

**BARRIERS TO INNOCENCE:
IDENTIFYING, UNDOING, AND INVESTIGATING
WRONGFUL CONVICTIONS**

FOREWORD

*Laura Cohen**

In the early morning hours of January 28, 1995, a 911 call was made from a phone booth in Camden, New Jersey. The anonymous, frantic-sounding caller reported that two people—thirty-five-year-old Rodney Turner and forty-year-old Margaret Wilson—were lying in pools of blood on a sidewalk in the Roosevelt Manor housing complex.¹ Both had been fatally shot in the head.² Apart from two bullets recovered from Ms. Wilson’s body, three spent shell casings, and a pack of cigarettes, the police found no physical evidence at the scene.³

Although the “crack era” was on the decline in 1995, Camden was still caught in its violent grip. By the end of the year, fifty-eight lives would be lost to homicide, the second highest number on record.⁴ It is a reflection of Camden’s long history of discriminatory policing and the chasm between the city’s largely Black population and its largely white police force that many of these crimes remained unsolved. In the wake of the murders of Mr. Turner and Ms. Wilson, angry and frightened local residents formed “a human blockade” to demand that the police take action to reduce the bloodshed.⁵ As the media attention and public outrage intensified, pressure to make arrests grew.

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1. Maurice Possley, *Sean Washington*, NAT’L REGISTRY OF EXONERATIONS (June 5, 2023), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5682>.

2. *Id.*

3. *Id.*

4. *Crime in the United States 1995: Section II – Crime Index Offenses Reported*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/1995/95sec2.pdf> (last visited Sept. 10, 2023).

5. S.P. Sullivan, *A Double Murder. Life in Prison for 2 N.J. Men. But Did They Do It?*, N.J.COM (June 10, 2015, 2:05 PM), https://www.nj.com/news/2015/06/a_double_murder_20_years_in_prison_but_did_they_do.html.

On February 2, an informant told police that Denise Rand and her cousin, Tyrone Moore, who lived in the neighborhood, had witnessed the shooting and that twenty-three-year-old Sean Washington was the shooter.⁶ They picked up Rand and Moore and transported them to the police station, where they interrogated them separately.⁷ Moore said that he and Rand were several blocks away from the scene when they heard shots fired and never saw the shooter, a statement that ultimately was corroborated by other witnesses.⁸ After much prodding and correction by detectives, however, Rand ultimately made a statement indicating that she and Moore saw Mr. Washington and Kevin Baker, also twenty-three, run up to Mr. Turner and Ms. Wilson, shoot them, and run away as the victims fell to the ground.⁹ (Many years later, she admitted that, under pressure from detectives, she picked Baker out of a mug shot book “at random.”)¹⁰ Importantly, by the time they questioned Rand and Moore, the police had received the ballistics and autopsy reports, which incorrectly concluded that two shooters were involved in the crime.¹¹ Based solely on Rand’s statements, Sean Washington and Kevin Baker were charged with the murders.¹²

At trial, the prosecution’s case rested entirely on Rand’s vague, inconsistent, and “vacillating” testimony.¹³ She faltered even with regard to the core facts of the crime; although she initially testified that she did not remember seeing Baker fire any shots, for example, she later stated that she saw him shoot Mr. Turner in the head.¹⁴ And she admitted that she had gone to Roosevelt Manor for the purpose of buying drugs and was high on cocaine at the time of the shooting.¹⁵

The prosecution also called a New Jersey State Police ballistics expert, who testified that the three recovered shells were nine-millimeter caliber and manufactured by the same company.¹⁶ He further stated that they were all fired from the same gun but could not determine the make

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Sullivan, *supra* note 5.

12. *See* Possley, *supra* note 1.

13. State v. Baker, Nos. A-0716-17T3, A-0719-17T3, 2019 WL 7187443, at *3 (N.J. Super. Ct. App. Div. Dec. 26, 2019).

14. *Id.*

15. *Id.*

16. *Id.* at *4.

or type of the weapon.¹⁷ Similarly, due to their “mutilated condition,” he could not determine whether the bullets recovered from Ms. Wilson’s body were fired by the same gun as the shells.¹⁸

The defense failed to call a single witness or introduce any other evidence at trial, even though Tyrone Moore was available to testify, Baker had identified a reliable alibi witness, and Washington could credibly account for his whereabouts at the time of the crime.¹⁹ On August 1, 1996, both men were convicted and ultimately sentenced to sixty years to life in prison.²⁰

Over the next two decades, Baker and Washington would pursue every possible pathway to freedom. Despite abundant evidence supporting their claims of innocence, and their clearly deficient legal representation at trial, they met with frustration and defeat on direct appeal,²¹ in state post-conviction relief litigation,²² and in federal habeas corpus proceedings.²³ It was not until 2012, when the two men already had been behind bars for sixteen years, that they obtained effective representation. After intensive investigation, evidentiary hearings were finally held on their petitions for post-conviction relief.²⁴ At those hearings, the following was established:

- In 2013, after the prosecution turned over the recording of the 911 call for the first time, several witnesses identified Sean Washington as the distraught, anonymous caller.²⁵ Washington subsequently testified at the hearing that on the morning of the murders, he went out to make a call from a pay phone.²⁶ He spotted the bodies on the ground from a distance and, in the mistaken belief that one may have been his nephew, became “hysterical” and called 911.²⁷ Although Mr. Washington provided this information to his trial attorney in

17. *Id.*

18. *Id.*

19. *Baker*, 2019 WL 7187443, at *5–6. This account would play a central role in later efforts to exonerate the two men. *See* Possley, *supra* note 1.

20. *Id.* at *5.

21. *Id.* at *7.

22. *Id.*

23. *Id.* at *7–8.

24. *See* Possley, *supra* note 1. Kevin Baker was represented by Michael and Lesley Risinger of the Last Chance Exoneration Project at Seton Hall Law School; Sean Washington was represented by Lawrence Lustberg of Gibbons P.C. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

1996, the lawyer never investigated it or even attempted to obtain the recording.²⁸

- A forensic pathologist testified that Margaret Wilson was lying down when she was shot, in direct contradiction to Rand's assertion that she saw Ms. Wilson fall to the ground after being hit.²⁹ Ballistics testimony corroborated the conclusion that Ms. Wilson was lying down when shot.³⁰
- A firearms expert testified that the shell casings came from the same, semi-automatic weapon.³¹ This testimony did not exclude the possibility of two shooters but stripped the theory of any forensic support.³²
- Sean Washington's trial defense counsel admitted that he did not consider retaining or consulting with experts in forensic pathology, firearms, or incident reconstruction.³³
- Although Kevin Baker's trial counsel interviewed his alibi witness, he never called her to testify.³⁴ Tragically, by 2012, the witness was dying of cancer, and the post-conviction relief court denied Mr. Baker's motion to take her deposition.³⁵ Although the appellate court ultimately remanded for reconsideration, the prosecution once again opposed the motion and the witness died without ever having been deposed.³⁶
- Review of an audio recording of Rand's initial police interview—a recording that was not previously provided to the defense—established that she identified a person named "J.D." as one of the two shooters, rather than "K.B.," as the police transcript of the recording indicated.³⁷
- Two acquaintances of Rand stated that, shortly after the 1996 trial, she told them that she had not witnessed the murders.³⁸

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See Sullivan, supra* note 5.

38. *Id.*

Even with this robust body of evidence establishing the unreliability and likely fallaciousness of Rand's testimony, the inaccuracy of the earlier forensic testimony, the ineffectiveness of defense counsel, and Baker's and Washington's whereabouts at the time of the crime, the court once again denied relief in August 2017.³⁹ It was not until nearly two and one-half years later, in December 2019, that the Appellate Division reversed and ordered a new trial, writing, "[O]ur independent review of the record, in light of the newly discovered evidence, compels us to conclude that it would be unjust to let this verdict stand."⁴⁰

This powerful judicial remonstrance, was not enough, however, to convince the Camden prosecutor to let go. Baker and Washington remained incarcerated for another six weeks when, after a spate of unfavorable news coverage, the prosecution finally announced that it would not seek to retry them.⁴¹ On February 11, 2020, the convictions were vacated and the two men finally walked out of prison, nearly a quarter-century after their arrests.⁴²

Like all other unjust convictions, those of Sean Washington and Kevin Baker wrought staggering devastation. Both spent more than half of their lives behind bars. They were denied the rites (and rights) of passage from young adulthood to middle age: watching their children grow up, forging careers, sharing joys and sorrows with loved ones. They suffered the complex and layered trauma associated with incarceration, trauma that was exacerbated by the fact of their innocence.⁴³

The aftershocks of their convictions, furthermore, reverberated far beyond the two men. When the legal system errs, and then refuses to acknowledge its errors and clings to its mistakes, it undermines its own legitimacy. It retraumatizes crime victims and their survivors.⁴⁴ It ravages the families of the wrongfully accused and incarcerated. It also undermines community safety, for every time someone is wrongfully convicted, the true perpetrator of the crime remains free to victimize others.⁴⁵

39. State v. Baker, Nos. A-0716-17T3, A-0719-17T3, 2019 WL 7187443, at *18 (N.J. Super. Ct. App. Div. Dec. 26, 2019).

40. *Id.* at *29.

41. See Possley, *supra* note 2.

42. *Id.*

43. See, e.g., Kathryn A. Thomas & William T. Hoyt, *The Psychological Impact of Wrongful Conviction: Exploring Retrospective Trajectories of Stress in Exonerees*, PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL'Y (advance online publication, January 2023), <https://psycnet.apa.org/record/2023-39978-001>.

44. See generally Seri Irazola et al., *Addressing the Impact of Wrongful Convictions on Crime Victims*, 274 NAT'L INST. JUST. J. 34 (2014).

45. See Rachel Aviv, *The Tortured Bond of Alice Sebold and the Man Wrongfully Convicted of Her Rape*, NEW YORKER (May 22, 2023),

Washington and Baker are not outliers. According to the National Registry of Exonerations, 3,348 innocent people have been exonerated in the United States since 1989.⁴⁶ Collectively, these exonerees lost 29,950 years to incarceration.⁴⁷ And these numbers unquestionably are a gross under-calculation. Estimates of rates of wrongful conviction range from two to eleven percent, but the most reliable studies to date estimate that over four percent of people sentenced to death⁴⁸ and six percent of the general state prison population are factually innocent of their crimes.⁴⁹

As at every other decision-making point along the carceral continuum, innocent people of color are substantially more likely than their white counterparts to be unjustly convicted. Black people comprise thirteen and one-half percent of the population of the United States but *fifty-three percent* of exonerations listed in the National Registry.⁵⁰ Judging from known exonerations, innocent Black Americans are seven and one-half times more likely to be convicted of murder, eight times more likely to be convicted of sexual assault, and *nineteen times* more likely to be convicted of a drug crime than white Americans.⁵¹ People with conditions that affect judgment and decision-making, such as youth and developmental immaturity,⁵² mental illness,⁵³ and intellectual

<https://www.newyorker.com/magazine/2023/05/29/the-tortured-bond-of-alice-sebold-and-the-man-wrongfully-convicted-of-her-rape>.

46. NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Sept. 10, 2023).

47. *Id.*

48. Samuel R. Gross *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7230 (2014).

49. Charles Loeffler et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANT. CRIMINOLOGY 259, 261 (2019).

50. SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2022).

51. *Id.*

52. See, e.g., Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 525 (2005) (finding, in a study of 328 DNA exonerations, forty-two percent of those convicted of crimes that occurred before they were eighteen falsely confessed, versus thirteen percent of adults). See generally Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2007) (detailing factors contributing to wrongful convictions and their disparate impact on youth).

53. See, e.g., Allison D. Redlich, *Law & Psychiatry: Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCH. SERVS. 19, 19–21 (2004) (describing vulnerability of people with mental illness to police interrogation techniques and, therefore, false confession).

disabilities, moreover, also are disproportionately vulnerable to wrongful conviction.⁵⁴

The causes of wrongful convictions are numerous, well-known, and deeply embedded in the machinations of the carceral state. One is race. As Karen Thompson powerfully describes in her symposium remarks,⁵⁵ four-hundred years of intransigent structural racism have spun a web of biased police and prosecutorial practices and priorities, judicial decision-making, legal doctrinal development, and procedural rules that render innocent Black and Brown people far more likely to be unjustly arrested, charged, prosecuted, and convicted than white people.⁵⁶

In addition to race, excavation of known exonerations has identified the specific factors that most frequently contribute to wrongful convictions. These include perjury, false accusation, and unreliable or incentivized informants; police and prosecutorial misconduct; mistaken eyewitness identification; reliance on flawed forensic techniques and technologies—“junk science,” in common parlance; false confessions, and the related problem of false guilty pleas.⁵⁷ Rarely does a wrongful conviction spring from one of these factors alone; instead, as a result of “confirmation bias,” police and prosecutorial “tunnel vision,” and a system of professional advancement and rewards for law enforcement actors based on arrests and convictions rather than justice and truth, the errors build on each other and almost always are co-occurring.⁵⁸

All of this is exacerbated by a callous and unforgiving legal system that too often sacrifices carefulness to efficiency and accuracy to finality. The hegemony of plea-bargaining, the coercion of money bail, the under-

54. See generally Sheri Lynn Johnson et al., *Convictions of Innocent People with Intellectual Disability*, 82 ALB. L. REV. 1031 (2018); Robert Perske, *Perske's List: False Confessions from 75 Persons with Intellectual Disability*, 49 INTELL. & DEV. DISABILITIES 365 (2011); Robert Perske, *False Confessions from 53 Persons with Intellectual Disabilities: The List Keeps Growing*, 46 INTELL. & DEV. DISABILITIES 468 (2008); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 971 (2004).

55. Karen Thompson, *Remarks to the Rutgers University Law Review Symposium: Barriers to Innocence*, 75 RUTGERS L. REV. 1269 (2023).

56. See Daniele Selby, *How Racial Bias Contributes to Wrongful Conviction*, INNOCENCE PROJECT (July 17, 2021), <https://innocenceproject.org/news/how-racial-bias-contributes-to-wrongful-conviction/>.

57. *Percent Exonerations by Contributing Factor and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx?utm_source=charybd.com&utm_medium=link&utm_campaign=article, (last visited Sept. 10, 2023).

58. See D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Conviction: A Sentinel Events Perspective*, 11 NE. U. L. REV. 791, 810–16 (2019).

funded public defense infrastructure, and the insurmountable procedural and logistical barriers to post-conviction relief,⁵⁹ join forces to create and perpetuate, rather than reveal and undo, wrongful convictions. And the list goes on.

And yet, hope abounds. The birth and evolution of the innocence movement over the last four decades has exposed the pervasiveness of the problems and helped us understand how, why, and the frequency with which innocent people are arrested for, charged with, and convicted of crimes they didn't commit. This increased awareness and understanding has spawned policy and practice changes intended both to correct previous injustices and prevent them from happening in the future. Some of those responses and innovations include:

- System change litigation challenging specific unreliable or suspect law enforcement practices;⁶⁰
- Following publication of the National Academy of Science's groundbreaking 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*,⁶¹ increasingly successful challenges to convictions based on "junk science," such as bite

59. These barriers abound. As recently as 2022, for example, the United States Supreme Court held that federal habeas courts may not conduct evidentiary hearings or consider any evidence outside of the state court record, even when the petitioner was sentenced to death and raises a viable claim of ineffective assistance by state court trial counsel. *See Shinn v. Ramirez*, 142 S. Ct. 1718, 1739–40 (2022). Similarly, state court post-conviction relief and habeas rules set forth extraordinarily narrow grounds for challenging wrongful convictions and strict and often unyielding time limitations. *See, e.g., State v. Goodwin*, 803 A.2d 102 (2002); *Tolliver v. State*, 486 S.W.3d 199 (2016).

60. *See, e.g., State v. Henderson*, 27 A.3d 872, 920 (2011) (mandating that trial courts conduct pre-trial hearings, addressing both "system" and "estimator" variables, to determine the admissibility of eyewitness identification testimony upon a showing of suggestiveness of the out-of-court procedure by the defendant).

61. HON. HARRY T. EDWARDS ET AL., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>.

mark,⁶² arson,⁶³ and hair microscopy⁶⁴ testimony, among others; passage of legislation and rule changes permitting post-conviction relief on the ground of “changed science”;⁶⁵ and the creation and vivification of forensic science oversight commissions in a number of states;⁶⁶

- Increased scrutiny of police lab policies and practices;⁶⁷

62. Perhaps the most well-known bite mark case is that of Steven Mark Chaney, whose wrongful conviction for a 1987 murder in Texas was based largely on now-discredited forensic odontology testimony and who was exonerated in 2018. *Ex parte* Chaney, 563 S.W.3d 239, 256 (Tex. Crim. App. 2018) (“[T]he Court finds that such testimony would not be justified, admissible, or accurate under today’s guidelines because the scientific community and the ABFO guidelines have invalidated individualization of bite marks in an open population . . .”).

63. Arson “science” has long been under fire, but the case of Cameron Todd Willingham, who was convicted of setting a fire that killed his three young daughters in Corsica, Texas in 1991, brought widespread public attention to its unreliability. *See, e.g.*, David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Aug. 31, 2009), <https://www.newyorker.com/magazine/2009/09/07/trial-by-fire>; Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004, 2:00 AM), <https://www.chicagotribune.com/nation-world/chi-0412090169dec09-story.html>. In 2011, the Texas Forensic Science Commission conducted an investigation of the Willingham case and that of Ernest Ray Willis, who was convicted and sentenced to death for killing two women in the course of committing arson in 1987. Unlike Willingham, Willis was released from prison in 2004 and ultimately exonerated on the ground of actual innocence. REPORT OF THE TEXAS FORENSIC SCIENCE COMMISSION: WILLINGHAM/WILLIS INVESTIGATION 13 (2011), <http://www.fsc.state.tx.us/documents/FINAL.pdf>. Among other findings, the Commission concluded that the fire marshal in the Willingham case was “unique among the investigators of both fires in his attitudes toward arson and fire scene examination.” *Id.* at 48–49. Further, “[t]he investigators had poor understandings of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators. Their methodologies did not comport with the scientific method or the process of elimination.” *Id.* at 51.

64. An FBI internal review of cases in which its own hair microscopy experts testified revealed that the witnesses made erroneous statements in more than ninety percent of cases. At least five of the resulting convictions were later reversed based on DNA evidence. *See* Kelly Servick, *Reversing the Legacy of Junk Science in the Courtroom*, SCI. (Mar. 7, 2016), <https://www.science.org/content/article/reversing-legacy-junk-science-courtroom>.

65. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2023).

66. *See generally* JERI D. ROPERO-MILLER & NICOLE JONES, FORENSIC SCIENCE STATE COMMISSIONS AND OVERSIGHT BODIES—A 2022 UPDATE (June 2022) <https://forensiccoe.org/private/6387e3c0cb5a7> (reporting on the various forensic science commissions among all fifty states); Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483 (2020) (highlighting and urging expansion of state habeas relief based on “changed science”).

67. In 2013, for example, former Massachusetts state chemist Annie Dookhan pled guilty to twenty-seven counts of misconduct that included tampering with evidence, perjury, and obstruction of justice, among others. She was sentenced to a prison term of three to five years, and more than 20,000 convictions based in whole or in part on her analyses were vacated. *See* Jess Bidgood, *Chemist’s Misconduct Is Likely to Void 20,000*

- The creation and proliferation of conviction review units (“CRU”) in prosecutor offices around the country;⁶⁸
- Audits of cases handled by police officers who engaged in pattern of misconduct, and vacatur of convictions that were based on the testimony of those officers;⁶⁹
- Recognition of the reality and ubiquity of false confessions, and adoption of preventive measures, such as recording of interrogations⁷⁰ and, in a handful of jurisdictions, presence of counsel for youth;⁷¹

Massachusetts Drug Cases, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/us/chemist-drug-cases-dismissal.html>. According to Professor Ronald Sullivan of Harvard Law School, one of the Symposium’s keynote speakers, “the wave of dismissals [was] ‘wholly unprecedented,’” and the “scandal led drug labs around the country to re-examine their protocols.” *Id.*

68. For an invaluable history and assessment of CRU’s, see Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017).

69. In perhaps the most high-profile example, efforts by the Brooklyn District Attorney’s Office, impacted people, and defense counsel to undo dozens of wrongful convictions tied to retired Brooklyn homicide detective Louis Scarcella, who extracted false confessions, fabricated evidence, and engaged in other forms of misconduct during his twenty-six years with the New York City Police Department, have continued for over a decade. See Sean Piccoli & Ed Shanahan, *Three Imprisoned for Fiery 1995 Subway Murder Are Exonerated*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2022/07/15/nyregion/subway-murder-false-conviction-exonerated.html>. As of June 2023, the National Registry of Exonerations has identified seventeen people whose wrongful convictions are attributed to Scarcella’s misconduct. See NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Scarcella%20cases%20in%20the%20Registry.pdf> (last visited Sep. 10, 2023). As is often true in cases of police misconduct, however, Scarcella has not been, and is unlikely ever to be, held accountable for his actions. See Alan Feuer, *Despite Seven Scrapped Convictions, Prosecutors Say Ex-Detective Broke No Laws*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/nyregion/louis-scarcella-murder-dismissals.html?module=inline>.

Prosecutors who engage in even egregious *Brady* violations and other unethical practices, furthermore, are rarely, if ever, sanctioned. See, e.g., Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS L. REV. 623, 631–41 (2017); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 884–98 (2015); cf. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2017) (asserting that a growing awareness of prosecutorial misconduct has given rise to recent “rhetorical and regulatory” changes that promote prosecutorial accountability and examining information technology’s role in ensuring transparency and encouraging and solidifying this new landscape).

70. See generally Saul M. Kassim et al., *Does Video Recording Alter the Behavior of Police During Interrogation? A Mock Crime-and-Investigation Study*, 38 L. & HUM. BEHAV. 73 (2014).

71. See CAL. WELF. & INST. CODE § 625.6 (West 2020); 2016 Ill. Laws 099-0882.

- Growing acknowledgement of the role bias plays in police, prosecutorial, and judicial decision-making—and, therefore, wrongful convictions—and slow integration of that understanding into policy, practice, and legal doctrine.⁷²

Barriers to Innocence: Identifying, Investigating, and Undoing Wrongful Convictions, a one-day symposium co-sponsored by the *Rutgers University Law Review*; the Rutgers Center on Criminal Justice, Youth Rights, and Race; the Rutgers Criminal and Youth Justice Clinic; and the newly launched New Jersey Innocence Project at Rutgers University, explored all of this: the causes, effects, and incalculable human toll of wrongful convictions, and strategies to prevent, undo, and redress these profound injustices.⁷³ The conference was intended to take stock, to cross-pollinate, to increase awareness and understanding of the issues in New Jersey and beyond, and to encourage expansive thought about both problems and solutions. To achieve these goals, we brought together many of the most compelling voices of the innocence movement—inspiring exonerees, including Sean Washington, among others; transformational defenders; leading legal scholars and journalists; visionary heads of conviction review units from around the country; and powerful community advocates and activists. The conversations were rich, probing, gut-wrenching and, without exception, full of heart and of hope.⁷⁴

The symposium also aimed to encourage and promote wrongful convictions-related scholarship, and the six pieces included in this volume make original, valuable, and forward-looking contributions to that body of work. Each identifies and examines particular issues or circumstances that give rise to unjust convictions or legal barriers that collude to prevent their undoing. But they do not stop there. Each also proposes concrete, well-considered reforms. Collectively, these writings chart a roadmap for achievable change.

72. See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. CIV. RTS. & CIV. LIBERTIES L. REV. 1, 14–19 (2011); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1543–47 (2018).

73. The symposium received generous financial support from Chancellor Nancy Cantor of Rutgers University – Newark and the David Stoffer Memorial Fund of Rutgers Law School, for which the organizers are very grateful. Also deserving of high praise and abundant thanks are the Rutgers Law Students who were primarily responsible for organizing the symposium: *Rutgers University Law Review* Editor-in-Chief Sarah Calderone, Symposium Editor Jeremy Posluszny, and Michael J. Sullivan Defender Fellows Ruby Chervin, Derrick Neves, and Chelsea Nkrumah.

74. A full list of the symposium speakers follows this Essay.

Karen Thompson's searing essay—an expanded transcript of her symposium remarks—compels us to look beyond the many successes of the innocence movement and “re-examine the circumstances fertilizing the ground that produces an incarceration that is a miscarriage of justice, whether factual or nonfactual in nature.”⁷⁵ With these words, Thompson makes a crucial point: it is not just the factually innocent who are wrongfully convicted. Countless others are victims of abusive policing, overcharging, invidious (and obvious) discrimination in the courtroom, an overburdened public defense infrastructure, the predatory plea-bargaining system, and excessive sentencing, among other injustices.⁷⁶ And, as Thompson reminds us, race and racism lie at the core of this pervasive injustice. In order even to begin to redress it, then,

WE must face the reality of how white supremacist principles are reproduced in the law, and how the structure of that reproduction informs wrongful convictions. WE must look at the creations of the criminal legal system that require and reward discrimination and violence against Black people and how state sponsored dehumanization aids in and is dependent on that reproduction to justify itself. WE must understand the space from which the recalcitrance towards overturning wrongful convictions emerges and understand why it so often takes months/years/decades of litigation to right those wrongs.⁷⁷

Thompson goes on to provide a stark summary of what she dubs this “legal genealogy,” a retelling of four-hundred years of state-sanctioned racism and race-based subjugation and brutalization that should be required reading for all wrongful conviction practitioners—or, in fact, for everyone.⁷⁸

But Thompson is not content simply to map the legal genome. She also offers several concrete strategies for integrating an awareness and understanding of this pernicious history and broader racial analyses into legal advocacy, and challenges us to do so—not only in the “exonerative voice,” but on behalf of all who have been unjustly convicted.⁷⁹ In her words, “every tool is a weapon if you hold it right,” and she is teaching us to do just that.⁸⁰

75. Thompson, *supra* note 55, at 1270.

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1277–79.

80. *Id.* at 1279.

In a similar vein, the six other articles identify specific shortcomings in legal doctrine, legislation, evidentiary and ethical rules, and practice that contribute to or prevent the vacatur of wrongful convictions, and propose specific fixes to these problems. Like Thompson, the authors draw on and center themselves around the narratives of impacted people and, in doing so, bring real-world urgency and legitimacy to their proposals. In *Prioritizing Proof of Innocence*, Thomas Lininger offers a sweeping review of the Federal Rules of Evidence and the ABA Model Rules of Professional Conduct and proposes amendments to those that, in his words, “heighten the likelihood of wrongful conviction.”⁸¹ These twelve amendments, elegant in their simplicity, are intended to ensure that exculpatory information (either pointing to the innocence of the accused or the guilt of an uncharged person) is admitted into evidence, even if the rules as currently written would prohibit admission on hearsay or other grounds; that across the entire arc of a case, prosecutors swiftly and expansively disclose not only evidence they deem to be exculpatory or mitigating, but also, “all leads or investigative opportunities known to the prosecutor that appear reasonably likely to result in the discovery of such evidence or information”⁸²; that prosecutor offices establish conviction integrity units; and that judges prioritize the admission of exculpatory and mitigating evidence and “only exclude the evidence as a last resort.”⁸³

In *Youngblood in Practice: How the Bad Faith Standard Preserves Wrongful Convictions and Creates Perverse Incentives*, Evan Glasner movingly describes the devastating impact of *Arizona v. Youngblood*—in which the Supreme Court held that loss or destruction of evidence is not a denial of due process unless the defendant can establish “bad faith” on the part of law enforcement—on two clients of the Duke Wrongful Convictions Clinic.⁸⁴ Deeming the *Youngblood* standard “nearly insurmountable,” Glasner proposes replacing it with a burden-shifting framework that would eliminate law enforcement intent from the equation and focus, instead, on the potential exculpatory or impeachment value of the missing evidence.⁸⁵

Like Glasner, Amelia Maxfield and Nilam Sanghvi draw on their work representing factually innocent clients to illustrate and elucidate

81. Tom Lininger, *Prioritizing Proof of Innocence*, 75 RUTGERS L. REV. 1281, 1282 (2023).

82. *Id.* at 1299.

83. *Id.* at 1301–02.

84. Evan Glasner, *Youngblood in Practice: How the Bad Faith Standard Preserves Wrongful Convictions and Creates Perverse Incentives*, 75 RUTGERS L. REV. 1307 (2023).

85. *Id.* at 1309, 1332–40.

another often insurmountable barrier to exoneration: the unjust and unforgiving operation of many post-conviction relief statutes in cases involving flawed, misleading, or discredited forensic evidence.⁸⁶ Strict time limitations, definitions of “newly discovered evidence” and interpretations of the “due diligence” standard render post-conviction relief a shell game for many wrongfully convicted people, particularly when their claims are based on scientific advances.⁸⁷ Maxfield and Sanghvi, too, make thoughtful proposals to rectify these problems, including post-conviction relief statutes that specifically permit claims based on evolving science; relaxed time limitations in these cases; inclusion of actual innocence as a ground for relief and a basis for overcoming procedural bars; and creation of forensic science commissions in every state, among others.⁸⁸

193 people sentenced to death have been exonerated since the 1970s.⁸⁹ At least twenty others were executed despite strong evidence of their innocence,⁹⁰ including several who were posthumously pardoned.⁹¹ This dreadful collision of capital punishment and innocence serves as the springboard for *Proportionality as the New Innocence*, in which Sheri Lynn Johnson, John H. Blume, and Rosalind Major urge states to embrace a holistic, defense-driven proportionality review as a condition precedent to imposition of the death penalty.⁹² Here, too, stories of impacted people provide the scaffolding for the authors’ proposal for doctrinal change, often to harrowing effect.⁹³

Jessica Henry’s illuminating essay, *The Wrongful Convictions of Women for Crimes that Never Happened and What We Can Learn from Them*, focuses on the disproportionate number of women—nearly three-fourths of female exonerees—who are wrongfully convicted of

86. Amelia Maxfield & Nilam Sanghvi, *Junk Statute: How Post-Conviction Statutes Fail Petitioners Convicted Based on False or Misleading Forensic Evidence*, 75 RUTGERS L. REV. 1343 (2023).

87. *Id.* at 1344–52.

88. *Id.* at 1358–59.

89. *Innocence By the Numbers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/innocence-by-the-numbers> [<https://perma.cc/9AHT-UDAJ>] (last visited Sept. 10, 2023).

90. *Executed But Possibly Innocent*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> [<https://perma.cc/8AA8-L5VS>] (last visited Sept. 10, 2023).

91. *Posthumous Pardons*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/posthumous-pardons> [<https://perma.cc/7NL3-8WXU>] (last visited Sept. 10, 2023).

92. Sheri Lynn Johnson, John H. Blume & Rosalind Major, *Proportionality as the New Innocence*, 75 RUTGERS L. REV. 1361 (2023).

93. *See id.* at 1386–96.

crimes that never occurred.⁹⁴ These “no-crime” cases often include misclassification of accidental deaths, death by suicide, or deaths resulting from natural causes as homicides.⁹⁵ Centering around the heartbreaking stories of innocent women convicted of murdering their own children,⁹⁶ as well as those convicted other crimes, Henry explores how intersectional gender, race, socio-economic, and sexual orientation biases contribute to wrongful convictions of women; examines the barriers to exoneration for these women;⁹⁷ and offers concrete proposals for future research and essential reforms.⁹⁸

Finally, Joshua Perry fixes our gaze on legal representation in juvenile court, an often-overlooked petri dish of wrongful convictions.⁹⁹ Perry, a longtime youth defender, posits that widespread deficiencies in the indigent youth defense delivery system and the quality and zeal of legal representation afforded children charged with delinquency, even in better-funded systems, contribute significantly to the disproportionate rate of wrongful conviction of youth.¹⁰⁰ He proposes three “structural” reforms to address these shortcomings: mandatory pretrial hearings to ensure early adversarial testing and “promote innocence-protecting checks on police and prosecutorial overreach and misconduct”¹⁰¹; mandatory data collection and publication by youth public defense systems¹⁰²; and—perhaps controversially—designation of youth defense “ombudspeople” who “can promote systemic effectiveness of counsel by auditing processes and random samplings of cases in something like real time, and protect youth by conducting time-sensitive inquiries into specific cases where red flags are raised while direct appeals are still ongoing.”¹⁰³ Accountability, in other words, matters.

Sean Washington lent his voice to the final panel of the symposium. He shared his story with grace and without rancor, and exhorted the

94. Jessica Henry, *The Wrongful Conviction of Women for Crimes that Never Happened and What We Can Learn from Them*, 75 RUTGERS L. REV. 1417, 1419 (2023).

95. *Id.*

96. *Id.* at 1422–24.

97. *Id.* at 1428–32.

98. *Id.* at 1433–34.

99. Joshua Perry, *Defense Accountability Structures to Prevent Wrongful Youth Convictions*, 75 RUTGERS L. REV. 1434 (2023). See generally Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007) (discussing the prevalence and causes of juvenile wrongful convictions).

100. Perry, *supra* note 99, at 1437–42.

101. *Id.* at 1454–57.

102. *Id.* at 1456–57.

103. *Id.* at 1457–59.

audience to fight for the freedom of those who remain behind bars unjustly. This volume embodies that exhortation. Take heed, and take action.

**BARRIERS TO INNOCENCE: IDENTIFYING, INVESTIGATING,
AND UNDOING WRONGFUL CONVICTIONS**

MARCH 31, 2023

SYMPOSIUM SPEAKERS

<i>Christine Bella</i>	<i>Thomas Lininger</i>
<i>Bryce Benjet</i>	<i>Rosalind Major</i>
<i>Huwe Burton</i>	<i>Amelia Maxfield</i>
<i>Nicholas Dawidoff</i>	<i>Kimberlee Moran</i>
<i>Steven Drizin</i>	<i>Carolyn Murray</i>
<i>Jill Friedman</i>	<i>Laura Nirider</i>
<i>Susan Friedman</i>	<i>Joshua Perry</i>
<i>Cynthia Garza</i>	<i>Nilam A. Sanghvi</i>
<i>Evan S. Glasner</i>	<i>Quincy Spruell</i>
<i>Nicole Gonzalez Van Cleve</i>	<i>Erica J. Suter</i>
<i>Jessica Henry</i>	<i>Ronald S. Sullivan, Jr.</i>
<i>Alexis Karteron</i>	<i>Nyssa Taylor</i>
<i>Becky Kling Feldman</i>	<i>Karen Thompson</i>
<i>Tamar Lerer</i>	<i>Sean Washington</i>

