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Criminal Justice System Reform and Wrongful Conviction

A Research Agenda

Marvin Zalman
Wayne State University, Detroit, MI

This article describes the nature and importance of wrongful conviction as a criminal justice policy issue, the development of an innocence movement to litigate on behalf of potential exonerees and to promote policy issues, the innocence movement's policy and research agenda, and the very small amount of criminal justice research on the issue in comparison to legal and psychological inquiry. A research agenda for criminal justice policy scholars is proposed to explore the innocence movement and its research agenda. Research models from political science and sociology regarding the study of public policy, social movements, and interest groups offer themes and methods that would allow criminal justice researchers to expand their understanding of the criminal justice system's capacity for reform. Network analysis and the diffusion of innovation research are suggested as approaches to examine the context and spread of innocence reforms.

Keywords: *wrongful conviction; innocence movement; criminal justice system*

The exoneration of hundreds of prisoners since 1989, and the plausible belief that thousands of wrongful convictions occur each year, underlie the importance of wrongful conviction as a policy issue (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005). "Wrongful conviction" is not only the conviction of a factually or "actually" innocent person.[1] It also describes an emerging movement and an evolving multidisciplinary academic subject. Paradoxically, although wrongful conviction has generated extensive legal, psychological, and forensic science research, the subject has not been significantly addressed by criminal justice scholars (Leo, 2005). This article highlights the issue's policy significance and suggests avenues for research by criminal justice scholars.

Wrongful Conviction As a Policy Issue

This section describes the policy salience of wrongful conviction, the nature of the emerging innocence movement, the movement's reform and research agenda,

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and the limited nature of innocence research by criminologists and criminal justice scholars. This discussion sets the stage for discussing potential avenues of criminal justice innocence research.

Wrongful Conviction on the Public and Policy Agendas

Fear of convicting the innocent is intrinsic to justice systems and predates the wrongful conviction (or innocence) movement (Blackstone, 1769/1979, p. 352; Volokh, 1997). Several 20th century books and films identified wrongful convictions but had little influence on criminal justice thinking or practices prior to the mid-1980s (Borchard, 1932; Frank & Frank, 1957/1971; Leo, 2005).[2] Erle Stanley Gardner (1952), creator of the fictional defense attorney Perry Mason, failed in the late 1940s to institutionalize a short-lived "Court of Last Resort" created to correct miscarriages of justice. In political science terms, wrongful conviction was not on the public or governmental agendas.

The innocence movement that now exists is based in part on research that significantly undermined faith in the accuracy of the criminal justice process, especially DNA testing, first used to exonerate a defendant in 1989 (Leo, 2005, pp. 205-206; Medwed, 2005, p. 1117). Its ability to prove with astronomically high probability that likely perpetrators deposited biological evidence, and its power to absolutely rule out DNA donors among convicted defendants, shattered social and professional disinterest in miscarriages of justice and created traction for wrongful conviction as a public issue (Connors, Lundregan, Miller, & McEwan, 1996; Leo, 2005, p. 205). In addition to DNA testing, the cumulative work of psychologists since the 1970s has cast doubt on the unerring accuracy of eyewitness identification (Doyle, 2005, pp. 129-132; Wells et al., 1998). The "DNA revolution" forced a reevaluation of the criminal justice system's capacity to function according to Packer's (1968, pp. 160-161) crime control model, in which factual errors are thought to be minuscule.

Two factors were especially salient in putting wrongful conviction on the public and policy agendas. First, Attorney General Janet Reno authorized an influential Justice Department study that highlighted the ability of DNA testing to undermine convictions, especially those based on eyewitness identification (Connors et al., 1996; Doyle, 2005, pp. 127-130, 165-167). The Justice Department followed up with a report on improved methods of interviewing witnesses and conducting lineups (Doyle, 2005, pp. 169-187; Technical Working Group for Eyewitness Evidence, 1999). Second, *Actual Innocence* was published (Scheck, Neufeld, & Dwyer, 2000). To their great credit, the lawyer and journalist authors of this popular book went beyond empathetic storytelling about the innocent people they helped free. They conceptualized the wrongful conviction project in terms of specific kinds of errors and organized the chapters of *Actual Innocence* around them. These were drawn together in an appendix—a "Short List of Reforms to Protect the Innocent"—which was slightly expanded in the 2003 edition (Scheck et al., 2000; Scheck, Neufeld, &

Dwyer, 2003, pp. 351-362). The book's lack of academic refinement is an advantage in reaching a mass audience. The inclusion of sources, however, acknowledges the debt owed by the innocence movement to varied and expanding fields of knowledge outside the law. To a significant degree, the innocence movement's policy and research agenda is set out in *Actual Innocence* and has been shaped by Scheck and Neufeld's leadership in opening new arenas, including programs to assist exonerees.[3]

Wrongful conviction is now an issue on the public agenda. The news media, long supportive of prosecutors, are now sensitized to miscarriages of justice, and their continuing reports of exonerations keeps the issue in the public eye (Tulsky, 2006; Warden, 2003). A stream of popular books and documentaries attest to a market for true accounts (Blakeslee, 2005; Edds, 2003; Holden, 2005; Humes, 1999; Johnson, 2003; Junkin, 2004). Novels and dramas portray wrongful convictions (Barnes, 2005; Feige, 2006a; Patterson, 2005). *The Exonerated* (Blank & Jensen, 2004) not only played off Broadway and on tour but was made into a television production and shown on Court TV. This publicity is not entirely happenstance, as innocence projects (described in the next section) have promoted some of it (Scheck et al., 2000; Vollen & Eggers, 2005). The movement's leaders appear to understand that innocence reforms require public opinion support.

Innocence movement reforms are on the governmental agenda (see Zalman, 2005). The *Innocence Protection Act*, passed after four years in the congressional hopper, was a most significant movement victory (Leahy, 2004a, 2004b). This watered-down part of the 2004 *Justice For All Act* provides, inter alia, standards and funding for DNA testing of potential exonerees (Weich, 2005). At least 38 states and the District of Columbia have passed innocence statutes allowing appeals by prisoners with claims based on DNA evidence but who have exhausted appellate remedies (C. E. Jones, 2005, p. 1249; Zacharias, 2005, pp. 193-195). The videotaping of police interrogations is spreading (Sullivan, 2005). Several states and a number of police departments have begun to adopt lineup reforms (Lindo, 2000). The *Justice for All Act* "increased the amount of compensation for those wrongfully convicted of federal crimes to up to $100,000 a year for death row exonerees, and $50,000 a year for non-death row exonerees" (Innocence Project, n.d.), and bills to compensate exonerees have been introduced in several state legislatures, including those of Georgia, Michigan, and Utah (Hunt, 2006; "State Should Offer," 2006; C. Tucker, 2005).

The most notable item on the innocence reform agenda is capital punishment. In what is arguably the best known wrongful conviction story, by 2000, 13 men on death row in Illinois had been exonerated, prompting then-Governor George Ryan to impose a moratorium on executions, appoint a commission to study the death penalty, and, before leaving office in 2002, commute the death sentences of all Illinois death row inmates. The 207-page report of the Illinois Governor's Commission on Capital Punishment (2002) made 85 recommendations that have become blueprints for reform. Other states have considered or imposed death penalty moratoria, and the American Bar Association (ABA) established a Death Penalty Moratorium

Implementation Project. Widespread knowledge of death row exonerations is credited with reenergizing the anti-death penalty movement and with a decline in capital sentences and executions since 2000 (Kirchmeier, 2002; Steiker & Steiker, 2005; Warden, 2005).

The Innocence Movement

Unlike Gardner's (1952) abortive efforts to create a court of last resort, an institutional response has emerged to do the legal work needed to exonerate prisoners and the policy work designed to promote the issue. It began with a law school-based clinical program in 1992 led by Barry Scheck and Peter Neufeld (Scheck et al., 2000, 2003), which has grown into a multipurpose nonprofit organization—the Innocence Project (n.d.). About 40 law school clinical programs or other legal organizations (e.g., public defenders' offices), half of them established after 2000, now screen and litigate cases for prisoners claiming innocence (Medwed, 2003; Stiglitz, Brooks, & Shulman, 2002). These projects reflect an American penchant for grassroots solutions to contentious issues that involve governmental impropriety (Zalman, 2005, pp. 187-189).

Two innocence projects, the Innocence Project (n.d.) at Cardozo Law School and the Center for Wrongful Conviction (n.d.) at Northwestern University, have expanded into multifunction organizations designed to promote systemic reforms.[4] The Center for Wrongful Conviction has three stated functions: legal representation, research into the systemic problems that cause wrongful convictions, and community service to raise awareness of the causes and costs of wrongful conviction. The latter goal includes assisting exonerees to reintegrate into the community after years in prison (Center for Wrongful Conviction, n.d.).

Beginning in 2001, Scheck and Neufeld and other innocence project leaders met annually to consider their collective interests. The National Innocence Network was formalized in 2005 with membership limited to innocence projects. Its three goals are to represent potential exonerees in court, to provide assistance for exonerees on release, and to work for policy reforms designed to reduce wrongful convictions. To advance the latter goal, the Innocence Project hired a policy director to manage legislative and policy reform and to train local innocence projects' personnel in lobbying skills (National Innocence Network Conference, 2005). In one policy area for example—improving the accuracy and integrity of forensic laboratories—the Innocence Project has worked to create audit oversight committees in a number of states to ensure laboratory quality, to suggest improvements, "and possibly to evaluate wrongful convictions and assist in determining what went wrong" (Cromett & Thurston Myster, 2005).

The innocence movement is not limited to innocence projects. It includes cognitive psychologists who have tested new lineup methods in thousands of experiments (Wells et al., 1998) and innocence commissions established to investigate the wrongful conviction issue (Mumma, 2004). It includes nonprofit organizations designed to promote the goals of criminal justice reform (Justice Project, n.d.), to investigate

cases (Centurion Ministries, n.d.), or to report wrongful conviction news (Justice Denied, n.d.). It includes authors who write about miscarriages of justice, documentary filmmakers, lawyers who take appeals on behalf of potentially innocent appellants, therapists who help exonerees, and scholars who research wrongful conviction issues. Exonerees such as Kirk Bloodsworth have become part of the movement by working for innocence reform or by participating in publicity events. The innocence movement has some attributes of a reformist social movement, a point of departure for potential research initiatives discussed below.

The Innocence Movement's Reform and Research Agenda

If wrongful conviction is viewed as a multidisciplinary academic subject, its backbone of knowledge is contained in a list of topics that are deemed to be causes of wrongful conviction. This perspective makes the innocence movement's reform agenda coterminous with the wrongful conviction research agenda. Leo (2005) notes that the "standard list" of causes began with Borchard's (1932) tally of factors associated with wrongful convictions. A version is found in the chapter outline and appendices of Scheck et al. (2003, pp. 205, 212-213), and it may have achieved canonical status with its adoption by an ABA committee (Gianelli & Raeder, 2006). The ABA report includes separate chapters with analyses and recommendations on six causes of wrongful conviction: false confessions, eyewitness identification procedures, forensic evidence, jailhouse informants, defense counsel practices, investigative policies and personnel, and prosecution practices. It concludes with a chapter on compensation for the wrongly convicted. Similar lists and parallel analyses are found in many sources, including the Illinois Governor's Commission on Capital Punishment (2002), the Innocence Commission for Virginia (2005), and a scholarly anthology (Westervelt & Humphrey, 2001). The basic list of causes and remedies can be expanded. Scheck et al. (2003, pp. 358-362), for example, include creating statewide innocence commissions and the creation of an innocence network, reflecting the Innocence Project's goals.

A point worth noting is that some rhetoric of innocence advocates is radically transformative. Neufeld asserted that the larger goals of innocence projects "is 'nothing less than the complete overhaul of the criminal justice system with a new awareness of how to make it more reliable'" (Vollen & Eggers, 2005, p. 256). A lawyer who litigated cases for exonerees believes that large judgments in civil lawsuits for exonerees might bring "diverse actors together to collaborate on systemic change in our criminal justice system," leading to "widening ripple effects throughout the policing industry . . . [having] a great impact on law enforcement" and "the most far-reaching and effective criminal justice system reform that our country has experienced since the Warren Court's criminal procedure revolution" (Garrett, 2005, pp. 45, 7-8, 111).[5] Although not all rhetoric by the movement's leaders is so transformative,[6] it suggests that emotions among innocence activists are akin to those of

participants in reformist social movements. Transformative rhetoric may be driven by a belief that urgent action is needed because widespread DNA testing in criminal cases will eliminate easily observable miscarriages; this may cause publicized exonerations to decline and so undermine popular support for innocence reforms before the problems that cause wrongful convictions are corrected (Scheck et al., 2003, p. 323; Steiker & Steiker, 2005, p. 622).[7] This fear is belied by the high proportion of exonerations not based on DNA testing and by the plausibility that thousands of miscarriages of justice occur every year (Gross et al., 2005).

Each component of the standard list of innocence reform is itself a major area of research, whose scholars and scientists command daunting bodies of recondite knowledge and research. This poses potential tensions between activists eager to implement reforms based on existing knowledge and scholars who argue for continuing research. A legal scholar eager for implementation, for example, has incautiously suggested that "the scholarly work on false confessions, faulty eyewitness identifications, and other predictable problems of proof is largely complete" (Siegel, 2005, p. 1222). Few doubt that imposing best-practices laboratory standards, videotaping interrogations, improving lineup procedures, or the like will reduce errors and improve criminal justice practices, but it seems risky to shut the door on continuing research in these areas. In addition, further research may qualify or enrich earlier findings, necessitating updating and modification. Conflicting research findings or challenges to the quality of innocence research can be expected to generate controversy.[8]

The wrongful conviction research agenda is curiously incomplete. It fails to acknowledge the adversary system itself as a source of error despite recent innovative scholarship on comparative trial and justice systems and on evidence law theory and practice (Burns, 1999; Damaška, 1986, 1997; Lerner, 2001). Perhaps such studies are so theoretical and so unlikely to change constitutionally embedded practices as to be irrelevant to the innocence movement. But more practical jury research exists on issues such as the comprehensibility of jury instructions, juror note taking and witness questioning, and jurors discussing cases before formal deliberations begin (Dann & Hans, 2004). Jury research has been underway for decades and has generated proposals adopted in several jurisdictions, so it is unlikely that innocence movement leaders are unaware of it. These practical jury reforms might plausibly reduce wrongful convictions and yet are not found on the standard list of wrongful conviction issues.

Speculation as to why the innocence movement has largely overlooked the adversary trial includes the fact that the innocence narratives did not make a connection between trial procedures and erroneous verdicts. Such connections are not as easily observed as the effects of mistaken eyewitness identification and the like. Trial errors are embedded in trial transcripts (which are expensive and not automatically provided), and it requires painstaking legal analysis to sift through them to identify errors, as was done by pro bono lawyers for the Innocence Commission of Virginia (2005). In addition, the innocence movement's leaders are litigators who are not conditioned to see a

properly operating trial as a problem, even while documenting such failures as a prosecutor, acting within the bounds of professional propriety, befuddling an honest witness on cross-examination (Scheck et al., 2003, pp. 25-27).

Trial issues were not entirely ignored by legal scholars concerned with wrongful convictions. An early and insightful article explored but did not completely answer the questions of whether the adversary jury trial, when working properly, can be a source of error and why trials often fail to filter out errors occurring earlier in the criminal justice process (Givelber, 1997). More recently, an evidence law theorist has generated an intriguing potential solution to trial-generated error by proposing two kinds of adversary system jury trial procedures (Risinger, 2004). The usual criminal trial would be reserved for cases involving "polyvalent facts" (e.g., intent in a homicide or rape case) where the criminal act is stipulated and a jury is well-suited to explore issues of motive and intent. For "who-done-it" cases, where a jury is called on to determine what happened ("binary facts"), Risinger (2004) sketches a stipulated procedure in which the adversaries agree to forego the rich storytelling tradition of adversary advocacy and instead focus on the facts (pp. 1307-1313). He also suggests adopting an "unsafe verdict" standard of guilt under such a procedure that has been adopted for appeals in England (pp. 1313-1333). Additional recent analyses by legal scholars have explored trial issues and wrongful conviction including acquittals (Givelber, 2005), the pretrial process (Leipold, 2005), an archaic and arguably unconstitutional South Carolina procedure that allows prosecutors to control criminal trial dockets (Siegel, 2005), and the preservation of evidence (C. E. Jones, 2005).

A final point about the wrongful conviction policy agenda, related to its partial focus, is the practicality of the standard list of reforms. The list was derived from counting factors associated with miscarriages of justice in the wrongful conviction narratives, beginning with Borchard (1932; see Harmon, 2001; Leo, 2005). Given the terrible consequences of wrongful convictions, there is an urgency to establish policies to correct such deficiencies as inadequate defense counsel, poorly equipped and operated forensic laboratories, and the like. There is little premium on conducting theoretical or basic research into the items on the innocence agenda, although some exists (e.g., Cole, 2005). Many items on the agenda are the special preserve of lawyers (e.g., prosecution and defense counsel issues), and most of the law review writing on innocence-related subjects is aimed at generating policy rather than legal theory. Issues concerning forensic science require major input from forensic scientists, laboratory directors, and forensic examiners, and innocence activists are not competent to generate innovation but only to lobby to ensure that proper procedures are followed. Police investigation intersects with important matters on the innocence agenda, but the study of the investigative process had its heyday in the 1970s, and there has been little research focusing on investigation by criminal justice scholars in recent years. In sum, much of the research on wrongful conviction is fragmented into various specialties, is mostly applied research, and is not within the competence of most criminal justice scholars.

The Paucity of Criminal Justice Innocence Research

Richard Leo (2005, pp. 208-211), noting that most wrongful conviction research has been conducted by lawyers and psychologists, identified three specialized areas of empirical research: eyewitness identification, child suggestibility, and false confessions. Significantly, this work has led to proposed reforms. Leading research psychologists, for example, made their findings about eyewitness identification accessible to policy makers and have assisted in policy reform efforts (Doyle, 2005; Wells, 2001; Wells et al., 1998). Research by child witness experts has led to substantial improvements in how police and courts treat child witnesses (ABA Task Force on Child Witnesses, 2002; Ceci & Bruck, 1995; Gilstrap, Fritz, Torres, & Melinder, 2005). Leo, a leading authority on confessions, has helped to make the study of false confessions an area of sociolegal and criminal justice scholarship (Drizin & Leo, 2004; Leo & Ofshe, 1998) and a concern of psychologists (Gudjonsson, 2003; Wrightsman & Kassin, 1993). As a result, many police departments have begun to videotape interrogations (Sullivan, 2005).

In contrast, Leo (2005, p. 214) identified only two or three studies by criminologists that have explored the causes of wrongful conviction (Harmon, 2001; Huff, Rattner, & Sagarin, 1986; Lofquist, 2001).[9] Although a few others can be located (Denov & Campbell, 2005; Poveda, 2001; Schehr, 2005; Schoenfeld, 2005), this is remarkable when considering that Wells et al. (1998) estimated that more than 2,000 psychological research articles on eyewitness identification were in print almost a decade ago. I estimate that several hundred law review articles have been published on wrongful conviction topics in recent years, with a few based on empirical analysis (e.g., Campbell & Denov, 2004; Gross et al., 2005).[10] Leo does not ask why so few criminologists have studied wrongful conviction but seeks to stimulate empirical research by urging criminologists to eschew research into the "legal causes" and instead study the "actual root causes" of wrongful convictions. In this perspective, it is a simplistic or unexamined assumption that once the causes of wrongful conviction are identified "we will know how and why the problem of wrongful conviction occurs" (Leo, 2005, p. 213). Deeper causal and theory-generating research is needed to determine why the causes of wrongful conviction occur in the first place. Criminologists, for example, should ask, "What are the causes of eyewitness misidentification?" and the like (Leo, 2005, p. 213). Leo cites Lofquist (2001) as an exemplary study. Lofquist explored the structural dynamics within a police department that led to the identification of an innocent suspect as the perpetrator. Note that Leo's conclusion that the deeper "criminological" research called for relies on organizational methods and theory.

Leo (2005) concludes by urging criminologists to move beyond legal categories and to draw on "existing social science frameworks" to build theories of miscarriages of justice. He specifically references psychological, sociological, and organizational frameworks for research. For example, psychological research could "study how the process of memory and perception formation" and the like "underlie a variety of psychological errors . . . and how those errors then lead to wrongful prosecution and conviction" (p. 215). "Sociologically, [criminologists] . . . need to study

how the institutions of criminal justice . . . are structured and how the decision making, actions, and ideologies of these social actors are patterned in the production of both accurate and inaccurate outcomes" (p. 215). As for an organizational perspective, Leo recommends that "criminologists need to look at the microlevel and macrolevel forces, contexts, and structures that underlie the normal processes and production of perception, belief, and error in American criminal justice" (p. 216). He ends by tempering enthusiasm of potential wrongful conviction scholars by specifying the huge obstacles to this research: the lack of a database, the unlikelihood of police and prosecution support, and the inherent difficulties of determining whether wrongful convictions occurred from assembled case files (pp. 217-218).

A Criminal Justice Wrongful Conviction Research Agenda

Leo's (2005) insightful depiction of the state of wrongful conviction research misspecifies the target audience by directing his remarks to criminologists and suggests too narrow a model of empirical innocence research, oriented mainly toward generating theories of the causal dynamics of wrongful convictions. He then suggests that this worthy goal is virtually unattainable because no database exists, primary case materials are very difficult to assemble, and it is inherently difficult to prove that a conviction was erroneous (pp. 216-217). Curiously, by holding up Lofquist (2001) as a model of wrongful conviction research, Leo glosses over the fact that it is more aptly categorized as organizational rather than criminological research. Analysts in business schools and in departments of public administration, organizational psychology, sociology, and criminal justice are better equipped to pursue such studies. Leo may be using criminology as shorthand for criminology and criminal justice, a reasonable assumption as these disciplines are coming to be housed in the same departments and as their research foci overlap to a greater extent than heretofore. If so, Leo takes a narrow view of criminological research. Kraska (2006), by contrast, posits criminal justice as a multifaceted discipline that, like criminology, has generated a variety of theoretical constructs. The theories generated by the subdisciplines within criminal justice may be macro theories of the entire criminal justice system (e.g., systems theory, late modernity), micro theories of system components (e.g., a theory of police management, of investigator behavior), or normative theories (e.g., democracy and policing, criminal jurisprudence).

Building on this broader foundation, I propose a number of innocence research strategies that could be pursued by "justician" scholars, whether their academic roots are in criminology, criminal justice, or allied disciplines. This perspective diverges from Leo's (2005) hint that undervalues existing lines of innocence research because of the "simplistic assumption" that the standard list of causes provides a theoretically robust explanation of wrongful convictions. I agree that the kind of empirical and theory-building research conducted by Harmon (2001) and Lofquist (2001) ought to be pursued. In addition, however, criminal justice scholars capable of conducting

eyewitness identification experiments, for example, or adept at the legal analysis of recent bills designed to strip federal courts of habeas corpus jurisdiction (Bergman, 2005) ought to attend to these and other areas where research questions need to be refined and resolved. Likewise, American scholars of police and prosecution need to explore the construction of the truth in criminal cases, an understudied area, in the light of recent knowledge of miscarriages of justice (Fisher, 1993; Martin, 2001; McConville, Sanders, & Leng, 1991; Schoenfeld, 2005). That said, much of the research agenda proposed in this article is aimed not only at understanding wrongful convictions but also at understanding the reform process (i.e., the innocence movement and its research agenda).

The Context of Reform

The DNA revolution is used as a shorthand explanation for the emergence of the innocence movement. This kernel of truth masks other likely reasons for why the movement emerged when it did. Edwin Borchard (1932), Jerome Frank (Frank & Frank, 1957/1971), and Gardner (1952) understood the deep problems of criminal justice, but their failure to establish lasting reforms such as widespread exoneree compensation or prisoner review tribunals suggests that structural factors impeded progress on the wrongful conviction issue.

A social history of wrongful conviction that goes beyond a description of the 20th century wrongful conviction literature is needed (Leo, 2005, pp. 203-205). The current innocence reform movement presupposes a criminal justice system with national prosecutorial standards, criminalistics labs in every jurisdiction, managerial-style police departments, and the like. The criminal justice system of the early 21st century is a product of major changes that began in the 1960s. Police are far more professional today, as measured by increased education, less corruption, a managerial mentality among ranking officers, a legacy of constitutional reform that makes policing relatively law abiding, and a growing commitment to community policing (Silverman, 1999; S. Walker, 2005). Another structural change critical to the existence and operation of innocence projects is the rise of law school clinical education in the 1970s (Panel Discussion, 1987). A research question amenable to social historical inquiry is whether the 2006 innocence research agenda (Gianelli & Raeder, 2006) was feasible, or even conceivable, in the middle of the 20th century. A study of these kinds of institutional innovations would have to be placed in the context of evolving social expectations such as Lawrence Friedman's (1985) sociolegal theory of total justice.

Understanding the Innocence Movement

Study of the innocence movement itself can shed light on the capacity of the criminal justice system to change. Several large, well-developed, and partially overlapping subfields of sociology and political science—social movements, interest groups, policy analysis—provide models of inquiry (Burstein, 1999; Burstein & Linton, 2002;

Heinz & Manikas, 1992; Mack, 1997, pp. 18-24; Weed, 1995; Zalman, 2005). Characterizing the innocence movement as a social movement may be odd as the latter category typically applies to the collective behavior of masses of people with common grievances who are typically excluded from political decision making and who coalesce to protest policies and to promote various interests (Eyerman & Jamison, 1991; Green & Bigelow, 2005; Morris & Mueller, 1992). It may be more accurate to describe the Innocence Network (n.d.) as an association type of interest group because of its organizational membership (31 innocence projects; Lowery & Brasher, 2004, p. 5). The lawyer leaders of the innocence movement seem to fit the model of interest group participants in that they are highly educated and well positioned to get results in various policy venues. They can marshal arguments before legislative committees, newspaper editorial boards, and a host of places where public opinion is shaped and policy decisions made. They are adept at working with scientists and experts and in mobilizing recondite information and techniques to gain attainable ends. The innocence movement, however, promotes a highly generalized interest—justice—and is marked by the kind of fervor encountered in reformist social movements. This is seen in the prodigious efforts of pro bono litigators on behalf of truly innocent (Blakeslee, 2005) and ultimately guilty defendants (Dao, 2006; J. C. Tucker, 1997). This zeal also motivates movement participants toward criminal justice system reform efforts.

Research strategies and themes from sociology and political science can produce useful insights about the movement. Methodological modifications may be necessary as the innocence movement can be viewed as a species of social movement organization (SMO) without a mass social movement as a foundation (McCarthy & Zald, 1977). The sociology of social movements, which prior to the 1960s emphasized the social psychology of collective behavior, has been eclipsed by newer theoretical models. The resource mobilization model, although perhaps not the focus of recent sociological analyses, provides useful research themes. Researchers could explore, among other themes, the constellation of innocence SMOs as organizations, studying their mobilization patterns, the confederated structure of the movement, modes of cooperation and competition, alliances with congruent groups (e.g., NAACP-Legal Defense Fund, ACLU; Death Penalty Information Center, n.d.), strategies for survival and growth, and the division of labor among innocence projects in regard to different areas of policy innovation (McCarthy & Zald, 1977, pp. 1226-1227; Minkoff, 2002). These kinds of organizational studies can be categorized under Kraska's (2004, pp. 177-213) theoretical orientation of criminal justice as a "growth complex." This list is meant to be suggestive of the wide variety of issues that could be explored through the resource mobilization lens.

Successful social movements often generate countermovements (Marx, 1979; Meyer & Staggenborg, 1996). Recent writings indicate some outright prosecutorial opposition to the innocence movement's policy goals (Marquis, 2005) and potential rifts among those supportive of the innocence movement's aims (Steiker & Steiker, 2005).[11] Although prominent conservatives have strongly supported and even led

innocence reforms (Mumma, 2004; Sessions, 2003), the dogged opposition by many prosecutors to postconviction DNA testing (Medwed, 2004) suggests an ideological component among prosecutors at the core of a countermovement. Defense lawyers and prosecutors are natural enemies. However much they may cooperate in plea negotiations, they are combatants in an adversary system, reflexively wary and initially antagonistic to any proposal coming from the "other side" (Doyle, 2005, pp. 169-187).

Research at this point can explore whether the oppositional themes sounded by Marquis (2005) are widespread among prosecutors, what threats are perceived by potential opponents that could mobilize a countermovement, whether the innocence movement has framed its agenda in a way to avoid opposition, and the elite sponsorship of both the movement and any countermovement that arises (Loge, 2005). Given the relatively high status of innocence movement leaders, they may be able to win the allegiance of political elites.

More recent social movement research has focused theory-building energies on individuals within social movements, examining the social psychology of recruitment patterns into SMOs and the influence of social movements on individuals' political activities (Eyerman & Jamison, 1991; Morris & Mueller, 1992). This is linked to the emergence of "new social movements," such as the environmental movement, that are largely postindustrial, middle-class movements that focus on contemporary quality of life issues (Pichardo, 1997). Such approaches may yield useful insights as innocence movement participants for the most part are middle class. More recent attention to broader theoretical themes in social movement research, including mobilizing political opportunity structures and cultural dynamics and emphases on tactical solutions, movement leadership, and the impact of transformative events, readily suggests applications to the study of the innocence movement (Morris, 2000).

Studies of SMOs can also be approached from the political science interest group perspective. Some studies examine the mobilization of individuals and institutions through the lenses of niche theory and exchange theory to explain organizational maintenance (Lowery & Brasher, 2004, pp. 29-69). Given the newness of the innocence movement, it may be premature to study its environment (a parallel concept to that of a social movement "industry"). The logic of studying the innocence movement's organizations as interest groups is that they seek policy changes in government agencies and from legislatures and courts. Although the study of interest groups has waxed and waned within political science, there is no doubt that interest groups are a large and important sector in the public policy universe (Baumgartner & Leech, 1998). A variety of issues are open to innocence movement researchers. One is the way in which the news and popular media have promoted the movement's interests or how the movement has utilized the media (i.e., "lobbied the public"; Browne, 1998, pp. 84-108; Kingdon, 1984, pp. 61-64; Molotch, 1979); this parallels the sociological category of frame analysis. Given the salience of legal issues, attention can be paid to legal strategies used by innocence groups to influence judicial bureaucracies and to use litigation as a policy lever (Smith, 1997; Wasby, 1983). As

a small movement consisting mostly of tiny organizations, it is worth examining the nature of the lobbying or influence strategies employed (e.g., inside vs. outside strategies; Green & Bigelow, 2005; Kingdon, 1984; Strate & Zalman, 2003). These approaches could be applied to a case study of the passage of the Innocence Protection Act or to studies of other policy advances.

Network analysis, described as "a powerful new approach to the study of social structure" (Emirbayer & Goodwin, 1994, p. 1411), is used by interest group and social movement researchers. Network analysis examines relationship patterns to overcome the limits of explaining human behavior "solely in terms of the categorical attributes of actors." Its central insight is that networks of social relations ("nodes" or behavioral networks), which can be precisely described, constrain and enable "patterned relationships among social actors within systems" (Emirbayer & Goodwin, 1994, pp. 1414-1418). Two "conceptual strategies" used to explain patterned relationships are (a) a social cohesion approach "that focuses on the direct and indirect connections among actors" (Emirbayer & Goodwin, 1994, pp. 1419-1422) and (b) a "positional" strategy that explores "actors' ties not to one another, but to third parties," so as to define an actor's position relative to other actors in a social system (Emirbayer & Goodwin, 1994, pp. 1422-1424).

A number of methods used in conjunction with network analysis could help describe and explain the behavior of innocence movement participants when acting as policy entrepreneurs (Diani, 2002; D. Friedman & McAdam, 1992). Scheck, one of the most prominent figures in the innocence movement, has, for example, placed himself in existing policy networks as past president of the National Association of Criminal Defense Lawyers and as a commissioner on the New York Forensic Science Review Board. By deliberately pursuing a networking strategy, Scheck has almost perfectly followed the script of a policy entrepreneur who creates opportunities to "persuade others to support their policy ideas" (Mintrom, 1997) and thus stimulate the diffusion of innovation (discussed below; Kingdon, 1984, pp. 188-193; Ward, 1998).[12] The quantity and intensity of network ties could, when combined with substantive knowledge of policy events, produce the kind of rich understanding that has illuminated elite criminal justice networks in one jurisdiction (Heinz & Manikas, 1992).

Studying the Innocence Reform Agenda

In addition to studying the innocence movement itself, criminal justice scholarly analysis and research can improve the understanding of the innocence reform agenda and its prospects for success. The focus of such research can include studies of established reforms and evaluations of claims about the innocence research agenda.

Diffusion of Innocence Innovations

The diffusion of innovation is an autonomous research tradition employed in many disciplines and is reported in more than 5,000 publications in the social and behavioral

sciences and in other disciplines (Rogers, 2003, pp. 43-45, 477). "*Diffusion* is the process in which an innovation is communicated through certain channels over time among the members of a social system" (p. 5). The four elements of innovation, communication, time, and social system have been the focus of much diffusion research (pp. 11-38), and much research has also been devoted to the process of making innovations decisions, focusing on the elements of knowledge, persuasion, decision, implementation, and confirmation (pp. 168-218). The unit of analysis in most diffusion research has been individuals, but in recent years diffusion research has focused more on organizations (pp. 402-435) and can include states of the union in political diffusion studies (Mintrom, 1997; J. Walker, 1969).

An opportunity exists to capture the recent spread of innovations such as videotaping interrogations and lineup reforms because the ability to "gather data at several points during the diffusion process" (Rogers, 2003, p. 129) can be helpful in resolving causality issues. Of special importance to innocence reform studies are the existence of diffusion networks. This can allow criminal justice scholars to move away from the study of the innocence movement and to focus on more familiar venues such as police agencies. Political and policy analysts among criminal justice scholars could examine the spread of state innocence laws (C. E. Jones, 2005), perhaps analyzing the role of policy entrepreneurs (Kingdon, 1984, pp. 188-193; Mintrom, 1997). An important concept of diffusion research is the critical mass, akin to the idea of a "tipping point," which is "the point after which further diffusion becomes self-sustaining" (Rogers, 2003, p. 343). This concept, interestingly, was borrowed from social movement research. Given the tendency of proinnovation bias in innovation research, innocence movement scholars should be cautious in finding that a critical mass has occurred and should be sensitive to the existence of reinvention of innovations, which is common (Rogers, 2003, pp. 106, 180-189).

Diffusion methods could be applied to the spread of state innocence commissions (Mumma, 2004; Scheck & Neufeld, 2002) or to a group of specific issues on the standard list of reforms. Correcting errors caused by lying jailhouse informants, for example, requires not one but a variety of solutions. Diffusion research could measure the spread of (a) jail procedures regarding the placement and control of prisoners, (b) police and prosecutors' policies on screening panels and evaluative techniques for properly evaluating the use of informants' testimonies, (c) judicial precedents allowing or requiring cautionary instructions to juries concerning the weighing of informants' testimonies, (d) prosecutorial policies requiring prosecutors to divulge any inducements to informants and procedures to ensure compliance, and (e) rules requiring extensive discovery when informants' testimonies are used (Gianelli & Raeder, 2006, pp. 63-78). One can imagine a legal analysis of appellate judicial precedents concerning jury instructions that sheds light on that rule. Such a study, however, would not fully cover the more important question of whether policies have been adopted that in combination may reduce wrongful convictions caused by jailhouse snitches. Awareness of diffusions research could stimulate such broader studies.

Criminal justice researchers should be aware of political fragmentation in the United States as an impediment to the diffusion of innovations within criminal justice agencies. Consider, for example, the videotaping of interrogations. Sullivan (2005, p. 1128) reported that all police departments in Alaska and Minnesota and more than 300 additional departments have adopted the innovation. As of this writing, seven states and the District of Columbia have required electronic recording by statute or judicial decision, with a variety of conditions and limitations.[13] Sullivan (2005) noted that although many police departments have voluntarily adopted a recording requirement, "they represent only a small percentage of all law enforcement departments in the country" (p. 1136). A recent study indicates that 40% of big city police department administrators oppose videotaping, suggesting considerable potential resistance (Zalman & Smith, 2005). This finding, in light of the existence of 3,070 sheriff's offices, 12,666 local police departments, and 49 state police agencies in the United States, suggests at least that the diffusion of recording interrogations will be a major undertaking (Hickman & Reeves, 2003, p. 1). The fragmentation of the American polity refers not only to the large number of jurisdictions but to the relative autonomy of local units of government. With no centralized authority over local police departments or sheriffs, the adoption of an innovation such as the recording of interrogation will be made on a department-by-department basis.

Case Studies of Innocence Legislation

A few law review articles have described the federal Innocence Protection Act of 2004, which was a watered-down version of its original proposal and was passed as part of the comprehensive Justice For All Act that included support for law enforcement. In addition, almost 40 states have passed laws that authorize postconviction appeals on the grounds of innocence, typically where DNA evidence can be found. Legal writing tends to be instrumental and practical, and legislative surveys published in law journals are useful to innocence policy advocates in understanding the strengths and limitations of the legislation (C. E. Jones, 2005; Kleinert, 2006). A retrospective case study of the efforts needed to pass the Innocence Protection Act, perhaps utilizing network analysis, ought to lead to a more theoretically robust understanding of the innocence movement and shed more light on the nature of the movement's policy goals. Indeed, Sen. Patrick Leahy's statement on passage of the act names the Justice Project (n.d.) and a number of individuals and legislators who were instrumental in the passage of the act (Leahy, 2004b). The discrepancy between the act's initial goals and the act as passed could be analyzed in terms of the incrementalism that is characteristic of American politics and policy making (Haller, 2001; Kingdon, 1984, pp. 83-88).

Critiquing the Innocence Reform Agenda

As noted above, some of the descriptive, legal, or policy-oriented innocence movement rhetoric is often transformative. Criminal justice scholars can analyze the

innocence reform agenda, applying what is known about change in criminal justice, to suggest the possible shape and limits of reform. However sympathetic researchers may be to the aims of innocence reforms, deep knowledge of the nature of justice bureaucracies suggests that claims of imminent criminal justice transformation may be premature.

The limits of litigated reform. Garrett (2005), for example, asserted that criminal justice can be transformed through civil litigation on behalf of exonerees. Because defendants' constitutional rights are viewed negatively as "truth-defeating" in criminal cases by a conservative judiciary, few defendants win retrials based on police or prosecution error. Federal civil rights actions by exonerees against the police under 42 U.S.C. §1983, however, reverse the "guilt paradigm." In civil cases, "fair trial rights vindicate the truth, while government misconduct is revealed as having concealed evidence of a person's innocence, leading to a gross miscarriage of justice" (Garrett, 2005, p. 38). Many such cases have resulted in large monetary awards. Garrett's legal tour de force, proposing that the cost of civil lawsuits will force wholesale criminal justice reforms and even restore the Warren Court–era respect for defendant's rights, is a rationalistic idea that needs to be subjected to empirical testing.

Sociolegal and political science research offers at best a tempered view of the ability of court cases to effect social change. Some political scientists have written well-researched books positing that Supreme Court cases have had limited or no effect on important areas of social life (Horowitz, 1977; Rosenberg, 1991). Other authors counter that litigation strategies have a place in social action as for example, catalyzing correctional reform (Epstein & Kobylka, 1992; Feeley & Rubin, 1998; Zalman, 1991, 1998). Even if a view that the law has no effect is too extreme, empirical evaluations of the law's impact simply do not find that litigation itself can institute radical institutional change. A program of sustained litigation can initiate and highlight problems, but without other levers of change, it is unlikely that deep policy modifications will occur (Feeley & Rubin, 1998). Cross-sectional research could compare innocence reforms in police departments that have been hit with large awards (and perhaps in close-by departments) to a matched set of police departments that have not been subjected to such suits to find whether the suits have had a policy effect.

Implementing reforms. Most legal writing on innocence reforms is conceptual and descriptive and tends to equate reform with rule creation. The formal adoption of a policy by legislation, court decision, or administrative rule, however, is only the beginning of reform; to be effective, a policy must be implemented. Implementation is only one step in the policy process, which extends conceptually from problem perception and agenda building, to policy formulation, legitimation, adoption, and budgeting, and to implementation, evaluation, and termination or redesign (C. O. Jones, 1984).[14] Every step of the policy process may be the subject of policy analysis, and this author has previously called for a public policy approach to understanding the

innocence movement's agenda (Zalman, 2005). Criminal justice researchers, with their knowledge of criminal justice system functioning, are well positioned to engage in implementation research at a time when a number of agencies are formally adopting innocence reforms.

Implementation is a well-developed area of policy analysis that provides a variety of methodological and conceptual tools. Criminal justice scholars contemplating the study of agency adoption of lineup procedural changes or the like should be aware of the consensus among policy scholars that implementation is itself a political process that is intimately connected to earlier policy design stages. In other words, implementation is not a mechanical process but a continuation of policy making. The inevitable gap between early policy designs and the programs that emerge led early policy researchers to view the entire policy process in harshly negative terms. On mature reflection, they have come to accept such gaps not as policy failures per se but as evidence of a dynamic policy process that endures through the implementation phase (Hill & Hupe, 2002; C. O. Jones, 1984, pp. 164-195; Palumbo & Calista, 1990).

Again using the electronic recording of interrogation as an example, case studies of implementation could apply qualitative and quantitative methods. Researchers would have to define what is meant by implementation (the dependent variable). For example, if a state law mandated recording, the statutory elements can provide measures of compliance. Independent variables could include such organizational features as the strength of the chief's policy support, officer training and monitoring, the means interrogating detectives might have to evade recording, and internal sanctions for rules violations. Such research potentially transcends the innocence issue and provides the foundation for theory-oriented research about police agencies.

Conclusion

Wrongful conviction narratives have exposed serious flaws in the investigation, prosecution, and adjudication of felony cases. As a result of the DNA revolution, it is now thought that wrongful convictions are so numerous as to constitute a major policy concern that poses a serious challenge to the fairness and accuracy of the criminal justice process. Most innocence research has been conducted by psychologists and lawyers and has focused on specific subprocesses such as lineups. This research has been oriented toward understanding the ways in which these processes have failed and have caused wrongful convictions. Innocence research that goes beyond these specific areas can potentially provide a better understanding of the way in which the criminal justice systemically generates errors. Unfortunately, the difficulties in collecting and evaluating case materials and unresolved issues in defining a wrongful conviction limits this kind of research at the present time.

This article has proposed a broad research agenda addressing the new innocence movement that works to exonerate wrongly convicted inmates and to generate and

publicize policy changes that logically should reduce miscarriages of justice. The innocence research agenda sketched here is primarily useful for understanding the innocence movement, itself a worthy object of research. Beyond this, the proposed kinds of research into the innocence movement and its reform agenda will possibly illuminate the capacity of the criminal justice system to reflect on its own shortcomings and to correct them. This wider goal should be of interest to the community of criminal justice policy scholars.

Notes

1. A strict legalist differs:

> I count myself among those who use the term "wrongful conviction" to refer not only to the conviction of the [factually] innocent but also to any conviction achieved in part through the violation of constitutional rights or through the use of systems and procedures that render the proceedings fundamentally unfair. (Siegel, 2005, p. 1219)

Factual innocence can include a "wrong person" error (i.e., the person had no involvement with the facts of a criminal event) and legal innocence under substantive criminal law:

> An acquittal is historically accurate whenever the jury correctly determines that the defendant either did not engage in the prohibited conduct or, if he did so engage, he either lacked the state of mind required to make the conduct criminal or his action was the product of appropriate beliefs that justify it. (Givelber, 2005, p. 1175)

Forst (2004) describes two broad kinds of errors of justice: errors of due process, which can range from violations of a defendant's rights to the conviction of a factually innocent person, and errors of impunity, which range from the failure to apprehend a criminal to the acquittal of a factually guilty defendant. The latter kinds of cases have caused dismay in recent decades (Fletcher, 1995). Nevertheless, it seems improper to speak of "wrongful acquittals," however logical the term. This reflects the common law balance that accepts such acquittals as a necessary price to be paid, however grudgingly, for a fair trial.

Take the following hypotheticals. (a) A defendant whom the police investigator thinks is guilty is acquitted. Depending on the crime's heinousness, different reactions are deemed acceptable. In a drug case, for example, the chagrined officer can expect the defendant to recidivate and get caught in the future, thinking, "We will put together a stronger case and get a conviction." Another reaction to a vicious crime, say the rape and murder of a child, is to have the acquitted defendant closely monitored as a means of individualized crime prevention. A third approach, arguably improper but facially lawful, is to monitor the defendant to catch him or her in any criminal act for which some punishment can be imposed. This may have happened to Oreste Fulminante (*Arizona v. Fulminante*, 1991). This is the strategy of organized crime enforcement. In contrast to these acceptable reactions, it beyond the pale, even after acquittal for a vicious crime, for the officer to engage in private retribution. (b) After a conviction the investigating officer is left with a belief that the wrong man was convicted. Although not obliged to do so, the officer investigates the case on her own time. This results in an exoneration. Such action is deemed noble. The different societal reactions to private retribution in (a) and private investigation in (b) bring out the essential difference between social acceptance of an acquittal of the factually guilty and the moral imperative to free the factually innocent. Incidentally, the error of wrongful conviction can be compounded if police in hypothetical (a) wrongly believe that an innocent defendant has been acquitted and add the person to a list of usual suspects in later criminal investigations. This can lead to a wrongful conviction (Johnson, 2003).

2. Films based on actual cases include *The Wrong Man* (1956), directed by Alfred Hitchcock, starring Henry Fonda, and *Call Northside 777* (1948), starring James Stewart (see Mnookin & West, 2001). "From

the time Borchard published his book . . . until the early 1990s, there was typically one big-picture book or major article published every decade or so on the subject of miscarriages of justice" (Leo, 2005, p. 203).

3. They learned to their surprise that exonerees face many adjustment problems and helped to establish a framework for action—the establishment of the Life After Exoneration Program (n.d.), an organization that provides assistance for exonerees (Vollen & Eggers, 2005).

4. A comparable organization in Canada is AIDWyC, Association in Defence of the Wrongly Convicted (http://www.aidwyc.org).

5. Brandon Garrett practiced with law firms headed by innocence movement leaders (Cochran Neufeld & Scheck, LLP) and with Beldock Levine & Hoffman LLP, one of whose partners, Myron Beldock, represented Rubin "Hurricane" Carter (Hirsch, 2001). The acknowledgments in Garrett (2005, p. 35) include many leaders in the wrongful conviction movement.

6. Scheck (2005), in a more restrained vein as president of a national defense lawyer's association, expressed "cautious optimism" for reforms emanating for the innocence movement.

7. The "policy window" for innocence reforms can be the subject of more sustained discussion or analysis (Kingdon, 1984, pp. 173-204).

8. News accounts discuss a rare 2006 field experiment of lineup methods in Chicago that purportedly finds more error using sequential compared to simultaneous lineups, contrary to the general findings of lab experiments. Some claim that this undermines reform efforts; others claim that the study was flawed (Feige, 2006b; Paulson & Llana, 2006; Zernike, 2006).

9. A number of studies can be bundled into a frequency-of-wrongful-conviction category: Bedau and Radelet (1987), Huff, Rattner, and Sagarin (1986, 1996), Rattner (1988), Poveda (2001), Ramsey and Frank (in press), and Zalman, Smith, and Kazaleh (2006).

10. A Lexis search for the terms *wrongful conviction* or *innocence* in the titles of U.S. and Canadian law journals produced 226 articles, and a search for the term *wrongful conviction* anywhere in the article produced 1,455 articles (June 7, 2006). The author's personal bibliography on the subject is extremely long.

11. Some defense lawyers worry that an emphasis on actual innocence will make jurors and appellate courts even more hostile to procedural claims of defendants who are or appear to be "factually guilty" (Siegel, 2005, p. 1221).

12. The practice of networking is not the focus of network analysis; network analysis assumes that networks arise "naturally from contacts between individuals and organizations and studies the nature and intensity of those contacts and their influence on behavior.

13. Alaska: *Stephen v. State* (1985); District of Columbia: D.C. Code (2006); Illinois: 20 ILCS (2006); Maine: 25 M.R.S. (2005); Massachusetts: *Commonwealth v. DiGiambattista* (2004); Minnesota: *State v. Scales* (1994); New Mexico: Michie's Ann. Stat. (n.d.); Texas: Tex. Crim. P. Code Ann. (2005).

14. Diffusion of innovation research has also examined implementation by individuals and organizations and has generated findings about the "re-invention" of innovations as implementers modify the innovation or how it is used in a number of ways (Rogers, 2003, pp. 179-180, 424-433).

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Marvin Zalman is a professor in the Criminal Justice Department at Wayne State University. He is the author of a textbook on constitutional criminal procedure and has published on such issues as assisted suicide, confessions law, and asset forfeiture. His primary research focus at present is wrongful conviction.