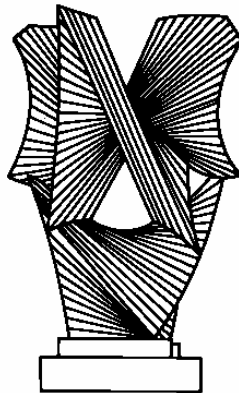


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AFTER INNOCENCE: FRAMING WRONGFUL CONVICTIONS

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Concern over wrongful convictions has led to an “innocence movement” that has managed to bridge ideological divides, rouse the public to action, and achieve unprecedented success in reforming the operation of the death penalty. This movement is now at a critical juncture. Exonerations based on DNA evidence are beginning to decline, and the public’s attention is beginning to stray. Yet there is an enormous amount of work left to be done. In this short essay, written as part of the symposium “Beyond Biology: Wrongful Convictions in a Post-DNA World,” I consider the fraught terms of the debate about the content of the category *wrongful convictions*. The definition of persons who should be considered wrongfully convicted (a term often used interchangeably with the terms “exonerated” and “innocent”) is hotly contested both by death penalty supporters arguing that claims of a fallible capital system are overblown, and by death penalty opponents debating whether the innocence movement has had a deleterious effect on broader efforts to reform the capital system. Delineating the category also raises another highly controversial issue—how to characterize the governmental conduct that leads to these miscarriages of justice.

I consider whether it remains helpful to organize our thinking about injustice in capital cases around the notion of wrongful convictions. Does framing the problem in this way help or hinder the larger debate about what is wrong with the death penalty and how to fix it? I suggest that though we should celebrate and learn from the successes of the wrongful convictions movement, we need to look beyond innocence and find ways to evoke outrage at a broader spectrum of injustice. I also explore a conundrum about framing police and prosecutorial misconduct. Although it is sometimes essential to identify and condemn intentional misconduct, the focus on malice and intent may also be ineffective and even counterproductive.

The challenge is to find ways to communicate concern for more than just the innocent, and to communicate the dangers of systemic governmental misconduct that defies traditional definitions of blameworthiness. Important lessons can be learned from the enormous success of the wrongful convictions movement. As we consider the evolving shape of the death penalty reform effort, we should explore why certain ways of framing injustice have so much power.

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After Innocence: Framing Wrongful Convictions

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Recently the New York Times published an opinion piece by a sociologist arguing that because the majority of those exonerated for capital crimes were on death row due to intentional and even malicious governmental conduct, the term *wrongful convictions* should be replaced with the term *unlawful convictions*.¹ His argument was that we need to address the prevalence of dishonest and downright illegal behavior by police and prosecutors in capital cases, and that we should begin by calling this conduct by its rightful name.

My first reaction was puzzlement that the author should be so concerned about labels, or that he should believe labels possess so much power. But of course, he is clearly correct about this. One need only think about the pitched battles over nomenclature in the abortion context to realize the importance of the power to name what is at stake. Likewise, the battle over nomenclature has been a central aspect of the capital punishment dialogue all along. The galvanizing power of the claim that the wrongfully convicted are sent to death row has stemmed mainly from the public perception that innocent people might be executed. The category of “innocence” is hotly contested terrain. What does it mean to be “found innocent,” which is after all a term that does not jibe with the legal standard of “not guilty?” What category of people can claim to have been “exonerated?” Do these terms apply to anyone whose conviction is overturned,

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¹ Richard Moran, The Presence of Malice, the New York Times at A21, August 2, 2007.

those whose convictions are overturned on reasonable doubt grounds, or only those whose blamelessness is somehow beyond question?² Can the label of innocence even apply to death row inmates who are guilty of the crime charged, but “innocent of the death penalty?”³ The boundaries of the category are contested both by death penalty supporters arguing that the system generally works and that claims of a fallible capital system are overblown, and by death penalty opponents debating whether the innocence movement has had a deleterious effect on broader efforts to reform the capital system.⁴

The author of the opinion piece contests a separate aspect of the *wrongful conviction* label. He calls attention to the fact that the term *wrongful conviction* contains a judgment not just about the defendant’s lack of culpability for the crime charged, but about the level of the government’s culpability for the defendant’s unjust treatment. Indeed he optimistically assumes that this judgment can be quite powerful: that calling attention to the prevalence of bad faith behavior will have productive consequences. In short, he believes that his suggested term would be both more accurate and more strategically effective.

Neither assumption is self-evident. As to accuracy, terms describing state of mind raise a basic definitional problem—the more we learn about human behavior, the less confident we should be about whether motivations are malicious, intentional, or even

² Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 *Journal of Criminal Law & Criminology* 587, 598 (2005); Richard A. Rosen, *Reflections on Innocence*, 2006 *Wisconsin L. Rev.* 237, 256.

³ See e.g. Andrew E. Taslitz, *Sentencing Lessons from the Innocence Movement*, *Criminal Justice* at 6 (Summer 2006) (arguing that many of the same dynamics that lead to wrongful convictions lead to wrongful death sentences).

⁴ See Daniel S. Medwed, *Innocentrism*, 2008 *Illinois L. Rev.* (forthcoming).

wholly conscious.⁵ This is a problem with state of mind standards generally;⁶ it is not endemic to standards resting on police and prosecutorial state of mind. Nevertheless, it may have particular practical and strategic implications for police and prosecutorial misconduct. There is no question that far too much serious misconduct by police and prosecutors goes unaddressed and even unidentified.⁷ But leaving aside the question of whether the term “unlawful” really conveys the seriousness of such misconduct in the way the author would like, there is the converse problem to consider. Sometimes labels claiming dishonesty, such as “bad faith” and “malice,” are so radioactive that their effect is entirely counterproductive. As I will discuss, while framing police and prosecutorial conduct in this way is sometimes essential, it often runs the risk of entrenching rather than uprooting bad behavior.

In this essay, I will consider the fraught terms of the debate about the content of the category of “wrongful convictions.” It is no exaggeration to say that wrongful convictions spurred and defined a movement—the most successful death penalty reform movement in our lifetime. This movement is now at a critical juncture. Exonerations based on DNA evidence are beginning to decline, and the public’s attention is beginning to stray.⁸ Given the enormous amount of work left to be done in reforming the criminal

⁵ Taslitz, *supra* note 3; Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, __ NYU J. L. & Liberty (forthcoming); Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *Howard L.J.* 475 (2006).

⁶ See e.g. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *A Reader on Race, Civil Rights and American Law: A Multiracial Approach* 127-130 (Timothy Davis, Kevin R. Johnson & George A. Martinez, eds., Durham, N.C.: Carolina Academic Press 2001) (discussing failure of current equal protection standards requiring intent to capture a wide swathe of racial discrimination).

⁷ See e.g. James Liebman, *The Overproduction of Death*, 100 *Colum. L. Rev.* 2030, 2083-97 n160 (2000) (discussing bad faith behavior by prosecutors); Maurice Possley & Steve Mills, *Special Report: The Legacy of Wrongful Convictions* (Chicago Tribune October 26, 27 (2003)).

⁸ Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Conviction Scholarship and Advocacy*, 42 *American Criminal Law Review* 1219, 1222 (2005); Marvin

justice system in general and our system of capital punishment in particular, it would be dispiriting to think that the movement drew all its power from revulsion at the execution of those able to prove they were blameless. The hard-fought contest over terminology is partly about that question—how narrow or capacious are our notions of injustice? The immediate, pragmatic questions are these: to what extent does it remain helpful to organize our thinking about injustice in capital cases around the notion of wrongful convictions? Does framing the problem in this way help or hinder the larger debate about what is wrong with the death penalty and how to fix it?⁹ And even if it has become time to reconceive the category, what lessons can be learned from the enormous success of the wrongful convictions movement? Why do certain ways of framing injustice have so much power, and with what ramifications for the shape of the reform movement and the future of capital punishment?

The Innocent Defendant

The innocence movement has had an unprecedented effect on the debate about capital punishment. Decades of data showing that the death penalty does not deter, which ought to have cut the heart out of the chief argument driving popular support for the death penalty, in fact had no effect on the level of popular support. When the populace concluded that the death penalty did not deter, it simply switched rationales, supporting it

Zalman, Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions, 41 *Criminal Law Bulletin* 169, 172 (2005).

⁹ For discussions of the concept of “framing,” generally, and of the effects of different frames on how people interpret and react to various issues, see e.g. Aaron Tversky and Daniel Kahneman, the framing of decision and the psychology of choice, 211 *Science* (1981); Daniel Kahneman and Cass R. Sunstein, Cognitive Psychology of Moral Intuitions, in *Neurobiology of Human Values* (2005) (available under title Indignation: Psychology, Politics, Law at http://ssrn.com/abstract_id=1002707

on retributive grounds.¹⁰ Although some people were disturbed that the death penalty was racially biased, it turned out that very few were disturbed by the most significant type of bias—that based on the race of the victim. The argument that it was unfair to punish someone more severely for killing a white person than for killing a member of a minority group proved to have no more traction with the public¹¹ than it had with the Supreme Court.¹² The development that finally roused people to anger, or at least to a willingness to re-examine their beliefs, was the mounting evidence that innocent people had been sent to death row. The stories told by Barry Scheck, Peter Neufeld,¹³ Larry Marshall¹⁴ and others about their innocent clients, and by the clients themselves, had a visceral effect. They moved and energized people in a way empirical data never could. As Daniel Medwed summarized:

... the innocence movement has captivated the public, with accounts of the exonerated not only surfacing regularly in newspapers, film documentaries, and television news programs, but also making inroads into components of pop culture [citing several examples]... All of the attention paid to actual innocence by litigators, academics, legislators, authors, even television executives, signals a new era in which fact-based arguments surrounding guilt or innocence may begin to trump or at least hold their own with ... traditional rights-based arguments...¹⁵

¹⁰ Susan Bandes, *The Heart has its Reasons: Examining the Strange Persistence of the American Death Penalty*, (Studies in Law, Politics and Society) special issue “Is the Death Penalty Dying?” (Austin Sarat ed.) (forthcoming 2008).

¹¹ David C. Baldus and George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L. Rev. 1411-1481-82 (2004).

¹² See *McCleskey v. Kemp*, 481 U.S. 252 (1987).

¹³ Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (2000).

¹⁴ Lawrence Marshall, *Walter C. Reckless Memorial Lecture: The Innocence Revolution and the Death Penalty*, 1 Ohio St. J. Crim. L. 573, 574 (2004) (describing the “‘innocence revolution’ that has caused people to put aside controversial ideological arguments around the death penalty, and instead, look at the particular fact that there are innocent people that receive the death penalty” and discussing the cases of Michael Evans and Paul Terry, who were both exonerated through DNA by the Northwestern Center on Wrongful Convictions after spending 26 years in prison.)

¹⁵ Medwed, *Innocentrism*, supra note 4. See also Brandon Garrett, *Judging Innocence* (forthcoming Columbia Law Review 2008).

Concepts like “innocent,” “exonerated,” and “wrongfully convicted,” are often used interchangeably. But the stunning reaction to the exoneration cases seemed keyed to a specific notion of innocence, and it was less a legal concept than as a moral one. It evoked the unjust treatment of the blameless.¹⁶ It seemed to assume not only factual innocence of the crime in issue, but a deeper, more character-based kind of innocence. This point has been made quite concretely during some of the legislative debates about compensation plans for those who have served times for crimes they did not commit. In Florida, for example, lawmakers have insisted on a plan that excludes those with prior criminal histories. One state representative said “I believe the taxpayers would be horribly offended if their money were to be spent compensating an exonerated prisoner who has a history of serious crimes.”¹⁷

The lure of the innocence cases lies in their simplicity and clarity—their promise of a clear line between the deserving and the undeserving. The stories are vivid; the injustice is easy to understand on an emotional level. When coupled with the authoritative ring of DNA evidence, the stories have tremendous power.

The power of simplicity works on a number of levels. At the most basic level, people have a hardy preference for ideas that are simple.¹⁸ Simple categories and clear dichotomies are reassuring in their promise of stability and verity, and they absolve us of the difficult job of sifting facts, evaluating competing perspectives, and making value

¹⁶ Steiker and Steiker, *supra* note 2. See also Margaret Raymond, *The Problem with Innocence*, 49 *Cleve. St. L. Rev.* 449, 457 (2001) (referring to a “supercategory of innocence, elevating factual innocence over other categories.”)

¹⁷ State Representative Ellyn Boddanoff, quoted in Fernanda Santos and Janet Roberts, *Putting a Price on a Wrongful Conviction*, *The New York Times Sec. 1* p. 4, December 2, 2007. See also *infra* note 34 (discussing the case of Steven Avery).

¹⁸ Jerome Kagan, *Three Seductive Ideas* at 67 (Cambridge, Harvard University Press 1998).

judgments. A notion like innocence that boils down to “either he did it or he didn’t” is attractive for its apparent lack of factual or moral ambiguity.

This preference for simplicity aligns neatly with—and is exacerbated by—the media’s approach to crime coverage. Most people have little direct contact with the criminal justice system, and turn to the media as their main source of information on the subject.¹⁹ Moreover, they do not necessarily distinguish among news shows, reality shows like *Cops*, or fictional shows like *Law and Order* (which, to compound the confusion, are often based on recent cases). It all becomes part of the “seamless torrent” of information and misinformation that imbues and helps constitute our cultural milieu.²⁰ From the media we learn what crime looks like, what criminals look like, and how the justice system works. We construct our core assumptions about crime accordingly. Unfortunately, the media too have an aversion to uncertainty, ambivalence, and ambiguity, and a preference for clear distinctions and absolute dichotomies.²¹ This preference is nowhere clearer than in media portrayals of the justice system, which tend to reinforce the split between the morally and factually blameless and the guilty as sin. Rarely is the audience left with open questions about who committed a crime, or about whether a homicide amounted to less than a murder, or about the proper sentence.²²

DNA testing has made a tremendous contribution to the ability to determine culpability and to exonerate the wrongly accused. It has saved lives and set prisoners free.

¹⁹ Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 2 *Ohio State Journal of Criminal Law* 585 (2004); Jeffrey Scheuer, *The Sound Bite Society: Television and the American Mind* at 39 (1999); Susan Bandes, *We Lost it at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, ___ *Loyola Los Angeles Law Review* __ (2008) (forthcoming).

²⁰ Todd Gitlin, *Media Unlimited: How the Torrent of Images and Sounds Overwhelms Our Lives* 7 (2001).

²¹ *Sound Bite Society*, supra note 18 at 121-160.

²² Bandes, *We Lost it at the Movies*, supra note 19 and Susan Bandes and Jack Beermann, *Lawyering Up*, 2 *Green Bag 2d* 5 (1998).

It has been crucial in demonstrating, even to the most recalcitrant observers, how often suspects are wrongly accused, wrongly convicted, and wrongly sentenced. It is difficult to overstate the importance of DNA. However, the advent of DNA testing has also helped foster the belief in a clear, ascertainable split between guilt and innocence. It offers the promise of innocence as an entity with clearly delineated boundaries, discoverable by scientific means. DNA is viewed as an on/off switch; an either/or test, kind of like a pregnancy test with a handy stick that turns one color for positive and another for negative. The concern is that much of DNA's public appeal derives from its resonance with the public's need to believe in an easily ascertainable method for telling truth from lies and good from evil.

We have long displayed an “incredible hunger to have some test that separates truth from deception.”²³ As a recent New Yorker article recounts, the eagerness to believe in the ability of various tests to read the body or brain in order to ascertain the truth has a long history. Some devices seem laughably archaic now. For example, the article describes a late nineteenth century device: it was a “bed that rested on a fulcrum... If a suspect reclining on it told a lie... resulting changes in blood flow would alter the distribution of weight on the bed, unbalancing it.”²⁴ But if some of the methods seem silly in retrospect, the idea behind them lives on. Whatever it is the polygraph measures (racing pulse, increased heart rate), it does not measure the truth-content of a subject's statement. Yet polygraphs were used frequently for just this purpose well into the 1980's, and are still used today, even by the federal government.²⁵ The New Yorker article discusses the current excitement about the so-called “No Lie MRI,” which claims to be

²³ Margaret Talbot, Duped: Can Brain Scans Uncover Lies? *The New Yorker* at 52, July 2, 2007

²⁴ *Id.* at 56.

²⁵ *Id.*

able to scan brains to determine definitively whether the subjects are lying—and concludes that these claims, too, are overstated.²⁶ Although fMRI technology has already yielded fascinating data about the operation of the brain, and holds tremendous promise for future discoveries, it cannot measure something that cannot be definitively measured—truth.

Likewise, DNA evidence cannot, by itself, measure guilt or innocence. DNA is valuable physical evidence, but by itself it cannot tell us, for example, whether a particular death was a murder or a justifiable homicide. In most murder cases it can tell us nothing at all, unless sexual intercourse was involved or the actual offender was injured and bleeding. If DNA becomes the gold standard, challenging wrongful convictions in the vast majority of cases with no DNA evidence will be problematic. Moreover, no evidence can transcend the limitations of the human beings who are supposed to seek it out, gather it, handle it, preserve it, interpret it, acknowledge its existence, or comply with discovery requests to turn it over.²⁷ The danger is that the public will misconstrue DNA evidence as a free pass from the troubling duty to weigh and assess evidence with a skeptical eye.²⁸

²⁶ Talbot, *supra* note 23 at 57-61. See also Jonathan H. Marks, Interrogational Neuroimaging in Counterterrorism: A No-Brainer or a Human Rights Hazard, 33 *American Journal of Law and Medicine* 483 (2007).

²⁷ See e.g. Jane Campbell Moriarity, “Misconvictions,” *Science*, and the Ministers of Justice, 86 *Nebraska L. Rev* 1 (2007).

²⁸ The problem of overclaiming the power of DNA evidence to resolve legal problems (the phrase belongs to Stephen Morse; see e.g. Stephen Morse, Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note, 3 *Ohio St. J. Crim. L.* 397 (2006)) has recently surfaced in another context—a bill moving through the French Parliament that would introduce DNA testing as a “basis for excluding prospective immigrants hoping to reunify with family members already living in France.” See editorial, “Pseudoscientific Bigotry in France,” *The New York Times* at 13, October 21, 2007. As the *Times* editorial

The point is not to minimize the importance of scientific advances like DNA. But the reaction to DNA evidence raises questions worth considering. Is the lure of DNA a function entirely of its forensic value? What causes certain types of evidence to be welcomed with open arms, and what are the dangers of this enthusiasm—both for evaluation of those types of evidence, and for the evaluation of evidence that does not strike such a receptive chord? Confessions, too, have been imbued with the aura of infallibility. It has been very difficult for people to accept that a suspect will falsely confess. As Richard Leo, Peter Neufeld and their coauthors observed, “police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible.”²⁹ (Indeed, DNA evidence has played an important role in disproving this myth). Videotaped evidence has been accorded a similar patina of infallibility. Yet videotapes (even leaving aside the possibilities of tampering), may not show the entire relevant context, and in any case, are subject to interpretation.³⁰ The lessons of fallibility and ambiguity must be learned again and again.

observes, DNA cannot establish the existence of family ties, since family is not determined solely by genetics.

²⁹ Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 *Wis. L. Rev.* 479, 485. See also Richard Leo, *False Confessions: Causes, Consequences, and Solutions*. In *Wrongly Convicted: Perspectives on Failed Justice* (Westervelt and Humphrey eds. 2001).

³⁰ The videotapes of the Rodney King beating by police are a well known illustration of this point. See e.g. Elizabeth F. Loftus, *The Rodney King Videotape: Why the Case was not Black and White*, 66 *S. Cal. L. Rev.* 1637, 1644-1645 (1993) (discussing the contextualizing choices made in editing the tape, and the different interpretations of the events depicted in the tape presented to the jury by the prosecution and defense.) See also *Scott v. Harris*, 127 S. Ct. 1769 (2007), an excessive force case in which the majority places heavy reliance on a videotape taken from a police car dashboard, yet interprets the video in a way that contradicts the lower court interpretation of the same footage, and that differs from the dissent’s interpretation as well. Compare 127 U.S. at 1775 with 127 U.S. at 1781 (Stevens, J., dissenting).

Fallibility and ambiguity are hard to accept because they bring responsibility. We cannot always rely on the system to identify the blameworthy, and this knowledge is burdensome. The innocence movement made our collective responsibility palpable; and it did so in large part by evoking concern and empathy for those falsely accused and convicted by our fallible system. The tremendous achievement of the narratives of the innocence movement is that they bridged the gaping empathic divide between the general populace and the death row inmate. This is a divide based on race and class, but also on a number of deeply held assumptions: that nobody confesses to a crime he did not commit; that the world is generally just and does not convict—much less execute—the wrong people;³¹ and that people choose their own destinies and are responsible for their own acts.³² Ordinary, law-abiding people cannot (or would rather not) imagine themselves committing a murder, and tend to be unmoved by the tribulations of those who have done so.³³ The innocence cases bridged this divide by their impossible-to-ignore proof that people were barely escaping execution for crimes they did not commit. They helped people imagine themselves or someone they cared about in the horrific situation of being falsely accused, falsely convicted of a capital crime.

This achievement can only be celebrated. Nevertheless, as we think about how to proceed we need to be mindful of the dangers of the false promise of simplicity, moral

³¹ See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *Buff. L. Rev.* 1275, 1319 (1999); Erwin Staub, *The Roots of Evil: the Origins of Genocide and Other Group Violence* 79 (1989) (describing “just world” thinking).

³² This assumption is often called “the attributional error,” the tendency of observers to overestimate how much a person's behavior is determined by his or her internal stable dispositions, overlooking the role of situational factors. See e.g. Justin D. Levinson and Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 *S. Cal. Interdis. L.J.* 195 (2004).

³³ See generally Scott E. Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* (2005) for a superb exploration of juror reactions to defendants accused of capital crimes and the dynamics of empathy in this context.

clarity and scientific infallibility. It is easy to identify with good people who have done nothing wrong and are sucked into nightmarish situations. But what of good people who have done something wrong, but not something that amounts to first degree murder? Or those who committed just an “ordinary” murder of the sort that only elicits a capital sentence when the defendant is poor, black and incompetently represented? Or those who have been in plenty of trouble before but did nothing wrong on this occasion?³⁴ Or those whose guilt could not be established beyond a reasonable doubt? None of these scenarios should lead to the death penalty, but each presents its own challenges for the creation of an empathic response between populace and death row inmate.

The challenge is to “expand the zone of perceived injustice.”³⁵ Indeed, the challenge is to create a wider circle of empathetic concern; to make people angry at a broader spectrum of injustice, and to make them angry enough to take action. But information alone, no matter how exhaustive, is not enough. This lesson is reinforced over and over. It is illustrated by the robustness of the public support for the death penalty even in the face of the collapse of its major rationale. It is the takeaway lesson of the Supreme Court’s decision in *McCleskey v. Kemp*: the strength of the social science cannot make up for a lack of moral indignation or a failure of political will. The recent

³⁴ See supra note 17 (discussing blamelessness). The story of Steven Avery highlights the importance of the “character” aspect of the popular notion of innocence. Avery was exonerated of rape and murder based on DNA testing, and soon thereafter, was charged with raping and killing another woman. See Tom Kertscher, Avery gets life, no release chance; Court hears victim talk of dying on dvd, *Milwaukee Sentinel* at 1, June 2, 2007. It may be that the similarity between the crimes cast doubt on Avery’s innocence of the first crime, though such doubt should be belied by the DNA evidence that excluded him as a suspect. The impact of Avery’s crime was more likely so devastating for its resonance with another assumption-- that Avery is simply the “kind of person” who is capable of committing such crimes, and therefore his exoneration is an embarrassment to the innocence movement even though he did not in fact commit the crime for which he was exonerated.

³⁵ Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 *Golden Gate University Law Review* 131 (2006).

exchange among Justices Souter, Scalia and Thomas in *Kansas v. Marsh*³⁶ is illustrative of the limits of information. Looking at the evidence of DNA exonerations, Justice Souter sees proof of innocent people convicted and even sentenced to death “in numbers never imagined before the development of DNA tests;”³⁷ Justice Thomas sees an “incendiary debate,”³⁸ and Justice Scalia sees proof of “insignificant” risks of error and of the system’s ability to self-correct.³⁹ These are not mere disagreements about statistics; they are reflections of the power of the lens through which statistics are interpreted.

People evaluate information differently when they are emotionally engaged in the subject at hand.⁴⁰ More important, people care about and are moved to act upon the results of their reasoning when information is not merely convincing but salient; not merely intellectually troubling, but emotionally infuriating.⁴¹ As the well-known trolley experiments show, when we experience ourselves as directly—and not just intellectually—implicated in a moral conundrum, our brains work differently and more emotionally, and our conclusions change.⁴²

As any good capital defense lawyer knows, it is possible to tell a story that creates empathy for flawed human beings, illuminates more complex motives and explanations, and moves people to care for those accused of capital crimes.⁴³ A good lawyer, with the right presentation of mitigation evidence, can help jurors put themselves in the shoes of a

³⁶ 126 S. Ct. 2516 (2006)

³⁷ *Kansas v. Marsh*, 126 S. Ct. 2516, 2544 (2006) (Souter, J., dissenting).

³⁸ *Id.* at 2528.

³⁹ *Id.* at 2536-38 (Scalia, J. concurring). See also Garrett, *Judging Innocence*, *supra* note (discussing the Supreme Court’s “first empirical debate about innocence.”)

⁴⁰ Ziva Kunda, *The Case for Motivated Reasoning*, 108 *Psychological Bulletin* 108, 480-498 (1990).

⁴¹ See Bandes, *The Heart has its Reasons*, *supra* note 10; see also Sunstein and Kahneman, *supra* note 9.

⁴² See e.g. Joshua Greene, J.D., Sommerville, R.B., Nystrom, L.E., Darley, J.M., & Cohen, J.D., *An fMRI investigation of emotional engagement in moral judgment*, 293 *Science* 2105-2108, Sept. 14, 2001.

⁴³ See e.g. Dr. Sunwolf, *Practical Jury Dynamics* (2004); Kevin Davis, *Defending the Damned: Inside Chicago’s Cook County Public Defender’s Office* (2007).

defendant, even one they have just convicted of a heinous murder. The obstacles are significant, particularly when they involve reaching across racial divides. It helps when the jurors already consider the defendant part of their community, as happened with Susan Smith, who was tried in the small town where she had grown up.⁴⁴ It helps when jurors can imagine their own sons or brothers taking the same kind of wrong turn.⁴⁵ But jurors can be helped to see commonalities even with those from very different backgrounds; and to come to care about a defendant they originally regarded with fear and detachment.⁴⁶ Nevertheless, this process is painstaking and individualized. It is difficult to tell a penalty phase jury a complex story about a flawed human being who committed a crime but may not deserve to die.⁴⁷ It is even more difficult to educate the public about systemic problems that, unless fixed, will continue to produce miscarriages of justice. It is more difficult still to move the public to action.

The Dysfunctional System: Conveying the Harm of Unfair Process

The innocence cases showcased a systemic breakdown that the public found shocking. Stories like that of the Ford Heights Four, who barely avoided wrongly execution largely through the efforts of a group of journalism students,⁴⁸ highlighted the reality that sometimes the system simply does not correct its own errors in capital cases.

⁴⁴ See Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U Chi L Rev 361, 399-400 (1996).

⁴⁵ Alex Kotlowitz, *In the Face of Death*, The New York Times, July 6, 2003 (see e.g. the observation of one juror, after hearing the mitigation evidence, that "Everyone knows a Jeremy. Every neighborhood has a Jeremy.")

⁴⁶ See e.g. Sundby, *supra* note 33 at 140-148.

⁴⁷ See e.g. David R. Dow, *The End of Innocence*, The New York Times at A31, June 16, 2006 ; Steiker and Steiker, *supra* note at A31.

⁴⁸ See e.g. Peter M. King & William H. Jones, *Crimes of the State: Obtaining Justice for the Wrongfully Imprisoned*, 29 Litig. 14, 17 (2002) (describing the role of Northwestern University journalism students and the Center on Wrongful Convictions in exonerating four men wrongly on death row.) See also <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/DennisWilliams.htm>

The innocence movement succeeded in linking these stories into a narrative of dysfunction that had more resonance than the countervailing narrative of “a few isolated mistakes in a system that works.”⁴⁹ But what are the contours of that narrative? To what extent, and in what ways, can it be extended without losing its power?

One challenge is to convey the continuing nature of the crisis. To the extent DNA evidence is viewed as the cure-all for the particular disease of convicting the innocent, one concern is that people will assume the problem solved.⁵⁰ This is problematic in part because, as discussed above, DNA is not a panacea. But the larger problem is with creating support for reforms that are not targeted wholly toward the innocent. Some reforms, such as limiting testimony from jailhouse informants, or making DNA testing available, are largely targeted at the question of guilt or innocence. Others, such as improving the quality of counsel, will improve justice across the board. Still others, such as limiting the categories of death-eligible crimes, may do little to protect those factually innocent of a crime; they are targeted mainly at penalty-phase injustice.

The notion of fair process, as distinguished from the notion of fair results in particular cases, is always a hard sell. The notion of process is abstract, complex, not very media-friendly. The notion that a process needed to protect the innocent will unavoidably protect the guilty on occasion is a sophisticated notion. An even harder sell is the idea that all suspects, and even convicted defendants at the sentencing stage and beyond,

⁴⁹ See Joshua Marquis, *The Myth of Innocence*, 95 *J. Crim. L. & Criminology* 501, 517-18 (2005); Paul Cassell, *The Guilty and the “Innocent”*: An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 *Harv. J. L. & Pub. Pol’y* 523 (1999).

⁵⁰ Steiker and Steiker, *supra* note 2.

should receive fair process, not just as a windfall, but because our constitutional protections are not meant to protect only the innocent.⁵¹

There are stories that can be told to illustrate these points, but they lack the clear moral, the obvious good guys and bad guys, that have enabled the innocence stories to reach across ideological lines. I have often told the story of my client Rosa Bennett,⁵² who killed her husband and was convicted of murder. There was never any question she killed her husband. The question was whether he, who had been physically abusing her for years, had done so on the night she killed him. The prosecutor argued that there was no physical evidence to corroborate her story that he had attacked her that night. We discovered during preparation of the appeal that the prosecutor had inventoried her torn and bloody sweater, failed to alert the defense that it existed, and then relied on the lack of physical evidence at trial. On appeal, the court determined that in light of the physical evidence, Bennett should have been convicted of manslaughter rather than murder. She was not entitled to claim self-defense, since she had gone to her bedroom to obtain her weapon and come back to the kitchen to kill the decedent. Lay audiences can generally agree that what happened at Rosa Bennett's trial was wrong, even though she did not fit the standard paradigm of the innocent defendant.⁵³

Still, this story works in part because it puts a human face on one rather sympathetic person who was the victim of government misconduct (more on the misconduct aspect shortly). How to convey the importance of process on its own terms? One remarkable narrative conveying gradual understanding of the importance of process

⁵¹ See Susan Bandes, 'We the People' and Our Enduring Values, 96 Mich. L. Rev. 1376 (1998).

⁵² See e.g. *id.* at 1385-86.

⁵³ See e.g. Taslitz, *supra* note 3 (discussing too-narrow views of factual innocence and the fact that there is a need for fact-finding in sentencing as well).

is the story told by former Illinois governor George Ryan when he announced his decisions to pardon four death row inmates and commute the sentences of all the rest to life without parole.⁵⁴ Ryan begins by locating himself as a law and order conservative from a small town in Illinois, someone who never gave much thought to the workings of the criminal justice system except to assume it worked fine.⁵⁵ As governor of Illinois, he watches evidence of wrongful capital convictions accrue until the wrongfully convicted constitute the majority of those on death row. Ryan describes what happens when the issue is made salient--when the evidence of a broken system cannot be ignored and it becomes clear to him that no other governmental official or agency is going to fix it. It becomes his problem to ensure justice is done.⁵⁶ What is remarkable is Ryan's description of his realization that this was more than just a string of individual injustices, and that he could not fix it solely by individual pardons. The system is so deeply broken that he can no longer trust its results. He says:

I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life. The facts I have seen in reviewing each and every one of these cases raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die?⁵⁷

⁵⁴ Former Governor Ryan's complex legacy is itself a vivid illustration of the ambiguities of character. Compare Governor Ryan Nominated for Nobel Prize, Counterpunch, January 17, 2003, at <http://www.counterpunch.org/ryan01172003.html> (last visited November 25, 2007) to Michael Higgins and E.A. Torriero, Ryan's Ride's Last Stop: Prison, Chicago Tribune Metro Section Page 1, November 8, 2007 (reporting on Ryan's imprisonment for federal crimes stemming from corruption in office).

⁵⁵ "Four years ago, I was sworn in as the 39th Governor of Illinois. That was just four short years ago; that's when I was a firm believer in the American System of Justice and the death penalty. I believed that the ultimate penalty for the taking of a life was administered in a just and fair manner." Gov. George Ryan's speech at Northwestern University College of Law. Address reprinted in Executive Intelligence Review, January 24, 2003.

⁵⁶ "As I prepare to leave office, I had to ask myself whether I could really live with the prospect of knowing that I had the opportunity to act, but that I failed to do so because I might be criticized." Id.

⁵⁷ Ryan speech, id.

At one point in his story, Ryan describes the murder of a family friend in his home town of Kankakee, and his realization that even the man who committed this particularly heinous murder, whom he has no reason to think was wrongfully convicted, would have to be spared the death penalty because the system was broken.

Governor Ryan's story illustrates his visceral understanding that there is a connection between the individual stories of injustice and the broader story of systemic dysfunction. It ceases to sound like a lawyer's argument to him, and becomes something he understands not just intellectually but emotionally and morally. As he himself notes, this is precisely the kind of visceral understanding Justice Blackmun reached when he wrote his famous dissent from the denial of *certiorari* in *Callins v. Collins*, refusing to "tinker with the machinery of death"⁵⁸ any longer. And it is the kind of connection the *McCleskey* court could or would not make. *McCleskey's* demand for individual stories of fault and blame in place of a broader account of deeply imbedded racism in the operation of the state's death penalty illustrates a visceral reaction of a different kind. A Supreme Court which will accept disparate impact statistics in other realms, such as the employment context, approached the notion of acknowledging pervasive racism in the criminal justice system with fear and a kind of horror at the potential consequences of the

⁵⁸ "On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction." Denial of certiorari in *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting). See also Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* at 178-181 (2005).

acknowledgement. The pervasiveness of the problem is, quite explicitly, a major reason for the Court's reluctance to act.⁵⁹

Framing Governmental Wrongdoing

The challenge is to characterize the dysfunction of the capital system in a way that motivates reform. The author of the opinion piece with which I began this article argues that the term “wrongful” should be discarded and replaced with a term that better conveys the prevalence of intentional police and prosecutorial misconduct. His argument brings me back to my initial question—what is the value of naming, or labeling? What purpose does this category of wrongful convictions serve, and what are the dangers to avoid in constructing it? Presumably the goal here is to identify and call attention to a common set of problems that lead to injustice so that we can solve them. It is by no means clear that defining the category based on prosecutorial state of mind is the best way to do this.

Using bad faith as the central explanatory frame for the systemic problems leading to wrongful convictions is problematic on two counts. First, the more we learn about decision-making in institutional contexts, the less helpful terms like “intent” and “bad faith” appear in isolating what needs to be remedied. And second, even where intentional misconduct seems provable, the decision to label it as such may backfire.

As a general matter, stories about malevolent villains, like stories about blameless victims, pack the greatest punch. And when governmental misconduct is at issue,

⁵⁹ See Randall Kennedy, *Race, Crime and the Law* 336-38 (1997), “Powell’s *McCleskey* opinion was haunted by anxiety over the consequences of acknowledging candidly the large influence of racial sentiment in the administration of capital punishment in Georgia.” See also Bandes, *Patterns of Injustice* supra note 31 at 1320.

malevolent villains play a particularly powerful role. Specifically, they play the role of rotten apple in an otherwise pristine barrel.⁶⁰ This pattern of blaming and even demonizing individual governmental actors is deeply ingrained (recall Brownie at FEMA during the Katrina disaster, for example), but it is especially noticeable when law enforcement wrongdoing is at issue. The torture at Abu Ghraib has been trivialized—both in its public portrayals and in the pattern of prosecutions—as the work of a few rogue evildoers and their compliant, naïve girlfriends.⁶¹ A pattern of police torture over more than a decade in Chicago, abetted by the actions and inactions of prosecutors and other governmental actors, was consistently portrayed as the work of a handful of bad cops—if not denied completely. The actions of Mike Nifong in the Duke lacrosse prosecution have been rightfully decried, but the public outcry has been mainly directed at Nifong’s individual acts, rather than at the system in which his conduct was allowed to proceed unchecked.⁶² In such situations, the government’s desire to disaggregate misconduct and force blame downward toward street level actors coincides with the public’s own needs. As I have argued elsewhere, it is particularly difficult for the public (and for the courts, for that matter)⁶³ to accept systemic wrongdoing by those we trust to protect us, and we have many ways of turning away that knowledge.⁶⁴ This story of a few bad apples is

⁶⁰ See Bandes, *Patterns of Injustice*, supra note 31 at 1287.

⁶¹ James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 *Whittier Law Review*, 671 (2006); Steven Lee Myers and Eric Schmitt, *Wide Gaps Seen in U.S. Inquiries on Prison Abuse*, *The New York Times*, Section 1, June 6, 2004.

⁶² See e.g. *Disbarred Duke Prosecutor’s Future Dim*, *Washington Post*, June 18, 2007. But see sources cited in note 72, *infra*.

⁶³ *Patterns of Injustice*, supra note 31 at 1320-27. See e.g. Justice (then Judge) Burger’s paradigmatic observation in *Bush v. United States*, 375 F. 2d 602 (D.C. Cir. 1967) that “it would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion.”

⁶⁴ See generally Bandes, *Patterns of Injustice*, *id*.

convenient for policymakers and comforting for those who need to believe the world is just and the government is benign.

The story of systemic governmental misconduct is harder to tell in every respect because it defies narrative expectations. It does not tend to be uncomplicated. It does not necessarily involve malevolence on the part of any individual. It often involves complex causal chains, multiple actors, failures to act rather than actions, or actions taken in good faith rather than with malicious intent.⁶⁵ It cannot be neatly resolved by punishing the bad guys. To the contrary, punishing the most obvious bad guys, when that is portrayed as “the end of the story,” might mean leaving the deeper sources of the problem unaddressed.

The incendiary nature of claims of police and prosecutorial bad faith presents a terrible conundrum. The failure to identify, address, and condemn wrongful conduct may serve to perpetuate the conduct, and worse, give the impression that it is occurring with impunity and even official approval. There are times when strong condemnation is absolutely essential, and when the failure to condemn individual conduct acts as a barrier to reform.⁶⁶ However, individual misconduct often flourishes for institutional reasons, and it is problematic when condemnation of individual actors takes the place of a broader examination of the underlying problem. It is also a cause for concern when the condemnation itself—the label used, the words chosen-- becomes the focal point, drawing energy that should have been focused on reform. A recent essay, for example, described the prosecutorial reaction to Angela Davis’s important article on intentional

⁶⁵ See generally Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *Howard L. J.* 475 (2006); Bandes, *Patterns of Injustice*, *id.*

⁶⁶ See generally Bandes, *Patterns of Injustice*, *supra* note 31 (discussing the Chicago Police Department’s refusal to condemn or in any way penalize individual police officers who had engaged in torture of suspects).

prosecutorial misconduct. Much of the reaction centered on arguing about nomenclature; on whether to categorize certain prosecutorial conduct as “purposeful,” or even as “misconduct” or simply as “error.”⁶⁷ The conundrum is how to frame the debate so that the spotlight stays trained on essential information rather than devolving into a diversionary debate about labels.

Many of the problems that lead to wrongful convictions arise, not from identifiable individual intentions, but from incentive structures deeply imbedded in police culture, prosecutors’ offices, and other agencies, abetted and exacerbated by political pressures and other external sources.⁶⁸ Recent research on cognitive processing helps explain how police and prosecutors can take (or fail to take) actions that lead to wrongful convictions, or that insulate wrongful convictions from correction in the face of conflicting information, without exactly “knowing” they are doing so. For example, a number of scholars have written about the problem of prosecutorial tunnel vision. Tunnel vision can be explained as a species of (or the result of) cognitive bias, and it “infects all phases of criminal proceedings, beginning with the investigation of cases and then proceeding through the prosecution, trial or plea-bargaining, appeal, and post conviction stages.”⁶⁹ It involves subconscious refusals to consider or reconsider information contradicting an initial theory of a case. Such deep-seated, subconscious cognitive biases

⁶⁷ Vanessa Martin, A Discussion of Angela Davis, “The American Prosecutor: Power, Discretion and Accountability,” Criminal Law Brief at 22, Spring 2007.

⁶⁸ See e.g. Bandes, Loyalty to One’s Convictions, *supra* note 65; Eric Luna, System Failure, 42 American Criminal Law Review 1201 (2005); Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 William and Mary L. Rev. 1587 (2006) Rodney Uphoff, Conviction of the Innocent: Aberration or Systemic Problem, 2006 Wisc. L. Rev. 739; Peter Joy, The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 Wisc. L. Rev. 399.

⁶⁹ Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wisc. L. Rev. 291; Bandes, Loyalty to One’s Convictions, *supra* note 62; Burke, Cognitive Bias, *supra* note 5; Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. Rev. 125 (2004).

are unlikely to meet legal definitions of intent or malice,⁷⁰ and they are rarely the stuff of riveting accounts of bad behavior. Ironically, categorizing conduct as blameworthy may have a perverse effect at this level of processing as well. People will go to great lengths to avoid thinking of themselves as the kind of people who commit unethical behavior.⁷¹

This does not necessarily mean they will avoid the behavior. Instead, they may avoid facing its unethical nature or its harmful consequences, thereby entrenching the behavior and further insulating it from correction.⁷²

Nevertheless, it would be an egregious error to assume that these cognitive biases and the errors to which they lead cannot be addressed. On the contrary, the more we understand about the nature of the behavior at issue, the better we can structure the relevant institutions to correct the problematic biases. For example, certain biases may be rooted out or at least ameliorated by layers of review, or by mandated exposure to countervailing theories. On a more basic level, even biases that are not entirely conscious may be amenable to change when the incentive structures make change desirable—or refusal to change undesirable.⁷³ If assistant prosecutors discovered that wrongful

⁷⁰ See e.g. Andrew Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 *Harv. J. L. & Gender* 381 (2005).

⁷¹ For a recent non-academic account of the cognitive mechanisms involved in this type of self deception, see Carol Tavis and Elliot Aronson, *Mistakes Were Made (but not by me): Why We Justify Foolish Beliefs, Bad Decisions, and Hurtful Acts* (2007). See also Sharon Lamb, *The Trouble with Blame: Victims, Perpetrators, & Responsibility* at 58 (1996) (discussing the desire to maintain a positive self image and the many ways in which people avoid accepting blame for their actions).

⁷² See e.g. Medwed, *The Zeal Deal*, *supra* note 68 at 140 n67. Medwed discusses the cognitive mechanisms which cause a prosecutor confronted with ethical rules forbidding her from bringing charges she does not believe are supported by probable cause to convince herself that any case she has prosecuted must be supported by probable cause, since she would not do something unethical. See also Bandes, *Loyalty to One's Convictions*, *supra* note 65 at 487-88 for a discussion of these mechanisms.

⁷³ Justice Brennan made a similar point in his dissent in *United States v. Leon*, 468 U.S. 897, (Brennan, J., dissenting), the case upholding an exception to the exclusionary rule for police actions taken in objective good faith reliance on an invalid warrant. Addressing the argument that police who reasonably believe they are acting lawfully cannot be deterred, he replied: "over the long term, the demonstration...that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system... If evidence is consistently excluded [when unlawfully

convictions caused them to lose opportunities at promotion or salary increase, or to lose the respect of their colleagues and the support of their superiors, they might themselves begin seeking out ways to counteract the possibility of tunnel vision.⁷⁴ Or if elected prosecutors found that wrongful convictions made them less electable, or subjected them to sanctions or their offices to litigation, they might take a hard look at the incentive structure of the office and whether it provides a meaningful check on tunnel vision.⁷⁵

The author of the opinion piece argues that “a crucial part of the problem rests in the hearts and souls of those whose job it is to uphold the law.”⁷⁶ But it is not at all clear that we should shape policies based on what lies in people’s hearts and souls. As Jeffrie Murphy has observed, “issues of deep character are matters about which the state is probably incompetent to judge.”⁷⁷ I suggest that we approach the problem by beginning with the question of reform, rather than the question of conduct. To the extent we can begin putting checks in place that address error more generally, it may be less essential to identify precisely what sort of error is at issue. Reforms such as increased transparency, better training, stronger and more consistently enforced ethical rules, institutional checks on discretion, and general changes in police and prosecutorial culture will address a broad

obtained]... police departments will surely be prompted to instruct their officers to devote greater care and attention [to warrant applications and the form of the warrant they have been issued].

⁷⁴ See Luna, *supra* note 65 at 1213-14; Medwed, *The Zeal Deal*, *supra* note 69 at 172.

⁷⁵ See e.g. Peter Boyer, *Big Men on Campus: the lacrosse furor and Duke’s divided culture*, *The New Yorker* at 44, September 4, 2006 (discussing dynamics of the Duke LaCrosse prosecution); Sarah Fleisch, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke LaCrosse Matter*, 31 *S. Ill. U. L. J.* 243 (2007) (discussing need for ethical rules regarding the ability of prosecutors to comment on investigations); Michael Cassidy, “The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle,” 71 *Law and Contemporary Problems* (forthcoming 2008) Available at SSRN: <http://ssrn.com/abstract=1022620> (examining ethical rules governing statements to the press regarding pending prosecutions) and Mike Nizza, *Students Sue Prosecutor and City in Duke Case*, *The New York Times* at 12, October 6, 2007 (reporting that Duke LaCrosse players have sued the city for \$30 million and are also seeking the implementation of a citizen review panel and other reforms to the Durham prosecutor’s office).

⁷⁶ Presence of Malice, *supra* note 1.

⁷⁷ Jeffrie Murphy, *Remorse, Apology, and Mercy*, 4 *Ohio State Journal of Criminal Law* 423, 437 (2007).

range of conduct, whether mistaken, erroneous or deliberate. To the extent that deliberate or vindictive misconduct defies solutions that might address mere prosecutorial error, it needs to be singled out for separate treatment. Sometimes public censure, discipline, termination or ethical or criminal charges are an essential response.⁷⁸ However, it is difficult—far too difficult-- to censure, discipline or terminate a police officer or prosecutor;⁷⁹ and perhaps even more difficult to bring criminal charges against a law enforcement officer and obtain a conviction.⁸⁰ The availability of these options is itself constrained by deeply held attitudes that must be addressed systemically.

The question at hand is how to learn from the success of the wrongful conviction movement thus far, and where to go from here. The goal is to implement systemic reform. As we have learned from the wrongful conviction movement, to implement this goal we need to find a way to explain it to the general public, and more than that, to explain why it matters—why injustice should rouse us to action. I believe our task is to complicate easy labels; to find ways to communicate concern for more than just the innocent, and to communicate the dangers of governmental conduct that defies traditional definitions of blameworthiness.

⁷⁸ See e.g. discussion of the Abner Louima case, in which Louima was sodomized by police with a plunger, suffering a torn colon and a ruptured bladder, while being subjected to racial epithets. Bandes, *Patterns of Injustice*, supra note 30 at 1284-86.

⁷⁹ See Bandes, *Patterns of Injustice*, id (discussing barriers to disciplining police in Chicago); Craig B. Futterman, H. Melissa Mather, and Melanie Miles, *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, available at <https://www.law.uchicago.edu/files/brokensystem-111407.pdf>

⁸⁰ See e.g. Bandes, *Loyalty*, supra note 65 at 479 n34 (discussing the acquittal of every one of the police officers and prosecutors charged with conspiracy to deny Rolando Cruz a fair trial.)

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