

## **Research Assessment #4**

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### **Assessment:**

The academic book review "The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System" by Locke E. Bowman summarizes and analyzes the book of the same title by Jon B. Gould. This article addresses the issue of wrongful convictions and explains how it can be used as a tool for reformers to drive change that is otherwise difficult to create in a majorly change-resistant justice system. This is because with the advances in DNA testing that spurred a wave of exonerations of hundreds of wrongfully convicted inmates beginning in 1989, the issue became magnified and is percolating. This article was written in 2008 so while much of the information is slightly outdated and additional research is needed to confirm facts and see what other reforms have been solidified since the writing, the concepts still remain relevant and I feel that Bowman does an excellent job at seeing the issue

through a reasonable lens. By a reasonable lens I mean that Bowman does not turn a blind eye to the obvious difficulty in passing reforms and the consistent resistance to change among conservative members of the justice system. He seeks to find reforms that will not necessarily tip the scale between the effectiveness of the system to convict the guilty while preventing wrongful convictions that I discussed in prior research and that is a major concern for many who are opposed to systemic reform.

The wave of DNA testing has unveiled a series of exonerations that were able to be studied to find patterns and similar issues among cases that can be used to make conclusions about flaws in the justice system, thus allowing these wrongful convictions in the first place. Bowman highlights 9 major factors that lead to wrongful convictions: mistaken eyewitness identifications, suggestive eyewitness identification procedures, "tunnel vision" on the part of police and prosecutors, "antiquated" forensic science, inadequate defense counsel, failure by police and prosecutors to disclose exculpatory material, police interrogations of mentally challenged suspects, "inconsistent statements" made by wrongfully accused defendants, and the unavailability of adequate post-conviction remedies. These factors were also almost all addressed in the University of Colorado Law School study I previously researched and also were clearly highlighted by the 218 exonerated cases up until 2008 where these factors played major roles in the guilty convictions. These consistencies and patterns from case to case are somewhat positive for reformers and researchers as they show clear paths for areas that can be addressed.

With clear issues with the justice system identified, it is now the role of organizations and reformers to look to find policy that can be changed with reasonable success. There are two sides to this task. Firstly, the reform must be proven to be beneficial to the goal of proving more

factual guilt and reducing the rate of wrongful convictions as they are likely to be somewhat burdening to law enforcement and prosecution. Secondly, and arguably more difficult, is creating policy that is likely to be approved by policymakers. The requisite to this task is not attacking the justice system. It should be noted that while I have spoken about possible flaws and shortcomings of the justice system, they should not be addressed as such when attempting to find common ground with policymakers on passing reforms. The system should be addressed as a way to strengthen the system, in the same way software needs updates or machines continue to be innovated, not as a way to “fix” a broken system. Additionally, it is important to consider the effects these reforms will have on the prosecutorial and political side. If reforms hinder the ability of prosecutors to effectively convict the factually guilty perpetrators in this country and a significant number are allowed to run free, then there is no benefit to that side with the reform. However, if reform can be proven to be mutually beneficial, as a way to more successfully convict the correct guilty parties while reducing the rate of wrongful conviction, it is more likely to be looked at and taken seriously. A stronger justice system is better for everyone but the definition of “strong” in this case may be different between people in correspondence with their place on the Paleyite/Romillist spectrum.

Bowman highlights the work of many groups around the nation that seek to find reform and prevent wrongful convictions. The work of these groups is pertinent to me as ways to either borrow policy to be more widely spread or to see connections between wrongful convictions as this is a major part of their research. With the growth and findings of other organizations such as the Innocence Project, work is being done to address wrongful convictions and seek reform. Additionally, simultaneous with the work towards pushing for reform, it is important for DNA

based exonerations to be fought for as promptly and effectively as possible. This is because the window for DNA exonerations for the many innocent people still likely serving time in jail is not everlasting and time is dwindling for many. Some objects from old cases can no longer be tested and so therefore, the more time that elapses from a person's conviction the less and less likely DNA testing is going to produce conclusive evidence for the release of an inmate.

Bowman highlights many reforms that have been passed in different places around the nation but I feel that it is best to focus on the 7 recommendations that came directly from Gould and his reform group, "The Innocence Commission for Virginia." Firstly, he addressed the issue with eyewitness misidentification by proposing a series of minor changes including multiple person lineups, introducing the idea that the perpetrator may not be in the lineup, and video recording of the procedures. The idea of video recording stemmed across many reform ideas as this can make it easier for trial and procedure to be reviewed and audited for mishaps. These things are also respectable and reasonable reform ideas as they do not inhibit the process of finding a true perpetrator; they simply help to resolve an issue that leads to wrongful convictions. He includes custodial changes to the interrogation process that include the recording of the process and different approaches taken to the mentally ill. Addressing Virginia's policy of a 21 day limit to find new evidence after the conviction, the time limit is removed and adequate evidence can be reviewed without a strict limit on when it is discovered. "Open-file" discovery for the defense. This allows for a more open and unquestionable system of investigation that not only helps to reduce the likelihood of mishap but also solidifies the job done by prosecutors and law enforcement making it arguably mutually beneficial to an extent. It also takes forensic evidence and puts it to the Daubert system. This is something I need to do additional research

into but from a basic understanding, the Daubert standard is a rubric for judging the validity and reliability of evidence based on peer reviewed nature, whether evidence has been tested, and the rate of error that is to be expected. This is a concept that should be applied to all forms of evidence in my opinion. Lastly, Gould addresses the issue of poor public defense that stems from underpaid public defenders by raising money and increasing the salaries of these attorneys. This can hopefully increase the usefulness and effectiveness of these lawyers and help reduce the role socioeconomic status has in convictions.

This paper can be exceptionally helpful for my research and my original work. I am planning on creating a database that can hold information about wrongful convictions and one of the sections I plan to have is based on what can be done to address the issue. These reforms are important to be included. It also brings up points about how to pass reform and what has and hasn't been tried already so that I can focus future research into these areas. With previous research having been done that established the need for reform and the factors that lead to wrongful convictions, this is the first assessment and paper that I read that comprehensively goes into specific reforms as well as their results. This is all crucial to my studies.

# The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System

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JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM (N.Y.U. Press 2007). 345 PP.

The Commonwealth of Virginia, like many other jurisdictions across the country, witnessed, during the 1990s and the current decade, a series of exonerations of persons who had been convicted and sent to prison (some to Death Row) for crimes they did not commit. Jon Gould's heartfelt and thoughtfully reasoned volume chronicles the efforts of a small group of volunteers, Gould among them, to change some of Virginia's criminal justice practices in the wake of these miscarriages of justice.

The conviction and subsequent exoneration of the innocent has assuredly been the most dramatic--perhaps the most important--recurring criminal justice story of the last two decades. Through repetition, the pattern is now familiar: before or shortly following 1989 (the year of the nation's first DNA exoneration); a suspect--often brown or black, almost invariably indigent, is convicted of a rape or murder; the state's evidence is facially compelling: a confession to the police, the testimony of a jail house snitch, an eyewitness's confident identification, possibly forensic evidence that appears to link the defendant to the crime scene; but years later, after the advent of DNA forensic technology, biological evidence establishes that someone other than the defendant committed the crime. As of this writing, this scenario has unfolded 218 times in the United States. (1)

In tandem with DNA exonerations, and probably to some extent because of them, this same time period has also witnessed the exoneration of hundreds of additional prisoners as a result of witness recantations, the exposure of investigatory misconduct, and the like.

(2) There is every reason to presume that the documented wrongful convictions are but a fraction of the true number of cases in which an innocent person was sent to prison for a crime he did not commit. (3)

The consequences of wrongful conviction are profound. An unspeakable tragedy is visited upon those who are falsely convicted, some of whom endure decades of harsh, unjust imprisonment before their exonerations. (4) With news of exonerations, victims and their family members are forced to relive the crime and its aftermath, years after they had every reason to believe the guilty party had been safely locked away. In some cases, with police, prosecutors, and the courts focused on the wrong person, the guilty perpetrator has remained free and has committed subsequent serious crimes that might have been prevented. (5)

The costs are enormous and impossible to quantify. Immeasurable suffering is caused to the wrongfully convicted as a result of shattered personal and community ties, the loss of freedom (sometimes for decades), harsh conditions of imprisonment, and ruined psyches. (6) There is also a broader effect, as confidence in the criminal justice system is shaken. Police-community relations may be further undermined in communities where such relationships have historically been strained. In extreme cases, the legitimacy of the entire criminal justice process may be called into question.

There is also high drama and human interest in the exoneration of an innocent person, who may have spent many years in prison. Even after scores of repetitions, the image of an innocent person walking through the prison gates still has great salience for the media and the public. This is now the stuff of movies, novels, and best selling non-fiction accounts. (7)

Gould's book discusses how reformers might capitalize on the so-called "innocence issue" to advance criminal justice reforms designed to safeguard against conviction of the innocent. In a few more years there will be very few cases in which old evidence can be re-examined using new DNA analysis. The era of wholesale DNA exonerations is drawing to a close. If the public attention focused on wrongful convictions can catalyze criminal justice reform, then the window of opportunity afforded by this phenomenon is narrowing. For that reason alone, Gould's book is timely and important.

Reforming law enforcement practices is not easy. The State of Illinois is unquestionably the gold standard for positive accomplishment in this regard, but the successes there came about as a result of an unlikely combination of factors. (8) In Illinois, reform of the criminal justice system was linked to the death penalty abolition movement. Capital punishment opponents used exonerations of the innocent from the state's Death Row to call for an end to the Illinois death penalty. They claimed that the capital punishment system was "broken," pointing to the fact that between 1977 and 2000 Illinois exonerated more men from its Death Row (thirteen) than it executed (twelve). (9) Public concern was heightened with the exoneration of Anthony Porter, who, in 1999, came within forty-eight hours of execution, was given a stay of execution because of concern about his competency to stand trial, and, with the stay in place, was exonerated through the efforts of a team of

Northwestern journalism students who were reinvestigating his case as a class project. (10) Then, three additional death row exonerations--Steven Smith, Ronald Jones, and Steve Manning--followed in quick succession during the course of 1999.

In response, former Illinois Governor George Ryan in January 2000 declared a moratorium on executions and appointed a Commission on Capital Punishment to study the causes of wrongful convictions and recommend reforms. (11) The Governor's moratorium and call for study of criminal justice reforms was a middle ground, falling short of total abolition of the death penalty, which had been (and remained) the principal reform goal of many of those whose public advocacy had brought the wrongful conviction issue to the top of the political agenda.

Over two years later, after exhaustive research, the Ryan Commission issued a comprehensive report proposing eighty-five specific reforms. Some of the Ryan Commission's key proposals were enacted by the Illinois legislature. As Gould recounts, (12) Illinois now requires, for example, the video recording of custodial interrogations in all homicide investigations, (13) reliability hearings prior to the admission of "snitch" testimony against a defendant, (14) and competency certification for all counsel who defend capital cases. (15) Most famously, the report also led Governor Ryan in January 2003 to commute the death sentences of every prisoner on the Illinois Death ROW. (16)

Following several of its own miscarriages of justice, North Carolina, acting more modestly than Illinois, established the North Carolina Actual Innocence Commission at the urging of the state's chief justice. (17) The Commission examines the correlates of wrongful convictions and issues recommendations for the improvement of criminal justice practices. By the Commission's account, its recommended protocols for line-ups and other eyewitness identification procedures are "increasingly" being implemented by law enforcement agencies. (18) In 2006, North Carolina also created an Innocence Inquiry Commission with limited authority to review and recommend judicial reconsideration of cases with "suspected miscarriages of justice." (19)

In the wake of the widely reported DNA exoneration of Steven Avery in Wisconsin in 2003, that state enacted legislation to require electronic recording of custodial interrogations, to require implementation of law enforcement agency procedures for handling eyewitness identifications, and to require new procedures for retaining biological evidence. (20) In 2004, following a several-year campaign by Senator Patrick Leahy and activists at the Washington, D.C.-based Justice Project, the federal government enacted the Innocence Protection Act, (21) which permits a federally convicted person to apply for post-conviction DNA testing under specified circumstances.

These are impressive successes. But, given the enormous personal toll for those directly affected by wrongful conviction, the practical costs to the entire criminal justice system of such miscarriages, and the moral implications for society at large, it is more noteworthy how little reform has actually occurred and how incomplete the reforms have been, even in Illinois, which failed to implement a number of the Ryan Commission's proposals. (22)



Gould, a veteran of multiple national political campaigns, lays out the problem in the language of political science: criminal justice practices are deeply entrenched and the system is highly resistant to change; wrongful convictions furnish an opportunity for reform, but not one that is self-executing; change can only come about through the efforts of "resourceful policy advocates," but those advocates face powerful opposition from those who are committed to the status quo. (23)

As Gould acknowledges, Virginia's criminal justice system has historically been a backwater. It woefully underpays defense counsel appointed to represent the indigent, with fee caps that are at or near the lowest in the nation. (24) Until recently, Virginia infamously enforced a strict "21 day rule," which barred a defendant from attacking his conviction on the basis of new evidence of actual innocence when more than twenty-one days had expired following the conviction. (25) The Commonwealth has a sordid history of racial misconduct, including in its criminal justice system, which featured slave codes and a variety of other overtly racist provisions and practices. (26) Virginia remains deeply committed to the use of capital punishment, having executed 102 people since 1976, more than any other state except Texas. (27)

Not surprisingly, Virginia has produced its fair share of wrongful convictions. In 2001, Earl Washington, Jr. and Marven Anderson, both black and each convicted in the early 1980s of sexually attacking a white woman, were formally exonerated as a result of DNA evidence that excluded them as a possible attacker. In the judgment of Gould and his collaborators, these widely reported and shocking exonerations furnished in their aftermath a window of opportunity to push for reform of some of Virginia's criminal justice practices. (28)

Lacking "an immediate political constituency" (29)--i.e., legislative or other official sponsorship--Gould and colleagues took the creative and audacious step of privately constituting themselves as "The Innocence Commission for Virginia," with a mission to investigate "the problems that may lead to wrongful convictions," to report their findings, and to "offer a series of best practices to improve" the system. (30) The directors of the Innocence Commission planned that the legitimacy of their report would derive from their established reputations, (31) from the thoroughness of their investigation, and from the reasonableness of their recommendations.

The staff of the Innocence Commission (32) conducted a comprehensive examination of the eleven "official" exonerations of rape and murder convictions that had occurred in that state since 1980. Believing that the inclusion of cases in which the judiciary and/or the executive had not officially acknowledged the innocence of the convicted person would invite a distracting debate, the Innocence Commission chose to limit its study to those cases in which state officials had ultimately admitted the defendant's innocence. (33)

The Commission surveyed law enforcement agencies regarding their practices for handling eyewitness identifications and conducting custodial questioning of suspects, and surveyed Virginia prosecutors regarding their pretrial discovery practices. (34) In the end, the Commission identified nine factors that were linked to erroneous convictions: (1) mistaken

eyewitness identifications, (2) suggestive eyewitness identification procedures, (3) "tunnel vision" on the part of police and prosecutors, (4) "antiquated" forensic science, (5) inadequate defense counsel, (6) failure by police and prosecutors to disclose exculpatory material, (7) police interrogations of mentally challenged suspects, (8) "inconsistent statements" made by wrongfully accused defendants, and (9) the unavailability of adequate post-conviction remedies. (35)

Based on its investigation and analysis, the Commission proposed seven broad reforms in its March 2005 report, the first three of which Gould identifies as "primary[:]" (36)

- \* Police procedural reforms to increase the accuracy of eyewitness identifications, including: (a) use of multiple person line-ups or photo arrays as opposed to single-suspect identification procedures, (b) specific instructions to witnesses that the perpetrator may not be included in the array, (c) sequential, rather than simultaneous, presentation of line-up participants to the witness, and (d) electronic recording of the procedure.

- \* Reforms to the custodial interrogation process, including a requirement that custodial interrogations be videotaped from inception to conclusion and a requirement that detectives be trained to recognize mental illness and mental retardation in interrogation subjects.

- \* The creation of a clear judicial procedure for convicted persons to present claims of actual innocence based on newly discovered evidence, without time limitation.

- \* Improvement of the indigent defense system, including the creation of a statewide system and allowing appropriate compensation for appointed counsel.

- \* Judicial acceptance of advances in scientific forensic detection, but subject to rigorous examination under a rubric similar to that set out in the Daubert decision. (37)

- \* "Open file" discovery to the defense of all non-privileged material relating to the investigation in the possession of police and prosecutors.

- \* Training of police in how to avoid "tunnel vision"--the unwarranted focus on a single suspect early in the investigation.

The reform proposals flow from the eleven cases that the Innocence Commission examined; they are an attempt to correct practices that figured in one or more of the wrongful convictions. They are all eminently reasonable and should not be controversial. Indeed, they mirror several key proposals from the Illinois Ryan Commission report and the suggestions of leading practitioners in the "innocence" field. (38) Mistaken eyewitness identifications have figured in the great majority of the known wrongful convictions. (39) False confessions have also been present in a number of these cases, as Steven Drizin and

Richard Leo have impressively documented. (40) Underpaid and inept defense counsel have perniciously affected the criminal justice system, particularly in capital cases, (41) and have had an unfortunate role in dozens of wrongful convictions (the well-to-do are almost never victims of miscarriage of justice). Concealed exculpatory evidence is a particularly galling feature of a number of false convictions. (42) Procedural reform to permit full and fair judicial examination of serious claims of wrongful conviction is an obvious need. Nor can there be any doubt as to the value of training to alert police and prosecutors to the real possibility of erroneous prosecutions. (43)

As Gould emphasizes, none of the Commission's proposed criminal justice reforms could be tailored solely to benefit the wrongfully accused. (44) Wrongful conviction cases arise in the context of broadly applied practices. There are not, in other words, strict causes of wrongful convictions that could be somehow surgically removed from the system. Instead, reforms must be aimed at practices that have been found to correlate with wrongful convictions. When the reforms are applied, they will sweep more broadly and will affect many cases in which the accused person is guilty.

This is why the innocence phenomenon is so important for the criminal justice system. It furnishes a sense of urgency and can potentially open the minds of judges, legislators, and law enforcement actors to the need for change. Importantly, since the reforms that Gould and others have proposed are designed to improve the accuracy and integrity of the system, implementation of those reforms can also be expected to contribute to securing swifter and more certain convictions in cases where the defendant is guilty.

Gould argues that the chances for achieving criminal justice reforms are maximized when advocates pursue a conciliatory strategy, appealing not only to the defense bar but also to law enforcement and conservative interests. "Sober" arguments, based on the proposition that criminal justice reform will improve public safety and confidence in law enforcement, offer the only hope of persuading law-and-order conservatives. An element of this across-the-aisle strategy is the avoidance of what Gould at one point terms "puerile flame throwing." (45) Accusations that the system is "broken" destroy the possibility for dialogue and the establishment of common ground; they should be avoided. (46)

The Virginia Innocence Commission was an unprecedented and bold initiative. Lacking official sanction, an abundance of faith and conviction was required to instigate this project. Within its defined parameters, the Commission's study and findings are thorough--the obvious product of many hours of labor on the part of a number of individuals. It is no surprise that the release of the Commission's report was widely covered in the media and was respectfully received by legislators and other policy makers.

But the Commission's report had little effect on Virginia's criminal justice practices. On the positive side, in July 2005, three months after the Commission's report, the Virginia Department of Criminal Justice Services issued a sample order for use by police departments regarding the conduct of eyewitness identification procedures. The sample order, which has no binding effect, calls for the sequential presentation of line-up subjects.

But, disappointingly, it does not call for double-blind administration of line-ups, a reform that is essential to remove the risk of intentional or inadvertent steering of eyewitnesses. As Gould notes, the DCJS sample order was to some degree prompted by the Virginia State Crime Commission's issuance of a report on line-up procedures at about the same time as the Innocence Commission report was released. (47)

Virginia has also limited the scope of the draconian twenty-one-days-from-conviction limitation on presentation of newly discovered evidence of innocence, a rule that had long sullied Virginia's reputation. In 2001, the year of the Washington and Anderson exonerations, Virginia began permitting a person convicted of a felony to move for new scientific testing of evidence (if certain conditions are met) at any time following conviction. (48) And in 2004, the year prior to the Commission's report, Virginia established a "writ of actual innocence," permitting persons convicted of a felony, unless as the result of a guilty plea, to present newly discovered evidence of their actual innocence at any time after conviction. To prevail, the petitioner must establish that, taking into account the new evidence, "no rational finder of fact could have found proof of guilt beyond a reasonable doubt." (49)

As Gould notes, (50) however, decisions that the Virginia Supreme Court issued in 2007 following the issuance of the Innocence Commission's report have made the writ of actual innocence all but unavailable as a practical matter for petitioners who do not have DNA evidence establishing their innocence. (51)

In 2004, in the wake of a scathing study performed by the Spangenberg Group under the auspices of the American Bar Association, (52) Virginia established an Indigent Defense Commission to provide oversight and certification of attorneys who accept appointments to represent indigent defendants. Since the Innocence Commission report, however, little else has transpired to improve the state of indigent defense in the state. Virginia has increased the amount that court appointed attorneys can receive, but the increase still leaves those attorneys vastly undercompensated. (53) The state has not enacted any other reforms to improve its crippled indigent defense system.

The Virginia state crime lab was subjected to an extensive audit, ordered by former Governor Mark Warner in 2004. Governor Warner claimed that the audit, which was performed by the American Society of Crime Laboratory Directors Laboratory Accreditation Board, gave the state lab a clean bill of health--a conclusion that, Gould intimates, may be fairly debated. (54)

There is no further progress to report. The Virginia judiciary has not adopted the Daubert framework for evaluating the admissibility of forensic findings, as the Innocence Commission recommended. The criminal discovery practices of Virginia prosecutors continue to be shockingly regressive. The Innocence Commission survey found that most prosecutors in the state do not disclose police reports to defense counsel. (55) Two-thirds of Virginia prosecutors do not provide the defense with the names and addresses of witnesses. (56) Prosecutors in the state almost never disclose police officers' field notes or

crime lab technicians' bench notes. (57) Gould offers no indication that these practices have changed. Virginia has not adopted measures to require videotaping of custodial interrogations. And, finally, the State has taken no steps to mandate training on the dangers for police investigators of "tunnel vision."

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This is certainly not a basis for criticism of the Innocence Commission, the report that it issued, or the reform strategy that followed the release of the report. The success of reform movements necessarily depends upon raw political factors well beyond the control of the "resourceful policy advocates" who conceive the reforms and advance the policy reasons in favor of their adoption.

As Rob Warden, a key player in the Illinois reform movement, has noted, the success of the reform legislation there hinged entirely on the confluence of two highly unlikely events in the political arena. First, Republican Governor George Ryan, a lifelong death penalty supporter, metamorphosed into a death penalty opponent. Then, with Governor Ryan departing from office in the shadow of a corruption scandal that would shortly thereafter lead to his federal indictment and conviction, (58) the Republican majority was voted out of the Illinois Senate in the 2002 general election and a progressive Democrat assumed the powerful post of Senate majority leader, replacing a long-term opponent of criminal justice reform. (59) No comparable realignment of the political stars has yet happened in Virginia. (60) There is cause for disappointment at Virginia's failure thus far to more fully reform problematic criminal justice practices, and for righteous indignation at the events that led to some of Virginia's most notorious miscarriages of justice and at Virginia's striking failures to acknowledge the deep flaws in its system.

The Earl Washington case, the first of the eleven cases that the Innocence Commission analyzed, is by Gould's account (61) a study in how the government can remain committed to a prosecution even in the face of exonerating evidence, and in how the system can stubbornly refuse for years to correct an undeniable miscarriage of justice. Washington, an African-American, was charged in 1983 with the rape and murder of a white woman the prior year in Culpepper, Virginia. He was convicted and sentenced to death despite the fact that the seminal fluid found at the crime scene did not match Washington's blood type. (62)

Gould writes that Washington's trial counsel "did not appreciate the significance" of the semen evidence, which the Commonwealth had turned over in pre-trial discovery. (63) This is an understatement. There could be no serious dispute that a single attacker had committed the crime and that, therefore, the lack of a match had enormous, if not decisive, exonerative effect. That Washington was nonetheless prosecuted and sentenced to death without strenuous objection based on this exculpatory evidence is a testament to his trial counsel's mind-boggling ineptitude. Indeed, even with no objection from the defense, it should deeply trouble any objective observer that the Commonwealth, also in possession of the information, chose to pursue this prosecution at all. (64) Years later, in 1993, DNA testing confirmed that the seminal fluid had a genetic marker that Washington does not possess. Inexplicably, this led former Virginia Governor L. Douglas Wilder not to pardon

Washington for the wrongful conviction, but, instead, merely to commute his sentence from death to life in prison. The test results that led to Wilder's decision were not shared with Washington's attorneys. (65)

In 1999, facing media pressure, Virginia's new Governor, James Gilmore, disclosed the 1993 DNA results and ordered another round of tests, which confirmed the findings from 1993--and those in the original report--and, for the first time, also connected the semen to the true perpetrator. (66) Gilmore thereupon pardoned Washington, some sixteen years following his arrest, based on the 1999 DNA findings that essentially did little more than confirm exonerating information that had been in the Commonwealth's possession prior to Washington's conviction.

Virginia's most infamous failure to admit the possibility that the Commonwealth had convicted an innocent man was in the case of Joseph O'Dell, who was executed in 1997 for a rape and murder that had taken place in Virginia Beach in 1985. O'Dell's conviction rested on his checkered past, on the facts that he had been in the same bar as the victim during the evening before she was attacked and had blood on his shirt and jacket at the time of his arrest, and on the testimony of a jail house snitch claiming that O'Dell confessed to the crime. (67)

Post-conviction DNA testing failed to establish a match between the blood on O'Dell's clothing and victim's blood, and O'Dell claimed that the blood had resulted from a fistfight on the night of the murder. The jail house snitch evidence, given in exchange for prosecutorial lenience, has twice been recanted since the trial. (68) Much of the remaining circumstantial evidence against O'Dell withers under scrutiny. (69)

Seminal fluid was recovered from the victim, which the prosecution theorized had been deposited by the perpetrator. In the months leading to his execution, O'Dell and his counsel petitioned the Virginia courts for permission to conduct PCR-based DNA testing on this evidence. A DNA result excluding O'Dell would have further substantiated O'Dell's claim that he did not attack the victim. At a minimum, it would have undermined the rape case and required the vacation of O'Dell's death sentence. The Virginia Supreme Court refused O'Dell's petition for DNA testing. (70)

Following O'Dell's execution, the Roman Catholic Archdiocese of Richmond petitioned the Virginia courts for access to the evidence, seeking, in effect, the opportunity to make a factual record as to whether Virginia had executed an innocent person. Testing might even have led to the discovery of a true perpetrator who was not O'Dell. The Commonwealth vehemently opposed the petition, famously arguing that if the test results did suggest O'Dell's innocence, "it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man." (71) The petition was denied and the evidence has been destroyed. (72)

Gould does not discuss the O'Dell case. Since O'Dell never achieved an official exoneration,

his case fell outside of the Innocence Commission's scope. The case merits study, however, because it, like the Washington case, glaringly reveals a recurrent theme in wrongful prosecution cases: the government's stubborn official refusal to acknowledge error, to engage in critical self-examination, and to discipline those whose negligent or intentional misconduct caused the miscarriage of justice. (73) Better to circle the wagons, as the Commonwealth did in the O'Dell case, or to take half measures, as Governor Wilder did in the Washington case, than to face the cold truth that persons in possession of enormous power may have negligently or intentionally abused it. This is not "tunnel vision"--it is blind intransigence.

Gould certainly appreciates this dimension of the problem. He argues persuasively that the criminal justice system should engage in a post hoc search for the causes of wrongful convictions similar to the investigations of airline disasters that are undertaken by the National Transportation Safety Board. (74) But, intent on his across-the-aisle political objectives, he chooses to dwell lightly on the distressing fact that, in criminal justice, such self-criticism routinely fails to happen. Nor does he fully address the ethical implications of that failure.

By Gould's account, a number of the other wrongful conviction cases in the Innocence Commission study were the product of serious official failings, be they gross negligence or deliberate misconduct. By way of example:

- \* David Vasquez, mentally impaired and vulnerable, was interrogated by investigators who must have recognized that he was clueless about how the rape-murder for which he was wrongfully charged had been committed, until they fed him the details of the crime and lied to him about his fingerprints having been found at the crime scene. Vasquez was then prosecuted for the crime despite serological evidence showing that seminal material recovered from the victim could not have come from Vasquez. Since Vasquez's "confession" did not include an accomplice and Vasquez was completely incapable of naming one when he was questioned on that point, any reasonable investigator should have recognized that the serological evidence was exonerating. (75)

- \* The investigators who wrongfully charged Marvin Anderson with rape manipulated the complaining witness into identifying Anderson as her attacker with a suggestive photo array. At his criminal trial, Anderson, astonishingly, was represented by counsel who had previously represented the actual perpetrator of the crime. (76)

- \* The wrongful murder prosecution of Jeffrey Cox was tainted by egregious failures of police and prosecutors to disclose exculpatory information--i.e., impeachment evidence regarding key witnesses and a trove of evidence from police files--and by police destruction of potentially exculpatory evidence only three months after Cox's conviction. (77)

There is no doubting the cogency of Gould's argument that these cases demonstrate the need for specific criminal justice reforms: the Washington, Vasquez, Anderson, and Cox

cases are all clear examples of the problem of tunnel vision. Washington and Vasquez demonstrate the need for videotaping interrogations. Anderson shows the need for reform of eyewitness identification procedures. And Cox reflects the need to reform prosecutorial discovery practices.

But there is more. The events in Gould's chronicle of the Virginia wrongful conviction cases cry out for censure. Yet Gould purposefully avoids opprobrium--a style that may gain points in legislative negotiation, but leaves the reader puzzled about whether Gould has the ability to recognize evidence of police and prosecutorial misconduct (and judicial acquiescence). Gould's book, after all, is not written solely for legislative staffers. It is a retelling for the general audience of how the Innocence Commission came to be, how the report was fashioned, and the results of the Commission's post-report lobbying efforts. Thus, it is an opportunity for Gould's own moral views to shine through in the telling. Regrettably, there is a flat and toneless quality to much of Gould's account.

The cause of reform will not be advanced by a single voice. Righteous indignation at governmental indifference and outright abuse of power, unleavened with reasoned argument, will surely bum itself out without ever meaningfully engaging with authority or offering any prospect of reform. Gould nails that point, and he's certainly right about it. There is a vital role for Gould's "sober," well-informed "resourceful policy advocates."

But, just as clearly, "sober" reason without more cannot rally policy makers to enact reform. For better or worse, the story of a wrongful conviction is often a story about the face of evil: indifference to the truth; indolence in the face of evidence that demanded investigation; raw abuse of authority. Some human beings entrusted with power are destined to abuse it. No procedural reform holds out any real hope of restoring trust and confidence in the criminal justice system, or effectuating real change, unless corruption and evil are rooted out and punished. We risk seeming to appease forces of prejudice, indifference, and oppression if we avoid stating that undeniable fact.

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