1-2021

The Evidence Rules That Convict the Innocent

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THE EVIDENCE RULES THAT CONVICT THE INNOCENT

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Over the past decades, DNA testing has uncovered hundreds of examples of the most important type of trial errors: innocent defendants convicted of serious crimes like rape and murder. The resulting Innocence Movement spurred reforms to police practices, forensic science, and criminal procedure. This Article explores the lessons of the Innocence Movement for American evidence law.

Commentators often overlook the connection between the growing body of research on convictions of the innocent and the evidence rules. Of the commonly identified causes of false convictions, only flawed forensic testimony has received sustained attention as a matter of evidence law. But other important contributors, like mistaken identifications and unreliable confessions, also pass through evidence rules. These pathways to admission go unquestioned today but are the result of long-forgotten policy choices that were once controversial precisely because they increase the likelihood of convicting the innocent.

This Article highlights these, and other, overlooked implications of the Innocence Movement. It argues that the discovery and ongoing chronicle of hundreds of false convictions present a unique opportunity to reevaluate American evidence law. This reevaluation could lead to innocence-protective changes to existing evidence rules and a welcome infusion of energy into evidence policymaking and commentary.

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† Professor, William & Mary Law School. Thanks to Ron Allen, Ed Cheng, Brandon Garrett, Sandra Mayson, Fred Moss, Mark Spottswood, Maggie Wittlin, and the participants in the Vanderbilt Summer Evidence Workshop, and the SMU Law School Faculty Forum for comments on an early draft. Thanks also to Bethany Fogerty and Fred Dingledy for research assistance.

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> "The basic purpose of a trial is the determination of truth . . . ."
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> —United States Supreme Court, 1966[1]

INTRODUCTION

In 1923, Judge Learned Hand famously mused that since the trial process provides the accused with "every advantage," the prospect of the "innocent man convicted" was "an unreal dream."[2] Few observations have aged as badly. In the past two decades, DNA tests definitively established the innocence of hundreds of defendants convicted of serious crimes.[3] These revelations "changed the face of criminal justice."[4] No one doubts any longer that the system convicts the innocent. The fight has shifted to the size of the error rate.[5]

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1 Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

2 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."); *cf.* Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J. concurring) (questioning the prevalence of wrongful convictions).

3 *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6 (2011).

4 *Id.*

5 *Compare* Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 785 (2017) (suggesting a false conviction rate for violent felonies "somewhere in the range from one to several percent"), *and* Charles E. Loeffler, Jordan Hyatt & Greg Ridgeway, *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANTITATIVE CRIMINOLOGY 259, 259 (2019) (estimating a six percent wrongful conviction rate), *with* Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 847 (2018) (positing a wrongful conviction rate of .016% to .062%). *See also* Marvin Zalman, *The Anti-Blackstonians*, 48 SETON HALL L. REV.

The discovery of large swaths of convictions of innocent defendants energized reformers in a variety of areas. Indisputable examples of "false convictions"[6] spurred reforms of police practices, forensic science, and criminal procedure.[7] Relatively untouched, however, are the rules of evidence.[8] The highly influential Advisory Committee to the Federal Rules of Evidence (Advisory Committee) has proposed few changes in response to the "Innocence Movement."[9] A smattering of state laws respond to the revelations of the Innocence Movement in ways that touch on evidence rules, but these changes serve only to illustrate the absence of a more comprehensive reckoning for evidence policy.[10]

This Article explores the implications of the Innocence Movement for the rules of evidence. It argues that the discovery and ongoing chronicle of hundreds of false convictions

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1319, 1329 (2018) ("[J]ustice system professionals now accept the regular occurrence of a non-trivial number of wrongful convictions.").

6 "Confictions," a term of my own invention, broadly captures these cases, which include, "wrong person" cases where "factually innocent persons . . . have been convicted of crimes that they did not commit" and "cases where someone is convicted for a crime . . . that never actually happened." Cassell, *supra* note 5, at 818–19; *cf.* James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1250 (2010) (noting that "innocent" in this context applies "to individuals charged with crimes that either never occurred . . . or, more commonly, were committed by someone else"). For a distinction between "false" and "wrongful" convictions, see *infra* text accompanying note 70.

7 *See* Brandon L. Garrett, *Actual Innocence and Wrongful Convictions*, *in* 3 REFORMING CRIMINAL JUSTICE 193, 193 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/G4W8-9UXW] ("Judicial opinions, academic research, criminal procedure reform legislation, changed post-conviction standards, new police practices focused on accuracy, new prosecution practices, and changes to legal education have all flowed from this focus on innocence."); *see also* Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 681, 700–01 (2016) (offering similar assessment).

8 Typical descriptions of the impact of the Innocence Movement omit reference to any changes to evidence rules. *See supra* text accompanying note 7.

9 The Advisory Committee convened a roundtable to discuss potential changes to the rule concerning expert testimony but did not recommend any changes. *See* ADVISORY COMMITTEE ON RULES OF EVIDENCE SPRING 2019 MEETING 14, https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books [https://perma.cc/Q3TZ-FK2K] (postponing consideration of amendment to Federal Rule of Evidence 702 in October 2018 "that would prohibit an expert from overstating conclusions"). In recent years, the Committee has made a number of minor changes, including a few that could be characterized as helping defendants. *See* FED. R. EVID. 804(b)(3) (2019 amendment) (adding a corroboration requirement for certain statements against interest); *infra* note 42 (proposing changes to notice requirements in Rule 404(b)). For a summary of the Innocence Movement, see Zalman, *supra* note 5, at 1330–35.

10 *See infra* notes 137, 215.

presents a unique opportunity to reevaluate evidence doctrine and unearth insights, both new and forgotten. This new lens brings out the importance of long neglected evidence rules and offers a fresh critique of the theoretical grounding of American evidence law.

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The prosecution of an innocent person is the equivalent of a stress test for the criminal justice system.[11] The outcome of such a proceeding should provide valuable data to evaluate the system's safeguards, including its evidence rules. Of course, researchers cannot ethically conduct this type of test. But America's accumulation of a growing body of research on false convictions provides a second-best alternative. A comprehensive categorization of the evidence used to convict factually innocent defendants can function as a rough audit of the evidence rules. If the rules are intended to advance the search for truth, false convictions shine a light on the rules most in need of rethinking.

As this Article explains, the findings from the false conviction research offer fascinating insights for the rules of evidence. The first thing that exoneration data suggest is that, contrary to the cynics,[12] the evidence rules still play an important and direct (not just indirect) role in separating the guilty from the innocent. It is widely recognized that approximately 95 percent of criminal convictions result from guilty pleas,[13] prompting the Supreme Court to observe that plea bargaining "*is* the criminal justice system."[14] Reports from the Innocence Movement, however, highlight one group of defendants that continues to rely on trials: the factually innocent.[15] The generalizability of this observation is clouded by uncertainty, but the evidence we have so far suggests that even as most defendants (including some innocent defendants) plead guilty, the trial process continues to be invoked by a significant subset of the defendants it

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11 "Stress tests" are used to assess whether a complex system will fail when it encounters challenging conditions. *See* Christina Parajon Skinner, *Misconduct Risk*, 84 FORDHAM L. REV. 1559, 1598 (2016) (discussing use of "stress testing" of financial institutions).

12 *See, e.g.*, MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 129 (1997) (describing evidence rules, in light of the decline of the jury trial, as "more ornamental than functional").

13 Missouri v. Frye, 566 U.S. 134, 143 (2012).

14 *Id.* at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

15 *See infra* subpart II.A.

was most intended to protect: defendants falsely accused of serious crimes.[16] The evidence rules governing those trials, consequently, maintain a critically important role in a world otherwise dominated by guilty pleas.[17]

The second thing we learn from the exoneration data is that the evidence rules directly implicated in false convictions are among the least talked about. The primary evidentiary contributors[18] to false convictions are: (1) mistaken eyewitness identifications; (2) flawed forensic expert testimony; (3) unreliable confessions; and (4) lying jailhouse informants.[19] All four of these types of evidence pass through a nonconstitutional evi-

16 *See* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 352 (2012); *infra* subpart II.A.

17 Even if this were not the case, the evidence rules would still play an important, albeit indirect, role. *See* Nora V. Demleitner, *More Than "Just" Evidence: Reviewing Mirjan Damaška's* Evidence Law Adrift, 47 AM. J. COMP. L. 515, 525 (1999) ("On a practical level, settlements in civil cases and plea-bargaining in criminal cases are not necessarily indicative of the irrelevance of evidence law since evidentiary rules may determine whether a party will agree to a settlement or a plea-bargain."); *infra* subpart II.A.

18 I use the phrases "contributors to" or "correlates of," rather than the more common "causes of" false convictions. Wrongful conviction researchers have not demonstrated that particular items of evidence "caused" false convictions. Instead, they show that certain types of evidence are frequently used, in conjunction with other evidence, to obtain false convictions. *See* Jennifer E. Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473, 1490 (2012) (reviewing BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011)) (highlighting "the near impossibility of isolating and assessing the significance of any single factor in a given case"). As a result, it seems more accurate to talk about evidentiary "correlates" or "contributors," rather than "causes," of false convictions. This point should not be controversial, as it is widely acknowledged that "cause" in this context is intended to be understood more broadly than typical usage would suggest. *See* Gross, *supra* note 5, at 769 ("When we talk about 'causes' of false conviction we usually mean facts in particular cases that increase the probability that an innocent defendant will be convicted by providing misleading evidence of guilt or concealing evidence of innocence.").

19 *See* Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 727 (2013) (identifying as leading contributors to wrongful convictions "eyewitness identifications, confessions, forensic science, and jailhouse informant or snitch testimony"); Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2928 (2009) ("Based on numerous national and state-wide studies conducted since 1996, four categories of admissible evidence have emerged as the leading causes of wrongful convictions: (1) eyewitness identifications; (2) non-DNA forensic analysis of physical evidence; (3) testimony of jailhouse informants; and (4) confessions obtained during custodial interrogations." (footnotes omitted)); Fiona Leverick, Kathryn Campbell & Isla Callander, *Post-Conviction Review: Questions of Innocence, Independence, and Necessity*, 47 STETSON L. REV. 45, 47 n.6 (2017) ("There is a remarkable consensus that the main evidential causes of wrongful conviction are mistaken eyewitness identification, false confessions, misleading forensic evidence and the evidence of accomplices or informers (or others who have a motivation to lie).").

dence rule intended to ensure reliability. For one category, the implicated rule is obvious. Expert testimony is admitted in every jurisdiction through evidence rules (and legal doctrines) that are heavily scrutinized by courts and scholars.[20] But apart from expert testimony, the evidence rules most implicated in false convictions—essentially hearsay exceptions—fly so far under the radar that most commentators fail to notice them at all.[21] The absence of any modern controversy regarding the wisdom of these rules obscures a fascinating history. These evidence rules are the result of long-forgotten policy choices that were once controversial precisely because they increase the likelihood of convicting the innocent.[22]

The cases that spur the Innocence Movement illustrate the consequences of these long-forgotten evidence policy choices. For example, commentators expressed disbelief that federal and state courts rejected challenges to the admission of Brendan Dassey's confession, profiled in the television series, *Making a Murderer*.[23] As described by a dissenting judge:

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20 *See, e.g.*, FED. R. EVID. 702 (requiring judges to screen expert testimony to ensure that it is "the product of reliable principles and methods" that have been "reliably applied . . . to the facts of the case"); Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 503 (2005) (suggesting that "courts apply some generalized level of scrutiny when considering the reliability of scientific evidence, regardless of the governing standard."); Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1571 (2018) (critiquing state and federal courts for failing to rigorously assess reliability of expert testimony despite Rule 702's command).

21 *See, e.g.*, Findley, *supra* note 19, at 754, 763 ("Alone among the prominent contributors to wrongful convictions, the problematic nature of expert testimony is explicitly addressed by the rules of evidence . . . . There are no rules that uniquely address the unreliability of eyewitness identifications, snitch testimony, or confessions."). There is only sporadic discussion of this point in the literature. I located only two examples that recognize the applicability of rules of evidence to wrongful conviction correlates like confessions and eyewitness identifications. *See* Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 816 (2013); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 389 (2012).

22 *See infra* subpart II.B.

23 *See* Dassey v. Dittmann, 877 F.3d 297, 317 (7th Cir. 2017) (en banc) (summarizing state court proceedings and refusing relief on collateral attack); Adam Liptak, *Was It a False Confession in 'Making a Murderer'? The Supreme Court May Decide*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/supreme-court-making-a-murderer.html [https://perma.cc/9PE5-92LJ] ("[M]any people were made powerfully uneasy by the treatment of . . . Brendan Dassey, whose videotaped interrogation was among the most gripping parts of the series."); Laura Nirider & Steven Drizin, *False Confessions Drive the True Crime TV Craze, But It's Time To End the Spectacle*, CHI. TRIBUNE (Aug. 9, 2019), https://www.chicagotribune.com/opinion/commentary/ct-opinion-true-

> Psychological coercion, questions to which the police furnished the answers, and ghoulish games of '20 Questions,' in which Brendan Dassey guessed over and over again before he landed on the 'correct' story (*i.e.*, the one the police wanted), led to the 'confession' that furnished the only serious evidence supporting his murder conviction in the Wisconsin courts.[24]

The outrage is understandable. While the evaluation of the credibility of relevant evidence is typically left to the jury,[25] there are good reasons to expect evidence law to exclude unreliable confessions like Dassey's. An out-of-court confession must pass through the hearsay rules, which ostensibly screen for reliability.[26] Indeed, American judges once demanded robust trustworthiness guarantees for hearsay confessions that would have excluded precisely this type of evidence.[27] But over the past 150 years, courts and evidence rule drafters gradually replaced the evidence rules that screened for reliability with constitutional protections that focus only on process.[28] Today, these process-focused constitutional protections are all that remain.[29] Dassey's confession was not admitted because it was reliable. It was admitted because the sixteen-year-old was read his rights.[30]

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crime-television-false-confessions-20190809-ejtzggbu3rgkzj7fjazipye37u-story.html [https://perma.cc/7GFT-THAA] ("Dassey sits in a Wisconsin prison to this day because a court held that the law does not clearly prohibit the tactics used against him — even though viewers around the globe were outraged by what they saw on his interrogation videotape.").

24 *Dassey*, 877 F.3d at 319 (Wood, J. dissenting).

25 *See* FED. R. EVID. art. VIII advisory committee's introductory note, at 405 ("For a judge to exclude evidence because he does not believe it has been described as 'altogether atypical, extraordinary . . .'); Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 48 (2013) ("A witness's credibility, however, is typically a jury question . . . .").

26 *See* ILL. R. EVID. 801(c), 802 (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and prohibiting its admission absent a specified exception); *see also* FED. R. EVID. 801(a)-(c), 802 (same); State v. Robinson, 735 P.2d 801, 807 (Ariz. 1987) (en banc) ("[T]he hearsay rules are at the core of the judicial function: defining what is reliable evidence and establishing judicial processes to test reliability."); FED. R. EVID. art. VIII advisory committee's introductory note, at 405 (explaining traditional approach to hearsay as, "a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness," and adopting that approach for "these [i.e., the federal] rules"); *infra* section II.B.2.

27 *See infra* section II.B.2.

28 *Id.*

29 *Id.*

30 *Dassey*, 877 F.3d at 306, 312 (emphasizing that Dassey "was given *Miranda* warnings and understood them sufficiently"); *cf.* Fare v. Michael C., 442 U.S. 707, 727 (1979) (rejecting challenge to confession where "the police took care

Purported confessions to informants—another prominent evidentiary contributor to false convictions—face even fewer hurdles.[31] For example, at Bruce Lisker's trial for murdering his mother, a jailhouse informant testified that Lisker confessed to the killing when they were both detained in Los Angeles County Jail. The informant claimed this happened, "during their very first conversation," through a hole in the wall between their pretrial detention cells, "before they even knew each other's names."[32] Again, this testimony communicated an out-of-court statement to the jury to prove the matter asserted by the out-of-court speaker.[33] Consequently, it had to pass through the reliability-focused hearsay rules.[34] But the only surviving requirement for admission of this evidence in California, and in jurisdictions across the country, is that the statement relayed to the jury by the informant was (purportedly) uttered by the defendant and offered by the prosecution.[35] As far as the modern evidence rules are concerned, there is no question that this type of informant testimony is admissible; and little controversy among evidence scholars, courts, or policymakers over the (evidence) rules that ensure that result. Not surprisingly, the informant's testimony in Lisker's case

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to inform [the sixteen-year-old] respondent of his rights and to ensure that he understood them"). Reading rights would be insufficient, of course, if the police did not honor those rights and, for example, went on to employ physical coercion to extract a statement. *Fare*, 442 U.S. at 727. But, again, the analysis would turn on the process of extracting the confession, not its reliability. *See id.*

31 *See infra* section II.B.3.

32 Scott Glover & Matt Lait, *From the Archives: New Light on a Distant Verdict*, L.A. TIMES (May 22, 2005, 12:00 AM), https://www.latimes.com/local/la-melisker22may22-story.html [https://perma.cc/DT4F-4G28].

33 *See* CAL. EVID. CODE § 1200(a)–(b) (West 2020) (defining hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated," and barring its admission, absent an exception).

34 *Id.*; *see supra* note 26 and accompanying text.

35 *See* CAL. EVID. CODE § 1220 (West 2020) ("Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."). California's Evidence Code also requires that the evidence be admissible under the State and federal constitution. CAL. EVID. CODE. § 1204. Some jurisdictions require corroboration for informant testimony, but such regulation is sporadic. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 177 (2009) (characterizing existing legislative restrictions as "largely piecemeal" and proposing additional restrictions); Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1078 (2011) ("[C]ompared to many other areas of the criminal justice system, snitching goes largely unregulated.").

turned out to be false.[36] But that discovery came much too late. Lisker served twenty-six years in prison before the prosecution's case fell apart, and the State dropped the charges.[37]

Out-of-court identifications—the most commonly cited contributor to false convictions—are similarly admissible under the evidence rules without any assessment of reliability. For example, the Court of Appeals of Texas rejected Andrew William Gossett's (truthful) claim of mistaken identification by highlighting police testimony that the victim "identified appellant as her assailant in the photographic line-up so fast that it surprised the officer."[38] That evidence was hearsay,[39] but its admissibility was a foregone conclusion. Under the Texas Rules of Evidence, like the Federal Rules, the only requirement for admission of an out-of-court statement of identification is that the declarant testify and is subject to cross-examination.[40]

These three examples illustrate one of the most remarkable lessons policymakers can take from the research on false convictions. The evidence rules play as prominent a role in the flawed convictions unearthed by the Innocence Movement as any of the more widely-criticized levers of the criminal justice system. And yet the implicated rules escape notice both in debates about wrongful convictions and critiques of evidence policy generally.

The third insight the false conviction data present is just as striking as the first two: the evidence rules that modern commentators do single out for criticism do not seem to be implicated at all.[41] The most famous, and famously reviled, evidence rules—such as the highly contentious pathway for the admission of prior crimes evidence,[42] or the much-maligned

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36 *See* Lisker v. Knowles, 651 F. Supp. 2d 1097, 1141 (C.D. Cal. 2009); *Full Coverage: The Case [sic] of Bruce Lisker*, L.A. TIMES (March 20, 2015, 12:54 PM), https://www.latimes.com/la-me-lisker-sg-storygallery.html [https://perma.cc/AKH8-TEW3].

37 *Full Coverage: The Case of Bruce Lisker*, *supra* note 36.

38 Gossett v. State, No. 13-00-166-CR, 2001 WL 997400, at *3–4 (Tex. App. Apr. 12, 2001).

39 *See* FED. R. EVID. 801(a)–(c) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted in the statement); *infra* section II.B.1.

40 TEX. R. EVID. 801(e)(1)(C); *see also* FED. R. EVID. 801(d)(1)(C).

41 *See infra* subpart II.C.

42 *See* FED. R. EVID. 404(b). The Advisory Committee recently proposed changes to Rule 404(b)'s notice requirements. *See* ADVISORY COMMITTEE ON RULES OF EVIDENCE SPRING 2019 MEETING, *supra* note 9, at 24. The controversial rule permitting impeachment with prior convictions, FED. R. EVID. 609, does appear to play at least an indirect role in enabling false convictions. *See infra* section II.B.3. The Advisory Committee rejected a modest reform to Rule 609 in 2018. *See*

hearsay exceptions for "excited utterances," "coconspirator statements," and "dying declarations"—are, so far, conspicuously absent from the false conviction narratives.[43] The revelations of the Innocence Movement suggest that courts, litigators, and scholars expend the bulk of their energy fighting about the wrong rules.

The Article proceeds in three parts. Part I proposes a methodology for using exoneration data to audit the evidence rules. Part II analyzes the results. After highlighting the ongoing importance of trials in this context, the discussion focuses on three areas: (1) now-uncontroversial evidence rules that mechanically usher in the evidence used to convict the innocent; (2) largely-forgotten historical controversies regarding these rules that bear revisiting in light of modern research into the causes of false convictions; and (3) the stark contrast between the rarely-discussed rules that enable false convictions and the evidence rules that draw lots of attention, but play little role. Part III explores the implications of the preceding discussion. At this point, the goal of the discussion is not to argue for specific rule changes. Rather, my aim is to propose a shift of scholars' and policymakers' attention. If fostering the accuracy of trial outcomes is the primary goal of the evidence rules, we need to turn our collective attention to the rules that convict the innocent.

I
TESTING THE EVIDENCE RULES

Any audit requires a clear methodology and a recognition of underlying assumptions. This Part maps out these elements. It begins by proposing accuracy or, more precisely, the ability to foster accurate verdicts, as the appropriate metric for testing the evidence rules. It then describes the data we have on false convictions and explores ways we can use this data to test the evidence rules for accuracy.

A. The Case for Accuracy

The modern law of evidence is one of the most intricate and thoughtful endeavors in American jurisprudence. Expert bodies constituted at the federal and state levels draft carefully

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ADVISORY COMMITTEE ON RULES OF EVIDENCE FALL 2018 MEETING 55–57 (Minutes of the Committee Meeting of April 26–27, 2018) https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf [https://perma.cc/34QV-HYVZ].

43 *See infra* subpart II.C.

nuanced rules, typically with only moderate interference from legislatures.[44] Most law students take an "Evidence" course to learn how those rules work, and the topic is tested on the Bar Examinations required to practice law.[45] Judicial opinions, law review articles, and treatises carefully interpret the rules. Out in the "real world," trial courts consider evidentiary objections, and apply the rules to exclude or admit evidence, subject to later appeal. Notably absent from this admirable enterprise, however, is any effort to evaluate whether the evidence rules work.

Even the question seems foreign. What would it mean for an evidence rule to "work"? An answer requires an assessment of the rule's function. The primary end sought through the evidence rules and accompanying trial process is factual accuracy.[46] The Federal Rules of Evidence themselves announce a "purpose" of "ascertaining the truth and securing a just determination."[47] The States largely copy this formulation;[48] judges and scholars echo it as well.[49] Consequently, it seems fairly

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44 *See* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L.J. 843, 846–56 (2002) (chronicling the creation of the Federal Rules of Evidence). For a state example, see CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION PROPOSING AN EVIDENCE CODE 3–9 (1965), http://www.clrc.ca.gov/pub/Printed-Reports/Pub060.pdf [https://perma.cc/BEX6-EADR] (setting forth the membership of the committees proposing the code and the comprehensive code itself).

45 *See Preparing for the MBE*, MULTISTATE BAR EXAMINATION http://www.ncbex.org/exams/mbe/preparing/ [https://perma.cc/3A5Z-KCM9] (last visited Apr. 14, 2020) (listing "Evidence" as one of the seven subject areas tested on the MBE); *see also* Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 915 (1994) ("The evidence class plays a special role in bringing students into the profession.").

46 *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . .").

47 FED. R. EVID. 102 (Purpose).

48 *See, e.g.*, OHIO EVID. R. 102 ("The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined.").

49 *See* Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1199 (2007) ("Scholars and policymakers thus overwhelmingly view evidentiary rules in criminal law as geared primarily toward accuracy in fact-finding."); Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 590 (1996) ("[T]he evidence rules have as their prime purpose the advancement of the accuracy of the truth-determination process of our trials . . . ."); Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 194 (2003) ("Evidence, or the rules regulating evidence, may be said to be more or less veritistic, more or less conducive to accurate verdicts."); Michael S. Pardo, *Evidence Theory and the NAS Report on Forensic Science*, 2010 UTAH L. REV. 367, 369, 372 (explaining that theoretical accounts of evidence law "aim to either justify or to reform evidentiary rules or practices in light of their tendencies to produce true (factually accurate)

uncontroversial to suggest that the chief (although not sole) purpose of the evidentiary project is to screen out evidence that will distract or overwhelm the jury, and thus jeopardize the likelihood of a factually accurate verdict.[50] Apart from a few rules that can best be understood as having been repurposed to achieve discrete policy goals (for example, attorney-client privilege),[51] the evidence rules all seem to strive to this end.[52] For better or for worse, we try through the rules to facilitate a jury's ability to reach the verdict that most closely parallels the underlying facts.[53] In the criminal context, then, the evidence rules "work" when they help juries distinguish the factually innocent from the factually guilty. Of course, the litigation process serves other goals as well. Fairness is important. And appearances matter.[54] But even if accuracy is not the only goal, it is the one that matters most.

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outcomes or produce false (factually erroneous) outcomes" and noting that these accounts are "relatively uncontroversial"); *infra* note 53.

50 *See supra* text accompanying note 49.

51 *See* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 420 (1991) ("Most privilege rules are designed to sacrifice truth-seeking to other values, and thus they are indifferent to the comparison of the conventional view of the proof rules and the equally well specified cases proposal."); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167–68 (2006) ("Privileges, for example, do not purport to serve epistemic goals . . . . Such rules are the exception, however, and most of the exclusionary rules are designed with the jury in mind and with the goal of increasing the accuracy and efficiency of fact finding under circumstances of jury decision making."); *see also* FED. R. EVID. 407 (policy-based rule banning introduction of subsequent remedial measures).

52 Some rules, like Rule 403 can be viewed as directed toward fairness, but fairness, in this context, is explicitly conceptualized as a fair opportunity to point the jury toward the factually accurate outcome. *See* FED. R. EVID. 403 advisory committee's note ("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

53 *See* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLGY 2 (2006) ("Judges and legal scholars have insisted repeatedly and emphatically that the most fundamental of these values is . . . finding out whether an alleged crime actually occurred and, if so, who committed it."); Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1132 (1993) (describing process as an effort to "settl[e] upon the most plausible account of what actually happened"). Scholars often criticize evidence law's deviation from truth seeking, but in doing so generally accept the premise that the rules *should* focus on facilitating accuracy. *See, e.g.*, Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 225 (2017) ("Until we find a better way to look for liars, we should discard the practice and focus on looking for lies."); *supra* text accompanying note 49.

54 *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985) ("The aim of the factfinding process is not to generate mathematically 'probable' verdicts, but rather to generate acceptable ones; only an acceptable verdict will project the underlying legal rule to society and affirm the rule's behavioral norm.").

Over the years, it has been easy to overlook the need to accuracy-test the rules of evidence because such testing seemed impossible. One cannot discern by observing trials and appeals whether the evidence rules work. This is because we usually lack any ability, independent of the trial itself, to assess whether verdicts are factually correct.[55] Eleanor Swift detailed this problem in 1987: "The goal of achieving accurate outcomes should not be the sole basis for choosing evidence rules since it cannot be ever determined which rules produce accurate outcomes, or even reliable items of evidence."[56]

Things have changed. We have long awaited an independent means of evaluating the factual accuracy of verdicts. Post-conviction DNA testing provides that opportunity.

In fact, the false conviction data seems so well suited to a reexamination of the evidence rules, that the absence of a more robust discussion along these lines is surprising.[57] When leading voices in this area offer observations like, "Few rules, however, regulate accuracy rather than procedures. Such matters are typically committed to the discretion of the trial judge,"[58] they overlook the field of Evidence. The evidence rules care a great deal about accuracy. It is time to introduce those rules to the Innocence Movement.[59]

B. Using False Conviction Data to Audit the Evidence Rules

The discovery of hundreds of false convictions provides a means to audit the evidence rules for accuracy. Specifically, we can use this data to identify the evidence pathways used to

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55 "There is no general test for the accuracy of criminal convictions." Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175 (2008).

56 Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1361 (1987); *see also id.* at 1366–67 ("Truth, if viewed as the correspondence between outcomes and actual past events, cannot legitimate results."). The difficulty is exacerbated in cases where even DNA-type evidence cannot solve a factual dispute, such as with an assessment of culpable recklessness. *Cf.* Allen, *supra* note 51, at 393–94 ("Mental states are endemic to the western concept of legal rights and obligations, and thus are central to litigation; and questions concerning mental states are not well-formed in the sense meant above, nor do they lend themselves to testing through replicable experiments." (footnote omitted)).

57 *Cf.* Findley, *supra* note 19, at 725 ("[N]ew understandings about wrongful convictions warrant re-examining the constitutional and evidentiary rules that have developed over time based upon assumptions about reliability and the effectiveness of those rules and trial processes.").

58 GARRETT, s*upra* note 3, at 8.

59 *Cf.* United States v. Scheffer, 523 U.S. 303, 303 (1998) ("State and federal rulemakers therefore have broad latitude under the Constitution to establish rules excluding evidence.").

convict the innocent. To the extent these pathways purport to screen out unreliable evidence, they failed.[60]

The methodology suggested here is not perfect. For example, it only screens for one type of inaccuracy: false convictions. It says little about another type of inaccuracy, "false acquittals."[61] In addition, the mechanism for DNA exonerations has been sporadic and ad hoc.[62] Shortcomings aside, it is also important to emphasize the unique opportunity DNA exonerations offer to those who study law. In one respect, these exonerations are better than clinical experiments. DNA exonerations are not just single-, double- or triple-blind. *No one* knows when these "experiments" will occur. In most cases, only after the jury reaches its verdict, and the appeals process runs its course, do the lawyers and judges learn that the accused was factually innocent. Not only does this tragic phenomenon provide a way to review what went wrong, it may be a singular moment in the history of criminal justice. The bulk of false convictions came to light through challenges to verdicts that predated the era of widespread DNA testing.[63] Now that DNA testing is widely available, we can expect fewer *post-conviction* DNA exonerations. Suspects can now be cleared by DNA testing before trial. That is a good thing in every respect, except one. It signals an end to our unintended stress testing of the trial process. Whatever lessons are to be learned, we need to learn them now.

On to the details. There is no official source of data on false convictions. Instead, there are a few studies. Legal scholar Brandon Garrett conducted one of the most-cited studies of

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60 *Cf.* Leo, Neufeld, Drizin & Taslitz, *supra* note 21, at 777 ("[C]riminal trials overwhelmingly fail as a safeguard for protecting innocent false confessors from the fate of wrongful conviction and incarceration."). It is possible that evidence rules "work" by allowing factually accurate information to be presented to the jury, even in cases that result in false convictions. This Article need not wade into that complexity, however, because of the dichotomous types of evidence called into question by the false conviction research. When a defendant is later exonerated by DNA evidence, a positive eyewitness identification introduced at trial, as well as any confession relayed by police or jailhouse informants, necessarily pointed the jury to the factually inaccurate verdict.

61 *See* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 85 (2008) ("Reading the pertinent literature, one might think that wrongful acquittals never occur."); Marvin Zalman & Matthew Larson, *Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation*, 79 ALB. L. REV. 941, 943 n.10 (2015) ("A wrongful acquittal is as equally inaccurate as a false conviction.").

62 *See infra* supbart II.A.

63 *See* Brandon L. Garrett, *Convicting the Innocent Redux*, 48–49, 53, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION (Daniel S. Medwed ed. 2017).

DNA exonerations for his 2011 book, *Convicting the Innocent*.[64] Garrett updated this study in 2017, adding eighty DNA exonerations that occurred after 2011.[65] By providing examples where a guilty verdict directly clashes with the defendant's factual innocence, Garrett's collection of over 360 cases offers valuable raw material with which to test the evidence rules for accuracy.[66]

There is another, ongoing study of wrongful convictions curated by University of Michigan Law School: The National Registry of Exonerations (NRE). "The National Registry of Exonerations reports every known exoneration in the United States since 1989, a total of 2,265 as of August 29, 2018."[67] The NRE is not limited to DNA exonerations.[68] The criteria for inclusion on the NRE is as follows:

> "Exoneration" . . . means that a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.[69]

As the above-quoted definition indicates, the NRE includes some cases that may only represent "wrongful" (legally flawed) as opposed to "false" (factually inaccurate) convictions.[70] For example, over 200 of the cases in the registry involve defendants who were convicted, but then received new trials and were

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64 GARRETT, *supra* note 3.

65 Garrett, *supra* note 63, at 44. Garrett's database can be accessed at the following link: https://www.convictingtheinnocent.com/ [https://perma.cc/49BB-F4MJ]. Garrett's database of cases is drawn from the Cardozo Innocence Project, which lists all collected wrongful conviction cases here: https://www.innocenceproject.org/all-cases/ [https://perma.cc/4ML9-P5F5].

66 *See DNA Exoneration Database*, CONVICTING THE INNOCENT, https://www.convictingtheinnocent.com/ [https://perma.cc/49BB-F4MJ] (last visited Apr. 15, 2020).

67 NAT'L REGISTRY OF EXONERATIONS, MILESTONE: EXONERATED DEFENDANTS SPENT 20,000 YEARS IN PRISON 2 (2018), http://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf [https://perma.cc/P7RN-2B3E]

68 NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018, at 5 (2019), http://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf [https://perma.cc/R3SQ-5QGW] ("Overall, DNA exonerations now account for 20% of the exonerations in the Registry through 2018 (484/2,372).").

69 SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 7 (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/L26J-9BK8].

70 *Cf.* Kansas v. Marsh, 548 U.S. 163, 195 (2006) (Scalia, J. concurring) (critiquing broad criteria for exoneration in Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529 (2005)).

acquitted.[71] These defendants' legal innocence is settled, but their factual innocence remains at least arguable. At the same time, the NRE presents a larger data sample and a broader reflection of the American criminal justice system. DNA exonerations from the past decades typically occur in cases of sexual violence and murder.[72] The NRE includes those cases, but also a wide variety of other cases, like drug crimes or robberies, that do not typically involve DNA evidence.[73]

Both Garrett's DNA exoneration studies and the NRE's broader collection of exonerations are valuable for our purposes. In particular, both endeavor to determine "what went wrong"[74] by identifying patterns in the cases that culminate in convictions of the innocent. Those findings have been distilled into a familiar, "canonical list" of the primary contributors to later-overturned convictions.[75] While there are distinctions between the NRE and Garrett's data, both data sets agree on the evidentiary contributors to false convictions that belong on that list: "eyewitness misidentification, flawed scientific evidence, informant testimony, [and] false confessions."[76]

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71 NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1,600 EXONERATIONS 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf [https://perma.cc/D6V4-538F].

72 *See* GARRETT, *supra* note 3, at 217–18.

73 NAT'L REGISTRY OF EXONERATIONS, *supra* note 71, at 3–4.

74 GARRETT, *supra* note 3.

75 CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 25 (Gerald Uelmen & Chris Boscia eds., 2008), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=httpsredir=1&article=1000&context=ncippubs [https://perma.cc/P9LH-R92Q] ("The most frequently identified causal factors include misidentification by eyewitnesses, false confessions, perjured testimony, mishandling of forensic evidence, withholding exculpatory evidence, and the incompetence of defense lawyers."); FLA. INNOCENCE COMM'N, FINAL REPORT TO THE SUPREME COURT OF FLORIDA 17 (2012), https://www.flcourts.org/content/download/218230/1975326/Innocence-Report-2012.pdf [https://perma.cc/WR3Z-DDT5] ("During the two years of its existence, the Commission identified five causes for wrongful convictions: Eyewitness identification, false confessions, informants and jailhouse snitches, improper/invalid scientific evidence, and professional responsibility."); Gross, *supra* note 55, at 186 ("There is a canonical list of factors that lead to false convictions: eyewitness misidentification; false confession; misleading, false, or fraudulent forensic evidence; testimony by highly motivated police informants such as "jailhouse snitches"; perjury in general; prosecutorial misconduct; ineffective legal defense."); Laurin, *supra* note 18, at 1478 (recognizing the "key evidentiary pathologies that emerge from the dataset," include "eyewitness misidentification, flawed scientific evidence, informant testimony, false confessions, and weak defenses," which "are consistent with the 'canonical' list of factors" that appear in the work "of every . . . scholar of wrongful convictions").

76 Laurin, *supra* note 18, at 1478 (recognizing that the "key evidentiary pathologies that emerge from the dataset" include "eyewitness misidentification, flawed scientific evidence, informant testimony, false confessions, and weak de-

In sum, we have a valuable sample of cases to study. It is not a random sample[77] and we must be wary of drawing broader lessons than are warranted. But the sample has much going for it. It is a sample of case evidence policymakers should care deeply about: *innocent* defendants convicted of *serious* crimes. This may be an imperfect audit, but it is as good a tool as we have ever possessed to try to determine whether the evidence rules work.

II.
THE RESULTS

This Part reports the "results" of the American criminal justice system's unintentional stress test of the evidence rules and explores their implications. It strives to use the exoneration data to assess how the evidence rules fared. As discussed below, the results are instructive not only with respect to the rules implicated in false convictions, but also for those that appear to play little role. Perhaps most importantly, the discussion exhumes largely-forgotten policy choices that facilitate false convictions. Modern courts, scholars and policymakers troubled by the conviction of the innocent should be eager to revisit these choices.

A. The Evidence Rules Remain Important

The typical argument for the ongoing importance of evidence rules in a system dominated by pretrial settlement is that the rules indirectly influence negotiated outcomes. Since criminal defendants and prosecutors weigh the benefits of a guilty plea against a trial alternative, the admissibility of evidence (and thus the evidence rules) plays an important role in influencing the parties' plea negotiations, even if few trials actually occur.[78]

The false conviction data supports a more direct argument for the importance of evidence rules. Existing exoneration data presents a particularly striking contrast between the typical defendant and the factually innocent defendant. Innocent defendants appear to go to trial more frequently. Ninety-five per-

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fenses," which "are consistent with the 'canonical' list of factors" that appear in the work "of every . . . scholar of wrongful convictions.").

77 *See infra* subpart II.A.

78 *See* Demleitner, *supra* note 17 ("[S]ettlements in civil cases and plea-bargaining in criminal cases are not necessarily indicative of the irrelevance of evidence law since evidentiary rules may determine whether a party will agree to a settlement or a plea-bargain.").

cent of convictions result from guilty pleas.[79] In the data we have so far, that number plummets to 17 percent of the convictions of those later exonerated (the NRE), and only 8 percent for those later proven innocent by DNA testing.[80]

The statistical evidence regarding innocence and guilty pleas is both critically important for modern criminal justice debates and clouded with uncertainty. There are reasons to credit the evidence and reasons to treat it warily.[81] Let's start with the reasons for caution. Guilty plea rates vary by offense. The types of crimes that typically lead to DNA exonerations have lower guilty plea rates (rape, 83 percent and murder, 69 percent).[82] Still, even adjusting for offense type, innocent defendants appear to go to trial far more frequently.[83]

Other reasons for caution include the ad hoc nature of the exoneration process. It takes time, resources, and expertise to overturn a conviction, and these commodities are finite. All things being equal, we should expect advocates to focus on defendants convicted after trial rather than those who plead guilty. Defendants who plead guilty typically receive shorter sentences than those convicted at trial.[84] An already released or soon to be released defendant will be a lower priority for

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79 Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

80 GARRETT, *supra* note 3, at 150 ("6% of the exonerees (16 of 250) pleaded guilty"); Garrett, *supra* note 63, at 44 (8 percent in 2017 update); Gross, *supra* note 5, at 756 ("17% pled guilty, 67% were convicted at trial by juries and 7% were convicted by judges").

81 *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 180 (2014) (noting that "factually innocent defendants may plead guilty because they are afraid that they will be punished (often quite severely) for exercising their Sixth Amendment right to a jury trial.").

82 GARRETT, *supra* note 3, at 151.

83 The exoneration data overwhelmingly consider serious cases. It says little about the likelihood of guilty pleas in minor cases where, for example, a detained defendant can face a choice between a lengthy delay pending trial and a guilty plea that results in immediate release. *See, e.g.*, Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR (Jan. 22, 2010, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=122725819 [https://perma.cc/A466-HJYY] (describing intense pressures on defendants to obtain release through a plea bargain prior rather than wait for trial).

84 *See* Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 157 (2014) (analyzing empirical study of murder defendants in Philadelphia and noting that for similarly situated cases, "[d]efendants who are convicted after trial are typically convicted of more serious charges . . . and receive lengthier sentences").

exoneration efforts.[85] In addition, the act of pleading guilty generates legal and rhetorical obstacles to subsequent claims of innocence.[86]

While there are reasons to weigh the relative frequency of reports of post-trial (as opposed to post-guilty-plea) exonerations warily, there are reasons to believe the imbalance reflects an underlying truth.[87] When accused of a serious crime, an innocent defendant should be more reluctant to plead guilty, a process that typically requires the defendant to formally admit guilt while under oath in front of media, family, and victims.[88] Innocent defendants should also possess inflated optimism about the prospects for acquittal. The trial process is a test of the prosecution's evidence. A factually innocent defendant should be more optimistic than a guilty defendant that the prosecution's evidence will fail.[89]

It is also important to note the extreme contrast presented in the data. There is a substantial gap between the rates of conviction by guilty plea (as opposed to trial) for all defendants (95 percent), and the rate of conviction by guilty plea (as opposed to trial) for convicted defendants who are subsequently cleared by DNA testing (8 percent).[90] The raw numbers make this imbalance even more striking. For example, in the federal system in 2016, almost 64,000 defendants pled guilty to felony charges while only about 1,500 were convicted after trial.[91] In Texas in that same year, 101,598 convictions resulted from a

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85 A complicating factor that points in the other direction is that non-detained defendants will be better able to assist in (or even direct) their exoneration than those in custody.

86 *Cf.* Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *see also infra* note 88.

87 *See* Gazal-Ayal & Tor, *supra* note 16.

88 *See* Brady v. United States, 397 U.S. 742, 748 (1970) ("Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."); Scheele v. State, 953 So. 2d 782, 785 (Fla. Dist. Ct. App. 2007) (explaining that a plea colloquy "is a formal ceremony, under oath, memorializing a crossroads in the case"). In some jurisdictions, defendants plead guilty without taking an oath. *See* FED. R. CRIM. P. 11(b)(1) ("[T]he defendant may be placed under oath, and the court must address the defendant personally in open court.").

89 Gazal-Ayal & Tor, *supra* note 16, at 368 (pointing to psychological research that supports the intuitive notion that innocent defendants would hold "systematically more optimistic beliefs than guilty defendants, which make trial prospects seem more attractive to the former than they appear to the latter").

90 *See* Missouri v. Frye, 566 U.S. 134, 135, 143 (2012), 566 U.S. at 135, 143 (2012); Garrett, *supra* note 63, at 44.

91 DEP'T OF JUSTICE, BUREAU OF CRIME STATISTICS, *Federal Justice Statistics, 2015-2016*, at 9 (2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf [https://perma.cc/EU9M-S78B].

guilty plea while 5,788 came after trial.[92] Given this numerical imbalance, the relatively infrequent appearance of guilty pleas in the false conviction data looks all the more significant. In sum, while the numbers we have may be misleading, as of now, they point dramatically in a single direction.[93]

The prospect that an "innocence effect"[94] substantially influences guilty plea rates is a perverse sliver of positive news in the exoneration data. Garrett observes in his updated study: "Not only do DNA exonerees disproportionately consist of individuals who had trials . . . but some DNA exonerees endured multiple trials, after receiving reversals on appeal or post-conviction, before eventually being exonerated."[95] The prevalence of trial convictions in the innocence data suggests that the evidence rules matter, not only indirectly in shaping plea bargains and settlements, but directly as well. Despite the well-documented pressures and distortions in our system,[96] it appears from the data we have so far that a significant portion of innocent defendants accused of serious offenses go to trial. We need to look closely at why, in such circumstances, the rules fail.

B. Evidence Rules that Fail the Innocent

The evidence rules have so far survived the Innocence Movement largely unscathed.[97] Yet all four of the primary evidentiary contributors to false convictions traverse these

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92 OFFICE OF COURT ADMIN., STATE OF TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, at Detail 10 (2016), https://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf [https://perma.cc/HX2B-WURL].

93 Investigating this important question, Oren Gazal-Ayal and Avishalom Tor scoured a "diverse body of evidence," including post-conviction interviews, exoneration data, and controlled experiments. Gazal-Ayal & Tor, *supra* note 16, at 347. They conclude that there is a strong "innocence effect." *Id.* Looking at similar data, others, like Russell Covey, suggest that the effect is largely an artifact of selection effects. *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1164 (2013) ("[T]he fact that so many mass exoneration cases were resolved by guilty pleas should erode any perception that actually innocent defendants almost uniformly refused to plead guilty."); Garrett, *supra* note 3, at 152–53 ("Just because few of these exonerees pleaded guilty does not mean that wrongful convictions are less of a problem for people who plead guilty . . . .").

94 Gazal-Ayal & Tor, *supra* note 16, at 339.

95 Garrett, *supra* note 63, at 44.

96 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467 (2004) (highlighting the "many structural impediments that distort bargaining in various cases").

97 *See supra* note 21 and accompanying text.

rules.[98] The rule covering expert testimony is regularly recognized in this context.[99] This subpart highlights the typically unnoticed rules applicable to the other three evidentiary contributors to false conviction. These rules are uncontroversial today. Yet as the following discussion shows, they arose out of eerily prescient historical debates centered on the danger of convicting the innocent.

1. *Eyewitness Identifications*

Those who attempt to draw lessons from the exoneration data frequently highlight eyewitness identification errors.[100] Garrett's most recent study finds that 72 percent of convictions of innocent defendants involved mistaken eyewitness identifications.[101] Importantly, there are two potential moments when the prosecution presents a witness identification to the factfinder. One occurs during the trial itself when the prosecutor asks the witness to point out the perpetrator in court.

It has long been recognized, however, that in-court identifications are "unsatisfactory and inconclusive."[102] Given the defendant's prominent place on the courtroom stage,[103] a witness' selection of the person sitting where the defendant sits during trial is pro forma.[104] John Henry Wigmore articulated the long-standing received wisdom as follows:

> Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there, is of little testimonial force. After all that has

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98 For a discussion of those correlates and how they are identified, see *infra* subpart I.B. For a discussion of the use of the term "correlates" as opposed to "causes," see *supra* note 18.

99 *See, e.g.*, Daniel J. Capra, *Foreword: Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1459, 1459–61 (2018) (discussing 2017 symposium conducted by the Judicial Conference Advisory Committee on Evidence Rules to consider changes to Rule 702).

100 *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78 (2008) ("The overwhelming number of convictions of the innocent involved eyewitness identification—158 of 200 cases (79%).").

101 Garrett, *supra* note 63, at 46.

102 FED. R. EVID. 801(d)(1)(C) advisory committee's note.

103 *Cf.* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 575 (2008) ("While a defendant sits in court . . . he is at center stage and on display for the jury.").

104 30B CHARLES ALAN WRIGHT & JEFFREY BELLIN, FEDERAL PRACTICE & PROCEDURE § 6762 (2020) [hereinafter WRIGHT & BELLIN] ("The testifying witness should be expected to pick the defendant out in most courtroom settings even if unable to make an identification in less suggestive circumstances.").

> intervened, it would seldom happen that the witness would not have come to believe in that person's identity.[105]

As a result of the superficial nature of an in-court identification, prosecutors have long sought to introduce more compelling identification evidence in the form of the witness' prelitigation identification of the defendant, typically in some kind of lineup.[106]

Testimony about prior identifications can take two forms: (1) the witness describes the prior identification procedure and its outcome; or (2) a police officer who participated in the earlier procedure testifies about what transpired.[107] The prosecution may present both forms of the evidence to maximize its impact.[108] Either way, the factfinder learns about an out-of-court statement: the witness stating on an earlier occasion, "That is the person who robbed me."[109] Since the prosecutor introduces the statement as proof of that fact, it is hearsay.[110]

Across the country, prior statements of identification are admissible despite the hearsay prohibition.[111] States typically

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105 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 1130 (1904) (emphasis omitted).

106 *Cf.* Gilbert v. California, 388 U.S. 263, 273 (1967) ("[T]he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury. . . .").

107 *See* WRIGHT & BELLIN, *supra* note 104, § 6763 ("[C]ourts commonly allow another person to testify about an eyewitness's out-of-court identification, so long as the eyewitness also testifies at the trial and is subject to cross-examination about the identification.").

108 *Id.*

109 FED. R. EVID. 801(d)(1)(C) advisory committee's note ("[I]t falls beyond a doubt in the category of prior out-of-court statements.").

110 *See* FED. R. EVID. 801(a)–(c) (defining "hearsay" as a statement made outside the current hearing, offered to prove the "truth of the matter asserted" by the out-of-court speaker); FED. R. EVID. 801(a) advisory committee's note ("Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement."); *Gilbert*, 388 U.S. at 272 n.3 ("The recent trend . . . is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial."); Murphy v. State, 51 S.W. 940, 943 (Tex. Crim App. 1899) (excluding evidence of prior identification on grounds that "[t]his was hearsay and inadmissible.").

111 BARBARA E. BERGMAN, NANCY HOLLANDER & THERESA M. DUNCAN, 2 WHARTON'S CRIMINAL EVIDENCE § 6:13 (15th ed. 2019) ("Most states follow the federal rule."). Some rules, like the federal rules, declare this evidence "not hearsay" (despite the fact that it meets the hearsay definition) while others style it an exception. *See* FED R. EVID. 801(d)(1)(C); *see also* discussion *infra* note 143. I use "exception" in the text because, analytically, the admission of the evidence is an exception to the general prohibition of hearsay. But nothing turns on the word choice. Nebraska used to have no hearsay exception for prior identifications, see State v. Wilson, 754 N.W.2d 780, 788 (Neb. Ct. App. 2008) (highlighting absence), but amended its code in 2019 to include a provision that mirrors the federal rule. *See* Legis. B.

adopt the formulation in Federal Rule of Evidence 801(d)(1)(C), defining as "not hearsay" an otherwise hearsay statement that "identifies a person as someone the declarant perceived earlier," so long as the declarant testifies.[112] There is little modern controversy over this rule.[113] The Reporter for the Advisory Committee on the Federal Rules of Evidence recently summarized the consensus: "the existing Rule 801(d)(1)(C) is working well and should be retained."[114]

The rationale for the admission of out-of-court statements of identification tracks its value as compelling prosecution evidence. As the Ninth Circuit explains: "The reasons for admitting identification statements as substantive evidence are that out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial . . . ."[115] The Advisory Committee's Note to the hearsay exception similarly touts the relative superiority of out-of-court identifications, and emphasizes that the exception "finds substantial support" in the pre-rules case law.[116]

Other than its potential to convict the innocent, then, all seems well with the hearsay exception for prior identifications. This wasn't always the case. After the Advisory Committee proposed the rule with the original Federal Rules of Evidence in 1971, Congress killed it.[117] Senator Sam Ervin, famous for his role in the Watergate hearings,[118] spearheaded the opposition.[119]

392, 106th Leg., 1st Sess. (Neb. 2019). For legislative materials on the change, see Neb. Legislature, *LB392 - Change Hearsay Provisions in the Nebraska Evidence Rules*, https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=37735 [https://perma.cc/HCY3-UC8V] (last visited Apr. 15, 2020).

112 *See* FED R. EVID. 801(d)(1)(C).

113 "In practice, Rule 801(d)(1)(C) has proved relatively uncontroversial." Daniel J. Capra, *Prior Statements of Testifying Witnesses: Drafting Choices to Eliminate or Loosen the Strictures of the Hearsay Rule*, 84 FORDHAM L. REV. 1429, 1445 (2016).

114 *Id.* at 1446.

115 United States v. Elemy, 656 F.2d 507, 508 (9th Cir. 1981).

116 FED. R. EVID. 801(d)(1)(C) advisory committee's note. *See also* David E. Seidelson, *Third-Party Testimony About Prior Identifications and Federal Rule of Evidence 801(d)(1)(C): A Petition for Rehearing*, 8 REV. LITIG. 259, 260–61 (1989) ("Yet, almost all extrajudicial declarations offered to prove the truth of the matters asserted therein are made closer in time to the operative facts. Nevertheless, the hearsay rule generally excludes such declarations.")

117 RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY xii, 331–33 (2015).

118 *See* KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 4 (2007).

119 *See* FRIEDMAN & DEAHL, *supra* note 117, at 331.

While proponents of the prior identification exception later dismissed Congress' resistance as a product of confusion about the distinction between weight and admissibility,[120] Ervin's opposition should not be lightly discounted. Ervin had been a trial lawyer, trial court judge, and highly-respected Justice of the North Carolina Supreme Court.[121] He prided himself on being "one of the few lawyers of his generation" who had read William Blackstone's Commentaries on the Laws of England cover to cover.[122] Ervin's judicial opinions reflect careful attention to the law.[123] One of his most notable opinions draws on Wigmore's canonical evidence treatise to reverse a death sentence, in part, because of the questionable nature of the prosecution's identification evidence.[124] Perhaps the most telling data point is that North Carolina evidence law, in Ervin's time and to this day, does not include a hearsay exception for prior statements of identification.[125] Thus, there is no reason to think Ervin's opposition was not well considered. It was also vehement. Congressman William Hungate later reported that Ervin's opposition to the prior identification exception was so fierce that it jeopardized the entirety of the evidence rules project.[126] Unfortunately, the only memorialization of the opposition appears in the Senate Judiciary Committee Report that killed the proposal, which expresses a cursory "concern that a person could be convicted solely upon evidence admissible under [the proposed rule]."[127]

Ervin retired shortly after Congress passed the legislation that enacted the Federal Rules of Evidence, without the proposed hearsay exception for prior identifications.[128] After his retirement, Ervin's opponents promptly reintroduced the ex-

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120 PHILIP A. HART, AMENDMENT TO THE FEDERAL RULES OF EVIDENCE, S. REP. NO. 94-199, at 2 (1975) (describing prior objection as "misdirected" because, in part, the hearsay "exception is addressed to the 'admissibility' of evidence and not the 'sufficiency' of evidence").

121 See CAMPBELL, *supra* note 118, at 43, 69, 77.

122 *Id.* at 49.

123 *Id.*

124 State v. Palmer, 52 S.E.2d. 908, 914 (N.C. 1949) (citing JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 415, (3d ed.)).

125 *See* State v. Patterson, 420 S.E.2d 98, 102 (N.C. 1992) (noting distinction between federal and North Carolina law).

126 121 CONG. REC. 31,866 (reporting colloquy in House that a Senator had communicated that "if we did not accept this [stripping out the provision], we would not get the bill"); Capra, *supra* note 113, at 1445 ("[T]he House acquiesced to that rejection in order to ensure passage of the Rules of Evidence.").

127 WRIGHT & BELLIN, *supra* note 104, § 6761 (referencing S. Rep. No. 194 (1975)).

128 Campbell, *supra* note 118, at 296–97; FRIEDMAN & DEAHL, *supra* note 117, at 333.

ception and rushed it through Congress.[129] (The Senate Report justifying reintroduction of the exception frames the renewed interest as arising "[u]pon reflection.")[130] The effort succeeded. With Ervin out of the picture, Congress reversed course and approved the prior identification exception, which went into effect a mere three months after the Federal Rules of Evidence.[131]

The Senate Report on the resurrected prior identification exception acknowledged worries about the type of evidence the rule could permit, emphasizing an intent to allow only: "non-suggestive lineup, photographic and other identifications, made in compliance with the Constitution."[132] Despite these assurances, however, the prior identification hearsay exception does not itself screen for reliability—something that would have represented a ready compromise between Ervin's position and that of his opponents. Instead, the rule leaves "compliance with the Constitution" as the sole safeguard.[133] But the Supreme Court has held that constitutional due process constraints apply only in a narrow circumstance: when state actors manipulate the identification procedure to create "a very substantial likelihood of irreparable misidentification."[134] As explained in the most recent Supreme Court pronouncement on the topic:

> In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant

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129 FRIEDMAN & DEAHL, *supra* note 117, at 333.

130 S. Rep. No. 94-199, at 2.

131 FRIEDMAN & DEAHL, *supra* note 117, at 333.

132 S. Rep. No. 94-199, at 1, 3 (noting as well that evidence "still must meet constitutional muster" (emphasis omitted)); H.R. Rep. 94-355, at 2 (1975) ("[T]he out-of-court statement of identification must still meet constitutional standards"); *see also* WRIGHT & BELLIN, *supra* note 104, § 6761 n.1 ("Congress stripped the proposed Rule 801(d)(1)(C) out of the rules submitted to it by the Supreme Court. Congress then promptly added the rule back in shortly after it enacted the original Federal Rules of Evidence.").

133 S. Rep. No. 94-199, at 1.

134 Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)); *see also id.* at 241 ("The due process check for reliability, . . . comes into play only after the defendant establishes improper police conduct.").

> testimony typically falls within the province of the jury to determine.[135]

Another portion of the Supreme Court's opinion expressly leaves reliability screening of eyewitness identifications to the "protective rules of evidence."[136] With the Supreme Court and the rules of evidence deferring to each other on the question of reliability, most jurisdictions end up with no effective reliability screen for out-of-court hearsay identifications.[137] The opponent of the evidence receives only the opportunity to cross-examine the declarant-eyewitness—a witness who may adamantly believe in the truthfulness of the prior identification even when mistaken.[138]

2. *Confessions to Law Enforcement*

Researchers highlight false confessions to police as a substantial contributor to false convictions.[139] In his updated study of DNA exonerations, Garrett finds that 21 percent of the convictions of innocent defendants involved false confessions.[140] The NRE's most recent report states that a false confession appeared in 13 percent of convictions that led to exonerations, including 21 percent of homicides.[141]

A prosecutor can most easily lay the foundation for admitting a defendant's confession through the testimony of the po-

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135 *Id.* at 231–32.

136 *Id.* at 233, 245.

137 My research assistant, Bethany Fogerty, and I reviewed the state analogues and found that most states have rules that are substantially identical to the federal variant. Table on file with author. A few states (e.g., Connecticut, Minnesota and New Jersey) include additional limits on the admissibility of prior statements of identification. *See, e.g.*, CONN. CODE EVID. 8-5 ("The identification of a person made by a declarant prior to trial where the identification is reliable."); *see also* State v. Henderson, 27 A.3d. 872, 919–21 (N.J. 2011) (creating more rigorous screening under state constitution); State v. Lawson, 291 P.3d 673, 694–95 (Or. 2012) (attempting to construct more rigorous screen of eyewitness identification evidence from rules of evidence); *supra* note 111 (noting the change in Nebraska identification laws).

138 *See* Gary L. Wells, R. C. L. Lindsay & Tamara J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 447 (1979) (explaining phenomenon); *infra* subpart II.C.

139 Garrett, *supra* note 100, at 88–89 ("In thirty-one cases (16%), a false confession was introduced at trial. . . . The confessions were particularly powerful at trial, perhaps in part because in some cases law enforcement supplied false facts to bolster false confessions.").

140 Garrett, *supra* note 63, at 46.

141 NAT'L REGISTRY OF EXONERATIONS, *supra* note 71, at 11. The NRE's 2018 report collects nineteen new cases involving false confessions out of a total of 151 new exonerations, or 12.5 percent. NAT'L REGISTRY OF EXONERATIONS, *supra* note 68, at 2.

lice officer who interrogated the defendant.[142] The officer tells the jury about the defendant's incriminating statements, or explains the origins of a recording or document memorializing the defendant's words. The officer's testimony introduces the defendant's out-of-court statement ("I committed the robbery") as proof of the matter asserted in that statement. That's hearsay.[143]

Following the model of Federal Rule of Evidence 801(d)(2), American jurisdictions reflexively admit confessions, despite the hearsay prohibition, as "an opposing party's statement."[144] These confessions constitute powerful evidence: "the trial equivalent of a deadly weapon."[145] Nevertheless, the Advisory Committee emphasizes that "[n]o guarantee of trustworthiness is required."[146] The underlying rationale for admissibility is a sense of fair play. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[147]

Courts and litigants spend little energy pondering the admissibility of criminal defendants' statements under the evidence rules. Modern evidence doctrine offers almost nothing to ponder. "The only question is did the statements come from the party's mouth, pen, keyboard, etc. If the answer is yes, and the statements are offered by the opposing party, the statements qualify for admission . . . ."[148] Litigants still fight over the admissibility of confessions, of course, but courts funnel

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142 *See* Leo, Neufeld, Drizin & Taslitz, *supra* note 21, ("When the prosecution seeks to introduce into evidence a defendant's confession, invariably it relies upon the state's evidentiary rules regarding admissions of a party opponent.").

143 *See* FED. R. EVID. 801(a)–(c) (defining hearsay). Through "definitional sleight of hand," the Federal Rules of Evidence redefine such statements, when offered by an opposing party, as "not hearsay." WRIGHT & BELLIN, *supra* note 104, § 6731. These semantic contortions are required because the statements are, in fact, hearsay under the definition of the term. *See* FED. R. EVID. 801(a)-(c); *cf.* Opper v. United States, 348 U.S. 84, 90 (1954) ("Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial."); Leo, Neufeld, Drizin & Taslitz, *supra* note 21 ("When the prosecution seeks to introduce into evidence a defendant's confession, invariably it relies upon the state's evidentiary rules regarding admissions of a party opponent.").

144 FED. R. EVID. 801(d)(2).

145 United States v. McKeon, 738 F.2d 26, 32 (2d Cir. 1984).

146 FED. R. EVID. 801(d)(2) advisory committee's note; Jewell v. CSX Transp., Inc., 135 F.3d 361, 365 (6th Cir. 1998) ("Trustworthiness is not a separate requirement for admission under Rule 801(d)(2)(A).").

147 FED. R. EVID. 801(d)(2) advisory committee's note.

148 WRIGHT & BELLIN, *supra* note 104, § 6773.

these fights through Fifth Amendment criminal procedure doctrine.[149]

To justify the ready conduit for admission of an opposing party's hearsay statements, the Advisory Committee that drafted the federal rules pointed to common law cases doing so, and "the apparently prevalent satisfaction with the results."[150] Oddly, the Committee cites Wigmore as authority on this point.[151] Wigmore, it is true, stated the general rule in simple terms: "Any utterance made by a party . . . asserting any relevant fact, in express words or by implication, and offered against the party, is termed an Admission, and is receivable as a piece of evidence."[152] But the Advisory Committee's citation is misplaced. Wigmore followed the general rule with a series of limitations on a distinct subset of party-opponent statements, "confessions,"[153] a topic to which he devoted fifty-two sections of his canonical evidence treatise.[154] The topic resonated beyond the legal academy. The Chief Justice of the Missouri Supreme Court wrote in 1881: "There is no branch of the law of evidence in such inextricable confusion as that relative to confessions."[155]

The Missouri Chief Justice was alluding to a prominent vein of the common law of evidence that required judges to screen confessions for reliability. Courts closely scrutinized this "doubtful species of evidence" which "at all times ought to

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149 *See infra* note 178.

150 FED. R. EVID. 801(d)(2)(C) advisory committee's note.

151 *Id.* The Advisory Committee also cites Edmund Morgan, who similarly carves out confessions as a distinct question. *See* EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 284 (1962). The other writer cited by the Advisory Committee does not discuss the "confessions" debate and seems focused on the civil context. *See* John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 579 (1937).

152 JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 201, Rule 128 (3d ed. 1942).

153 *Id.* at 203, Rule 130(a) ("The confession of the accused in a criminal case is admissible only on the conditions named in Rule 135 . . . ." (emphasis omitted)); *id.* at 217–22, Rule 135 (listing series of limitations designed to ensure reliability when a confession was "not made in open Court").

154 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW §§ 815–867 (1904); WIGMORE, *supra* note 105, §§ 815–867, § 1050 (defining confessions as "a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge"); *see also* WIGMORE, *supra*, § 815 ("The situation of a person charged with crime is obviously peculiar with reference both to the circumstances under which these advantages will be presented, as well as to their nature and force; and thus, in history and in principle, statements in the nature of confessions of guilt by an accused person stand somewhat apart and call for a separate treatment in the law of evidence.").

155 State v. Patterson, 73 Mo. 695, 705 (1881).

be received with great caution."[156] Importantly, this restriction did not arise from the Fifth Amendment privilege against self-incrimination. Enforcement of the constitutional privilege sought to deter abusive government practices, protecting the guilty (whose confessions were true) as much as the innocent (whose confessions were false).[157] Evidence law's hearsay-confession doctrine, by contrast, was a common law rule of evidence directed exclusively toward "exclud[ing] self-criminating statements which are false."[158] Vexed by the mounting confusion at the turn of the century, Wigmore dedicated a section of his treatise to clarifying that under the evidence rule, "a confession is not rejected because of any connection with the *privilege against self-crimination*."[159]

Wigmore himself despised the common law's resistance to confessions, calling it "an exhibition of sentimentalism toward criminals."[160] He rationalized the rule, arising "during the latter half of the 1700s and the first part of the 1800s," as "a natural reaction from the harshness and unjust severity prevailing in penal administration up to that time."[161] Reminiscent of Judge Hand's skepticism about "the ghost of the

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156 State v. Bostick, 4 Del. 563, 564 (Del. Ct. Oyer & Terminer 1845) ("But it has been said by some eminent jurists, that, as verbal confessions are so often misunderstood or misrepresented, from a want of attention, the improper use of language, or the uncertainty of memory, they are at best, but a doubtful species of evidence; and at all times ought to be received with great caution."); *see infra* note 167 and accompanying text.

157 *See, e.g.*, Twining v. State of N.J., 211 U.S. 78, 91 (1908) ("It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.").

158 WIGMORE, *supra* note 105, § 823 (emphasis omitted); *see* Garrard v. State, 50 Miss. 147, 151 (1874) ("For the object of all the care which is taken to exclude confessions which are not voluntary, is to exclude testimony not probably true."); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward A Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 481 (2005) ("The second, distinct confession doctrine that developed in England and the Colonies in the decades leading up to the *Bram* decision was simply a common law rule of evidence designed to prevent the introduction of unreliable evidence at trial.").

159 WIGMORE, *supra* note 105, § 823. The section is titled, "Other Theories not sanctioned; Self-Crimination Privilege, distinguished." *Id.* It begins: "This principle of testimonial untrustworthiness being the foundation of exclusion, it follows that the exclusion is not rightly rested on certain other possible and occasionally plausible theories." *Id.*

160 *Id.* § 867. For a critique of Wigmore's reading of the history, see George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 255, & n.65 (1991) ("Wigmore's analysis is, of course, but one reading of the historical data.").

161 WIGMORE, *supra* note 105, § 815.

innocent man convicted,"[162] Wigmore thought that, in his day, "the danger of a false statement induced by an important advantage" is "of a slender character and the cases of that sort are of the rarest occurrence."[163] Nevertheless, the doctrine remained a prominent component of the common law, so Wigmore dutifully chronicled it, warts and all.[164]

The common law's treatment of confessions presents a remarkable contrast to present day evidence rules.[165] A leading English case, *Rex v. Warickshall* (1783), set out the common law doctrine:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[166]

An early American judicial opinion remarked that the law jealously protected against false confessions, such that even "telling the prisoner, what he said would be *used in his favor* on his trial," disqualified any subsequent statements.[167] The case law includes vivid examples of courts resisting the admission of confessions that were not *entirely* voluntary and thus indispu-

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162 *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923); *supra* Introduction.

163 WIGMORE, *supra* note 105, § 867. Wigmore goes on to list some of "the most notable" examples, including this chilling example: "1660, Perry's Case, 14 How. St. Tr. 1312 (one of two brothers confessed that he, his brother, and his mother had murdered his master; they were executed, but two years afterward, the master returned home, and explained that he had been kidnapped and sold to the Turks; it was never understood why Perry falsely confessed)." *Id.* § 867 n.1.

164 *Id.* §§ 815-867.

165 For a discussion of modern voluntariness doctrine, see Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 643 (2006) ("Many judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects.").

166 Rex v. Warickshall (1783) 168 Eng. Rep. 234, 234–35; 1 Leach 262, 263–64) (footnote omitted); *see also* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 207–08 (1992) ("At the head of, and clearly influencing, the entire line of cases stands *Warickshall*.").

167 State v. Bostick, 4 Del. 563, 564 (Del. Ct. Oyer & Terminer 1845) (emphasis in original).

tably "intitled to credit."[168] In one influential 1783 case, Jacob Thompson came under suspicion for passing a forged check.[169] When Thompson could not account for his possession of the check to a curious official, the official stated, "unless you give me a more satisfactory account I shall take you before a Magistrate."[170] Thompson confessed. The court excluded the confession and acquitted Thompson.[171] Its opinion explained: "This scarcely amounts to a threat, but it is certainly a strong invitation to him to confess. . . . The prisoner was hardly a free agent at the time."[172] The contrast is jarring. If modern American courts, like the Seventh Circuit in the *Dassey* case, applied this "free agent" language in weighing the admissibility of confessions, false confessions would all but disappear from exoneration narratives.[173]

Paradoxically, the pinnacle of the hearsay confession doctrine in the United States came in an opinion that sowed the seeds of its demise. In an 1897 Supreme Court case, *Bram v. United States*,[174] the Supreme Court unreservedly embraced the doctrine. The Court's opinion reads to the modern ear like a revolutionary tract:

> But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . . [T]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.[175]

Suggesting a full embrace of the common law's "sentimentalism toward criminals,"[176] *Bram* cites the *Thompson* case sum-

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168 *Warickshall*, 168 Eng. Rep. at 234–35.

169 Rex v. Thompson (1783) 169 Eng. Rep. 248, 248; 1 Leach 291, 291.

170 *Id.*

171 *Id.* at 249.

172 *Id.*; *see generally* Herman, *supra* note 166, at 198–99 (discussing lengthy history of *Rex v. Thompson*).

173 *See Dassey*, 877 F.3d at 304 ("[T]he Supreme Court allows police interrogators to tell a suspect that 'a cooperative attitude' would be to his benefit."); *see also* Fare v. Michael C., 442 U.S. 707, 727 (1979) (rejecting challenge to confession elicited from sixteen-year-old who "wept during the interrogation" and where "police did indeed indicate that a cooperative attitude would be to respondent's benefit").

174 168 U.S. 532 (1897).

175 *Id.* at 542–43 (quoting 3 WILLIAM OLDNALL RUSSELL, RUSSELL ON CRIMES 478 (6th ed. 1896)).

176 WIGMORE, *supra* note 105, § 867.

marized above and incorporates that case's hyper-protective "free agent" language.[177]

Most significantly, however, the *Bram* Court described its analysis as "controlled by . . . the Fifth Amendment to the Constitution of the United States."[178] This observation was historically inaccurate.[179] Wigmore sharply condemned *Bram*'s language: "[N]o assertions could be more presumptuously unfounded. The history of the two rules . . . shows that there never was any connection or association between the constitutional clause and the confession-doctrine."[180] Alas, the Supreme Court outranks even Wigmore, and its error would prove calamitous for innocent defendants.

As Wigmore emphasized, at the time of the *Bram* decision there were two prominent sources of authority regulating the admission of confessions: (1) an evidence rule focused on reliability and (2) a constitutional rule focused on process. A useful contrast can be drawn to modern English law which, as in the common law tradition that it shares with the United States, directs judges to exclude confession based on two distinct grounds: (1) "oppression" of the accused, and (2) unreliability.[181] In the United States, only the first ground survives.

The Supreme Court's motives were likely otherwise, but by conflating what had previously been separate doctrines, the Court's opinion in *Bram* steered American analysis of the admissibility of confessions away from reliability-based evidence law and into process-focused Fifth Amendment doctrine. Over

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177 *Bram*, 168 U.S. at 551–52, 564 (noting that "the statements of Bram were not made by one who, in law, could be considered a free agent").

178 *Id.* at 542–43 ("In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"); *see also* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 2 CRIMINAL PROCEDURE § 6.2(a) (4th ed. 2019) ("In the 1897 case of *Bram v. United States*, the Court appeared to adopt the 'radically different approach' of basing exclusion upon violation of the Fifth Amendment privilege against self-incrimination, but the Court later pulled back from that position.") (footnotes omitted)).

179 *See* Godsey, *supra* note 158, at 478 (critiquing *Bram* because the cases it relied on "are historically unrelated to the self-incrimination clause").

180 WIGMORE, *supra* note 105, § 823 n.8; *cf.* Herman, *supra* note 166, at 171 (identifying consensus that Wigmore "was historically correct").

181 *See* Police and Criminal Evidence Act 1984, c. 60, § 76(2) (UK) (barring admission of confession made by an accused person if the prosecutor cannot show beyond a reasonable doubt that the confession was not obtained: "(a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof").

time, Fifth Amendment doctrine became less protective, dominated by *Miranda* warnings[182] and the notoriously permissive constitutional voluntariness analysis applied in the *Dassey* case.[183] Once entangled with the constitutional inquiry, what remained of the common law's reliability-focused evidence rule slowly bent toward process-focused constitutional doctrine, and then vanished entirely. The precursors to modern evidence law, the American Law Institute's 1942 *Model Code of Evidence* and the 1953 *Uniform Rules of Evidence*, included hearsay rules specific to "confessions."[184] The Federal Rules of Evidence, by contrast, contain no reference to confessions at all—a position that spread to the States along with the wildly popular Federal Rules.[185]

As the Innocence Movement uncovers the danger of unreliable confessions, the "branch of the law of evidence"[186] that once severely restricted their admission is now a historical curiosity. Eighteenth century common law cases invoked a pure version of voluntariness ("free agent") that bears no resemblance to modern American conceptions.[187] And, most importantly, the common law cases referenced this pure form of voluntariness as a means of ensuring reliability, not a substitute for it.[188] "Confessions [were] received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit."[189] Now, the sole remaining screen

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182 *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966).

183 *See supra* Introduction (discussing *Dassey* case); *cf.* Berkemer v. McCarty, 468 U.S. 420, 433 (1984) (identifying one of "[t]he purposes of the safeguards prescribed by *Miranda*" as "free[ing] courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary"); Leo, Neufeld, Drizin & Taslitz, *supra* note 21, at 790 ("*Miranda* fails to offer any meaningful protection against the elicitation of false confessions or the admission of false and unreliable confessions into evidence at trial.").

184 *See* AM. L. INST., MODEL CODE OF EVIDENCE 238–45 (1942) (Rule 505 "Confessions"); *Uniform Rules of Evidence*, *in* 62 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 161, 201 (1953) (Rule 63(6) "Confessions").

185 *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018) (noting spread to states). Some vestiges remain, such as a longstanding provision in Georgia state law. *See* GA. CODE ANN. § 24-8-824 (West 2020) ("To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury."); *cf.* Earp v. State, 55 Ga. 136, 137 (1875) (quoting statutory language).

186 State v. Patterson, 73 Mo. 695, 705 (1881).

187 *See, e.g.*, Rex v. Thompson (1783) 169 Eng. Rep. 248, 249; 1 Leach 291, 293 (characterizing a defendant as "hardly a free agent" at the time their confession was coerced).

188 *Id.*

189 Rex v. Warickshall (1783) 168 Eng. Rep. 234, 234; 1 Leach 262, 263. Since the focus was on reliability, not police misconduct, *Warickshall* emphasized that a

on confessions—constitutional law—explicitly rejects inquiries into reliability. *Miranda* doctrine requires warnings not reliability.[190] As for the constitutional voluntariness inquiry, the Supreme Court has said: "the reliability of a confession has nothing to do with its voluntariness."[191] After co-opting the common law hearsay confession rule over a century ago in *Bram v. United States*, the Court now declares, without any hint of irony, that the reliability of confessions is "a matter to be governed by the evidentiary laws of the forum."[192]

3. *Confessions to Jailhouse Informants*

According to Garrett's study, 22 percent of the convictions of DNA exonerees involved false informant testimony.[193] The

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questionable confession must be excluded while physical evidence that stemmed from the confession was properly admitted. *Id.* at 235 ("This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false.").

190 *See* GARRETT, *supra* note 3, at 39–40 ("[T]he Supreme Court has ruled out reliability as a reason to *exclude* a confession . . . ."); Thomas & Bilder, *supra* note 160, at 277 (explaining that *Miranda* "rejected . . . the reliability of the confession . . . as [a] test[ ] of coercion"); *cf.* Lego v. Twomey, 404 U.S. 477, 488 (1972) (asserting that under *Miranda*, "evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts").

191 Jackson v. Denno, 378 U.S. 368, 384–85 (1964); *see also* Rogers v. Richmond, 365 U.S. 534, 543–44 (1961) ("[T]he question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." (footnote omitted)). In an earlier case, the Supreme Court referenced the "unreliability of the confession" as a possible lens through which to reject the admission of a confession of a suspect who was "insane and incompetent at the time he allegedly confessed." Blackburn v. Alabama, 361 U.S. 199, 207 (1960). But that reference seems overwhelmed at this point in light of the Court's more recent, repeated, and more direct, statements to the contrary. *Dassey*, 877 F.3d at 317 (discussing case law and observing that "it is not unreasonable to interpret *Connelly* as foreclosing" an inquiry into reliability).

192 Colorado v. Connelly, 479 U.S. 157, 167 (1986); *cf.* Leo, Neufeld, Drizin & Taslitz, *supra* note 21, at 764 ("Most state courts continue to apply federal due process criteria to evaluate the admissibility of confession evidence, yet perversely these criteria are concerned exclusively with the so-called voluntariness, not the reliability, of confession evidence.").

193 Garrett, *supra* note 63, at 46; *see also* ROB WARDEN, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004) ("That makes snitches the leading cause of wrongful convictions in U.S. capital cases—followed by erroneous eyewitness identification testimony in 25.2% of the cases, false confessions in 14.4%, and false or misleading scientific evidence in 9.9%."), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf [https://perma.cc/CP3M-U7HE].

most notorious variants of this evidence involve witnesses who emerge from the local jail and, in return for concessions in their own cases, testify that they heard the defendant confess.[194] The NRE reports that "eight percent of all exonerees in the Registry were convicted in part by testimony from jailhouse informants," with this evidence "concentrated among the worst crimes," appearing in 15 percent of all murder exonerations.[195]

Some of the concerns about reliability raised by the confessions-to-police context also apply to confessions to jailhouse informants. A Georgia judge writing in 1876 saw a straightforward application of the common law's reliability-based restriction to informant-relayed confessions:

> What motives may have induced this witness, who was seeking a pardon for his own criminal conduct, to extort confessions from the defendant no one can tell, and the only safe rule in such cases is . . . to . . . reject all evidence of confessions whenever the same are induced by another, by the slightest hope of benefit or the remotest fear of injury.[196]

Jailhouse informants and other cooperating witnesses who testify about a defendant's confession also highlight a more modern dilemma in the law of evidence. The primary concern in this context is not that the informant pressured the defendant to falsely confess, but that the informant fabricated the defendant's confession entirely.[197]

The typical response to concerns about live-witness perjury highlights the opponent's ability to discredit the witness.[198] When a distrusted witness relays the statements of

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194 Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 992–93 (2008) ("Criminal informants—i.e., criminal offenders who receive lenient treatment because of their cooperation with the government—are a longstanding and important part of the criminal system.").

195 *Snitch Watch*, NAT'L REGISTRY EXONERATIONS (May 13, 2015), http://www.law.umich.edu/special/exoneration/Pages/Jailhouse-Informants.aspx [https://perma.cc/XQN9-FKPX].

196 Stafford v. State, 55 Ga. 591, 596 (1876) (emphasis omitted) (citing GA. CODE ANN. § 24-8-824, which codified the common law doctrine discussed in *supra* section II.B.2). *See also supra* note 185. The statement is that of the judge who authored the opinion in the case, but the judge then states that the majority of the court did not agree with the sentiment. *Stafford*, 55 Ga. at 596–97.

197 Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 108 (2006) ("Police and prosecutors, in turn, often do not and cannot check these lies because the snitch's information may be all the government has. Additionally, police and prosecutors are heavily invested in using informants to conduct investigations and to make their cases."); Natapoff, *supra* note 194, at 999 ("Informant unreliability is exacerbated by secrecy, making mistakes harder to discern and errors easier to conceal after the fact.")

198 *See infra* note 199.

another person, the opponent can call the other person to testify and refute any falsely attributed statements. Party opponents can employ this strategy more easily than most, since they *are* the other person. The Pennsylvania Supreme Court sums up the sentiment as follows: "[A] party can hardly complain of his inability to cross-examine himself. A party can put himself on the stand and explain or contradict his former statements."[199] The drafters of California's influential evidence rules justify admission of party opponent hearsay statements on the same grounds: "The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant since the party himself made the statement. Moreover, the party . . . can explain or deny the purported admission."[200]

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199 Commonwealth v. Chmiel, 738 A.2d 406, 420 (Pa. 1999) (quoting PA. R. EVID. § 805); *see also* Chaabi v. United States, 544 A.2d 1247, 1248 (D.C. 1988) ("With admissions, a usual objection to the use of hearsay—the inability to cross-examine the declarant as opposed to the witness hearing the hearsay—is not present, since the declarant is himself a party to the litigation and therefore 'has the full opportunity to put himself on the stand and explain his former assertion.'"); Globe Sav. Bank, F.S.B. v. United States, 61 Fed. Cl. 91, 95 (2004) (citing Wigmore) ("In other words, the hearsay rule is satisfied; [the declarant] has already had an opportunity to cross-examine himself . . . or (to put it another way) he now as opponent has the full opportunity to put himself on the stand and explain his former assertion."); State v. McClaugherty, 133 N.M. 459, 466 (2003) (*overruled on other grounds by* State v. Tollardo, 275 P.3d 110, 121 n.6 (N.M. 2012)) ("An opposing party may introduce out-of-court statements made by its opponent under the theory that the declarant party is in court and has the opportunity to deny or explain such statements."); State v. Richardson, 195 N.C. App. 786, *5 (2009) ("A defendant is free to take the stand and explain, deny, or otherwise address the statement."); Commonwealth v. Edwards, 903 A.2d 1139, 1157 (Pa. 2006) (quoting PA. R. EVID. § 805); *cf.* Jones v. Nat'l Am. Univ., 608 F.3d 1039, 1045 (8th Cir. 2010) ("Once the [statement] was admitted [as the statement of a party-opponent], NAU had the opportunity to explain, rebut, or deny its substance to reduce its evidentiary value for the jury."); Devenyns v. Hartig, 983 P.2d 63, 69 (Colo. App. 1998) ("On the other hand, admissions or statements of a party-opponent are not classified as hearsay because the need to admit such statements as a part of the adversary system outweighs the concerns for trustworthiness underlying the exceptions to the hearsay rule."); State v. Harberts, 848 P.2d 1187, 1191 n.10 (Or. 1993) ("Unlike statements by other persons, a party can hardly object to the admissibility of his own statements, or of statements attributable to him, on the ground that he had no opportunity to cross-examine himself or that he is unworthy of belief. The party-opponent is considered to have an adequate opportunity to explain or deny the contents of any such statements.").

200 CAL. EVID. CODE § 1220 (West 2020), law revision commission's comments. *Cf.* HLC Props., Ltd. v. Superior Court, 105 P.3d 560, 565 (Cal. 2005) ("While not binding, the Commission's official comments reflect the intent of the Legislature in enacting the Evidence Code and are entitled to substantial weight in construing it."). The even-more-influential drafters of the Federal Rules of Evidence cite California's section 1220 in their explanation of the federal rule. *See* FED. R. EVID. 801(d)(2)(A) advisory committee's note.

Unlike other party opponents, however, a criminal defendant's ability to rebut incriminating statements is highly circumscribed.[201] The rules surrounding defendant testimony punish testifying and reward silence:

> The Supreme Court has permitted severe burdens to be placed on the right to testify, while prohibiting the placement of equivalent burdens on the right to remain silent at trial . . . . [A] properly advised defendant who wishes to testify must consider not only the numerous legal burdens that attach should he do so, but also the many court-created benefits of remaining silent that will be foregone.[202]

The result of this imbalance can be seen in the large number of defendants who plead not guilty, insist on a trial, and then decline to testify on their own behalf. "In modern times, only about half of criminal defendants take the witness stand."[203] Perhaps most striking is that this percentage only changes modestly for defendants later proven innocent. John Blume studied this phenomenon and reports that 39 percent of factually innocent defendants did not testify.[204] A comparison of this finding to the roughly 50 percent generic non-testifying rate for criminal trials,[205] suggests that "factual guilt is a factor, but not a powerful determinant of a defendant's decision to testify."[206]

Instead, the factors that seem to most powerfully influence the decision whether to testify are tactical, often influenced by evidence rules. The primary factor concerns the admissibility of prior convictions.[207] Blume reports that 91 percent of the

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201 "There is less concern about trustworthiness, especially in civil cases, because the party against whom the statements are offered generally can take the stand and explain, deny, or rebut the statements." Jordan v. Binns, 712 F.3d 1123, 1128 (7th Cir. 2013).

202 Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 863 (2008).

203 Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 397 (2018) (citing studies); *see* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1373 tbl.2 (2009) (summarizing findings from the broad study of felony trials).

204 John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 489 (2008). Garrett's online database presents a similar figure (35.15 percent). *See* Convicting the Innocent, *Did Defendant Testify?*, DUKE L.: CTR. SCI. & JUST., https://www.convictingtheinnocent.com/graphics/did-defendant-testify/ [https://perma.cc/46YL-S73Q] (last visited Apr. 15, 2020).

205 Bellin, *supra* note 203.

206 *Id.* at 430.

207 *See id.* (citing studies); Cassell, *supra* note 5, at 849 & n.208 (citing email from Sam Gross) (citing NRE statistics regarding criminal record of wrongfully

later-exonerated defendants who did not testify "had prior convictions that potentially could have been used for impeachment purposes."[208] The predominant practice in American jurisdictions is that a defendant's prior criminal convictions are not admissible *unless the defendant testifies*.[209] Blume again: "In every single case in which a [later exonerated] defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions."[210]

Thus, it is not a satisfying answer to the ready admissibility of dubious informant-relayed confessions that the defendant can "put himself on the stand and explain or contradict his former statements."[211] The rules of evidence penalize defendants who take the witness stand and reward those who remain silent. The problem is not just theoretical. Empirical evidence suggests that, for both guilty and innocent defendants, these rules "substantially damage[ ] defendants' chances for acquittal."[212] But only defendants who are willing to forgo the benefits of trial silence and accept the many burdens of testifying can directly challenge lying informants.[213] And defendants who decline to take that risk suffer a "silence penalty" that is inevitably exacerbated by jurors' assumptions about the reaction innocent defendants "should have" to a false accusation that they confessed.[214]

This takes us full circle. In trying to rationalize the common law courts' historical reluctance to admit confessions, Wigmore highlighted defendants' inability to testify at common law.

> In view of the apparent unfairness of a system which practically told the accused person, "You cannot be trusted to speak here or elsewhere in your own behalf, but we shall use

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convicted, that "of those with prior-record data, 647 (42%) had a prior felony conviction, 163 (11%) had a prior misdemeanor conviction, 30 (2%) had a prior juvenile felony conviction, and 13 (1%) had a prior juvenile misdemeanor conviction.").

208 Blume, *supra* note 204, at 490.

209 *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 292 (2008) ("The admission of prior convictions is now a well-established and virtually routine part of federal (and most state) criminal proceedings in which a defendant with a criminal record takes the witness stand.").

210 Blume, *supra* note 204, at 490.

211 Commonwealth v. Chmiel, 738 A.2d 406, 420 (Pa. 1999) (quoting PA. R. EVID. § 805).

212 *See* Bellin, *supra* note 203, at 406, 417, 426.

213 *Id.*

214 *See id.* at 426.

> against you whatever you may have said," it was entirely natural that the judges should employ the only makeweight which existed for mitigating this unfairness and restoring the balance, namely, the doctrine of confessions.[215]

In light of the modern realities surrounding defendant testimony, an evidentiary effort aimed at "restoring the balance" may again be needed.

C. The Apparent Insignificance of the Most Infamous Evidence Rules

The data on false convictions offer another important insight for evidence policymakers. Many of the most frequently litigated and debated evidence rules do not appear to play a direct role in convicting the innocent. If a core goal of evidence law is preventing such convictions, this finding hints at the need for a shift of attention.

Some of the most heated controversies in the modern evidence landscape involve evidence of uncharged crimes admitted under Federal Rule of Evidence 404(b) or innovative variants like Rules 413 and 414.[216] As Ed Imwinkelried explains: "Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules. In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases."[217] The prohibition on character evidence and

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215 WIGMORE, *supra* note 105, § 865. Illinois recently enacted a statute in this vein. *See* 725 ILL. COMP. STAT. ANN. 5/115-21(d) (West 2020) ("The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial.").

216 *See* Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 709 (2018) (describing Rule 404(b) as "perhaps the most controversial"); Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 610 (2008) ("The most controversial of the recent Evidence Rule changes was the addition of Rules 413-415 . . . .").

217 Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibitio*n, 51 OHIO ST. L.J. 575, 577 (1990) (footnote omitted); *see* FED. R. EVID. 404 advisory committee's note to 1991 Amendment ("Rule 404(b) has emerged as one of the most cited rules in the Rules of Evidence."); United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Rule 404(b) has become the most cited evidentiary rule on appeal."); State v. Rutchik, 341 N.W.2d 639, 649 (Wis. 1984) (Abrahamson, J. dissenting) ("This case is another in the ever-increasing number of cases interpreting the rule excluding other crimes evidence, the most litigated rule of evidence."); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 211 (2005) (offering statistics to show that "[n]o other evidentiary rule comes close to this rule as a breeder of issues for appeals").

accompanying conduits for admission of prior misconduct, however, are notably absent from the false conviction narrative.[218]

Similarly, the celebrity hearsay exceptions that scholars (and judges) love to hate generate lots of heat but do not get so much as a cameo in the false conviction research. Academic literature and judicial opinions spotlight the questionable reliability of evidence admitted under notoriously defendant-unfriendly hearsay exceptions, like the exception for statements against interest,[219] coconspirator statements,[220] and dying declarations.[221] Judge Richard Posner recently caused a stir when, drawing on academic critiques, he attacked the hearsay exceptions for excited utterances and present sense impressions.[222] These rules are all missing from the reports on "what went wrong" in false convictions. The recently strengthened (and then weakened) Confrontation Clause receives great fanfare in scholarship and judicial opinions, but seems to play little role in false convictions.[223]

Perhaps the answer is that these hotly-debated evidence rules do play a role in false convictions, but researchers overlooked the evidence rules while combing through voluminous trial records. A key witness' testimony could contain hearsay and other objectionable material, but, without a trial objection, the role of the evidence rule would be obscured. And a litigant

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218 The sole exception is the narrow use of character evidence permitted by Rule 609, which allows impeachment of a testifying defendant with prior convictions. *See supra* section II.B.3.

219 *See, e.g.*, WRIGHT & BELLIN, *supra* note 104, § 6992 ("[T]he Rule 804(b)(3) exception is one of the most controversial in the rules of evidence."); John P. Cronan, *Do Statements Against Interest Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 3 (2002) (describing psychological factors that undermine the assumptions of the rule and arguing that "research and common experience reveal myriad reasons why persons make untrue, self-incriminating statements").

220 *See, e.g.*, Comment, *Reconstructing the Independent Evidence Requirement of the Coconspirator Hearsay Exception*, 127 U. PA. L. REV. 1439, 1441–42 (1979) ("Substantial controversy exists as to whether the coconspirator hearsay exception is actually founded upon the reliability of the evidence and whether coconspirator declarations are in fact credible." (footnote omitted)).

221 *See, e.g.*, Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 237–43 (1998) (highlighting scientific evidence that casts doubt on the reliability of statements of the dying).

222 *See* United States v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J. concurring); Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 906 (2018) ("Judge Richard Posner dropped a bombshell on traditional hearsay doctrine in a 2014 concurrence in *United States v. Boyce*.").

223 *See generally* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1866–71 (2012) (summarizing Confrontation Clause changes and debate).

might decline to object if the evidence is clearly admissible. (Juries don't like overly-objecting attorneys).[224] Even with an objection, a researcher searching for more powerful, and perhaps more obviously false, evidence, could understandably gloss over seemingly minor evidentiary objections.[225] More evidence-rules-focused research is needed. That said, it is unlikely that, across the run of cases misleading evidence of guilt coming in through controversial evidence rules (like dying declarations or uncharged misconduct) would regularly go unnoticed by litigators, and then researchers.

A more intriguing hypothesis is that, for some of the same reasons that they are widely litigated and debated, the more infamous evidence rules do not admit the kind of evidence that generates false convictions. Character evidence rules, like Rule 404 for example, may create enough of a hurdle to exclude the most spurious propensity evidence, while only admitting damaging evidence that either correlates well with factual guilt or is readily discounted by the factfinder.

More generally, the most notorious evidence rules may well be admitting faulty and prejudicial evidence (in addition to valuable evidence of guilt). But the faulty evidence they admit may be transparently unreliable. Juries may intuitively understand that when a live witness tells them what a curiously absent witness purportedly said, that evidence must be taken with a serving of salt.[226] Similarly, if the prosecution attempts to establish someone's guilt of crime X by introducing evidence of unrelated act Y, jurors may sense the disconnect—and discount accordingly.

III
IMPLICATIONS

The surprising connections between the evidence rules and false convictions signal the need for a shift in the focus of policymakers and scholars. The rules that appear to misfire

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224 *See* 3 LANE GOLDSTEIN TRIAL TECHNIQUE § 13:8 (3d ed. 2019) ("It is generally accepted that jurors resent the attorney who makes an excessive number of objections.").

225 Garrett, *supra* note 100, at 96 tbl.5 (observing that state law evidence claims were the most frequent claim raised by innocent defendants on appeal).

226 *See* Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 885 (2015) (reporting based on empirical studies "that jurors spontaneously discount hearsay evidence, even when that evidence is not subject to cross-examination"). Note that this same instinct might not apply when the "absent" declarant is the defendant who is often sitting silently in the courtroom and, even when testifying, is saddled with a strong transparent bias in favor of acquittal.

most in the quest for truth are absent from modern debates about evidence policy. And while these rules reflect resolutions of once-hotly-contested policy disputes, they have become so deeply woven into the fabric of American evidence doctrine that they are almost invisible today. False convictions research suggests that these unnoticed rules, and not more familiar (and more controversial) provisions, endanger innocent defendants who elect to go to trial. This novel insight points the way to important new areas for scholarship and commentary and potentially fertile grounds for reform.

Moving forward, the research on false convictions spotlights two broad areas where evidence policymakers should reflect on the need for changes. The first is the ready admissibility of party opponent hearsay statements in criminal cases. The rationale for essentially unchecked admissibility of this form of hearsay is anomalous in that, unlike virtually every other hearsay exception, it explicitly disclaims any connection to reliability.[227]

Party opponent statements can be introduced under modern hearsay doctrine regardless of the possibility or even likelihood that those statements are unreliable. This policy choice becomes especially problematic as DNA exonerations reveal its substantial impact on the falsely accused, the precise group the rules are supposed to protect.[228] The only built-in reliability-protection for party opponent statements, whether offered through a police officer or a jailhouse informant, is the ability of the declarant-defendant to take the witness stand and explain or refute a purported confession. Modern criminal procedure and evidence rules, however, burden the criminal defendant's decision to take the witness stand with a series of unfavorable legal and tactical consequences.[229] The result is a perfect storm of potential unreliability. Prosecutors will commonly be able to introduce unreliable evidence of defendants' confessions in trials where the defendant-declarant never takes the stand to explain or refute that confession. This leaves the jury

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227 FED. R. EVID. 801(d)(2) advisory committee note (emphasizing that "[n]o guarantee of trustworthiness is required"). The other example of a hearsay exception that is not based in some argument for reliability is Rule 804(b)(6), forfeiture by wrongdoing. That rule allows the introduction of hearsay where the party against whom the hearsay is offered wrongfully and intentionally caused the declarant's absence from the proceeding. *See* FED. R. EVID. 804(b)(6); Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.").

228 *See supra* subpart II.A.

229 *See supra* section II.B.3.

in a precarious position of trying to evaluate the reliability of these critical out-of-court statements without either of the normal tools for evaluating out-of-court statements offered for their truth: an evidentiary rule that screens out unreliable statements or live examination of the declarant.

Another place for evidence policymakers to look to incorporate lessons from the false convictions research is the admissibility of out-of-court statements of identification. The fallibility of eyewitness identifications is one of the primary lessons of the Innocence Movement.[230] And just as traditional tools for ensuring reliability stumble when false confessions are introduced at trial, those tools can be ineffective in counteracting unreliable statements of identification. As already discussed, the rules of evidence contain no reliability screen for out-of-court identifications.[231] The only reliability-enhancing protection is the requirement that the declarant testify. But, as the social science literature shows, cross-examination may be particularly unhelpful in this context because the witness is typically mistaken, not lying.[232] Eyewitnesses typically harbor no recognizable bias or motive to falsely accuse the defendant. And the mistake may be counterintuitive to jurors who understandably empathize with the victims of serious crimes and seek to validate their claims, particularly when endorsed by the police and prosecution, that the defendant is the perpetrator.[233]

Reformers inspired by the Innocence Movement seek to remedy the failings of both misidentifications and false confessions through increased attention to police procedures, expert testimony, jury instructions, and criminal procedure.[234] Each of these responses suffers from weaknesses. There are thousands upon thousands of police departments with varying dedication to implementing improved identification and inter-

230 *See supra* section II.B.1.

231 *Id.*

232 *See* Wells, Lindsay & Ferguson, *supra* note 138 (summarizing and explaining research); *cf.* United States v. Downing, 753 F.2d 1224, 1230–31 n.6 (3d Cir. 1985) ("To the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event.").

233 *See Downing*, 753 F.2d at 1230–31 n.6; Wells, Lindsay & Ferguson, *supra* note 138.

234 *See* Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1111–12 (2015) (detailing efforts and arguing that "more can be done on this front").

rogation procedures.[235] In addition, eyewitness identification mistakes and false confessions often arise from human fallibility, and not the malevolent designs of police.[236] As a result, they cannot be eliminated even with the best investigation procedures. Expert testimony, while likely beneficial,[237] is not readily available;[238] and juries can shrug off experts as overly academic and removed from the "real world" of serious crimes and sympathetic victims.[239] Jury instructions can seem legalistic and get easily lost in the sea of other instructions.[240] Criminal procedure protections based in vague constitutional provisions like the Due Process Clause struggle to gain traction with skeptical courts.[241] Given these weaknesses, an evidence-rule-based, reliability screen for prior identifications and hearsay confessions offers a promising alternative avenue for reform.

Changes to the evidence rules offer numerous advantages for reformers. The core goal of the Innocence Movement is promoting accuracy, which parallels the primary goal of the evidence rules.[242] Hearsay exceptions, in particular, are in-

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235 *See* Jon Greenberg, *How Many Police Departments Are in the United States?*, POLITIFACT (July 10, 2016), https://www.politifact.com/punditfact/statements/2016/jul/10/charles-ramsey/how-many-police-departments-are-us/ [https://perma.cc/C38C-QHR3] ("If you include every college campus security department, tribal land unit, sheriff office, local police department, state police, and every federal agency, you get to 17,985.").

236 *See* Perry v. New Hampshire, 565 U.S. 228, 232 (2012) (emphasizing distinction between suggestive identifications created by police and those, "in which the suggestive circumstances were not arranged by law enforcement officers").

237 *See* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psychol. Pub. Pol'y & L. 817, 840 (1995) (summarizing evidence).

238 *See* Jennifer L. Mnookin, *Constructing Evidence and Educating Juries: The Case for Modular, Made-in-Advance Expert Evidence About Eyewitness Identifications and False Confessions*, 93 TEX. L. REV. 1811, 1813 (2015) (cautioning that expert testimony "is simply not an approach that can feasibly be used in the very large number of cases" because "[e]xperts are simply too few in number and too expensive to be able to be called in as many cases as they would have meaningful relevance").

239 *Id.* at 1845.

240 *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1061 (1995) ("[J]ury instructions often work better in theory than they do in practice."); Penrod & Cutler, *supra* note 237, at 834 ("In summary, the experiments reviewed above provide little evidence that judges' instructions concerning the reliability of eyewitness identification improve juror decision making.").

241 *See* Perry v. New Hampshire, 565 U.S. 228, 243–47 (2012); *supra* section II.B.1.

242 *See* Zalman, *supra* note 5, at 1335 (discussing primary goals of Innocence Movement, including "decision accuracy"); *supra* part I.A (discussing goals of the evidence rules).

tended to foster accuracy, ensuring that, in contexts where juries struggle to separate out-of-court truth from fiction, only reliable evidence is introduced. And unlike constitutional criminal procedure rules, hearsay exceptions need not target flaws of law enforcement procedures.[243] A hearsay exception can focus unapologetically on the issue that matters most to innocent defendants: reliability (not process). And it can be directly tailored to the causes of false convictions. Finally, evidence rules need not purport to be dictated in their precise parameters by vague constitutional provisions like "due process." Typically crafted by expert committees, evidence rules can include fine-grained requirements unapologetically tied to interdisciplinary research and policy considerations.

The last and perhaps most important implication of this Article's audit of the evidence rules extends beyond any of the specific rules of evidence discussed above. The growing body of research on false convictions presents a blueprint for a general reevaluation of evidence rules and doctrines. The evidence most likely to generate false convictions seems to fit a pattern: a victim's earnest but mistaken selection of the defendant out of a lineup of potential suspects; a police officer's matter-of-fact testimony about an out-of-court confession; an expert's avuncular testimony that a bite-mark could not have come from anyone other than the defendant. The common problem is not just that this evidence is unreliable. Rather, a key ingredient of critical evidence-rule failures appears to be a specific type of unreliability that eludes the wisdom of lay jurors.[244] This notion resonates with a prominent, but contested, vein of evidence theory that the true challenge for a system of evidence is not unreliable evidence, but unreliable jurors.[245] This sug-

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243 *See supra* subpart II.B (describing Supreme Court's restrictions on constitutional intervention to circumstances involving police misconduct).

244 *See* Findley, *supra* note 19, at 727 (suggesting that "factfinders tend to misapprehend the risks inherent" in evidence that leads to wrongful convictions); Leo, Neufeld, Drizin & Taslitz, *supra* note 21, at 774 (explaining that confessions and their flaws "are outside the realm of common experience"). This may be a distinction between the various types of evidence referenced in this Article. Assuming appropriate disclosures, jailhouse informant testimony (unlike other forms of evidence discussed) may be a form of testimony that jurors intuitively discount. *See* Maxwell v. Roe, 628 F.3d 486, 510 (9th Cir. 2010) ("*Brady* requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases.").

245 *Cf.* State v. Bocharski, 22 P.3d 43, 56–57 (Ariz. 2001) (Martone, J. concurring) ("I do not believe that jurors need to be protected from themselves. In my experience, jurors quite properly separate the wheat from the chaff."); Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 LECTURES ON LEGAL TOPICS 89, 100–01 (1926) (highlighting reverential reliance on juries in most

gests a final, overarching takeaway. Perhaps the rules of evidence could better achieve their purpose if instead of lightly policing all evidence for reliability flaws, they aggressively targeted the less common, but more damaging, forms of evidence that contribute to inaccurate verdicts.

CONCLUSION

A bedrock assumption of the American criminal justice system is that trials produce accurate results.[246] A "full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward" is the "gold standard of American justice."[247] The cases highlighted by the Innocence Movement tarnish that standard. With important flaws exposed, it falls to scholars, judges, and policymakers to examine the research on false convictions and assess what went wrong.

In conducting this assessment, it is important to recognize that a substantial portion of the evidence that condemns innocent defendants shares a curious thread: it passes through a typically-overlooked evidence rule that could, but does not, protect against unreliable evidence. Presenting an unsettling contrast, rules that do get lots of attention seem oddly unconnected to the narratives of false convictions. As conviction of the innocent is the worst outcome for an accuracy-focused evidence regime,[248] it follows that we should start paying more attention to the neglected rules of evidence implicated in false convictions, and less to the highly-contested rules that are not.

A shift in attention does not mean that any particular rule must be changed. Evidence rules require a balance. Correcting too far in favor of admission or exclusion of evidence can reduce the likelihood of accurate verdicts across the broad run of cases. Still, in fine tuning the evidence project, it helps to be looking in the right places. The National Transportation Safety Board investigates the statistically rare disasters to find

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contexts, as inconsistent with rules' distrust of their ability to evaluate hearsay evidence); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CALIF. L. REV. 1267, 1288 (1996) (highlighting tension between "exalting" the jury and the "elaborate rules . . . devised to keep relevant evidence from the jury on the ground that it might be too prejudicial").

246 *See, e.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth.").

247 Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J. dissenting); *cf.* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (similar language).

248 *See supra* subpart I.A.

out what went wrong, rather than the vast majority of uneventful flights.[249] Evidence policymakers too should examine false conviction data for failures of the evidence rules. Evidence rules—which focus directly on fostering the accuracy of verdicts—are a logical, but so far overlooked next stop for the Innocence Movement.

249 *See* Adam M. Gershowitz, *An NTSB for Capital Punishment*, 47 TEX. TECH L. REV. 151, 160 (2014) (describing NTSB's responsibilities).