

REFORMING CRIMINAL JUSTICE

BRANDON GARRETT is a prolific member of the Virginia Law faculty whose work enjoys a national reputation within the legal academy, throughout the state and federal judiciary, in Congress, and in the popular media. He has made substantive and timely contributions to numerous policy debates, and he is especially known for his work studying wrongful convictions. He is also a leading scholar on the criminal prosecution of corporations and a prominent figure in the rapidly changing areas of forensic science and other matters of criminal justice. In all of these fields, Garrett manages to combine academic theory, empirical analysis, and practical application in a unique way that has captured the attention of countless policymakers who seek his expertise.

Garrett has spent the last decade pursuing an intriguing collection of questions: How can innocent people be convicted of crimes? How can corporations be prosecuted for crimes? What constitutional rights should corporations be able to litigate? How should forensic science be used in criminal cases? Why is the death penalty continuing to decline in America? Garrett's work shares a common approach. By digging deeply into the on-the-ground practice of the law, Garrett has described root causes and patterns that had not been previously well understood.

Garrett's interest in civil rights and criminal law issues began when he volunteered for homeless outreach while an undergraduate at Yale College, where he studied painting and graduated with a degree in philosophy. He later worked as an advocate representing individuals in the Bronx and Manhattan in reclaiming welfare benefits and avoiding evictions. These experiences convinced him to go to law school. Garrett's student note, "Remedying Racial Profiling," 33 *Colum. Hum. Rts. L. Rev.* 1 (2001), and a law review article written in law school, "Standing While Black: Distinguishing *Lyons* in Racial



BRANDON L.
GARRETT

Profiling Cases,” 100 *Colum. L. Rev.* 1815 (2000), each examined the evolving law and practice surrounding racial profiling litigation in the late 1990s.

Garrett clerked on the U.S. Court of Appeals for the Second Circuit before practicing civil rights litigation at a law firm that was then called Cochran, Neufeld & Scheck. At the time, Johnny Cochran, Peter Neufeld, and Barry Scheck had just formed a small litigation boutique to bring high-profile police misconduct cases. While Garrett was initially attracted to work on police brutality litigation and worked on several major cases involving police shootings, he was gradually drawn to a very different type of case that came out of Peter Neufeld and Barry Scheck’s pioneering work at the Innocence Project. “These cases were filed on behalf of prisoners who had been exonerated by DNA testing conducted post-conviction, and alleged that police and prosecutors had caused their wrongful convictions,” Garrett said. For example, Garrett helped file a complaint on behalf of Eddie Lowery, a man who had falsely confessed to a rape he did not commit in Oklahoma. Lowery spent years in prison before DNA exonerated him; he ultimately received many millions of dollars in compensation. Garrett also had the opportunity to litigate a bench trial on behalf of a man who had been mistakenly identified by the victim of a rape on Staten Island, but who was exonerated by DNA testing. In a brief stint at a second civil rights firm in New York City, Garrett continued this line of work, litigating on behalf of five individuals who had been convicted and then exonerated by DNA tests in the well-known Central Park jogger case.

By this time, Garrett’s interest in the cause of wrongful convictions had grown scholarly. He continued to write, including companion articles co-authored with James Liebman, examining a theory of equal protection law and remedies (grounded in part in the thinking of James Madison) titled “Madisonian Equal Protection,” 104 *Colum. L. Rev.* 807 (2004) and “Experimentalist Equal Protection,” 22 *Yale L. & Pol’y Rev.* 261 (2004). And, while still in civil rights practice, Garrett wrote “Innocence, Harmless Error and Federal Wrongful Conviction Law,” 2005 *Wisc. L. Rev.* 35, examining the novel context in which wrongful conviction lawsuits are brought: civil rights lawsuits litigating criminal procedure claims.

In 2005 Garrett joined the Virginia Law faculty. Garrett soon realized that little empirical work had been conducted on the conviction

of the innocent. One of his first projects was to examine what actually happened in the cases of the 200 individuals who had by then been exonerated by DNA testing. Garrett was offering a new course on habeas corpus and post-conviction remedies, and he wondered how those innocent people had actually litigated their cases on appeal and post-conviction, particularly in the years *before* they obtained the DNA tests that led to their exonerations. Garrett conducted a detailed empirical study and painstakingly tracked what claims each inmate had raised and how courts ruled on them. That work resulted in an article, “Judging Innocence,” 108 *Colum. L. Rev.* 55 (2008), which has been widely cited by journalists, judges, scholars, and policymakers. Garrett showed that these innocent people had great difficulty trying to raise their innocence in the courts on appeal and post-conviction. Efforts to challenge the flawed evidence that had convicted them often failed. Garrett also constructed a set of “matched” individuals, studying the success rates of similarly situated inmates, who fared no better or worse than the exonerees did in the years before they obtained the DNA tests that exonerated them.

In the summer of 2007, a committee of the National Academy of Sciences was formed to investigate the state of forensic science in the United States. Garrett was asked to explain what role forensic testimony played in his review of DNA exoneration cases. The committee issued a groundbreaking report in 2009 on the need to overhaul forensics in the United States. Garrett realized that to provide the committee with the data they requested, he would have to dig deeper into the claims raised by exonerees on appeal or post-conviction by studying the testimony of forensic analysts at criminal trials. Studies of criminal trials had been rare, and trial transcripts themselves can be quite difficult and expensive to obtain. But, by working with Peter Neufeld, Garrett assembled a large archive of trial testimony from DNA exoneree cases. Garrett and Neufeld presented their findings, which showed just how common invalid and unreliable forensic testimony was in those cases, along with detailed information on specific types of errors. This report to the National Academy of Sciences committee was later published as a law review article, “Invalid Forensic Science Testimony and Wrongful Convictions,” 95 *Va. L. Rev.* 1 (2009). Having amassed an unusual archive of criminal trials of the innocent, Garrett pursued still more complex research on the trials of DNA exonerees. His next project examined their false confessions in the article “The

Substance of False Confessions,” 62 *Stan. L. Rev.* 1051 (2010).

Ultimately, Garrett expanded on this body of research in his first book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, published by Harvard University Press in 2011. “The book illustrated what went wrong in the cases of the first 250 people exonerated by DNA tests in the United States, examining failures such as eyewitness misidentifications, false confessions, false informant testimony, and flawed forensics,” Garrett said. The book developed detailed data—but it was also written for a general audience.

Convicting the Innocent was widely reviewed and critically acclaimed. A *New York Times* book review by Jeff Rosen hailed it as “a gripping contribution to the literature of injustice, along with a galvanizing call for reform.” Similarly, it has been praised as “a fascinating study” (John Grisham) and an “invaluable book” (Scott Turow). The book has been cited extensively since its publication in a wide range of newspapers and magazines (including *The New York Times*, *Mother Jones*, *USA Today*, *Slate*, and *Cosmo*), as well as on television and radio programs. Garrett’s findings have influenced policymakers and been cited by prominent courts, including the U.S. Supreme Court, a series of federal Courts of Appeals, supreme courts in states such as Massachusetts, New Jersey, Oregon, Pennsylvania, Tennessee, and the Texas Court of Criminal Appeals, and the supreme courts of Canada and Israel. The Innocence Project co-developed and co-hosted with Garrett a widely viewed multimedia website with video interviews and graphics exploring the book’s research. Litigators have also relied on the book, and an accompanying website with data and information concerning the cases of DNA exonerees is hosted by the Arthur J. Morris Law Library at UVA Law. Widely assigned in both undergraduate and graduate courses, the book has also been translated into Japanese and Chinese.

Garrett has brought his fastidious analytical rigor to a very different type of criminal justice phenomena—one relating not to the least privileged criminal offenders, but rather the most fortunate. As early as 2006, he noticed that federal prosecutors were beginning to settle some of the largest corporate criminal cases using detailed and largely out-of-court agreements. “They resembled the types of ‘structural reform’ cases used in civil rights litigation, harkening back to the racial profiling cases that I studied as a law student,” Garrett said. “But now the structural agreements were being used to settle complex

criminal prosecutions.” Garrett wrote one of the first articles on this emerging practice, “Structural Reform Prosecution,” 93 *Va. L. Rev.* 853 (2007), which documented and critiqued the emerging practice. The research for this article also led to the creation of a resource website that Garrett has maintained with Jon Ashley, a UVA law librarian. Over the years, this website has become a crucial resource for prosecutors, defense lawyers, scholars, and policymakers alike who seek to learn how corporate prosecutions are negotiated. Garrett has testified in Congress twice regarding this changing practice of corporate prosecution agreements, and he has also been appointed amicus by a federal judge seeking guidance on authority to review and supervise a proposed deferred prosecution agreement. Garrett expanded his research to include convictions of corporations, and the increasing importance of multinational corporate prosecutions, in “Globalized Corporate Prosecutions,” 97 *Va. L. Rev.* 1775 (2011). His expanded resource website now includes more than 2,500 corporate prosecution agreements dating back to 2001.

In late 2014, Garrett published a second book, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press). This book developed Garrett’s extensive data on all corporate convictions to offer an unprecedented look at what happens when criminal charges are brought against major corporations. He found a pattern of negotiations where prosecutors exact growing fines, demand admissions of wrongdoing, and require compliance reforms. But he also observed that many of these reforms were vaguely defined, and usually allowed high-level employees to get off scot-free. Like his first book, *Too Big to Jail* has been widely reviewed, including in the *American Prospect*, *Boston Review*, *Financial Times*, *New York Law Journal*, *New York Review of Books*, *Handelsblatt*, *Library Journal*, *Wall Street Journal*, and *Washington Monthly*. It has been the subject of broad discussion in the media, among corporate lawyers, lawmakers, and in the business community. There has also been substantial international interest in the book, including from Brazilian, Dutch, French, German, Spanish, Swiss, and U.K. media. Indeed, a conference was held in Lille, France to discuss the book, and translations are forthcoming in Spain and Taiwan.

Garrett continues to explore a variety of topics related to corporate prosecutions. “The Corporate Criminal as Scapegoat,” 102 *Va. L. Rev.* (2015) focuses on how and when prosecutions of individuals

accompany corporate prosecutions. A separate line of research examines the increasingly prominent litigation of constitutional claims by corporations. In “The Constitutional Standing of Corporations,” 163 *U. Penn. L. Rev.* 95 (2014), Garrett studies this latter problem as not one of whether corporations are “persons” in some sense, but as a question raising Article III standing or justiciability issues, particularly if a corporation seeks to litigate the interests of third parties. “This question has become particularly pressing in the wake of recent U.S. Supreme Court decisions such as *Citizens United* and *Hobby Lobby*,” Garrett said.

Garrett’s focus on wrongful convictions and the role of eyewitness identifications drew him to serve on a National Academy of Sciences Committee studying how to improve eyewitness evidence and research. He has also examined eyewitness identification procedures in Virginia law enforcement agencies and contributed to the drafting of improved model policies in the Commonwealth, which is detailed in “Eyewitness Identifications and Police Practices in Virginia,” 3 *Va. J. Crim. L.* 1 (2014). And Garrett has updated his research on false confessions in “Confession Contamination Revisited,” 101 *Va. L. Rev.* (2015), and studied interrogation policies in Virginia in an effort to improve their quality, a topic he wrote about in “Interrogation Policies,” 49 *U. Rich. L. Rev.* 895 (2015).

Garrett continues to work on ways to improve the use of forensics in criminal cases. He co-authored with University of Virginia law professor Greg Mitchell an empirical study of how laypeople interpret testimony explaining fingerprint comparison evidence in “How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information and Error Acknowledgement,” 10 *J. Empirical Legal Stud.* 484 (2013). Surprisingly, they found that laypeople responded very little to even quite overstated language describing a fingerprint “match” as near conclusive. Instead, the authors found that language describing some possibility of an error had a great impact, suggesting important avenues for future research and policy. Garrett and Mitchell intend to continue that line of research. Garrett helped to plan the newly created Forensic Science Center of Excellence, funded by the National Institute of Standards and Technology. The center, which will foster research studying ways to improve the connection between criminal justice, scientific evidence, and statistics, is a partner with the University of Virginia

and the Law School. Goals of the center include further study of how lay jurors understand forensic evidence, helping lawyers and judges to better use forensic evidence, and assisting crime laboratories in assessing and improving their procedures.

Garrett has also written about how forensics and DNA technology have affected the law more broadly. During a visiting fellowship at All Souls College, Oxford in the summer of 2015, Garrett worked on an article exploring how DNA has changed rules surrounding claims of innocence across the world. Other countries with very different legal systems have reconsidered rules of finality and the status of innocence claims, just as the United States has had to do, in reaction to DNA technology and amplified research on wrongful convictions. In addition, Garrett co-authored with University of Virginia law professor Kerry Abrams an article exploring the legal uses of DNA evidence across criminal law, family law, public benefits law, and employment law, “DNA and Distrust,” 91 *Notre Dame L. Rev.* — (2016).

Teaching habeas corpus has encouraged Garrett to think more about the connections between bodies of law regulating detention of prisoners before a trial, including in national security cases, as well as civil detention of immigrants facing deportation, and the use of habeas corpus to challenge criminal convictions. This has resulted in another series of law review articles, including “Habeas Corpus and Due Process,” 68 *Cornell L. Rev.* 47 (2012), which explores the misunderstood relationship between the Suspension Clause, habeas corpus remedies, and the Due Process Clauses of the Constitution, and “Accuracy in Sentencing,” 87 *S. Cal. L. Rev.* 499 (2014), which explores the complex body of law regulating the uses of Section 2255 challenges to federal criminal sentences. That work led to something more ambitious still: the first comprehensive casebook on federal habeas corpus, co-authored with Lee Kovarsky, *Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation* (Foundation Press, 2013). Garrett and Kovarsky are now working on a second edition of the casebook as well as a new book in contract with Foundation Press describing death penalty case law, litigation, and social science research on the death penalty.

Garrett frequently speaks about criminal justice matters before legislative and policymaking bodies, groups of practicing lawyers, and law enforcement, and to local, national, and international media. He helps organize the Virginia Association of Criminal Defense Lawyer’s

annual conference hosted at UVA Law. He has written op-eds in *Asahi Shimbun*, *The Boston Globe*, *The New York Times*, *The Washington Post*, and the *Richmond Times-Dispatch*, while also periodically contributing to online publications, such as Slate, ACS Blog, the Conversation, Jurist, and Huffington Post.

Garrett is presently serving, along with University of Virginia law professor Rachel Harmon, on an American Law Institute panel studying policing in the United States. That work will involve examining practices, policy, and law concerning use of force by police, criminal investigations, and police supervision. Relatedly, he is working on a paper with University of South Carolina School of Law Professor Seth Stoughton, a 2011 UVA Law graduate. “A Tactical Fourth Amendment” explores the relationship between police practices and constitutional doctrine regulating police use of force.

Garrett is also interested in the state of the death penalty in the United States. For example, he presented work at the United Nations and contributed to a volume examining the U.N. moratorium on the death penalty (*DNA Exonerations in the United States*, United Nations, OHCHR Global Panel, “Moving Away from the Death Penalty: Wrongful Convictions” (2014)). He also described U.S. death row exonerations in a report focused on the death penalty in Japan (*The United States*, in *The Death Penalty Project, Wrongful Convictions, Miscarriages of Justice, Unfair Trials and the Death Penalty* (2014)). He briefly summarized his data on death row DNA exonerations in a review of several death penalty-related books (“The Banality of Wrongful Executions,” 112 *Mich. L. Rev.* 979 (2014) (book review of Raymond Bonner, *Anatomy of Injustice*; Dan Simon, *In Doubt*, and James Liebman et al., *Los Tocayos Carlos*)).

In his works in progress, Garrett is using some of his past approaches, including careful study of empirical data and criminal trial records, to examine a new puzzle: Why is the American death penalty in such a rapid state of decline? Garrett has begun that work in an academic article, “The Decline of the Virginia (and American) Death Penalty,” which examines in detail capital trials in Virginia. Virginia used to be the second-largest death penalty state in the United States, having executed the second-highest number of prisoners since the 1970s, after Texas. However, in the past decade, there are now two or fewer capital trials in Virginia, and over one-half of those trials now result in a life sentence. By studying those trial records in

detail, Garrett has found that defense lawyers have transformed how death penalty cases are litigated in Virginia, placing detailed mitigation evidence before a jury, humanizing their clients, and as a result, often sidestepping a death sentence. “Defense lawyers are litigating hard and obtaining life sentences in cases that would have resulted in death sentences a decade ago,” Garrett said. Other factors are likely at work; public opinion may make jurors more receptive to mitigation evidence. “Concerns about wrongful convictions may also play a role, and indeed, innocence claims have been litigated in many of the recent capital trials in Virginia,” he added. Fewer prosecutors in Virginia (and around the country) seek the death penalty, and very few counties in Virginia seem willing to tackle the costs involved. Garrett is currently collecting and studying empirical data to examine what factors might explain the nationwide decline in the death penalty and the implications for this remarkable decline.

Taken together, Brandon Garrett’s research blends rare theoretical insight with detailed empirical analysis to shed new light on fundamental topics of criminal justice. His indefatigable and creative pursuit of these ideas, his extraordinarily prolific scholarly output, and his willingness to engage in practical legal reform merge together in a way that has transformed Garrett into a leading figure.

EXCERPTS

CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG**(Harvard University Press, 2011)**

In October 1993, Ronald Jones sat on death row in Illinois waiting to be executed. He had been sentenced to death for a gruesome rape and murder in Chicago. Jones clung to one last request—for a DNA test, which he claimed would prove his innocence. His lawyers offered to pay the \$3,000 that it would cost to do the test. At the time, only a handful of people had ever proven their innocence using postconviction DNA testing. The prosecutors opposed testing, arguing that it would make no difference. Indeed, there appeared to be overwhelming evidence of Ronald Jones's guilt. Cook County circuit judge John Morrissey agreed and angrily denied the motion, exclaiming, "What issue could possibly be resolved by DNA testing?"

Eight years before, in March 1985, the victim, a twenty-eight-year-old mother of three, was out dancing late with her sister on the South Side of Chicago. She was hungry and decided to get food a few blocks from her home at Harold's Chicken Shack. She ran into a friend on the street. As they talked, a panhandler approached; people in the neighborhood had nicknamed him "Bumpy," because of his severe acne. "Bumpy" asked the friend for fifty cents. She gave him fifty cents and all three parted ways.

Several hours later, the victim was found half-naked and dead in a nearby alley behind the abandoned Crest Hotel. She had been stabbed many times and beaten. Ronald Jones, who was familiar to the police because he was a suspect in a sexual assault case that was never brought to a trial, was arrested. He had a severe acne problem and was known as Bumpy. He may have in fact been the man the friend saw that night. He was "a homeless, alcoholic panhandler" with an IQ of about 80.

From *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* by Brandon L. Garrett, published by Harvard University Press. Copyright © 2011 by the President and Fellows of Harvard College. Used by permission. All rights reserved.

After Jones was arrested, he was placed in a small police interrogation room with walls bare save a sheet of paper listing the Miranda warnings. During an eight-hour-long interrogation, he confessed. Jones did not just say, "I did it." He made far more damning admissions, signing a written statement that included a series of details that only the killer could have known. The victim was assaulted in a room inside the vacant Crest Hotel, where police found a large pool of blood and some of her clothing. In his statement, Jones said that on the morning of the crime, he was walking "by the Crest," saw the victim, and assaulted her in a room inside. Police analysts detected semen in the victim's vagina. Jones said that they had sex. The pathologist testified that the victim had injuries from trying to fend off blows. Jones said they were "wrestling and tussling." The victim had been stabbed four times. Jones said he lost his temper and "cut her a few times" with a knife. Police had found a trail of blood leading out of a window that had no glass, into the alley where they found the victim's body. Jones knew there was "an alley" by the hotel and said he came and left through an open "side window." It was unlikely that anyone could coincidentally guess so many details that matched the crime scene.

The lead detective testified at trial that he brought Jones to the crime scene, where Jones offered more details. Jones "showed us the room" and "showed us where the struggle took place and where she was actually stabbed." He accurately described the victim's appearance. Jones supposedly offered all of these crime scene details without any prompting. Those details sealed his fate.

Ronald Jones's confession was not the only evidence against him. Forensic evidence also linked Jones to the crime. DNA testing was attempted on the semen evidence, but the results were said to be inconclusive. At the time of the trial, in 1989, DNA technology was brand-new and could only be conducted in cases with large quantities of biological material, so conventional A-B-O blood-typing was performed. At trial, the forensic analyst explained that 52% of the population could have been the source of the semen and that Ronald Jones's blood type placed him in that group.

At the five-day trial, Jones took the witness stand and recanted his confession. In his closing argument, the prosecutor told the jury to consider that Jones was a "twice-convicted felon." He added, "Please don't be fooled by this man's quiet demeanor in this court-

room and on the witness stand. The only two eyes that witnessed the brutal rape and murder ... are in this courtroom, looking at you right now.” The jury convicted Jones and sentenced him to death.

Jones appealed and lost. He argued that his confession was coerced and said procedural errors infected his trial. The Illinois Supreme Court denied his petition, as did the U.S. Supreme Court. Then the trial judge denied his request for DNA testing.

But at the eleventh hour, Ronald Jones’s luck began to change. In 1997, the Illinois Supreme Court reversed the trial judge and granted his request for DNA testing. The DNA profile on the sperm did not match Jones. The DNA also did not match the victim’s fiancé, with whom she had been living at the time of the murder. It belonged to another man, who remains at large. Jones’s conviction was vacated. But prosecutors waited until 1999 to drop the charges. Governor George H. Ryan pardoned Jones in 2000. He had spent more than thirteen years behind bars.

DNA testing saved Ronald Jones’s life. Jones later commented, “Had it not been for DNA, who knows about me?” He likely would have been executed.

What went wrong in Ronald Jones’s case? Why did he confess to a crime he did not commit? How did he confess in such detail? Why did the blood evidence appear to modestly support the State’s case? The answers appear in the records from Jones’s trial.

The transcripts of the criminal trial reveal a troubling story. Ronald Jones signed the written confession statement only after enduring hours of interrogation. On the witness stand at trial, Jones testified that a detective had handcuffed him to the wall and hit him in the head again and again with a long black object, because he refused to confess. Jones said that a second detective then entered the room and said, “No, don’t hit him, because he might bruise.” That detective instead pummeled him with his fists in a flurry of blows to the midsection. The defense had argued prior to trial that, based on this police misconduct, the confession should be suppressed. The detectives both denied Jones had been struck. The lead detective denied using any interrogation techniques at all. He testified, “I sit down, I interview people, I talk to people. That’s all I do, sir.” The judge ruled that the confession should be admitted at trial, explaining, “I do not feel that there was any coercion or any undue influence used upon the defendant.”

Even if the confession was physically coerced as Jones described at trial, it still raises a puzzle. Now that we know Jones was innocent, one wonders how he could have known so much detailed inside information about the crime. At trial, Jones explained that when police took him to the crime scene they had walked through how the crime happened. The detective “was telling me blood stains on the floor and different clothing that was found inside the abandoned building,” and that the victim “was killed with a knife, and she was stabbed, three or four times.” It appears that Jones repeated the specific details about the crime in his confession statement not because he was there, but because the police told him exactly what to say.

The forensic evidence at Jones’s trial was also flawed. Although the prosecutor told the jury in his closing statement that “physical evidence does not lie,” in fact, the forensic analyst had grossly misstated the science. Jones’s blood type was the most common type. He was a Type O. However, he was also a nonsecretor, meaning that his body fluids did not reveal his blood type. Only 20% of the population are nonsecretors. The victim was a Type A secretor, as are about 32% of the population. The vaginal swabs collected from the victim’s body matched her type and had Type A substances on them. The analyst testified that the percentage of males who could have been the source for the semen was the percentage of nonsecretors added to the percentage of Type A secretors, which would add up to about half the population.

The analyst was wrong. A competent analyst would have explained that any man could have been the rapist. The analyst had found nothing inconsistent with the victim’s Type A. This raised a problem that was common at the time, called the problem of “masking.” Substances from the victim could “mask” any material present from the rapist. The evidence from this crime scene was totally inconclusive. Nothing at all could be said about the blood type of the rapist.

THE 250 EXONEREEES

In retrospect, Ronald Jones’s case provides a stunning example of how our system can convict the innocent. If his case were the only case like this, we might call it a tragic accident, but nothing more. But his case is far from unique. Since DNA testing became available in

the late 1980s, more than 250 innocent people have been exonerated by postconviction DNA testing.

Who were these innocent people? The first 250 DNA exonerees were convicted chiefly of rape, in 68% of the cases (171), with 9% convicted of murder (22), 21% convicted of both murder and rape (52), and 2% convicted of other crimes like robbery (5). Seventeen were sentenced to death. Eighty were sentenced to life in prison. They served an average of thirteen years in prison. These people were typically in their twenties when they were convicted. Twenty-four were juveniles. All but four were male. At least eighteen were mentally disabled. Far more DNA exonerees were minorities (70%) than is typical among the already racially skewed populations of rape and murder convicts. Of the 250 exonerees, 155 were black, 20 Latino, 74 white, and 1 Asian.

DNA testing did more—it also identified the guilty. In 45% of the 250 postconviction DNA exonerations (112 cases), the test results identified the culprit. This most often occurred through a “cold hit” or a match in growing law enforcement DNA data banks. The damage caused by these wrongful convictions extends far beyond the suffering of the innocent. Dozens of criminals continued to commit rapes and murders for years until DNA testing identified them.

Before the invention of DNA testing, the problem of convicting the innocent remained largely out of sight. Many doubted that a wrongful conviction could ever occur. Justice Sandra Day O’Connor touted how “our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.” Judge Learned Hand famously called “the ghost of the innocent man convicted” an “unreal dream.” Prosecutors have from time to time claimed infallibility, announcing, “Innocent men are never convicted.” Others acknowledged that human error is inevitable, but doubted that convicts could ever convincingly prove their innocence. Scholars spoke of “the dark figure of innocence,” because so little was known about wrongful convictions.

DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system’s accuracy. This sea change came about because of the hard work of visionary lawyers, journal-

ists, and students who suspected that the criminal justice system was not as infallible as many believed. Barry Scheck and Peter Neufeld, two well-known defense lawyers, founded the pioneering Innocence Project at Cardozo Law School in the early 1990s, which helped to free many of the first 250 exonerees. I first met several of these exonerees when, as a rookie lawyer, I worked for Scheck and Neufeld representing innocent people who sued to get compensation for their years behind bars. Over the years, lawyers, journalists, and others established an “innocence network,” including clinics at dozens of law schools, designed to locate innocence cases. Today, DNA exonerations have occurred throughout the United States, in thirty-three states and the District of Columbia. Public distrust of the criminal justice system has increased, and popular television shows, books, movies, and plays have dramatized the stories of the wrongfully convicted. We now know that the “ghost of the innocent man” spoken of by Judge Learned Hand is no “unreal dream,” but a nightmarish reality.

WHAT WENT WRONG

What we have not been able to know, however, is whether there are systemic failures that cause wrongful convictions. Now that there have been so many DNA exonerations, we have a large body of errors to study. Did the first 250 DNA exonerations result from unfortunate but nevertheless unusual circumstances? Or were these errors the result of entrenched practices that criminal courts rely upon every day? Are there similarities among these exonerees’ cases? What can we learn from them?

This book is the first to answer these questions by taking an in-depth look at what happened to these innocent people. Collecting the raw materials was a challenge. Although scholars have surveyed jurors and judges using detailed questionnaires, no one has studied a set of criminal trial transcripts to assess what evidence was presented, much less studied the criminal trials of the exonerated. One reason is the difficulty and expense of locating trial records. These voluminous records must often be pulled from storage in court archives or requested from the court reporters. I was able to overcome these difficulties with the help of numerous librarians and research assistants. For each of the first 250 DNA exonerees, I

contacted defense lawyers, court clerks, court reporters, prosecutors, and innocence projects around the country. I located documents ranging from confession statements to judicial opinions and, most important, transcripts of exonerees' original trials. I obtained 88% of their trial transcripts, or 207 of the 234 exonerees convicted at a trial. I also obtained hearing transcripts and other records in thirteen of sixteen cases where exonerees had no trial but instead pleaded guilty. In the remaining cases, the records had been sealed, destroyed, or lost.

When I began to assemble this wealth of information, I had a single goal: to find out what went wrong. When I analyzed the trial records, I found that the exonerees' cases were not idiosyncratic. The same problems occurred again and again. Like Ronald Jones, almost all of the other exonerees who falsely confessed had contaminated confession statements. Most other forensic analysis at these trials offered invalid and flawed conclusions. As troubling as it was, Ronald Jones's case looked typical among these exonerees: his case fit a pattern of corrupted evidence, shoddy investigative practices, unsound science, and poor lawyering.

These trials call into question the "unparalleled protections against convicting the innocent" that the Constitution supposedly affords. The system places great trust in the jury as the fact finder. When the Supreme Court declined to recognize a right under the Constitution for convicts to claim their innocence, it reasoned, "the trial is the paramount event for determining the guilt or innocence of the defendant." Yet at a trial, few criminal procedure rules try to ensure that the jury hears accurate evidence. To be sure, celebrated constitutional rights, such as the requirement that jurors find guilt beyond a reasonable doubt and that indigent defendants receive lawyers, provide crucial bulwarks against miscarriages of justice. But those rights and a welter of others the Court has recognized, like the Miranda warnings, the exclusionary rule, and the right to confront witnesses, are procedural rules that the State must follow to prevent a conviction from being overturned. Few rules, however, regulate accuracy rather than procedures. Such matters are typically committed to the discretion of the trial judge.

Exonerations provide new insights into how criminal prosecutions can go wrong. We do not know, and cannot ever know, how many other innocent people have languished behind bars. Yet there

is no reason to think that these 250 are the only ones who were wrongly convicted because of the same types of errors by police, prosecutors, defense lawyers, judges, jurors, and forensic scientists. The same unsound but routine methods may have contaminated countless other confessions, eyewitness identifications, forensic analysis, informant testimony, and defenses.

TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS

(Harvard University Press, 2014)

1. UNITED STATES VS. GOLIATH

*"I know what this is about.
I have been expecting you."*

It was not until 2006 that The Banker finally got the knock on his door. Six police officers and a prosecutor were standing there with an arrest warrant. He later recalled, "I was a true Siemens man, for sure. I was known as the keeper of the slush fund. We all knew what we were doing was illegal." The Banker was in charge of just some of the multinational bribery operations at Siemens Aktiengesellschaft, a German multinational firm, ranked in the top 50 of the Fortune Global 500 list of the world's largest corporations. It has more than 400,000 employees in 190 countries and makes everything from trains to electrical power plants to home coffeemakers. Among its many activities was paying more than a billion dollars in bribes around the world to secure lucrative business from foreign governments. Now Siemens would be prosecuted, and not just in Germany but also in the United States.

This book is the first to take a close look at what happens when

Too Big to Jail: How Prosecutors Compromise with Corporations by Brandon L. Garrett, published by Harvard University Press. Copyright © 2014 by Brandon L. Garrett. Used by permission. All rights reserved.

a company is prosecuted in the United States. A corporate prosecution is like a battle between David and Goliath. One would normally assume that federal prosecutors play the role of Goliath. They wield incredible power, with the ability to hold a corporation liable for a crime by even a single employee and the benefit of expansive federal criminal laws. It is hard to think of federal prosecutors as the little guy in any fight. Yet they may play the role of David when up against the largest and most powerful corporations in the world.

Some companies are not just “too big to fail” but also “too big to jail”: they are considered to be so valuable to the economy that prosecutors may not hold them accountable for their crimes. The expression “too big to jail” has mostly been used to refer to failures to prosecute Wall Street banks. A dismayed reaction to the lack of prosecutions after the last financial crisis is understandable, but to see why corporations may escape prosecution, it is important to understand exactly how a company can be prosecuted for a crime and the many practical challenges involved. The very idea that a corporation can be prosecuted for an employee’s crime seems odd on its face, and even among criminal lawyers, the topic of corporate crime had long been obscure. Over the past decade, corporate crime exploded in importance—not only because of greater public interest in accountability but also because prosecutors transformed their approach to targeting corporations.

In this book, I present data collected from more than a decade of cases to show what really happens when prosecutors pursue corporate criminals. I examine the terms of the deals that prosecutors now negotiate with companies, how prosecutors fine companies to punish them, the changes companies must make to prevent future crimes, and whether prosecutors pursue individual employees. The current approach to corporate prosecutions raises “too big to jail” concerns that extend beyond Wall Street banks to the cases brought against a wide range of companies. I argue that prosecutors fail to effectively punish the most serious corporate crimes. Still more troubling is that not enough is known about how to hold complex organizations accountable; prosecutors exacerbate that problem by settling corporate prosecutions without much transparency. My main goal in exploring the hidden world of corporate prosecutions is to encourage more public attention to the problem of punishing corporate crime. To go deeper inside the decision making of prosecutors and compa-

nies, in each chapter not only do I present data describing the larger patterns in corporate prosecutions and non-prosecutions, but I also tell the stories of how particular companies such as Siemens fared. The Siemens story is an important one to begin with: the case broke all records for the biggest prosecution for foreign bribery.

How were the Siemens bribes paid? The Banker did not pay them himself. True to his nickname, he instead “organized the cash” by transferring funds from anonymous bank accounts in Switzerland and Lichtenstein or using dummy corporations to hide where the money was coming from and where it was going. He explained how he carried the cash undetected: “For a million euros, you don’t need a big suitcase because the bills aren’t very big. A briefcase is enough—200,000 euros isn’t so much that you couldn’t carry it in your coat pocket.” In the countries where Siemens was pursuing lucrative government contracts—whether it was Greece, Nigeria, Argentina, or Bangladesh—executives hired “consultants” to help them “win” the government contracts. The consultants received a fee and personally delivered the bribes to government officials.

Siemens paid bribes around the world—more than a billion dollars from 2002 to 2007. The Banker’s division dealt with telecommunications and had a bribery budget of \$40-50 million a year. He recalled how the telecom unit was kept “alive” by bribes and how other major divisions at Siemens operated this way. Bribery was pervasive and “common knowledge.”

Bribing foreign government officials is a crime in Germany, the United States, and many other countries. In 2008, prosecutors in Germany charged The Banker with corruption, leading to a conviction, two years’ probation, and a \$170,000 fine. He received leniency on account of his cooperation with the authorities. When he later spoke to journalists, he expressed disappointment that Siemens treated him like an “outsider” and gave him a “kick in the pants” while people at the top were not held accountable. “I would never have thought I’d go to jail for my company,” he later said. “Sure, we joked about it, but we thought if our actions ever came to light, we’d all go together and there would be enough people to play a game of cards.”

The controversy surrounding this global bribery scheme would eventually bring in prosecutors around the world, notably those in the United States. They would wield a powerful new approach to tar-

getting corporations, one I explore throughout this book. In the Siemens case, was The Banker right that underlings would be the only ones held accountable, or would the storm reach the summit—the top executives or the company itself?

No Soul to Be Damned, No Body to Kick

How exactly are corporations convicted of a crime? The word *corporation* comes from *corpus*, the Latin word for “body.” A corporation may be a body, but it is a collective body that can act only through its employees. As the British lord chancellor Edward Thurlow reportedly remarked in the late eighteenth century, corporations have “no soul to be damned, no body to kick.” Corporate persons obviously cannot be imprisoned. However, companies can face potentially severe and even lethal consequences, even if in theory they can be “immortal.” They can be forced to pay debilitating fines or suffer harm to their reputation. When convicted they can lose the government licenses that make doing business possible; for example, a company can be suspended or even barred from entering into contracts with the federal government.

The federal rule for corporate criminal liability is powerful and long-standing. In its 1909 decision in *New York Central & Hudson River Railroad v. United States*, the Supreme Court held that a corporation could be constitutionally prosecuted for a federal crime under a broad rule. The rule is simple: an organization can be convicted based on the criminal conduct of a single employee. That standard comes from a rule called the master-servant rule or respondeat superior—“let the master answer” in Latin—which makes the master responsible for the servant’s acts. Under that rule, an employer was responsible for an employee’s wrongs if those wrongs were committed in the scope of employment and at least in part to benefit the employer. As the Court suggested in *New York Central*, the master or corporation may be in the best position to make sure employees are properly supervised to prevent lawbreaking. The Court emphasized “the interest of public policy,” since giving companies “immunity” from criminal prosecution would make it hard to “effectually” prevent “abuses.” Rather than spend time on theoretical questions about when and whether corporations should constitute legal persons, I focus on whether corporate prosecutions are actually effective in

preventing crime. Many have debated corporate personhood, including in response to the Court’s ruling in *Citizens United v. Federal Election Commission* (2010) that the First Amendment protects corporations against regulation of election spending. To understand corporate prosecutions, though, what matters is not *Citizens United* but rather the strict master-servant rule from the less well-known *New York Central* case.

Today, a corporation is a “person” under federal law, as are other types of business organizations. The very first section of the U.S. Code, with definitions that apply to all federal laws, including those dealing with crimes, defines a person to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” As a result, federal prosecutions may be brought against any type of organization. The *U.S. Sentencing Commission Guidelines Manual* uses the word *organization* because the guidelines cover criminal sentences for all kinds of companies, including partnerships not formally incorporated by a state. Prosecutors convict giant multinational corporations such as Siemens, large domestic public corporations with millions of shareholders, and mom-and-pop companies with just a few owners or only one owner.

In theory, a corporation can be prosecuted for just about any crime that an individual can be prosecuted for (except for crimes with heightened intent, such as homicide). In practice, corporations are prosecuted for crimes likely to take place in a business setting, such as accounting fraud, banking fraud, environmental violations, foreign bribery, money laundering, price fixing, securities fraud, and wire fraud. Important corporate prosecutions are chiefly brought by federal prosecutors, in contrast to prosecutions of smaller-scale corporate crimes or prosecutions of individuals, which are overwhelmingly brought at the local level.

Data on Corporate Prosecutions

Over the past decade, there has been an increase in the size and importance of federal prosecutions of corporations, though not in the number of cases brought. One of my goals in writing this book was to uncover and present data explaining how corporations are actually prosecuted. As Figure 1.1 illustrates, the data that I have gathered show a large spike in corporate criminal fines over the past few years.

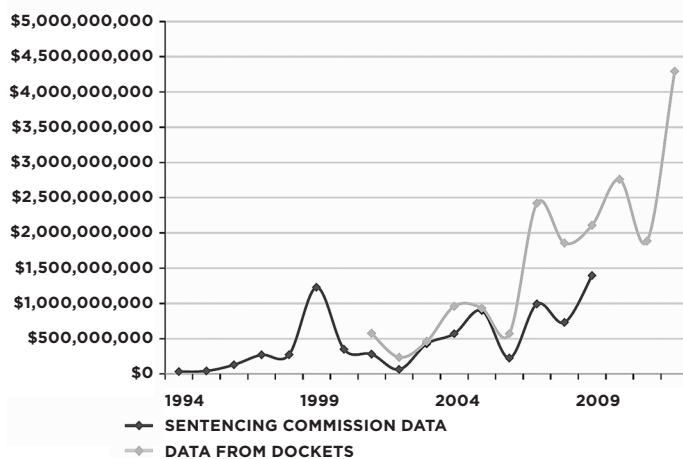


FIGURE 1.1 Total Criminal Fines for Organizations, 1994–2012

In the past, given the modest sentences for companies, it was often not worth the effort to prosecute them. Corporate fines grew after 1991, when the U.S. Sentencing Commission, a group convened by Congress to write rules for sentencing federal criminals, adopted the first sentencing guidelines specifically designed for corporations. More resources were also devoted to corporate prosecutions in response to Enron and other corporate scandals that shook the United States in the early 2000s, prompting the Department of Justice to form an Enron Task Force and later a Corporate Fraud Task Force (now called the Financial Fraud Enforcement Task Force). Figure 1.1 shows total fines for the approximately 3,500 companies convicted from 1994 to 2009. It includes data from the Sentencing Commission for the earlier period, but from 2001 to 2012 the more dramatic rise in fines is shown in the data that I collected by hand from more than 2,250 court dockets and corporate prosecution agreements.

To understand what has really changed, we need to look behind the aggregate data displayed in Figure 1.1. The bulk of those corporate fines were actually paid in a small number of blockbuster cases, such as the Siemens case. For example, the large spike in 2009 is because the pharmaceutical giant Pfizer paid a then-record fine of nearly \$1.2 billion. That single fine made up about half of the total for that year. Other massive antitrust cases, foreign bribery cases, and illegal pharmaceutical sales cases involve fines in the hundreds of millions. There is still more about corporate prosecutions that those

totals do not capture. The criminal fines are only a fraction of the costs imposed on companies. For example, as part of criminal settlements, companies were required to pay billions more to victims of fraud. Also not reflected in the fines are structural reforms that prosecutors require companies to adopt to prevent future crimes.

What is clear from the reported activity of prosecutors is that over the past decade they have embraced a new approach: deferred prosecution agreements. Prosecutors enter agreements that allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the boardroom. The rise of such deferred prosecution agreements, and non-prosecution agreements, in which no criminal case is even filed, means that the official Sentencing Commission statistics on corporate convictions, as shown in Figure 1.1, fail to capture many of the most important cases. Corporate fines are up, but the big story of the twenty-first century is not corporate fines or convictions but prosecutors changing the ways that corporations are managed. Prosecutors now try to rehabilitate a company by helping it to put systems in place to detect and prevent crime among its employees and, more broadly, to foster a culture of ethics and integrity inside the company. This represents an ambitious new approach to governance in which federal prosecutors help reshape the policies and culture of entire institutions, much as federal judges oversaw school desegregation and prison reform in the heyday of the civil rights era in the 1960s and 1970s.

What initially attracted me to studying these corporate agreements with prosecutors was that, as a former civil rights lawyer, I was surprised to see prosecutors taking on for themselves the hard work of changing institutions. I have spent years researching wrongful convictions and DNA exonerations in individual criminal cases, in which errors may implicate larger problems in our criminal justice system. I turned my attention to the very different world of corporate prosecutions because a single prosecution of a company such as Siemens can have enormous repercussions in the U.S. and the global economy, particularly since other industry actors will be watching and nervous about whether they might be next. I quickly learned, however, that there is not much information out there about when or how corporations are prosecuted.

There is no official registry for corporate offenders, nor is there

an official list of deferred prosecution and non-prosecution agreements by federal prosecutors. I decided to create these resources. Over the years, with invaluable help from the UVA Law Library, I created a database with information on every federal deferred prosecution or non-prosecution agreement with a company. In one place or another, this information was publicly available, but I wanted to put it together in order to learn who these firms were, what they did, what they were convicted of, and how they were punished.

There have been more than 250 such prosecution agreements entered over the past decade. I made this database available online as a public resource, and it remains the most authoritative and complete source. I then amassed a second and much larger archive of more than 2,000 federal corporate convictions, mostly guilty pleas by corporations, and placed these data online as well. These data have real limitations; although prosecutors pound their chests when bringing the largest corporations to justice, in many other cases no charges are brought. We have no way to know how often prosecutors decline to pursue charges against corporations—they do not usually make those decisions public—except when they enter non-prosecution agreements. We do not know how often corporations commit crimes, as the government does not keep data on corporate crime, which is hard to detect and to define.

More than 250 federal prosecutions since 2001 have involved large public corporations. These are the biggest criminal defendants imaginable. Prosecutors have taken on the likes of AIG, Bristol-Myers Squibb, BP, Google, HealthSouth, JPMorgan, KPMG, Merrill Lynch, Monsanto, and Pfizer. Such Fortune 500 firms can and do mobilize astonishing resources in their defense. The Siemens case illustrates the titanic scale of the power plays at work in federal corporate prosecutions, making them unlike anything else in criminal justice.

Convicting Siemens

The story of the prosecution of one of the world's biggest corporations began in one of the world's smallest countries—the principality of Lichtenstein. In early 2003, a bank in Lichtenstein owned by the royal family was having auditors review its records. The bank auditors noticed something strange: millions of euros were bounc-

ing around between Panama, Lichtenstein, and the British Virgin Islands. The bank secrecy laws in Lichtenstein, like those in Switzerland, make banks an attractive place for some people to keep money. Auditors were on the lookout for unusual transactions that might be the work of terrorists or other criminals trying to take advantage of this secrecy to engage in money laundering. They noticed odd transactions between offshore companies, including large sums going into an account of an offshore firm called Martha Overseas Corp. That company was incorporated in Panama, but it was controlled by an executive of Siemens working in Greece—and the money going into the account was coming from another offshore company, one based in the British Virgin Islands and controlled by another executive of Siemens.

The bank informed Siemens of this problem in 2004 and began to block these money transfers. They also notified bank regulators in Germany and Switzerland, who in turn contacted regulators in Austria and Italy. Two years later, German police appeared on The Banker's doorstep in Munich and seized documents from more than thirty Siemens offices.

Still, there are good reasons to worry whether the right corporations are being prosecuted and whether the punishments fit the crimes. Prosecutors say that they target the most serious corporate violators. Yet the fines are typically greatly reduced in exchange for little oversight. If one justification for prosecuting a company in the first place is egregiously bad compliance, then one wonders why so little is typically done to deter or correct it. Are these prosecutions really helping to reform corporate criminals? Which compliance programs actually work? We simply do not know. While there are no silver-bullet solutions to these vexing problems, there are concrete ways to improve matters, including by insisting on more stringent fines, imposing ongoing judicial review, monitoring, and mandating transparency.

Corporate prosecutions upend our assumptions about a criminal justice system whose playing field is tilted in favor of the prosecution. It is admirable that prosecutors have taken on the role of David in prosecuting the largest corporations—but if they miss their shot at Goliath, the most serious corporate crimes will be committed with impunity. The surge in large-scale corporate cases shows how federal prosecutors have creatively tried to prevent corporate malfeasance

at home and overseas, but real changes in corporate culture require sustained oversight of management, strong regulators, and sound rules and laws. Congress enacts new criminal laws intended to bolster regulations, but it is perennially unwilling to provide adequate resources to many agencies to carry out enforcement of those regulations. That is why prosecutors can fill an important gap—and when they do prosecute a corporation, they can wield the most powerful tools. A broader political movement toward greater corporate accountability more generally, with stronger regulations and enforcement, could make prosecutions far less necessary. But if we take as a given the larger dynamics of our economic and political system, modest changes could improve the role criminal cases play in the larger drama.

Corporate criminal prosecutions serve a distinct purpose—to punish serious violations and grossly deficient compliance—and this purpose is not served if companies obtain kid-glove non-prosecution deals in exchange for cosmetic reforms. Corporate convictions should be the norm, and in special cases in which prosecutors defer prosecution, they should impose deterrent fines and stringent compliance requirements. A judge should carefully supervise all corporate agreements to ensure their effective implementation. Sentencing guidelines and judicial practices could be reconsidered, but prosecutors themselves can revitalize the area by adopting a new set of guidelines to strengthen the punishment reserved for the most serious corporate criminals.

Although I propose reforms, my main goal in this book is to describe the hidden world of corporate prosecutions. Corporate crime deserves more public attention. What is particularly chilling about the problem is that corporate complexity may not only enable crime on a vast scale but also make such crimes difficult to detect, prevent, and prosecute. We need to know much more. When we ask if some companies are being treated as “too big to jail,” it is not enough to ask whether the largest firms are so important to the economy that they are treated as immune from prosecution. We also need to ask whether individuals are held accountable. We need to evaluate whether the corporate prosecutions that are brought are working. We need to look beyond the press releases announcing eye-catching fines and ask whether adequate criminal punishment is imposed and whether structural reforms are working.

The Banker feared that although Siemens was punished, most others would not face the same consequences. He may have been right to worry. After all, not only do prosecutors regularly offer leniency, but we do not know how many corporate crimes go undetected or unprosecuted. As The Banker put it: “The Eleventh Commandment is: ‘Don’t get caught.’”

THE SUBSTANCE OF FALSE CONFESSIONS

62 *Stan. L. Rev.* 1051 (2010)

False confessions present a puzzle: How could innocent people convincingly confess to crimes they knew nothing about? For decades, commentators doubted that a crime suspect would falsely confess. For example, John Henry Wigmore wrote in his 1923 evidence treatise that false confessions were “scarcely conceivable” and “of the rarest occurrence” and that “[n]o trustworthy figures of authenticated instances exist....” That understanding has changed dramatically in recent years, as, at the time of this writing, postconviction DNA testing has exonerated 252 convicts, forty-two of whom falsely confessed to rapes and murders. There is a new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations. Scholars increasingly study the psychological techniques that can cause people to falsely confess and have documented how such techniques were used in instances of known false confessions.

This Article takes a different approach by examining the substance of false confessions, including what was said during interrogations and how confessions were litigated at trial. Doing so sheds light on the phenomenon of confession contamination. Police may, intentionally or not, prompt the suspect on how the crime happened so that the suspect can then parrot back an accurate-sounding narrative. Scholars have noted that “on occasion, police are suspected of feeding details of a crime to a compliant suspect,” and have described several well-known examples. However, no one has previously stud-

ied the factual statements in a set of false confessions.

The set of forty cases that this Article examines has important limitations. As will be developed further, false confessions uncovered by DNA testing are not representative of other false confessions, much less confessions more generally. These forty cases cannot speak to how often people confess falsely. Nor can these examples themselves tell us whether reforms, such as recording interrogations, prevent more false convictions than they discourage true confessions. But these data provide examples of a very troubling problem that deserves further study.

In the cases studied here, innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. Exonerees told police much more than just “I did it.” In all cases but two (ninety-seven percent—or thirty-six of the thirty-eight—of the exonerees for whom trial or pretrial records could be obtained), police reported that suspects confessed to a series of specific details concerning how the crime occurred. Often those details included reportedly “inside information” that only the rapist or murderer could have known. We now know that each of these people was innocent and was not at the crime scene. Where did those details, recounted at length at trial and recorded in confession statements, come from? We often cannot tell what happened from reading the written records. In many cases, however, police likely disclosed those details during interrogations by telling exonerees how the crime happened. Police may not have done so intentionally or recklessly; the study materials do not provide definitive information about the state of mind of the officers. Police may have been convinced the suspect was guilty and may not have realized that the interrogation had been mishandled.

An illustrative case is that of Jeffrey Deskovic, a seventeen-year-old when he was convicted of rape and murder. Deskovic was a classmate of the fifteen-year-old victim, had attended her wake, and was eager to help solve the crime. Deskovic spoke to police many times and was interrogated for hours over multiple sessions, including a session in which police had a tape recorder, but turned it on and off, only recording thirty-five minutes. During one discussion, he “supposedly drew an accurate diagram,” which depicted details concerning “three discrete crime scenes” which were not ever made public. He never actually confessed to raping or murdering the victim, but

he offered other details, including that the victim suffered a blow to the temple, that he tore her clothes, struggled with her, held his hand over her mouth, and “may have left it there a little too long.” In his last statement, which ended with him in a fetal position and crying uncontrollably, he reportedly told police that he had “hit her in the back of the head with a Gatoraid [sic] bottle that was lying on the path.” Police testified that, after hearing this, the next day they conducted a careful search and found a Gatorade bottle cap at the crime scene.

The trial transcripts highlight how central these admissions were to the State’s case. DNA tests conducted by the FBI laboratory before the trial excluded Deskovic, providing powerful evidence that he was not the perpetrator. The district attorney asked the jury to ignore that DNA evidence, speculating that perhaps the victim was “sexually active” and “romantically linked to somebody else” who she had sexual relations with shortly before her rape and murder. After all, “[s]he grew up in the eighties.” There was no investigation or DNA testing conducted to support this conjecture, either by the prosecution or the defense.

Instead, the district attorney emphasized in closing arguments the reliability of Deskovic’s statements, noting that after he told police about the Gatorade bottle, “it was found there,” and this was a heavy weapon, “not a small little bottle.” Detectives “did not disclose any of their observations or any of the evidence they recovered from Jeffrey nor, for that matter, to anyone else they interviewed.” They kept their investigative work nonpublic for the simple reason ... that [if a suspect] revealed certain intimate details that only the true killer would know, having said those, and be arrested could not then say, “Hey, they were fed to me by the police, I heard them as rumors, I used my common sense, and it’s simply theories.” The district attorney told the jury to reject the suggestion that Deskovic was fed facts, stating, “Ladies and gentlemen, it doesn’t wash in this case, it just doesn’t wash.”

Deskovic was convicted of rape and murder and served more than fifteen years of a sentence of fifteen years to life. In 2006, new DNA testing again excluded him, but also matched the profile of a murder convict who subsequently confessed and pleaded guilty. Now that we know Deskovic is innocent, how could he have known those “intimate details”? The District Attorney’s postexoneration inquiry

noted:

Much of the prosecution's effort to persuade the jury that Deskovic's statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know.... Given Deskovic's innocence, two scenarios are possible: either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community.

This confession was contaminated, either by police leaking facts or feeding them. Given the level of specificity reportedly provided by Deskovic, the second and more troubling possibility, that the officers disclosed facts to him, seems far more likely. Yet during the trial, the police and the prosecutor not only denied having told Deskovic those facts, such as the presence of the Gatorade bottle cap and the depiction of the crime scene, but were emphatic they did not leak those facts to the media or to anyone else, such as other high school students interviewed. Whether the police acted inadvertently or intentionally, in hindsight we know that they provided an inaccurate account. Deskovic has commented, "[b]elieving in the criminal justice system and being fearful for myself, I told them what they wanted to hear." Deskovic is currently suing for civil rights violations caused by a "veritable perfect storm of misconduct by virtually every actor at every stage of his investigation and prosecution...." The suit alleges that police disclosed facts to him.

The Deskovic case illustrates how false confessions do not happen simply by happenstance. They are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows. Constitutional criminal procedure does not regulate this critical phase of an interrogation. The Constitution requires the provision of initial Miranda warnings and then requires that the bare admission of guilt have been made voluntarily. That admission of guilt, while important, is only a part of the interrogation process. The "confession-making" phase may be far more involved. Much of the power of a confession derives from the narrative describing how the crime was committed. For a person to confess in a convincing way, he must be able to say more than "I did it." Police are trained to carefully test the suspect's knowledge of how the crime occurred by

assessing whether the suspect can freely volunteer specific details that only the true culprit could know.

That confession-making process was corrupted in the cases studied in this Article. This Article examines the substance of the confession statements, how they were litigated at trial, and then on appeal. Just as in Deskovic's case, in almost all of the cases that resulted in trials, detectives testified that these defendants did far more than say "I did it," but that they also stated they had "guilty" or "inside" knowledge. Only two of the thirty-eight exonerees, Travis Hayes and Freddie Peacock, relayed no specific information concerning the crime. Hayes was still convicted, although DNA testing conducted before trial excluded him and his co-defendant. Peacock was mentally disabled and all he could say to the police about the crime was "I did it, I did it." The other thirty-six exonerees each reportedly volunteered key details about the crime, including facts that matched the crime scene evidence or scientific evidence or accounts by the victim. Detectives further emphasized in twenty-seven cases—or seventy-one percent of the thirty-eight cases with transcripts obtained—that the details confessed were nonpublic or corroborated facts. Detectives sometimes specifically testified that they had assiduously avoided contaminating the confessions by not asking leading questions, but rather allowing the suspects to volunteer crucial facts.

The nonpublic facts contained in confession statements then became the centerpiece of the State's case. Although defense counsel moved to exclude almost all of these confessions from the trial, courts found each to be voluntary and admissible, often citing to the apparent reliability of the confessions. The facts were typically the focus of the State's closing arguments to the jury. Even after DNA testing excluded these people, courts sometimes initially denied relief, citing the seeming reliability of these confessions. The ironic result is that the public learned about these false confessions in part because of the contaminated facts. These false confessions were so persuasive, detailed and believable that they resulted in convictions which were often repeatedly upheld during appeals and habeas review. After years passed, these convicts had no option but to seek the DNA testing finally proving their confessions false.

Why does constitutional criminal procedure fail to regulate the substance of confessions? Beginning in the 1960s, the Supreme Court's Fifth and Fourteenth Amendment jurisprudence shifted. The

Court abandoned its decades-long focus on reliability of confessions. Instead, the Court adopted a deferential voluntariness test examining the “totality of the circumstances” of a confession. The Court has since acknowledged “litigation over voluntariness tends to end with the finding of a valid waiver.” Almost all of these exonerees moved to suppress their confessions, and courts ruled each confession voluntary. The Court supplemented the voluntariness test with the requirement that police utter the Miranda warnings, which if properly provided, as the Court puts it, give police “a virtual ticket of admissibility.” All of these exonerees waived their Miranda rights. All lacked counsel before confessing. Most were vulnerable juveniles or mentally disabled individuals. Most were subjected to long and sometimes highly coercive interrogations. Nor is it surprising that they failed to obtain relief under the Court’s deferential voluntariness inquiry, especially where the confessions were powerfully—though falsely—corroborated.

The Court has noted that “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk” of constitutional violations. These false confessions shed light on dangers of coercion during interrogations, but they also provide examples of a different problem in which the line blurred is that between truth and fiction. When custodial interrogations are not recorded in their entirety, one cannot easily discern whether facts were volunteered by the suspect or disclosed by law enforcement. Before they obtained DNA testing and without complete recordings of their interrogations, these exonerees could not prove that they did not volunteer inside knowledge of the crime.

A series of reforms could orient our criminal system towards the substance of confessions. First, constitutional criminal procedure could regulate reliability, though such constitutional change may be unlikely. An understanding of the vulnerability of confessions to contamination can also inform courts reviewing trials postconviction, particularly in cases involving persons vulnerable to suggestion, such as juveniles and mentally disabled individuals whose false confessions are studied here. Second, unless interrogations are recorded in their entirety, courts may not detect contamination of facts, especially when no DNA testing can be performed. In response to some of these false confessions, state legislatures, police departments, and

courts have increasingly required videotaping of entire interrogations. Third, additional police procedures can safeguard reliability, such as procedures intended to assure against contamination, assess suggestibility, and avoid postadmission coercion.

THE CONSTITUTIONAL STANDING OF CORPORATIONS

163 *U. Pa. L. Rev.* 95 (2014)

During the oral arguments in *Citizens United v. Federal Election Commission*, Justice Sonia Sotomayor commented that it would seem as if the Supreme Court had “imbued a creature of State law,” the corporation, “with human characteristics.” In *Citizens United*, the Court ruled that the First Amendment prohibited restrictions on political speech of corporations. Like no other prior decision, *Citizens United* elevated the importance of the question whether corporations and other types of organizations can assert constitutional rights. That was until the Court decided *Burwell v. Hobby Lobby Stores, Inc.*, in which three for-profit closely held corporations challenged contraceptive coverage under the Affordable Care Act of 2010. In *Hobby Lobby*, at oral arguments, Justice Kennedy posited: “You say profit corporations just don’t have any standing to vindicate the religious rights of their shareholders and owners.” Yet in its decision, the Court did not address the standing requirements directly, stating that because corporations protect those “associated with a corporation in one way or another,” a for-profit firm can assert free exercise rights and can itself claim to have sincere “religious beliefs.”

Are corporations “persons” with standing to assert constitutional rights? The Court in *Citizens United* gingerly avoided addressing the issue directly; and in *Hobby Lobby*, the Court avoided the First Amendment issue, relying instead on statutory rights under the Religious Freedom Restoration Act of 1993 while evading the question of corporate standing. As I will explore in this Article, real missteps in both decisions could have been avoided by directly addressing these questions. Corporations and other types of organi-

zations have long exercised a range of constitutional rights, including those found under the Contracts Clause, Due Process Clause, Fourteenth Amendment Equal Protection Clause, First Amendment, Fourth Amendment, Fifth Amendment Takings and Double Jeopardy Clauses, Sixth Amendment, and Seventh Amendment.

Corporate constitutional litigation is pervasive. While perhaps the most significant, *Citizens United* and *Hobby Lobby* are by no means the only recent high-profile constitutional cases involving corporate litigants. Take a few prominent examples: (1) shareholders of AIG filed two derivative actions claiming that during the global financial crisis, the government's bailout of AIG was a taking in violation of the Fifth Amendment;¹⁴ (2) the Southern Union Corporation successfully won a Supreme Court victory asserting its Sixth Amendment right to have aggravating facts proven to a jury when prosecuted for environmental crimes; and (3) the Court held that the Goodyear Dunlop Corporation's subsidiaries in Turkey, France, and Luxembourg were not "essentially at home" in North Carolina under its Due Process Clause test for general jurisdiction. Those constitutional claims have little in common with each other, but just those examples indicate the sheer breadth and importance of corporate constitutional litigation.

Responding to the long list of corporate constitutional rights the Supreme Court has already recognized, Justice Stevens went one step further in his *Citizens United* dissent to note "[u]nder the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech." Justice Stevens suggested, no doubt tongue in cheek, that having recognized First Amendment rights, the Court would be obligated for the sake of consistency to extend all other constitutional rights to corporations. The Court has not extended all constitutional rights to corporations or to organizations more generally, such as associations, partnerships, and limited liability companies. Corporations cannot vote, and the Court has ruled that they are not citizens under the Fourteenth Amendment. Corporations lack Fifth Amendment self-incrimination rights, Article IV Privileges and Immunities Clause rights, and Due Process Clause liberty rights. Some constitutional rights are individual-centered and not plausible as rights of corporations. Unsurprisingly, courts have not recognized a right of corporations to serve on juries, run for public office, marry,

procreate, or travel.

What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory. The closest the Court has come to touching the third rail of this jurisprudence was to suggest that certain "purely personal" constitutional rights cannot be exercised by corporations. Even when the Court recognizes that a corporation does enjoy a constitutional right, it generally does so without discussion. In *Citizens United*, for example, the Court did not discuss whether a corporation is a pure creature of state law, as Justice Sotomayor suggested; a "real entity" that can exercise all or most of the legal rights of an individual person; or an aggregate entity that helps groups of people realize their interests. The Court noted the difficulty in categorizing firms, which range from media companies to small closely held corporations to large public companies, and recognized that they exist for a wide range of purposes. In *Hobby Lobby*, the majority called it "quite beside the point" that the plaintiffs were for-profit organizations incorporated separately from their owners, blithely offering that without the action of human beings, a corporation "cannot do anything at all."

Legal scholars have long found the Supreme Court's lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing, calling the Court's rulings "ad hoc," "right-by-right," "arbitrary," "sporadic," inconsistent, and incoherent. Scholarly objections to the Court's rulings concerning corporate constitutional rights have only increased post-*Citizens United*.

In this Article, I part company with the many cogent critics of the Supreme Court's rulings, but also with those who conversely argue that in *Citizens United* (and perhaps now in *Hobby Lobby*), the Court has finally recognized corporations as "real entit[ies]." The Court adopts a consistent approach, but the approach proceeds right-by-right, rather than by starting with a theory of organizations or corporations as constitutional actors.

...

One could imagine that each right might apply in different ways to individuals and organizations, or apply to only some types of organizations. Instead, the Court keeps constant the substantive content of rights when litigated by organizations. The Court largely avoids organizational theory and focuses on constitutional theory.

The Supreme Court's approach should be grounded in the doctrine of standing, a body of law flowing from the case-or-controversy requirement of Article III, which vests the federal judiciary with the "Power" to decide "Cases" and "Controversies." The Court has defined the general test for standing as a question whether the organization itself can claim a "concrete injury," or an "injury in fact," that is separate from any injury to a third party. The Court has explained that "the injury must affect the plaintiff in a personal and individual way." Conceived as a question of standing, rather than a question of what an organization is and whether it "has" a constitutional right, the analysis is simple: once an organization has Article III standing to litigate a constitutional question, the merits analysis proceeds as for an individual litigant.

...

The Supreme Court has set out two doctrines of Article III standing—associational and organizational standing—that, together with the prudential doctrine of third-party standing, explain when and whether entities can litigate constitutional rights. Corporations are separate legal entities that have standing to assert rights on behalf of the entity itself. Tracking the organizational standing test, a court is most likely to view corporations as having Article III standing to assert a constitutional right when that right relates to the economic interests. In contrast, associations and religious organizations have broad standing to litigate injuries of their members. The Court has also set out related prudential standing doctrines that sharply limit the ability of third parties to assert rights on behalf of another. Thus shareholders can only assert rights derivatively in the name of the corporation, and conversely, the corporation cannot litigate the separate rights of shareholders or other constituents, like officers or employees. Those Article III tests, I argue, best explain the existing doctrine, even if some of the earlier decisions predated the Court's modern Article III decisions and do not frame their reasoning in Article III terms.

This approach toward corporate constitutional standing is normatively preferable, and I sharply criticize the Supreme Court's decision in *Hobby Lobby* for not only ignoring Article III and prudential third-party standing entirely but also for using casual language in the opinion that suggests that even outside the context of a closely held family-owned corporation, the distinctions between associations,

religious organizations, and for-profit corporations simply do not matter to the analysis. Separating the question of Article III standing from the merits importantly avoids advisory opinions on constitutional claims, and such caution is particularly warranted when an entity seeks to litigate a constitutional right. One person does not normally have standing to assert the liberty interest of another. Why a corporation can assert the religious beliefs of its owners is a puzzle not clearly answered in *Hobby Lobby*. A careful Article III standing analysis could have more narrowly (if not defensibly) explained the result in the case, if limited to the circumstances of a closely held family-owned corporation and if the owners did not themselves have standing to sue. That the Court did not engage in any such analysis not only adds fuel to the criticism of its free exercise and corporate constitutional rights jurisprudence but also to the malleability of its Article III jurisprudence.

As Justice Frankfurter famously remarked, "The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene." Corporate litigation has long reshaped the content of constitutional rights, from the *Lochner* era to modern Commerce Clause jurisprudence. Where the corporation is the litigant, one may ask different constitutional questions, examine different facts, and perhaps reach different answers. Understanding the contours of the approach across different areas, from civil procedure to criminal procedure to speech, can help us understand the future direction of corporate constitutional litigation. I describe in Part IV how several key rulings by the Court, in part due to developments in underlying substantive law, now stand on thinner ice.

Finally, I conclude by exploring how the treatment of corporate constitutional standing helps illuminate something double-edged about constitutional rights more generally: few are framed as purely "individual" rights. Constitutional rights are framed generally, often imposing limitations on the government or recognizing general privileges or immunities, but not by creating individual-specific tests. Moreover, some of the most effective constitutional rights may be precisely those not limited by individual circumstances, and therefore readily exercised by organizations. At the same time, however, such rights may poorly protect individual dignitary interests. Individuals have long sought protection by seeking to have associa-

tions litigate to challenge constitutional violations. However, litigation by organizations can also conflict with individual interests and undermine individual rights. The *Hobby Lobby* decision contains dicta suggesting that courts need not adhere to well-established categories of Article III standing, opening the door to all manner of ill-advised corporate standing. That specter provides all the more reason to scrutinize corporate assertions of constitutional standing carefully if and when corporations act at the expense of individual rights.

BIBLIOGRAPHY

BOOKS

- The Death Penalty* (with Lee Kovarsky) (Foundation Press, Concepts and Insights Series, forthcoming 2016).
- Too Big to Jail: How Prosecutors Target Corporations* (Harvard University Press, 2014).
- Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation* (with Lee Kovarsky) (Foundation Press, 2013).
- Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2011).

ARTICLES AND BOOK CHAPTERS

- “The Constitutional Rights of Corporations in the United States,” in Barnali Choudhury & Martin Petrin, eds., *Understanding the Modern Company* (Cambridge University Press, forthcoming 2016).
- “Convicting the Innocent Redux,” in Daniel S. Medwed, ed., *Wrongful Convictions and the DNA Revolution* (Cambridge University Press, forthcoming 2016).
- “Individual and Corporate Criminals,” in Jennifer Arlen, ed., *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar, forthcoming 2016).
- “Blinding Eyewitness Identifications,” in Kathi E. Hanna et al., *Blinding as a Solution to Bias in Biomedical Science and the Courts: A Multidisciplinary Approach* (Elsevier, forthcoming 2015).
- “Constitutional Law and the Law of Evidence,” 71 *Cornell L. Rev.* (forthcoming 2015).
- “The Corporate Criminal as Scapegoat,” 102 *Va. L. Rev.* (forthcoming 2015).
- “DNA and Distrust” (with Kerry Abrams), 91 *Notre Dame L. Rev.* (forthcoming 2015).
- “Why Plea Bargains are Not Confessions,” 57 *Wm. & Mary L. Rev.* (forthcoming 2015).
- “Contaminated Confessions Revisited,” 101 *Va. L. Rev.* 395 (2015).
- “Images of Injustice,” in Charles J. Ogletree, Jr. & Austin Sarat, eds., *Punishment in Popular Culture 257* (New York University Press, 2015).
- “Interrogation Policies,” 49 *U. Rich. L. Rev.* 895 (2015).
- “Accuracy in Sentencing,” 87 *S. Cal. L. Rev.* 499 (2014).
- “The Constitutional Standing of Corporations,” 163 *U. Pa. L. Rev.* 95 (2014).
- “Eyewitness Identifications and Police Practices: A Virginia Case Study,” 2 *Va. J. Crim. L.* 1 (2014).
- “Aggregation and Constitutional Rights,” 88 *Notre Dame L. Rev.* 593 (2013).
- “How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information, and Error Acknowledgment” (with Gregory Mitchell), 10 *J. Empirical Legal Stud.* 484 (2013).
- “Validating the Right to Counsel,” 70 *Wash. & Lee L. Rev.* 927 (2013).
- “Eyewitnesses and Exclusion,” 65 *Vand. L. Rev.* 451 (2012).
- “Habeas Corpus and Due Process,” 98 *Cornell L. Rev.* 47 (2012).
- “Collaborative Organizational Prosecution,” in Anthony S. Barkow and Rachel E.

- Barkow, eds., *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 154 (New York University Press, 2011).
- “Globalized Corporate Prosecutions,” 97 *Va. L. Rev.* 1775 (2011).
- “DNA and Due Process,” 78 *Fordham L. Rev.* 2919 (2010).
- “The Substance of False Confessions,” 62 *Stan. L. Rev.* 1051 (2010).
- “Invalid Forensic Science Testimony and Wrongful Convictions” (with Peter J. Neufeld), 95 *Va. L. Rev.* 1 (2009).
- “Claiming Innocence,” 92 *Minn. L. Rev.* 1629 (2008).
- “Corporate Confessions,” 30 *Cardozo L. Rev.* 917 (2008).
- “Judging Innocence,” 108 *Colum. L. Rev.* 55 (2008).
- “Aggregation in Criminal Law,” 95 *Cal. L. Rev.* 383 (2007).
- “Structural Reform Prosecution,” 93 *Va. L. Rev.* 853 (2007).
- “Criminal Justice Collapse: The Constitution After Hurricane Katrina” (with Tania Tetlow), 56 *Duke L. J.* 127 (2006).
- “Innocence, Harmless Error and Federal Wrongful Conviction Law,” 2005 *Wis. L. Rev.* 35.
- “Experimentalist Equal Protection” (with James S. Liebman), 22 *Yale L. & Pol’y Rev.* 261 (2004).
- “Madisonian Equal Protection” (with James S. Liebman), 104 *Colum. L. Rev.* 837 (2004).
- “Remedying Racial Profiling,” 33 *Colum. Hum. Rts. L. Rev.* 41 (2001).
- Note, “Standing While Black: Distinguishing *Lyons* in Racial Profiling Cases,” 100 *Colum. L. Rev.* 1815 (2000).

BOOK REVIEWS AND SHORTER WORKS

- “Applause for the Plausible,” 162 *U. Penn. L. Rev. Online* 221 (2014).
- “The Banality of Wrongful Convictions,” 112 *Mich. L. Rev.* 979 (2014) (reviewing James Liebman et al., *Los Tocayos Carlos* (2012); Raymond Bonner, *Anatomy of Injustice: A Murder Case Gone Wrong* (2012); and Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (2012)).
- “Big Data and Due Process,” 100 *Cornell L. Rev. Online* 207 (2014).
- “DNA Evidence Casts Light on Flaws in System,” in *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* 30 (United Nations, 2014).
- “Rehabilitating Corporations,” 67 *Fla. L. Rev. Online* 1 (2014).
- “The United States— False Confessions, Flawed Evidence and the Advent of DNA Testing,” in *The Administration of Justice in Death Penalty Cases* 14 (The Death Penalty Project, 2014).
- “Wrongful Convictions and the Role of Forensic Science,” in Allen Jamieson & Andrew Moenssens, eds., *Wiley Encyclopedia of Forensic Science* (Wiley online ed. 2014).
- “Blinded Criminal Justice,” 2 *J. Applied Res. Memory & Cognition* 73 (2013).
- “Habeas Corpus Standing Alone: A Reply to Lee B. Kovarsky and Stephen I. Vladeck,” 98 *Cornell L. Rev. Online* 35 (2013).
- “Remaining Silent after *Salinas*,” 80 *U. Chi. L. Rev. Dialogue* 116 (2013).

- “Roots of Wrongful Convictions,” in Philip H. Crowley & Thomas R. Zentall, eds., *Comparative Decision Making* 379 (Oxford University Press, 2013).
- “Trial and Error,” in C. Ronald Huff & Martin Killias, eds., *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* 77 (Routledge, 2013).
- “The Great Writ,” 74 *Rev. Pol.* 346 (2012) (reviewing Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (2011)).
- “Introduction: New England Law Review Symposium on *Convicting the Innocent*,” 46 *New Eng. L. Rev.* 671 (2012).
- “Judges and Wrongful Convictions,” 48 *Ct. Rev.* 132 (2012).
- “Opening the Black Box,” 58 *Crime, L. & Soc. Change* 567 (2012) (reviewing Daniel S. Medwed, *Prosecution Complex: America’s Race to Convict and Its Impact on the Innocent* (2012)).
- “Trial and Error: Learning from Patterns of Mistakes,” *Crim. Just.*, Winter 2012, at 30.
- “False Confessions,” *Litigation*, Summer 2011, at 54.
- “United States v. Goliath,” 93 *Va. L. Rev. In Brief* 105 (2007).

Brief essays and commentaries have also appeared in the following sources:

ACS Blog
 Asahi Shimbun
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