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THEORIZING FAILED PROSECUTIONS

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Over the last twenty years, the scholarly field of erroneous convictions has skyrocketed, with multiple articles and books exploring the failures that convict the innocent. However, there has been comparatively little attention to the other side of the coin, failed prosecutions, when the criminal justice system falls short in convicting the likely perpetrator. In this Article, we take up an analysis of failed prosecutions, simultaneously seeking to define its breadth and explain its relation to erroneous convictions. We explore potential hypotheses for the existence of failed prosecutions and then compare those theories to a set of failed prosecutions compiled from a moderately-sized district attorney's office. With almost no prior research on failed prosecutions, these empirical data help to put meat on the theoretical bones of the concept. In the end, we argue that failed prosecutions and erroneous convictions may be seen as different sides of the same coin of miscarriages-of-justice. Not only do both reflect significant errors by the criminal justice system, but the sources of each also appear to be surprisingly similar.

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INTRODUCTION

Anyone who studies miscarriages of justice is familiar with Blackstone's famous principle that it is better that ten guilty people go free than one innocent person be convicted.[1] The mathematical asymmetry of the Blackstone Ratio reflects the principle that a fair-functioning criminal justice system should not regularly convict the innocent. But what of the opposite problem, when the guilty go free? Both represent a miscarriage of justice.[2] As Simon points out, "[f]ewer than one-half of felony crimes are ever reported to the police, and only one of every five reported felonies is cleared by an arrest."[3] Society has an interest in catching and holding accountable the guilty. If a guilty defendant escapes conviction because the police or prosecution have violated his or her constitutional rights, the victim undoubtedly suffers an injustice in seeing the perpetrator go unpunished.[4]

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[1] 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1769).

[2] In two works, Forst discusses wrongful convictions and failed prosecutions, considering them both to be miscarriages of justice. *See* Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209 (2010) [hereinafter Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*]; BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES (2004) [hereinafter FORST, ERRORS OF JUSTICE].

[3] DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 4 (2012).

[4] Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1069–70 (2015).

Over the last twenty years, the scholarly field of erroneous convictions has skyrocketed, with multiple articles and books exploring the failures that convict the innocent.[5] But, there has been comparatively little attention to the other side of the coin, failed prosecutions, when the criminal justice system falls short in convicting the likely perpetrator. Recently, one of the authors of this Article argued that "it is now time for empirical scholars also to begin to study other sources of error and inaccuracy . . . in the criminal justice system . . . erroneous outcomes, not just erroneous convictions."[6] Some scholars refer to this as "false acquittals,"[7] but that locates the problem primarily with judges and jurors, who may not appreciate the significance of the evidence offered and, thus, unwittingly acquit a guilty suspect.[8] Others conflate "false prosecutions" with erroneous convictions, thereby constructing a larger category of system failure in which the "police, defense, prosecutors, or court erred to such a degree that [a] conviction could not be sustained."[9]

In this Article, we take up the topic of failed prosecutions, simultaneously seeking to define its breadth and explain its relation to erroneous convictions. We explore potential hypotheses for the existence of failed prosecutions and then compare those theories to a set of failed prosecutions compiled from a moderately-sized district attorney's office. With almost no prior research on failed prosecutions, these empirical data put meat on the theoretical bones of the concept. In the end, we argue that

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[5] *See, e.g.*, Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471 (2014); EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre eds., 2014); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201 (2005).

[6] Richard A. Leo, *The Criminology of Wrongful Conviction: A Decade Later*, 33 J. CONTEMP. CRIM. JUST. 82, 99 (2017).

[7] Marvin Zalman, *The Anti-Blackstonians*, 48 SETON HALL L. REV. 1319, 1326 (2018); Larry Laudan, *Different Strokes for Different Folks: Fixing the Error Pattern in Criminal Prosecutions by "Empiricizing" the Rules of Criminal Law and Taking False Acquittals and Serial Offenders Seriously*, 48 SETON HALL L. REV. 1243, 1253 (2018) [hereinafter Laudan, *Different Strokes for Different Folks*]; Michael L. DeKay, *The Difference Between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 LAW & SOC. INQUIRY 95, 101 (1996); Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1257–60.

[8] *But see* DANIEL GIVELBER & AMY FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT (2012) (seeking to determine when the acquitted are factually innocent).

[9] REBECCA SILBERT, JOHN HOLLWAY & DARYA LARIZADEH, U.C. BERKELEY SCH. OF L., CRIMINAL INJUSTICE: A COST ANALYSIS OF WRONGFUL CONVICTIONS, ERRORS, AND FAILED PROSECUTIONS IN CALIFORNIA'S JUSTICE SYSTEM 6 (2015).

failed prosecutions and erroneous convictions may be seen as different sides of the same miscarriages-of-justice coin. Not only do both reflect significant errors by the criminal justice, but the sources of each also appear to be surprisingly similar.

This Article is divided into five parts. In Part I, we offer a definition of failed prosecutions and explain how our broader construction compares to prior research that largely limits its inquiry to the courtroom or jury box. In Part II, we extrapolate from existing literature on wrongful convictions and justice-system error to offer a matrix of potential hypotheses for failed prosecutions. In Part III, we turn to a set of case data on failed prosecutions initially compiled by a prosecutor's office. Cleaning, coding, and analyzing these cases, we are able to focus the set of potential sources for failed prosecutions. In Part IV, we return to the prior hypotheses to compare these new data with the proffered theories. Finally, in Part V, we address the limitations of our research, outline future possible research, and close by arguing that the sources and nature of erroneous convictions are more similar to failed prosecutions than currently envisioned.

I. A DEFINITION

In two works, Forst has examined the broad topic of "miscarriages of justice."[10] As he notes, there are least two ways in which the criminal justice system "fails" —whether by convicting the innocent or failing to convict the guilty.[11] While this is sometimes understood by the social scientist's notion of Type 1 and Type 2 error,[12] Forst considers the failure to convict and punish a culpable criminal for the appropriate offense an "error of impunity."[13] We use the term "failed prosecution."

A two-by-two table helps to illustrate this concept. As Diagram 1 indicates, in two of the four boxes the criminal justice system (or at least the adjudicative phase of the criminal justice process) "works" as intended: convicting the factually guilty and acquitting or dismissing charges against the innocent. By contrast, there is a miscarriage of justice when the factually innocent are convicted or the factually guilty are absolved of responsibility.

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[10] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2; FORST, ERRORS OF JUSTICE, *supra* note 2.

[11] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1209–10.

[12] Type 1 error is sometimes known as a false positive, which in this context would be an erroneous conviction. Type 2 error is a false negative, such as when a guilty suspect escapes conviction.

[13] FORST, ERRORS OF JUSTICE, *supra* note 2, at 23.

Diagram 1 – Miscarriages of Justice

	Defendant Convicted	**Defendant Goes Free**
Factually Guilty	System Works – Plea or verdict	Failed Prosecution
Factually Innocent	Wrongful Conviction	System Works – Dismissal or Acquittal

This is a broader definition of failed prosecution than others have posited. As we explain in the next Part, most prior theorizing, which has focused on "false acquittals," locates error in the decisions of judges or jurors to let the guilty go free.[14] Although the source for acquittals could occur earlier in the criminal justice system—as, for example, from a failure to maintain chain of custody for a biological sample—the terminology of false acquittal, by definition, leaves out cases in which prosecutors or courts dismiss charges against defendants who are likely guilty. Since fewer than five percent of criminal cases are resolved by trial,[15] an exclusive focus on false acquittals also excludes the great bulk of other cases in which mistakes of some kind prevent the conviction of the guilty.

We propose extending the lens outwards to problems, errors, or failures in the criminal justice system that prevent the conviction of suspects who likely committed a crime. Theoretically, this approach could expand the pathway to a point before a crime is even reported—such as the attitudes, beliefs or fears that discourage a victim from calling law enforcement. Indeed, as Diagram 2 indicates, there are multiple cut-points in the criminal justice system for the study of "failed" cases.

[14] *See* sources cited *supra* note 7.

[15] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 28 (2017), https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/ [https://perma.cc/62DQ-59KZ].

Diagram 2 – Various "Cut-points" For Considering Failed Prosecutions

►Level 1: Problems that discourage a victim from reporting the crime
►Level 2: Errors that cause the police not to stop, investigate or arrest a guilty suspect

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►Level 3: Mistakes that convince a prosecutor not to bring charges for crimes committed
►Level 4: Errors that lead a prosecutor or judge to dismiss charges against guilty suspects
►Level 5: Problems that convince a prosecutor to charge for a lesser or different crime.

►Level 6: Conditions that lead judges or jurors to acquit guilty defendants

At one end, researchers could focus on problems that prevent cases from reaching the attention of law enforcement or those that dissuade or stop officers from arresting or citing suspects. On the other end of the spectrum, scholars of false acquittals already have examined the decisions of judges or jurors to acquit factually guilty defendants.[16] Our focus in this study will be processes or errors that lie within the knowledge or control of prosecutors, such as failures in police investigations that convince prosecutors to drop charges or those that thwart them from obtaining a conviction that matches the crime committed. It addresses actions by prosecutors themselves that lead them to file the wrong charges, prepare their case inadequately, or pursue the wrong trial strategy, among others. And it covers the actions of judges and juries that thwart prosecutors from obtaining a conviction of a defendant who likely committed the crime.

We choose this cut-point for two reasons. First, we seek to expand the scholarly focus of failed prosecutions beyond false acquittals. That research essentially sees police and prosecutorial action as extant variables, whereas we already know from erroneous convictions that miscarriages of justice can often be traced to a police officer or prosecutor whose mistake changed the outcome of a case.[17] Second, previous research has established the vital

[16] Terry Connolly, *Decision Theory, Reasonable Doubt, and the Utility of Erroneous Acquittals*, 11 LAW & HUM. BEHAV. 101, 102–03 (1987).

[17] Jon Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 851–52 (2010).

power of prosecutors in steering the outcome of a case.[18] Whether by their charging decisions or plea offers, prosecutors are often said to be the most powerful individuals in the criminal justice process.[19] Hence, to fully appreciate their influence and better understand the errors that hamper their work, we examine cases from the start of arrest or citation.

Central to the study of failed prosecutions is defining what it means for the "guilty" to go unpunished. It is a central precept of the American justice system that criminal suspects are only held accountable if their guilt can be proven beyond a reasonable doubt.[20] Anything less than that standard of proof and they are presumed innocent by law.[21] Thus, any discussion of failed prosecutions must acknowledge that, at least legally, the suspects in these cases may well be innocent.

In other publications, scholars have contrasted the concepts of factual and legal innocence, distinguishing those exonerations in which the defendant did not commit the crime from those in which the conviction was overturned because of reasonable doubt or procedural violations.[22] Here, we flip the concepts to suggest that failed prosecutions may involve legal innocence and factual guilt. Or, put another way, but for some error in the investigation, prosecution, or consideration of a criminal case, a suspect who actually committed a crime would have been found guilty of that crime.

This definition, in turn, raises the larger question of whose standard of guilt to employ. Certainly, two people may look at the same evidence from a crime and reach different conclusions about a suspect's guilt. Perhaps a detective sees a weapon, deduces a motive and opportunity, and concludes that the person who found the proceeds of the crime is responsible. Conversely, a different investigator may believe that the evidence is circumstantial and that someone else committed the crime. Because this is an exploratory article on an under-researched subject, we employ a modified reasonable person standard—that of the reasonable prosecutor who is aware of the case facts—in considering the prospect of factual guilt in these cases. More specifically, we used the judgment of prosecutors as a starting point in

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[18] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 3–18 (2007).

[19] *See, e.g.*, DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012) (investigating the role of prosecutors in wrongful convictions); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 453–54 (2018).

[20] *See Beyond a Reasonable Doubt*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt [https://perma.cc/P4QH-NABL].

[21] *See Presumption of Innocence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/presumption_of_innocence [https://perma.cc/4VEA-6VQA].

[22] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 483.

our empirical assessments of potential failed prosecutions, and then applied our own independent assessment to remove all cases in which we believed a reasonable person could not conclude the defendant was guilty. Our goal was to understand what judgements, processes, or problems prevent an adjudgment of guilt.

This is not to say that acquitting the factually guilty or dismissing charges against them is legally wrong under the circumstances. Certainly, if a patrol officer violates a suspect's Fourth Amendment rights in obtaining key evidence, the exclusionary rule mandates suppression of the evidence, and with it, potentially the dismissal of charges as a whole.[23] But, just as there was a miscarriage of justice against the suspect—his or her Fourth Amendment rights violated, for example—there is, as Forst explains, an error of impunity when a criminal goes unpunished.[24] Our goal is to look beyond the issue of legal accuracy in the criminal justice system to also examine factual accuracy: To the extent that our criminal justice fails to punish those who commit crimes, why is that so, and what, if anything, can be done to prevent that?

Little of the existing literature addresses failed prosecutions, per se. To be sure, Forst writes of "miscarriages of justice," arguing that the failure to convict criminals is as much a systemic error as are wrongful convictions.[25] But, to the extent that prior literature has addressed the sources of such mistakes, they have largely fallen into three categories. First, scholars have examined the potential disconnect between juror perception and judicial judgement, comparing those cases in which jurors acquitted the defendant when judges would have convicted.[26] In essence, these works suggest that jurors, who are not trained in the intricacies of law and are not veteran observers of trial advocacy, make mistakes and fail to hold some criminals responsible that judges, who, in theory, bring a more impartial temperament, would have convicted.[27] In Kalven and Zeisel's famous study, twenty percent of queried federal judges would have convicted a defendant that jurors acquitted.[28] Indeed, as other scholars contend, a "closer look at jury decisions

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[23] *See Exclusionary Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/exclusionary_rule [https://perma.cc/RA27-L8LF].

[24] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1240–41; FORST, ERRORS OF JUSTICE, *supra* note 2, at 23–30.

[25] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1275; FORST, ERRORS OF JUSTICE, *supra* note 2, at 22–23.

[26] *See, e.g.*, Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 307 (2007).

[27] *See, e.g.*, *id*. *But see* GIVELBER & FARRELL, *supra* note 8 at 79–98.

[28] HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 56 (1966).

reveals a serious gap between what we expect from juries and what probably occurs . . . . [W]e as a society should recognize and acknowledge the abundance of error."[29]

"Juror error" is, of course, a loaded term. It presupposes that judges, scholars, or other observers are capable of correctly deducing a defendant's guilt and that jurors improperly depart from this standard. Putting that question aside for the moment, subsequent studies have sought to explain the basis for intentional juror error.[30] For example, some scholars and practitioners raise the prospect of jury nullification, a situation in which jurors rightfully know that the defendant committed the crime but for extra-legal reasons choose to acquit.[31] Perhaps the most famous description comes from drug prosecutions in the District of Columbia during the 1980s in which "lawyers and judges increasingly [came to believe] that some African-American jurors vote[d] to acquit black defendants for racial reasons, a decision sometimes expressed as the juror's desire not to send yet another black man to jail."[32]

Other scholars suggest that juror error is unintentional, usually the result of their inability to appreciate the legal concepts raised at trial or their difficulty understanding the arcane deliberation instructions given to them by judges.[33] As Uviller explains, "In some cases, the judge's instruction is quite impossible to apply literally . . . . Thus, jurors regularly vote between first- and second-degree murder, with its awesome consequence, on a charged distinction that defies rational understanding."[34] Nor should this be seen as an isolated problem. For more than forty years,[35] sociolegal scholarship has been replete with results suggesting that judges' instructions are "incomprehensible" and full of "legalese"[36] that "can inhibit jurors' ability to

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[29] Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 625 (2002).

[30] *See, e.g.*, Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 433–34 (1998).

[31] *Id.*

[32] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

[33] Joseph L. Gastwirth & Michael D. Sinclair, *Diagnostic Test Methodology in the Design and Analysis of Judge-Jury Agreement Studies*, 39 JURIMETRICS 59, 61 (1998); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1307–08 (1979).

[34] H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L.F. 1, 19–20 (1990).

[35] *See, e.g.*, Charrow & Charrow, *supra* note 33.

[36] *Id.* at 1307.

comprehend and apply the law."[37] Although raised more typically as a potential source of wrongful convictions,[38] jurors may be just as willing to settle on a lesser-included offense and absolve a defendant of greater criminal responsibility because they cannot quite understand the judge's statement of the law or her instructions of their duty.[39]

Still a third branch of the literature investigates failed prosecutions from an almost economic perspective, seeking to estimate the rates of "false negatives"[40] and predicting how many more criminal defendants would be convicted if the "beyond a reasonable doubt" standard of trial were adjusted to a lesser standard of proof.[41] By definition, much of this work is theoretical, seeking to estimate where the burden of proof should be set to arrive at the "correct" level of criminal liability.[42] Based on hypothetical assumptions, Laudan, for example, argues that convicting a serial offender should require a comparatively lower burden of proof because of the heightened risks of failing to convict an extremely dangerous suspect.[43]

This research generally starts from the presumption that police and prosecutorial work is fixed at a given level of effort and quality. So, if the guilty are not convicted, fault must lie with jurors who ignored or could not understand the law or the application of legal standards that give too much benefit of the doubt to the guilty. This hypothesis has been criticized as empirically inconsistent with how jurors evaluate criminal cases, in which they may begin with an assumption that the defendant has done something wrong.[44] And there are many more potential explanations at play. Ironically, several of these can also explain wrongful convictions.

Police may poorly investigate a case and miss key evidence or become so devoted to one theory of a case that they fail to fully investigate others.

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[37] Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 153 (1982).

[38] *See, e.g.*, Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 201 (1984).

[39] *See* Uviller, *supra* note 34, at 19. *But see* GIVELBER & FARRELL, *supra* note 8, at 61–63, 137–40.

[40] Larry Laudan, *When the "Not-Guilty" Falsely Pass for Innocent*, ERROR STATS. PHIL. (July 3, 2015), https://errorstatistics.com/2015/07/03/larry-laudan-when-the-not-guilty-falsely-pass-for-innocent-the-frequency-of-false-acquittals-guest-post/ [https://perma.cc/82NP-YUAV]; Larry Laudan, *Eyewitness Identifications: One More Lesson on the Costs of Excluding Relevant Evidence*, 7 PERSPS. ON PSYCH. SCI. 272 (2012) (comparing false negatives, failed prosecutions, with false positives, wrongful convictions).

[41] *See, e.g.*, Connolly, *supra* note 16, at 10116; Epps, *supra* note 4, at 1073.

[42] Laudan, *Different Strokes for Different Folks*, *supra* note 7, at 1253.

[43] *Id.* at 1244–45.

[44] *See* GIVELBER & FARRELL, *supra* note 8, at 53–55, 137–40.

Forensic technicians may err in collecting physical evidence, making it unusable. Prosecutors, too, may rely on untested witnesses whose stories are unsubstantiated. And, of course, judges or jurors may improperly weigh evidence, credit witnesses they should not, and in turn contribute to the miscarriage of justice. These potential factors go beyond the triers of fact or the legal standards employed to consider guilt. In turn, we think it time to broaden the conceptualization and study of failed prosecutions and the extent to which sources beyond the courtroom lead to the dismissal or acquittal of suspects who likely committed a crime.

II. THEORIES FOR FAILED PROSECUTIONS

There have been few publications that have attempted to catalog the established reasons or theorized sources for failed prosecutions.[45] We begin, then, with a deep dive through the literature of justice-system error to try to piece together potential factors. From this work, we have identified multiple sources that may explain why criminals go unprosecuted or convicted. To be sure, some factors occur before police even enter the equation, such as an offender's skill in evading detection[46] or the reticence of some victims to report an offense.[47] From Diagram 2, these would be Level 1 problems, which is not a focus of this paper. We are interested in those factors within the control of prosecutors and other professionals in the criminal justice system—those sources that derail cases against criminals once the facts are known to justice officials.

Using this delimitation, we have identified eight broad categories within the literature that conceive the sources of failed prosecutions. Moving from the investigative to trial stages of a case, these include:

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[45] *See* Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2; FORST, ERRORS OF JUSTICE, *supra* note 2.

[46] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1219.

[47] William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631, 643 (1980).

- Flawed Police Investigations
- Forensic Error
- Official Misconduct
- Errors in Charging
- Prosecutor Biases
- Competence of Prosecutors
- Victim/Witness Cooperation
- Victim/Witness Credibility

To scholars of wrongful convictions, many of these categories should seem familiar. Prior research has linked erroneous convictions to: errors in forensic testing or testimony; police or prosecutor misconduct; and victim or witness credibility, among others.[48] But, this should not come as a surprise, since, as Forst explains, erroneous convictions and failed prosecutions are both miscarriages of justice.[49] One is a false positive (wrongful conviction), and the other is a false negative (failed prosecutions). They are, therefore, different sides of the same coin. And, as we argue and as others have claimed,[50] they may even have similar consequences. Some of the mistakes that convict the innocent might also lead people astray in absolving the guilty.

In presenting these hypotheses, we do not claim that they are definitive sources of failed prosecutions, nor can we rank them by likely causal influence. In this Part only, we offer our distillation of the literature that theorizes the causes of failed prosecutions.

A. FLAWED POLICE INVESTIGATION

Research on wrongful convictions has already identified flawed or inadequate police investigation as a source of error.[51] Police officers sometimes fail to appreciate the significance of evidence they are presented, they fail to consider all potential suspects, and they may suffer from tunnel vision that prevents them from imagining alternative explanations for the crime.[52] The same may be true for failed prosecutions. According to Forst,

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[48] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 478–82.

[49] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2; FORST, ERRORS OF JUSTICE, *supra* note 2.

[50] Frank R. Baumgartner, Amanda Grigg, Rachelle Ramírez & J. Sawyer Lucy, *The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 ALB. L. REV. 1263, 1274–78 (2017).

[51] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 479.

[52] Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L. REV. 291 (2006) (providing a general background on "tunnel vision" theory); Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 501.

the guilty go free when police do not properly pursue leads or are untrained in proper interrogation techniques of witnesses and suspects.[53] In turn, they latch onto the wrong suspect or inaccurately conclude that the suspect is not at hand, thereby allowing the guilty to go free.[54] They may also obtain some evidence against the defendant but not enough to convict him because of the offender's evasiveness.[55] Perpetrators may leave little evidence, clean it up, or otherwise obstruct the efforts of law enforcement to fully investigate the crime.[56]

B. FORENSIC ERROR

Forst also mentions that police may not be trained properly to collect evidence,[57] which may lead to the spoilage or even loss of key specimens. Wrongful conviction cases are rife with examples of poor forensic science, from employing outdated or discredited techniques to relying on evidence contaminated with the biological material of others beside the suspect or victim.[58] Theoretically, these same sources may be present in failed prosecutions. Investigators may fail to secure the chain of custody of evidence. This failure may expose them to charges of tampering, and it could also cause samples of evidence to become too degraded to be tested.[59]

Forensic scientists also may fail in the methods they use or the interpretations they reach. In some wrongful convictions, experts have relied

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[53] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1217; FORST, ERRORS OF JUSTICE, *supra* note 2, at 24–25. *See also* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008) (detailing the ways that police behavior, especially custodial interrogations, can lead to miscarriages of justice).

[54] Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 13–17 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

[55] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1219.

[56] FORST, ERRORS OF JUSTICE, *supra* note 2, at 23–24.

[57] Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, *supra* note 2, at 1245.

[58] GARRETT, *supra* note 5 (detailing the sources of wrongful convictions); NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (addressing frailties in forensic science).

[59] Paul C. Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 AM. CRIM. L. REV. 527, 537 (1982); John Comley, *New Approaches to Sample Identification Tracking and Technologies for Maintaining the Quality of Stored Samples*, 18 DRUG DISCOVERY WORLD 30, 31 (2017).

on techniques that have not been sufficiently validated.[60] Perhaps the most known errors involve hair comparison analysis, in which hair left at a crime scene is compared to that of a possible suspect.[61] For years, forensic experts would testify in court about the similarity of the two samples, sometimes going beyond the limits of science to suggest that the suspect's hair and that of the perpetrator were a match, when the most that could be said was that they were similar.[62]

This familiar story, which was true of other pattern evidence,[63] such as tire prints, was more likely to be found among erroneous conviction than failed prosecution cases. However, as defense teams have become more adept at scientific evidence and their cross-examinations more formidable, prosecutors are coming to appreciate that cases can be lost if they fail to employ the most modern forensic techniques or if their experts are not trained and prepared to stick to the limits of the science involved.[64] This is especially true as the scientific community is increasingly skeptical of pattern evidence, including hair comparison, bite and tire marks, bullet casings, and even fingerprints.[65]

C. OFFICIAL MISCONDUCT

Police or prosecutor error may also tar cases. Some of this error may be inadvertent or negligent, such as when police stop or search suspects on a hunch but without sufficient reasonable suspicion or probable cause to

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[60] Sabra Thomas, Comment, *Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent*, 52 HOUS. L. REV. 1037, 1046 (2015).

[61] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 47–62 (2009).

[62] PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 118–21 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/P5CW-559K].

[63] Gerald Laporte, *Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science*, 279 NIJ JOURNAL 1, 1, 8 (2018), https://www.ojp.gov/pdffiles1/nij/250705.pdf [https://perma.cc/7P4P-ZCDL].

[64] Conversation with Kristine Hamann, Executive Director, Prosecutors' Ctr. for Innovation (Nov. 2019). Ms. Hamann is the former first assistant district attorney in the Manhattan District Attorney's Office.

[65] PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, *supra* note 62, at 25. This point was brought home to one of us recently when called for jury duty. The case involved simple marijuana possession, and the potential jurors during *voir dire* peppered the assistant district attorney with many sophisticated questions about the quality of the field testing done on the sample while questioning whether the police had also sent the sample to the state crime lab.

withstand Fourth Amendment scrutiny.[66] But officials may also intentionally misbehave. Detectives may browbeat suspects into confessing,[67] prosecutors may make inflammatory and misleading remarks in court,[68] police or prosecutors may refuse to disclose material, exculpatory evidence,[69] and officers may even plant evidence at a crime scene.[70]

Each of these errors has been seen in a case of erroneous conviction, whereby innocent suspects are essentially steamrolled to a conviction.[71] However, it is conceivable that misconduct spoils good cases. An overly zealous prosecutor who implies that the defendant knew more than he did might induce judicial intervention and then dismissal when the case was going just fine without the attorney's overreach.[72] Furthermore, since an erroneous conviction leaves the true perpetrator unpunished, the mistakes that convict the innocent also divert official attention from the crimes that could be solved and effectively prosecuted.[73]

D. CHARGING

One of the most central decisions to a criminal case is a prosecutor's choice of the charge:[74] charge too lightly and a criminal may evade appropriate punishment; charge too severely and the defendant may escape any punishment at all as judges or juries are unwilling to convict on facts that

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[66] Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 335 (2004).

[67] LEO, *supra* note 53, at 42.

[68] Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 279–80 (2004).

[69] Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 654–55 (2007).

[70] Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L REV. 1133, 1137–38, 1155–56 (2013).

[71] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 478–82.

[72] *See, e.g.*, United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984).

[73] Indeed, these cases are the very example of the overlap between erroneous convictions and failed prosecutions. On one hand, the defendant should never have been convicted of a crime when based on illegally obtained evidence; on the other hand, if the defendant were the likely culprit, his conviction might have been secured had police properly obtained a search warrant or identified appropriate grounds to stop and question him. James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1631 (2012); Baumgartner, Grigg, Ramírez & Lucy, *supra* note 50, at 1286; James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 ALB. L. REV. 719, 721–22 (2018); Robert J. Norris, Jennifer N. Weintraub, James R. Acker, Allison D. Redlich & Catherine L. Bonventre, *The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting the Innocent?*, 19 CRIMINOLOGY & PUB. POL'Y 367, 368 (2020).

[74] DAVIS, *supra* note 18, at 3–18.

do not fit an overstated charge. The academic literature is replete with concerns of overcharging as the basis for a failed prosecution. One of the first mentions was Albert Alschuler's 1968 article on prosecutors and plea bargaining in which he distinguished between horizontal and vertical overcharging.[75] In the former, a prosecutor charges a suspect with more crimes than warranted, whereas in the latter the offense level of the charge is too high.[76] More recently, Richard Delgado has criticized the prosecution for overcharging George Zimmerman in the death of Trayvon Martin, saying that the jury might have convicted Zimmerman had the charge been reduced to a less serious one like felony stalking coupled with a felony murder charge.[77] Scholars and defense advocates have raised similar criticisms in other noteworthy acquittals,[78] including Cliven and Ammon Bundy[79] and John Wiley Price.[80]

Police and prosecutors may also undercharge a case—seeking conviction on a lesser included offense rather than the one that best fits the facts.[81] Of course, this is similar to the practice of plea bargaining, in which prosecutors accept a guilty plea to a crime less severe than the one charged, but plea bargaining is a mode for disposing cases.[82] When officials undercharge a case—whether because "the detective is so corrupt that he is willing to undercharge the crime in order to close the file"[83] or because domestic violence cases have been historically and "notoriously underplayed"[84]—they ensure from the very beginning that the defendant will not be held fully accountable for his misbehavior.

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[75] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–86 (1968).

[76] *Id.*

[77] Richard Delgado, *The Trayvon Martin Trial—Two Comments and an Observation*, 47 J. MARSHALL L. REV. 1371, 1372 (2014).

[78] Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 709–12 (2014).

[79] Matt Pearce, *How the Government Lost Its Case Against the Oregon Occupiers*, L.A. TIMES (Oct. 28, 2016, 3:45 PM), https://www.latimes.com/nation/la-na-oregon-malheur-legal-defense-20161028-story.html [https://perma.cc/D49T-JE4D].

[80] Mark Curriden, *White-Collar Bar Blasts Federal Prosecutors, FBI in John Wiley Price Acquittal*, DALL. BUS. J.: TEX. LAWBOOK (May 1, 2017, 8:25 AM), https://www.bizjournals.com/dallas/news/2017/05/01/white-collar-bar-blasts-federal-prosecutors-fbi.html [https://perma.cc/Y22W-FXDJ].

[81] Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 775–76 (2016).

[82] *See generally* STEVEN P. GROSSMAN, PLEA BARGAINING MADE REAL (2021) (explaining how plea bargaining disposes of most criminal convictions).

[83] Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1089 (1997).

[84] Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 317 (2006).

Implicit in the decision to charge is the standard of proof the prosecutor requires to move a case forward. Some offices are content to indict and litigate a case on the bare minimum standard of probable cause,[85] whereas others choose to bring charges only when prosecutors believe they can prove the case to a judge or jury.[86] Both are legally acceptable approaches, although as Forst explains, they come with opposing risks.[87] Should a prosecutor bring a case in which there is a basis but not near certainty of the defendant's guilt, she takes the risk that a judge or jury may erroneously convict the suspect for a crime he did not commit. However, if she acts cautiously and requires certitude before litigating, she will dismiss some cases in which the defendant is factually guilty.

Not all prosecutors engage in a careful balancing of the available evidence against the appropriate charge. Some writers accuse prosecutors of vindictiveness and bias in charging that cause them to ignore or lose potential convictions. William Conour claims that spiteful prosecutors "upcharge" defendants who exercise their statutory or procedural rights.[88] For example, if a defendant were to challenge the seizure of drugs with a motion to exclude, a prosecutor who otherwise would have considered a charge of possession might respond angrily with a heightened charge of possession with the intent to distribute. Were that charge to be dismissed, or should a judge or jury refuse to convict for lack of evidence, the prosecutor's bitterness would have thwarted a just outcome.[89]

In a similar vein, other writers point to prosecutors' biases as a basis for failed prosecutions.[90] Specifically, they criticize some prosecutors for overly crediting the explanation of police in cases of excessive force or officer-involved shootings so that charges are never brought.[91] Devon Carbado, for example, argues that police officers' use of excessive force is "translated" by

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[85] Under *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983), this standard requires a "substantial chance" of criminal activity.

[86] *See* Belén Lowrey-Kinberg, Jon Gould & Rachel Bowman, *"Heart and Soul of a Prosecutor": The Impact of Prosecutor Role Orientation on Charging Decisions*, 49 CRIM. JUST. & BEHAV. 239, 245–46 (2021).

[87] FORST, ERRORS OF JUSTICE, *supra* note 2, at 115–16.

[88] William F. Conour, Criminal Justice Notes, *Prosecutorial Vindictiveness*, 25 RES GESTAE 140, 140–41 (1981).

[89] By contrast, were a judge or jury to convict on the unreasonably heightened charge, the defendant might also face the injustice of disproportionate punishment.

[90] *See, e.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1518 (2016); Isaac G. Lara, *Shielded from Justice: How State Attorneys General Can Provide Structural Remedies to the Criminal Prosecutions of Police Officers*, 50 COLUM. J.L. & SOC. PROBS. 551, 551 (2017).

[91] *See, e.g.*, Carbado, *supra* note 90, at 1518; Lara, *supra* note 90, at 551.

prosecutors as "justifiable force," in turn allowing guilty police officers to escape legal responsibility.[92] More generally, Lara claims that the "reciprocal relationship" between police and prosecutors creates a "a real or perceived conflict-of-interest" that, again, biases prosecutors against the possibility that police officers have broken the law and warrant punishment.[93] To the extent that prosecutors dismiss or refuse to prosecute criminal acts by law enforcement officers, these institutional blinders may be at play.

E. PROSECUTOR COMPETENCE

Successful prosecutions presume the competence of the prosecutor, who is able to convince factfinders of the defendant's guilt or effectively negotiate with the defense to achieve a guilty plea. Nonetheless, lawyers vary in their talents.[94] Prior caselaw has examined ineffective defense lawyering,[95] a deficiency that itself may justify overturning a defendant's conviction.[96] Research also has established that the "the prosecution's skill level is crucial" to the outcome in serious cases.[97] Experienced prosecutors prepare cases better than their colleagues, make smarter strategic decisions in court, and have better rapport with judges and jurors.[98] As a result, they win more often at trial. They also are more familiar with defense tactics and can strike an advantageous bargain in plea bargaining.[99]

It is important, of course, not to conflate a prosecutor's loss with an injustice. Sometimes, an indictment or charge is wrong, and the state should lose. But, when a guilty defendant goes free because an inexperienced or unskilled prosecutor makes an avoidable mistake, the failure becomes a miscarriage of justice. Such may have been the situation in the Trayvon Martin case, where the prosecution failed to prepare its witness, Rachel

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[92] Carbado, *supra* note 90, at 1518.

[93] Lara, *supra* note 90, at 551.

[94] *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 324–27 (2011).

[95] Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1433–34 (1999); EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/7CFV-NPFK].

[96] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 691–92 (1984).

[97] Jennifer Bennett Shinall, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 291 (2010).

[98] Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648, 660–61 (2017).

[99] *Id.*

Jeantel, sufficiently for court so that she became confused in her testimony and was tripped up in cross-examination.[100] Even if she otherwise might have been a credible witness, confusion in a witness' testimony likely dilutes their persuasive power with the triers of fact.

F. VICTIM AND WITNESS COOPERATION

Ms. Jeantel's experience highlights the importance of credible and well-prepared witnesses for the prosecution's case, but in many cases "alleged victims and key witnesses fail to show for trials."[101] In one county, for example, up to forty murder cases in a given year were dismissed or had charges reduced in large part because key witnesses would not cooperate.[102] The problem is especially acute in cases of domestic violence when victims either still love their perpetrators or fear they will be unable to escape them and, thus, refuse to testify against those who battered them.[103] This experience is widespread—from jurisdictions like Toledo, Ohio, where the majority of domestic violence cases have been dismissed because victims failed to appear,[104] to foreign countries such as the United Kingdom, where one-third of failed prosecutions in domestic violence cases owed to the victim's retracting evidence or failure to attend court.[105] It has gotten to the point that "victims' refusal to cooperate is 'the prime reason prosecutors drop

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[100] LISA BLOOM, SUSPICION NATION: THE INSIDE STORY OF THE TRAYVON MARTIN INJUSTICE AND WHY WE CONTINUE TO REPEAT IT (2014) (critiquing the state's case as a trial lawyer and television analyst).

[101] Karen Shuey, *Too Often, Alleged Victims and Key Witnesses Fail to Show for Trials for Violent Crime, Berks DA Says*, READING EAGLE (Aug. 19, 2021, 6:11 AM), https://www.readingeagle.com/news/too-often-alleged-victims-and-key-witnesses-fail-to-show-for-trials-for-violent-crime/article_dbaa2bcb-60fc-5fcc-b1d8-e1f2c60d69a4.html [https://perma.cc/PJS2-6LEK].

[102] Elizabeth Choi, *Protecting Witnesses in Criminal Cases is Focus of New Effort*, WISH-TV (Mar. 1, 2018, 8:35 PM), https://www.wishtv.com/news/protecting-witnesses-in-criminal-cases-is-focus-of-new-effort/ [https://perma.cc/288G-KGXV].

[103] Michael Vandehey & Shelly Wilbanks, *If She Doesn't Want to Prosecute, Why Should We?*, TEX. PROSECUTOR (2010), https://www.tdcaa.com/journal/if-she-doesnt-want-to-prosecute-why-should-we/ [https://perma.cc/DBY5-X495].

[104] *See* Robin Erb, *Defendants Go Free as Victims Fail To Show for Court Cases*, BLADE (Nov. 26, 2006, 5:31 AM), https://www.toledoblade.com/local/2006/11/26/Defendants-go-free-as-victims-fail-to-show-for-court-cases/stories/200611260039 [https://perma.cc/5M4X-FQ4V].

[105] Vanessa Bettinson, *Restraining Orders Following an Acquittal in Domestic Violence Cases: Securing Greater Victim Safety?*, 76 J. CRIM. L. 512, 517 (2012).

or dismiss domestic violence cases,'" even when police or prosecutors are convinced a crime has occurred.[106]

Sometimes that reluctance owes to intimidation, such as in drug cases where a higher-up threatens a street dealer or courier from testifying.[107] Gang cases are notorious for witnesses gone mute.[108] In New Jersey, for example, "slam-dunk [murder] cases" can devolve quickly into failed prosecutions when fellow or even rival gang members "announce [they will not] testify for fear [that they will] be ostracized for helping the police—or wind up murdered."[109] Horrifically, even the grandmother of a seven-year-old girl who was shot and killed by a stray bullet in gang crossfire would not talk to police or finger a suspect for fear she would "have to move out of the country" if she did.[110]

In other cases, a witness' reluctance can be procured. Perhaps the most famous examples are sexual assault or domestic violence cases, in which the initial accuser declines to go forward on the criminal charge and then settles a civil claim against the alleged perpetrator.[111] In many of the well-known cases, the suspect is a celebrity.[112] In 2015, for example, former NFL player Greg Hardy escaped domestic violence charges when his ex-girlfriend refused to come to court and testify in the retrial of his earlier conviction.[113] Investigating the matter further, prosecutors reported "reliable information that Holder [had] reached a settlement before the trial" with the victim in which she would not testify.[114]

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[106] Travis Waldron, *Why Victims of Domestic Violence Don't Testify, Particularly Against NFL Players*, THINK PROGRESS (Feb. 11, 2015, 4:08 PM), https://archive.thinkprogress.org/why-victims-of-domestic-violence-dont-testify-particularly-against-nfl-players-e76fe2e39165/ [https://perma.cc/74VB-96QD] (quoting a Department of Justice report).

[107] *See, e.g.*, PETER FINN & KERRY MURPHY HEALEY, NAT'L INST. OF JUST., PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION vii (1996).

[108] *Id.*

[109] David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES (Mar. 1, 2007), https://www.nytimes.com/2007/03/01/nyregion/01witness.html [https://perma.cc/P8WN-W76T].

[110] David Kocieniewski, *A Little Girl Shot, and a Crowd That Didn't See*, N.Y. TIMES (July 9, 2007), https://www.nytimes.com/2007/07/09/nyregion/09taj.html [https://perma.cc/GHT7-PDSD].

[111] *See, e.g.*, Melissa Block, *Case Against Kobe Bryant Is Dismissed*, NPR (Sept. 1, 2004, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=3885056 [https://perma.cc/34JD-JNCN].

[112] *See, e.g.*, *id.*; WBTV Web Staff, *Panthers: No Change in Greg Hardy Status After Charges Dismissed*, WBTV (Feb. 9, 2015, 3:23 PM), https://www.wbtv.com/story/28059971/charges-dismissed-in-greg-hardy-trial-after-victim-fails-to-show-for-court/?clienttype=generic&mobilecgbypass [https://perma.cc/D3ML-HTPP].

[113] WBTV Web Staff, *supra* note 112.

[114] *Id.*

G. VICTIM AND WITNESS CREDIBILITY

Even when victims or witnesses are willing to participate in a prosecution and testify against the defendant, they may not be seen as credible by judges or jurors.[115] Indeed, as a program in judicial education explains, "If witnesses are deemed not credible in their testimony, that could derail prosecution efforts to secure a guilty verdict or allow the defense to raise the reasonable doubt necessary to prevent a conviction."[116] To be sure, scholars of erroneous convictions have long warned about the veracity of informants or "snitches," who police or prosecutors cultivate and/or whose testimony is rewarded by some form of compensation or reduced charges against themselves or their family members.[117] However, police informants may be accurate in some cases and yet are discounted by jurors who perceive them as having sold out or snitched.[118]

More concerning are those cases in which the biases of judges and jurors color their accurate assessment of victims and witnesses. Research suggests that triers of fact may discredit the reports of non-white accusers or attribute blame to a female victim when they would not to a man.[119] For example, scholars found that mock jurors are more likely to hold non-white victims at least partially responsible for their mistreatment in child sexual abuse cases as compared to when the victim is white.[120] Even a meta-analysis from as recently as 2015 found that jurors sometimes subscribe to "rape myths" when judging victims for their drinking and sexual habits rather than focusing on

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[115] *See* Stanley L. Brodsky, Michael P. Griffin & Robert J. Cramer, *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*, 28 BEHAV. SCI & L. 892, 892–97 (2010); Ellen Wessel, Guri C. B. Drevland, Dag Erik Eilertsen & Svein Magnussen, *Credibility of the Emotional Witness: A Study of Ratings by Court Judges*, 30 LAW & HUM. BEHAV. 221, 221–22, 225–26 (2006).

[116] *Credibility and the "Reasonable Person"*, UNIV. OF N.M. JUD. EDUC. CTR., http://jec.unm.edu/education/online-training/stalking-tutorial/credibility-and-the-reasonable-person [https://perma.cc/358N-WCZG].

[117] Gould & Leo, *supra* note 17, at 851–52.

[118] Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381, 1388–91 (1996).

[119] Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 266–312 (1996); Jacklyn E. Nagle, Stanley L. Brodsky & Kaycee Weeter, *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 203–04 (2014).

[120] Bette L. Bottoms, Suzanne L. Davis & Michelle A. Epstein, *Effects of Victim and Defendant Race on Jurors' Decisions in Child Sexual Abuse Cases*, 34 J. APPLIED SOC. PSYCH. 1, 13 (2004).

the perpetrator's conduct in the assault.[121] Indeed, some claim that the singer R. Kelly escaped punishment for years because his accusers were "black girls and women who are young or underage . . . poor or working . . . who are not famous."[122] As such, they faced a "higher" burden "to get people to care" about their plight and claims.[123]

To be sure, credibility assessments of witnesses plague both sides of a criminal case, with jurors sometimes over-crediting the testimony of state witnesses.[124] Here, though, the concern is that judges, jurors, or even police or prosecutors may discount the word of a victim or witness if she is non-white and/or female or if her behavior does not fit a presumed model of "acceptable" victimhood.[125] That the perpetrators of crimes against such victims may go unpunished may accentuate the disparities of race, gender, and wealth that already afflict the criminal justice system.[126]

III. CASE DATA

A. METHODOLOGY

Each of the theories presented in Part II is just that—a hypothesis for why prosecutors may lose cases in which the defendant is factually responsible and a supposition that the sources between erroneous convictions and failed prosecutions may be more closely aligned than otherwise thought. To our knowledge, no one has sought to catalog or quantify the multiple potential sources for failed prosecutions. As a next step in unpacking the nature of failed prosecutions, we are able to tie the synthesis of the literature view to an accounting of failed prosecutions in a state prosecutor's office.

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[121] Sokratis Dinos, Nina Burrowes, Karen Hammond & Christina Cunliffe, *A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?*, 43 INT'L J.L. CRIME & JUST. 36, 37 (2015).

[122] Michael Arceneaux, *Why R. Kelly May Never Meet the Fate of Harvey Weinstein*, SPLINTER NEWS (Oct. 26, 2017, 4:00 PM), https://splinternews.com/why-r-kelly-may-never-meet-the-fate-of-harvey-weinstei-1819873053 [https://perma.cc/8Q46-6E97].

[123] *Id.*

[124] Debra Cassens Weiss, *Why Do Juries Acquit Police Officers of Brutality? Experts Offer Differing Explanations*, ABA J. (Mar. 15, 2019, 12:00 PM), https://www.abajournal.com/news/article/why-juries-acquit-police-officers-experts-offer-differing-explanations [https://perma.cc/CE8S-Q9YU].

[125] Dinos, Burrowes, Hammond & Cunliffe, *supra* note 121, at 37–40.

[126] Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 286–89 (2010); JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015) (presenting a popular account of a "ghettoside" murder).

We were fortunate to locate this office by way of introduction from a professional organization. In an effort to anonymize the jurisdiction, we call it Sharpesbury, a county adjoining a major city. In terms of size and crime rate, Sharpesbury would be comparable to a jurisdiction like San Jose, California.

In Sharpesbury, the deputy district attorney oversees all cases that pass through the office and seeks to follow and identify any problematic trends in the office's handling of cases. Over the course of a year, he kept a hand-written log of every case that he and his colleagues felt had, in his words, "gone wrong." By that, he meant arrests and indictments of suspects who were likely innocent *and* cases in which the office had failed to convict a defendant of any count in a crime[127] that prosecutors believe he likely committed. In previous work, we have called the former class of cases a "near miss."[128] These are cases in which defendants are "released before trial or . . . acquitted based on their factual innocence."[129] The latter category reflects failed prosecutions—the subject of this Article. As a reminder, this term includes not just acquittals at trial but also the district attorney opting not to pursue a case, dropping charges, and the like because of errors in investigation or prosecution.

In our experience, the deputy district attorney's recordkeeping is rare. He kept the list of near misses and failed prosecutions for 2017, when the office processed more than 8,000 cases. Under the condition of anonymity, he shared his log with us.

Examining the cases, we first separated the near misses and failed prosecutions, focusing on the 102 cases in which the office did not secure a conviction. Most of the information was recorded in narrative form, so we created a method (described below) to code the cases. Our top priority was to assess whether, in our independent judgment, the cases truly should be considered failed prosecutions, excluding those that were not. We were careful throughout this project not to substitute our judgement for that of the deputy district attorney; his office handled the cases, and as the supervisor for the attorneys involved, he and his colleagues would be more familiar with the intricacies of the investigations than us. At the same time, we sought to remove any cases from the analysis in which we did not believe there was enough information on which to reasonably base a judgement about the defendant's guilt. For purposes of this exploratory Article, we adopted a

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[127] This term necessarily excludes "under-convictions," in which the prosecution secured a conviction for a lesser-included offense but not the one they considered most appropriate for the crime charged. It is a limitation of the available data.

[128] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 483.

[129] *Id.* at 475.

standard of reasonable plausibility, eliminating only those cases in which we believed no reasonable person would believe that the defendant was factually responsible for the crime.

From there, we turned to the case data (including case descriptions and explanations) initially provided by the senior prosecutor and assigned two researchers to code those cases across multiple factors, including the reason for the failed prosecution, the party most likely responsible for the failure, and the procedural point at which the prosecution failed (e.g., prior to charging, on motion to dismiss, at trial, etc.). Coding was initiated by a trained graduate student, with difficult questions brought to the principal investigator for discussion and resolution. Spot checks also were performed to test for consistency. After pilot testing the coding rules, updates were made and all of the cases coded. Intercoder reliability therein exceeded ninety percent. Together, this project estimates the sources of failed prosecutions, the responsible parties, and the disposition that resulted. We did not attempt to estimate the rate of failed prosecutions, because the deputy district attorney could not confirm that he was aware of all possible failed prosecutions that passed through the office. Nonetheless, for an office that processed 8,000 criminal cases in 2017, a set of only 102 failed prosecutions suggests a rate of just over 1%.

We readily acknowledge multiple imperfections in this approach. A prosecutor's judgement that a suspect is guilty does not necessarily mimic the judgement of a trier of fact, who does not have a vested interest in the call. Nor was our determination necessarily better when weeding out obvious cases of innocence. The available records and explanatory narratives were often modest, and we are unable to say how representative the work of this jurisdiction is to justice agencies elsewhere in the nation. Indeed, the data we reviewed are, of course, convenience samples. However, just as the study of wrongful convictions was advanced by the discovery of untested biological evidence in the notebooks of a single laboratory technician,[130] we believe the field's understanding of failed prosecutions can be enhanced by the records of a medium-sized district attorney's office that is willing to share the history of these errors. When there are few examples of a phenomenon, even a single detailed accounting is illuminating.

Moreover, these data are based on the initial judgements by an experienced prosecutor's office tempered by our subsequent check and analysis of the records. Any time the research team was unclear or doubtful

[130] *Potential Wrongful Convictions Revealed in Virginia Study*, INNOCENCE PROJECT (Jan. 10, 2012), https://innocenceproject.org/potential-wrongful-convictions-revealed-in-virginia-study/ [https://perma.cc/W29E-P6VK].

about the records, we spoke with senior leaders in the office to confirm, question, or recode their data. As an exploratory study, we believe that the additional data help us shed light on and begin to think systematically about an important subject that heretofore has received scant attention.

B. ANALYZING THE CASE DATA

Turning to the cases, the plurality of failed prosecutions in Sharpesbury were lost because police were unable to collect sufficient evidence to secure a conviction. In fact, as Table 1 indicates, one-quarter of failed prosecutions fell into this category. On one level, these cases might not even qualify as failed prosecutions; after all, if the police and prosecution lack sufficient evidence to convict a suspect, the defendant is necessarily presumed innocent.[131] However, at the same time, prosecutors believed that they had enough evidence to cross the "probable cause" line for indictment yet lacked either enough evidence or a key piece of evidence—a corroborating fact, an additional eyewitness—that would secure conviction against even the toughest cross-examination.

In another third of cases, lawyers watched prosecutions evaporate when victims or witnesses disappeared, refused to cooperate, or had their credibility questioned. In many of these cases, both the victim and suspect knew one another, leading prosecutors to wonder whether victims were seeking to protect friends or family members or if they had been intimidated into silence.

Legal and constitutional violations accounted for almost twenty percent of failed prosecutions, as police officers conducted improper stops or searches and prosecutors failed to bring cases within the required time period, in turn, violating speedy trial statutes. From there, none of the remaining sources exceeded five percent of cases, from problems with chain of custody to the filing of the wrong charge, the incident not constituting a crime, or otherwise uncategorized errors by police or prosecutors.

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[131] *See Presumption of Innocence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/presumption_of_innocence [perma.cc/4VEA-6VQA].

Table 1 – Sources of Failed Prosecutions

Reason	Frequency
Insufficient Evidence	24.5%
Witness/Victim Credibility	12.7%
Witness/Victim Unavailable	11.8%
Improper Stop or Search	9.8%
Speedy Trial Violation	8.8%
Witness/Victim Uncooperative	8.8%
Other Prosecutor Error	4.9%
Wrong Charge	4.0%
Chain of Custody	2.9%
Victim Requests	2.0%
Judge Discretion	2.0%
Other Police Error	2.0%
Wrong Jurisdiction	1.0%
Defendant Unavailable	1.0%
Other	3.9%
N	102

Among all cases of failed prosecution, police were the primary contributors to the failure nearly forty percent of the time. This estimate, found in Table 2, may not be surprising given that a prosecutor's office was collecting the information and recording notes, and the chief deputy might have been reluctant to assign fault to his colleagues. However, given that the primary source in Table 1 was insufficient evidence, and given that police are generally responsible for the underlying investigation, it is understandable that police officers would be predominantly responsible.

Victims and witnesses were responsible for another third of failed prosecutions because of either unwillingness to cooperate, failure to appear, or lack of credibility. Prosecutors were viewed as responsible in fewer than twelve percent of cases, which, again, may be explained by lack of impartiality by the entity collecting data. However, it may also demonstrate that problems are most likely to appear in the investigative stage of the criminal justice process. Of note, most of the cases had a singular responsible party, the analysis indicating multiple parties in just seven percent of cases.

Table 2 – Responsible Party

Party	Frequency
Prosecutor	11.8%
Police	39.2%
Judge	3.9%
Defendant	2.0%
Victim	25.5%
Witness	9.8%
Multiple	6.9%
Other	1.0%
N	102

Tracing failures in prosecution to a responsible party helps to answer some of the questions raised in Tables 1 and 2. Specifically, most prosecutor mistakes involved speedy trial violations, an error within their control. Although one-quarter of their failures were otherwise unspecified, what remained were primarily charging decisions or decisions to proceed with insufficient evidence. By contrast, one half of police mistakes involved insufficient evidence, with another twenty-two percent of errors turning on search and seizure violations. Not surprisingly, almost eighty-five percent of the prosecution failures traceable to victims were because of the victim's credibility, unavailability, or uncooperativeness. Similarly, seventy percent of witness failures turned on their credibility or unavailability. All of these data are found in Table 3.

Table 3 – Sources of Failed Prosecution by Responsible Party

Reason	Prosecutor	Police	Judge	Defendant	Victim	Witness	Multiple	Other
Insufficient Evidence	8.3%	50%				10%	28.6%	100%
Witness/Victim Not Credible		2.5%			30.8%	20%	28.6%	
Witness/Victim Unavailable					26.9%	50%		
Witness/Victim Uncooperative					26.9%		14.3%	
Stop or Search		22.5%					14.3%	
Defendant Unavailable				50%				
Victim Requests					7.7%			
Speedy Trial	41.7%	10%						
Chain of Custody		7.5%						
Other Prosecutor Error	25%							
Wrong Charge	8.3%		25%		3.8%		14.3%	
Judge Discretion			50%					
Other Police Error		5%						
Wrong Jurisdiction			25%					
Other	16.7%	2.5%		50%	3.8%	10%		
N	12	40	4	2	26	10	7	1

Finally, we examined how failed prosecutions were disposed—that is, at what point in the investigation and prosecution and through what methods cases were acknowledged as failed. As Table 4 indicates, the great plurality (forty percent) ended through voluntary dismissal.

Only five percent of cases concluded at the investigative stage, whereby police and prosecutors concluded that a prosecution could not be sustained. An additional fourteen percent of cases also ended early in the process, as prosecutors refused charges recommended by law enforcement. At the other end of the justice process, almost one-fifth of cases were lost at trial, with nearly ten percent of defendants acquitted, respectively, in bench and jury trials.

This leaves another fifth of failed prosecutions that ended in an "agreement with conditions." In these cases, prosecutors dismissed charges in exchange for the defendant's promise to do something, such as offering payment to the alleged victim, volunteering for an organization, or keeping away from a person or location. In several respects, such agreements have all the markings of a plea bargain, with the defendant informally "sentenced" to a task and the prosecutor's office "reducing" charges to none. As such, it is questionable whether these cases truly count as failed prosecutions. We include them for two reasons. First, each case was officially dropped, meaning that neither prosecutors nor justice officials had any further leverage or control over the defendant. Second, by even collecting data on these cases, prosecutors in Sharpesbury necessarily considered them to be "failures." The office believed these defendants to be responsible for the crimes charged and sought fines or sentences as criminal punishments. That defendants accepted the terms of dismissal, then, is more a reflection of the office's ability to "make something out of a flawed case" than arriving at the desired resolution based on what prosecutors believed to have occurred in the investigation or preparation of the matter.

Table 4 – Modes of Disposal for Failed Prosecutions

Mode of Disposal	Proportion of Failed Prosecutions
Investigation Ends	4.9%
Charges Rejected	13.7%
Agreement with Conditions	21.6%
Voluntary Dismissal	40.2%
Jury Not Guilty	8.8%
Bench Not Guilty	10.8%
N	102

IV. DISCUSSION

The findings from Sharpesbury's case data support many of the proffered hypotheses for failed prosecutions. Predominantly, failed prosecutions in Sharpesbury turned on insufficient evidence, as prosecutors were left without adequate admissible material to convict a suspect they otherwise considered guilty. To be sure, this is how the criminal justice system is intended to operate: suspects are not to be convicted on a prosecutor's belief but upon the presentation of credible evidence that proves guilt beyond a reasonable doubt. But, when prosecutors believe the suspect is guilty but are prevented from moving forward because they feel that

important evidence is missing, the situation warrants better understanding of what has gone wrong.

Although the Sharpesbury data do not fully explain why evidence was insufficient in individual cases, the hypotheses discussed earlier offer potential clues, as do some of the other sources in the dataset. Certainly, a flawed investigation might leave out key evidence, such as when patrol officers or detectives are so captured by tunnel vision that they devote attention to one theory of a case without fully investigating another. Inexperienced or untrained investigators may fail to appreciate key evidence in their midst or make mistakes when collecting it. For example, the Sharpesbury cases identified failures in chain of custody, which often happen when forensic procedures are not followed. Flawed forensic methods also may leave prosecutors without sufficient evidence to move forward, such as when technicians rely on methods with high error rates or exhaust limited biological evidence so that it cannot be tested in multiple ways.

Cases also can be lost to professional misconduct. The most likely transgressions are search and seizure violations, as noted in the Sharpesbury data. It is axiomatic that prosecutors are barred from employing evidence when acquired in violation of the Fourth or Fifth Amendments; even if the evidence is the key to conviction, the case should be dismissed and the prosecution declared a failure if justice officials fail to respect the suspect's constitutional rights. Other misconduct can serve as grounds for overturning a conviction, such as when officers have planted evidence, beaten suspects, or otherwise engaged in conduct that would be subject to civil remedies, too. Although we typically think of these cases as wrongful convictions—after all, the misconduct itself is unconstitutional—it is conceivable that some number of them might also be failed prosecutions. Where officers are especially overzealous, illegally securing "evidence" when there are actually good grounds to suspect the defendant's guilt, the case becomes a double miscarriage of justice. Not only would officers violate the suspect's constitutional rights under such circumstances, but they also would prevent a criminal conviction. Admittedly, the Sharpesbury data do not present a category of official misconduct, but they do categorize upwards of seven percent of cases as involving "other police or prosecutor error." We should hold open the possibility that some number of these cases might involve intentional misconduct.

We should also consider that Sharpesbury's failed prosecutions reflect poor lawyering skills—another theory offered in the prior literature.[132] "Winnable" cases can be lost in court when prosecutors fail to conduct an adequate voir dire, make poor decisions about which witnesses to call, fail to ask key questions on cross-examination, promise at opening what they do not deliver at trial, or overreach on closing argument.[133] Many of these failings may be remedied over time as lawyers get more experience or training. But, with the trial rate for criminal cases below five percent nationwide,[134] it would not be surprising if prosecutors in Sharpesbury made "rookie mistakes" in court that turned winnable cases into failed prosecutions.

The Sharpesbury data also buttress those hypotheses that focus on victims and witnesses. Whether the issue is their credibility, willingness to cooperate, or readiness to appear, nearly one-third of failed prosecutions in Sharpesbury could be attributed to victims and witnesses. The data do not, however, explain *why* victims or witnesses may fail to cooperate or appear. Prior literature has pointed to their loyalty to the defendant, fears of intimidation, or even payoffs to remain silent,[135] all of which are reasonable possibilities. Although the Sharpesbury data do not offer enough information to delineate between these possibilities, we can confirm that recalcitrance and credibility problems with victims and witnesses are associated with a significantly large percentage of failed prosecutions in this jurisdiction.

Finally, it bears noting that cases are lost when prosecutors charge them incorrectly. This possibility was identified earlier, with authors such as Richard Delgado decrying prosecutors overcharging suspects. [136] In the Sharpesbury failed prosecutions, four percent of defendants faced the wrong charge, and another one percent were prosecuted in the wrong jurisdiction. Each of the wrong charges was an overcharge—meaning that prosecutors failed to obtain a conviction because they sought a conviction for a crime

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[132] Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, *in* EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 123, 123 (Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre eds., 2014); Alissa Pollitz Worden, Andrew Lucas Blaize Davies & Elizabeth K. Brown, *Public Defense in an Age of Innocence: The Innocence Paradigm and the Challenges of Representing the Accused*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 210, 210–15 (Marvin Zalman & Julia Carrano eds., 2014).

[133] *See* Shinall, *supra* note 97, at 284.

[134] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty,* PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/R6V7-YPE6].

[135] Shuey, *supra* note 101; Kocieniewski, *supra* note 109; Kocieniewski, *supra* note 110; Trott, *supra* note 118, at 1381–432.

[136] Delgado, *supra* note 77, at 1371–75.

more serious than the one that they might have proved. To be sure, prosecutors might have charge-bargained these cases to a lesser charge and still have obtained a conviction,[137] but in going forward, they saw a court either dismiss the case or a judge or jury reach an acquittal.

Not captured, and a topic for future research, is whether prosecutors might have undercharged any defendants. Is it possible that they failed to achieve a conviction for a more serious, arguably more appropriate, crime because they aimed too low in charging? In today's national conversation about criminal justice reform, outside of the recent #MeToo movement, it is rare to hear academic researchers say the criminal justice system is not punitive enough. But if one recalls the years in which prosecutors refused to charge a defendant with rape because the victim had failed to physically resist, it is easy to appreciate how undercharging permits a potentially guilty suspect to avoid appropriate criminal responsibility.

Apart from these explanations for failed prosecutions, the data present at least three other interesting issues. First, there is a disconnect between the primary reason for the failed prosecution and the mode of resolution. As Table 1 indicated, the predominant source of a failed prosecution was inadequate evidence. Yet, as Table 4 showed, the plurality of cases was voluntarily dismissed by the prosecution following indictment. Why did it take so long in the criminal justice process for prosecutors to reach this conclusion? Did they push cases forward, reaching the minimum threshold of probable cause for indictment, and then hope that sufficient evidence would eventually arise to warrant a conviction? Or, did they wait to evaluate the strength of the evidence until after indictment when they were considering a plea or trial? Either way, the process is, at best, inefficient, since the case eventually failed. During that time, the defendant was subject to the control of the criminal justice system, when, in the end, the case could not be sustained. Indeed, this depiction would appear to confirm the conclusion reached years ago by Malcolm Feeley that "the process is the punishment" for the defendant, even if he likely committed the crime.[138]

On a related note, there is an ethical question when prosecutors seek to impose conditions in dismissing charges they cannot prove (Table 4). On one hand, the process may be little different than prosecutors' calculations in plea bargaining, where they may offer a lesser charge or dismiss some but not all charges in exchange for the defendant's guilty plea, especially when the case is weak. There, prosecutors calculate that it is better to obtain some

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[137] Indeed, a charge-bargain presents may of the same challenges as undercharging, described on page 16, *infra*.

[138] *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

conviction against the defendant, who they believe is guilty, than see the defendant escape any criminal responsibility. One can imagine the same thinking in dismissing all charges and accepting the defendant's agreement to take some other action—whether an apology, promise to avoid a place or person, or even restitution or a contribution of sorts. But, if the prosecution cannot establish guilt on any counts, is it acceptable to use the power of the state to compel the defendant to undertake particular behavior simply because the prosecutor believes the defendant committed the crime? For that matter, should the defense even recommend this outcome to the client? Why should a defendant agree to any conditions if the prosecutor's case is likely to fold anyway?

We raise these questions not to engage in the larger debate about the ethics of plea bargaining when the state's case is weak; similar questions have been addressed before.[139] Rather, the conundrum we identify also raises questions about the very definition of a failed prosecution. Technically, a failed prosecution implies legal innocence. Even if there is good reason to believe that the defendant committed the crime in question—a supposition of factual guilt—the defendant should be acquitted or have his case dismissed if the prosecution cannot establish that conclusion beyond a reasonable doubt. As discussed earlier, we and others have contrasted the concepts of factual and legal innocence in the wrongful conviction literature.[140]

Here, failed prosecutions may be similar to erroneous convictions involving legal innocence. In both sets of cases, the prosecution fails to achieve a lasting conviction because it cannot establish sufficient legal grounds. The distinction between the two turns on the presumption that the defendant committed a crime. A failed prosecution accepts that, but for an error in investigation or prosecution, the defendant would have been convicted. An exoneration of legal innocence, by contrast, is agnostic about the defendant's culpability, saying only that it is not certain he was factually innocent.

The close relation between a failed prosecution and legal innocence is not simply a philosophical debate. It also suggests that the causes—and remedies—for failures in the criminal justice system are related. By now, the primary sources of erroneous convictions are well known among scholars and practitioners.[141] In an empirical study, for example, Gould et al.

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[139] ABA Comm. on Ethics & Pro. Resp., Formal Op. 486 (2019) (discussing obligations of prosecutors in negotiating plea bargains for misdemeanor offenses).

[140] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 483; Leo, *supra* note 5, at 201–23.

[141] *See* GARRETT, *supra* note 5; Leo, *supra* note 5; 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, 523–60 (2005).

identified ten likely sources, including problems in eyewitness identification, tunnel vision, poor defense lawyering, and forensic errors.[142] Other studies have focused on false confessions[143] and snitch testimony,[144] among others.[145] As we explain in this Article, some of those sources are also found among failed prosecutions. Just as eyewitness errors may convict the factually innocent, suggestive eyewitness procedures may be attacked at a preliminary hearing or in court and permit the actual perpetrator to avoid punishment. Weak evidence undoubtedly convinces many prosecutors to abandon a possible case, but it also is connected to erroneous convictions when prosecutors, grand jurors, or triers of fact accept the word of state witnesses when more questioning minds would view the information skeptically.

Table 5 below provides a visual depiction of the similarity between erroneous convictions and failed prosecutions, showing how some of the sources are related. The most analogous are official misconduct—the kinds of constitutional violations that see officers search a suspect without probable cause or a warrant, unlawfully interrogate an individual, or fail to disclose material, exculpatory evidence to the defense. Each of these may be grounds for overturning a conviction (legal innocence) and, where the defendant otherwise would be found guilty, is a source of a failed prosecution.

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[142] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 515.

[143] LEO, *supra* note 53 (examining police interrogation and the problem of false confessions via a comprehensive empirical study).

[144] ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009) (reviewing criminal cases involving informant testimony).

[145] EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD, *supra* note 5 (identifying informant testimony as a potential source of wrongful convictions in a larger assessment of miscarriages of justice).

Table 5 – Similarity Between Erroneous Convictions and Failed Prosecutions

Erroneous Conviction	Failed Prosecution
Mistaken Eyewitness Identification	Not Credible Witnesses/Victims
Lying Witnesses	Not Credible Witnesses/Victims
Erroneous Forensic Evidence	Chain of Custody
Weak Evidence	Insufficiency of Evidence
False Confessions	Wrong Charge
Police/Prosecutor Misconduct	Police/Prosecutor Misconduct
Tunnel Vision	Failures to Investigate/Prepare
Poor Defense Lawyering	Prosecutor Error

An advocate's lack of skill can also affect the outcome of a case. In erroneous convictions, poor defense lawyering—from lack of effort to failures to properly prepare for trial or call appropriate witnesses—sees cases go under-investigated or key evidence unchallenged.[146] Similarly, as the Sharpesbury data indicate, cases can fail when prosecutors make tactical errors at trial, including mistakes in choosing a jury, questions to pose on cross-examination, or opening or closing arguments.

Problems with witnesses plague both sets of cases. Mistaken identifications and even lying witnesses too often have been credited by police, prosecutors, and triers of fact, thereby leading to the conviction of the factually innocent.[147] At the same time, uncooperative witnesses and victims, or those whose criminal records or past behavior raise doubts about their testimony, may lead to failed prosecutions.

Suspects may also confess to crimes they did not commit.[148] In turn, prosecutors can be persuaded to file charges for crimes that did not occur, or at least were not committed by the defendant. Alternatively, prosecutors may become too aggressive, viewing the evidence in such a favorable light that they seek charges more severe than the available information would support. Left without other options, or even seeking to punish prosecutors for overreaching, judges or juries may fail to convict defendants on the heightened charges presented.

Forensic evidence also can influence both sets of cases. The annals of erroneous convictions are replete with defendants condemned on the basis of

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[146] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 502–03.

[147] Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 380–81 (2016).

[148] Leo & Drizin, *supra* note 54, at 12.

flawed forensic evidence.[149] Whether it was serology testing used in place of DNA analysis, forensic experts who over-credited the specificity of pattern evidence, or hypnosis offered as the basis for an eyewitness' identification, imperfect and unsound forensic evidence has been the basis for several erroneous convictions.[150] The lessons from those errors have helped to train a new wave of defense lawyers, now better able to push back on forensic evidence that is not collected according to written protocol or is presented in court by an expert who testifies beyond the power of the evidence. Even where the defendant may have committed the crime, a trained defense lawyer can now poke holes in the state's forensic evidence and, in some circumstances, even convince the prosecution to abandon the case when such mistakes are identified early in the investigation. As Table 1 indicated, for example, a small number of cases fails because of breaks in the chain of custody of the evidence. In these cases, and in others in which forensic errors occur, the guilty may go unpunished.

Of all the problems associated with erroneous convictions, tunnel vision may be the most common source.[151] It potentially affects all justice actors, leading police officers, prosecutors, forensic scientists, and others to over-credit their theory of the case and overlook alternative evidence or theories that challenge their assumptions. As a result, prosecutors may indict defendants even in the fact of contradictory findings; detectives, too, may fail to investigate alternative suspects or evidence because they are certain they have "the right guy."

On the flipside, failures to investigate may doom certain prosecutions.[152] Perhaps officers are affected by tunnel vision, certain they have sufficient evidence to indict or convict the suspect right up until a judge dismisses the case for want of probable cause. Maybe an over-confident prosecutor fails to read the casefile carefully, concluding all too late that a corroborating witness is needed or that an eyewitness procedure was suggestive.

The same is true, ironically, for insufficient evidence. Table 1 illustrates the prominence of this source in failed prosecutions, affecting approximately one-fourth of cases. The concept is fairly intuitive: unless a prosecutor has sufficient evidence to prove a case beyond a reasonable doubt, the defendant may go free even if the prosecutor is convinced of his guilt. As a result,

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[149] GARRETT, *supra* note 5 (examining the first 250 wrongful convictions to be rectified by DNA testing).

[150] Gould & Leo, *supra* note 17, at 852–54.

[151] Findley & Scott, *supra* note 52, at 291–95; Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 503–06.

[152] *See generally* D. KIM ROSSMO, CRIMINAL INVESTIGATIVE FAILURES (2009) (describing case studies of investigative failures and their consequences for criminal prosecutions).

prosecutors may require multifarious evidence to successfully bring a case, including reliable forensic evidence, a videotape, or even the suspect's confession.

But, weak evidence is also common in wrongful convictions. This may seem odd, that an innocent defendant would be at greater risk of conviction when the prosecution's evidence is weak. But, as prior work has indicated, prosecutors may hold such cases, waiting to see if additional evidence is collected.[153] When it is not, they nonetheless decide to test the case before a grand jury, which is inclined to believe the prosecution and issue an indictment. At that point, defendants may agree to plead guilty to reduce the ultimate sentence, or prosecutors may feel compelled to take the case to court where trial jurors, for much the same reason as their counterparts on the grand jury, convict the defendant. When weak evidence is coupled with deficient defense lawyering, and especially when police or prosecutors fail to disclose exculpatory evidence, innocent defendants may face an unfortunate "perfect storm" that threatens a conviction.

Our ultimate point is not that erroneous convictions and failed prosecutions are alike. Although some exonerations of legal innocence are akin to failed prosecutions, the cases are distinct concepts. But, their sources have much in common and reflect several of the same forces or behaviors that lead to error in the criminal justice system. Best considered miscarriages of justice, the two may be seen as different sides of the same coin.

V. LIMITATIONS AND FUTURE RESEARCH

This project comes with many limitations. Foremost, we were reliant on the judgement of one prosecutor, albeit the chief deputy of the office, for the initial disclosure of failed cases. Prosecutors may be more inclined than others to believe that the defendants brought to them are guilty, if only because they are motivated to trust their partners, the police. Although we also reviewed the recorded cases to eliminate those in which the defendant reasonably had not committed a crime, we were unable to evaluate whether there were other potential failed prosecutions that the chief deputy did not record. So, on one hand, the case data may be overly inclusive, because prosecutors as a whole may be motivated to consider the defendants guilty, while, on the other hand, the dataset may have missed qualifying cases that were unknown to the chief deputy.

It is also possible that the chief deputy incorrectly assigned a reason for some of the failed prosecutions and that our translation of his judgements into coding rules was erroneous. We employed traditional social science

[153] Gould, Carrano, Leo & Hail-Jares, *supra* note 5, at 511.

methods for the latter task, but even when intercoder reliability is high (in our case over ninety percent), some percentage of cases may be coded inconsistently.

In addition, Sharpesbury is likely different from many other jurisdictions—from its size, rate, and distribution of crime, and quality of police and prosecutors. The types of errors, and the parties likely responsible for them, may well be different from those occurring elsewhere. That said, we see these data as a window into a local process that has lessons for other jurisdictions. These data help us to better understand how failed prosecutions can occur, what the causes may be, and who the responsible parties may include.

To our knowledge, these are the first empirical data on failed prosecutions. That alone is important as a "reality check" of sorts on the multiple theories previously propounded for failed prosecutions. Are things different in another jurisdiction? Probably. But, the Sharpesbury data allow us to test the theories of miscarriages of justice against real case data. As such, this research helps to refine the theories offered.

As an initial step to synthesize and then quantify the potential sources of failed prosecutions, this Article leaves multiple future avenues for research. A primary goal should be replication, seeking out other prosecutors' offices willing to collect information on cases they believe were lost in spite of the suspect's likely criminality. In addition, it may be desirable to employ expert panels, comprised not only of prosecutors but also judges, academic researchers, and even defense lawyers, to assess the probability of the defendant's responsibility. Finally, just as erroneous convictions have been studied against a control group of near misses, it would be useful to compare the path of failed prosecutions—which could be conceptualized as a different kind of near miss—against those that ended correctly. Certainly, this study has identified a collection of potential sources for failed prosecutions, but it will be even more instructive to understand how the trajectory of a failed case compares against those that proceed as intended.

CONCLUSION

This is an exploratory article. But, individually in the specific sources they identify and together in the image they paint of the criminal justice system, the findings suggest there are multiple problems that can arise in criminal case processing, ultimately preventing the identification, prosecution, and conviction of the perpetrator of a crime. Many problems are within the control of prosecutors and police officers, whereas others occur in different ways yet still might be mitigated.

Nor should some sources be unfamiliar to criminal justice officials, the problems having been identified earlier in research on erroneous convictions. Indeed, if this research serves a single purpose, it is to challenge the assumption that erroneous convictions and failed prosecutions "are unrelated."[154] "America's criminal justice system creates a significant risk that innocent people will be systematically convicted. It also creates a distinct and presumably larger risk that the guilty will be acquitted."[155] Not only do the two share similar sources, but they may also be different sides of the same coin.

[154] Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997).

[155] *Id.*