of most cases—that is, the feedback the system provides—confirm the assumption that most defendants are guilty; recent data show that federal juries return guilty verdicts in 84 percent of the cases that go to trial,<sup>329</sup> and, in total, defendants are acquitted in less than 1 percent of all cases.<sup>330</sup> Moreover, others have argued that the reasonable doubt instruction, as currently formulated in most jurisdictions, is significantly weaker than as first developed at common law<sup>331</sup> and is sometimes misunderstood by juries as weaker than the law requires.<sup>332</sup>

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(1968) (“The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands.”); Felkenes, *supra* note 263, at 112 (noting that surveys of prosecutors reveal that more than half do not presume that a person is innocent until proven guilty, and that “[m]any believe that once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997) (“The presumption of guilt, not the presumption of innocence, permeates the criminal adjudicatory system.”).

328. Saks & Risinger, *supra* note 327, at 1062 (citing Thomas M. Ostrom, Carol Werner & Michael J. Saks, *An Integration Theory Analysis of Jurors’ Presumptions of Guilt or Innocence*, 36 J. PERSONALITY & SOC. PSYCHOL. 436 (1978)). Risinger and Saks have gone on to observe that “[s]ome evidence exists to suggest that jurors set their probabilities lower than they think they do,” and that jurors might actually start with “assumptions close to zero (innocence), but to which they attach[] very little weight, so that the presumption of innocence [is] abandoned as soon as the first piece of inculpatory evidence [is] presented.” *Id.* As Professor Daniel Givelber has explained, “Jurors apparently do not listen, evaluate and deliberate on the assumption that the defendant is innocent unless the government proves otherwise. Rather, jurors take the logical position that they are in equipoise concerning the defendant’s guilt and will await the presentation of evidence before reaching a verdict.” Givelber, *supra* note 327, at 1372.

329. Saks & Risinger, *supra* note 327, at 1060 n.33 (citing U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001 tbl.5.17 (2002) (showing the disposition of cases terminated in U.S. District Courts in the fiscal year 2000)).

330. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 103 (2005).

331. See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1170 (2003) (arguing that the proof required to convict has shifted from a “certainty” standard to a much weaker one, in which juries are instructed to acquit only if they can identify reasonable doubts, defined as specific and articulable doubts).

332. See Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999) (finding

Aside from the possibility that these features of the trial process are ineffectual at neutralizing tunnel vision, other features of the trial experience expressly limit the ability to consider the possibility that anyone other than the accused might have committed the crime, thereby making some aspects of tunnel vision prescriptive. Regardless of how or whether this is justified by other values (such as interests in convicting the guilty or in efficiency and conservation of judicial resources), rules that limit the availability or admissibility of exculpatory evidence inevitably increase the risk of convicting the innocent.<sup>333</sup> A few examples of rules that directly limit the ability to explore alternative case theories follow.

a. *Limited Admissibility of Evidence Suggesting an Alternative Perpetrator*

I. THE “DIRECT CONNECTION” DOCTRINE

Evidentiary rules in most jurisdictions impose significant limitations on the ability of defendants to introduce evidence of

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inconsistency and confusion among jurors, including that some jurors understand the reasonable doubt standard to be less rigorous than civil standards, depending on the wording of the instruction); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 PSYCHOL. PUB. POL’Y & L. 769, 774-78 (2000) (discussing empirical studies on the effect of the “beyond a reasonable doubt” standard).

333. For example, Professor Andrew Leipold has noted that rules that limit pretrial release on bail, tolerate precharging delay, or minimize government disclosure obligations, among others, limit the ability of criminal defendants to develop exonerating evidence and hence contribute to wrongful convictions. Leipold, *supra* note 246, at 1163. Leipold acknowledges that the “policy considerations that lead courts and legislatures to accept the risks” of some of these procedures “are legitimate,” but argues that the cost in terms of wrongful convictions must be considered in assessing the value of such rules. *Id.* at 1163. Some evidence-limiting rules are derived from a concern for reliability. Excluding “unreliable” defense evidence (hearsay, for example) can indeed be justified by concern about the reliability of the outcome of a trial. But it can be justified only if one is willing to accept that, while excluding such evidence will on balance enhance the odds of finding the “truth,” it will do so at the cost of prohibiting some innocent people from proving their innocence. In a system where the risks of error are apportioned roughly equally between the two opposing parties in a case (as in our civil system), such rules that enhance “truth” in the aggregate make perfect sense. But in a system that ostensibly places all of the risk of error on the government (as does the criminal justice system), rules that limit evidence that in some cases might prove innocence are more problematic. See Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621 (1998).

alternate or third-party suspects. At trial, evidence is generally admissible if merely relevant (unless excludable for some other specific evidentiary reason, such as hearsay, privilege, or other such exceptions). Relevancy is an exceedingly broad standard. The Federal Rules of Evidence, which are extensively replicated in most state evidentiary codes, define relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>334</sup> Evidence—even relatively weak evidence—suggesting that someone other than the defendant committed the crime seems to fit a common sense understanding of relevance under this standard; it surely has a “tendency to make” the defendant’s guilt “less probable than it would be without the evidence.” Indeed, given that criminal defendants have a constitutional right to present a defense,<sup>335</sup> it would seem that relevancy might be construed particularly liberally when a defendant seeks to offer evidence that someone else might have committed the crime. It is, after all, the stuff of *Perry Mason*.<sup>336</sup>

But, to the contrary, courts apply a particularly restrictive view of relevance when considering the admissibility of evidence about alternative perpetrators. The “direct connection” doctrine limits admissibility to evidence that not only has a “tendency” to make the defendant’s guilt “less probable,” but that also has a “direct connection” to the crime.<sup>337</sup> As a leading case explained the rule, evidence of an alternative perpetrator

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334. FED. R. EVID. 401.

335. See *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *United States v. Nixon*, 418 U.S. 683, 711 (1974); *Davis v. Alaska*, 415 U.S. 308, 319-20 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 295-303 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

336. See David McCord, “*But Perry Mason Made It Look So Easy!*”: *The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 TENN. L. REV. 917 (1996).

337. Various jurisdictions employ different phraseology to refer to the direct connection requirement, including “clearly link,” “point directly,” “point unerringly,” or “inherent tendency,” but all such terms are employed in essentially the same fashion and to essentially the same effect. *Id.* at 921, 928, 938. In Wisconsin, the doctrine is generally referred to as the “legitimate tendency” doctrine. See *State v. Denny*, 120 Wis. 2d 614, 623-24, 357 N.W.2d 12, 17 (Ct. App. 1984). In a few other jurisdictions, including Texas, Alabama, and Kansas, the rule is even more draconian. “In those three states, a defendant could offer [third-party suspect] evidence only if the prosecution’s case was entirely circumstantial. Thus, if the prosecution had even one eyewitness, no matter how weak, the defendant was completely disabled from offering [third-party suspect] evidence.” McCord, *supra* note 336, at 927 (citing *Dubose v. State*, 10 Tex. Crim. 230, 251 (1881); *Tatum v. State*, 31 So. 369 (Ala. 1902); and *State v. Neff*, 218 P.2d 248, 256 (Kan. 1950)). According to McCord, “this

is inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense. . . . The rule is designed to place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects . . . .<sup>338</sup>

As another court put it, the alternative-perpetrator evidence must not only raise a reasonable inference of the defendant's innocence, but must also "directly connect the other person with the corpus delicti."<sup>339</sup> The rule frequently excludes evidence of strong motive or opportunity because courts often require "direct evidence placing the third party at the scene."<sup>340</sup>

At times, defense evidence of an alternate suspect is excluded at trial even when that evidence is arguably of the same nature and quality as the circumstantial evidence offered by the State to support its charges against the defendant. While the State is permitted to build its case entirely on circumstantial evidence, the direct connection doctrine suggests that wholly circumstantial evidence offered by the defense is not admissible in many courts unless it is particularly powerful circumstantial evidence.<sup>341</sup> Professor Ellen Suni has noted that,

the fact that the alternative perpetrator may have made threats against the victim, or was seen with blood on his hands in the vicinity of the crime, or had assaulted the victim two weeks before the crime, have been deemed insufficient in the

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aberrant . . . doctrine is probably still good law in Texas, Alabama and Kansas." McCord, *supra* note 336, at 927 (citing *Erwin v. State*, 729 S.W.2d 709, 714-15 (Tex. Crim. App. 1987); *Coral v. State*, 628 So. 2d 954, 983 (Ala. Crim. App. 1992); and *State v. Peckham*, 875 P.2d 257, 266 (Kan. 1994) (footnotes omitted)).

338. *People v. Green*, 609 P.2d 468, 480 (Cal. 1980) (citations omitted).

339. *Santana v. State*, 510 S.E.2d 916, 917 (Ga. Ct. App. 1999) (quoting *Kline v. State*, 501 S.E.2d 810, 814 (Ga. Ct. App. 1998)).

340. *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999).

341. Some courts permit alternative perpetrator evidence where there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Pyles v. State*, 947 S.W.2d 754, 757 (Ark. 1997) (quoting *People v. Kaurish*, 802 P.2d 278, 295-96 (Cal. 1990)). Even in those cases, however, the circumstantial evidence must directly link the alternative suspect to the offense.

absence of evidence clearly linking the alternative perpetrator to the actual crime itself.<sup>342</sup>

To the extent that the direct connection doctrine serves to choke off inquiry into possible alternate suspects at trial, it enforces a kind of tunnel vision as a normative matter. Thus, not only do cognitive biases and institutional pressures disincline police and prosecutors to consider alternatives to the defendant's guilt, the rules of evidence reinforce those biases by preventing the trier of fact from having access to alternate theories of the case.

## II. STATEMENTS AGAINST PENAL INTEREST

In a similar and related way, most evidentiary codes expressly limit the ability of criminal defendants to offer hearsay evidence that a third party confessed to the crime. Federal Rule of Evidence 804 creates a hearsay exception for statements against the penal interest of a declarant if the declarant was unavailable at the time of trial.<sup>343</sup> The Rule, however, does not apply equally to all litigants, in all types of cases. Rather, the Rule uniquely disfavors statements against interest offered by a defendant in a criminal case to show that someone else might have committed the crime: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>344</sup> Like the direct connection doctrine, this rule reflects a distrust of criminal defense evidence and an institutionalized unwillingness to consider the possibility that someone else committed the crime, absent particularly strong showings of that possibility. As the Advisory Committee to the Federal Rules has noted:

The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic. . . . [B]ut one senses in the decisions a distrust of evidence of confessions of third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. . . .

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342. Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 *FORDHAM L. REV.* 1643, 1677 (2000) (citing *State v. Robinson*, 628 A.3d 664, 667 (Me. 1993); *State v. Luna*, 378 N.W.2d 229, 232 (S.D. 1985); *State v. Stokes*, 638 S.W.2d 7151, 723 (Mo. 1982) (footnotes omitted)).

343. *FED. R. EVID.* 804(a) & (b)(3).

344. *FED. R. EVID.* 804(b)(3).

The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations.<sup>345</sup>

This “distrust of evidence of confessions of third persons” also reflects manifestations of the psychological processes underlying tunnel vision. And it contributes to tunnel vision by narrowing the focus to the charged suspect.

To recognize that these rules constitute a form of prescribed tunnel vision is not necessarily to say that the rules are indefensible, or that they should be abandoned or modified; it may be that these forms of tunnel vision are appropriate at this stage of the process. Nonetheless, it is important to recognize that these rules constitute a form of prescribed tunnel vision that reinforces natural tendencies. This understanding is necessary for evaluating the potential that these rules present to contribute to erroneous convictions, and for assessing whether the rationale for the rules justifies the risk inherent in any form of tunnel vision. We consider whether these rules can be justified, or whether they should be modified or abandoned in light of their effect on tunnel vision, when we consider reforms designed to overcome tunnel vision later in this Article.

*b. Other Trial-Related Rules that Foster Tunnel Vision*

Other legal rules governing the admissibility of evidence also contribute to tunnel vision, although many do so in less direct ways. Our purpose is not to catalogue all such rules, but merely to illustrate the point.

Standards set by the Supreme Court for the admissibility of eyewitness identification evidence are particularly susceptible to the kinds of cognitive biases that underlie tunnel vision. Justice Brennan, writing for the Court in 1967, famously observed that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”<sup>346</sup> Yet the Court’s response to the problem has been largely ineffectual. Unreliable identifications are rarely excluded,<sup>347</sup> and mistaken eyewitness

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345. FED. R. EVID. 804 advisory committee’s note.

346. *United States v. Wade*, 288 U.S. 218, 228 (1967).

347. Empirical evidence indicates that motions to exclude eyewitness identifications are filed in somewhere between 1.2 percent and 4.8 percent of cases, and, when such motions are filed, they are granted only between 1.6 percent and 5.75 percent of the time. Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1730-31 nn.123, 124 & 125 (basing results on



identification remains the leading cause of wrongful conviction of the innocent in this country.<sup>348</sup>

To a great extent, the problem lies in the doctrine developed by the Supreme Court, which permits—indeed feeds—the kinds of cognitive biases that foster tunnel vision. The Court has developed a two-step due process analysis for determining admissibility of eyewitness evidence. First, courts evaluate whether the procedures used by police to obtain the identification were “impermissibly suggestive.”<sup>349</sup> Second, even if the procedures were impermissibly suggestive, due process does not require suppressing the identification if, considering the totality of the circumstances, the out-of-court identification was nonetheless sufficiently reliable.<sup>350</sup> But any such postidentification reliability assessment is bound to be affected by cognitive distortions that will make the identification appear reliable, accurate, and even inevitable. Confirmation bias will lead decision-makers to interpret data to support the reliability of the identification, and hindsight bias will make the identification appear to have been inevitable.

Moreover, as social science research has shown, many of the factors that the Supreme Court instructs courts to rely on when assessing reliability are not well correlated to reliability and are themselves influenced by the very suggestiveness that the “reliability” analysis is intended to assess.<sup>351</sup> Thus, a few courts, recognizing that

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surveys of judges, prosecutors, and defense lawyers); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 594, 595 tbl.2, 596, 597 tbl.7 (basing results on analysis of nearly 8000 trial court files).

348. See *supra* note 10.

349. *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977).

350. *Id.* at 111, 114; *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

351. Those factors, according to the Supreme Court, include

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*Biggers*, 409 U.S. at 199-200. Most of those factors, however, are subjective and reported by the witness, and hence subject to influence by the suggestiveness of the procedure itself. See Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 275 (1991); Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 23 (1998); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523 (2003); Wells & Bradfield, *supra* note 215, at 360-76; Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the Neil v. Biggers Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347 (1983).

trial courts are virtually doomed to fail in their attempts to assess reliability under these circumstances, have invoked their state constitutions to eliminate the reliability assessment. Under those decisions, due process is violated whenever police employ an unnecessarily suggestive procedure, without any further attempt to assess reliability.<sup>352</sup>

### 3. PRESCRIBED TUNNEL VISION ON APPEAL AND POSTCONVICTION REVIEW

Normative tunnel vision does not end after conviction; it intensifies as cases proceed through appellate and postconviction litigation. Once again, saying that the rules require tunnel vision on appeal and in postconviction review is not to say that such rules are necessarily flawed; good reasons may justify the increasing hostility to claims of innocence as a case works its way through the system. To evaluate those rules properly, the effect they have on enforcing tunnel vision—and hence on sustaining the conviction and imprisonment (or execution) of innocent persons—must be acknowledged and understood.

#### *a. Deferential Review of Factual Guilt Determinations*

One of the most startling revelations to newcomers to the justice system is that appeals have almost nothing to do with guilt or innocence. Appellate courts, as a matter of principle, decide legal questions and focus on process, not the accuracy of factual determinations. Trial courts, not appellate courts, decide facts. Indeed, the Supreme Court has notoriously held that the due process clause is generally not concerned about the accuracy of criminal proceedings (including whether an innocent person has been condemned to die) as long as the proceedings themselves were fair.<sup>353</sup> Accordingly, appellate courts are particularly loath to reverse jury verdicts in criminal cases based on insufficiency of the evidence. While the Supreme Court established in *Jackson v. Virginia*<sup>354</sup> that due process requires a sufficient quantum of evidence in criminal cases to protect the constitutional requirement of proof beyond a reasonable doubt,

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352. See, e.g., *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582; *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981).

353. See *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the Court held that, except perhaps in the most extraordinary circumstances, a freestanding claim of actual innocence, without an accompanying claim of procedural error, does not raise a constitutional due process issue. *Id.* at 399.

354. 443 U.S. 307 (1979).

appellate review of the sufficiency of the evidence is expressly very limited. Under *Jackson*, courts consider only whether the evidence, viewed in the light most favorable to the verdict, could reasonably support a finding of guilt beyond a reasonable doubt.<sup>355</sup> Under this standard, almost any evidence suffices, so long as there is some evidence.<sup>356</sup>

The deference to trial courts on questions of fact is usually justified by considerations of institutional competence. According to the conventional wisdom, appellate courts are comparatively disadvantaged at fact-finding because, unlike trial judges and juries, they were not present to observe the witnesses testify.<sup>357</sup> With access only to the “cold record” comprised of written transcripts and documents, appellate courts miss significant information arguably necessary for reliable fact determinations.

While there is much to this argument, one effect of such a deferential standard of review of factual determinations is that appellate courts, by design, are constrained in their ability to consider seriously the possibility that someone other than the defendant committed the crime, or that no crime was committed. This deference to the trial court, as a matter of rule, effectively prohibits appellate courts from looking outside the tunnel, except in the most extreme cases. Later in this Article, we analyze the justifications for this standard when we consider reforms that might be implemented to overcome tunnel vision.

*b. Guilt-Based Harmless Error and Prejudice Assessments*

Even when appellate courts do find constitutional or procedural errors at trial, they are disinclined to grant relief. Increasingly, the harmless error doctrine enables and encourages appellate courts to overlook trial error when they are satisfied that the defendant was in fact guilty.<sup>358</sup> The harmless error doctrine has long posed challenges of definition and application for courts. Increasingly, harmless error

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355. *Id.* at 318.

356. *Id.* at 335 (Stevens, J., concurring) (noting that “in practice there may be little or no difference between” the “no evidence” standard and the standard adopted by the Court in *Jackson*); see also D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 Hous. L. REV. 1281, 1314 (2004) (observing that, because the *Jackson* standard requires courts to “accept[] at face value all testimonial evidence in favor of the verdict and assum[e] all testimonial evidence to the contrary to have been rejected on credibility grounds,” courts rarely find the evidence insufficient).

357. See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 439 (2004).

358. See Edwards, *supra* note 237.

analysis is applied in a way that turns on an appellate court's assessment of a defendant's guilt, as opposed to whether the error might have had an effect on the verdict.<sup>359</sup> Under some current formulations and typical applications of the doctrine, courts look not "to whether an error actually 'contributed' to the jury's actual verdict. . . . [Rather,] courts broadly search the record by asking whether independent evidence of guilt taken alone *could* support the conviction."<sup>360</sup> Under this doctrine, cognitive biases can contribute in powerful ways to a conclusion that the defendant was indeed guilty, and that the error was therefore harmless.

Other doctrines that expressly shift the burden to prove that an alleged error might have affected the outcome of the case to the defendant are even more likely to reinforce cognitive- and role-based tunnel vision. For example, ineffective assistance of counsel claims require a defendant to show both that counsel performed deficiently, and also that counsel's errors prejudiced the defense—that is, that there was a reasonable possibility of a different outcome if counsel had not made the errors.<sup>361</sup> Similarly, to succeed on a claim that the prosecutor unlawfully withheld exculpatory evidence, the defendant must show that the withheld evidence was material—which, again, requires a showing that disclosure of the evidence would have created a reasonable probability of a different outcome.<sup>362</sup>

Professor Stephanos Bibas has observed that, because of hindsight and confirmation biases, "the very enterprise of after-the-fact review [of ineffective assistance of counsel claims] is doomed to failure. Judges simply cannot see the errors, because psychological biases make it hard to imagine that cases could have come out any differently."<sup>363</sup> Existing data suggest that Bibas's analysis is correct: despite woefully inadequate funding of services for indigent defendants,<sup>364</sup> and despite abysmal representation in many cases,<sup>365</sup> courts almost never grant relief on ineffective assistance grounds. An analysis of 4,000 reported

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359. See *id.* at 1171 (noting that courts increasingly rely on a "guilt-based approach" to harmless error, rather than an "effect-on-the-verdict approach"); Garrett, *supra* note 237, at 58-60.

360. Garrett, *supra* note 237, at 59.

361. Strickland v. Washington, 466 U.S. 668, 687 (1984).

362. Brady v. Maryland, 373 U.S. 83, 87 (1963).

363. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2.

364. See Bright, *supra* note 286, at 1843-44, 1846.

365. Judge Richard Posner has observed: "I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented." Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1, 14 (1996).

appellate decisions between 1970 and 1983 involving an ineffective assistance claim showed that only 3.9 percent resulted in a finding of reversible error.<sup>366</sup> Indeed, courts have failed to find ineffective assistance even where the lawyer was asleep, drunk, or otherwise nonfunctional during significant portions of a trial.<sup>367</sup>

The picture is similar—perhaps even bleaker—when one considers the prosecutor’s duty to disclose exculpatory evidence under *Brady v. Maryland*.<sup>368</sup> The Supreme Court has held that prosecutors have no duty to disclose evidence unless the evidence is “material”—that is, unless disclosure of the evidence presents a reasonable probability of a different outcome.<sup>369</sup> For the same reasons that judges are unlikely to be able to envision an alternative outcome in ineffective assistance of counsel cases, prosecutors (and ultimately reviewing judges) are unlikely to be able to envision a different outcome based on withheld evidence. Not only do cognitive biases make it unlikely that prosecutors (and judges) can envision a different outcome or appreciate the value of the withheld evidence, prosecutors situated as adversaries are not well-positioned to handle that task.<sup>370</sup> *Brady* demands too much of prosecutors when it simultaneously asks them to act as advocates charged with prosecuting a defendant and as neutral observers responsible for assessing the value of evidence from the defendant’s perspective.

To make prospects for disclosure even worse, most *Brady* violations are never detected because, by definition, the defense does

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366. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 632 (1986).

367. See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996); Bright, *supra* note 286, at 1843.

368. 373 U.S. 83, 87 (1963).

369. A “reasonable probability” is a “probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

370. Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward The Search for Innocence?*, in CRIMINAL PROCEDURE STORIES (Carol Steiker ed., 2005) (“Adversarial-minded prosecutors are poorly suited to do that job.”); Givelber, *supra* note 327, at 1389. Givelber has noted that prosecutors cannot reasonably be expected to assess materiality because:

[o]nly the unusual prosecutor will believe: (a) the defendant is guilty; (b) the jury will so find in light of all the evidence in the prosecutor’s possession; and (c) the potentially exculpatory but undisclosed evidence in the prosecutor’s possession is material in the sense that there is a reasonable probability that it will change the outcome of the case.

*Id.*

not know about them; violations can be litigated only if the defense learns of the nondisclosed information through some fortuity that usually occurs sometime after trial.<sup>371</sup> Moreover, the Supreme Court has held that the *Brady* duty does not apply, at least regarding exculpatory impeachment evidence, unless the defendant goes to trial.<sup>372</sup> Yet 95 percent of all cases are resolved by a guilty or no contest plea.<sup>373</sup> And, as the *Brady* dissenters pointed out, the *Brady* test oddly imposes a retrospective analysis on decisions that must be made prospectively, pretrial.<sup>374</sup> *Brady* asks reviewing courts to determine *after* trial whether the withheld evidence might have made a difference to the outcome of the trial in light of all evidence presented at trial.<sup>375</sup> Yet the prosecutor must determine the materiality of the evidence *prior* to trial, *before* hearing any of the trial evidence or exposure to the defense presented at trial.<sup>376</sup> Not surprisingly, empirical evidence confirms what these considerations suggest: *Brady* claims are rarely successful. An analysis of 210 *Brady* and related claims in cases decided in 2004 found that 83 percent were unsuccessful.<sup>377</sup>

For these reasons, *Brady* and other such burden-shifting doctrines should be reexamined.<sup>378</sup> The dissenters in *United States v. Bagley* might have had it right when they insisted that the prosecution should be required to turn over to the defense all evidence “that might reasonably be considered favorable to the defendant’s case,” not just evidence the prosecutor deems “material.”<sup>379</sup> Given the pressures of

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371. “Commitment to the rhetoric and formalities of the adversary system, coupled with a refusal to acknowledge the profound inequality between certain adversaries, means that innocent people will be convicted simply because there is no meaningful way for them to learn about or present exculpatory evidence.” Givelber, *supra* note 327, at 1321.

372. *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002).

373. *Id.* at 632.

374. 373 U.S. at 92 (Marshall, J., dissenting).

375. *Id.*

376. *Id.*; see also Bibas, *supra* note 370.

377. Bibas, *supra* note 370.

378. See Burke, *supra* note 127, at 39 (“The problem with the Court’s *Brady* doctrine is its use of a harmless error standard not just in determining whether the reversal of a conviction is warranted based on the non-disclosure of exculpatory evidence, but also in determining whether disclosure is required in the first place.”).

379. *United States v. Bagley*, 473 U.S. 667, 695-96 (1985) (Marshall, J., dissenting); see also Burke, *supra* note 127, at 40.

Importantly, to mitigate cognitive bias, the standard for disclosure should require prosecutors to evaluate the potential exculpatory value of evidence from the perspective of the defense, not through the lens of their existing theory of guilt. . . . [P]rosecutors should be required to disclose any evidence “favorable to the defendant’s preparation or presentation of his defense.”

the adversarial system and the unavoidable cognitive distortions that skew even the fairest prosecutor's judgments, the pressures toward tunnel vision do not need help from doctrines that shift the burden of proving the significance of evidence to the defense.

*c. Limitations on Postconviction Consideration of New Evidence*

As grim as the prospects look for obtaining relief based on an innocence-based claim on direct appeal, the prospects are even grimmer thereafter. State postconviction procedures limit the range of issues that can be raised on collateral attack of a conviction, and impose heightened burdens on the defendants to obtain relief after conviction and direct appeal, as finality interests are given greater prominence over concerns about wrongful convictions.<sup>380</sup> In many jurisdictions, strict time limits and onerous burdens of proof make it difficult even for defendants with powerful new evidence of innocence to find a forum for presenting that evidence.<sup>381</sup> At the federal level, habeas review is ever more constricting, especially after Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, which imposes strict time limits and numerous procedural and substantive barriers to federal court challenges to convictions.<sup>382</sup> The details of these

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*Id.* (quoting Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *FORDHAM L. REV.* 391, 428 (1984)).

380. See INNOCENCE COMM'N FOR VA., *supra* note 20, at 95 (noting the need to balance a prisoner's interest in access to a forum to test the fundamental correctness of his conviction against the government's "interest in the finality of its criminal justice proceedings").

381. For a thorough summary and analysis of the barriers to obtaining postconviction relief on a claim of actual innocence, see 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 (2005). Medwed has argued that to protect the rights of innocent defendants to establish their innocence, states should:

- (1) refashion their procedures to minimize the chance newly discovered non-DNA evidence claims will be rejected due solely to procedural default;
- (2) construct each remedy so as to enhance the likelihood that viable claims will be heard in open court in front of an unbiased judge; and
- (3) utilize a de novo standard of review for appellate courts in assessing summary denials of motions for post-trial relief based on newly discovered evidence, i.e., cases where the trial court declines to hold an evidentiary hearing on the merits of an innocence claim prior to rejecting it.

*Id.* at 661.

382. See James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 *BROOK. L. REV.* 411, 416 (2001); Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 *U. MIAMI L. REV.* 75 (2005).

constraints are beyond the scope of this Article. For our purposes, the point is simple: severe limitations on considering innocence in postconviction procedures further prescribe tunnel vision. Whether or not justified by countervailing interests in finality, they impose a cost on the wrongly convicted that must be included in an assessment of tunnel vision in the criminal justice system.

#### 4. CONCLUSION

In sum, tunnel vision is the product of innate cognitive biases, institutional pressures, and normative features of the criminal justice system. Tunnel vision permeates all levels of the criminal justice system, and intensifies in response to these three dimensions as criminal cases pass through each stage of the system—from police investigation, to prosecution and trial, and to appeal and postconviction review.

### III. CORRECTING FOR TUNNEL VISION

Overcoming tunnel vision in these various manifestations is one of the most intractable problems underlying wrongful convictions of the innocent. Because it has so many causes that are so deeply rooted in our psyches, our culture, and our institutions, and because it has such multivariate expressions, tunnel vision defies simple solutions. It is surely beyond the scope of this initial inquiry to conceive solutions to the problem in all its complexities. But we do offer a few preliminary considerations as a starting point for discussions about what might be done to minimize tunnel vision in criminal cases.

Reforms can begin along several fronts. First, to the extent that existing legal rules enforce tunnel vision, doctrinal reform is an obvious place to begin. Second, education and training must be an important part of the solution to help system actors understand the nature of the problem and attempt to overcome the cognitive biases and institutional pressures that produce tunnel vision. Third, to the extent that tunnel vision is produced by flawed evidence collection and investigation techniques and procedures, those techniques and procedures should be reexamined. Fourth, police and prosecutors can adopt a variety of management and supervision practices to reduce the risk that tunnel vision will lead to wrongful arrest, prosecution, and conviction. Fifth, to the extent that the cognitive biases and institutional pressures are simply too powerful to overcome from within, greater transparency throughout the criminal justice system offers a way to provide both incentives for police and prosecutors to overcome tunnel vision, and, more importantly, the necessary information to those who already have an incentive to see outside the tunnel so that they can pursue alternative



theories about a case. Finally, we propose a few major reforms to the police and prosecution institutions to minimize the effects of tunnel vision. We consider each of these aspects of the solution in turn.

### *A. Doctrinal Reform*

Thorough review of the rules of the criminal system should be undertaken to look for those rules that reinforce tunnel vision. We have identified several in preceding sections of this Article: 1) the direct connection doctrine; 2) the corroboration requirement for admissibility of statements against penal interest that exculpate the accused; 3) admissibility standards for eyewitness identification evidence; 4) the exceptional deference appellate courts exhibit when reviewing sufficiency of the evidence to convict; 5) guilt-based harmless error and prejudice rules such as the *Strickland* and *Brady* doctrines;<sup>383</sup> and 6) postconviction rules that limit the ability to present new evidence of innocence. As implied previously, some of these rules should be abandoned entirely, while others should be modified. Regardless, each should be reevaluated with awareness of the cost it incurs in terms of reinforcing tunnel vision and contributing to the wrongful conviction of innocent persons. In addition, a searching inquiry should be made for any and all other rules that reflect a presumption of guilt and a constraint on introducing evidence of innocence. Once identified, these rules should be carefully evaluated to determine if they truly can be justified despite their role in contributing to tunnel vision. To illustrate, we analyze a few—but not all—of those rules in greater detail to assess whether they should be reformed in light of their effect on tunnel vision.

#### 1. THE DIRECT CONNECTION DOCTRINE AND LIMITATIONS ON ADMISSIBILITY OF STATEMENTS AGAINST PENAL INTEREST

As discussed previously, both the direct connection doctrine and the exclusion of uncorroborated statements against penal interest offered to exculpate the accused contribute directly to the problem of tunnel vision.<sup>384</sup> Surprisingly, however, these rules—and particularly the direct connection doctrine<sup>385</sup>—have been subjected to very little judicial analysis, and almost no scholarly attention.<sup>386</sup>

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383. Others have made compelling arguments that the *Brady* and *Strickland* doctrines require repair. See *supra* notes 370-79 and accompanying text.

384. See *supra* Part II.C.2.a.

385. “Curiously, although this body of law raises basic issues of both criminal and evidence law, it has remained virtually unexplored by scholars and has been rarely

Both rules have been defended on the basis that such alternate-suspect evidence is “too easily fabricated falsely for the purpose of deceiving.”<sup>387</sup> Perhaps more significantly, the direct connection doctrine in particular is defended by the contention that, unless alternate-perpetrator evidence is strong and direct, it is likely to distract and confuse the jury, waste judicial resources, and invite jury speculation.<sup>388</sup> While these are legitimate and weighty concerns as a general matter, it is far from clear why they should apply with particular force when the defense offers evidence of an alternate suspect. Commenting on the special burden imposed by such rules on the admissibility of exculpatory evidence offered by the accused, Professor James Joseph Duane has observed: “This asymmetry in favor of the Government is logically and morally indefensible, and flies in the face of the constitutional imperative that ‘[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself.’”<sup>389</sup>

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subjected to any significant scrutiny by the very courts that promulgate and rely upon it.” McCord, *supra* note 336, at 919. Indeed, until recently, McCord’s 1996 *Tennessee Law Review* article stood as one of the only scholarly pieces that analyzed the direct connection doctrine. Recently, Ellen Suni has added a significant article to that literature. See Suni, *supra* note 342.

386. The statement against penal interests exception to the hearsay rule has received somewhat more scholarly attention, much of it critical of the asymmetry between evidence offered by a criminal defendant, and evidence offered by the State or for purposes other than to exculpate the criminally accused. See, e.g., James Joseph Duane, *The Proposed Amendments to Federal Rules of Evidence 608(b) and 804(b)(3): Two Great Ideas that Don’t Go Far Enough*, 209 F.R.D. 235 (2002) (criticizing the asymmetry); Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)’s Penal Interest Exception*, 69 GEO L. J. 851, 978-1011 (1981) (arguing that the corroboration requirement is unjustified, unbalanced, and unconstitutional); Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1113-28 (1987). But see John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 14-24 (2002) (employing the “rational actor theory” to criticize the very notion that people rationally make statements against interest, and in particular arguing that statements against penal interest are suspect).

387. McCord, *supra* note 336, at 925, 930 (quoting *State v. May*, 15 N.C. (1 Dev.) 328, 333 (1833)); see also FED. R. EVID. 804 advisory committee’s note.

388. McCord, *supra* note 336, at 930

389. Duane, *supra* note 386, at 244 (quoting *Addington v. Texas*, 441 U.S. 418, 423-24 (1979)). Duane also points out that, not only is the rule asymmetric in that it requires corroboration when a defendant offers a statement against penal interest, and not when the government offers that same statement, but it is also asymmetric in the sense that no similar corroboration rule exists when either party in a civil law suit offers that statement, or when anyone offers a statement that might tend to subject the declarant to only *civil* liability, but not also *criminal* liability. *Id.* at 245-49. In 2003, after several years of work, the Judicial Conference Advisory Committee on Evidence

Certainly, courts have a legitimate interest in preventing fabricated testimony. But that does not explain why the rules presuppose that exonerating evidence—evidence of a third-party perpetrator or of a self-inculpatory statement made by another person—is uniquely easy to manufacture. Indeed, although hard data does not exist, most criminal defense lawyers would likely agree that developing usable alternative-perpetrator evidence, or obtaining inculpatory statements from third parties, is exceedingly difficult. Eminent scholars have long derided this heightened suspicion of statements offered to exculpate the accused. Wigmore, for example, characterized the rule excluding statements against penal interest as a “barbarous doctrine,” and dismissed the contention that such statements are unusually susceptible to fabrication:

This [fabrication argument] is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, *viz.*, the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.<sup>390</sup>

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Rules proposed amendments to the Federal Rules of Evidence that would have addressed some of this asymmetry, not by eliminating the corroboration requirement, but by adding a corresponding requirement that statements against penal interest offered against the accused (that is, by the Government) must be “supported by particularized guarantees of trustworthiness.” Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2433 (2005). That language was proposed to satisfy the confrontation clause requirements imposed by *Ohio v. Roberts*, 448 U.S. 56 (1980). Capra, *supra*, at 2439-40. The amendments were forwarded to the Supreme Court, but before the amendments were adopted the Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* changed the Court’s confrontation clause jurisprudence, and those changes scuttled the proposed amendments. Capra, *supra*, at 2426.

390. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1477, at 358-59 (Chadbourn ed. 1974); *see also* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 278, at 822-23 (Edward W. Cleary ed., 3d ed. 1984) (“Wigmore rejects the argument of the danger of perjury since the danger is one that attends all human testimony . . . .”); *Donnelly v. United States*, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting) (“[N]o other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . .”). Justice Holmes, however, nonetheless went on to advocate for a corroboration requirement for statements against penal interest offered by a criminal defendant. *Id.* at 278.

Moreover, limiting the admissibility of evidence because of a concern that the evidence might be false is inconsistent with most rules that do not require corroboration and do not permit courts to prescreen otherwise competent testimony to assess its reliability. Outside of the limited gatekeeping function courts in many jurisdictions perform to assess the validity of scientific or expert testimony<sup>391</sup> (and of course, the rule against hearsay), our system typically does not prescreen evidence for reliability, but relies on juries and cross-examination to test the veracity of evidence.

Indeed, even some of the most notoriously unreliable—and most frequently fabricated—evidence is typically not subject to any such prescreening or limitation based upon concerns about easy fabrication when offered by the State. Jailhouse snitch or informer testimony is widely recognized as easily and frequently fabricated, because such witnesses are “incentivized”<sup>392</sup>—they are frequently offered, or at least expect, favorable treatment in their own cases in return for evidence against a defendant.<sup>393</sup> Unlike third-party perpetrator evidence or statements against interest, which might require witnesses to make statements contrary to their own interests, jailhouse snitches have no such disincentive to lie; to the contrary, they have an overt incentive to lie. Not surprisingly, jailhouse snitch testimony has been shown to be a leading cause of wrongful convictions of the innocent.<sup>394</sup> Because it is so easily concocted, it is also a significant contributor to the problem of tunnel vision. When police or prosecutors, focused on a suspect, fear that they have insufficient evidence to convict in a serious case, a devious inmate can frequently be found to bolster the State’s case with

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391. See *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

392. ROB WARDEN, *THE SNITCH SYSTEM: HOW INCENTIVISED WITNESSES PUT 38 INNOCENT AMERICANS ON DEATH ROW* (2002), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Snitch.htm>.

393. For a description of how jailhouse snitches manufacture their evidence, see Steven Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at A1.

394. Scheck, Neufeld & Dwyer’s analysis of the first sixty-two DNA exonerations found that jailhouse snitch testimony played a part in 21 percent of the cases. SCHECK ET AL., *supra* note 5, at 156. A more recent analysis of the first 111 cases in which a person sentenced to death was released based on evidence of innocence found that jailhouse snitch testimony was the leading cause of the wrongful convictions in that category of cases, present in 45.9 percent of the death row exonerations. NORTHWESTERN UNIV. SCH. OF LAW, CENTER ON WRONGFUL CONVICTIONS, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3* (2004-2005), available at <http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf>.

claims that the defendant confessed to him or her.<sup>395</sup> Yet, recommendations for special prescreening rules and limitations on admissibility of this type of evidence have been almost uniformly rejected by courts and legislatures.<sup>396</sup> If concerns about easy and frequent fabrication of jailhouse snitch testimony do not warrant special limitations on admissibility, surely those concerns do not warrant limitations on admissibility of third-party perpetrator evidence or statements *against* one's penal interest.

Preventing jury confusion or distraction, waste of judicial resources, or jury speculation is also an important goal. But that concern applies to any evidence, not just third-party-perpetrator evidence offered by a defendant. Concerns about confusion, distraction, and waste of resources in other contexts are handled by a balancing of the probative value of the evidence against the risk of unfair prejudice, as provided by Federal Rule of Evidence 403.<sup>397</sup>

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395. The case of Wilton Dedge, who spent twenty-two years in prison for a rape that DNA testing eventually proved he did not commit, is illustrative. *See* Editorial, *It's Time to Right the Wrong*, THE LEDGER (Lakeland, Fla.), Mar. 29, 2005. The State's case against Dedge was suspect from the beginning. *Id.* The primary evidence against Dedge included an eyewitness identification and microscopic hair comparison testimony. *Id.* But the victim originally said her attacker was about six feet tall, 160 pounds and had a receding hairline, while Dedge was only five-foot-six, weighed 125 pounds, and had a full head of hair. *Id.* Moreover, Dedge, who had no criminal record, had eight witnesses who placed him at work at the time of the rape. *Id.* After Dedge's first conviction was reversed on appeal, prosecutors responded by presenting, at his second trial, the testimony of a seven-time convicted felon who said Dedge confessed to him while the two were locked up together. *Id.* The snitch received a significant reduction in his sentence in return for his testimony. *Id.* Dedge was convicted again, and remained in prison until DNA testing finally proved his innocence. *Id.*; *see also* Innocence Project, Case Profiles: Wilton Dedge, [http://www.innocenceproject.org/case/display\\_profile.php?id=149](http://www.innocenceproject.org/case/display_profile.php?id=149) (last visited Mar. 28, 2006).

396. Numerous studies and governmental inquiries have proposed limitations on jailhouse snitch or informer testimony. *See, e.g.*, STATE OF ILL., *supra* note 16, at 119-24; Province of Manitoba, *supra* note 19, at 6-7. Little has been done, however, to implement such recommendations. Several courts have also attempted to remedy the problem, but their attempts have been quickly reversed. *See, e.g.*, *Dodd v. State*, No. F-97-26 (Okla. Crim. App. July 22, 1999) (imposing a pretrial "reliability" hearing to screen out unreliable snitch testimony), *reh'g granted vacating and withdrawing opinion*, No. F-97-26 (Okla. Crim. App. Oct. 6, 1999), *new opinion issued in 2000* OK CR 2, ¶ 2, 993 P.2d 778, 784 (requiring discovery related to snitches, but no "reliability hearings"); *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998) (holding that, under 18 U.S.C. § 201(c)(2), no party, including the government, can offer incentivized testimony), *rev'd en banc*, *United States v. Singleton*, 165 F.2d 1297 (10th Cir. 1999) (holding that the government is exempt from the prohibition against offering inducements to witnesses).

397. FED. R. EVID. 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

Indeed, some have suggested that the direct connection doctrine, in particular, is not really an enhanced relevance standard, but merely “a specialized application of the balance between probative value and countervailing considerations.”<sup>398</sup>

Regardless of whether the doctrine is conceptualized as a heightened relevancy requirement or an application of the balancing of probative value versus prejudicial effect, it is clear that the rule reflects more than an unexceptional expression of the routine weighing of probative value and unfair prejudice. Under the standard Rule 403 balancing analysis, evidence is presumptively *admissible* unless its probative value is *substantially* outweighed by the danger of *unfair* prejudice or other countervailing factor.<sup>399</sup> The direct connection doctrine reverses the Rule 403 burden and presumption. Third-party perpetrator evidence is, in effect, presumptively *inadmissible* unless the defendant can show a direct connection to the charged crime, and that burden, as we have seen, is not insubstantial. As Professor Ellen Suni has explained, the direct connection doctrine “substitutes a mechanical determination of connection for the careful balancing of probative value and legitimate prejudicial effect that is normally necessary to exclude relevant evidence.”<sup>400</sup> Hence, the Rule 403 analogy does not explain or justify the direct connection doctrine, but merely leads to the question: “[W]hy is evidence offered by a criminal defendant that merely casts suspicion on an [alternate perpetrator] almost invariably excluded, while evidence offered by the prosecution that merely casts suspicion on the *defendant* routinely admitted—and usually without any explicit effort to balance probative value against countervailing considerations?”<sup>401</sup>

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of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

398. McCord, *supra* note 336, at 975.

399. FED. R. EVID. 403.

400. Suni, *supra* note 342, at 1683.

401. McCord, *supra* note 336, at 975. McCord answers that question by suggesting that the asymmetry in the probative-prejudice balancing is explained, and justified, by the asymmetry in the burdens of proof that apply in criminal trials. Because the prosecution must prove guilt beyond a reasonable doubt, he contends, there is little danger that admitting evidence of the defendant’s opportunity or motive alone “will result in the prosecution’s suggesting—but not really showing—the defendant’s guilt.” *Id.* at 976. If the State’s evidence is insufficient to establish proof beyond a reasonable doubt, the court must (theoretically) intervene as a matter of law and acquit. *Id.* But, McCord says, because the defendant does not have to prove anything—let alone that a third party committed the crime—admissibility of weak alternative-perpetrator evidence might indeed lead to an acquittal based on speculation rather than a reasonable doubt, which a court cannot intervene to prevent. *Id.* McCord’s analysis on this point, however, essentially permits the rules of evidence to compensate for, and

The concern regarding speculation is particularly troubling. Circumstantial evidence (which is what is typically at issue, given that direct evidence, by definition, should satisfy the direct connection doctrine) is rarely conclusive, requiring fact finders to make inferential connections to arrive at a judgment. Yet courts routinely recognize that circumstantial evidence can support the inferences necessary to establish proof beyond a reasonable doubt.<sup>402</sup> Even when reviewing whether the State presented evidence sufficient to meet its high burden of proof beyond a reasonable doubt, which the Supreme Court has held presents a question of constitutional law,<sup>403</sup> courts reject the contention that the evidence was merely speculative unless the evidence was virtually absent on an essential element of the crime.<sup>404</sup>

Even greater deference to the fact finders—which should at least include permitting the jurors to hear the disputed evidence—should apply when a criminal defendant offers evidence of a third-party perpetrator. Unlike the State, the defendant need not meet any burden of proof whatsoever. Evidence that might require speculation to satisfy the high burden of proof beyond a reasonable doubt might require no speculation at all to undermine the State’s proof. To create reasonable doubt, the jury need not speculate that the third party actually committed the crime, because the jury need not conclude that the third party actually committed the crime; the jury must only be sufficiently and reasonably unsettled about the sufficiency of the State’s proof.<sup>405</sup> That determination will be made, as it should be, on an assessment both of the strength of the evidence against the defendant, and the strength of the exculpatory evidence presented by the defendant, including any third-party-perpetrator evidence. The stronger the State’s evidence, the less likely it is the jury will have its confidence in the defendant’s guilt undermined by weak evidence that an alternate perpetrator committed the crime; the weaker the State’s evidence, or the stronger the third-party evidence, the more likely the jury will entertain reasonable doubt.

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therefore dilute, the constitutionally required burden of proof and presumption of innocence at trial.

402. See, e.g., *State v. Poellinger*, 153 Wis. 2d 493, 499-500, 451 N.W.2d 752, 755 (1990).

403. *Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979).

404. See Irene Merker Rosenberg & Yale L. Rosenberg, “*Perhaps What Ye Say Is Based Only on Conjecture*”—*Circumstantial Evidence Then and Now*, 31 HOUS. L. REV. 1371, 1416 (1995) (stating that, under *Jackson*, “the appellate court will disturb a verdict based on circumstantial evidence only when the jury has no justifiable or rational bases for its inferences, in effect applying the discredited no-evidence test”).

405. In this sense, “[t]he direct connection doctrine improperly shifts the focus of admissibility from whether the evidence sought to be offered has a tendency to negate the defendant’s guilt to how effectively it proves the guilt of the alternative perpetrator.” Suni, *supra* note 342, at 1683.

Excessive concern about speculation need not interfere with that balance; to a great extent, the concern about speculation impermissibly imposes on the defense a burden of proof that it constitutionally cannot be made to bear.

There is no good reason that anything more than the traditional balancing of probative value against countervailing factors ought to apply to third-party-perpetrator evidence offered by the defense.<sup>406</sup> All of the legitimate concerns animating the direct connection doctrine can be satisfied fully and fairly by evenly applying the Rule 403 balancing principle. By going beyond that, the direct connection doctrine institutionalizes tunnel vision, and does so without good reason.

There is little support—in experience or logic—for the fears expressed by some courts that, without the direct connection doctrine, defendants would flood their trials with irrelevant and distracting evidence about the conduct of others.<sup>407</sup> Although most jurisdictions adhere to the direct connection doctrine, there are jurisdictions in the United States that do not, and there is no evidence that courts in those jurisdictions are inundated with specious alternative-perpetrator evidence.<sup>408</sup> Even without the direct connection doctrine, courts still retain discretion to regulate the amount and flow of evidence to prevent presentation of truly irrelevant or cumulative evidence. In reality, no reasonable defense attorney would want to engage in such an obvious act of desperation—piling on patently weak or overly extensive alternative-perpetrator evidence—given the damage it would do to the defense's credibility, and to the jury's patience.

Efficiency concerns, therefore, should not trump the right to present relevant evidence of alternative suspects. At a commonsense level, most people would agree that, in deciding whether someone committed a wrong, it would be important to consider all of the

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406. Indeed, Professor Katherine Goldwasser has argued that, because of our constitutional preference for erring on the side of acquittal rather than wrongful conviction, Rule 403 balancing ought not be used to exclude exculpatory defense evidence, at least without exceptionally powerful factors that overwhelm the probative value of the evidence. Goldwasser, *supra* note 333.

407. See, e.g., *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12, 17 (1984) (“[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased—degenerating the proceedings into a trial of collateral issues.”).

408. McCord has identified eight jurisdictions that “seem to rely on the standard balancing of probative value versus unfair prejudice (or other relevancy determinations),” three that add a “capable-of-raising-a-reasonable-doubt approach” without equating it to the direct connection doctrine, and one that directly rejects the direct connection doctrine “as setting too high a standard.” McCord, *supra* note 336, at 937-38.



reasonable alternative suspects. The logic in this approach stems, in part, from another natural psychological tendency: the preference people typically exhibit for making relative judgments—comparing one thing to the next to decide which fits best—as opposed to making absolute judgments.<sup>409</sup> Prosecutors seem to understand this intuitively, as they frequently present evidence of alternative suspects who were investigated and excluded. They do this both to rebut any possible suggestion that the police investigation was not thorough or competent, and also to demonstrate that, comparatively, the person on trial is the most likely suspect. Ironically, there are no restrictions on prosecutors' abilities to use weak and discredited alternative-suspect evidence to bolster the claim that the defendant must have committed the crime; in this sense, the direct connection doctrine creates another asymmetry that favors the prosecution.

From the defendant's perspective, the relative judgment process means that a defendant who presents weak alternative-perpetrator evidence runs the risk of making himself or herself look comparatively even guiltier. Hence, there is no real risk that defendants will introduce too much or too weak alternative-perpetrator evidence, or that use of such evidence will mislead juries into acquitting inappropriately; the relative judgment process suggests that presenting marginal alternative-suspect evidence would likely enhance the likelihood of conviction, not lead to a risk of an "erroneous acquittal."<sup>410</sup> Conversely, preventing defendants from introducing such evidence in situations where they deem it helpful to their cause does run

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409. The relative judgment process is explored extensively in the context of explaining how eyewitnesses react to photospreads and lineups. See, e.g., Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 613-17 (1998); Gary Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 ANNUAL REV. OF PSYCHOL. 277, 286 (2003); Gary Wells & Elizabeth Loftus, *Eyewitness Memory for People and Events*, in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 149, 157-58 (Goldstein et al. eds., 2003).

410. Some courts have suggested that one reason for limiting alternative perpetrator evidence—a reason related to the concern that juries might speculate—is that it might produce "erroneous acquittals." See *State v. Scheidell*, 227 Wis. 2d 285, 304, 595 N.W.2d 661, 671 (1999). Such a concern, however, distorts the fundamental principles that underlie our criminal justice system and "ignores the value our system places on avoiding conviction of the innocent." Suni, *supra* note 342, at 1687. Through the presumption of innocence and the requirement of proof beyond a reasonable doubt, our system expresses a preference for allowing acquittal of some guilty people to minimize the risk of convicting the innocent. If we take the presumption of innocence and requirement of proof beyond a reasonable doubt seriously, "to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable." Goldwasser, *supra* note 333, at 635-36.

the risk of foreclosing legitimate options, misleading the jury, and inducing wrongful convictions.<sup>411</sup>

Moreover, in assessing whether trial considerations justify this type of prescribed tunnel vision, other effects of this evidence-limiting doctrine must be considered as well. In addition to directly promoting this tunnel vision effect at trial, the direct connection doctrine also might indirectly encourage or reward tunnel vision in law enforcement at the pretrial investigation stage. The rule might serve as a disincentive for police to investigate any suspects other than the defendant they have selected. If police look too hard at alternate suspects, and develop too much evidence, they might weaken their case by providing an evidentiary basis for admitting the third-party evidence. Suni has argued that,

[i]f police and prosecutors know that defendants have limited resources to investigate other possibilities, and that even if defendants obtain resources to do so, evidence that they find will be unusable unless they can establish a direct connection to the crime, police and prosecutors will have little incentive to explore alternative theories once they have reached a preliminary conclusion.<sup>412</sup>

On the other hand, it might be that the direct connection rule has the opposite effect on investigator and prosecutor decision-making. That is, investigators and prosecutors might feel more confident exploring alternate suspects knowing that the rule makes it unlikely that defendants will be permitted to introduce third-party perpetrator evidence detrimental to the case against the primary suspect. Further research would be useful to better understand the actual effect of the rule on investigative decision-making.

In either event, there might be “significant systemic benefits” to eliminating the direct connection doctrine “even in cases of relatively strong evidence of guilt and weak alternative perpetrator showings.”<sup>413</sup> As Suni has explained,

Over time, if alternative perpetrator evidence is admissible at trial, police may have an incentive to better investigate all

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411. The direct connection doctrine “totally prevents a defendant from introducing evidence to advance an alternative perpetrator theory of defense unless the defendant can overcome a high preliminary hurdle by showing a direct connection. In doing so, the doctrine totally excludes relevant defense evidence from consideration by the jury.” Suni, *supra* note 342, at 1682 (footnotes omitted).

412. *Id.* at 1690 (citations omitted).

413. *Id.* at 1691.

alternatives. Such an expanded investigation may unearth evidence that clearly demonstrates that the alleged alternative perpetrator is not guilty of the offense. This will likely preclude the defendant from advancing the alternative perpetrator theory and make conviction of a guilty defendant more likely. Alternatively, the police may find evidence during their expanded investigation indicating that the alternative perpetrator, rather than the defendant, is responsible for the crime.<sup>414</sup>

At the very minimum, we must at least acknowledge that rules such as the direct connection doctrine have a tunnel-vision-enhancing function. If they are to be retained, they must be retained only after careful consideration of these harmful effects, and critical assessment of the arguments that purportedly support them. Such careful consideration powerfully suggests that the direct connection doctrine cannot be justified. Instead, traditional rules of relevance and balance between probative value versus prejudicial effect, tempered by sensitivity to the effects of exclusion on tunnel vision, should govern this evidence. In determining relevance, “courts should be clear that the focus is not on whether the evidence establishes the guilt of the third party, but on what relevance the evidence has to the guilt or innocence of the defendant on trial.”<sup>415</sup> And, when balancing probative value against prejudice, “the court should ‘ask what rational inferences of innocence the evidence supports, what risks of improper decision the evidence poses, and whether any response short of exclusion could secure the probative value of the evidence without its prejudicial baggage.’”<sup>416</sup> As Suni has concluded, courts should exclude relevant alternative-perpetrator evidence “only if it can make a finding on the record ‘that the jury’s consideration of the proffered evidence would make an irrational acquittal substantially more likely than a rational conviction.’”<sup>417</sup> Understood in the framework of this Article, liberalizing the admissibility rules governing third-party-perpetrator evidence at trial would serve an important role in combating tunnel vision at the police investigation level.<sup>418</sup>

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414. *Id.* (citations omitted).

415. *Id.* at 1692.

416. *Id.* at 1693 (quoting Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1421 (1996)).

417. *Id.* (quoting Dripps, *supra* note 416, at 1420).

418. Some movement in that direction may be under way already, in part as a response to the problem of wrongful convictions. Just before this Article was set to go to press, the United States Supreme Court decided *Holmes v. South Carolina*, in which

## 2. EXPANDED APPELLATE REVIEW OF THE FACTS UNDERLYING GUILT DETERMINATIONS

As also discussed above, deferential standards of review of factual guilt determinations constitute a form of prescribed tunnel vision. Understood in this way, it becomes important to determine whether this norm is justified.

As we have seen, the deference to trial courts on questions of fact is usually justified by considerations of institutional competence—appellate courts are not well situated to make factual determinations because they do not actually see and hear witnesses testify. Recently, however, scholars have argued that such deference is not always warranted, at least not on all factual issues where serious claims of innocence are at stake in criminal cases.

For example, Professor Chad Oldfather has pointed out that the conventional wisdom about the institutional inferiority of appellate courts in deciding factual questions is simply wrong in some respects.<sup>419</sup> While certainly appellate courts do lose significant information because of their inability to watch witnesses testify in person—because much of the meaning conveyed by oral communication is expressed outside the actual words spoken—they are actually better situated than juries in other respects to make factual judgments. Empirical research has shown that basing fact-finding on nonverbal cues can be misleading. People are best able to detect lies when they listen without looking at the speaker.<sup>420</sup> And, contrary to the conventional wisdom about the

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the Court addressed South Carolina's particularly draconian version of the direct connection doctrine. 126 S. Ct. 1727 (2006). In *Holmes*, the South Carolina Supreme Court had held that a defendant may not introduce proof of third-party guilt if the prosecution had introduced forensic evidence that, if believed, strongly supported a guilty verdict. *Id.* at 1730. While acknowledging the widely accepted general limitations on third-party-perpetrator evidence, which the U.S. Supreme Court characterized as a specific application of the Rule 403 balancing test, the Court held that South Carolina's variation of the rule went too far and violated the defendant's constitutional right to present a defense. *Id.* at 1734-35. The Court noted that, under South Carolina's rule, if the prosecution appeared to have a strong case, no third-party guilt evidence, no matter how powerful or direct, was admissible. *Id.* This, the Court said, "does not rationally serve the end that the [direct connection doctrine was] designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 1734. The Court was also troubled by the asymmetry created by the South Carolina rule: "The rule applied in this case is no more logical than its converse would be, *i.e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty." *Id.* at 1734-35.

419. Oldfather, *supra* note 357, at 439-40, 449-66.

420. *Id.* at 459.

deficiencies of a “cold record,” people who base their judgments about veracity on a written transcript “perform[] nearly twice as effectively at detecting deceit as those exposed to both audio and visual cues.”<sup>421</sup>

Appellate courts also enjoy other advantages over trial courts and juries in making some factual determinations. Oldfather has explained that the complexity of the information presented at trial often makes it difficult to assimilate all the salient information through such fleeting presentations as witness testimony.<sup>422</sup> Jurors have little opportunity to reflect on what they just heard, or to organize it into a logical and coherent scheme. A juror “may fail to connect a piece of information with the rest of what she has heard, fail to understand it, forget it, or simply miss it altogether.”<sup>423</sup> For an appellate court with access to a written transcript, by contrast, the evidence is static, not fleeting, and is available to be read and reread, organized, and analyzed.<sup>424</sup> While evidence presentation at a trial is cumbersome and disjointed, presented witness-by-witness rather than in some overarching logical order, appellate courts can reorder the information to make comparisons, note inconsistencies and gaps, and “test whether the information works as a syllogism,” and thus whether it is consistent “with logic.”<sup>425</sup>

Oldfather has therefore contended that, while juries and trial courts have significant advantages over appellate courts when it comes to factual determinations that are particularly dependent on observing witness demeanor, they do not have an advantage with other types of fact-finding. For example, Oldfather has noted that appellate courts may have an institutional advantage in deciding factual issues that require particular experience or knowledge that juries are not likely to possess, such as factual issues about the reliability of an eyewitness identification that might require a more general understanding of the fallibility of eyewitness identifications and the psychological factors that can influence them.<sup>426</sup> In addition, appellate courts would likely have an institutional advantage in considering circumstantial and documentary evidence, and some types of hearsay evidence that do not rely on the jury’s observational powers at trial at all.<sup>427</sup>

Our point is that, in criminal cases, it might make sense to permit appellate courts to more aggressively review sufficiency of the evidence

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421. *Id.*

422. *Id.* at 451.

423. *Id.*

424. *Id.* at 454-56.

425. *Id.* at 457. In this way, Oldfather has argued that a transcript “facilitates a mode of thinking that is more consistent with the ideal of legal thought.” *Id.* at 456.

426. *Id.* at 459-63.

427. *Id.* at 463-66.

claims in cases where innocence and guilt are the central concern, at least where the evidence relied upon to convict is a type that appellate courts are institutionally capable of reviewing. Oldfather has noted that, while courts “almost never reverse convictions” on sufficiency grounds in criminal cases,<sup>428</sup> they take a much more active role in reviewing sufficiency of the evidence in civil cases. An analysis of 208 cases in which a court addressed challenges to the sufficiency of the evidence to support a jury verdict in civil cases revealed that courts found the evidence insufficient in at least one sense in 102, or 49 percent, of the cases.<sup>429</sup> Other empirical data is consistent with that finding.<sup>430</sup> Logically, one would expect to see greater scrutiny of facts in criminal cases than civil cases. In civil cases, facts are decided by the preponderance of the evidence, so significantly less evidence should be required to support a factual determination than in criminal cases, where proof must be established beyond a reasonable doubt. In criminal cases, the higher burden of proof places the risk of error on the government, while in civil cases the preponderance standard apportions the risk of error roughly equally between the litigants. While one would therefore expect to see greater involvement in reviewing sufficiency of the evidence in criminal cases, and less in civil cases, the data reveal just the opposite: “The problem is that the courts have their allocation of resources backwards.”<sup>431</sup>

Appellate standards of review therefore should be reevaluated, at least concerning issues related to the reliability of the guilt determination. Oldfather has suggested that appellate review should be recalibrated to incorporate the notion of institutional competence at the case-by-case level, so that the degree to which an appellate court reviews the facts would turn in part in each case on the court’s assessment of its institutional capacity to review the type of factual determination or evidence at issue.<sup>432</sup> Oldfather has suggested that courts should have to consider in each case “whether the nature of a particular sort of evidence in a particular case is such that the appellate

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428. *Id.* at 478.

429. *Id.* at 497.

430. *Id.* at 498.

431. *Id.* at 503. As Oldfather has explained:

Our criminal justice system places an asymmetric premium on factual accuracy, such that avoidance of wrongful convictions is (at least in most accounts of the system) of paramount importance. As such, the value that would flow from effective appellate scrutiny of facts is relatively high. Our civil justice system, in contrast, places a comparatively low value on factual accuracy and a relatively high value on the role of the jury.

*Id.*

432. *Id.* at 506, 509.

court could do a better job of evaluating it than could the responsible actor at the trial level.”<sup>433</sup>

Others also have suggested permitting greater scrutiny of guilt determinations in criminal cases, at least where the case includes an “innocence-in-fact” claim.<sup>434</sup> For example, Professor Michael Risinger has suggested that American courts should adopt something similar to the British “unsafe verdict” standard for reviewing claims of actual innocence.<sup>435</sup> Under Risinger’s standard, when a claim of actual innocence is raised, a reviewing court would be required to engage in a probing review of the evidence, including evaluating (instead of accepting at face value) the strength of the State’s evidence where appropriate and permitting courts to consider “any relevant fresh evidence, including research results casting doubt on the kind of evidence relied upon at trial.”<sup>436</sup>

Expanding the role of appellate courts would be consistent with modes of fact-finding in other contexts, where it is not unusual to have someone who reviews a written record serve as the ultimate fact finder. For example, in police internal disciplinary cases, a high-level police official typically makes the determination of factual guilt or innocence based upon a review of the written investigative file.<sup>437</sup> Similarly, administrative agencies with significant fact-finding responsibilities, such as the National Traffic Safety Board, make determinations of historical facts in important matters based upon a written record of the evidence in a case or incident following a field investigation, or

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433. *Id.* at 509. Appellate courts in some states have historically engaged in more aggressive review of some sufficiency-of-the-evidence claims in criminal cases, particularly those related to circumstantial evidence. *See, e.g.*, Stephen L. Richards, *Reasonable Doubt Redux: The Return of Substantive Criminal Appellate Review in Illinois*, 34 J. MARSHALL L. REV. 495, 515-21 (2000-2001) (tracing the historical practice in Illinois of reviewing sufficiency-of-the-evidence claims in cases that turn on particular types of evidence, including circumstantial evidence); Elizabeth A. Ryan, *The 13th Juror: Re-evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH. L. REV. 1291, 1294 (2005) (criticizing a Texas law providing for more searching review of factual sufficiency claims than required by *Jackson v. Virginia*).

434. *See* Rosenberg & Rosenberg, *supra* note 404, at 1416 (arguing that appellate courts should review evidence independently for reasonable hypotheses of innocence in circumstantial evidence cases, given that in such cases “guilt is based . . . on inferences from the evidence, and the [appellate] court is in as good, if not better, position to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt”).

435. Risinger, *supra* note 356, at 1331-33.

436. *Id.* at 1332.

437. *See* JAMES J. FYFE ET AL., *POLICE ADMINISTRATION* 467-78 (5th ed. 1997).

sometimes following a hearing that produced a written transcript of the proceedings.<sup>438</sup>

Whatever its form, more active appellate review of factual innocence claims in criminal cases would be at least be one step toward freeing appellate courts from prescribed tunnel vision.

### *B. Education and Training*

Education is an important and frequently suggested part of the solution to the tunnel vision problem.<sup>439</sup> It is obviously important to sensitize police, prosecutors, defense lawyers, and judges to the problem, to help them understand its consequences and the nature and effects of its underlying cognitive biases and institutional pressures. Beyond helping these individuals understand the nature and effects of the problem, the more difficult educational challenge is to equip these actors with the tools to help them overcome the cognitive biases and institutional pressures that produce tunnel vision.

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438. See John F. Easton & Walter Mayer, *The Rights of Parties and Civil Litigants in an NTSB Investigation*, 68 J. AIR L. & COM. 205, 214-17 (2003).

439. Most inquiries into to the problem of wrongful convictions, and specifically to tunnel vision, call for better education of police and prosecutors. The Illinois Commission on Capital Punishment, for example, specifically recommended that police investigators should receive periodic training in the following areas: (1) the risks of false testimony by in-custody informants (“jailhouse snitches”), (2) the risks of false testimony by accomplice witnesses, (3) the dangers of tunnel vision or confirmatory bias, (4) the risks of wrongful convictions in homicide cases, (5) police investigative and interrogation methods, (6) police investigating and reporting of exculpatory evidence, (7) forensic evidence, and (8) the risks of false confessions. STATE OF ILL., *supra* note 16, at 40; see also ABA CRIMINAL JUSTICE SECTION, AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 95 (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA REPORT] (calling for police training that includes “presentation and discussion of actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person, thus compromising public safety”); MINISTRY OF THE ATTORNEY GEN. OF ONT., REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN 26 (2005), available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin\\_recom.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf) (recommending training about tunnel vision); Burke, *supra* note 127 (arguing for increased education for prosecutors about cognitive biases); Medwed, *supra* note 196, at 170 (arguing for better education to help prosecutors “transform[] the theoretical underpinnings of their ethical obligations to do justice in the postconviction sphere into a reality of everyday practice”); Fisher, *supra* note 262, at 201-02 (calling for a better definition of and education about prosecutors’ “quasi-judicial role”); Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in WRONGLY CONVICTED 36, 48 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (calling for better training to help police understand the psychology of interrogation and suspect decision-making, and improve the ability of police to recognize and prevent false confessions).



The challenge is difficult because the cognitive biases that contribute to the problem are not easily suppressed by self-awareness, training, or practice. Unfortunately, research suggests that merely informing people about a cognitive bias, or urging a person to overcome the bias, is to some degree ineffective.<sup>440</sup> For example, research shows that people are incapable of overcoming hindsight bias even when advised about it and instructed to try to ignore reported outcomes.<sup>441</sup> That is to say, outcome information has a substantial effect on judgments even when individuals are given unambiguous instructions to ignore the outcome information.<sup>442</sup>

Education and training can nonetheless have some beneficial effect. Asking individuals to consider the opposite of their position, and to articulate the reasons why the results at issue could have been different, is somewhat helpful in overcoming hindsight bias.<sup>443</sup> Confirmation bias tends to produce, among other things, overconfidence about the accuracy of one's own judgments.<sup>444</sup> Research suggests that this "illusion of validity"<sup>445</sup> also can be reduced to some degree by forcing people to articulate reasons that counter their own position.<sup>446</sup> Similarly, while belief perseverance is extremely powerful, it can be mitigated if individuals are compelled to explain why beliefs contrary to their own might be true.<sup>447</sup> But it is difficult to get people to argue against their own position, and even when they do, overconfidence in their positions is generally only reduced, not eliminated.<sup>448</sup>

To facilitate this process, education must be coupled with other mechanisms that institutionalize the process, and that make counterarguing an established part of every investigation and prosecution. We explore some ideas for facilitating this process in

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440. Bibas, *supra* note 363, at 5; Richard M. Kurtz & Sol L. Garfield, *Illusory Correlation: A Further Exploration of Chapman's Paradigm*, 46 J. CONSULTING & CLINICAL PSYCHOL. 1009 (1978); Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 32 (Daniel Kahneman et al. eds., 1982).

441. Hawkins & Hastie, *supra* note 200, at 312; Harley, Carlsen & Loftus, *supra* note 200, at 960, 963.

442. Hawkins & Hastie, *supra* note 200, at 314.

443. *Id.* at 318 (citing Hal R. Arkes et al., *Eliminating the Hindsight Bias*, 73 J. APPLIED PSYCHOL. 305 (1988); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984)).

444. Nickerson, *supra* note 127, at 188.

445. *Id.*

446. *Id.*

447. Lieberman & Arndt, *supra* note 184, at 691.

448. *Id.*

greater detail later in this Article.<sup>449</sup> Moreover, because pet theories or set conclusions about guilt are so difficult to overcome, much of the training must focus on helping police, prosecutors, defense lawyers, and judges understand why it is important to suspend judgment as long as possible, and to resist the impulse to develop conclusions about a case too soon.<sup>450</sup> Once developed, judgments about a case can distort subsequent perceptions and can be very difficult to dislodge, even with an awareness of the cognitive biases at play.

A new awareness or understanding of the roles of police and prosecutors is necessary. Although the adversary system exerts polarizing pressures that feed the cognitive distortions underlying tunnel vision, it is possible to layer some features of a more neutral, inquisitorial system within the adversarial framework.<sup>451</sup> The police investigative function, in particular, can be conceived as an essentially inquisitorial one.<sup>452</sup> In general, police and prosecutor training needs to place greater value on neutrality, emphasizing the need to postpone judgment, and to develop all the facts rather than merely building a case against a suspect.

We offer a few special considerations relating to the education and training of police, prosecutors, and judges below.

# 1. POLICE

Once again, police interrogation training serves as an example—here as an example of the way in which a paradigm shift can be effected through new training. As discussed in Part II.C.1, interrogation training that encourages police both to make judgments about guilt or innocence before the proof is in, and then to interrogate a suspect for the purpose of obtaining a confession, is a form of deliberate tunnel vision. Like all forms of tunnel vision, it runs the risk of obscuring the truth. Defenders of the Reid Technique maintain that it works because it gets suspects to confess, and that it is necessary in

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449. See *infra* notes Parts III.D.1.c., e. & f., and Parts III.D.2.c. & d.

450. See *infra* Part III.C.1. & 2.

451. See, e.g., Thomas M. Williamson, *From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning*, 3 J. COMMUNITY & APPLIED SOC. PSYCHOL. 89, 89 (1993).

452. See *id.* at 90 (“Within the adversarial system, it is Police questioning which is the most important inquisitorial element.”). Others have noted that in a similar way, to some extent innocence projects, with their focus on utilizing DNA to obtain the truth, whatever it might be, operate as an inquisitorial layer at the conclusion of the adversarial criminal process. See Ralph-Pierre Grunewald, *The Role of Innocence Projects in American Criminal Procedure* (2005) (unpublished LL.M. thesis, University of Wisconsin-Madison) (on file with authors).

the harsh world of criminal investigations.<sup>453</sup> Given the potential for harm, those claims ought to be carefully scrutinized and must be balanced against the risk of convicting the innocent (and correspondingly, failing to convict the truly guilty). In the end, tunnel vision suggests the need to consider altering the dominant paradigm of criminal investigations from a focus on making a case against a chosen suspect to a more objective search for the truth.

Police training is important in other respects as well. Whether any police officer naturally possesses the mental abilities necessary to guard against tunnel vision, police agencies should ensure that all officers—pre-service recruits, patrol officers, detectives, and supervisors—receive some formalized training about the various psychological phenomena that contribute to tunnel vision and, ultimately, to erroneous investigations. Such training should include an understanding of the fallibility of eyewitnesses' memories; the memory-distorting effects of certain eyewitness identification procedures; the reasons why and conditions under which suspects will falsely confess to the police; the potential to fixate on one theory of a criminal case to the exclusion of rival theories; and the tendency to become defensive about one's professional decisions, methods, and judgments. Training exercises might include role-playing scenarios where police trainees witness an incident and are subsequently asked to describe and identify the individuals involved in the incident. These sorts of training exercises can be profoundly influential in helping police officers recognize their own memory fallibility, and consequently, to better appreciate the fallibility of other eyewitnesses. Other training exercises might lead police trainees to draw erroneous conclusions from obvious, but false or misleading, clues in criminal cases.<sup>454</sup> Police trainees should also have some of their own criminal case investigations subjected to

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453. Inbau et al., for example, have argued:

[A] killer would not have been moved one bit toward a confession by being subjected to a reading or lecture regarding the morality of his conduct. It would have been futile merely to give him a pencil and paper and trust that his conscience would impel him to confess. Something more was required—something that was in its essence an “unethical” practice on the part of the investigator—but under the circumstances involved in this case, how else would the murderer’s guilt have been established?

INBAU ET AL., *supra* note 290, at xv.

454. For example, trainees might read investigative reports that indicate that a suspect's DNA was conclusively matched to DNA found at a crime scene, but have it subsequently revealed that either the suspect's identical twin was the true perpetrator or that there was an innocent explanation for the presence of the DNA at the scene. The purpose of such exercises is to reinforce the notion that even strong direct evidence can be explained by other than the most apparent explanation, and, therefore, can be misleading.

critique, partly to improve their investigative techniques and skills, but partly to gauge how well they handle critiques and to help them be more comfortable with having their work critiqued. Case studies of investigations known to have resulted in wrongful arrests, prosecutions, and convictions might be used to train investigators to recognize the critical points in the investigation where decisions took the investigation down the wrong path. Those who train police officers in criminal investigation would do well to review known cases of tunnel vision and wrongful arrest to improve training.

There is an abundance of specialized training available for police investigators, ranging from forensic science to interrogation techniques. There is less available in the areas pertaining to the tunnel vision phenomenon. Training programs that serve the police investigation field should remedy this training gap. The textbooks and training documents that supplement criminal investigation training programs should likewise devote greater attention to tunnel vision and its contribution to wrongful arrest and conviction. Commendably, some such recent publications already do so.<sup>455</sup>

## 2. PROSECUTORS AND JUDGES

Like police officers, prosecutors and judges should be educated about the causes of, and correctives for, tunnel vision.<sup>456</sup> This education should begin in the juris doctorate programs in law schools and continue through the various continuing legal education opportunities afforded to prosecutors and judges by law schools, national and state judicial and prosecutorial colleges and institutes, state bar associations, and so forth.<sup>457</sup>

Professor Alafair Burke has noted that, because established beliefs in guilt can be so difficult to overcome, “prosecutorial neutrality should be at its peak prior to the prosecutor’s charging decision, before she has

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455. See JAMES W. OSTERBURG & RICHARD H. WARD, CRIMINAL INVESTIGATION: A METHOD FOR RECONSTRUCTING THE PAST (4th ed. 2004) (addressing issues relating to sources of investigator bias, eyewitness identification fallibility, improper interrogation procedures, informant reliability, and wrongful convictions).

456. Fisher, *supra* note 262, at 258; Burke, *supra* note 127, at 30 (advocating training for prosecutors “about the sources of cognitive bias and the potential effects of cognitive bias upon rational decision making”).

457. Joseph Rand has observed that some movement in this direction is beginning in law schools: “We are already seeing a dramatic increase in academic attention to cognitive biases and their effect on legal doctrine, theory, and practice.” Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 734 (2003).

formed a theory of guilt that will taint subsequent information processing.”<sup>458</sup> For this reason, it is especially important that prosecutors be taught to suspend judgment as long as possible—to resist the temptation to assume that the suspect is guilty, and instead to engage in an independent analysis of the case before reaching any assessment.

*C. Procedures and Protocols for Collecting and Assessing Evidence*

A word of caution about police investigative reform is in order: police investigative policies, procedures, and practices have, for a variety of reasons, remained more impervious to change than other dimensions of police work.<sup>459</sup> Although forensic technology has changed and improved dramatically in recent years, most police investigative operations are hampered by excessive caseloads, inadequate case management systems, and insufficient training for investigators.<sup>460</sup> Any effort to significantly reform the police investigation function, including measures described below to remedy tunnel vision, must be done with an appreciation of the factors that have historically inhibited investigative reform.

Improved evidence collection and assessment procedures are important because they minimize the risks of producing tainted evidence that can reinforce the erroneous judgments that contribute to tunnel vision. In this regard, any improvements in the procedures related to factors that contribute to the problem of wrongful convictions will help solve the problem of tunnel vision. Such reforms include, but are not limited to, improving procedures for handling eyewitness identifications, greater safeguards against unreliable jailhouse snitch testimony, electronic recording of interrogations, and better oversight of crime laboratories.<sup>461</sup> Reforms in all of these areas are under way, and each improvement makes an incremental correction to the problem of tunnel vision.

To counter the natural preference for seeking out confirming evidence, investigation protocols should require police and prosecutors to test their theories by searching for facts *inconsistent* with their early

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458. Burke, *supra* note 127, at 29.

459. See Frank Horvath, Robert T. Meesig & Yung Hyeock Lee, National Survey of Police Policies and Practices Regarding the Criminal Investigations Process: Twenty-Five Years After Rand 110-11 (Nov. 17, 2003) (unpublished report), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202902.pdf>.

460. *Id.* at 2-4.

461. Improvements in each of these areas are typically recommended following inquiry into the causes of wrongful convictions. See, e.g., STATE OF ILL., *supra* note 16, at 19, 31, 40, 51.

assessments of a case—that is, to deliberately seek disconfirming evidence. For example, when evaluating physical evidence, police and prosecutors should consider not just the evidence that was found, but anything that was not found and that one would have expected to find if the suspect had committed the crime. Similarly, when evaluating a confession, police and prosecutors should look carefully for any statements that are not corroborated by other evidence, or that are inconsistent with known facts of the case.<sup>462</sup>

To help overcome the tendency to seek only confirming evidence, former Attorney General Janet Reno, among others, has advocated that police develop checklists to help guide their investigations.<sup>463</sup> Those checklists could require police to note, for example, all the evidence expected to be found, all that was found, all that was sought but not found, all possible suspects and what the investigations into them produced,<sup>464</sup> any inconsistencies in the evidence, and whether nearby

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462. Richard Leo has urged that, when evaluating confessions, “police investigators and prosecutors should routinely review and analyze the statements they take in a genuine effort at external corroboration.” Leo, *supra* note 258, at 100. Leo says that review should include consideration of three factors. Police and prosecutors should: 1) analyze the conditions under which statement was made and the extent to which coercive forces were present; 2) analyze the extent to which the statement contains details that are internally consistent and consistent with known crime facts; and 3) look for the source of details of the confession, that is, examine whether the statement contains details knowable only by the perpetrator. *Id.* In their article published in this symposium issue of the *Wisconsin Law Review*, Leo and his co-authors go a step further and argue that admissibility of confession evidence at trial should turn on weighing three factors: 1) whether the confession contains nonpublic information that can be independently verified that would only be known by the true perpetrator or an accomplice and cannot likely be guessed by chance; 2) whether the suspect’s confession led the police to evidence about the crime that the police did not already know; and 3) whether the suspect’s postadmission narrative ‘fits’ (or fails to fit) with the crime facts and existing objective evidence. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479.

463. Tom Kertscher, *Reno Advocates for Use of a Judicial Checklist*, MILWAUKEE J. SENTINEL, Apr. 23, 2004, at 7B, available at <http://www.jsonline.com/news/state/apr04/224261.asp>; see also Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379, 1435 (2000) (noting that English law provides “checklists of potentially exculpatory evidence—such as notebook entries, first descriptions by potential witnesses, information from tapes or telephone records, [and the] defendant’s explanation of an offense,” which police must keep, turn over to the prosecutor, and, if appropriate, disclose to the defense).

464. If police had listed all possible suspects and the results of the investigations into them in the Steven Avery case, for example, and if that information had then been disclosed to the prosecution and then the defense, the name of Gregory Allen (the true perpetrator) would have come to light much sooner in the case (because he was indeed a known suspect early in the investigation, but was never pursued), and

police agencies have been consulted to identify possible alternative perpetrators.<sup>465</sup>

### 1. PHYSICAL EVIDENCE

Collecting physical evidence from a crime scene or other location can be influenced by the theory of the crime. Where the primary investigator is also the primary collector of physical evidence, there is a heightened risk that important physical evidence might be overlooked if the investigator prematurely settles on one theory of the crime. Even where separate crime scene technicians collect the physical evidence, their work can be influenced by learning about the primary investigator's preferred theory of the crime. Obviously, we do not want to preclude primary investigators from communicating with crime scene technicians, or any investigator from hypothesizing about the crime to guide the search for physical evidence, but care should be taken to collect the greatest amount of potential physical evidence at the crime scene, regardless of the theory of the crime. Crime scene technicians should be guided by the theories of primary investigators to the extent that discussion of theories broadens the search for, and collection and analysis of, evidence, but not to the extent that it limits it. At least several alternative theories of the crime should be considered at the time physical evidence is collected.

### 2. TESTIMONIAL EVIDENCE

Development of testimonial evidence is also influenced by the theory of the crime. And, as we have discussed, when the theory of the crime is wrong, the testimonial evidence developed in the investigation can be misleading or inaccurate. To minimize the risk that police will inadvertently produce flawed testimonial evidence—for example, regarding a suspect's own statements—we have suggested a shift away from high-pressure, confession-driven interrogation techniques toward more neutral investigative interviewing techniques.

We recognize, however, that there might be a cost to such a shift, a cost reflected in the concern that a shift away from high-pressure interrogation techniques will lead to too many guilty suspects avoiding conviction. Yet, precisely that kind of shift is occurring in other countries, and to some extent within some American jurisdictions. The

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follow-up investigations by the prosecutor or defense might have prevented Avery's wrongful conviction. Allen might have been prosecuted instead, and the crimes he went on to commit might have been prevented. *See supra* Part I.B.

465. Kertscher, *supra* note 463.

experience in those jurisdictions offers an opportunity to examine whether such a shift does indeed come with unacceptable costs.

In response to a series of high-profile British wrongful convictions, including the "Guildford Four" and the "Birmingham Six," Great Britain adopted the Police and Criminal Evidence Act (PACE) in 1984, which significantly reformed police practices in that country.<sup>466</sup> The Act includes rules against the use of undue police pressure or oppression, and a requirement that suspect interviews be audiotaped.<sup>467</sup> Police in Great Britain have since shifted to a practice that they call "investigative interviewing."<sup>468</sup> The product of a collaborative effort between psychologists, academics, and practitioners to establish best practices based on findings from empirical studies, investigative interviewing is designed as an alternative to previous confession-driven interrogation approaches.<sup>469</sup> It is viewed as "a less oppressive approach to interviewing suspects. The use of trickery, deceit, and other methods to build up psychological pressure is no longer included, and nonverbal cues to deception are disregarded."<sup>470</sup> Police in England and Wales have created a national training course on investigative interviewing that "encourage[s] a non-oppressive, non-coercive approach, with an emphasis on information gathering rather than obtaining a confession *per se*."<sup>471</sup> The effort was explicitly intended "to introduce an inquisitorial element into a scenario traditionally dominated by the adversarial nature of the judicial system."<sup>472</sup>

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466. MEMON, VRIJ & BULL, *supra* note 291, at 66-67; John Pearse & Gisli H. Gudjonsson, *Police Interviewing Techniques at Two South London Police Stations*, 3 PSYCHOL. CRIME & L. 63, 63 (1996).

467. MEMON, VRIJ & BULL, *supra* note 291, at 67. To various degrees, other European countries also encourage nonconfrontational interrogation techniques. German law, for example, provides that "the accused must be given every opportunity to remove any suspicion against him and to point to out those circumstances which are favourable to his defence." Barbara Huber, *Criminal Procedure in Germany*, in COMPARATIVE CRIMINAL PROCEDURE 118 (John Hatchard et al. eds., 1996).

468. Williamson, *supra* note 451, at 90, 97-98.

469. *Id.* at 90. Williamson describes the model in this way:

The role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses or victims to discover the truth about matters under Police investigation. Investigative interviewing should be approached with an open mind. Information obtained from the person who is being interviewed should always be tested against what the interviewing Officer already knows or what can reasonably be established.

*Id.* at 98.

470. *Id.* at 65.

471. Pearse & Gudjonsson, *supra* note 466, at 65.

472. *Id.*



Despite PACE, continuing observation of a number of coercive interrogations prompted the Royal Commission on Criminal Justice Report in 1993, which endorsed a new “culture” of interrogation practices and led to the development of a PEACE model (Preparation and Planning, Engage and Explain, Account, Closure, and Evaluate).<sup>473</sup> As Richard Leo has explained,

[a]t the heart of this approach, and in sharp contrast to the confrontational Reid Technique, is an ethical and inquisitorial frame of mind. . . . Overall, PEACE proposes a formal interrogation in which the purpose is clearly communicated to the suspect, rights are properly administered, rapport is established, and a “conversation” is engaged between the lead investigator and suspect. More an interview than an interrogation, the primary purpose of this conversation is to gather information, not to elicit a confession . . . .<sup>474</sup>

Significantly, research conducted in Great Britain after implementing PACE and the new interviewing model has suggested that, although interrogations have become less coercive, the confession rate has not been affected.<sup>475</sup> British police continue to report interrogations in more than half of all cases.<sup>476</sup> Experiences in jurisdictions like Great Britain, Canada,<sup>477</sup> and in some American jurisdictions where police are experimenting with less confrontational and judgmental interrogation tactics on a smaller scale,<sup>478</sup> suggest that

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473. Leo, *supra* note 258, at 101.

474. *Id.* at 101-02.

475. *Id.* at 101. The research also indicates, however, that, despite significant changes in the way police in Great Britain conduct interviews, vestiges of the old, confession-driven interrogation techniques have persisted even after the adoption of PACE. John Baldwin, *Police Interviewing Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 334-44 (1993).

476. Various studies show continuing confession rates in the range of 42 to 76 percent, with most post-PACE studies showing confessions in the 55 to 62 percent range. Pearse & Gudjonsson, *supra* note 466, at 72. This confession rate is comparable to, or even higher than, the confession rate in the United States, which studies suggest ranges from 42 to 50 percent. Kassin & Gudjonsson, *supra* note 99, at 44.

477. See Michel St-Yves, *The Psychology of Rapport: Five Basic Rules, in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 87, 88 (Tom Williamson ed., 2006) (describing a model for investigative interviewing in Quebec, Canada, that emphasizes: 1) keeping an open mind, 2) building up rapport, 3) paying attention, 4) keeping a professional attitude, and 5) knowing how to conclude).

478. See *infra* notes 515-20 and accompanying text. In Wisconsin, for example, the attorney general has established an interrogation training model that encourages a less-aggressive interviewing technique that is closer to the British model than the Reid Technique. WIS. DEP'T OF JUSTICE, OFFICE OF ATTORNEY GEN.,

such approaches can be employed profitably on a wider scale in the United States as one response to the problem of tunnel vision.

*D. Management and Supervision of Investigations and Cases*

1. POLICE

Education and training are necessary, but not sufficient, to guard against the harmful effects of tunnel vision. Even when detectives and their supervisors understand the tunnel vision phenomenon and make their best personal efforts not to succumb to it, investigations can still focus on the wrong suspect or the wrong theory of the case. Several investigative management practices can further mitigate the probability that tunnel vision will lead to an erroneous result in a case.

*a. Selection of Police Investigators*

Nearly all police officers, regardless of their particular assignment, are expected to be able to investigate criminal matters. A select few are given criminal investigation as a full-time, specialized assignment. In most police agencies the position of criminal investigator (most commonly referred to as a detective) is filled by police officers who have demonstrated that they possess a high level of investigative skill. In most agencies, assignment as a detective is a promotion from the position of patrol officer; in other agencies, it is a nonpromotional specialized assignment, which may or may not be permanent. Every police agency determines for itself what particular knowledge, skills, and abilities are desired for the detective position, and what criteria and processes determine which police officers will become detectives. The knowledge, skills, and abilities that are conventionally prized include: keen inductive reasoning abilities (the ability to draw logical conclusions from bits of evidence); the ability to write clear and comprehensive reports; the ability to organize, analyze, and retrieve information; the ability to communicate effectively orally (for courtroom testimony); the ability to persuade others (witnesses and suspects) to provide information necessary to an investigation; a comprehensive knowledge of the law and procedures as they relate to criminal investigation (including the elements of crimes, constitutional guidelines, criminal procedures, and investigative and evidentiary policies and procedures); the ability to manage one's time effectively

and efficiently so as to be able to investigate multiple cases simultaneously while under time constraints; determination and persistence in seeking clues to solve cases; and knowledge of the community (including knowing and understanding criminal suspects and their accomplices, criminal networks, and who might have information that will help solve cases).

Given what we know about human psychology and its inherent vulnerability to the tunnel vision phenomenon, an additional criterion for choosing detectives is called for: the ability to understand and guard against tunnel vision. Police executives who appoint officers as detectives should seek out officers who have demonstrated a willingness and ability to explore alternative theories of criminal cases; seek and accept input from other investigators; be aware of and control their own personal biases; resist the temptation to lock in on some suspects to the total exclusion of others; avoid becoming defensive about one's decisions, methods, and judgments; and be open to constructive critiques of the same. Official job descriptions for a detective should reflect these mental abilities in addition to the conventional sets of knowledge, skills, and abilities. Detective selection procedures should incorporate some assessment of the degree to which candidates possess the ability to guard against tunnel vision.

*b. Selection of Investigative Supervisors*

The investigative supervisor is perhaps the most critical role in guarding against tunnel vision in criminal investigations. Depending on the size and structure of the police agency, the investigative supervisor is typically either a sergeant or a lieutenant responsible for assigning cases to detectives, monitoring their progress, reviewing their reports, and liaising with prosecutors about investigative procedures. In larger police agencies there will be several layers of investigative supervision—first-line supervisors, investigative commanders, and perhaps high-level investigative executives. While anyone in the investigations hierarchy might take the initiative to caution against tunnel vision and to challenge the accumulated evidence in a particular case, it is the first-line investigative supervisor who is in the best position to do so. The first-line supervisor should consult with the case detectives regularly and read their reports.

Careful consideration should be given to the knowledge, skills, and abilities sought in individuals who assume these supervisory roles. Investigative supervisor candidates should demonstrate an understanding of the tunnel vision phenomenon and be familiar with techniques for guarding against it. They must be comfortable challenging detectives, especially experienced detectives, about their

theories, methods, and conclusions in such a way as to mitigate tunnel vision without undermining the investigation. This is not always done so easily, especially where, as is oftentimes true, the major case detectives have more experience than do their supervisors. For a variety of reasons, the police culture grants detectives a considerable amount of independence and discretion. It is commonly believed that detectives have earned this independence by virtue of having demonstrated certain skills and knowledge about their craft. Many detectives resent what they perceive to be excessive and undue scrutiny of their work. Moreover, detectives often deal directly with prosecutors on matters relating to their cases, oftentimes bypassing their own investigative supervisors in these communications. While this is usually a more efficient way to handle matters, it can make it more difficult for a police investigations supervisor to be part of the deliberations and decision-making in a particular case, particularly if the detective and the prosecutor are already in agreement about the theory and direction of the case.

*c. Posing Alternate Theories of the Case*

The investigative supervisor should routinely posit alternate theories of each case during the briefing sessions in which cases are discussed. Much as scientists seek to “prove” theories by testing the null hypothesis (providing a reason to reject the hypothesis that something occurred merely by chance), police investigative supervisors should seek to “prove” a case by offering evidence and a rationale to reject all reasonable alternate theories as to how the crime was committed and by whom.

*d. Approaching an Investigation from the Perspective of Ignorance*

Police investigators commonly formulate theories about cases and suspects on the basis of what they know (or what the available evidence appears to indicate) at any particular point in time. At some point, they might reasonably conclude that they have enough evidence and knowledge (applying the probable cause standard) to support a conclusion that a particular suspect committed the crime, even if gaps remain in their evidence and knowledge. They might conclude that the gaps in knowledge either cannot be filled or will be filled at a later stage (after arrest, during pretrial preparation, or during trial). A different approach to criminal investigations can help reduce the likelihood of tunnel vision and premature conclusions about the case. By anticipating all of the information that a reasonable person might want to know about a case, the investigation can be built around what

investigators do not know, but should try to discover. By aggressively seeking to fill in all of the significant knowledge gaps in a case, investigators should be constantly challenged to explain those knowledge gaps. Do the gaps exist merely because the evidence has not yet been found, or do they exist because the theory of the case is wrong?<sup>479</sup>

To be sure, “probable cause” is a slippery notion. While it constitutes a minimal threshold of knowledge necessary to support a criminal arrest in a court of law, it need not be interpreted by police investigators and supervisors at its most minimal level. Police can and should hold themselves to a higher standard of proof than that which might minimally satisfy a judge or grand jury in a probable cause determination, particularly when the potential penalty for the crime under investigation is severe.

*e. Apportioning Case Investigation Responsibilities*

Assigning different detectives different tasks in the context of one investigation is another technique police supervisors can use to minimize the likelihood that tunnel vision will distort the conclusions in a criminal investigation. For example, one detective could be assigned to process and analyze physical evidence, while another detective interviews potential witnesses, and a third reviews documents. Alternately, different detectives could be assigned to interview the same witnesses, analyze the same physical evidence, or review the same documents previously investigated by another investigator. A second set of eyes, ears, and minds might either detect what the first set might have missed or reach different conclusions from the same evidence.

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479. Criminal investigations in which the identity of the offender is genuinely a mystery and many individuals might be suspected commonly take many turns, with many promising leads and suspects failing to pan out. For a fascinating and detailed account of a criminal investigation of a serial killer that spanned over two decades and which took many such turns, see DAVID REICHERT, *CHASING THE DEVIL: MY TWENTY-YEAR QUEST TO CAPTURE THE GREEN RIVER KILLER* (2004). As Reichert wrote:

In real life, physical evidence is hard to come by, most people don’t want to talk to you, and snitches can push you in the wrong direction. As a result, investigators spend an awful lot of time chasing down the witnesses, associates, friends, and acquaintances who might fill in the details of a crime suspect’s story. Although we often discover contradictions and startling revelations that blow a story apart, our goal is to get at the truth. If a second, third, or fourth party confirms what we have been told and that helps us rule out a suspect, that’s a good thing. It means we can move on to another lead.

*Id.* at 81.

Under this approach, the supervisor can periodically bring the detectives together to present their findings and challenge one another's methods and conclusions. This technique goes beyond a standard case briefing in which one detective might summarize the progress being made on a case. It openly invites detectives to challenge the evidence and the theories of the case, and increases the likelihood that a false theory or wrong suspect will be revealed prior to arrest.

*f. Assigning an Advisory Investigator*

As an alternative approach, investigative supervisors might select another experienced criminal investigator to periodically review the existing evidence and conclusions, and to offer suggestions to the lead case investigator about investigative methods, alternate theories of the case, or alternate conclusions that could be drawn from the available evidence. This could be done either by having advisory investigators review the written case file or by having the lead case investigator conduct an oral briefing of the case. Whichever briefing method is used, written recommendations are preferable to oral recommendations because they minimize the likelihood that the case investigator will perceive a need to defend the methods or conclusions under review.

This technique does not give the advisory investigator any responsibility for investigating the case at hand. That person merely gives an independent, but generally knowledgeable, perspective on the investigation. The advisory investigator may or may not work for the same police agency as the primary investigator. It is only important that the primary investigator have some basis for respecting the knowledge, experience, and perspective of the advisory investigator. By not assuming any investigative responsibility, the advisory investigator is less likely to become emotionally attached to any particular suspect or theory of the case, and is freed of the pressures, frustrations, and anxieties that come with assuming responsibility for a successful conclusion to the case. This advisory review should occur before the case is presented to the prosecutor for formal filing of charges.

*g. Presenting the Case to the Prosecutor*

In some instances it might be advisable for someone other than the lead investigator, ideally someone without a significant emotional attachment to the investigation, to present the evidence and conclusions drawn in the case to the prosecutor. This reduces the possibility that the evidence and investigative procedures of the case will be presented selectively.

In addition, investigative supervisors should require that a complete log of all evidence gathered in the investigation—physical and testimonial evidence, both confirmatory and exculpatory—be maintained and submitted to the prosecutor at the conclusion of the investigation.<sup>480</sup> Even if such a requirement were to prove infeasible in less serious criminal investigations, it should be standard practice in more serious ones.

Generally speaking, few rules require police to preserve evidence or make records of all case-related information discovered during an investigation.<sup>481</sup> Professor Dianne Martin has observed that, in Canada, police are known for “boxing the notes”—drafting their investigative notes in a way that ensures that “no officer contradicts another, and where possible, that officers corroborate the version [of the offense] decided on.”<sup>482</sup> Professor Stanley Fisher has argued that, while American police ostensibly attempt to report “all relevant evidence,” in practice police reports are “artifacts of the adversary process” that tend to include evidence of guilt and omit exculpatory facts.<sup>483</sup> Given the cognitive distortions and institutional pressures in play, such omissions are inevitable.<sup>484</sup> The consequence, however, is that “we suffer a systematic loss and suppression of exculpatory evidence at the stage of police investigation and reporting.”<sup>485</sup>

After studying a series of wrongful convictions in Illinois’s death penalty system, former Illinois Governor Ryan’s Commission on Capital Punishment noted that police failure to document and disclose

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480. See Thomas P. Sullivan, *Preventing Wrongful Convictions*, 86 JUDICATURE 106, 108 (2002).

481. In *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), and *Trombetta v. California*, 467 U.S. 479, 491 (1984), the Supreme Court held that due process is not violated by police destruction of even potentially exculpatory evidence unless the exculpatory nature of the evidence was apparent and police acted in bad faith. Given the cognitive biases at work, this doctrine is destined to produce many instances in which police fail to recognize the potentially exculpatory nature of such evidence and few instances in which, in hindsight, courts will hold that the exculpatory nature of the evidence was apparent or that police acted in bad faith. Ironically, Larry Youngblood, the defendant in *Arizona v. Youngblood*, was denied relief under the doctrine announced by the Supreme Court in his case, but was exonerated many years later when newly discovered DNA evidence proved his innocence. See Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12. However one might otherwise assess the merits of this constitutional doctrine, it is undeniable that it contributes to tunnel vision and wrongful conviction of the innocent.

482. Martin, *supra* note 6, at 850.

483. Stanley Z. Fisher, “*Just the Facts Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 18-31, 57 (1993).

484. See *id.* at 17.

485. Fisher, *supra* note 463, at 1384.

to the prosecutor all exculpatory evidence was one cause of the errors.<sup>486</sup> Accordingly, the commission specifically recommended that:

- (a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location.
- (b) Record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.
- (c) The police must give copies of the schedules to the prosecution.
- (d) The police must give the prosecutor access to all investigatory materials in their possession.<sup>487</sup>

Greater attention to preserving and recording all evidence is important to ensure that potentially exculpatory evidence is not overlooked.

*h. Disclosing Investigative Information to the Media*

Although police are often eager to publicize at least some of the details regarding an investigation because an arrest might be considered the culmination of a police investigation, an arrest is also only the beginning of the legal adjudication of the case. Further investigation, either by police or prosecutors, is often conducted after an arrest is made. Moreover, citizens who comprise the jury pool are almost certainly influenced by media reporting of investigative details in their prejudgments about the guilt or innocence of the arrested person. For this reason, police should be more cautious than is the current norm in making details about the nature and strength of evidence against the arrested suspect public. Aside from assuring the public that a suspect has been arrested or requesting additional information from the public about the crime, the desire to provide the details about the State's

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486. STATE OF ILL., *supra* note 16, at 22. Similarly, the Virginia Innocence Commission, after reviewing proven wrongful convictions in that state, recommended that, to counter tunnel vision,

[l]aw enforcement agencies should train their officers to document all exculpatory, as well as inculpatory, evidence about a particular suspect/individual that they discover and to include this information in their official reports to ensure that all exculpatory information comes to the attention of prosecutors and subsequently to defense attorneys.

INNOCENCE COMM'N FOR VA., *supra* note 20, at 73.

487. STATE OF ILL., *supra* note 16, at 22. These recommendations were based in large part on the British Criminal Procedure and Investigations Act of 1996. *Id.* at 20 (citing Fisher, *supra* note 463).



evidence is nearly always outweighed by the possible prejudice to the suspect. Although defense attorneys often release investigative information to the media when they believe doing so will create a more favorable public opinion of the suspect's defense, police should nonetheless refrain from this practice. Prosecutors are equally advised not to create the appearance that they are trying the case in the media.

## 2. PROSECUTORS

Scholars have proposed a range of measures to reign in the adversarial excesses that prosecutors sometimes exhibit. Those suggestions run the gamut from revised ethical rules,<sup>488</sup> to stricter prosecutor discipline,<sup>489</sup> to revised incentive structures,<sup>490</sup> to more frequent reversals of convictions based on prosecutorial misconduct.<sup>491</sup> Several reforms that some prosecutors' offices have adopted and that could be adopted more widely through policy and practice are discussed below.

### *a. Demanding the Fullest Disclosure of Information from Police*

Prosecutors must have access to all case investigative materials, not just those that support the conclusion reached by police. Providing prosecutors with *all* such materials, and providing those materials early in the process, better enables prosecutors to evaluate cases with an open mind before they have settled on a theory of guilt, when neutrality is at its peak. This requirement highlights the importance of ensuring that police record, retain, and forward to prosecutors all investigative information.<sup>492</sup> It is well within the power and prerogative of a

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488. See, e.g., Fisher, *supra* note 463.

489. See, e.g., Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004); Medwed, *supra* note 196, at 174.

490. See Fisher, *supra* note 262, at 200; Medwed, *supra* note 196, at 171-72 (citing Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 320 (2001) (arguing that prosecutor performance measures ought to include factors other than conviction rates, such as decisions not to prosecute or to turn over biological evidence for DNA testing without litigating the case)).

491. Fisher, *supra* note 262, at 201; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 737 (1987); Medwed, *supra* note 196, at 172-73 (noting that appellate courts reverse infrequently and "invariably neglect to identify the prosecutor by name as a matter of 'professional courtesy'").

492. See *supra* Part III.D.1.g.

prosecutor's office to insist upon such full disclosure from police investigators and many already do so.

*b. Maintaining Independence from Police Investigators*

Prosecutors should seek to maximize their neutrality during the precharging phase in other ways as well. Where the prosecutor assigned to a case has a personal relationship with a police investigator who had a key role in the investigation, the prosecutor can easily lose objectivity.<sup>493</sup> Prosecutors must also guard against blindly trusting, without evidentiary substantiation, police investigators whom the prosecutor has come to know and trust professionally. Even well-intentioned, honest, and trustworthy investigators can unwittingly be affected by tunnel vision.

While it may be difficult to achieve true neutrality, it is clear that prosecutors do manage to maintain some measure of neutrality in the precharging context, because they do refuse to charge in a meaningful proportion of cases.<sup>494</sup> The lessons from the cognitive sciences and their implications for tunnel vision reinforce the importance of enhancing the capacity and rewards for prosecutors to exercise independence and neutrality.

*c. Employing Multiple Levels of Case Review*

Multiple levels of case screening, whether achieved by a supervisor reviewing cases prior to assigning them to individual prosecutors or after assignment but prior to formal charging, can serve as another check against tunnel vision. As others have noted, many U.S. Attorney offices have policies requiring trial attorneys to seek review and approval from a supervisor for some charging and disposition decisions.<sup>495</sup>

*d. Counterarguing*

Once the decision to charge is made, cognitive biases make it difficult to see alternative conclusions about a case. Although the task becomes more difficult at that point, prosecutors need to understand the importance of striving for objectivity. Because the research into cognitive biases suggests that being compelled to argue against one's own position is one of the more effective means of countering one's

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493. See *supra* note 264.

494. Brown, *supra* note 243, at 1600; Givelber, *supra* note 243, at 255.

495. See Brown, *supra* note 243, at 1619.

cognitive biases, prosecutors should be taught to switch sides, to play their own Devil's Advocate.<sup>496</sup>

Because it can be difficult to get people to conceive counterarguments, however, more formalized methods of counterarguing should also be considered. Formal processes can be developed within a prosecutor's office for obtaining second opinions from other prosecutors, or from review committees. Accordingly, Professor Alafair Burke has argued that "[t]he reduction of bias might be achieved internally within a prosecutor's office by establishing a process for 'fresh looks' of a file by a lawyer or a committee of lawyers whose evaluation would not be tainted by earlier developments in the case."<sup>497</sup> Professor Darryl Brown has noted that separating prosecutors into "distinct offices and assignments establishes them as checks both on police and on other prosecutors," and that "[s]eparating investigators from prosecutors helps make the latter a check on the former."<sup>498</sup>

Burke and Brown, however, have also acknowledged that getting prosecutors to engage in critical review of a colleague's conclusions, free from time- and guilt-presuming pressures, can be difficult.<sup>499</sup> Accordingly, Burke has suggested that, because "a fresh look attorney may be reluctant to dissent from her colleague's initial case evaluation, . . . a more meaningful fresh look process might involve an advisory committee that includes non-prosecutors."<sup>500</sup> While an external review committee would no doubt be too cumbersome to use regularly in routine cases, it could be employed in serious disputed cases. In such cases, a review committee could function much like the civil review boards that monitor police.<sup>501</sup>

Even where formal procedures for arguing and counterarguing cases are not feasible, encouraging informal discussions and debates among peer prosecutors regarding serious, complex, and borderline cases can help reduce the risk that tunnel vision will negatively affect prosecutorial decision-making.

### *E. Transparency*

To the extent that training and new procedures are inadequate to overcome the powerful forces that produce tunnel vision, an additional

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496. Burke, *supra* note 127, at 34.

497. *Id.* at 34.

498. Brown, *supra* note 243, at 1618.

499. *Id.* at 1619; Burke, *supra* note 127, at 36.

500. Burke, *supra* note 127, at 36.

501. *Id.* at 38.

reform is necessary. Given that police and prosecutors, because they are human, cannot be expected to recognize and correct for all of their natural biases, the system must find a way to give sufficient case information to those who have different incentives and different natural biases. In the end, greater transparency at all stages of the criminal process is the most powerful way to counter tunnel vision.<sup>502</sup>

In criminal cases, greater transparency requires providing the fullest possible investigative information to the defendant.<sup>503</sup> At a minimum, this requires greater discovery.<sup>504</sup> Expanding the *Brady* doctrine would go a long way toward achieving this goal. But even more can and should be done. Providing full investigative information to the defense improves the capacity of the one party best situated to evaluate the evidence free from guilt-confirming biases.<sup>505</sup>

The trend in state criminal justice systems is toward broad, reciprocal discovery.<sup>506</sup> In federal court and most state systems, however, discovery in criminal cases is far less extensive than in civil cases.<sup>507</sup> That gap can and should be closed. For example, some states effectively mandate open investigation files, while others allow witness depositions in criminal cases.<sup>508</sup> In many northern European countries, police compile a single investigative file for each case that includes all investigative material; those files are then disclosed fully to

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502. See, e.g., INNOCENCE COMM'N FOR VA., *supra* note 20, at 68.

503. "The defendant is the actor in our system who has the true stake in preventing, exposing, and mitigating prosecutorial misconduct and making sure the adversary system works as intended." Jonakait, *supra* note 267, at 567.

504. See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541. More expansive discovery is also a frequently cited measure to protect against wrongful convictions. See, e.g., INNOCENCE COMM'N FOR VA., *supra* note 20, at 3, 59-68 (recommending "formal discovery rules to mandate open-file discovery procedures"); Jonakait, *supra* note 267, at 567; Brown, *supra* note 243, at 1619. Professor Jenny Roberts has argued that fuller discovery is necessary not only as a matter of due process, but also because "restrictive discovery rules block the delivery of effective assistance of counsel when defense counsel has insufficient information to investigate the case." Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1100 (2004).

505. Although, as noted above, defense counsel are also conditioned to believe that their clients are guilty, see *supra* Part II.B.3, they at least are subject to considerable countervailing pressures, not to mention ethical obligations, that make them better situated than police or prosecutors to approach a case with an alternative perspective.

506. Brown, *supra* note 243, at 1596.

507. *Id.* at 1622.

508. *Id.*

prosecutors, defense counsel, and judges.<sup>509</sup> Applied to the American criminal justice system, this approach would effectively position police as neutral inquisitors, and would strengthen the adversary system itself by balancing the adversary playing field.

Transparency helps to counter tunnel vision in another important way as well. In addition to sharing the information with actors who have an incentive to look outside the tunnel, transparency also helps to modify the effects of biases on decision-makers. Psychological research has shown that, “when people feel publicly accountable for decisions, they exhibit less bias in their hypothesis testing strategies.”<sup>510</sup> Thus, the more that police investigations are conducted and prosecutor’s decisions are made in open and observable ways, the more likely police and prosecutors are to resist biasing pressures and tendencies. This is not, of course, to suggest that there is no room for secrecy or confidentiality in police work or prosecution. Plainly, sensitive information relating to ongoing investigations, or that could jeopardize witness safety, cannot be made public. But this research does suggest that, whenever possible, transparency in the criminal justice system should be an objective because it enhances reliability as well as public trust and confidence.<sup>511</sup>

Once again, interrogation practices provide an example. Increasingly, jurisdictions in the United States, as well as other countries such as Great Britain and Australia, are mandating that custodial interrogations of suspects be electronically recorded.<sup>512</sup> Jurisdictions are moving toward electronic recording principally because it provides a record of what happened during an interrogation, thereby deterring coercive interrogation tactics and assisting courts in determining whether *Miranda* rights were properly waived as well as

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509. *Id.* at 1623-24. Brown has noted that this approach distinguishes the typical American system from many European inquisitorial systems: “narrow discovery rules in adversarial systems make factual accounts reliable by redundant investigations, [while] this European model puts more emphasis on multiple scrutiny of a single file.” *Id.* at 1625.

510. Leo, *supra* note 258, at 99.

511. Stephanos Bibas has argued that greater transparency is needed throughout the criminal justice system, particularly to make the system more understandable and accessible to victims and the public, and to make insiders like police, prosecutors, and judges more accountable. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 86 N.Y.U. L. REV. (forthcoming June 2006). As an example that is particularly germane here, Bibas has noted that “[v]ideotaping police interrogations and searches, and mandatory record-keeping, could improve monitoring and credibility.” *Id.*

512. See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131-35 (2005).

precisely what the defendant actually said.<sup>513</sup> After initial resistance, police in those jurisdictions that record have come to embrace the practice because they have learned that it is also a powerful law enforcement tool; recording provides compelling evidence of guilt when a suspect confesses or responds evasively, and, at the same time, protects police against baseless claims of misconduct.<sup>514</sup>

Interestingly, the transparency imposed by electronic recording is also beginning to change the way that police interrogate.<sup>515</sup> Police with considerable experience with electronic recording find that it not only provides a means for evaluating their own interrogation skills, but it also requires new strategies that look better in an electronic recording than some of the confrontational methods of the Reid Technique.<sup>516</sup> For example, one leading detective with many years of experience recording interrogations, who does extensive interrogation training for police, has noted in his training materials that “[e]xisting strategies don’t work well on tape.”<sup>517</sup> He teaches that, when recorded, the officer is better served not by cutting off denials or engaging in hostile confrontations with suspects, but instead by being “disarming,” trying to “‘see, hear, and feel’ from the interviewee’s point of view,” treating the interviewee “like a fellow human being,” maintaining a “friendly atmosphere,” keeping “an open mind,” asking “objective questions,” and asking “difficult, delicate, or distressing questions in a firm, gentle, considerate (yet persistent) manner.”<sup>518</sup>

In essence, electronic recording has fostered a new approach that moves police away from the Reid Technique. Instead of cutting off denials and pressuring suspects to confess, the new approach permits the suspect keep talking and responding to cordial but challenging questions until the suspect’s own statements either convince the observer of innocence, or trap the suspect in a web of lies. Nelson reminds police that, while other interrogation techniques “[w]ere

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513. *See id.* at 1127.

514. *See* THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6 (2004) (surveying 238 law enforcement agencies in thirty-eight states that electronically record interrogations, and reporting that “[v]irtually every officer with whom we spoke, having given custodial recording a try, was enthusiastically in favor of the practice”).

515. *Id.* at 15.

516. *Id.* at 16-17.

517. NEIL NELSON, MAXIMIZING THE OPPORTUNITY: INTERVIEW AND INTERROGATION C2 (2005). Neil Nelson is a commander with the St. Paul, Minnesota, Police Department, who has been recording his interrogations for more than ten years. *Id.* He also provides police interviewing and interrogation training through Neil Nelson & Associates. *Id.*

518. *Id.* at B5.

created with the goal of getting a suspect to confess,” the real objective is to gather information and “to keep[] the suspect talking (even if only to tell lies).”<sup>519</sup>

Such new methods of interrogation, which are similar to the new “investigative interviews” in England (which were also developed after police began recording their interrogations), reveal that the transparency brought by electronic recording has not just provided fuller information to the judicial proceedings, but has also more directly mitigated the cognitive biases that might otherwise impede the search for the truth. In this way, Dr. Richard Leo has noted, “the presence of a camera, and the scrutiny it implies, may help to increase the diagnostic value of interviews and interrogations and protect the innocent from false confessions.”<sup>520</sup>

#### F. Institutional Reforms

Finally, we suggest several major institutional reforms for the police and prosecution.

##### 1. POLICE CRIME LABORATORIES

Given our understanding of how scientists in crime laboratories are susceptible to having their findings and conclusions influenced by what investigators tell them they should expect to find and to conclude,<sup>521</sup> consideration should be given to promoting a greater degree of independence between crime laboratories on the one hand, and police and prosecutors on the other.

There are over 350 publicly funded crime laboratories in the United States, including some thirty-three federal labs, 203 state or regional labs, sixty-five county labs, and fifty municipal labs.<sup>522</sup> Crime laboratories are generally considered an arm of law enforcement. The nation’s largest crime lab is operated by the FBI.<sup>523</sup> In Wisconsin, the State Crime Laboratories operate under the jurisdiction of the Division of Law Enforcement Services in the State Department of Justice.<sup>524</sup> In

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519. *Id.* at E1-E2.

520. Leo, *supra* note 258, at 99.

521. Risinger et al., *supra* note 13, at 27-41; William C. Thompson, *Accepting Lower Standards: The National Research Council’s Second Report on Forensic DNA Evidence*, 37 JURIMETRICS J. 405, 408 (1997).

522. JOSEPH L. PETERSON & MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2002, at 1 (2005).

523. *Id.* at 11.

524. See Wis. Dep’t of Justice, The Wisconsin Crime Lab System, <http://www.doj.state.wi.us/dles/crimelabs/labinfo.asp> (last visited Mar. 21, 2006).

many larger municipalities, the police department operates its own forensic crime lab.<sup>525</sup> It is not self-evident, however, that crime laboratories should be arms of law enforcement agencies rather than independent government agencies, as are medical examiners' or coroners' offices. While organizational independence from law enforcement is not a guarantee that forensic scientists will not share a police investigator's tunnel vision, independent oversight and funding can help minimize that risk.<sup>526</sup>

Even if crime laboratories are not made organizationally independent from law enforcement, they can and should be made operationally independent. Ideally, this means that precautions should be taken to insulate laboratory analysts from all case investigation information they do not need to perform their scientific analyses.<sup>527</sup> Thus, contrary to common current practice, laboratory analysts should be shielded from information about the detectives' theory of the case, the nature of other evidence and other test results in the case, and the results police hope to obtain from the laboratory analyses.<sup>528</sup> Only by insulating analysts in this way can the objectivity (and hence, reliability) of the analysts' conclusions be assured.<sup>529</sup>

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525. PETERSON & HICKMAN, *supra* note 522, at 12.

526. See, e.g., Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 470 (1997) (recommending independent crime labs); Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 422-23 (2004) (recommending independent crime labs); STATE OF ILL., *supra* note 16, at 52 (endorsing independent crime labs).

527. Because observer effects can influence any scientific endeavor, standard scientific procedures—such as “double blind testing” (in which both the subject in a study and the scientist or study administrator are blinded to the conditions or expected results of a procedure)—require shielding the observer (the scientist or analyst) from extraneous information that can bias perception. Risinger et al., *supra* note 13, at 12.

528. As Risinger and his colleagues have put it,

A wall of separation must be created between forensic science examiners and any examination-irrelevant information about a case. That means properly controlling information flowing to examiners from external investigators, from laboratory managers, and from fellow examiners . . . . The solution is to provide examiners with the information they need to perform the tests, and only that information.

*Id.* at 45; see also Brown, *supra* note 243, at 1605.

529. The importance of this recommendation is highlighted by a recent study of fingerprint examiners. In that study, five experienced examiners who had previously analyzed fingerprints in a case and had all concluded that the latent prints matched a suspect's prints, were presented with the same prints five years later, but were told that other evidence had excluded the suspect. Unaware that they had previously called the prints a match, this time four out of the five examiners (80 percent) either declared that the prints did not match (three of the four) or that the prints provided insufficient information to permit a definite decision (one examiner). Only one of the five



## 2. PROSECUTION

Once a conviction has been obtained, beliefs in guilt are, quite naturally and appropriately, at their peak. Yet, the emerging mass of postconviction exonerations has shown that those beliefs still can be wrong. Although protecting the finality of judgments is a weighty concern, there is no legitimate interest in preserving the finality of factually incorrect judgments. Prosecutors need to find a way to overcome the biases and pressures that inevitably make it nearly impossible to conceive the possibility that the defendant, found guilty beyond a reasonable doubt, might in fact be innocent, so that they can at least fairly consider the import of new evidence of innocence.

The task for any prosecutor is daunting. To accept the possibility that the defendant is innocent is to accept the possibility that the prosecutor played a role in an unthinkable injustice. Reopening a case admits the possibility that a prosecutor made a grievous error, and it is only natural for prosecutors to fear the opprobrium or political consequences of admitting such an error—the “fear-based assumption that the public is intolerant of mistakes and unforgiving of those who admit to them.”<sup>530</sup> Moreover, the crush of ongoing business makes prosecutors naturally disinclined to revisit settled matters.<sup>531</sup> As Travis County, Texas, prosecutors Ronnie Earle and Brian Case have put it,

Cases in which the evidence proves the defendant’s guilt beyond a reasonable doubt are difficult to put together, harder to hold together, and happily left behind once a conviction is obtained. The ongoing onslaught of current cases and

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examiners adhered to the original conclusion, calling the prints a match. Expectation effects caused by the insertion of non-domain-specific information altered the conclusions of these examiners. Itiel Dror, David Charlton, & Ailsa E. Péron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT. 74 (2006).

530. Earle & Case, *supra* note 282, at 73. Prosecutors Brian Case and Ronnie Earle, however, reflecting on their experience facilitating the exoneration and release of several innocent men in their jurisdiction, found that the fear was unfounded:

Ronnie Earle readily confessed astonishment at the public reaction [to the exonerations], having been convinced that mistakes of such horrendous moment as convictions of innocent men would result in his being thrown ignominiously out of office. Acknowledgement and remedy seemed to matter to the public more than the game of Gotcha often played out on political fields.

*Id.*

531. *Id.*

opposition from victims certain of the identity of the perpetrator add to the pressure to let sleeping dogs lie.<sup>532</sup>

To counter these forces, external review panels might be especially important when prosecutors are presented with postconviction claims of actual innocence. Alternatively, Professor Daniel Medwed has suggested “altering the manner in which [prosecutor’s offices] assign post-conviction motions by creating internal innocence or post-conviction units,” so that prosecutors wedded to a theory of guilt are not the ones deciding the significance of new DNA or other evidence of innocence.<sup>533</sup> More dramatically, initial evaluations of postconviction claims of innocence can be removed from the adversarial process altogether and submitted for initial evaluation to an independent body with inquisitorial powers, such as the Criminal Cases Review Commission in Great Britain,<sup>534</sup> or the new postconviction review commission currently being considered by the legislature in North Carolina.<sup>535</sup>

#### CONCLUSION

Tunnel vision is the product of multiple processes and pressures. Cognitive distortions such as confirmation bias, hindsight bias, outcome bias, and a host of other psychological phenomena make some degree of tunnel vision inevitable. Institutional pressures on police, prosecutors, defense lawyers, and courts amplify those natural tendencies. Yet, instead of countering those pressures and tendencies, normative features of the criminal justice system, from police training to legal doctrine, institutionalize them.

The inevitability of tunnel vision does not relieve us from an obligation to do what we can to minimize its effects. A host of interlocking measures can reduce the distorting effects of tunnel vision, even if they cannot eliminate it altogether. The first step toward addressing the problem is to recognize its multiple causes and expressions. Serious efforts must be made to identify tunnel vision, or the features of the criminal justice system that contribute to tunnel

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532. *Id.*

533. Medwed, *supra* note 196, at 175.

534. See Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241 (2001); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000); Findley, *supra* note 18, at 347.

535. See Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 654 (2004).

vision, at every stage in the life of a criminal case. The recognized costs of those features then can be measured against their ostensible benefits (such as the perceived benefits in terms of obtaining convictions, or in efficiency and finality). Where appropriate, measures can then be taken to overcome tunnel vision. Education and training; improved policies and procedures for interviewing suspects, obtaining identifications, processing physical evidence, and reviewing charging decisions; greater transparency; and doctrinal reform can all be profitably employed to mitigate the effects of tunnel vision, and thereby more reliably convict only the guilty.

We have suggested a range of tangible measures that can be taken to mitigate the effects of tunnel vision, but perhaps the most important factor toward that end is one that cannot be prescribed merely by rule: creating and sustaining an ethical organizational and professional culture. An ethical organizational or professional culture is more than the just the sum of doctrine, rules, policies, procedures, and training programs. Such a culture—among police, prosecutors, defense counsel, and the judiciary—is one that treats wrongful arrest, prosecution, and conviction with the utmost seriousness. It seeks to minimize tunnel vision as a contributor to wrongful conviction not because it must, but because it is right. Where there is a strong ethical culture, police investigators, prosecutors, defense attorneys, and judges do not take shortcuts in cases where it might lead them away from the truth. Instead, they embrace the fullest disclosure of information consistent with a fair hearing of the evidence, they are cognizant of and guard against the pernicious effects of tunnel vision, and they are open to the possibility—however remote—that a confluence of even honest errors can yield an invalid result.<sup>536</sup>

Public trust and confidence in the criminal justice system has been shaken by the recent host of exonerations. Recognizing that the system is not perfect, a dose of humility coupled with openness to serious reform is needed to mitigate the effects of tunnel vision and restore trust and confidence in the system.

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536. As Norm Maleng, a King County, Washington, prosecuting attorney, wrote in the foreword to the recent report of the American Bar Association's Ad Hoc Innocence Committee: "The next step is to instill in every prosecutor's office, police agency, and crime laboratory an unwavering ethic to seek the truth through the most reliable methods available. This carries with it the obligation to refrain from using investigative techniques that may yield questionable results." ABA REPORT, *supra* note 439, at ix.