



Précis Paper

Wrongful Convictions

This BenchTV broadcast is with Professor Jon Gould and Dr Richard Leo on Wrongful Convictions. This is a must watch for everyone. A very important presentation.

Discussion Includes

- The study of wrongful convictions examines factual innocence and not legal innocence
- False confessions and the Bradley Page case
- Investigatorial bias, the recording of police interviews and Earl Washington Jr.
- The implementation of a regulatory body to punish prosecutorial misconduct
- Judicial deference to the decisions of biased juries and the presumption of innocence

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Wrongful Convictions

1. In this edition of BenchTV, Professor Jon Gould (Lawyer) and Professor Richard Leo (Lawyer) discuss wrongful convictions resulting from false confessions, prosecutorial misconduct and investigatorial bias. Mr Gould is a Professor of Public Affairs and Law at American University in Washington D.C. with research focused on wrongful convictions, hate speech, police conformance with the *Constitution*, and judicial treatment of race and gender. Dr Leo is a Professor of Law and Psychology at the University of San Francisco and is one of the leading experts in the world on police interrogation practices, the impact of *Miranda*, psychological coercion and false confessions.

Wrongful Convictions: Focus on Factual Innocence

2. The presenters begin their discussion of wrongful convictions by considering the 6th Amendment of the *United States Constitution* and the case of *Burdine v. Johnson* 262 F3d 336 (5th Cir) (2001).

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. *Burdine v Johnson* concerned a situation where a lawyer fell asleep during the trial. An intermediate appellate court considered that this conduct did not violate the right to effective counsel in the 6th Amendment because the lawyer may have just been feigning sleep. The presenters note that the appellant was legally innocent, because this really was a denial of procedural fairness (usually triggering a re-trial), but the appellant was not necessarily factually innocent because a denial of procedural fairness does not mean that the appellant had proven their innocence.
4. The study of wrongful convictions focuses on helping those who are factually innocent and not those who are legally innocent, such as the appellant in *Burdine v Johnson*. The presenters note that wrongful convictions came to the fore following the discovery of DNA

analysis bringing to light factual errors in countless cases where the convicted criminal's DNA was not present at the crime scene.

False Confessions: Bradley Page

5. A University student, Bradley Page, was convicted of the murder of his girlfriend, Bibi Lee. Bradley, Bibi and a mutual friend had been jogging. Bradley and the friend went one way and Bibi went another way. Bibi was not seen after this until she was found dead 6 weeks later. The Oakland police naturally suspected Bradley Page, given he was her boyfriend. They brought him in for interrogation and after 16 hours of interrogation he confessed. He claimed that he was innocent and his confession did not match the crime scene facts and other evidence. At that time, no one believed that Page could have made a false confession (and he was ultimately convicted in *People v. Page*, 2 Cal. App. 4th 161, 2 Cal. Rptr. 2 d 898 (1st Dist, 1991) but there was great controversy because he insisted he was innocent.
6. Significantly, the Oakland police had only recorded 3 and half hours of the 16 hour interrogation. Furthermore, Page had been run through a polygraph which is a gimmick instrument that purports to tell whether someone is telling the truth. Dr Leo explains that the polygraph is 'junk science' and that it has no scientific basis. Also, during the course of the interview Page was threatened with the death penalty and after giving the confession he immediately recanted. Page was convicted at a time prior to DNA analysis.
7. The case was not unusual. As Dr Leo explains, when you analyse why the justice system got it wrong in this case and many others, a primary cause is the use of false confessions. Suspects would confess to a crime that they did not commit and a jury would place significant weight on the admission in finding them guilty. In many ways, a jury acting rationally would reasonably place significant weight on such an admission because it is highly counterintuitive that an innocent person would admit to a crime they did not commit. However, given the significant number of wrongful convictions involving false confessions, a jury attaching considerable weight to confessions in police custody should be more cautious. This is particularly the case where confessions represent the primary (and perhaps the only) piece of evidence against the accused.
8. Hundreds of peer-reviewed studies, books and articles have been published on the concept of false confessions subsequent to the Page case and other cases like it. Today, experts regularly give evidence as to the nature of false confessions and the indications of such confessions that juries and courts need to be aware of. The indicia of false confessions are divided into two categories of inquiry: (1) why did they confess and (2) how do we know the confession is false.
9. The first inquiry demands an identification of whether circumstances of the interrogation are commonly observed in false confession situations. In relation to the Bradley Page case, the

following circumstances are noted by Dr Leo as indicating why Page might have falsely confessed:

- The interrogation lasted 16 hours overnight
 - He was subjected to a polygraph test which has no scientific validity
 - He was told he failed the polygraph test (when he did not)
 - He was told there was evidence that he committed the crime (when there was none)
 - He was threatened with the death penalty and promised leniency in exchange for confessing
10. In relation to the second inquiry, which is how do we know the confession is false, analysis should be focused on whether there are specific aspects of the confession itself that make it highly likely to be false. In Bradley Page's case, Page claimed to bury Bibi Lee's body in a particular area and claimed to use particular instruments from his car to bury her. However, this story did not match any of the available physical evidence. In situations like this, where the physical evidence does not support the confession, it is likely the confession is false.
11. Dr Leo considers that the following are necessary for investigating authorities and juries to be confident in the reliability of a confession:
- The confession indicates a knowledge of non-public information that only the guilty party would know;
 - The confession was able to lead police to new evidence; and
 - The confession helps to explain facts that are anomalous or which the police do not know.
12. Notwithstanding the circumstances of the confession bearing many of the hallmarks of a false confession and the specifics of the confession suggesting that it was indeed false, Bradley Page has not been acquitted and remains serving a custodial sentence. Dr Leo considers that he is an innocent man who was wrongly convicted as a result of his false confession.

Investigatorial Bias: Earl Washington Jr

13. Earl Washington Jr came within 9 days of being executed for the rape and murder of a young mother when he was ultimately exonerated, proven innocent and received a settlement from the State for his wrongful conviction.
14. Earl Washington was mentally retarded, with an IQ below 70. He was slow thinking and slow acting. Dr Leo explains that the mentally retarded as a group are especially vulnerable to

accusatory, guilt-presumptive American interrogations. This was all too clearly highlighted for Earl Washington because it was evident that even prior to his confession, the police had determined that he had committed the crime and basically forced him to confess to that crime and a string of others. Significantly, the law enforcement authorities were aware that a large number of crimes for which he confessed to, could not possibly have been committed by him. Nevertheless, they pursued him for the rape and murder primarily on the basis of the confessions.

15. One aspect of the case which indicated the possibility of a wrongful conviction was the contamination of evidence, where non-public crime facts are leaked or disclosed to the suspect. In particular, showing him the shirt and educating him about how the crime occurred was highly problematic because when he confessed he incorporated those details into the confession which made the confession, which was ultimately false, appear to be true. In fact, the police wrote out his confession and he simply signed it.
16. Currently in the United States, approximately 20 States require the electronic recording of police interrogations, but at the time when Earl Washington was arrested not a single State required such recordings. The recording of interrogations is particularly important for the interests of justice because one can determine whether a suspect has been coerced, for example by threats, and whether there was any contamination.
17. In NSW, there are laws that require the mandatory use of ERISP recordings of police interviews. The ERISP system was brought in to combat the practice of police verballing of suspects.
18. The problem in the United States, and perhaps to a lesser extent in Australia, is that police see their job as solving the crime and that once they have a suspect they should make them confess. Moreover, the goal of the interrogation is to get a confession, and police are not truth-seekers but rather quasi-prosecutors. Dr Leo explains that in the wrongful convictions cases tunnel vision (the tendency to focus exclusively on a single or limited objective or view i.e. proving the suspect is guilty) and confirmation bias (the tendency to search for or interpret information in a way that confirms one's preconceptions) are easily observed in the actions and thinking of the police.
19. The recording of police interviews has also been welcomed by police and prosecutors because where interrogations are recorded, showing that the interview lacked any undue influence on the part of the police, the recording will be damning evidence in court. Professor Gould notes that this has been observed in the United States with more cases resulting in early guilty pleas.
20. Admittedly, some police departments are resistant to the implementation of recording interviews because they are concerned about exigent circumstances, for example if the

camera suddenly breaks. Accordingly, in the United States (and Australia) there is a rebuttable presumption that non-electronically recorded confessions will be inadmissible – such that if there is exigent circumstances the confession may be allowed in notwithstanding the lack of recording.

Prosecutorial Misconduct: Michael Morton

21. The presenters co-authored the paper entitled "Predicting erroneous convictions: A social science approach to miscarriages of justice" for the National Institute of Justice in 2013. The paper was the result of a 3-year study examining wrongful convictions and one focus of the study was discerning whether prosecutorial error was caused by wilful or negligent misconduct. What they found was that it was very rare for errors to be caused by wilful misconduct. The most common error was a Brady Violation (from *Brady v. Maryland*, 373 U.S. 83 (1963) where it was held that a prosecutor must provide the defence with any exculpatory evidence). It was rarely the case that prosecutors knew there was exculpatory evidence for the defence and simply refused to turn it over such that they could successfully prosecute. More often there was problems of communication between the police and prosecutors that causes the violation, for example the police might not hand it to the prosecutors, might not highlight it if they do hand it over, or the prosecutor may simply be too busy to identify it.
22. Professor Gould suggests that negligent Brady violations are particularly worrying for the justice system because it would be easier to solve the problem if there were certain prosecutors who knowingly broke the law and they could be rooted out. He suggests that one approach that might limit these negligent errors would be to train police and prosecutors on wrongful convictions so that they are aware of when they need to be particularly vigilant. Another approach would be to train police on best practice in relation to issues such as tunnel vision, eyewitness error, and faulty expert evidence. Furthermore, increasing funding for defence lawyers and incentivising them to ask the right questions of the prosecution, witnesses and the evidence at trial would be extremely useful in preventing the harmful consequences of these errors.
23. Dr Leo notes that it is hard to see the system improving unless we make prosecutors more accountable for their errors and misconduct. Today, prosecutors cannot be sued even where they are intentionally engaging in misconduct and it is very rare that prosecutors are themselves prosecuted for misconduct. Dr Leo notes that almost all other professionals (e.g. doctors) suffer penalties for their misconduct even when it is negligent and that these penalties have a useful deterrent effect. In the criminal justice system, the wrongful conviction of the innocent is a catastrophic error and where an actor is responsible for such an error, they need to be punished. Dr Leo suggests that a regulatory body for prosecutors that disbars those prosecutors who engage in repeated or significant misconduct, either wilful or negligent, would be an appropriate step towards cutting out these errors.

Additionally, in published opinions where prosecutor misconduct is identified, the relevant prosecutor should be identified by name. The advantage of this is that that small subset of prosecutors who are responsible for the majority of misconduct can be efficiently removed from their positions rather than continuing to undermine the administration of justice.

24. Professor Gould notes that perhaps we should not be waiting until the wrongful conviction is identified before we take steps to ensure those responsible are punished. He notes that whilst many wrongful convictions have been discovered there are undoubtedly many more which remain undiscovered. Accordingly, beyond punishing those who have been identified as responsible, he wonders whether anything can be done to prevent the prosecutorial errors and misconduct that is causing unidentified wrongful convictions. For example, would it be possible for prosecutors to admit that they engaged in misconduct or for prosecutors to point the finger at their colleagues and say they are engaging in misconduct. Dr Leo argues that police and prosecutors will simply not regulate themselves to the extent necessary to prevent those undiscovered wrongful convictions and a regulatory body for prosecutors is the only reasonable approach to try and solve these problems.
25. Dr Leo highlights the example of the infamous Central Park Jogger Case in 1989 where five African-American men were charged with the rape and brutal beating of a woman. Subsequent DNA evidence proved that they were innocent and on examining the evidence that the prosecutors had at the time it also seemed that the prosecutors should have seen they were innocent. Perhaps, in such cases, the prosecutors should be disciplined given the horrible result that 5 innocent men were incarcerated for a crime they did not commit and for which they were compensated with \$40 million from the State.
26. In Canada, there have been Commissions of Inquiry in the aftermath of wrongful conviction cases, where the body has subpoena power and can determine what went wrong, for the purpose of educating the justice system as to how to prevent such errors. An example of a wrongful conviction due to prosecutorial misconduct is the case of Michael Morton who served 25 years for murdering his wife but was later found to be innocent. In that case, the prosecutor was found to have knowingly suppressed several pieces of evidence that tended to show that Morton was innocent. In such circumstances, and even where Morton was diligently represented by extremely good defence counsels, he was nevertheless convicted. The prosecutor from the case was subjected to a trial, disbarred and served 10 days in jail, spending hundreds of thousands of dollars defending himself. Consequently, there were clear, tangible consequences for the misconduct of the prosecutor and Dr Leo strongly recommends that such processes need to be implemented more broadly.

The Role of the Judge and Jury

27. Another concern about the criminal justice system is that judges and juries are not appropriately undertaking their roles. In the case of juries, psychological research clearly indicates that they effectively ignore the presumption of innocence because when they see the accused in court they assume they must have committed the crime if they are there in the first place. For judges, they seem to show an inordinate amount of deference to the opinions of juries. This is the case even where juries come to verdicts that are plainly not open on the facts and yet courts are extremely reluctant to overturn them.
28. In thinking about the possible solutions to these problems, Dr Leo suggests that "In Doubt" by Dan Simon is a useful resource. It is suggested that one approach to this problem is to prevent the errors earlier on in the process, prior to the matter reaching trial. It should be noted that if false confessions are not relied on by police and prosecutors it is highly unlikely that a matter will lead to trial, but where false confessions are wrongly relied upon, they lead to convictions in 75-90% of trials according to Dr Leo.
29. Furthermore, judges should be encouraged to play a more active and independent role in ensuring that potential problematic evidence such as false confessions never reach the jury. The problem is that that is not the case. For example, United States studies have shown that in deciding whether expert opinion evidence is reliable for the purpose of satisfying the test in *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993), courts have been much more willing to exclude defence evidence than prosecution evidence.

BIOGRAPHY

Professor Jon Gould

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Professor Gould is a lawyer and social scientist. He combines empirical research with policy advocacy to advance government reform and administration on the subjects of wrongful convictions, hate speech, police conformance with the Constitution, and judicial treatment of race and gender. His first book, *Speak No Evil: The Triumph of Hate Speech Regulation*, was a co-winner of the 2006 Herbert Jacob award for the best book in law and society. His second book, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System*, was named an Outstanding Academic Title for 2008 by the American Library Association. Prior to joining AU, Professor Gould was director of the Center for Justice, Law and Society at George Mason; practiced law at Mayer, Brown and Platt; and worked on the national staffs of two presidential campaigns.

Professor Richard Leo

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Dr. Leo is the Hamill Family Chair in Law and Social Psychology and professor and Dean's Circle Research Scholar at the San Francisco School of Law, and a Fellow in the Institute for Legal Research at the University of California, Berkeley School of Law.

Dr. Leo is one of the leading experts in the world on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has authored more than 100 articles in leading scientific and legal journals as well as several books, including the multiple award-winning *Police Interrogation and American Justice* (Harvard University Press, 2008). Dr. Leo is one of the most cited criminal law and procedure professors in the United States and has been cited by the United States Supreme Court on multiple occasions.

Dr. Leo has worked on many high profile cases involving false confessions, including the cases of Michael Crowe, Earl Washington, Kerry Max Cook, the Beatrice Six, Jessie Misskelley, Jr. of the West Memphis 3, the Norfolk 4 and two of the Central Park jogger defendants.

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