TRIAL AND ERROR

Learning from Patterns of Mistakes
BY BRANDON L. GARRETT

The Supreme Court has emphasized that “the trial is the paramount event for determining the guilt or innocence of the defendant.” (Herrera v. Collins, 506 U.S. 390, 416 (1993).) On the other hand, the court has noted that in our adversarial system, “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” (Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).) While no trial may be completely “perfect,” some trial errors are more harmful than others. With the benefit of modern DNA tests, we know that even at a seemingly “fair trial,” an innocent person can be convicted. Every few weeks another innocent person is walked out of prison, freed by DNA testing on old evidence.

Looking back at the criminal trials of those innocent people, one might expect to find out that weak evidence was used to convict them, since, after all, they were not actually guilty. Perhaps jurors were swayed by sinister details of the rapes and murders with which the defendants were charged. However, when reading the transcripts of those trials, one finds that jurors were not always so wrong to convict based on the seemingly solid evidence that they heard. Only years later did DNA tests show that this trial evidence was in fact deeply flawed. In retrospect, we can unravel how what the jurors saw was misleading. Grave errors were cemented before trial, during the criminal investigation, and crucial evidence was contaminated or even concealed, making cases seem far stronger than they should have been to the jurors.

Even seemingly powerful testimony by a trial witness—an informant recalling the defendant’s confession, a detective describing a confession in custody, and an eyewitness pointing out the defendant from the stand—can be tainted by unreliable procedures commonly used by police across the country. A few representative examples from wrongful conviction cases illustrate flaws in our criminal procedure and how states can effectively reform criminal procedure to make our criminal trials less error-prone.

Jailhouse Informants and Prosecutorial Misconduct

Jerry Watkins served 13 years for a murder he did not commit. In November 1984, an 11-year-old girl was found stabbed to death in a partially wooded field in Hancock County, Indiana. The autopsy indicated that she had been raped. She was Watkins’s sister-in-law, and, despite a strong alibi, he was a suspect early on for a reason: He had been previously charged with molesting her. He had pleaded guilty to molestation, and a year later was in a holding cell, facing sentencing in nearby Marion County, Indiana.

There, a jailhouse informant was placed in Watkins’s cell. The informant had just been convicted of forgery and burglary, but police apparently asked that sentencing be postponed pending his cooperation. The informant had a long list of aliases, prior convictions, and escapes from prison. He had a history of cooperating with the police in multiple states. (Trial transcript at 1068–78, Watkins v. State, 3CSCC-87C8-CB-764 (Ind.)
At Watkins’s criminal trial, the informant testified that he hadn’t yet received any money from police in Indiana, but in Florida he was paid “by the kilo” in cocaine he helped police seize. (Id. at 1076.) He testified so frequently that he had hangers and clothes in his cell. He commented: “No one else has had clothes to wear to Court.” (Id. at 1102.)

He was placed in Watkins’s cell and claimed he heard Watkins confess in detail to the murder. He described at trial how Watkins “was upset real bad, he was cryin’. He was holdin’ the bible in his hands.” (Id. at 1053.) More powerful were the details about the crime. He said the victim was Watkins’s “sister’s little girl.” “He said that he’d cut her throat. That he’d left her in some bushes in Hancock County.” More specifically, he said “her jugular vein was cut.” (Id. at 1058.) The informant said that he had no prior knowledge of these details: “I hadn’t heard anything about it either.” (Id. at 1062.)

The informant also denied that prosecutors made him any promises of leniency. He said: “They didn’t promise to do anything. They said that after the trial was over . . . that they would talk to the people in Indianapolis and if there was any consideration or anything—it would be done.” (Id. at 1065.) The prosecutors denied at trial that there had been any deal. The informant had by the time of trial been sentenced, and a prosecutor testified that there was no consideration “whatsoever” given to the informant’s cooperation in the Watkins case. (Id. at 1921.)

No other evidence connected Watkins to the crime. In fact, blood typing excluded him. The prosecution theory was that one man raped and killed the victim. The forensic analyst inaccurately suggested to the jury that the serology might be inconclusive, speculating that the blood group substances that excluded Watkins might be “erratic” or “spurious” or the result of bacterial contamination. Watkins also presented a detailed alibi at trial, and several alibi witnesses testified on his behalf. However, since the time of death could not be pinned down, he had to account for his whereabouts over several days.

Watkins also took the stand. He admitted to molesting the victim in the past, but denied committing a murder. He denied that he had ever confessed in jail, but recalled that “a man he did not know had been in the holding cell the day of his sentencing and had asked him lots of questions about his case.” Watkins recalled that the informant “just kept buggin’ me and buggin’ me and buggin’ me trying to see what he could get out of me,” and that he finally “got tired of him askin’ me so I told him” nothing more than “what charge I was in for.” (Id. at 1737.)

The jury also had more cause to doubt the informant’s story. The defense presented another inmate at trial, who heard the informant describe “a scheme for getting out of jail. The plan was to find an unsolved crime, have a confederate research the newspaper coverage,” and then tell police he heard the culprit confess. Prosecutors responded by introducing newspaper articles into evidence, and pointing out that none of them included details about how the victim was killed or the vegetation where her body was found.

During the closing arguments, the prosecutor admitted that the informant had testified for the police many times before, but insisted that in this case, “we’ve promised him nothing.” He had argued: “Did he research it in the paper as has been intimated? I don’t think so . . . it just couldn’t happen.” The prosecutor noted that the informant “knew about the jugular vein—something that was never in the paper.” In addition, the informant had said Watkins admitted that he “left this little girl in the bushes, which was certainly an accurate statement.” (Id. at 2172.) This was information that the “public could not know, the public did not know.” (Id. at 2224.)

The defense lawyer in response agreed that the “jugular vein is a bombshell in this case,” but countered that he could have heard that information from multiple sources or just assumed a fatal stabbing to the neck would have severed the jugular. (Id. at 2189.) The defense added that the informant “goes around the land peddling perjury,” and was “a master of misinformation” who would “turn in his own mother if he thought he could get out of jail a day early.” (Id. at 2190–91.)

Jurors were clearly focused on the testimony of the jailhouse informant. During their deliberations, they asked to read his testimony again. (Id. at 46.) They found Watkins guilty, though the jury recommended against a death sentence. Watkins was sentenced to 60 years in prison for murder. After the trial, the defense introduced affidavits from two more men in the jail who said the informant had told them how police fed him the details about the crime. The court denied the motion for a new trial and Watkins’s appeals were dismissed.

In 1992, Jerry Watkins obtained DNA testing that excluded him as the rapist. Remarkably, the Indiana Court of Appeals concluded that the DNA results were not sufficient to order his release, stating that they only “suggest the possibility” of another perpetrator and were merely “cumulative” of the trial evidence. (Watkins v. State, 661 N.E.2d 911 (Ind. Ct. App. 1996).) In fact, the DNA conclusively showed that someone else, not Watkins, had raped the victim.

Meanwhile, a host of evidence of prosecutorial misconduct mounted. The jury had not heard the whole

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story—not even close. Evidence about other suspects had been concealed. So had evidence about a witness who gave a detailed and accurate description of what the victim was wearing and saw the victim abducted from a park in a black Camaro; Watkins had no such car. Several others gave statements that the informant admitted to making up his statements.

Watkins filed a federal habeas petition, again seeking to have his conviction overturned. The federal judge described how it had been uncovered that placing the informant in Watkins’s cell had been contrary to a direct and “emphatic” order from the jail commander that this informant was not to be allowed outside his own cellblock. (Watkins v. Miller, 92 F. Supp. 2d 824, 834 (S.D. Ind. 2000).) The informant had also recanted in an affidavit in which he said:

That the State of Indiana did in fact pay (with promises) for this petitioner’s testimony, and did in fact show him not only the “death-site,” but “grizzely” [sic] pictures of the murder in order to inflame this petitioner’s feelings towards the defendant (Jerry Watkins), and thus secured (for the state) a statement from this petitioner that could, and was used to obtain a conviction.

(Id. at 852.)

He went on to say that he was cheated and that “the Courts [of] the (State of Indiana) and (Jerry Watkins) were cheated as well.” (Id.) If it was true that police had shown the informant photographs of the dead victim and had taken him to the field where she had been killed, then they would have suborned perjury and actively participated in fabricating false testimony against Watkins.

The federal judge concluded that if this statement was true, it was “explosive.” (Id. at 853.) Records that the defense had never seen showed police had met with the informant several times at the jail just before Watkins was in the holding cell with him—and had taken the informant out of the jail, perhaps to see the “death-site.” If the informant had, in fact, received the “detailed information” about the murder from police or a prosecutor, “that information utterly destroys the state’s case against Watkins” and it “described an intentional corruption of the criminal justice system.” The judge noted that the prosecution had at trial brought in newspaper articles to show that the jailhouse informant had “specific, correct knowledge that he could not have derived from newspaper articles.” (Id.)

Although the court granted Watkins’s habeas petition, the federal judge failed to ensure that the prosecutors who allegedly fed facts to the informant were appropriately sanctioned. The judge decided not to address whether the police and prosecutors had concealed the fact that they had offered the informant a deal and had fed him specific details of the crime. Although the judge concluded that the “prosecution’s failure to disclose such information would amount to suborning perjury and corrupting the judicial process,” he declined to investigate further. Because the prosecutors had also concealed a host of other evidence (a Brady violation), the judge decided to reverse on that ground alone. He said that “[a] finding of such subornation of perjury would require more extensive proceedings and evidence than have been submitted here.” He declined to investigate much less recommend that the prosecutor suffer any sanction for potentially grave ethical violations. (Id.)

Meanwhile, prosecutors sought to appeal, and pushed for another round of more modern STR DNA tests. In 1999, Watkins had asked for STR DNA tests but prosecutors had said the evidence could not be found. In 2000, the materials were found and were tested. The results again excluded Watkins. Prosecutors finally dropped all charges against him and he was released. But the DNA did more. A DNA profile was entered into the Indiana State Police database. It matched another man who pled guilty to the sexual assault after prosecutors agreed to drop murder charges; another man also pled guilty to battery. (See Jerry Watkins, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Watkins.php.) Watkins was far from the only person exonerated by DNA tests who was convicted based on false informant statements. Informant statements of several different kinds, including cellmates, codefendants, or cooperating witnesses, played a role in 20 percent of the first 250 DNA exoneration cases. These incentivized witnesses were concentrated in the murder cases. Just like in Watkins’s case, almost all of the jailhouse informants claimed that exonerees admitted details about the crime that only the true culprit could have known. Many informants admitted
receiving rewards from prosecutors for these lies, but in some cases it came to light years later that deals with the prosecution had been concealed from the defense.

Jailhouse informant testimony in particular is inherently suspect. If informant testimony is to be used as evidence in criminal trials, it should be carefully regulated to make sure that deals are not hidden, prior statements are carefully documented, and judges instruct jurors about the potential unreliability of informant testimony. Judges could also assess the reliability of informants before permitting them to testify. Prosecutors can themselves adopt guidelines requiring the careful use of informants and careful documentation of their statements and of any consideration to be provided in exchange for their cooperation. However, very few jurisdictions have adopted any of those protections. (But see Carol Williams, Gov. Brown Signs Law Weakening Testimony of Jailhouse Snitches, L.A. Now, Aug. 1, 2011, http://tinyurl.com/3oa85ap.)

**Contaminated Confessions**

In 1988, an elderly woman was killed in Rochester, New York, while out for a walk. The crime remained unsolved. Frank Sterling became a suspect and was interrogated alone, without a lawyer. Sterling waived his *Miranda* rights; when asked whether he agreed to waive, he answered “yeah.” (Trial Transcript at 618–19, People v. Sterling, Ind. No. 91-0624 (N.Y. Cnty Ct. Sept. 17, 1992).) The interrogation began at 7 a.m. and continued for 12 hours.

To try to get more out of him, an officer used a hypnotic-type “relaxation” technique where he lay down beside Sterling, held his hand, and they breathed deeply. (Id. at 649–52.) Sterling for the first time supposedly told the officer that the victim was wearing “a purple top, maybe two-toned, and dark pants.” (Id. at 655.) The officer also testified at trial that at the interrogation he had not yet looked at the photos and did not know what the victim was wearing. (Id. at 658.) But the other officer recalled they had already showed Sterling photos of the crime scene. (Id. at 769.)

In the last 20 minutes of the interrogation—the only portion that was video-recorded—Sterling appears utterly exhausted and distraught. It is difficult to watch that video with the knowledge that he is innocent. In the recorded portion of the questioning, he mentions three details that became crucial at trial: the location of the murder in brush by the side of a jogging trial, the victim’s clothing and her purple jacket, and a BB gun found at the scene. (See more on the case, including the taped portion of the confession, at www.innocenceproject.org/Content/Frank_Sterling.php.) Could Sterling, who we now know is innocent, have guessed those details?

Sterling later told *New York Magazine*, “They just wore me down. . . . I was just so tired. . . . It’s like, ‘Come on, guys, I’m tired—what do you want me to do, just confess to it?’” Sterling recalls he was never asked an open-ended question about what happened. Instead, he was asked leading questions and asked to answer “yes.” “‘Yes’ and grunts—that’s basically what the whole confession is about.” (Robert Kolker, *I Did It: Why Do People Confess to Crimes They Didn’t Commit?*, N.Y. Mag., Oct. 3, 2010, http://nymag.com/news/crimelaw/68715/).

There were also inconsistencies that should have been a red flag to the detectives. For example, Sterling said the victim fell in the brush. Yet the crime scene evidence indicated that she was dragged a long distance to the place where her body was found. Sterling had an alibi; he was at work much of the day in question.

Sterling’s defense lawyer asked the jury: “And do you feel in your stomach that this is reliable? That this is free of suggestion? That this is voluntary?” Prosecutors responded: “Truthful? How does the defendant know it’s a purple jacket or purple top? A guess? [The police] never released to the media . . . the purple jacket.”

Sterling tried to appeal, arguing another man had committed the crime. The judge rejected his motion. “Only Sterling confessed to authorities,” read the judge’s decision. “Only Sterling had a motive. . . . Only Sterling knew facts that had not been publicized.” Sterling spent nearly 19 years in prison before DNA exonerated him and inculpated another man. (See Kolker, supra.)

Frank Sterling was not alone. In 26 percent of the first 250 DNA exonerations, innocent defendants made incriminating statements, delivered outright confessions, or pleaded guilty. In 16 percent (40 cases) of the exonerations, innocent defendants falsely confessed. All but two of the 40 DNA exonerees who falsely confessed were said to have confessed in detail. As in Sterling’s case, 23 of those 40 false confessions were recorded, but only in part, usually just a confession statement at the end of a long interrogation. What the jurors heard was seemingly irrefutable evidence that those individuals had confessed when they offered police details that only the true culprit could have known. In eight cases, the confessions were thought to be such powerful evidence of guilt that the defendants were convicted despite DNA tests at trial that excluded them.

Police are supposed to be carefully trained never to contaminate a confession by disclosing key details to the suspect. During the interrogation “[w]hat should be sought particularly are facts that would only be known by the guilty person.” Thus police are trained to ask open questions, like “What happened next?” And “the truthfulness of a confession should be questioned, however, when the suspect is unable to provide any corroboration beyond the statement, ‘I did it.’” (Fred E. Inbau et al., *Criminal Interrogations and Confessions* 367, 425 (4th ed. 2001).) How-
ever, detectives may themselves lose track of who said what during complex interrogations lasting many hours and using psychologically coercive tactics. Absent a recording of the entire interrogation, it may be impossible to unravel what transpired.

Perhaps because of the way that detailed facts were incorporated into the confessions, judges rejected challenges to the confessions at trial. Of those 40 exonerees who falsely confessed, 14 were mentally retarded or borderline and three more (at least) were mentally ill. Thirteen were juveniles. All but four were interrogated for more than three hours. Seven described their involvement as coming to them in a “dream” or “vision.” Seven were told they failed polygraph tests. Several described threats or physical force. In addition, like Sterling, all waived their Miranda rights. Despite the long interrogations they endured and the heightened vulnerability of those who were juveniles or mentally disabled, judges rejected motions to suppress the confessions.

Recording of interrogations should be mandatory. A record of who said what during an interrogation can help prevent wrongful convictions like that of Frank Sterling. Recording can also increase the reliability of confessions as evidence. More than 750 law enforcement jurisdictions across the United States are voluntarily recording interrogations. Studies have shown that once recording becomes standard practice, police officers and prosecutors become strong supporters of the reform. After all, a taped record can mean fewer motions to suppress and fewer claims that suspects were unduly deceived or abused. In addition to requiring recording of interrogations, judges should also conduct hearings to carefully evaluate those recordings to assess the reliability of interrogations before allowing them in court. Recording interrogations protects the innocent, aids police and prosecutors, and provides judges and jurors with the clearest evidence of what transpired during the interrogation process.

**The New Jersey Supreme Court and Eyewitness Misidentifications**

McKinley Cromedy’s case would, in its way, lead to the most thorough reconsideration of the rules surrounding eyewitness identifications in the United States. At his trial, Cromedy’s defense lawyer argued that his client had been misidentified by the victim of a rape, telling the jury in the opening statement that “the evidence will show, not that she’s a liar, but that she’s mistaken, that her identification is wrong and it’s a misidentification.”(Trial Transcript at 182, State v. Cromedy, Ind. No. 1243-07-93 (N.J. Super. Ct. July 27, 1994).)

The victim, a white college student, had been raped by a black man in her apartment. A few days later, she had helped a police artist draw a composite sketch of a black man with a full face and a moustache, and she looked at thousands of photos of black men who had been arrested. One of those photos was of Cromedy. In fact, the police had him in mind as a suspect because he had been seen in the area, but she did not identify him.

Almost eight months after the rape, she saw Cromedy crossing the street. She thought he was her attacker because of his appearance, but also because of his unusual way of walking due to a limp—a “swagger,” as she put it. (Id. at 104.) She called the police, who called her back 15 minutes later to say that they had picked up a man matching her description. She then went to the police station and positively identified Cromedy as her attacker. The police officer explained, “I’ve had a lot of experience with identifications and I’m not going to lead somebody. I asked her to see if she recognized this person.” (Id. at 142.) Yet she was not given a lineup to test her memory. She was asked to identify Cromedy by viewing him one-on-one from behind one-way glass—a show-up.

Cromedy’s lawyer argued that the identification was improper, saying that the show-up was “like true or false, and to me that is about as suggestive as a procedure you can have . . . . She knows somebody was picked up. What could be more suggestive?” However, the judge ruled that the identification was admissible, emphasizing that “she was very certain of her identification.” (Id. at 164, 168.) Following the US Supreme Court’s ruling in *Manson v. Brathwaite*, an eyewitness identification that was the product of suggestive procedures, such as this one, may still be admitted based on a set of “reliability” factors, including the apparent confidence of the eyewitness. (Manson v. Brathwaite, 432 U.S. 98 (1977)). That test has been discredited by decades of social science research demonstrating that factors such as confidence do not correspond with reliability at all. The memory of an eyewitness must be handled sensitively because it is highly malleable. In fact, the apparent confidence of an eyewitness may be just a byproduct of suggestive police procedures.

Moreover, psychologists have long found that eyewitnesses have particular trouble identifying persons of the opposite race. The defense lawyer asked for a special jury instruction, asking the jury to consider “whether the cross-racial nature of the identification has affected the accuracy of the witness’s original perception and/or accuracy of a subsequent identification.” The trial judge denied the request. (State v. Cromedy, 727 A.2d 457 (N.J. 1999).)

The jury saw the victim describe her ordeal on the stand, and finally, point to Cromedy in the courtroom and agree she was “absolutely sure” he was her attacker.

The jury convicted Cromedy and he was sentenced to 60 years in prison. On appeal, though, the New Jersey Supreme Court reversed his conviction. The court ruled in 1999 that “forty years” of empirical studies documented a risk of heightened error when white eyewitnesses try to identify black subjects. The court noted that some
courts, such as in California, Massachusetts, and Utah, had permitted such instructions. The court ruled that under the facts of Cromedy’s case, it was reversible error not to instruct the jury about “the possible significance of the cross-racial identification factor.” (Id. at 120, 132.)

The court reversed Cromedy’s conviction without knowing that he was innocent. After the ruling, however, the prosecution agreed to conduct DNA tests. The results excluded him and he was exonerated. The victim later commented, “I couldn’t believe that I was wrong.” (Tom Avril, Eyewitness’ Blind Spot, PHILA. INQUIRER (May 22, 2006) http://tinyurl.com/83jhf4e.)

What made the response to the wrongful conviction of McKinley Cromedy even more remarkable was that the state of New Jersey then embarked on a project of revamping its criminal procedure rules. The New Jersey attorney general’s office issued guidelines to all law enforcement agencies in the state requiring that detailed procedures be followed when eyewitnesses are asked to identify a suspect. (Office of Attorney Gen., N.J. Dep’t of Law & Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001).) These guidelines were a landmark reform. New Jersey became the first state in the country to adopt double-blind lineups. No longer would the officer administering the procedure know who the suspect is. Other best practices long recommended by social scientists were adopted. All lineups would use sequential photo arrays, where photos are shown one at a time to prevent “comparison shopping.” Eyewitnesses were to be instructed that the perpetrator might not appear in the lineup. The results were to be recorded, including the witnesses’ certainty at the time of the identification procedure.

In 2006, the court expanded this rule to require that police similarly record or document all eyewitness identifications. The court noted, “Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country.” (State v. Delgado, 188 N.J. 48, 62–63 (2006).) In 2007, the court adopted a model jury instruction charging all jurors not to rely on “the confidence level” of an eyewitness, at least not “standing alone.” Jurors are cautioned: “Although nothing may appear more convincing than a witness’s categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken.” (State v. Romero, 191 N.J. 59, 76 (2007).)

Finally, the court asked that a special master explore something more fundamental: the US Supreme Court’s Manson v. Brathwaite test for evaluating admissibility of eyewitness identifications. The special master held hearings, with the participation of the New Jersey Office of the Public Defender, the New Jersey attorney general, the New Jersey Association of Criminal Defense Lawyers, and the Innocence Project at Cardozo Law School, and recommended that the court adopt a new test for evaluating eyewitness identification evidence and require pretrial hearings to evaluate all eyewitness identifications. The New Jersey Supreme Court issued its ruling in that case, State v. Henderson, in August 2011, and established a comprehensive social science framework for regulating eyewitness identifications in the courtroom. (State v. Henderson, 203 N.J. 208 (2011).) The decision provides a national model for how to ensure that sound lineups are conducted in the first instance, rigorously evaluate the reliability of eyewitness evidence pretrial, and carefully instruct jurors about the factors affecting the reliability of eyewitness evidence at trial.

Most other states have not yet followed suit. For example, in Kirk Bloodsworth’s case, the first death row DNA exoneration, the Court of Appeals of Maryland had upheld the trial court’s refusal to allow expert testimony on the dangers of eyewitness misidentifications. The trial judge excluded this testimony on the grounds that such evidence would be unnecessary and would “confuse or mislead” the jury. (Bloodsworth v. State, 512 A.2d 1056, 1062 (Md. 1985).) We now know, of course, that the jury was in fact gravely misled when it believed the eyewitnesses in Bloodsworth’s case. Other judges have become more open to questioning reliability of eyewitness identifications by providing juries with cautionary instructions concerning eyewitness error, or admitting expert testimony explaining social science research concerning misidentifications.

Seven states—Connecticut, Illinois, Maryland, North Carolina, Ohio, West Virginia, and Wisconsin—have passed statutes in response to these misidentifications. (Find examples of the statutes at http://www.innocenceproject.org/fix/Eyewitness-Identification.php.) The statutes vary—the North Carolina and Ohio statutes are the most specific in requiring that best practices be adopted for eyewitness identifications. Other states have recommended best practices and studied the problem further, while still more local jurisdictions and departments have adopted voluntary guidelines. All of this marks the beginning of a sea change. Traditionally, police had no written procedures on identifications, and, worse, they routinely used unreliable and suggestive lineups. Because so many DNA exonerations involve eyewitness misidentifications, and because decades of social science research support use of double-blind and well-documented lineups, police will likely continue to adopt improved procedures. It is crucial that they do so. Nor should our constitutional criminal procedure permit grossly suggestive procedures so long as the identification appears “reliable.” Judges should impose conse-

(CONTINUED ON PAGE 42)
M., 558 A.2d 661 (Conn. 1989), although in recent decades a handful of state courts have resurrected the defense. The California Supreme Court, for example, has held that the Delinquency Code “should apply only to those who are over 14 and may be presumed to understand the wrongfulness of their acts and to those under the age of 14 who clearly appreciate the wrongfulness of their conduct.” (In re Gladys R., 464 P.2d 127 (Cal. 1970).) (Whether the proof need be “beyond all doubt and contradiction” is another matter.) In most states, however, every child is subject to prosecution, regardless of age.

Maintaining a system that is essentially “age blind” raises, or at least should raise, several legal issues. One is competency, generally defined as the ability to understand the proceedings and materially assist in one’s defense. How many six-year-olds or, for that matter, 10-year-olds understand judicial proceedings and possess the ability to fully assist counsel? Second, the principle of specific intent or mens rea is deeply ingrained in criminal law jurisprudence. How many children below the age of 12 (or perhaps 14) possess the mens rea we require when the offender is older? Another issue is diminished responsibility. We increasingly apply the principle when adjudicating a 15-year-old as opposed to a 20-year-old, but have yet to develop diminished responsibility standards when adjudicating an eight-year-old as opposed to a 15-year-old. (An eight-year-old, like his or her older brethren, is usually subjected to the full restrictive panoply of juvenile delinquency dispositions.) And just what purpose is served? Does anyone believe that prosecuting a seven-year-old deters other seven-year-olds from committing similar acts, or that society needs protection against seven-year-old predators? An analysis of these principles is beyond the scope of this short article. Suffice to say that the American legal system has given scant attention to the underlying purposes and principles of the penal law as applied to the very young offender.

Establishing a minimum age for delinquency prosecution would not necessarily evade the problem of dealing with the occasional violent or lawless acts committed by young children. Countries that follow the norm of placing an age floor under the prosecution of children treat the complained of incident as a child welfare matter instead of a juvenile justice issue. An assault or theft committed by a 10-year-old may raise child protective issues or may prove the need for family counseling and therapy (although minor criminal acts by the very young may be just part of growing up). Services appropriate for that age group are within the domain of social service systems rather than the juvenile justice system. Referring the child for juvenile delinquency prosecution, as happens to approximately 40,000 children each year, is manifestly unfair and counterproductive, like swatting a fly with a sledge hammer.

The ABA Juvenile Justice Standards recommend a minimum age of 10, quite an improvement over the current practice of no minimum age (1 JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS, Standard 2.1, (1980).) Other experts have advocated a floor of age 12, see Rubin, supra, which would place the United States firmly within the international consensus. Regardless of the specific age threshold, the time is long past to abolish the century old prosecution of toddlers who, regardless of their individual aptitudes, cannot possibly fully understand the consequences of their acts, cannot adequately defend themselves (even with counsel), and cannot possibly benefit from restrictive dispositions tailored to the older adolescents.

TRIAL AND ERROR (CONTINUED FROM PAGE 35)

Errors can be introduced early on in the criminal process, and detecting them later is incredibly difficult. Once an informant statement is contaminated, once facts are disclosed in the interrogation room, or once a suggestion is made to an eyewitness, the opportunity to learn the truth may be lost. These innocent people were the lucky ones in one way, despite the ordeals they suffered, since DNA tests could later be done to free them. That is not true of the vast majority of criminal convictions, which do not involve usable DNA evidence. While these wrongful convictions are the tip of a much larger iceberg, we can learn from patterns of error in these trials to make our criminal justice system more accurate.

Conclusion
Each of the types of evidence discussed—jailhouse informant testimony, confession testimony, and eyewitness testimony—share a common problem. The jury may hear confident witnesses describing seemingly powerful evidence, but they cannot tell how police and prosecu-