

Blinded by the Light: A Review of Mark Godsey's *Blind Injustice*

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MARK GODSEY, *BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS* (University of California Press 2017).

“Mama always told me not to look into the sights of the sun
Whoa, but mama, that’s where the fun is”¹

Stop me if you’ve heard this one.

Police interrogators are not able to tell whether a suspect is lying or telling the truth by his demeanor and tone of voice. Studies show that the ability of police to be a “human lie detector” is little better than flipping a coin.²

Eyewitness identifications are often wrong. We do not know how often, but we do know that of the 350 or so cases exonerated by DNA that appear on the Cardozo Innocence Project web site, over 70% included an identification of a suspect who turned out to be factually innocent.³ Thus, cases of assault, robbery, and rape that depend crucially on eyewitness identification are inherently suspect.

Almost all forensic science (CSI be damned) is, at best, an educated guess. Even fingerprints are, in cases at the margin, not as scientific as examiners claim. DNA testing of a sufficient sample that is not contaminated by more than one person’s DNA is an exception, but new evidence suggests that methods for testing tiny or mixed samples can produce inaccurate results that free the guilty and convict the innocent.⁴

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¹ BRUCE SPRINGSTEEN, *Blinded by the Light*, on GREETINGS FROM ASBURY PARK, N.J. (Columbia Records 1973).

² DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 120–32 (2012) (discussing studies and reasons why deceit is difficult to spot).

³ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/54QT-VN4M] (last visited Mar. 11, 2018).

⁴ Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/nyregion/dna-analysis-evidence-new-york-disputed-techniques.html> [https://perma.cc/H9AQ-NG3S].

As difficult as it is for most to believe, a non-trivial number of normally functioning suspects falsely confess when interrogated by police.⁵

When faced with DNA evidence that irrefutably establishes the innocence of a prisoner, some prosecutors concoct bizarre stories that “prove” they did not convict an innocent defendant.⁶

One former prosecutor told a student when she mentioned my Wrongful Convictions course: “There are no wrongful convictions.”⁷

The National Registry of Exonerations has over 2,000 heart-breaking stories of innocent men and women who have spent years, and sometimes decades, behind bars. A few have languished on death row. One of my “favorite” stories is the case of Jerry Lee Jenkins who was convicted of rape in 1987 on two shaky pieces of evidence.⁸ Because the rapist wore a stocking over his face, the victim only saw the bottom of his face when he pulled up the stocking to kiss her. She testified in court, “I cannot say that I can positively identify him.”⁹ An FBI serology expert said tests put Jenkins in 4% of the population that could have committed the rape (DNA testing was in its infancy in 1987).

The decision even to prosecute Jenkins was questionable. The police had a theory that the rape for which Jenkins was arrested was committed by the same man who had raped in 1984, noting more than a dozen similarities in the two rapes. But blood tests excluded Jenkins in the 1984 case. Given the substantial possibility that the same rapist committed both rapes, and he was not Jenkins, together with the weak eyewitness identification and the inability to narrow the pool below 4%, one wonders why the prosecutor brought the case against Jenkins. And, of course, twenty-six years later, authorities learned that the 1986 rape was indeed committed by the 1984 rapist, who was not Jenkins.

The jurors in the Jenkins case did not seem to give much weight to the requirement of proof beyond a reasonable doubt. The rape took place in a suburb of Washington, D.C.¹⁰ The victim’s description was a white man wearing a plaid flannel shirt, jeans, and work boots. At a minimum that description would fit tens of thousands of men in the D.C. area. Four percent of tens of thousands would be in the hundreds, and the victim had never made a definite identification of Jenkins.

⁵ See, e.g., Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

⁶ See, e.g., MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 9–11 (2017).

⁷ Email to author recounting November 3, 2017 conversation, available from author. To be fair, the same student mentioned this conversation to a current prosecutor at a panel discussion at Rutgers later in November and he said of course there are wrongful convictions; anytime humans are involved, there will be errors.

⁸ Maurice Possley, *Jerry Lee Jenkins*, NAT’L REGISTRY EXONERATIONS (June 7, 2013), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4191> [<https://perma.cc/7UZU-MXLS>].

⁹ *Id.*

¹⁰ Waldorf, Maryland is 23 miles from Washington, D.C.

In what universe is that proof beyond a reasonable doubt? But the jury convicted after ten hours of deliberation.¹¹

Around ten years after he was convicted, Jenkins persuaded a court to order a DNA test, but the rape test kit had been misplaced. Jenkins served another fifteen years before the Mid-Atlantic Innocence Project requested one more search for the test kit; the search of the sheriff's storage facility "turned up a battered box that contained hairs from the victim's rape kit, hairs from the scene of the crime and fingernail scrapings, along with the victim's purse."¹² The DNA test exonerated Jenkins who, by then, had served twenty-six years for a crime he did not commit.

Reading these stories produces disbelief and sorrow. How could the system fail so many so badly?

And that, of course, is the subject of Mark Godsey's new book, *Blind Injustice*. There have been, over the past dozen or so years, several excellent books examining the failings of the American criminal justice system. A skeptic might wonder what there is new to say about the problems that infect the system.

But that skepticism melts almost instantly when one opens Godsey's book. Mark Godsey brings a unique perspective to bear on the problem of convicting the innocent. For years, he was one of the prosecutors who, he now sees, suffered from a too-smug attitude about the ability of investigators and prosecutors to (almost) always get it right when deciding who to prosecute. He was, in his own words, a "hard-nosed prosecutor." (P. 3.)

When he got into law teaching in 2001, Godsey was assigned to be faculty supervisor of the Kentucky Innocence Project. He accepted the assignment reluctantly because he "didn't believe that innocent people were sent to prison in this country." (P. 4.) He saw his law students who were striving to prove innocence as "naïve"—as "a bunch of gullible, bleeding-heart law students." (P. 4.) His first case involved eyewitness testimony of the rape victim, who was certain that the man she identified was the man who raped her. Godsey was also certain that the man they represented was guilty. "In fact, I *knew* it," he writes in his book. (P. 4.) But new DNA testing techniques proved, conclusively, that the semen collected from the victim did not match the man who had served thirteen years for a crime he did not commit.

The next year he moved to the University of Cincinnati College of Law where he helped found the Ohio Innocence Project, which he still runs. Over the years, the project "has investigated thousands of cases of Ohio inmates claiming innocence." (P. 5.) The investigations "confirmed the guilt of many" but led to the exoneration, so far, of "twenty-five men and women on grounds of innocence." (P. 5.)

Godsey describes his book as "a kind of confessional and memoir, which, because of my personal journey, provides a behind-the-scenes look at the psychological and political factors that cause wrongful convictions in a way that no

¹¹ Possley, *supra* note 8.

¹² *Id.*

book previously has.” (P. 3.) The book is “the story of one person’s evolution, a story of my enlightenment and discovery.” (P. 3.) He is Saul on the road to Damascus who, according to the New Testament, was called by God to fight for Jesus rather than persecute him.¹³ And, like Saul, Godsey brings passion, energy, and determination to the new task at hand.

In an obscure double jeopardy case for the United States Supreme Court, Justice Holmes began his analysis: “It is a short point.”¹⁴ He then proceeded to decide two cases, one of which he described as “delicate,”¹⁵ in a page and one half. I could write a similarly short book review: “Godsey’s book is splendid. Everyone who cares the least bit about justice must read it. Parts will make you shake your head in amazement, parts will give you a sense of elation, and parts will make you cry.” All of that is true, but permit me to fill in a few details.

The structure of the book is to take stories, mostly from his innocence work but some from his experiences as a federal prosecutor, to illustrate six broad themes (roughly the seven deadly sins): blind denial, blind ambition, blind bias, blind memory, blind intuition, and blind tunnel vision. It all adds up, of course, to blind injustice.

I. BLIND DENIAL

This chapter is a moving, insightful account of the “levels of extreme psychological denial to which prosecutors and police often succumb to avoid admitting that they convicted an innocent person.” (P. 9.) No better example exists than the case of Clarence Elkins, who was convicted of raping and murdering his mother-in-law and assaulting and raping his six-year-old niece in 1998. The entire case was based on testimony of the niece who initially told police that the attacker “looked like” her uncle, but at trial testified it *was* her uncle (and this despite seeing the attacker only for a few seconds in the dark). The crime scene was awash in blood, but police found no blood on Elkins or any evidence that he had disposed of his bloody clothes. Elkins had a solid alibi. The jury convicted. In 2005, more sophisticated DNA tests revealed that the semen inside the mother-in-law and in the skin cells on the niece’s underwear was that of the same male but that man was not Elkins. (Pp. 9–10.)

Godsey expected the State to agree to vacate Elkins’s convictions and look for the real killer/rapist. Instead, the prosecutor concocted fanciful explanations for how another man’s DNA was inside the murder victim and on the underwear of the niece. Part of the story was that the mother-in-law had shaken hands that day with a man and had gotten his DNA on her hands, and then had come home and masturbated. Of course, this did not explain the DNA of the same man on the underwear of the niece. As outrageously implausible as this story was, the judge

¹³ *Acts* 9.

¹⁴ *United States v. Adams*, 281 U.S. 202, 204 (1930).

¹⁵ *Id.*

denied the motion to free Elkins—as Godsey puts it, “the judge was in denial too”—and only a stroke of luck allowed the Ohio Innocence Project to develop even stronger evidence that another man was guilty.¹⁶ Even with conclusive evidence that another man was the murderer and rapist, it took the intervention of the Ohio attorney general before the prosecutors capitulated and agreed to exonerate Elkins. (P. 12.) There are other stories of denial but the Elkins case is the best, most bizarre, unbelievable story of denial that I have ever read.

II. BLIND AMBITION

Chief state prosecutors in each county or district are elected in all but three states (Connecticut, New Jersey, and Alaska are the exceptions).¹⁷ Trial judges in all but eleven states are elected.¹⁸ Many prosecutors want to become judges or politicians (Chris Christie, former United States Attorney and now former governor of New Jersey, is but one example of the latter). Pretty much all judges want to be re-elected until they choose to retire or go into politics. One can find many examples of judges who lost elections because they were perceived as being soft on crime. I doubt that a judge has ever lost an election because she was too hard on those charged with or convicted of a crime.

In my home state of Tennessee, Justice Penny White voted with the 3–2 majority to vacate the death sentence in *State v. Odom* because the rape of the elderly victim did not cause the murder to be “especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.”¹⁹ In her 1996 retention election, she was targeted by various conservative and victims’ rights groups as well as the Tennessee governor and both of Tennessee’s United States Senators.²⁰ She lost. Chief Justice Rose Bird of the California Supreme Court is perhaps the best-known example of judges defeated because they were perceived as “soft on crime.”²¹

¹⁶ GODSEY, *supra* note 6, at 10–12. In a twist out of a movie, the man Godsey suspected of being the rapist/murderer was in the same cell block with Elkins, and Elkins managed to collect a cigarette butt from the suspect. DNA from the cigarette established, conclusively, that it was he and not Elkins who had raped and murdered. *Id.* at 12.

¹⁷ GEORGE COPPOLO, OLR RESEARCH REPORT, STATES THAT ELECT THEIR CHIEF PROSECUTORS (2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm> [<https://perma.cc/AQR2-FV7R>].

¹⁸ AM. BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES (2002), https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [<https://perma.cc/WBL5-92BN>].

¹⁹ *State v. Odom*, 928 S.W.2d 18, 24 (Tenn. 1996) (quoting Tenn. Code Ann. § 39–13–204(i)(5)).

²⁰ JOHN R. VILE, GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 306–07 (2003). (The Governor was Don Sundquist and the Senators were Bill Frist and Fred Thompson).

²¹ *Id.* at 306.

As Godsey puts it, fear of losing elections naturally causes judges to “flex[] their pro-prosecution muscles.” (P. 69.) Justice Sotomayor quoted an elected judge on the problem of judges considering voter reaction to their decisions: “Let’s face it. We’re human beings.”²² Former Chief Judge of the Alabama Supreme Court Sue Bell Cobb put it this way: “Judges would have to be saints to ignore the political reality. And judges aren’t saints.”²³ Part of the political reality for judges facing election is fund-raising. Ohio Supreme Court Justice Paul Pfeifer told the *New York Times*: “I have never felt so much like a hooker by the bus station in any race I’ve ever been in as I did in a judicial race.” (P. 72.)

To bring this global concern down to the retail level, recall the judge who denied the motion to free Elkins based on a fanciful speculation about the murder victim masturbating with another man’s DNA on her hands. A second example is the case of Chris Bennett, who was found in the driver’s seat with his dead friend on the floorboard. (P. 60.) Based only on this evidence, and the blood alcohol test, the State convicted Bennett of aggravated vehicular homicide. Bennett’s memory was impaired by his injuries, but in prison he began to remember that he was in the passenger’s seat when the crash happened and later crawled into the driver’s seat to try to help his friend. The prosecution had not tested the windshield to see whose blood was present on which part. Godsey’s innocence project corrected that omission and found Bennett’s blood on the windshield on the passenger’s side; none was found on the driver’s side of the windshield. The Ohio Innocence Project also presented an affidavit from the first person to arrive at the scene stating that Bennett was in the passenger’s seat; police had not bothered to gather evidence from those who arrived at the crash before police did. (Pp. 60–61.)

The judge hearing Bennet’s motion to vacate gave “the cold shoulder” to Godsey but “was friendly and warm with the prosecutors.” (P. 61.) He also appeared uninterested in Godsey’s evidence, often taking phone calls for long stretches of time and reading briefs while the defense presented its case. (P. 61.) The judge rejected Godsey’s motion to exonerate Bennett. But once Godsey’s team was in a higher court “away from the politics of the prosecutor’s home field,” the Ohio Innocence Project won Bennett’s case, and he was released from prison. (P. 61.) One pauses to wonder not only about the judge but also the prosecutors. Given that zero of Bennett’s DNA was found on the driver’s windshield and that the affidavit of the first person on the scene stated that Bennett was in the passenger’s seat, why would the prosecution not join Godsey’s motion?

As far as I know, I had only one innocent criminal client when I practiced law in Tennessee, a father charged with misdemeanor child abuse in 1978. Because of a recent and truly horrible case of child abuse in a nearby county, my case caught

²² GODSEY, *supra* note 6, at 68 (quoting *Woodward v. Alabama*, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting from denial of certiorari)).

²³ *Id.* (quoting Christie Thompson, *Trial by Cash*, MARSHALL PROJECT (Dec. 11, 2014), <https://www.themarshallproject.org/2014/12/11/trial-by-cash> [<https://perma.cc/A7YJ-PZN2>]).

the public's attention even though it was only a misdemeanor prosecution. Without burdening the reader with details, the State failed to prove guilt beyond a reasonable doubt. My best evidence of the State's failure? After a short period of jury deliberation, the jury foreman in open court asked the judge if they could indict the child's mother! The judge of course said no. Imagine my surprise when the jury, evidently persuaded that the mother was guilty, nonetheless convicted my client and imposed a mere ninety-day sentence. I felt relatively confident that the judge would grant my motion for a new trial, given what he must have inferred about the jury deliberation. This would allow me to begin again with a new jury. He did not.

Every time I saw him for months thereafter he asked how my appeal was going. But we lost the appeal, and were almost certain to lose given the very low bar that the State had to pass at that time to demonstrate on appeal that the State had presented sufficient evidence.²⁴ I have always thought the judge, an honorable man whom I knew fairly well, knew the State's case was insufficient but wanted to pass the buck to the court of appeals. Judges are elected in Tennessee. This does not approach the pro-State bias Godsey reports in his book but is another piece of evidence, subtle though it is, that judges think about political consequences in criminal cases.

III. BLIND BIAS

By "bias" Godsey does not mean bias in general, as I am biased against the New York Yankees. He means confirmation bias that tends to blind us to other explanations for phenomena we observe. The subtle but corrosive effect of confirmation bias is one of the most disturbing aspects of our justice system that the innocence movement has unmasked. Indeed, this bias affects us all in our day-to-day lives. If we favor candidate X or team A, and the issue is at all close, it seems to us that X won the debate and the A players did not commit a foul. Those who favor candidate Y and team B will likely reach precisely the opposite conclusion and we will often be surprised to learn that our view is not shared by all. Most of the time confirmation bias does no real harm. Elections are determined by counting votes (or so we hope). The officials on the field make the final call whether it was a foul.

But when confirmation bias makes an innocent suspect look guilty, it does incalculable harm. Moreover, the vaunted trial procedure guarantees that we once thought separated the innocent from the guilty—that the Court has lionized over and over—are less successful than we have been taught. I have long told my students that the presumption of innocence, the requirement of proof beyond a

²⁴ The Fourteenth Amendment due process standard for reviewing the sufficiency of evidence on appeal in 1978 was stated in *Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960), as whether *any* evidence supported the conviction. *Thompson* was later overruled in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

reasonable doubt, and the requirement (in almost all states) of a unanimous jury verdict do far less than we assume to protect the innocent because *once a case gets to trial, most cases against innocent defendants look just like cases against guilty defendants*.

This weird effect is largely the result of confirmation bias. Once police officers or detectives have a theory of the case, and a suspect, they tend to see every piece of evidence as confirming their theory. It is the way the human brain is wired. Pieces of evidence that go against the original theory are often rejected; that evidence is unreliable or the witness mistaken. Prosecutors who get a case file with a theory and a suspect suffer the same confirmation bias. Godsey reports his own experience with confirmation bias in a striking passage:

In fact, when I was hired as a prosecutor, one of the first things I was told was not to write down the parts of a witness's statements that I believed were incorrect until he had "come to Jesus" and told the "truth." If we wrote down an early version of the witness's recollection when he still might be "confused," it would later have to be turned over to the defense attorney, and that witness would be torn apart on cross-examination for changing his story. The defense attorney might even suggest to the jury that we had told the witness what to say and coaxed him into changing his story. That, of course, is arguably what we had done in reality, but we didn't see it that way.²⁵

If the police and prosecutors have ignored or mischaracterized evidence of innocence, while doubling down on circumstantial and other thin evidence of guilt, the innocent defendant who appears in court looks guilty to the prosecutor, the judge, the jury, and probably even to the defense lawyer. Is it any wonder we have uncovered over 2,000 cases of innocent prisoners and who knows how many more remain undiscovered? The blind-bias problem also shows up when forensic evidence is offered. For decades, the FBI fingerprint experts assured us that there was zero chance of error when they make a fingerprint match. We now know that not only is this untrue but also that there are a host of problems with fingerprint matches. Many have written about the Brandon Mayfield case, in which the FBI confidently found a match between the prints of an Oregon lawyer and latent prints found at the site of the Madrid terrorism attack. Spanish authorities disagreed; the FBI condescendingly repeated its conclusion and tried to browbeat the Spanish experts into agreeing. They never did. Later of course the latent prints were conclusively matched to those of an Algerian national. Confirmation bias played a role here, too. Mayfield had no passport and thus there was no record of a trip to Spain. Because that did not fit the FBI theory of the case, they asserted he must

²⁵ This passage appears in the "Blind Memory" chapter but it also demonstrates confirmation bias. GODSEY, *supra* note 6, at 143.

have traveled under an assumed name.²⁶ To substantiate their case, the FBI claimed to have confiscated “miscellaneous Spanish documents” from Mayfield’s office and home. These documents turned out to be his young children’s Spanish homework.²⁷

So, what are the problems with fingerprint identification? They can be grouped into three categories. First, there is no standard in this country for how many points of similarity must be found before a match can be established. Many other countries have standards, most of which are greater than what the FBI will accept as a match in a given case.²⁸ Second, many latent prints are incomplete and faint. As Godsey puts it, “murderers rarely dip their fingers evenly in blood and carefully roll each finger across the knife they just used to murder someone.” (P. 97.) And there is subjectivity in what counts as a match. In the Mayfield case, for example, the FBI claimed there were fifteen similarities between his prints and the ones found at the scene of the terrorist attack, while the Spanish authorities saw only seven.²⁹ Third, and most troubling, fingerprint experts in this country (and perhaps everywhere) do not follow the scientific method. They are given the fingerprint from the scene of the crime and a clean fingerprint of the suspect. In effect, they are told “please confirm that we have the right suspect.” And when a second or third expert confirms the initial match, they are told the opinion of the earlier experts.

Sometimes the police are none too subtle in communicating that they want a match. Godsey includes a photocopy of a “Request for Examination of Physical Evidence” revealing that the victim “was shot in his vehicle, which the suspect reportedly drove prior to the shooting.” (P. 101.) The report also noted that prints were found in the vehicle that did not match the victim or his wife. In “Remarks,” the police tell the expert that the print he has is from “the person who pulled the trigger, making every effort to place him in the truck” and noting that “[o]ne witness riding in the truck was too drunk to make an identification.” (P. 101.)

But the reliability problems with fingerprints pale by comparison to “expert” testimony about hair matches, crowbar markings, tire tracks, bite marks, blood spatter, “and a host of other forensic disciplines.” (P. 97.) In 2015, we learned that between 2,000 and 3,000 convictions included FBI hair match evidence that was deeply flawed. The Justice Department and the FBI “formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in

²⁶ SIMON, *supra* note 2, at 40–43.

²⁷ *Id.* at 43.

²⁸ The FBI accepted fifteen similarities as a match in the Mayfield case (the Spanish authorities saw only seven matching characteristics in the prints). *Id.* France and Italy require sixteen matching characteristics; Brazil and Argentina require thirty. DAVID A. HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* 26 (2012).

²⁹ SIMON, *supra* note 2, at 43.

almost all trials in which they offered [hair match] evidence against criminal defendants over more than a two-decade period before 2000.”³⁰

In the first 268 of these hair match cases to be reviewed, twenty-six of twenty-eight examiners in the FBI microscopic hair comparison unit “overstated forensic matches in ways that favored prosecutors in more than 95 percent” of the cases.³¹ Thirty-two of those defendants were sentenced to death and fourteen “have been executed or died in prison.”³² Of course, in many cases there was other evidence of guilt, and the flawed hair match testimony did not cause a wrongful conviction. Still, it is disconcerting, to say the least, that the FBI admits the use of flawed forensic evidence in thousands of cases. And four defendants in the pool of the first 268 had been exonerated before the problem with hair match evidence was discovered.³³ That, tentatively, suggests that the error rate in the cases where these examiners testified must be at least 1.5% and is almost certainly much higher.³⁴

In 2009, the National Academy of Sciences (NAS), first chartered by Congress during the Lincoln administration, released a report entitled *Strengthening Forensic Science in the United States: A Path Forward*.³⁵ The news release was titled “‘Badly Fragmented’ Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques is Lacking.”³⁶ The first paragraph pulled no punches:

A congressionally mandated report from the National Research Council finds serious deficiencies in the nation’s forensic science system and calls for major reforms and new research. Rigorous and mandatory certification programs for forensic scientists are currently lacking, the report says, as are strong standards and protocols for analyzing and reporting on evidence. And there is a dearth of peer-reviewed, published studies establishing the scientific bases and reliability of many forensic

³⁰ Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST (Apr. 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html?utm_term=.c84ccf85d5e6 [<https://perma.cc/SJ3Q-QMZD>].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ If 1.5% of the defendants in FBI hair match cases were exonerated without evidence of the flawed hair match, the percentage that will be exonerated once the hair match evidence is excluded or reduced in probative value should be higher.

³⁵ See COMM. ON IDENTIFYING THE NEEDS TO THE FORENSIC SCI. CMTY, NAT’L RESEARCH COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [<https://perma.cc/DC7J-7H6J>].

³⁶ See Press Release, Nat’l Research Council, ‘Badly Fragmented’ Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques Is Lacking (Feb. 18, 2009) (online at <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12589> [<https://perma.cc/6VWE-6TTT>]).

methods. Moreover, many forensic science labs are underfunded, understaffed, and have no effective oversight.³⁷

A news release from the National Academy of Sciences concluding that much forensic evidence lacks proof of reliability should have been front page news in the *New York Times*, the *Los Angeles Times*, the *Chicago Tribune*, the *Washington Post*, and many other newspapers. How many newspapers covered the release of the report? One. The *Pittsburgh Post-Gazette*.³⁸ And only five news sources have even referred to the report in the eight years since it was released—the *New York Law Journal*, *Knoxville News-Sentinel*, *Philadelphia Inquirer*, *The Columbian*, and the *Fulton County Daily Report*.³⁹

The report concluded, in typical understated science language, that forensic science “has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.”⁴⁰ The forensic science community of experts, perhaps unsurprisingly, has largely resisted to the utmost any attempt to require scientific rigor in their analysis. David Harris provides many examples.⁴¹ Godsey has perhaps the most staggering example I have come across. After the NAS report showed how deeply flawed is the “science” of bite mark identification, the American Board of Forensic Odontology (ABFO) waged “aggressive, sometimes highly personal campaigns to undermine the credibility of people who have raised concerns.”⁴²

The ABFO conducted its own study to demonstrate the reliability of bite mark evidence. But its own study demonstrated “wildly divergent views on the hundred cases” from the panel of thirty-nine experts. (P. 32.) That, in itself, is not all that surprising but what happens next borders on the unbelievable. The ABFO tried to cancel the panel that was due to report the results of the study. When they were unable to cancel the panel, “presenters from the ABFO downplayed the significance of the study, criticizing the organization’s own methodology in the

³⁷ *Id.*

³⁸ Michael A. Fuoco, *Federal Report Finds Deficiencies in Use of Forensics in Criminal Cases*, PITTSBURGH POST-GAZETTE (Sept. 12, 2009, 12:00 AM), <http://www.post-gazette.com/news/nation/2009/09/12/Federal-report-finds-deficiencies-in-use-of-forensics-in-criminal-cases/stories/200909120105> [https://perma.cc/YZX9-AZBF].

³⁹ Search results, FACTIVA, <http://global.factiva.com> [https://perma.cc/M6PG-RCFM] (enter “Strengthening Forensic Science in the United States: A Path Forward” in Free Text Search Form, select Newspapers: All from Source Field).

⁴⁰ See NAT’L RESEARCH COUNCIL, *supra* note 35.

⁴¹ See HARRIS, *supra* note 28, at 57–127.

⁴² GODSEY, *supra* note 6, at 32 (quoting Radley Balko, *A Bite Mark Matching Advocacy Group Just Conducted a Study That Discredits Bite Mark Evidence*, WASH. POST: THE WATCH (Apr. 8, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/04/08/a-bite-mark-matching-advocacy-group-just-conducted-a-study-that-discredits-bite-mark-evidence/?utm_term=.0689fd5ec097 [https://perma.cc/V3YB-FEWE]).

study as flawed.” (P. 32.) And the ABFO “encouraged its members to continue testifying about this ‘science’ in courtrooms.” (P. 32.) The ABFO “decided not to publish or release its study.” (P. 33.) Godsey concludes: “Prosecutors who continue to support bite mark evidence have sometimes reacted with similar defensiveness, if not outright dishonesty.” (P. 33.)

Even more disappointing, the legal community seems blissfully unaware of the NAS report. Godsey reports that when he speaks about the report to audiences that include prosecutors and judges “very few know anything about *Strengthening Forensic Science*. Many have not even heard of it.” (P. 104.) And, of course, little reform resulted in the eight years since the report’s release. We are, in sum, faced with the following terrible realization. The criminal justice community—including prosecutors, judges, defense lawyers, and forensic experts—has been on notice for eight years that the methods used in non-DNA expert testimony are flawed, and sometimes deeply flawed, *and we have done almost nothing about it*.

The one concrete, albeit tentative, effect from the report was the Department of Justice creation of a National Commission on Forensic Science with the charge to implement some of the report’s suggestion. “Shortly after it began its work, however, Donald Trump was elected president, and his administration promptly killed it. The beat goes on.” (P. 105.)

Oddly enough, even defense lawyers do not seem eager to jump on the bandwagon. In 1993, the Supreme Court created a mini-revolution in judicial gate-keeping where expert witness testimony is challenged. In a civil case, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,⁴³ the Court set some fairly rigid scientific standards that expert testimony must meet before it is admissible. To be sure, *Daubert* affects only federal cases, but most states have followed suit.⁴⁴ One study looked at challenges in federal and state criminal cases before and after *Daubert*. The study’s authors (and the legal community generally) expected to find increased attention to admissibility and a lower rate of admissible expert testimony after *Daubert*. Readers to this point will not be surprised at the study’s conclusions. Comparing appellate decisions in the five and a half years prior to and after *Daubert*, the study found “no change in the overall rate of admission for all types of expert evidence” in criminal cases.⁴⁵

But this study was done before the *Strengthening Forensic Science* report was issued. If defense lawyers were aware of the report, its claim that most forensic evidence offered in criminal cases lacks scientific precision should have prompted these lawyers to attack expert testimony more vigorously. And it should have given them ammunition to discredit more of this “expert” testimony. Thus, in the

⁴³ 509 U.S. 579 (1993).

⁴⁴ John M. Conley & Scott W. Gaylord, *Scientific Evidence in the State Courts: Daubert and the Problem of Outcomes*, JUDGES’ J., Fall 2005, at 6, 6 (reporting that, in 2005, thirty-one states followed *Daubert*).

⁴⁵ Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL., PUB. POL’Y, & L. 339, 363 (2002).

years after the report, we should have seen more *Daubert* challenges in criminal cases and we should have seen more of them succeed. Preliminary data suggest that neither effect has been observed. The number of cases raising *Daubert* claims in the five-year period before and after *Strengthening Forensic Science* is almost exactly the same (660 cases before and 654 after).⁴⁶ Moreover, the success rate in *Daubert* claims in criminal cases actually falls in the post-report period, from 50% in the earlier period to 36% in the later period.⁴⁷ Of course, it is possible that prosecutors and forensic scientists read the report and markedly improved their methods and presentation of evidence, but anecdotal evidence to the contrary abounds.

My *Daubert* study also disclosed that in the almost ten years since the publication of the *Strengthening Forensic Science* report, only 152 cases in the Westlaw and Lexis databases have cited the report. It has been cited three times by the United States Supreme Court: in a majority opinion holding that forensic experts should be exposed to cross-examination as a way to expose any problems with their science;⁴⁸ in a dissent in the same case, arguing that it is improper for the Court to take notice of a report directed at legislatures;⁴⁹ and as a “see generally” cite in a per curiam opinion involving firearms and tool mark identification.⁵⁰

Available evidence suggests that the system has failed to give effect to the *Strengthening Forensic Science* report. If this is correct, it is a blind bias criminal justice failure of the first order.

IV. BLIND MEMORY

Here, of course, Godsey, to some extent, brings coals to Newcastle. Felix Frankfurter told us in 1927 that the “identification of strangers is proverbially untrustworthy.”⁵¹ We have known since 1932 that the failure of eyewitnesses to correctly identify the person they saw committing the crime is the most common cause of wrongful convictions.⁵² But Godsey’s chapter begins with a truly stunning example, complete with a photo of a failed lineup. The rape victim told police that her attacker was stocky with a round face. In the photo of the lineup,

⁴⁶ Jarrod Sowell & George C. Thomas III, *Daubert* Research Report (unpublished 2017). The search was of all federal cases and all state cases and *Daubert* for 2005–2009 and 2010–2015. I was not able to break it down into civil and criminal, but if there had been a large increase in *Daubert* claims in criminal cases, that would show up in the total post-report data.

⁴⁷ *See id.* Search data available from author.

⁴⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

⁴⁹ *Id.* at 351 (Kennedy, J., dissenting).

⁵⁰ *Hinton v. Alabama*, 134 S. Ct. 1081, 1084 (2014) (holding that the defense failure to present a competent expert witness was ineffective assistance of counsel).

⁵¹ *United States v. Wade*, 388 U.S. 218, 228 (1967) (quoting FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927)).

⁵² *See* EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932).

we see five men, four of whom are thin with thin faces. Indeed, the lineup is so flawed that it should fail due process. But amazingly, despite her description, the victim picked one of the men who was thin with a thin face. She identified him again in court and, based solely on the identification, John Jerome White served twenty-two years in prison. The DNA testing that exonerated White showed that the rapist was the only man in the lineup who fit the description! The police had the actual rapist in the lineup (he was not the suspect) and the victim picked a man who did not fit the description she gave police but who was the suspect.⁵³

The error occurred, Godsey believes, because the victim was first given a photo array that included White but not the actual rapist. She picked White out of the photos and that replaced in her mind the memory of the actual rapist with the memory of White's face. (P. 113.) This kind of error, we now know, often occurs when the victim makes an initial misidentification, a discovery that should lead to even greater care to create a fair initial lineup or photo array.

The rest of the chapter provides an excellent summary of what we know about how memory fails. In part, it fails because we hear and see different facts to begin with. In part, it fails because memory decays over time. In part, it fails because memory is not a videotape of the past but a reconstruction or, to use a metaphor developed by memory expert Elizabeth Loftus, our memory is like Wikipedia. "We constantly edit our memories subconsciously." (P. 119.) And because we are not aware we are altering our memories, we will be far more certain of our memory than we have any right to be.

New to me was the idea of selective encoding, where we focus on some aspect of what happens and simply assume the rest of the story "fits." Godsey gives an example where a surveillance videotape conclusively proved wrong two eyewitnesses who saw the event from different places and were both certain of their memory. But there were critical gaps in what they saw and they just filled in the gaps with facts that seemed to fit. (P. 127.) I can provide a personal anecdote. I was on a crosswalk with a stop sign for cars when I realized that the car to my right was continuing to creep in my direction. I turned to see the driver was an elderly person and I slammed the hood of the car with my hand to get his attention. He looked up, sheepishly, and stopped the car a foot or so from me. When I got to the sidewalk, two eyewitnesses asked if I was hurt. Hurt, I asked, by what? That car hit you, they both assured me. I told them what had happened, more than once, but I could see that they did not believe me. They had heard my hand hit the hood and encoded the most logical explanation of the sound—that the car hit me. They were so certain of their memory that they thought I, the putative victim, did not know whether the car hit me!

⁵³ GODSEY, *supra* note 6, at 113–14. A fascinating question is how the actual rapist wound up in the lineup with White. Mark thinks the police just rounded up some guys in lockup and the actual rapist happened to be there. Email from Mark Godsey to author (September 24, 2017) (on file with author). That is quite a coincidence.

That the police and prosecutors can shape the memory of what happened when they interview witnesses is, of course, the reason not to write down stories that conflict with the State's theory of the case until the witness has "come to Jesus" and told the "correct" story. Godsey writes: "When we engaged in this practice in my prosecutor's office, we didn't feel we were unethically altering witness testimony." (P. 143.) Of course, in most cases prosecutors and police *are* dealing with guilty suspects and are genuinely helping witnesses correct their recollections. (P. 144.) He now sees, however, that "this practice manufactures evidence and can lead to wrongful convictions in cases where the suspect truly is innocent." (P. 144.) More troubling are the accounts of experiments that show memories can be *created* by techniques that police routinely use in interrogations. In one study, 70% of college students were led to believe, falsely, that they had committed a particular crime several years earlier. The crime was fabricated but by the time of the third interview, these 70% not only recalled committing the crime but also came "to visualize and recall detailed false memories" of these crimes. (P. 139.)

The realization that police can shape and even create memories is further reason to reject the standard Inbau-Reid method of interrogation that includes unwavering confidence in the suspect's guilt and confronting him with false evidence of guilt. While false confessions are not nearly as frequent a cause of wrongful conviction as false eyewitness identifications, they are far more frequent than one would expect. Richard Leo offers an excellent account of false confessions in his book, *Police Interrogation and American Justice*.⁵⁴ Leo's account and Godsey's description of the research provide a compelling explanation. Given what we now know about false confessions and the Inbau-Reid method of interrogation, a less confrontational, more open-ended style of interrogation developed in the United Kingdom would seem a better approach.⁵⁵

Godsey closes the chapter with these words: "Such is the terrible unreliability of human memory." (P. 151.) And yet we rely on it to send hundreds of thousands of defendants to prison each year, some to death row.

V. BLIND INTUITION

Humans are generally smug about our abilities, including the ability to tell when others are lying or telling the truth. Police officers are smugger than average citizens and detectives are the smuggest of all. But the evidence to support this

⁵⁴ RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008).

⁵⁵ See, e.g., Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33 (2011). Leo's policy suggestions in Chapter 8 deserve careful consideration by courts and legislatures. Videotaping interrogations is perhaps the simplest and most effective way for courts and juries to be able to judge the reliability of a confession. But another idea I like very much (developed by Leo and Ofshe) is to permit defendants to challenge the reliability of a confession and to have judges apply a measure of the "fit" between the confession and three tests of reliability. See LEO, *supra* note 54, at 269–317.

smugness is just not there. The TSA spent nearly one billion dollars to enhance the ability of TSA screeners to tell which passengers are lying to them. Upon review of the results, the U.S. Government Accountability Office concluded that “*the human ability to accurately identify deceptive behavior based on behavioral indicators is the same as or slightly better than chance.*” (P. 160.) Congress then abandoned the project and began the search for alternatives. We can spend a billion dollars trying to perfect human lie detection, and then abandon it as a tool against terrorists, but continue to rely on it to arrest, charge, and convict defendants, some of whom are innocent.

And the depth of the arrogance some officers display is staggering. One of the Ohio Innocence Project exonerees, David Ayers, was exonerated after spending twelve years in prison for a murder he did not commit. In 2013, he sued the detectives who arrested him. One of the detectives testified that she had never, *never*, arrested an innocent person. She believed she was, “a human lie detector with no rate of error.” (P. 156.) She testified that despite the conclusive DNA evidence exonerating Ayers, she was certain that he was guilty. “I’d bet my life on it. And take my word for it, my partner would bet his life on it. We’ve been doing homicides for thirteen years I can pick out a killer in five minutes. I can tell talking to a person within two minutes whether they’re lying to me.” (P. 156.) That level of arrogance would have been out of place with Sergeant Joe Friday in *Dragnet*, circa 1950s (just the facts, ma’am), and I do not recall Friday claiming to be a human lie detector, but complete certitude was almost beyond belief in 2013 when we knew about a quarter century of exonerations. Perhaps it escaped the attention of the “lie-detector” detective but all of these innocent exonerees were arrested by police officers. The jury in the civil case did not believe the human lie-detector detective and awarded Ayers \$13 million against the detectives, none of which Ayers has seen.⁵⁶

It is not just police who wildly exaggerate their ability to detect liars and truth-tellers. In the rape trial of Steven Avery, twenty witnesses testified that he was nowhere near the scene of the rape. (P. 157.) Yet the jury chose to disbelieve every single one of those witnesses. How is that possible? Most criminal defendants can find one or two friends or family members to testify to a false alibi, but it strains (if it does not shatter) credulity that twenty witnesses could be mistaken or be persuaded to lie about an alibi. But that is what the jury chose to believe.

My readers have undoubtedly noticed a thread running through the various “blind” categories: arrogance about the ability of the criminal justice system to find and convict the guilty. This arrogance has been with us for at least a century. In researching one of my books, I read dozens of newspaper stories about police “third degree” interrogation methods. Some of the methods were truly horrible

⁵⁶ The detective whose testimony Godsey quotes bankrupted the judgment and her partner died. Mark Godsey tells me that at the time this book review went to press, Ayers was pursuing the City of Cleveland under a respondeat superior theory.

and could be explained, though not of course justified, only if the police were 100% confident that they were dealing with a guilty criminal. In one 1913 case, the Chicago police beat a suspect mercilessly; his cell mate said that he “looked as if he had been struck by a cyclone or had tried to stop an automobile . . . blood was running down his face . . . I never saw a man so scared in my life . . . His clothing was almost all torn off.”⁵⁷ To make matters worse, the *Chicago Daily Tribune* reported that the subject of the ordeal at the hands of police had been mistaken for someone else, someone whom he did not “resemble” even “remotely.”⁵⁸ Professional police forces date back only to the mid-1850s, and one wonders how and when police assumed the mantle of infallibility. Whenever it happened, the innocence movement has shown what we should have expected all along: Police, like the rest of us, are human beings with human failings.

The next chapter takes arrogance to a new height and accentuates all that is wrong with the criminal justice system.

VI. BLIND TUNNEL VISION⁵⁹

The “trump card” of police/prosecutorial mistakes is tunnel vision. It is human nature to grab onto the first theory that seems to explain phenomena and then interpret everything else in accordance with the original theory. If the earth is the center of the universe (and why wouldn't it be?) then the sun and stars must revolve around the earth. That fits our original theory. If also fits the apparent rising and setting of the sun; it must be revolving around the earth. When Galileo embraced the Copernican theory that had the earth revolving around the sun, he was tried at the inquisition, found suspect of heresy, forced to recant, and then spent the rest of his life under house arrest. Such was the power of tunnel vision of the Catholic Church of the time!

We looked at the Elkins case earlier as a stunning example of blind denial when the prosecutors refused to admit that DNA exoneration meant Elkins was not the murderer and rapist. It is also a vivid example of tunnel vision. Because the six-year-old rape victim, who witnessed her attacker for only a few seconds in the dark, said he looked like her Uncle Clarence, the police and prosecutors fixed on Elkins as the perpetrator. Lined up on the other side was a mountain of evidence strongly suggesting that he was not the murderer/rapist. I already noted that the crime scene was awash in blood, and no blood was found in Elkins's car, on his clothes, or anywhere in his house. The police searched the drains in his house for evidence that he had washed off the blood but found nothing. There were fingerprints and hair and other evidence all over the victims' house, none of which

⁵⁷ *Backs Story of Haas Beating; Cellmate Tells of Seeing Him Bleeding in the Station*, CHI. DAILY TRIB., Feb. 4, 1913 at 6.

⁵⁸ *Accuses Police of 'Third Degree'; Victim Innocent*, CHI. DAILY TRIB., Jan. 30, 1913, at 1.

⁵⁹ Tunnel vision is a close cousin, if not a sibling, of blind bias and I would probably have put these chapters next to each other, and perhaps in a single chapter, but this is a minor complaint.

could be connected to Elkins. Plus, he had a solid alibi. His wife, Melinda, the daughter of the victim who was raped and murdered, testified that Elkins was in bed at home all night. She had been awake most of the night taking care of one of their children who was sick. It was impossible, she said, for Elkins to have left the house, driven to the crime scene, raped and murdered in a blood bath, driven back home and disposed of all traces of the crime without her knowing anything about it. But the police had already found “their man” and so rejected Melinda’s statements as a lie. She had already lost her mother, so their thinking must have gone: she was not about to lose her husband too. Maybe. But coupled with the mountain of forensic evidence none of which matched Elkins, a more likely explanation was that the police had the wrong man.

Not only did the police proceed with the case against Elkins but the prosecutor maintained Elkins was guilty even after learning that DNA evidence had conclusively exonerated him. In Godsey’s words: “Thanks to appalling tunnel vision, Elkins spent seven and a half years in hell, and [the real culprit] went on to rape and physically abuse several other children before he was eventually caught and imprisoned for life.” (P. 172.) Again quoting Godsey: “The Elkins story might seem bizarre, or almost unbelievable, to a person not familiar with the criminal justice system. But it is not atypical at all. Tunnel vision is rampant in our system.” (P. 172.)

Another startling example of tunnel vision is the case of the Norfolk Four. It would take a book to describe all the twists and turns of this case, and Tom Wells and Richard Leo have written that book; it offers a gripping account of the profound injustice done here.⁶⁰ A brief description begins with Danial Williams, the first suspect in a brutal rape and murder of Michelle Moore-Bosko. When he confessed after eleven hours of coercive police interrogation, the Norfolk police were convinced the case was solved.⁶¹ The only problem was that the confessor’s DNA did not match what was found in the victim.⁶² The police then fastened on a second suspect who confessed after coercive interrogation to committing the crime with Williams.⁶³ Again, his DNA did not match.⁶⁴ One would hope that the double failure to match the DNA in the victim would move police to revisit their theory that these two suspects had raped and murdered her. But police kept bringing in more men in the hopes of finding a DNA match; eventually a dozen men were suspects in what had become a gang rape even though police initially

⁶⁰ TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND NORFOLK FOUR* (2008).

⁶¹ *Id.* at 31–39.

⁶² *Id.* at 54.

⁶³ *Id.* at 64–75.

⁶⁴ *Id.* at 95.

thought it had been committed by one man.⁶⁵ And still no one's DNA matched that found at the scene.⁶⁶

After one innocent suspect had pleaded guilty and cases were proceeding against the other three, the real killer/rapist was found. In a twist that one would not believe in a novel, Omar Ballard, admitted his crime in a threatening letter he sent a "friend" while he was in jail.⁶⁷ Ballard threatened to kill his "friend" like he had killed Michelle if she did not write him. She went to the police.

Ballard's DNA matched that found at the crime scene.⁶⁸ He confessed that he acted alone.⁶⁹ Indeed, he claimed on many occasions he acted alone. But the detectives made clear that he would get a plea deal and no death penalty only if he told the "truth," and the "truth" they wanted was that he had met four of the suspects in the parking lot and the five of them committed the gruesome crime.⁷⁰ He initially stuck to his story that he acted alone but eventually told the "truth."⁷¹ He failed two lie detector tests with this fabricated story.⁷² Yet the State continued to pursue, achieve, and defend on appeal convictions against four innocent men.

The Wells/Leo book shows how the facts available to the police in this case simply were not allowed to affect the original police theory. All of the original evidence pointed to a single rapist, but the State persuaded itself, somehow, that it was a gang rape even though only one man's DNA was found at the crime scene. Other than tunnel vision and deluded thinking, the only other possibility after Ballard confessed that he committed the crime by himself is that the State was trying to cover up its awful mistake that was going to keep four innocent men in prison for many years. But that possibility is just too awful to put forward seriously. Wells and Leo are willing to accept tunnel vision and deluded thinking; they suggest it is likely that the detectives still believed their gang rape story and thought Ballard simply lying about committing the crime alone.⁷³

While most errors that produce wrongful convictions are not as egregious as the ones in the Elkins and Norfolk Four cases, we now know that the system fails far more often than we once thought. What are we to do? In his last chapter, Godsey offers common-sense recommendations for modest reforms. Modest though the proposed reforms are, Godsey is right to worry that the problem is "not identifying which reforms are necessary, but rather getting system buy-in on their implementation." (P. 215.) David Harris has offered persuasive reasons why

⁶⁵ *Id.* at 169, 183.

⁶⁶ *Id.* at 182.

⁶⁷ *Id.* at 187–89.

⁶⁸ *Id.* at 195.

⁶⁹ *Id.* at 199.

⁷⁰ *Id.* at 230.

⁷¹ *Id.*

⁷² *Id.* at 231.

⁷³ *Id.* at 199.

“buy-in” is so difficult to achieve.⁷⁴ These reasons can mostly be grouped around, you guessed it, the arrogance of the actors in the criminal justice system. We have done it this way for 150 years; we know what we are doing; the occasional wrongful conviction (when we are willing to admit it exists) is a freakish outlier. Sure, the National Registry of Exonerations has identified over 2,100 cases (some of which, by the way, we will continue to deny were wrongful convictions) but that is a trivial number compared to the roughly 1,500,000 prisoners in state and federal prisons at any given time.⁷⁵

A moment’s reflection—stripped of tunnel vision, denial, and bias—screams that the 2,100 exonerees are only the ones lucky enough to find an advocate willing to commit much time and energy to the exoneration process *and* lucky enough to find powerful evidence of innocence that can persuade judges to vacate a conviction. DNA exonerations should be (thankfully) less common because every state now permits DNA testing before trial. Thus, finding persuasive evidence of innocence years later becomes more and more difficult. North Carolina has had, for over ten years, a procedure by which convicted felons can move to have a commission review claims of innocence. Cases of plausible innocence are referred to a judicial panel for final review. Almost 2,000 requests for review were filed between 2006 and 2016.⁷⁶ And how many innocent prisoners had their convictions vacated? Ten.⁷⁷

Now a defender of the status quo would say, see, I told you these wrongful conviction cases are outliers. But what we have learned about the criminal justice system to this point—from Mark Godsey, from other writers, and from various innocence organizations—is proof to me that the innocents we have identified so far are only a very small slice of those in American prisons. We simply must do better to let light into the dark recesses of our blind justice system. A good place to start would be to require every police officer, prosecutor, and judge to read Mark Godsey’s *Blind Injustice*. Oh, and by the way, every defense lawyer should also read it, both to make us more sensitive to the possibility that some of our clients might be innocent and to give us better tools to attack blind injustice. And while we are at it, why not require every federal and state legislator to read it, too?

Remember Alice’s Restaurant’s “anti-massacre” movement against the Vietnam War? (If you do not, if like Mark Godsey you are too young to remember, you should listen to Arlo Guthrie’s song.)⁷⁸ Maybe we can start a Mark

⁷⁴ HARRIS, *supra* note 28.

⁷⁵ See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, KEY STATISTICS: PRISONERS (2015) <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=488> [<https://perma.cc/CU9H-GTAS>].

⁷⁶ *Statistics*, THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION <http://www.innocencecommission-nc.gov/about/> [<https://perma.cc/NAW3-7TTV>].

⁷⁷ *Id.*

⁷⁸ Tenafly Viper, *Alice’s Restaurant - Original 1967 Recording*, YOUTUBE (Mar. 18, 2012), <https://www.youtube.com/watch?v=m57gzA2JCcM> [<https://perma.cc/DSZ5-P7FN>] (recording ARLO GUTHRIE, ALICE’S RESTAURANT (United Artists 1969)).

Godsey anti-blind injustice movement. All you got to do is join in the next time it comes around. Remember: American citizen opposition to the Vietnam War was a large part of the reason we stopped fighting that war. Maybe if we work together we can reduce the number of innocents who are sent to prison.⁷⁹

⁷⁹ The academic in me hastens to add that it is also critically important to convict the guilty; most measures that prevent the conviction of innocent defendants will cause more guilty defendants to avoid conviction. Deciding how many guilty defendants we are willing to free in exchange for protecting innocent defendants is a philosophical and policy argument that has no obvious or easy answer. Blackstone famously said we should be willing to let ten guilty go free to avoid a single conviction of the innocent. 4 WILLIAM BLACKSTONE, COMMENTARIES *358. But it is not so clear that this is the right ratio. For some thoughts on this difficult question, see LARRY LAUDAN, *THE LAW'S FLAWS: RETHINKING TRIALS AND ERRORS?* (2016); Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008); Paul G. Cassell, *Can We Protect the Innocent Without Freeing the Guilty: Thoughts on Innocence Reforms That Avoid Harmful Tradeoffs*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 264 (Daniel S. Medwed ed. 2017); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).