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# INTRODUCTION TO THE SYMPOSIUM ON WRONGFUL CONVICTIONS: ISSUES OF SCIENCE, EVIDENCE, AND INNOCENCE

Ellen Yankiver Suni

It is hard to imagine an injustice greater than the incarceration or, worse yet, execution of an innocent. Especially in our system of justice, which purports to accept as a basic premise that it is better that ten guilty go free than that one innocent person be imprisoned,<sup>1</sup> the incarceration of an innocent is simply intolerable. Yet it happens — and much more often than we would like to believe.<sup>2</sup> Questions abound as to why and what can be done about it. This Symposium addresses some of those and related questions.

The problem of wrongful convictions has been discussed for some time, but it has often been rejected or downplayed.<sup>3</sup> It was only the advent of DNA technology, which makes it possible to definitively demonstrate that a person did not commit the crime for which he or she is incarcerated, that has forced doubters to acknowledge that wrongful convictions actually do occur.<sup>4</sup> Unfortunately, the

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<sup>1</sup> See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 334 (1995):

This maxim may be traced to Hale who noted in the late 1600s that it is better that five guilty men should be acquitted before one innocent man is convicted. Matthew Hale, *Pleas of the Crown, or, A Brief but Full Account of Whatsoever Can Be Found Relating to that Subject*, 289 (1678). Similar references may be found in the work of Fortescue, who wrote: "I would rather wish twentie evill doers to escape death through pitie than one man to be unjustly condemned." *De Laudibus legum Angliae* c. 27 (1545). Blackstone observed that "the law holds, that it is better that ten guilty persons escape than that one person suffer." 4 William Blackstone, *Commentaries*, 358 (1765).

*Id.* at 334, n.17. This statement is oft quoted in an innocence context. See, e.g., DANIEL GIVELBER, *THE ADVERSARY SYSTEM AND HISTORICAL ACCURACY: CAN WE DO BETTER, IN WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 253, 254 (Saundra D. Westervelt and John A. Humphrey eds., 2001).

<sup>2</sup> Since the advent of DNA testing, 110 individuals have been fully exonerated across the United States. See *Innocence Project*, at <http://www.innocenceproject.org/> (last visited September 25, 2002). Over one hundred people have been released from death row after it was determined they did not commit the crimes for which they were sentenced to death. See *Death Penalty Information Center, Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/Innocentlist.html> (last visited September 25, 2002). While there is disagreement as to whether any actually innocent individuals have been executed, studies would indicate that there is a significant possibility that such an execution has occurred. See, e.g., Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); see also Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971 (2002) (suggesting such executions have occurred in Missouri).

<sup>3</sup> In 1923, Judge Learned Hand stated, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

<sup>4</sup> See, e.g., Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW AND CONTEMP. PROBS., Autumn 1998, at 125 ("In the past decade, this complacent view [that no innocent people are convicted] has been shattered.").

incidence of wrongful conviction is almost impossible to determine,<sup>5</sup> because DNA evidence is not available in a large majority of cases.<sup>6</sup> There is reason to believe, however, that the number of wrongfully convicted individuals should cause us to have real concern about how the criminal justice system is functioning.<sup>7</sup>

This Law Review Symposium is an effort to bring together scholars working on various aspects of the broader issue of wrongful convictions. It is part of a year-long educational effort relating to innocence issues at the University of Missouri-Kansas City, planned and implemented in conjunction with the formation of the Midwestern Innocence Project at UMKC (MIP).<sup>8</sup> The Project, when fully funded, will provide representation to inmates in the Midwest who claim to be actually innocent of the crimes for which they are incarcerated.<sup>9</sup>

The articles in this Symposium cover many facets of wrongful convictions and do so in an interdisciplinary fashion. Two of the articles are authored by professors in university departments other than law,<sup>10</sup> and one is written by a journalist.<sup>11</sup> They span the geographic spectrum as well, with two articles and a

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<sup>5</sup> See Ellen Yankiver Suni, *Who Stole the Cookie From the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 48 *FORD. L. REV.* 1643, 1689 and n. 272.

<sup>6</sup> James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 *COLUM. HUM. RTS. L. REV.* 527, 541-542 (2002).

<sup>7</sup> Suni, *supra* note 5, at 1689-1690 and n. 273.

<sup>8</sup> In addition to the Symposium, the Law School dedicated its speakers programs for 2001-2002 to the innocence theme. Programs presented during this period included a panel presentation by Jennifer Thompson (a rape victim who made an erroneous eye-witness identification of Ronald Cotton as her attacker), Ronald Cotton (the wrongfully convicted individual) and Professor Richard Rosen (the attorney who helped Cotton obtain his freedom); a talk by Michael Baden, a renowned forensic pathologist; and Lawrence Farwell, developer of brain fingerprinting. Additionally, MIP hosted a kick-off event featuring Barry Scheck, Co-Founder of the Innocence Project at Cardozo, and 5 exonerated individuals.

<sup>9</sup> MIP will accept both DNA and non-DNA cases. It is one of the more than 30 projects that have joined the Innocence Network in an effort to increase the availability of assistance to those who claim innocence. See Ellen Y. Suni, *Ethical Issues For Innocence Projects: An Initial Primer*, 70 *UMKC L. REV.* 921, 922 n.6 (2002). The Project currently operates through two courses, Wrongful Convictions I and II, with students doing most of the screening and investigative work.

<sup>10</sup> One article is co-authored by a professor and student of Political Science. See Paul Parker and Wayne A. Yokum, *A Time to Delay Killing: Evidence For A Death Penalty Moratorium in Missouri*, 70 *UMKC L. REV.* 983 (2002); and another by a professor of Sociology, Criminal Justice and Criminology. See Cathleen Burnett, *Constructions of Innocence*, 70 *UMKC L. REV.* 971 (2002).

<sup>11</sup> Rob Warden is a legal affairs journalist who was editor and publisher of Chicago Lawyer magazine during the 1980's. He has won more than fifty journalism awards, including the Medill School of Journalism's John Bartlow Martin Award for Public Interest Magazine Journalism, two American Civil Liberties Union James McGuire Awards, five Peter Lisagor Awards from the Society of Professional Journalists, and the Norval Morris Award from the Illinois Academy of Criminology. He is also Executive Director of The Center on Wrongful Convictions at Northwestern Law School. See Northwestern Law School, Bluhm Legal Clinic, Faculty and Staff, at <http://www.law.northwestern.edu/depts/clinic/facstaff/Warden.html> (last visited September 25, 2002).

student Note focusing on Missouri issues,<sup>12</sup> several on issues of national significance<sup>13</sup> and one of international dimension.<sup>14</sup>

The problem of wrongful convictions must be addressed on several fronts. First, we must get a better understanding of what leads to such convictions in order to determine what can be done to remedy them. Next, we must find ways to identify those cases in which wrongful convictions have occurred and means by which to prove innocence and secure the inmate's release. Finally, it is crucially important that we focus as well on the larger, systemic issues to prevent such injustices from occurring. This Symposium attempts to address these varied perspectives.

The first set of articles look at some of the causes of wrongful conviction.<sup>15</sup> Rob Warden's article, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, presents a historic account of the role of the media in both contributing to and helping to identify and remedy wrongful convictions. Told in a journalist's style, with compelling stories, Mr. Warden's article gives us realistic insight into the emerging and important role of the press both in identifying the causes of wrongful convictions and helping to exonerate those who have been wrongfully convicted as well as in educating the public on this important issue. In *Lessons about Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, Professor Dianne Martin uses a comparative analysis, looking at cases from Canada, Great Britain and Australia, to demonstrate the role that police interviewing and evidence collection, as well as use of informers, play in contributing to wrongful convictions. Professor Edward Imwinkelreid, in *The Reach of Winship: Invalidating Evidentiary Admissibility Standards That Undermine the Prosecution's Obligation to Prove the Defendant's Guilt Beyond a Reasonable Doubt*, examines evidentiary limits placed on defendants who attempt to use alternative perpetrator evidence in an effort to establish

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<sup>12</sup> See Parker and Yokum, *supra* note 10; Burnett, *supra* note 10; Heidi C. Schmitt, Note, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001 (2002)

<sup>13</sup> See Suni, *supra* note 9; Edward Imwinkelreid, *The Reach of Winship: Invalidating Evidentiary Admissibility Standards That Undermine the Prosecution's Obligation to Prove the Defendant's Guilt Beyond a Reasonable Doubt*, 70 UMKC L. REV. 865 (2002); Andre A. Moenssens, *Brain Fingerprinting – Can It Be Used to Detect the Innocence of Persons Charged With A Crime?*, 70 UMKC L. REV. 891 (2002); *see also* Schmitt, *supra* note 12 (surveying law nationally relating to availability of DNA testing).

<sup>14</sup> Dianne Martin, *Lessons about Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002) (examining police investigation and use of informers in Canada, Great Britain and Australia).

<sup>15</sup> For a more comprehensive overview of the causes of wrongful conviction, see, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* (2000); Westervelt & Humphrey, *supra* note 1; EDWARD CONNORS ET. AL., U.S. DEP'T OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996). The articles in this Symposium make a contribution by identifying factors, some of which have not previously been adequately developed, and proposing interesting new solutions.

innocence<sup>16</sup> at trial. He proposes a novel approach, the use of the *Winship*<sup>17</sup> standard, as a means for challenging limits on a defendant's ability to present potentially exculpatory evidence and suggests that this approach may have broader implications for admissibility issues generally.

The second group of articles address issues relating to how we identify and prove that wrongful convictions have occurred. The advent of DNA technology has had a revolutionary effect on proof of innocence, and Heidi Schmitt's Note, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, addresses post-conviction access to DNA evidence, including analysis of statutes that both provide for DNA testing and open courtroom doors, otherwise often closed or jammed, to those seeking exoneration through DNA. The question whether brain fingerprinting, a new technology pioneered by Lawrence Farwell, is likely to be the next DNA-style breakthrough or is more akin to a modern polygraph is explored by Professor Andre Moenssens in his article, *Brain Fingerprinting – Can It Be Used to Detect the Innocence of Persons Charged With A Crime?*. The article takes a critical look at brain fingerprinting to determine what role it may eventually play in the exoneration of the wrongfully convicted.

Professor Warden's article, discussed above, belongs in this group as well, because it makes a significant contribution to understanding the role the media can play in seeking to remedy wrongful convictions. Professor Ellen Suni focuses on another group working to secure the release of the wrongfully convicted, Innocence Projects, and the important role they play in this effort. Her article, *Ethical Issues For Innocence Projects: An Initial Primer*, addresses the unique ethical issues that confront attorneys, students and staff working in such projects. She identifies the reasons innocence projects may face distinct and difficult ethical issues and provides an introduction to addressing and resolving these issues as they arise in practice.

Finally, the Symposium focuses on the larger systemic issues that are implicated by what we have learned about wrongful convictions, particularly in the context of the relationship between innocence and the death penalty. In *Constructions of Innocence*, Professor Cathleen Burnett engages in a study of clemency petitions filed in Missouri capital cases in which the death penalty was imposed. After identifying three constructions of innocence – actual, factual and legal – Professor Burnett examines the people and cases behind the petitions to demonstrate that a significant number of those executed in Missouri fit into one of these categories. She urges a broader view of innocence in order to prevent unjust conviction and execution. The relationship between the death penalty and innocence is also the focus of Professor Paul Parker and Wayne Yocum in *A Time to Delay Killing: Evidence For A Death Penalty Moratorium in Missouri*.

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<sup>16</sup> Of course, defendants have no obligation to prove their innocence, but there are strong indications that, unless defendants actually do so, the risk of conviction is great. See Suni, *supra* note 5, at 1654-1655 and n. 45.

<sup>17</sup> In re *Winship*, 397 U.S. 358 (1970).

In this article, the authors conclude that a moratorium on the death penalty in Missouri is needed to allow for further study of these important issues. The authors take a careful look at both the need for such a moratorium and the politics involved in adopting one.

One final piece deserves mention in identifying directions for the future with regard to the problem of wrongful convictions. While not directly addressing the issue, Professor Martin's article instructs on the importance of innocence commissions, a process utilized in Canada, Great Britain and Australia to identify the causes of wrongful convictions and propose remedies when a systemic breakdown leading to wrongful conviction has occurred. Such "Commissions of Inquiry have been influential in generating a new awareness of the fallibility of the prosecution process, and in informing scholarly critiques of current investigative and prosecution policies."<sup>18</sup> In fact, one of the current projects of the Innocence Network is to urge for and assist in the creation of such Innocence Commissions in the United States.<sup>19</sup>

While no one volume can adequately address the myriad of issues that instruct our knowledge and understanding of wrongful convictions, it is our hope that this Symposium issue adds positively to the discourse on innocence both here and abroad. The articles in this Symposium have identified issues and proposed solutions that we hope, in the coming years, can play a role in remedying the intolerable injustice that the incarceration of the innocent presents not only to the direct victim of that injustice but to the society as a whole.

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<sup>18</sup> Martin, *supra* note 14.

<sup>19</sup> See Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 902-03 (2002):

In Actual Innocence we characterize such post-exoneration inquiries as Innocence Commissions and call for their creation on a state and federal level. . . . The need for this institution is obvious. When an airplane falls from the sky, a train derails, or a patient dies in a hospital for no apparent reason, a postmortem is conducted by a neutral blue ribbon group of experts with subpoena power--best exemplified by the National Transportation Safety Board--to see what went wrong and who, if anyone, is responsible? Was it system error or individual error? And, most importantly, how can we prevent such a catastrophe from happening again? Yet in the criminal justice system, despite the fact that life and liberty of people are at stake, when the system fails, we don't have a very systematic way of analyzing that failure. So, when 104 wrongly convicted people walk out of jail as a result of DNA testing, there is not a syllable written about it that can be found in a reported or unreported opinion in Lexus or WestLaw that explains what went wrong or even raises questions about it. I strongly suspect the establishment of Innocence Commissions in the United States would produce some very persuasive data . . .

*Id.*