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## Wrongful Convictions: Not Just an American Phenomenon?: An Investigation Into the Causes of Wrongful Convictions in the United States, Germany, Italy, and Japan

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# WRONGFUL CONVICTIONS: NOT JUST AN AMERICAN PHENOMENON?: AN INVESTIGATION INTO THE CAUSES OF WRONGFUL CONVICTIONS IN THE UNITED STATES, GERMANY, ITALY, AND JAPAN

## INTRODUCTION

In a world where wrongful convictions are an unfortunate reality, what criminal justice system best poses the solution to this international problem? Is the adversarial system, the inquisitorial system, or a hybrid system the answer to what may seem like an American phenomenon? Wrongful convictions have received a great amount of publicity in everyday media, but how significant of a problem are wrongful convictions?<sup>1</sup> The wrongful conviction problem is challenging to solve, not only because of the systemic problems that cause wrongful convictions, but also because the scale of the problem is largely unknown.<sup>2</sup> In the United States, estimates frequently put the range of wrongful convictions between 0.5–5% or more, making “the number of wrongful convictions each year in the thousands to tens of thousands.”<sup>3</sup>

Commentators often blame wrongful convictions on unavoidable compromises between finding the truth and other important values such as fundamental rights, democratic participation, efficiency, and finality.<sup>4</sup> The U.S. adversarial system in particular faces great criticism for its tendency to produce wrongful convictions.<sup>5</sup> The National Registry of Exonerations in the United States totals the current number of exonerations at 2,372 with a total of more than 20,000 years spent in prison by innocent individuals.<sup>6</sup> The Innocence Project alone has identified 364 DNA exonerations.<sup>7</sup> However, wrongful

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<sup>1</sup> Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 388 (2010).

<sup>2</sup> Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 918 (2011–2012).

<sup>3</sup> *Id.* In an American study, defendants in 15.4% of cases self-reported that they were wrongfully convicted, while this number is likely higher than the true statistic, it is an expression of just how far this problem may reach. JAMES R. ACKER & ALLISON D. REDLICH, *WRONGFUL CONVICTION: LAW, SCIENCE, & POLICY* 9 (2011).

<sup>4</sup> *COMPARATIVE CRIMINAL PROCEDURE*, 10 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

<sup>5</sup> Findley, *supra* note 2, at 914–19.

<sup>6</sup> NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Mar. 22, 2020). During the editing of this Comment this number rose to 2,603 exonerations and more than 23,000 years lost. *Id.* The number of exonerations and the number of years lost to wrongful convictions will continue to rise. *See id.* for updated figures.

<sup>7</sup> INNOCENCE PROJECT, <https://www.innocenceproject.org> (last visited Mar. 22, 2020).

convictions are not just an American phenomenon.<sup>8</sup> All systems are vulnerable to producing wrongful convictions but some systems may be more vulnerable than others.<sup>9</sup> The purpose of this Comment is to determine which systems, or aspects of a system, are most likely to minimize the wrongful conviction problem.

This Comment first examines the U.S. adversarial system and the causes of wrongful convictions in the U.S. adversarial system. The United States was chosen for examination because of the number of DNA exonerations that have taken place in the United States in recent years, and the extensive research that has been done on the causes of wrongful convictions in the U.S. criminal justice system.<sup>10</sup> This Comment then examines the German inquisitorial system and potential causes of wrongful convictions in the German inquisitorial system. Germany was chosen for examination because it is viewed as a more traditional inquisitorial system that focuses on the “truth.”<sup>11</sup> This Comment then examines the Italian hybrid system and the potential causes of wrongful convictions in the Italian system. Italy was chosen because of their substantial judicial reform from a traditional inquisitorial system into a hybrid system and because of the highly publicized wrongful conviction of Amanda Knox.<sup>12</sup> This Comment then examines the Japanese hybrid Saiban-in system and the potential cause of wrongful convictions in the Japanese system. Japan was chosen for this Comment because recent reform to the Japanese system is modeled after the U.S. system and because the Japanese system maintains above a 99% conviction rate.<sup>13</sup> Finally, this Comment proposes that, to prevent wrongful convictions, criminal justice reform must be undertaken to incorporate the positive aspects of the United States, German, Italian, and Japanese systems, while limiting and recognizing the systemic problems that produce wrongful convictions.

## I. DEFINING “WRONGFUL CONVICTION”

First, it is important to understand how a “wrongful conviction” is defined. Individuals who have been prosecuted and put in prison may believe that any

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<sup>8</sup> Ralph Grunewald, *The Narrative of Innocence, or, Lost Stories*, 25 L. & LITERATURE 366, 381 (2013).

<sup>9</sup> *Id.*

<sup>10</sup> See Findley, *supra* note 2, at 919; ACKER & REDLICH, *supra* note 3, at 13.

<sup>11</sup> See Findley, *supra* note 2, at 931.

<sup>12</sup> See generally Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 B.U. INT’L L.J. 229 (2012) (discussing the reform to the Italian legal system and the wrongful conviction of Amanda Knox).

<sup>13</sup> See Akira Goto, *Citizen Participation in Criminal Trials in Japan*, 42 INT’L J.L. CRIME & JUST. 117, 120 (2014); Kazuko Ito, *Wrongful Convictions and Recent Criminal Justice Reform in Japan*, 80 U. CIN. REV. 1245, 1248 (2012).

miscarriage of justice leads to a “wrongful conviction.”<sup>14</sup> However, the term is narrowly defined by scholars as covering only “the conviction of . . . actually innocent [defendants].”<sup>15</sup> By this definition of “wrongful conviction” the scope is limited to those who are considered to be factually innocent rather than those who may be considered legally innocent.<sup>16</sup> Factual innocence rests, in part, on someone else having committed the crime or in no crime being committed at all.<sup>17</sup> On the other hand, legal innocence, “expand[s] the meaning of wrongful conviction to include erasures of convictions, due process errors, and other types of injustice more broadly.”<sup>18</sup> Factual innocence and legal innocence often coexist when a legal malfunction leads to the conviction of a factually innocent person.<sup>19</sup> This Comment examines causes of wrongful convictions that are produced by both factual and legal malfunctions within each system.

## II. THE UNITED STATES: AN ADVERSARIAL SYSTEM

The U.S. adversarial system consists of the prosecution, the defense, the judge, the jury, and the defendant (or the accused).<sup>20</sup> The prosecution is an advocate for the state and has the power to bring charges against a suspect based on probable cause, i.e., when there is a fair probability that this individual committed the crime.<sup>21</sup> The prosecution is required to put forth evidence beyond a reasonable doubt against the accused to obtain a conviction.<sup>22</sup> Jurors have the ultimate task in deciding whether the prosecution has proven the defendant’s guilt “beyond a reasonable doubt.” The jury is not required, or even encouraged to explain their rationale.<sup>23</sup> The defense is an advocate for the accused who may put forth evidence for the defendant and refute the prosecution’s evidence during cross-examination.<sup>24</sup> In a U.S. jury trial, the majority of the evidence is live oral testimony by lay or expert witnesses.<sup>25</sup> In addition to each side presenting their

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<sup>14</sup> ACKER & REDLICH, *supra* note 3, at 9.

<sup>15</sup> WRONGFUL CONVICTIONS & THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 3 (Daniel S. Medwed ed., 2017); *see also* ACKER & REDLICH, *supra* note 3, at 3.

<sup>16</sup> *See* ACKER & REDLICH, *supra* note 3, at 8.

<sup>17</sup> JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS & RESTORING THE CRIMINAL JUSTICE SYSTEM 3 (2008).

<sup>18</sup> WRONGFUL CONVICTIONS & THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT, *supra* note 15, at 5.

<sup>19</sup> GOULD, *supra* note 17, at 3.

<sup>20</sup> THEODORE L. KUBICEK, ADVERSARIAL JUSTICE: AMERICA’S COURT SYSTEM ON TRIAL 9 (2006).

<sup>21</sup> DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT & ITS IMPACT ON THE INNOCENT 13 (2012).

<sup>22</sup> Grunewald, *supra* note 8, at 372.

<sup>23</sup> *See id.*

<sup>24</sup> *See generally* KUBICEK, *supra* note 20 (discussing the role of defense attorneys in the U.S. system).

<sup>25</sup> *See id.* at 48–49, 113.

own witnesses, the defense and prosecution are allowed to cross-examine the opposing side's witnesses.<sup>26</sup> During a trial in the United States, witnesses and judges play a fairly passive role.<sup>27</sup> A witness's sole role is to answer an attorney's questions on direct or cross-examination.<sup>28</sup> The witness is not allowed to step outside the bounds of an attorney's questions.<sup>29</sup> Attorneys for both sides often rely on this limitation to induce answers that are helpful to their theory of the case, regardless of their substantive truth.<sup>30</sup>

The judge rules on decisions of law and in most instances controls sentencing.<sup>31</sup> The judge does not actively participate in the collection of evidence or questioning of witnesses during trial.<sup>32</sup> The jury is the ultimate fact-finder and determines the guilt or innocence of the defendant.<sup>33</sup> Jurors are selected through a relatively vigorous *voir dire* process, in which the prosecution and defense are allowed to question potential jurors and may remove any juror for cause upon approval from the judge, as well as a select number of jurors without cause.<sup>34</sup> The stated purpose of *voir dire* is to be able to find "a fair and impartial jury."<sup>35</sup> However, *voir dire* is often used as a tool by attorneys to choose jurors who may sympathize with their theory of the case, or to eliminate jurors who may sympathize with the other party's theory of the case.<sup>36</sup> While jurors are tasked with the ultimate question of guilt, jurors are largely untrusted in the U.S. system.<sup>37</sup> As a result, procedural rules in the United States allow both judges and attorneys to withhold evidence from the jury to dissipate any unfair prejudice toward the defendant.<sup>38</sup> The defendant can also choose to not testify; jurors are instructed to withhold judgment against the defendant for such a decision.<sup>39</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *See generally Id.* at 9, 113 (discussing the role of judges in the U.S. court system).

<sup>28</sup> *See id.* at 114.

<sup>29</sup> *See id.* Doing so may raise an objection.

<sup>30</sup> *See id.*

<sup>31</sup> *How Courts Work: Courts and Legal Procedure: The Role of Juries*, AM. BAR ASS'N (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/jury\\_role/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_role/).

<sup>32</sup> *See generally* KUBICEK, *supra* note 20, at 9, 113 (discussing the role of judges in the U.S. criminal justice system). While judges have questioned witnesses, it is ultimately uncommon and not a central role of the judge. *See id.*

<sup>33</sup> *Id.* at 139.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 9, 113.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 14–15.

In the U.S. adversarial system, the prosecution and defense go head to head, each telling diametrically opposed “stories” or “theories” about the facts of the case.<sup>40</sup> The primary focus of the adversarial system is to facilitate a vigorous “war” in which the prosecution and the defense work around procedural barriers rather than focus on finding the “truth.”<sup>41</sup>

This Comment will now discuss some of the most commonly cited causes of wrongful convictions in the U.S. adversarial system. This analysis will start with eyewitness identification error and false confessions because these two factual errors are major causes of wrongful convictions found frequently in DNA exonerations. The analysis then will move on to other systemic or legal issues that cause wrongful convictions, including: forensic evidence, improper testimony, jailhouse informants, tunnel vision, plea bargaining, and the appellate process.

### A. *Eyewitness Identification Error*

The Innocence Project indicates that the most prevalent cause of wrongful convictions in the United States is eyewitness identification error.<sup>42</sup> More than 75% of wrongful conviction cases that led to exonerations by DNA evidence involved eyewitness misidentification.<sup>43</sup> Eyewitness identification error occurs when a witness to the crime misidentifies—often during a police lineup—the individual who committed the crime.<sup>44</sup> Errors in eyewitness identification may occur because of “exposure time, amount of light, distance from observer, level of violence, and post-event factors . . . . Misidentification is also more likely when the observer and the observed are of different races.”<sup>45</sup> Other factors that may facilitate eyewitness misidentification are “personal prejudice, expectations based on past experience, and stereotypes.”<sup>46</sup> Police lineup practices that are suggestive or procedurally improper can also impact the witness’s ability to properly identify the perpetrator.<sup>47</sup> When police officers are suggestive,

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<sup>40</sup> Grunewald, *supra* note 8, at 372.

<sup>41</sup> KUBICEK, *supra* note 20, at 12–13, 48–49.

<sup>42</sup> ACKER & REDLICH, *supra* note 3, at 13.

<sup>43</sup> *Id.*

<sup>44</sup> See generally Gary L. Wells, *Eyewitness Identification: Systemic Reform*, 2006 WIS. L. REV. 615 (2006) (discussing the problems and potential solutions to eyewitness identification error).

<sup>45</sup> MARVIN D. FREE, JR. & MITCH RUESINK, RACE & JUSTICE: WRONGFUL CONVICTIONS OF AFRICAN AMERICAN MEN 6–7 (2012) (cross-racial identification problems are especially problematic when a white witness is attempting to identify a black perpetrator).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* These practices may include: the number of suspects in a lineup, whether the suspect “stands out” in the lineup, failure to tell the witness that the suspect may not be in the lineup, a viewing everyone in the lineup at once, failure to use a police officer who does not know who the suspect is for the lineup, and failure to assess

individuals may pick the “suspect” and be given positive feedback—thus feeling as though they made the correct choice—despite the actual perpetrator being absent from the lineup.<sup>48</sup>

Eyewitness identification error is particularly problematic in an adversarial jury system because jurors tend to overestimate the value of direct evidence, such as eye witness testimony while undervaluing circumstantial evidence, such as DNA evidence.<sup>49</sup> The adversarial system allows for this overestimation because prosecutors are able to create their own “theory” of the case that can explain the presence of another individual’s DNA evidence, or the lack of physical evidence against a defendant.<sup>50</sup> Additionally, jurors may pay more attention to an emotional eyewitness on the stand or to a prosecutor’s closing argument than to a scientific expert discussing DNA evidence.<sup>51</sup> Jurors are prone to associating a witness’s confidence with the accuracy of their identification.<sup>52</sup> The association between confidence and accuracy is problematic because a witness can feel a sense of false confidence from police feedback or from rehearsing the testimony with an attorney.<sup>53</sup> Consequently, jurors may convict an innocent defendant because of a confident eyewitness despite overwhelming evidence of innocence.<sup>54</sup>

Steven Avery, the subject of Netflix’s “Making a Murderer” documentary, was exonerated in 2003 for a rape he did not commit.<sup>55</sup> Steven Avery was arrested after he was picked by the victim out of a photo array provided by the police, and convicted when the victim later identified him as the perpetrator at trial.<sup>56</sup> Despite overwhelming alibi evidence, Steven Avery was convicted by a jury beyond a reasonable doubt.<sup>57</sup> While the real perpetrator, who was discovered in 2002, looked fairly similar to Steven Avery, it was not, in fact, Steven Avery.<sup>58</sup> Steven Avery spent eighteen years in prison for a crime he did not commit.<sup>59</sup> Ronald Cotton, an exoneree, was also convicted primarily on the

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the witness’s confidence level at the time of the lineup. Wells, *supra* note 44, at 623–32.

<sup>48</sup> See Wells, *supra* note 44, at 620.

<sup>49</sup> See Grunewald, *supra* note 8, at 367.

<sup>50</sup> See *id.* at 367–68.

<sup>51</sup> See *id.*

<sup>52</sup> See Wells, *supra* note 44, at 617–23.

<sup>53</sup> See *id.*

<sup>54</sup> See Grunewald, *supra* note 8, at 367–68.

<sup>55</sup> *Steven Avery*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/steven-avery/> (last visited Mar. 22, 2020).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

basis of eyewitness testimony.<sup>60</sup> The victim of the crime, Jennifer Thompson-Cannino, stated that she “made every effort to study the perpetrator’s face while he was assaulting her.”<sup>61</sup> However, Jennifer still misidentified Ronald Cotton in a photo lineup and a later live lineup even though “she was 100 percent sure she had the right man.”<sup>62</sup> Ronald Cotton spent ten years in prison for a crime he did not commit.<sup>63</sup>

### B. *False Confessions*

False confessions are a second major cause of wrongful convictions in the United States.<sup>64</sup> False confessions were a factor in twenty-five percent of wrongful convictions that were overturned by DNA evidence.<sup>65</sup> “A false confession is an admission to a criminal act—usually accompanied by a narrative of how and why the crime occurred—that the confessor did not commit.”<sup>66</sup> To lay persons the idea of falsely confessing to a criminal act may seem completely irrational.<sup>67</sup> This belief is widely held despite highly publicized wrongful conviction cases, such as the Central Park Five.<sup>68</sup> The Central Park Five, are five teenagers who were convicted of the attack and rape of a woman in Central Park after a string of false confessions.<sup>69</sup> The Central Park Five case is another example of when direct evidence, such as a confession, was valued over circumstantial DNA evidence.<sup>70</sup> In the Central Park Five case, DNA testing was done on semen samples found in the victim—the DNA did not match any of the defendants.<sup>71</sup> The prosecution decided to continue to prosecute the case solely on the false confessions under the “theory” that they had caught some, but not all of the perpetrators of the crime.<sup>72</sup>

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<sup>60</sup> *Ronald Cotton*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/ronald-cotton/> (last visited Mar. 22, 2020).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* “Cotton and Thompson-Cannino are now good friends. They travel around the country working to spread the word about wrongful convictions and reforms—especially for eyewitness identification procedures—that can prevent future injustice . . .” *Id.*

<sup>64</sup> ACKER & REDLICH, *supra* note 3, at 13.

<sup>65</sup> *Id.*

<sup>66</sup> Saul M. Kassir et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 5 (2010).

<sup>67</sup> See *id.* at 25.

<sup>68</sup> Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 215 (2005).

<sup>69</sup> *Id.*

<sup>70</sup> See Grunewald, *supra* note 8, at 367; Saul M. Kassir, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 527–28 (2009).

<sup>71</sup> Kassir, *supra* note 70, at 527–28.

<sup>72</sup> *Id.*

An individual may submit a false confession for a multitude of reasons such as: “[d]uress, coercion, intoxication, diminished capacity, mental impairment, a misunderstanding of the law, fear of violence by the police, actual harm by the police, the threat of a harsh sentence if a confession is not given, and a misunderstanding of the situation.”<sup>73</sup> Additionally, innocent individuals may be susceptible to confessing as a byproduct of their innocence.<sup>74</sup> For example, an innocent individual may waive their right to silence or counsel, or may appear anxious and defensive when questioned because they are innocent and just want to help the police to clear up the situation.<sup>75</sup>

Lay jurors may often miscount the goal of an interrogation—“to obtain legally admissible confessions” from the suspect—when considering the probative weight of a confession.<sup>76</sup> To a juror, a false confession may be especially convincing evidence of guilt when the confession includes facts that the jurors may believe—or are told—that only the perpetrator of the crime could know.<sup>77</sup> In actuality the defendant may have received these details from the police officer during interrogation.<sup>78</sup> Investigators may go so far as to correct an innocent confessor’s errors, and have them initial these errors in a written confession.<sup>79</sup> An investigator may genuinely believe that this is the perpetrator and that they would “know a false confession if [they] saw one.”<sup>80</sup> However, one study on false confessions comparing investigators to college students found that, “investigators were not more accurate than students, only more confident and more biased.”<sup>81</sup>

False confessions can be especially troubling evidence in an adversarial system because the system is relying on jurors to determine the viability of the confession, while listening to competing testimony on the matter from the prosecution and defense.<sup>82</sup> It can be difficult for anyone to identify a false confession, including judges, attorneys, and investigators.<sup>83</sup> There is a belief of

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<sup>73</sup> FREE & RUESINK, *supra* note 45, at 8.

<sup>74</sup> See generally Kassir, *supra* note 68, at 215 (discussing how innocence impacts confessions).

<sup>75</sup> *Id.* at 223.

<sup>76</sup> Kassir et al., *supra* note 66, at 14.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* (“Without an electronic recording of the entire interrogation process, courts are thus left to decide a swearing contest between the suspect and the detective over the source of the details contained within the confession.”).

<sup>79</sup> Saul M. Kassir, *False Confessions*, 73 ALB. L. REV. 1227, 1233 (2010).

<sup>80</sup> Saul M. Kassir et al., “I’d Know a False Confession if I Saw One”: A Comparative Study of College Students & Police Investigators, 29 L. & HUM. BEHAV. 211, 218 (2005).

<sup>81</sup> *Id.*

<sup>82</sup> See Kassir et al., *supra* note 66, at 10.

<sup>83</sup> Kassir, *supra* note 68, at 223–24.

lay persons that “certain interrogation tactics are psychologically coercive . . . [but do not] elicit false confessions.”<sup>84</sup> As lay people, jurors may not comprehend these rationales and thus be unpersuaded by a defense that claims there has been a false confession.<sup>85</sup> This problem is only enhanced by the fact that a false confession may taint or impact other independent evidence such as lay or expert testimony, and even circumstantial evidence.<sup>86</sup> In a study of exonerations, researchers found that in two-thirds of the cases where false confession evidence resulted in conviction, the corroboration for the false confession was unreliable forensic evidence.<sup>87</sup>

Evidence of actual innocence may not be enough for those who falsely confess. In 2010, The Center on Wrongful Convictions “reported on several known cases in which a confessor was tried and convicted despite having been excluded by DNA,” of which the Central Park 5 case is just one example.<sup>88</sup> One study of DNA exonerations found that “a false confessor who chooses to take his case to trial stands more than an 80% chance of conviction, despite the fact that he is officially presumed innocent, that he is in fact innocent, and that there is no reliable evidence confirming or supporting his false confession.”<sup>89</sup> What is particularly troublesome is that those confessing are not aware of this harsh reality. Jeffery Deskovic, an exoneree who falsely confessed, stated “[b]elieving in the criminal justice system and being fearful for myself, I told them what they wanted to hear.”<sup>90</sup> Jeffery Deskovic spent sixteen years in prison for a crime he did not commit before being exonerated.<sup>91</sup>

### C. *Forensic Evidence and Expert Testimony*

Unreliable or invalid forensic evidence also plays a role in wrongful convictions, which may be attributable to a legal or systematic defect in judicial gatekeeping.<sup>92</sup> The introduction of this type of forensic evidence at trial was a

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<sup>84</sup> Kassin et al., *supra* note 66, at 24.

<sup>85</sup> *Id.* at 25.

<sup>86</sup> Saul M. Kassin et al., *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files*, 23 PSYCHOL. SCI. 41, 41 (2012). For example, “John Kogut, who was eventually exonerated on the basis of DNA evidence, had alibi witnesses who withdrew their support once told by police that he had confessed.” *Id.* at 44.

<sup>87</sup> Kassin et al., *supra* note 86, at 44.

<sup>88</sup> See Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 433 (2012); Kassin, *supra* note 68, at 215.

<sup>89</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 961 (2004).

<sup>90</sup> Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L. HUM. BEHAV. 327, 329 (2011).

<sup>91</sup> *Id.*

<sup>92</sup> See ACKER & REDLICH, *supra* note 3, at 13.

factor in fifty percent of wrongful convictions that were overturned by DNA evidence.<sup>93</sup> Forensic evidence covers a wide variety of evidence including analysis and comparison of blood types, hair, bite marks, fingerprints, and shoe marks.<sup>94</sup> One of the reasons forensic evidence may lead to wrongful convictions is that it is most often left solely in the hands of government agencies, who are often looking for incriminating evidence rather than evidence of innocence.<sup>95</sup> In some cases, the search for incriminating evidence is taken further when forensic experts purposefully create results that indicate guilt or cover up results that suggest innocence.<sup>96</sup> Gregory Taylor, an exoneree whose story was told briefly in the Netflix documentary “The Staircase,” is just one example of a wrongfully convicted defendant whose case involved false information in a forensic report for the prosecution.<sup>97</sup> The forensic report in Gregory Taylor’s case was presented at trial without the technician who wrote the report as a witness.<sup>98</sup> The report stated that there was “a chemical indication for the presence of blood in his truck.”<sup>99</sup> Subsequent testing showed that there was no blood was present.<sup>100</sup> However, this fact was never presented to the jury.<sup>101</sup> Taylor spent seventeen years in prison for a crime he did not commit.<sup>102</sup> Taylor may have been able to successfully refute this evidence in court; however, forensic agencies are essentially unavailable to defendants, and thus independent testing for defense is unlikely, especially if the defendant lacks the necessary funding.<sup>103</sup>

Forensic evidence may also lack proper testing for scientific validity and reliability, yet may still be heavily relied upon by a jury.<sup>104</sup> Testimony about

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<sup>93</sup> *Id.*

<sup>94</sup> Brandon L. Garret & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 9 (2009).

<sup>95</sup> Findley, *supra* note 2, at 915–16.

<sup>96</sup> See Patrick Zarcone, *Durham Novelist Michael Peterson Back in Court for Motions Hearing*, CBS17 (Aug. 15, 2016, 11:14 AM), [https://www.cbs17.com/news/local-news/durham-novelist-michael-peterson-back-in-court-for-motions-hearing\\_20180327004741638/1080826496](https://www.cbs17.com/news/local-news/durham-novelist-michael-peterson-back-in-court-for-motions-hearing_20180327004741638/1080826496).

<sup>97</sup> See Phil Hornshaw, “*The Staircase*”: *What Happened to Blood Spatter Analyst Duane Deave After the Case?*, THE WRAP, (June 26, 2018, 2:01 PM) <https://www.thewrap.com/the-staircase-blood-spatter-analyst-duane-deaver/>. Gregory Taylor was not the only one in North Carolina to experience improper forensic evidence being brought against him, “analyst, Duane Deaver with the SBI, [who] was found to have repeatedly aided prosecutors of obtaining convictions over a 16-year period, mostly by misrepresenting blood evidence and keeping critical notes from defense attorneys.” Zarcone, *supra* note 96.

<sup>98</sup> *Gregory Taylor*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3677> (last visited Mar. 22, 2020).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Findley, *supra* note 2, at 915–16.

<sup>104</sup> FREE & RUESINK, *supra* note 45, at 10.

forensic evidence may present inadequate information that is catered specifically to one finding rather than an impartial scientific view.<sup>105</sup> Specifically, forensic evidence may be presented in a way that ignores any exculpatory information or data.<sup>106</sup> For example, while DNA evidence may be rather reliable when following proper protocol, the test results may still be stretched to get the prosecution's preferred conclusion.<sup>107</sup> While defense attorneys should be playing an active role in exposing the potential bias or invalidity of the forensic evidence, this practice is lacking.<sup>108</sup> Defense attorneys may not effectively cross-examine forensic testimony because of a lack of understanding of the underlying science or the inability to provide a defense expert that could comment on the validity of the evidence.<sup>109</sup>

The increasingly popular “battle of the experts” in the United States creates an additional barrier for the innocent.<sup>110</sup> “[J]uries are more likely to assume a scientist, technician, or specialist is neutral,” despite the fact the expert is being provided and paid for by one side in an adversarial battle.<sup>111</sup> However, judges often feel as though experts have a “tendency to ‘abandon objectivity and become advocates for the side that hired them.’”<sup>112</sup> The “battle of the experts” is closely tied with forensic evidence, and thus the typical defendant in a criminal case often does not have much, if anything, to bring to this “battle” due to the vast expense of expert testimony.<sup>113</sup>

#### *D. Preparation of Witnesses, Testimony, and Jailhouse Informants*

In the United States, the prosecution and the defense have the right to prepare witnesses prior to trial, making witnesses more convincing to jurors and themselves.<sup>114</sup> The preparation of a witness could lead the witness to feel a sense of false confidence if they are lying or unsure. This false confidence may impact how reliable the jurors believe the testimony is.<sup>115</sup> Preparation gives both sides

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Garret & Neufeld, *supra* note 94, at 63–64.

<sup>108</sup> *Id.* at 89–90.

<sup>109</sup> *Id.*

<sup>110</sup> Lynn S. McCreary & David R. Singh, *Winning the “Battle of the Experts” While Keeping Fees Under Control*, AM. BAR ASS’N (Sept. 27, 2012), <http://apps.americanbar.org/litigation/committees/corporate/articles/summer2012-0912-winning-battle-experts-while-keeping-fees-under-control.html>.

<sup>111</sup> Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 707 (2014).

<sup>112</sup> *Id.* (internal citations omitted).

<sup>113</sup> McCreary & Singh, *supra* note 110.

<sup>114</sup> Findley, *supra* note 2, at 916.

<sup>115</sup> *Id.*; see Wells, *supra* note 44, at 617–22.

an opportunity to manipulate their own witness's testimony in a way that hampers finding the "truth."<sup>116</sup>

In addition to traditional eyewitnesses, the U.S. system commonly takes advantage of jailhouse informants to provide key testimony in criminal cases.<sup>117</sup> Jailhouse informants are individuals who are currently in jail or prison and are typically being paid or given leniency for their own crimes to testify against the defendant.<sup>118</sup> These informants are even used in cases of "co-defendants."<sup>119</sup> In the case of "co-defendants," one defendant is given the opportunity to evade trial and have a substantial reduction in their sentence in exchange for their testimony against the other defendant with regard to the same offense.<sup>120</sup> Jurors may find this testimony trustworthy despite being aware of the informant's incentive to lie or be biased against the defendant.<sup>121</sup> Police and prosecutors' confidence in the accuracy of a jailhouse informant's testimony may enhance a juror's positive perspective toward the testimony.<sup>122</sup> Joe Amrine, an exoneree and subject of the documentary "Unreasonable Doubt: The Joe Amrine Case," was convicted and sentenced to death on the basis of jailhouse informant testimony despite substantial evidence of innocence.<sup>123</sup> The jailhouse informants in Joe's case were given reduced criminal charges and put in protective custody.<sup>124</sup> Despite the recantations of the jailhouse informants in 1987, a year after the crime, Joe Amrine was not released until 2003.<sup>125</sup> Joe Amrine spent sixteen years on death row for a crime he did not commit.<sup>126</sup>

Defendants in the U.S. adversarial system may also be discouraged from testifying in their own defense, by their own attorney or by others, because of the offensive nature of the prosecution.<sup>127</sup> In other fact-finding systems, the defendant's testimony is a key piece of evidence for making a determination of

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<sup>116</sup> KUBICEK, *supra* note 20, at 100.

<sup>117</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 108 (2006).

<sup>118</sup> *Id.*

<sup>119</sup> *Bobby Ray Dixon*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/bobby-ray-dixon/> (last visited Mar. 22, 2020).

<sup>120</sup> *Id.*

<sup>121</sup> FREE & RUESINK, *supra* note 45, at 8; Natapoff, *supra* note 117, at 123.

<sup>122</sup> Natapoff, *supra* note 117, at 112.

<sup>123</sup> *Joseph Amrine*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2993> (last visited Mar. 22, 2020).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Slobogin, *supra* note 111, at 707.

guilt or innocence.<sup>128</sup> While jurors are not allowed to impose any judgment against the defendant for not testifying, jurors often end up considering it, at least at an unconscious level.<sup>129</sup>

### *E. Tunnel Vision: Police and Prosecutorial Misconduct*

Even if the legal system works to prevent jurors from hearing misleading or improper testimony, false confessions, or invalid forensic evidence, wrongful convictions in the United States would still occur due to police and prosecutorial misconduct.<sup>130</sup> As a result of the combative nature of the adversarial system, there is concern that the U.S. system is prone to “outright dishonest practices of police, prosecutors, and forensic experts.”<sup>131</sup> One study suggests that of post-conviction exonerations based on DNA evidence, “63 percent involved police or prosecutorial misconduct.”<sup>132</sup> Prosecutorial misconduct may include racial or gender bias in jury selection; “harassment or bias towards the defendant or defense attorney”; the use of false, misleading, or mischaracterized evidence; evidence suppression; mishandling evidence; gathering testimony based on grants of rewards without properly informing the defense; improper comments during trial and closing arguments; and improper conduct toward witnesses.<sup>133</sup>

The improper actions of police officers may lead to coerced or false confessions, the mishandling of physical evidence, the threatening of witnesses to turn on a defendant, or the coaching of a witness during a lineup identification.<sup>134</sup> Thus, police misconduct may be at the root of several other factors that cause wrongful convictions including eyewitness identification error, false confessions, and invalid forensic evidence.<sup>135</sup> In a study of thirty-eight DNA exonerations, the exoneree in *thirty-six* cases had included factually

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<sup>128</sup> *Id.*

<sup>129</sup> See KUBICEK, *supra* note 20, at 114–15.

<sup>130</sup> See Stephen C. Thaman, *Ensuring the Factual Reliability of Criminal Convictions: Reasoned Judgments or a Return to Formal Rules of Evidence?*, in *COMPARATIVE CRIMINAL PROCEDURE* 75, 75 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

<sup>131</sup> *Id.*; see also C. Ronald Huff, *Wrongful Convictions in the U.S.*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 59, 61 (2008) (“[O]verzealous law enforcement officers and prosecutors who engage in misconduct, including withholding evidence; false or coerced confessions and suggestive interrogations; perjury; misleading lineups; the inappropriate use of informants or “snitches”; the ineffective assistance of counsel; community pressure for a conviction; forensic science errors, incompetence, and fraud; and the ‘ratification of error’” also play a role in wrongful convictions in the United States.”).

<sup>132</sup> HUFF, *supra* note 131, at 62.

<sup>133</sup> FREE & RUESINK, *supra* note 45, at 78.

<sup>134</sup> *Id.*

<sup>135</sup> See generally ACKER & REDLICH, *supra* note 3, at 13.

accurate and non-public information in their false confession.<sup>136</sup> Thus, “it appears that police had communicated these details, inadvertently or purposefully—through leading questions and assertions, exposure to photographs, or escorted visits to the crime scene.”<sup>137</sup> In high profile cases especially, police officers may resort to misconduct because they may feel pressure to make a quick arrest.<sup>138</sup>

Misconduct by police and prosecutors may also result due to tunnel vision, specifically the failure to fully investigate other theories or suspects.<sup>139</sup> Tunnel vision encompasses both confirmation bias<sup>140</sup> and hindsight bias.<sup>141</sup> Tunnel vision may result in further misconduct or other systemic errors because the prosecutor or investigators fully believe this individual committed the crime.<sup>142</sup> Tunnel vision may also result in a prosecutor or police officer being unwilling to accept a legitimate post-conviction claim of actual innocence.<sup>143</sup>

In 1986, Michael Morton was charged with the murder of his wife.<sup>144</sup> In Morton’s case, despite an order by the trial judge to turn over all reports by the investigator, an overwhelming amount of exculpatory evidence included in the reports was kept from the defense.<sup>145</sup> Morton was convicted based on the prosecution’s theory of the case, without any witnesses or physical evidence that Morton was the real perpetrator.<sup>146</sup> Mr. Anderson, the prosecutor who withheld evidence in the Morton case, later became a judge.<sup>147</sup> Following Morton’s exoneration, Mr. Anderson was charged with criminal contempt and tampering with evidence for his misconduct.<sup>148</sup> Mr. Anderson spent ten days in jail and lost

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<sup>136</sup> Kassin, *supra* note 88, at 435.

<sup>137</sup> *Id.* at 435–36.

<sup>138</sup> Nat’l Summit on Wrongful Convictions, *National Summit on Wrongful Convictions: Building a Systematic Approach to Prevent Wrongful Convictions*, 5 (Aug. 2013).

<sup>139</sup> FREE, *supra* note 45, at 8.

<sup>140</sup> Anthony W. Batts et al., *New Perspectives in Policing: Policing and Wrongful Convictions* 6 (Harv. Kennedy Sch., Nat’l Inst. of Just., NCJ 246328, 2014) (confirmation bias is the “tendency to seek information and evidence that bolster existing expectations and hypotheses”).

<sup>141</sup> *Id.* (“Hindsight bias refers to the tendency to think that an eventual outcome was much more likely to occur than one originally expected”).

<sup>142</sup> See Kassin, *supra* note 88, at 433.

<sup>143</sup> See *id.* at 431.

<sup>144</sup> *Michael Morton*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/michael-morton/> (last visited Mar. 22, 2020).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

his law license.<sup>149</sup> Michael Morton spent twenty-four years in prison for a crime he did not commit.<sup>150</sup>

#### F. *Inadequate Defense Counsel and Indigent Clients*

A general concern with the adversarial system is that defendants are often left underrepresented, especially when indigent, while prosecutors have greater access to resources to prove their theory of the case.<sup>151</sup> This concern is heightened especially when the prosecution does not fight fairly and participates in misconduct, as discussed *supra*. Inadequate defense counsel may result from a lack of funding, case management, absence of quality control, motivation, or a presumption of guilt.<sup>152</sup> In some areas of the United States, indigent defense counsel represent ninety percent of criminal defendants.<sup>153</sup> Some view an inadequate and indigent defense as creating an insurmountable hurdle for the defense to even put up a fight, let alone win the “war” against the prosecution.<sup>154</sup>

An inadequate defense can be particularly problematic in the case of a factually innocent client if the defense attorney assumes the client’s guilt at the outset of the case and subsequently fails to protect the client from the other wrongful conviction factors. A defense attorney’s failure may allow the jury to consider, without skepticism or awareness, evidence produced through prosecutorial or police misconduct, untrustworthy forensic evidence or expert testimony, eyewitness identification error, a false confession, or the testimony of biased informants.<sup>155</sup> Additionally, the failure of a defense attorney pre-trial may ultimately impact an innocent individuals ability to seek post-conviction relief.<sup>156</sup> In 2003, Sandeep (Sonny) Bharadia was convicted of aggravated sodomy, burglary, and aggravated sexual battery.<sup>157</sup> Prior to trial, Bharadia’s defense attorney failed to have DNA testing done on a pair of gloves used by the perpetrator during the attack.<sup>158</sup> In 2012, post-conviction DNA testing was done

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Findley, *supra* note 2, at 914.

<sup>152</sup> FREE & RUESINK, *supra* note 45, at 9; Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 220, 228–33 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

<sup>153</sup> Bernhard, *supra* note 152, at 225.

<sup>154</sup> Findley, *supra* note 2, at 914.

<sup>155</sup> See generally FREE & RUESINK, *supra* note 45.

<sup>156</sup> See Julie Seaman, *When Innocence is No Defense*, N.Y. TIMES (Aug. 12, 2015) <https://www.nytimes.com/2015/08/12/opinion/when-innocence-is-no-defense.html>.

<sup>157</sup> See *id.*; *Sonny Bharadia*, GA. INNOCENCE PROJECT, <https://www.georgiainnocenceproject.org/cases/active-cases/sonny-bharadia/> (last visited Mar. 22, 2020).

<sup>158</sup> See *id.*

on the gloves which implicated another individual, Bharadia's co-defendant, who received a plea deal for twenty-four months in exchange for his testimony against Bharadia.<sup>159</sup> The Georgia Supreme Court refused to offer Bharadia a new trial because he and his defense attorney had not been "diligent" in testing the gloves pre-trial.<sup>160</sup> Sonny Bharadia has been in prison for over fifteen years.<sup>161</sup>

### G. Plea Bargaining and "Alford" Pleas

Trials are a long and complicated process in the U.S. adversarial system; thus, there is a heavy reliance on plea bargaining to keep the system running.<sup>162</sup> While most individuals believe that they would never plead guilty to a crime they did not commit, many individuals end up taking guilty pleas despite their innocence.<sup>163</sup> Defendants may plead guilty to crimes they did not commit out of worry of a more severe sentence such as the death penalty.<sup>164</sup> Some prominent individuals in the criminal justice system, such as the Assistant Attorney General of Missouri, believe "that the Court need not stop the execution of an innocent person as long as the prisoner had a fair trial."<sup>165</sup> Guilty plea convictions have been upheld even when the defendant admitted to only taking the plea due to fear of more severe charges if the case were to go to trial.<sup>166</sup> Specifically, innocent defendants may feel the need to accept a plea bargain because of a false confession or other wrongful conviction causing factor(s) that may result in a guilty verdict and much longer sentence at trial.<sup>167</sup> In 1980, Bobby Ray Dixon falsely confessed to rape and murder.<sup>168</sup> Bobby Ray then pled guilty to life in prison—rather than face the death penalty at trial—for a crime he did not commit.<sup>169</sup> Bobby Ray was given a lighter sentence in exchange for his testimony against a co-defendant.<sup>170</sup> Bobby Ray Dixon spent thirty years in prison and ultimately died before being officially exonerated in 2010.<sup>171</sup>

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<sup>159</sup> *See id.*

<sup>160</sup> *See Seaman, supra* note 156.

<sup>161</sup> *See Sonny Bharadia, supra* note 157.

<sup>162</sup> Rachel A. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 11 EMORY INT'L L. REV. 419, 429 (1997) (stating that approximately ninety percent of all criminal cases in the U.S. result in a plea bargain).

<sup>163</sup> MEDWED, *supra* note 21, at 54.

<sup>164</sup> Slobogin, *supra* note 111, at 707–08.

<sup>165</sup> *See Joe Amrine Is Released: 109th Wrongly-Convicted Person Exonerated After 16 Years Under Sentence of Death*, MURDERPEDIA, <https://murderpedia.org/male.A/a/amrine-joseph.htm> (July 28, 2003).

<sup>166</sup> Cleave, *supra* note 162, at 459.

<sup>167</sup> *See Drizin & Leo, supra* note 89, at 961.

<sup>168</sup> *Bobby Ray Dixon, supra* note 119.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

In addition to guilty pleas, the U.S. system also has “Alford” Pleas. An Alford Plea is a form of guilty plea in which a defendant is allowed to accept the charges and plead “guilty” while still maintaining that they are innocent of the crime.<sup>172</sup> Alford Pleas, by their very nature, have a clear link to wrongful convictions because the individual is refusing to admit guilt.<sup>173</sup> Alford Pleas are fairly rare and are likely only offered and implemented to avoid future lengthy trial proceedings or additional time spent in prison.<sup>174</sup> Additionally, Alford Pleas may be misused by prosecutors, in cases where the prosecutor is aware that there has been a wrongful conviction, to avoid putting an obligation on the state to pay for the wrongful conviction or to admit “failure” in convicting a factually innocent individual.<sup>175</sup> Alford Pleas have recently been brought to the attention of the public in a couple of famous cases. Each of the “West Memphis Three” took an Alford Plea in order to be immediately released after spending eighteen years in prison, for murders that DNA evidence suggests they did not commit.<sup>176</sup> Michael Peterson, the defendant from “The Staircase” documentary on Netflix, also used an Alford Plea rather than stand trial again.<sup>177</sup> Alford Pleas seem to be an American phenomenon and are ultimately unfathomable in systems where the focus is on finding the “truth.”<sup>178</sup>

#### H. *The Appellate Process*

While wrongful convictions are created at the trial level, there are significant barriers to uncovering a wrongful conviction because of the appellate procedure in the United States.<sup>179</sup> Specifically, the appellate system in the United States makes it very difficult to bring a valid appeal primarily based on factual innocence.<sup>180</sup> The appellate process in the United States focuses on legal error and correcting legal mistakes rather than finding the “truth.”<sup>181</sup> It is an additional

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<sup>172</sup> Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139, 1161–65 (2014).

<sup>173</sup> Johnny Nhanet et al., *Discounted Justice: The Potential Misuse of Alford Pleas for Future Exonorees*, 50 SOC. SCI. J. 374, 377–80 (2013).

<sup>174</sup> *See id.* at 379.

<sup>175</sup> *See id.* at 378.

<sup>176</sup> Kaytee Vota, *The Truth Behind Echols v. State: How an Alford Guilty Plea Saved the West Memphis Three*, 45 LOY. L.A. L. REV. 1003, 1005 (2012).

<sup>177</sup> *See* Bethonie Butler, *Netflix’s “The Staircase”: The Long, Sensational Murder Trial Behind the New Series*, WASH. POST (June 11, 2018, 2:33 PM), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/06/11/netflixs-the-staircase-the-long-sensational-murder-trial-behind-the-new-series/?noredirect=on&utm\\_term=.9ef905b6c9ab](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/06/11/netflixs-the-staircase-the-long-sensational-murder-trial-behind-the-new-series/?noredirect=on&utm_term=.9ef905b6c9ab)).

<sup>178</sup> MEDWED, *supra* note 21, at 67; Grunewald, *supra* note 172, at 1161–65.

<sup>179</sup> *See* Grunewald, *supra* note 172, at 1180–83.

<sup>180</sup> *Id.*

<sup>181</sup> Findley, *supra* note 2, at 916–17.

hurdle to be able to present new factual evidence in the United States or to bring a claim of substantive innocence without alleging other constitutional violations.<sup>182</sup> Other fact-finding system allow appeals on the sole basis of establishing the “truth.”<sup>183</sup> Outside of procedural barriers, those who were involved in the initial finding of guilt may be unwilling to admit the possibility of error even if evidence of innocence is available.<sup>184</sup> Thus, the appellate process is often a dead end for the wrongfully convicted in the United States.

### *I. A Conclusion About Wrongful Convictions in the United States*

In the U.S. adversarial system, wrongful convictions may occur for many different reasons. Some of the most prevalent factors as discussed *supra* are eyewitness identification error, false confessions, forensic evidence, expert testimony, jailhouse informants, witness preparation, police and prosecutorial misconduct, tunnel vision, or inadequate or indigent defense counsel.<sup>185</sup> This list may be particularly expansive in part because the United States has received the most scrutiny for wrongful convictions, and thus more research has been done to determine why wrongful convictions occur in the United States, as opposed to other systems like Germany’s, Italy’s, and Japan’s. While these factors may seem vast and impossible to reduce or resolve, this Comment intends to propose a solution.

## III. GERMANY: AN INQUISITORIAL SYSTEM

The focus in the German inquisitorial system is to find the “truth,” as in inquisitorial systems generally.<sup>186</sup> In the German system there is a judge, a prosecution, and a defense.<sup>187</sup> The role of the prosecutor is as a neutral party in search for the “truth.”<sup>188</sup> The “truth” is ascertained through the state’s “objective investigation of the facts.”<sup>189</sup> The prosecutor is obligated to present evidence in favor of innocence just as much as evidence in favor of conviction, and can even

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<sup>182</sup> *See id.*

<sup>183</sup> Grunewald, *supra* note 172, at 1181–82.

<sup>184</sup> ACKER & REDLICH, *supra* note 3, at 10.

<sup>185</sup> Findley, *supra* note 2, at 919.

<sup>186</sup> *Id.* at 931.

<sup>187</sup> Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial “Objectivity” in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1312 (2010).

<sup>188</sup> Findley, *supra* note 2, at 931.

<sup>189</sup> Shawn Marie Boyne, *Procedural Economy in Pre-Trial Procedure: Developments in Germany and the United States*, in *COMPARATIVE CRIMINAL PROCEDURE* 223 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

recommend a defendant's acquittal.<sup>190</sup> Prosecutors summarize the evidence both for and against the defendant for the main procedural hearing.<sup>191</sup> German prosecutors may even file an appeal on behalf of a defendant if the prosecutor believes that the defendant should not have been found guilty or that the sentence was too harsh.<sup>192</sup> The ability of a prosecutor to appeal appears to reflect the systems focus on finding the "truth." Alternatively, prosecutors in the U.S. system tend to remain on the offensive during the appellate process unless the prosecutor decides to drop the charges entirely. The presumption of innocence and the search for the "truth" are of the utmost importance to Germany's system, thus there is no burden of proof placed on either the prosecution or defense.<sup>193</sup> The prosecution must have sufficient suspicion to move the case from the investigatory stage to an actual court proceeding.<sup>194</sup> German prosecutors are more likely to dismiss or impose lesser sanctions for minor crimes rather than stretch a charge to use as leverage.<sup>195</sup>

Unlike U.S. prosecutors, German prosecutors are not allowed to meet with witnesses to prepare testimony pre-trial.<sup>196</sup> However, the German prosecutor is allowed to discuss the case with the judge prior to trial.<sup>197</sup> During the trial, the prosecution is prohibited from leading witnesses, just like in the United States.<sup>198</sup> In the German system there are safeguards for prohibiting statements which were obtained involuntarily.<sup>199</sup> Throughout the process, the defense attorney attempts to steer the prosecutor toward evidence that leads to a finding of innocence.<sup>200</sup> However, the prosecutor may refuse to investigate that evidence.<sup>201</sup>

Unlike the U.S. adversarial system, where the jury decides between two competing theories of the case, the German judge is ultimately in charge of determining the truth or narrative of the case.<sup>202</sup> The judge has the ability to play an active role in the trial by asking for additional evidence, as opposed to acting

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<sup>190</sup> *Id.*

<sup>191</sup> Boyne, *supra* note 187, at 1289.

<sup>192</sup> *Id.*

<sup>193</sup> Thomas Weigend, *Assuming that the Defendant is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice*, CRIM. & PHILOS. 285, 286–87, 290 (2014).

<sup>194</sup> Boyne, *supra* note 189, at 246.

<sup>195</sup> *Id.* at 237.

<sup>196</sup> Findley, *supra* note 2, at 931.

<sup>197</sup> Boyne, *supra* note 187, at 243.

<sup>198</sup> *Id.* at 244.

<sup>199</sup> *Id.* ("Even leading questions can lead to suppression of an answer.").

<sup>200</sup> Boyne, *supra* note 187, at 242.

<sup>201</sup> *Id.*

<sup>202</sup> Grunewald, *supra* note 8, at 382.

just as a gatekeeper; as a result, the judge has a heightened awareness of any narrative one side may try to put forth.<sup>203</sup> At the end of a trial the judge must be “convinced” of the defendant’s guilty to impose a guilty verdict.<sup>204</sup> If a judge is not “convinced” or has a reasonable doubt about the potential guilt of the defendant, the judge must acquit the defendant.<sup>205</sup> The judge is required to write an opinion in the event of either an acquittal or guilty verdict that explains how the evidence was evaluated and the rationale for the chosen narrative.<sup>206</sup>

Rather than a plea-bargaining system, Germany has a “confession agreement” system to promote efficiency in minor crimes cases.<sup>207</sup> However, a confession alone is insufficient for a determination of guilt, and the court will still take evidence at trial, but, the confession evidence will lead to a more efficient trial.<sup>208</sup>

When it comes to the appellate system in Germany, a case may be reopened at any time “if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant’s acquittal.”<sup>209</sup> On appeal, the written opinion of the trial judge will be reviewed.<sup>210</sup> Reversals tend to stem from “evident lacunae or contradictions in the court’s explanation of its factual findings.”<sup>211</sup> An appeal is an automatic right and a general appeal allows a German defendant to have “a new trial on issues of guilt and sentence.”<sup>212</sup>

#### A. *The Relationship Between the Prosecutor and the Judge*

A cause of wrongful convictions in Germany may be the close relationship between the prosecutor and the judge, and the ultimate idea that the prosecutor is a neutral party searching for the truth.<sup>213</sup> The assumption that the prosecutor is neutral, and thus will act neutrally, may result in a large detriment to defendants when a prosecutor does not act in this way.<sup>214</sup> The concern is that

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<sup>203</sup> *Id.*; Boyne, *supra* note 189, at 248.

<sup>204</sup> Weigend, *supra* note 193, at 290–91.

<sup>205</sup> *Id.*

<sup>206</sup> Grunewald, *supra* note 8, at 382; Weigend, *supra* note 193, at 291.

<sup>207</sup> Boyne, *supra* note 189, at 248; Boyne, *supra* note 189, at 1296.

<sup>208</sup> Boyne, *supra* note 189, at 248–49.

<sup>209</sup> Grunewald, *supra* note 8, at 382 (citation omitted).

<sup>210</sup> Weigend, *supra* note 193, at 291.

<sup>211</sup> *Id.*

<sup>212</sup> Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT’L. 1, 23 (2011).

<sup>213</sup> See Thaman, *supra* note 130, at 87.

<sup>214</sup> See *id.*

judges in the German system are working on the same side as the prosecutor and thus “will nearly always consciously or unconsciously view the evidence at trial in conformity with the prosecutor’s initial assessment in the file.”<sup>215</sup> As a result, a judge may find themselves siding with the prosecution’s narrative even if the evidence does not fully support guilt.<sup>216</sup> At the same time, a prosecutor may be hesitant to challenge the court when their initial assessment is so persuasive.<sup>217</sup>

### *B. The Failure to Acknowledge a Problem*

Prior to a recent, highly publicized wrongful conviction case, there was a belief that the German inquisitorial system did not produce wrongful convictions.<sup>218</sup> Therefore, a major concern is that, while wrongful convictions do occur in Germany, they are just not discussed publicly.<sup>219</sup> The extent of the wrongful conviction problem in Germany is unclear; however, this lack of clarity may simply be because wrongful conviction research focuses primarily on the U.S. system and DNA exonerations rather than inquisitorial systems, such as the German one.<sup>220</sup> The German inquisitorial system may have many other systematic practices that cause wrongful convictions that have not been addressed because of a lack of research on the topic in inquisitorial systems. Unfortunately, wrongful convictions do occur in Germany—most likely at a substantially higher rate than the German public is aware of—yet Germany has no “Innocence Projects.”<sup>221</sup>

On the other hand, the German system does take some steps to mitigate against certain causes of wrongful convictions. For example, “statutory provisions and interrogation norms prohibit the police from lying to suspects or from misleading interrogation tactics which may produce a false confession.”<sup>222</sup> Additionally, German judges are required to exclude from their consideration any statement that was obtained through improper interrogation.<sup>223</sup> Also, as discussed *supra*, a confession alone is not enough to prove the guilt of a

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<sup>215</sup> *Id.*

<sup>216</sup> See Grunewald, *supra* note 8, at 382–83.

<sup>217</sup> Boyne, *supra* note 189, at 244.

<sup>218</sup> Grunewald, *supra* note 172, at 1140.

<sup>219</sup> Isabel Kessler, *A Comparative Analysis of Prosecution in Germany and the U.K. Searching for Truth or Getting a Conviction?*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE*, 213, 234 (Ronald Huff & Martin Killias eds., 2008).

<sup>220</sup> See Grunewald, *supra* note 8, at 382.

<sup>221</sup> Grunewald, *supra* note 172, at 1145.

<sup>222</sup> Boyne, *supra* note 189, at 244.

<sup>223</sup> *Id.*

defendant, providing an additional safeguard to those who falsely confess.<sup>224</sup> German courts and prosecutors have also taken action to prevent wrongful convictions by punishing those individuals who make false allegations resulting in wrongful convictions.<sup>225</sup> In 2002, a woman accused her work colleague, Horst Arnold, of rape.<sup>226</sup> Arnold was convicted and sentenced to five years in jail based on this accusation.<sup>227</sup> For maintaining his innocence, Arnold was denied parole and served his full five-year sentence.<sup>228</sup> Arnold was acquitted in his 2011 retrial.<sup>229</sup> In 2013, Arnold's accuser, Heidi K., was charged and convicted with deprivation of freedom as a result of her false allegation.<sup>230</sup> Heidi K.'s sentence is for five and a half years.<sup>231</sup>

### C. *False Confessions*

Despite safeguards, false confessions are still a reality in Germany. In a highly publicized case, four "intellectually challenged" individuals were convicted of murdering Rudolf Rupp, a German farmer, after they all falsely confessed to feeding his body to the dogs.<sup>232</sup> The false confessions were recanted prior to trial but the judges convicted the defendants anyway, even without finding a body.<sup>233</sup> The case was reluctantly reopened when Rudolf Rupp's body was found years later in his car, in a river.<sup>234</sup> Here, the German system failed in the search for the "truth." The Rudolf Rupp case is just one example that the German system is not immune to false confessions, bias, or prejudice, let alone wrongful convictions.<sup>235</sup>

### D. *A Failure to Comply with the Law and Finding the "Truth"*

The inquisitorial system in Germany, while procedurally strong, may still cause wrongful convictions when judges fail to strictly follow the implemented protections.<sup>236</sup> For example, the judge and the prosecutor may find themselves

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<sup>224</sup> *Id.* at 248.

<sup>225</sup> André W.E.A. De Zutter et al., *Motives for Filing a False Allegation of Rape*, 47 ARCHIVES SEX BEHAV. 457, 457 (2018).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Grunewald, *supra* note 8, at 382–83.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See Jenia Iontcheva Turner, *Limits on the Search for Truth in Criminal Procedure: A Comparative*

working informally, “without complying with the requirements of the legislation,” to negotiate a “plea bargain.”<sup>237</sup> While German law requires that the judge rely on more than a confession for guilt, “[i]n a significant percentage of cases, judges accepted a formal agreement of the prosecutor’s factual allegations by the defendant as the sole basis for finding the defendant guilty.”<sup>238</sup> In actuality, the trade-off between efficiency and finding the “truth” may result in wrongful convictions in the same way that plea bargaining does in the United States.<sup>239</sup> Critics suggest that tunnel vision—a cause of wrongful convictions in the United States—is also a main cause of wrongful convictions in Germany.<sup>240</sup> Tunnel vision may arise when the prosecution is solely in charge of accumulating evidence for or against a defendant because the prosecutor may choose to only thoroughly investigate the evidence that they find to be most persuasive.

#### IV. ITALY: A HYBRID SYSTEM

The Italian system is a hybrid system that falls somewhere between the traditional adversarial system and the inquisitorial system.<sup>241</sup> The Italian system started as an inquisitorial system that later introduced adversarial elements in the 1988 Code of Criminal Procedure.<sup>242</sup> First, the 1988 Code of Criminal Procedure added protections for those being investigated and took away some of the discretionary power from the police.<sup>243</sup> Next, the 1988 Code of Criminal Procedure made changes for the purposes of “efficiency and morality.”<sup>244</sup> Then, the 1988 Code of Criminal Procedure introduced elements to allow for easier disposal of cases.<sup>245</sup>

The new system allows for trial by jury for high level crimes such as treason, homicide, and kidnapping.<sup>246</sup> This jury is made up of six lay people and two professional judges.<sup>247</sup> One of the professional judges sits as the “President of

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View, in *COMPARATIVE CRIMINAL PROCEDURE* 51–52 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

<sup>237</sup> *Id.* at 51.

<sup>238</sup> *Id.* at 51–52.

<sup>239</sup> See Boyne, *supra* note 187, at 251; see also Cleave, *supra* note 162, at 429.

<sup>240</sup> See Grunewald, *supra* note 8, at 383.

<sup>241</sup> Adina Rosenfeld, *Admissibility of DNA Evidence: Italy Under Attack*, 40 S.U. L. REV. 197, 199–200 (2012).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 204.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 205.

the court.”<sup>248</sup> A majority of the jury must find the defendant guilty to convict.<sup>249</sup> Everyone on the panel is in charge of considering issues of law and fact.<sup>250</sup> A unique aspect of this hybrid system is the requirement to explain the verdict based on the evidence presented.<sup>251</sup>

The system relies on a *pubblico ministero* who works like an investigating prosecutor and is “to behave as an impartial magistrate.”<sup>252</sup> The *pubblico ministero* investigates the crime and ultimately gathers evidence for the prosecution.<sup>253</sup> However, the defense and other interested parties are allowed “to require evidence be taken and that witnesses be called to testify at the trial.”<sup>254</sup> This evidence is presented in open court where cross-examination is allowed and the panel is able to determine the credibility of witnesses themselves.<sup>255</sup> Like closing arguments in the United States, the prosecution and defense are allowed to argue their case in front of the panel of judges at the end of the trial.<sup>256</sup> A written explanation of the verdict is required to explain the decision making process, specifically showing that the conviction was not a result of corruption or bias.<sup>257</sup>

Italy has implemented a system of “special procedures” to dispose of cases outside of trials.<sup>258</sup> The first is an agreement between the prosecution and the defense on the punishment they will request from the judge.<sup>259</sup> The second is an agreement to dispose of the case in a way that does not result in going to a full trial.<sup>260</sup> The third is an agreement to request a sentence of imprisonment prior to trial for a reduction of one-third of the sentence.<sup>261</sup> Ultimately, a defendant is not required to admit guilt in these special procedures.<sup>262</sup>

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<sup>248</sup> Mirabella, *supra* note 12, at 236.

<sup>249</sup> Rosenfeld, *supra* note 241, at 205.

<sup>250</sup> THOMAS GLYN WATKIN, *THE ITALIAN LEGAL TRADITION* 129 (1997).

<sup>251</sup> Rosenfeld, *supra* note 241, at 204–07 (“These opinions can be hundreds of pages in length and provide a detailed insight into the deliberation process, should the case be appealed”); WATKIN, *supra* note 250, at 129.

<sup>252</sup> WATKIN, *supra* note 250, at 137–38.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 139.

<sup>255</sup> *Id.* at 138–39.

<sup>256</sup> *Id.* at 139.

<sup>257</sup> Michele Panzavolta, *Reforms & Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 N.C. J. INT’L L. & COM. REG. 577, 593 (2005).

<sup>258</sup> Cleave, *supra* note 162, at 440–41.

<sup>259</sup> *Id.* at 441.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 443 (stating that this option is only available when the resulting punishment would not exceed two years imprisonment.).

<sup>262</sup> *Id.* at 441–42.

Unlike the U.S. adversarial system, in the Italian hybrid system the judge is allowed to question witnesses following their testimony and suggest new issues.<sup>263</sup> Defendants are also allowed to speak up at any point to challenge the testimony of another witness.<sup>264</sup> Additionally, “defendants are not under an obligation to tell the truth” because they are never considered witnesses at trial and thus are not required to take an oath.<sup>265</sup>

Italy’s criminal justice system allows for appellate review by any party, including the victim of the crime.<sup>266</sup> The appellate review process is similar to the inquisitorial system, allowing for a broad appellate process where each defendant is “guaranteed a retrial.”<sup>267</sup>

#### A. *Simultaneous Civil and Criminal Proceedings*

One possible cause of wrongful convictions in Italy is the procedural ability for civil and criminal proceedings to take place simultaneously.<sup>268</sup> This process is criticized for its potential to confuse jurors and allow evidence that should not be presented in a criminal case to be presented because of the attached civil case, and vice versa.<sup>269</sup> The ability to hold concurrent criminal and civil proceedings makes it so that character evidence, in particular, will be made available in a criminal trial.<sup>270</sup> In the Amanda Knox case, there was a criminal case for murder, a civil suit by the victim’s family, and a defamation case all going on in one courtroom.<sup>271</sup> The combination of these cases allowed jurors to make a conviction decision based on judgments about Amanda Knox as a person, rather than the evidence of her involvement in the crime.

#### B. *Special Procedures*

In Italy, there is an absolute need to dispose of cases prior to full trial proceedings to sustain the system as a whole, which may be a factor in producing wrongful convictions.<sup>272</sup> While more individuals may want to participate in an

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<sup>263</sup> Mirabella, *supra* note 12, at 235.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 236.

<sup>266</sup> Rosenfeld, *supra* note 241, at 205.

<sup>267</sup> *Id.* at 205–06; Peter Gill, *Analysis and Implications of the Miscarriages of Justice of Amanda Knox and Raffaele Sollecito*, 23 FORENSIC SCIENCE INT’L: GENETICS 9, 10 (2016).

<sup>268</sup> Mirabella, *supra* note 12, at 241.

<sup>269</sup> *Id.*

<sup>270</sup> See James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 990 (2016).

<sup>271</sup> Mirabella, *supra* note 12, at 241.

<sup>272</sup> Panzavolta, *supra* note 257, at 594.

adversarial type proceeding, they may feel pressured to resolve the case through a special proceeding because of the time it could take for the case to go to trial.<sup>273</sup> Different special procedures may dispose of a case early, which, like the U.S. plea bargaining system, greatly incentivizes defendants to partake regardless of innocence.<sup>274</sup> Furthermore, because a defendant is not required to admit guilt in these special procedures, there seems to be a substantial risk that these special procedures will be used by innocent defendants who fear a greater sentence if convicted.<sup>275</sup>

C. *The Ability of the Judge to Seek Evidence*

In Italy, the judge is able to inquire for further evidence.<sup>276</sup> The judge's ability to step into an investigative role may lead to wrongful convictions because the judge, in stepping away from a neutral role, may begin to lose impartiality in the case at hand.<sup>277</sup> Another concern is that the judge, who is meant to play an impartial role, will not incorporate rationale that could lead to a reversal on appeal in their explanation of the verdict.<sup>278</sup> If a judge fails to incorporate all of the evidence and rationale, an innocent individual may face a steeper challenge on appeal.

D. *The Amanda Knox Case: DNA Evidence, The Failure to Sequester the Jury, False Confessions, and Tunnel Vision*

The Amanda Knox case is a large focus of criticism of the Italian legal system.<sup>279</sup> Amanda Knox was an exchange student from Seattle who had been studying abroad in Perugia, Italy when she was charged with the murder of her roommate, Meredith Krecher.<sup>280</sup> The conviction of Amanda Knox led to a substantial uproar in the United States against the Italian legal system.<sup>281</sup>

One criticism was that the Italian courts chose not to sequester the jurors during the highly publicized case.<sup>282</sup> Thus, the lay person jury members were

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<sup>273</sup> See *id.* at 619.

<sup>274</sup> See Cleave, *supra* note 162, at 442.

<sup>275</sup> See *id.*

<sup>276</sup> Panzavolta, *supra* note 257, at 605.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See generally Mirabella, *supra* note 12, at 230.

<sup>280</sup> *Id.*

<sup>281</sup> See Martha Grace Duncan, *What Not to Do When Your Roommate is Murdered in Italy: Amanda Knox, Her "Strange" Behavior, and the Italian Legal System*, 41 HARV. J. OF L. & GENDER 55–56 (2017).

<sup>282</sup> Mirabella, *supra* note 12, at 242–43.

exposed to the news frenzy that surrounded the case, in addition to the already allowed character evidence in the combined civil and criminal trial.<sup>283</sup> Arguably this lethal combination may be a source of wrongful convictions in Italy because instead of substantive evidence being put on trial, the character of the defendant is put on trial instead.<sup>284</sup>

Another potential cause of wrongful convictions in Italy is the improper use of DNA evidence.<sup>285</sup> After the Amanda Knox trial, Italy was criticized—by the United States—for allowing in DNA evidence that would not have been allowed in a U.S. court due to its questionable accuracy and the use of poor scientific protocol in its collection.<sup>286</sup> There is a concern that DNA evidence generally is not properly obtained or maintained in Italy.<sup>287</sup> The presiding judge in the Italian system is tasked with determining the reliability of, and whether to accept, the DNA evidence.<sup>288</sup>

The Amanda Knox case is also an example of how Italy's hybrid system allows for false confessions, just like the U.S. adversarial system.<sup>289</sup> Amanda Knox was interrogated, without an attorney, by a dozen police officers, over a four-day period.<sup>290</sup> During this period, Amanda Knox was told that there was physical evidence placing her at the scene and that her boyfriend, who had produced her alibi, had recanted.<sup>291</sup> Neither of these statements were accurate.<sup>292</sup> Amanda later “confessed” to things about the crime that were untrue but never actually implicated her in the murder.<sup>293</sup> However, despite her recantation once she was left alone, the confessions led to her arrest.<sup>294</sup> The confessions were inadmissible in court because Amanda Knox did not have an attorney present and the confessions were not recorded.<sup>295</sup>

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<sup>283</sup> *Id.*

<sup>284</sup> *See id.*

<sup>285</sup> *See Gill, supra note 267, at 17.*

<sup>286</sup> Mirabella, *supra note 12, at 245; see generally Rosenfeld, supra note 241, at 197* (for a more thorough examination of the use and criticism of the DNA evidence in the Amanda Knox case); Gill, *supra note 267, at 9.*

<sup>287</sup> *See generally Rosenfeld, supra note 241, at 219–20* (discussing DNA evidence and the Italian legal system).

<sup>288</sup> *Id.* at 219.

<sup>289</sup> *See Kassin, supra note 88, at 431.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

Despite the fact that the confessions were inadmissible in court, the confessions were still incredibly powerful in producing the case against Amanda Knox.<sup>296</sup> Just like false confessions in the United States, Amanda Knox's false confession facilitated tunnel vision throughout the investigation and prosecution of her case.<sup>297</sup> After her false confession, other evidence began building up against Amanda Knox.<sup>298</sup> First, the individual who was implicated by DNA evidence changed his story and stated that Amanda Knox was present for the murder.<sup>299</sup> Then, forensic experts concluded that Amanda Knox's DNA was on the handle of the proposed murder weapon.<sup>300</sup> Eyewitnesses also came forward and implicated Amanda Knox in the crime.<sup>301</sup> All of this incriminating evidence followed Amanda Knox's false confession.<sup>302</sup> Even though Amanda Knox did not implicate herself in the crime and the confession was not allowed in court, it produced tunnel vision strong enough to convict.<sup>303</sup>

## V. JAPAN: THE HYBRID "SAIBAN-IN" SYSTEM

The hybrid Saiban-in system in Japan was created in response to severe criticism of the Japanese criminal justice system.<sup>304</sup> The Saiban-in system is used primarily for a small subset of serious crimes.<sup>305</sup> In this system, six lay people are chosen to sit on a panel with three professional judges.<sup>306</sup> For a guilty verdict only a majority is needed and all votes are counted equally; however, that majority cannot be made up of solely lay people.<sup>307</sup> The panel plays a role as

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 431, 440–41.

<sup>298</sup> *Id.* at 431.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 436 (“In the case of Amanda Knox . . . the prosecutor theorized in the wake of her coerced confession that Knox was motivated by money or personal envy of her British roommate. Two weeks later, the rapist whose DNA was found in sperm and other biological matter at the crime scene was apprehended. Yet rather than reconsider Knox’s confession in light of this contradictory evidence, the prosecutor spun a new and wholly unsupported theory of the crime: that the rapist, Knox, and her boyfriend had come together and killed the victim as part of a satanic sex game.”).

<sup>303</sup> See Kassir, *supra* note 88, at 431 (following Amanda Knox’s acquittal, “the Italian appeals court released a strongly worded 143-page opinion in which it criticized the prosecution and concluded that there was no credible evidence, motive, or plausible theory of guilt.”).

<sup>304</sup> Ito, *supra* note 13, at 1245–46.

<sup>305</sup> David T. Johnson, *Japan’s Prosecution System*, 41 CRIME & JUST. 35, 37 (2012) (“Lay judge courts hear two types of cases: those punishable by death, imprisonment for an indefinite period, or with hard labor and those in which the victim has died as a result of an intentional criminal act.”).

<sup>306</sup> Ito, *supra* note 13, at 1258.

<sup>307</sup> *Id.* at 1258–1259.

fact-finders and in sentencing.<sup>308</sup> The lay judges ask questions of witnesses, victims, and defendants.<sup>309</sup> Interpretations of law are left solely up to the professional judges.<sup>310</sup> Victims may be allowed to participate in the trial process if allowed by the court.<sup>311</sup> A victim's participation can include questioning the defendant and other witnesses with regards to sentencing, and arguing before the court at the close of trial.<sup>312</sup> A victim cannot present additional evidence.<sup>313</sup>

The intended purpose of the Japanese system, like that of inquisitorial systems, is to find the substantive truth.<sup>314</sup> However, the Saiban-in system incorporates some adversarial elements, such as by allowing live oral testimony from witnesses at trial.<sup>315</sup> The Japanese criminal justice system is unique because it has a reported conviction rate of over 99%.<sup>316</sup> This high conviction rate is often attributed to the fact that there is no "obligatory prosecution" in Japan; prosecutors often drop or suspend cases that are not founded on confessions.<sup>317</sup> Plea bargaining is not allowed.<sup>318</sup> Thus, even when the defendant has confessed and admitted guilt to a serious crime, a trial is still required.<sup>319</sup> However, "tacit bargaining" often does occur in Japan in exchange for a confession.<sup>320</sup> In the Saiban-in system both defendants and prosecutors can appeal the verdict, but a victim may not.<sup>321</sup>

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<sup>308</sup> *Id.* at 1258.

<sup>309</sup> David T. Johnson, *Japan's Lay Judge System*, in *COMPARATIVE CRIMINAL PROCEDURE* 396, 403 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

<sup>310</sup> Ito, *supra* note 13, at 1259.

<sup>311</sup> Goto, *supra* note 13, at 128.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Arne F. Soldwedel, *Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants*, 41 *VAND. J. TRANSNAT'L L.* 1417, 1430 (2008).

<sup>315</sup> Goto, *supra* note 13, at 120.

<sup>316</sup> Ito, *supra* note 13, at 1248.

<sup>317</sup> Johnson, *supra* note 305, at 40, 42. Additionally, arrests are infrequent because of "concerns about caseload pressure and jail capacity, the desire to protect suspects from the stigma of arrest, and the belief that failure to charge an arrested suspect is impermissible." *Id.* at 42; Johnson, *supra* note 309, at 412 (stating that charges are filed in two-thirds of cases where confessions are present and rarely absent a confession); *see also* Johnson, *supra* note 305, at 60–62; Soldwedel, *supra* note 314 at 1431 (stating that approximately 39% of cases are suspended by Japanese prosecutors).

<sup>318</sup> Johnson, *supra* note 305, at 44.

<sup>319</sup> Goto, *supra* note 13, at 118.

<sup>320</sup> Priyanka Prakash, *To Plea or Not to Plea: The Benefits of Establishing an Institutionalized Plea Bargaining System in Japan*, 20 *PACIFIC RIM L. & POL'Y J.* 607, 614 (2011) (stating that tacit bargaining may result in: "1) an informal offer of summary prosecution and a monetary fine rather than a custodial sentence . . . 2) an informal offer of suspended prosecution or recommendation of a lenient sentence . . . 3) an unspoken exchange of a lighter sentence for confession and cooperation with the court.").

<sup>321</sup> Johnson, *supra* note 305, at 44; Goto, *supra* note 13, at 128.

### A. *Forced Confessions and The Lack of Lawyers in Interrogations*

The Japanese system focuses so heavily on defendant confessions that the United Nations has stepped in to criticize Japan's criminal justice system because interrogations are often extreme in "length, location, and method[]." <sup>322</sup> The Japanese criminal justice system also forbids lawyers from being with their clients during interrogations. <sup>323</sup> Suspects can be held for up to twenty-three days prior to being charged and are often forced through "long, thorough, and intense" interrogations by police and prosecutors without an attorney. <sup>324</sup> The confessions that result may often be false or coerced. <sup>325</sup> The problem of forced confessions is so rampant in the Japanese system that, "[s]ome estimates put the rate of forced confessions as high as fifty percent." <sup>326</sup> Additionally, "[i]n the large majority of cases, suspects who do not confess are not released on bail." <sup>327</sup> Once a defendant is allowed counsel they may recant a confession—however, the court may still use the confession as evidence against the defendant. <sup>328</sup>

The issue of false or coerced confessions is particularly concerning in Japan's hybrid Saiban-in system because of the overreliance on confessions in the Japanese legal system. <sup>329</sup> In up to 90% of cases the suspect confesses to committing the crime. <sup>330</sup> A growing number of false confessions have come to light as a major cause of wrongful convictions in Japan. <sup>331</sup>

### B. *The Undefeatable Prosecutor*

A common criticism of the Japanese system is that trials are "mere formalities" as exemplified by Japanese prosecutors' extraordinarily high conviction rates. <sup>332</sup> Many Japanese prosecutors fear that if they fail to maintain this extreme conviction rate it will negatively impact their careers. <sup>333</sup> More

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<sup>322</sup> Johnson, *supra* note 305, at 63; *see also* Ito, *supra* note 13, at 1245–46.

<sup>323</sup> Johnson, *supra* note 305, at 64.

<sup>324</sup> *Id.* at 42, 43.

<sup>325</sup> *Id.* at 52; *see also* Prakash, *supra* note 320, at 618–21.

<sup>326</sup> Soldwedel, *supra* note 314 at 1433.

<sup>327</sup> Johnson, *supra* note 305, at 43.

<sup>328</sup> Prakash, *supra* note 320, at 621.

<sup>329</sup> Johnson, *supra* note 305, at 52.

<sup>330</sup> Soldwedel, *supra* note 314 at 1433.

<sup>331</sup> *Extractor, Few Fans; Japan's Criminal-Justice System*, 417 *ECONOMIST* 39, 40 (2015) [hereinafter *Extractor, Few Fans*] (describing stories of different individuals such as, Iwao Hakamada, who served forty-six years on death row for a false confession that was given after being beaten and prodded during an interrogation that lasted for twenty-three days).

<sup>332</sup> Soldwedel, *supra* note 314 at 1431.

<sup>333</sup> *Extractor, Few Fans, supra* note 331, at 40.

shockingly, a survey reveals that some Japanese prosecutors may do whatever it takes to win.<sup>334</sup> For example, prosecutors reported writing confession statements that differ from the actual given confession.<sup>335</sup>

### C. Tunnel Vision

The United Nations has also criticized the Japanese system for investigative tunnel vision.<sup>336</sup> Since very few of the suspected crimes actually make it to the trial stage, it is likely that all parties involved, including the prosecution, professional judges, and lay judges, are confident that the individual is guilty merely because they have made it up to the Saiban-in trial phase.<sup>337</sup> Even defense attorneys may find themselves quick to believe their client's guilt.<sup>338</sup> As discussed *supra*, a false confession may enhance tunnel vision. Thus, the Japanese system, in its extraordinary reliance on confessions, is highly susceptible to tunnel vision.

### D. Adversarial Elements

The fact that the Japanese Saiban-in system was heavily influenced by the U.S. adversarial system exposes its hybrid system to many of the apparent wrongful conviction causes that are found in the United States. There is specifically a worry about eyewitness identification error because of the reliance on live oral testimony.<sup>339</sup> Additionally, there is concern that lay judges participating in the Saiban-in system do not have the qualifications to determine guilt or sentencing of defendants.<sup>340</sup> Lack of experience may result in a misunderstanding of complex factual situations and legal procedures.<sup>341</sup> Japan is starting to make subtle progress to help with the wrongful conviction problem. In 2016, the Innocence Project Japan opened its doors.<sup>342</sup>

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Johnson, *supra* note 305, at 63.

<sup>337</sup> Ito, *supra* note 13, at 1258–61.

<sup>338</sup> Soldwedel, *supra* note 314 at 1447.

<sup>339</sup> See Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PACIFIC RIM L. & POL. J. 11, 78 (1992).

<sup>340</sup> Goto, *supra* note 13, at 124.

<sup>341</sup> *Id.* at 127.

<sup>342</sup> Mark Godsey, *Launch of Innocence Project Japan*, WRONGFUL CONVICTIONS BLOG (Mar. 21, 2016), <https://wrongfulconvictionsblog.org/2016/03/21/launch-of-innocence-project-of-japan/>.

## VI. PROPOSAL: A NEW AND IMPROVED HYBRID SYSTEM FOR THE UNITED STATES

It is evident that none of the aforementioned systems is perfect at preventing wrongful convictions. To reduce the number of wrongful convictions in the United States and internationally, some criminal justice reform must occur, regardless of whether we are talking about an adversarial, inquisitorial, or hybrid system. This Comment proposes reform that could be made to the U.S. adversarial system specifically to help reduce wrongful convictions. This proposal will go through the major causes of wrongful convictions in the United States and suggest some changes that derive from Germany, Italy, and Japan. This proposal will also introduce some reforms that are not currently in practice in Germany, Italy, or Japan.

The first established cause of wrongful convictions in the U.S. adversarial system is eyewitness identification error.<sup>343</sup> While eyewitness identification error is a major cause of wrongful convictions in the United States, it does not appear to pose as big of a problem for inquisitorial systems like Germany.<sup>344</sup> One reason for this difference may be that the German system does not allow for pre-trial witness preparation, while the U.S. system does.<sup>345</sup> Pre-trial witness preparation can increase a witness's confidence, which in turn can increase the value that jurors place on the testimony.<sup>346</sup> The U.S. system should strictly limit the practice of pre-trial witness preparation, at least—and especially with—eyewitnesses, to avoid producing a false sense of confidence. Also, police procedures in the U.S should follow current psychological research outlining the best practices available to avoid improperly leading the witness to the suspect.<sup>347</sup> One example would be that, for lineups, research suggests that double-blind lineup procedures, among other practices, can help reduce eyewitness identification error.<sup>348</sup> Additionally, judges, attorneys, investigators, jurors, and potential jurors should be educated about eyewitness identification error so that the criminal justice system as a whole can be more critical of eyewitness identifications.<sup>349</sup>

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<sup>343</sup> ACKER & REDLICH, *supra* note 3, at 13.

<sup>344</sup> Grunewald, *supra* note 172, at 1192.

<sup>345</sup> John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 829; *see also* Wells, *supra* note 44, at 631.

<sup>346</sup> *See id.* at 620, 21.

<sup>347</sup> *See id.* at 617–23.

<sup>348</sup> *See id.*

<sup>349</sup> Findley, *supra* note 2, at 938.

The second identified cause of wrongful convictions in the U.S. adversarial system is false confessions.<sup>350</sup> False confessions appear to have their place in wrongful convictions in Germany, Italy, and particularly Japan. One way to limit false confessions in the criminal justice systems of these countries would be to require and enforce the video recording of all interviews with police, as required in the Italian hybrid system.<sup>351</sup> However, as seen in the Amanda Knox case, this precaution is not always taken in Italy. Therefore, additional steps to prevent false confessions are necessary. First, police officers should be punished for using methods such as duress, coercion, or physical harm in interrogations.<sup>352</sup> Additionally, police should be punished for interrogating individuals who are intoxicated, have a diminished capacity, mental impairment, or a misunderstanding of the law without an attorney present.<sup>353</sup> Second, interrogations of a suspect should occur only with an attorney present—which is explicitly required in Japan—especially if the suspect has an impairment that would make them more likely to give a false confession.<sup>354</sup> Interrogations should also be limited in terms of when, where, and for how long they can take place to reduce any potential for police misconduct. Jurors should not be exposed to any evidence of a confession if there is even potential that the confession is false. Lastly, police should be required to continue to look for exculpatory evidence even after a confession is made to reduce any tunnel vision that may have developed as a result of the confession.<sup>355</sup>

The third identified cause of wrongful convictions in the United States is invalid forensic evidence and expert testimony.<sup>356</sup> One change that should be made is to create greater separation between government labs which conduct forensic testing and investigators or prosecutors.<sup>357</sup> By separating these two populations, the hope would be to limit any potential unconscious or conscious bias that the lab may have towards finding incriminating rather than exculpatory results.<sup>358</sup> Alternatively, a defendant could be given equal access and funding

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<sup>350</sup> ACKER & REDLICH, *supra* note 3, at 13; Kassir et al., *supra* note 66, at 5; *See generally* Saul M. Kassir, et al., *Police Reports of Mock Suspects Interrogations: A Test of Accuracy and Perception*, 41 L. & HUM. BEHAV. 230 (2017) (discussing the results of an experiment on the accuracy and completeness of police reports and advocating for the video recording of all interrogations).

<sup>351</sup> Kassir et al., *supra* note 66, at 439; *see also* Kassir, *supra* note 88, at 431.

<sup>352</sup> FREE & RUESINK, *supra* note 45, at 8.

<sup>353</sup> *Id.*

<sup>354</sup> *See id.*

<sup>355</sup> *See* Kassir, *supra* note 88, at 433 (“Once a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the produce of coercive interrogation.”).

<sup>356</sup> *See* ACKER & REDLICH, *supra* note 3, at 13; McCreary & Singh, *supra* note 110.

<sup>357</sup> *See* Findley, *supra* note 2, at 915–17.

<sup>358</sup> *See id.*

for independent testing of the evidence.<sup>359</sup> The ability to have independent testing would help limit any potential dishonest practice from expert witnesses on behalf of the prosecution.<sup>360</sup> The U.S. system should also be open to more gatekeeping by judges, who should be advised by experts in the appropriate field, to keep out evidence that is really just “junk science.”

The fourth identified cause of wrongful convictions in the U.S. adversarial system is the use of jailhouse informants who receive a sentencing reduction or pay for their testimony as key witnesses.<sup>361</sup> Jailhouse informants do not appear to be a major cause of wrongful convictions in Germany, Italy, and Japan. Thus, their systems did not provide much insight on how to handle this problem. One solution to this problem that follows from these systems would be to simply not use jailhouse informants at all. At the very least, jailhouse informants should be banned from receiving pay or a sentencing reduction for their testimony, especially in a case of co-defendants. A less extreme alternative could be to have an extensive pre-trial reliability hearing on the validity of the jailhouse informant’s testimony.<sup>362</sup> This hearing could, and should, require that the jailhouse testimony only be allowed if there is overwhelming corroborating evidence to establish the validity of the testimony.

The fifth and sixth identified causes of wrongful convictions in the United States are tunnel vision and official misconduct.<sup>363</sup> Tunnel vision is a problem that may be a factor in wrongful convictions in Germany, Italy, and Japan in addition to the United States. Tunnel vision is a difficult problem to solve because it is something that may occur in police, prosecutors, and defense attorneys unconsciously when an individual becomes a suspect in a criminal case.<sup>364</sup> Tunnel vision is not always the result of conscious misconduct.<sup>365</sup> However, tunnel vision is still very dangerous in any criminal justice system because it can enhance the likelihood of a false confession, a confident yet erroneous eyewitness, misinterpretations by forensic experts, a dishonest jailhouse informant, and misconduct by prosecutors, police, and forensic experts.<sup>366</sup> One way to reduce tunnel vision and misconduct across the four

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<sup>359</sup> See *id.*

<sup>360</sup> See Thaman, *supra* note 130, at 75.

<sup>361</sup> See Natapoff, *supra* note 117, at 108.

<sup>362</sup> See *generally id.* (for a discussion of a potential pre-trial Daubert-like hearing for the admissibility of jailhouse informant testimony).

<sup>363</sup> See Thaman, *supra* note 130, at 87.

<sup>364</sup> Grunewald, *supra* note 172, at 1141.

<sup>365</sup> *Id.* at 1195–96.

<sup>366</sup> Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 293 (2006).

systems may be to reduce institutional pressures on police and prosecutors.<sup>367</sup> By reducing institutional pressures through delayed media coverage, or other avenues, police officers and prosecutors may feel less pressure to make arrests or produce convictions. With less pressure, prosecutors and investigators may take more time during their investigation to consider alternative theories and be less likely to turn to misconduct to get an arrest or conviction.

Investigators and prosecutors should be trained in Germany, Italy, Japan, and the United States about what tunnel vision is, and how to thoroughly investigate a case regardless of their personal belief about who committed the crime.<sup>368</sup> Specifically, police officers should not only be aware of tunnel vision but should also learn concrete techniques to help combat tunnel vision. Possibilities include posing alternative theories of the case, approaching the investigation from the perspective of ignorance, delegating case investigations, assigning an advisory investigator, a disinterested police officer presenting the case to the prosecutor, limiting disclosure of information to the media, and more.<sup>369</sup> Police officers should at the very least avoid using interrogation techniques that enhance tunnel vision.<sup>370</sup> Additionally, these individuals should be informed of actual punishment that may result from misconduct and should be punished when purposeful misconduct occurs.<sup>371</sup>

Prosecutors should be fully aware and accepting of all incriminating and exculpatory evidence.<sup>372</sup> Prosecutors may also be able to reduce tunnel vision if they become more independent and critical of police investigations.<sup>373</sup> Prosecutors should be thoroughly trained and educated in the practice of counter arguing so that they can see the case in an alternative way.<sup>374</sup> Specifically, in cases like Michael Morton's, Steven Avery's, and the Central Park 5 where there is overwhelming evidence of innocence, a prosecutor should be able—and required—to dismiss the case rather than taking it to trial and risk a wrongful conviction.

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<sup>367</sup> *Id.* at 292.

<sup>368</sup> *See generally id.*

<sup>369</sup> *Id.* at 380–87.

<sup>370</sup> *See generally* Findley, *supra* note 2 (discussing tunnel vision and techniques that enhance tunnel vision and techniques that can combat tunnel vision).

<sup>371</sup> *See id.* at 293.

<sup>372</sup> *Id.* at 387–88.

<sup>373</sup> *Id.* at 388.

<sup>374</sup> *Id.* at 388–89.

More importantly, a shift should be made where prosecutors act as neutral fact finders, such as in Germany or Italy, rather than as an offensive opponent.<sup>375</sup> When it comes to prosecutors in the United States, “perhaps the most striking difference between American and German prosecution practice is that, in contrast with American practice, the majority of German prosecutors do not regard convictions as victories and acquittals as losses.”<sup>376</sup> Shifting the prosecutor’s perspective from an advocate of the state to a neutral factfinder would be a major change to the U.S. adversarial system, and would frankly push the system to be a lot more like an inquisitorial system. However, any system that wants to prevent wrongful convictions cannot be harmed by shifting their focus to the “truth” rather than an adversarial battle.

The seventh identified cause of wrongful convictions in the United States is inadequate defense counsel and indigent clients.<sup>377</sup> Defense counsel burden may be relieved by shifting prosecutor perspective because the prosecutor is not trying to prevent exculpatory evidence from being presented at trial. However, these institutional problems could also likely be lessened by simply increasing funding for defense counsel. Specific proposals could include raising the pay of public defenders and hiring more public defenders to reduce unmanageable caseloads.

The eighth identified cause of wrongful convictions in the United States is the use of guilty pleas and Alford Pleas.<sup>378</sup> U.S. prosecutors should follow the practice of German prosecutors, who are unlikely to overcharge a defendant in an attempt to seek leverage, or in the case of the United States, a guilty plea.<sup>379</sup> The United States could also follow the lead of Japan, by dropping more cases that do not have strong enough evidence of guilt. To reduce guilty pleas of innocent individuals, the death penalty should be abolished because it creates an impossible choice for those who are actually innocent: plead guilty to life in prison without parole or risk going to trial and being put to death.<sup>380</sup> Appeals of guilty pleas should also be taken seriously, particularly when a defendant claims that the guilty plea was only taken out of a fear of a harsher sentence.<sup>381</sup> Prosecutors should refrain from offering guilty pleas that are coercive in nature and from threatening to ask for an extreme sentence post-trial. Significantly

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<sup>375</sup> See Boyne, *supra* note 187, at 1289; WATKIN, *supra* note 250, at 139.

<sup>376</sup> See Boyne, *supra* note 187, at 1289.

<sup>377</sup> Findley, *supra* note 2, at 914.

<sup>378</sup> MEDWED, *supra* note 21, at 67.

<sup>379</sup> Boyne, *supra* note 189, at 237.

<sup>380</sup> Slobogin, *supra* note 111, at 720–22.

<sup>381</sup> See Cleave, *supra* note 162, at 459.

reduced sentences through guilty pleas should not be allowed at all as a bargaining chip in order to get a possible co-defendant to testify against another co-defendant.

Alford Pleas should also be discouraged. When accepting an Alford Plea, the prosecution and the judge are at least partially acknowledging a legitimate claim of actual innocence. Instead of an Alford Plea, prosecutors should focus on finding the “truth” and dismissing cases if there is evidence of actual innocence, as a prosecutor in Germany would be encouraged to, even during the post-conviction appellate process.<sup>382</sup>

To mitigate wrongful convictions, the U.S. adversarial system should also include some explanation of the trial. For instance, the United States could follow the Italian system, which requires a magistrate judge to write a lengthy opinion describing how the verdict was determined based on the evidence available at trial.<sup>383</sup> In the United States, rather than a judge being required to write this extensive opinion, it would be a requirement of the jury. Writing an opinion would require the jury to justify their decision and could heighten the jurors’ attention to any potential bias or irrational judgments that they made to come to their decision. If a jury is not engaged enough during the trial to explain their verdict, the defendant should be acquitted. This explanation would be helpful to a judge on appeal and could provide clear evidence of potential constitutional violations, as it does in Germany.<sup>384</sup> Another reform to the U.S. system could include creating a judge and jury panel like that of Italy or the Saiban-in court of Japan.<sup>385</sup> However, a panel system has not been clearly shown to reduce wrongful convictions, and in fact the extreme conviction rate in Japan suggests that a lay person/judge panel may be just as quick to produce wrongful convictions.<sup>386</sup>

In addition to mitigating the current causes of wrongful convictions in the United States by introducing inquisitorial elements into the system at the trial level, the U.S. appellate system also needs to be reformed. First, the appellate process should be more open to actual innocence claims and limit the procedural roadblocks that cause innocent individuals to spend their lives in prisons with no hope of acquittal, even when evidence of actual innocence is available. Each

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<sup>382</sup> See Boyne, *supra* note 187, at 1289.

<sup>383</sup> Rosenfeld, *supra* note 241, at 204–05.

<sup>384</sup> See Weigend, *supra* note 193, at 291.

<sup>385</sup> Rosenfeld, *supra* note 241, at 204–07; Ito, *supra* note 13, at 1258–59.

<sup>386</sup> See Ito, *supra* note 13, at 1247–48.

defendant should be guaranteed a retrial—like in Italy or Germany—especially with a claim of actual innocence.<sup>387</sup>

Out of all the reforms this Comment proposes, the most important reform to reduce wrongful convictions in the U.S. adversarial system is changing the perspective of the prosecutor. Prosecutors should not be an advocate for the state, nor should they be “at war” with the defense. The prosecution should take a more neutral position during the investigation and subsequent trial so that they are not participating in and enhancing the wrongful conviction problem. Prosecutors should stop viewing “convictions as victories and acquittals as losses.”<sup>388</sup> A wrongful conviction is never a “victory” for the prosecution or an innocent individual.<sup>389</sup>

### CONCLUSION AND MOVING FORWARD

This Comment merely touches the surface of the wrongful conviction problem. This Comment has looked briefly at the U.S. adversarial system, the German inquisitorial system, the Italian hybrid system, and the Japanese hybrid system. This Comment has addressed some of the causes of wrongful convictions in the various judicial systems and proposed potential solutions.

Moving forward, the next step is more research. More research should be done in Italy, Germany, and Japan to determine how extensive the wrongful conviction problem is. More research should be done in the United States to determine how many innocent individuals are still in prison because of procedural barriers in the U.S. appellate system. More psychological research needs to be done to give investigators, prosecutors, defense attorneys, judges, and potential jurors the knowledge and tools to save innocent individuals from unnecessary years spent behind bars. In addition to doing the research to find out how to help the wrongful conviction problem, the judicial system must put trust in that research. If the judicial systems in the United States, Germany, Italy, or Japan fail to follow the research, they will create an impossible barrier to overcoming the wrongful conviction problem.

Eyewitness identification error, false confessions, tunnel vision, official misconduct, and other factors are creating the problem, as discussed *supra*. However, the wrongful conviction problem cannot be helped or solved if those

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<sup>387</sup> Rosenfeld, *supra* note 241, at 204–07; see Gill, *supra* note 267 at 9–10; Marshall, *supra* note 212 at 23.

<sup>388</sup> See Boyne, *supra* note 187, at 1289.

<sup>389</sup> See *id.*

involved are unable to accept that an error occurred. Research should be done specifically about how many legitimate post-conviction claims of actual innocence have been shut down despite unequivocal DNA or other evidence. Extensive research should also be done about the inability for individuals that help produce convictions—such as police officers, prosecutors, and judges—to accept that there has been a mistake.

Most importantly, innocence must matter moving forward. Innocence must matter to prosecutors, investigators, judges, defense attorneys, current jurors, and future jurors. If innocence does not matter, then society will begin to accept cases like Sonny Bharadia's, as he sits in prison, awaiting post-conviction relief because of a lack of "diligence."<sup>390</sup> Society will come to accept the deaths of individuals like Joe Amrine, who "had a fair trial."<sup>391</sup> To "solve" the wrongful conviction problem, innocence and "truth" have to matter over the pride of prosecutors, investigators, eyewitnesses, and forensic experts. Innocence must matter over finality.

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<sup>390</sup> See Seaman, *supra* note 156; Sonny Bharadia, *supra* note 157.

<sup>391</sup> See Joe Amrine is Released: 109th Wrongly-Convicted Person Exonerated After 16 Years Under Sentence of Death, *supra* note 165.

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