

LEGAL THINKING, THE ADVERSARIAL PROCESS AND EXONERATING INNOCENT DEFENDANTS: A SOCIO-LEGAL VIEW OF THE WRONGFUL CONVICTION PROCESS

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Little is as frustrating as advocating the release of an innocent defendant who has been wrongfully convicted. Surprisingly, most of the wrongfully convicted fail to overturn their cases through the courts, and rely on government officials and prosecutors to find other ways to release them from custody. Too often the wrongful conviction process leaves lawyers and judges arguing to legally support injustices in the face of a practical common sense indicating a defendant's innocence. This paper is an attempt to understand the tendency of legal professionals to argue against remedying a wrongful conviction in favor of the continued social injustice of holding an innocent person in custody. First, the way legal professionals learn to "think" and construct legal arguments will be examined. Second, how legal professionals use legal language to support positions of social power to maintain imbalanced relationships that lead to wrongful convictions will be researched. Lastly, the ability of the adversarial legal process to overturn wrongful conviction will be assessed. The paper will close by arguing that all three factors contribute to the wrongful conviction process and provide suggestions for reform.

Keywords: cant, sociolinguistics, discourse analysis, hegemony, exoneration

I. INTRODUCTION

In his dissent of the Supreme Court's granting of habeas corpus relief to convicted killer Troy Anthony Davis, Justice Antonin Scalia wrote, "this Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to

convince a habeas corpus court that he is actually innocent.”¹ Davis was appealing his death sentence for the killing of a Savannah, Georgia Police Officer. His appeals brought national attention because the evidence strongly indicated innocence. There was no physical evidence linking Davis to the murder, no murder weapon was found and seven of the nine witnesses who identified him as the shooter recanted their testimony.² Scalia’s remark prompted Washington D.C. lawyer William Baude to comment, “at this point anyone whose common sense has not been deadened by three years of law school might scream: how can it be an open question whether it is constitutional to execute the innocent.”³ Yet, innocence was an open question in the *Davis* case. Justice Stevens, joined by Justice Ginsburg and Justice Breyer in a concurring opinion, tried to rescue the Court by replying to Scalia that the “decisions of this Court clearly support the proposition that it would be an ‘atrocious violation of our Constitution and the principals upon which it is based to execute the innocent.’”⁴ However, the Justices could not undo the public damage against the U.S. Supreme Court and the legal system as Scalia’s dissent and Baude’s humorous knock left a much bigger impression of the case than Justice Stevens’ concurrence.

The problems Davis was experiencing in attempting to overturn his wrongful conviction in the courts are not unusual. Shockingly, the courts have not been doing a good job at overturning wrongful convictions. In his study of the first 200 people exonerated by postconviction DNA testing in the United States, Brandon Garrett found that only 14% of the 133 who received written court opinions were able to obtain any kind of appellate relief before the DNA test results were received.⁵ He reports that twelve could not obtain relief in the courts even after the DNA evidence showed their

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1. *In re Davis*, 557 U.S. 952, 954 (2009) (Scalia, J., dissenting).

2. William Baude, *Last Chance on Death Row: A Little-Known Legal Doctrine Confounds the Most Basic Understanding of Justice—Whether it Matters if a Convicted Person is Actually Innocent*, 34 WILSON Q. 18, 18 (2010). Adding credibility to his case for innocence, Davis was assisted by the N.A.A.C.P., the Innocence Project, Amnesty International, Jimmy Carter, Archbishop Desmond Tutu and 51 members of Congress. Davis was executed on September 21, 2011.

3. *Id.* at 20.

4. *In re Davis*, 557 U.S. at 953 (Stevens, J. concurring).

5. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 98 (2008).

innocence.⁶ In all, he found that 41 received a pardon from the state that convicted them, often because they had no other place to file a claim.⁷ Garrett concluded “the exonerees could not effectively litigate their factual innocence, likely due to a combination of unfavorable legal standards, unreceptive courts, faulty criminal investigations by law enforcement, inadequate representation at trial or afterwards and a lack of resources for factual investigations that might have uncovered miscarriages.”⁸ Wrongful conviction researchers Gould and Leo comment that in non-DNA cases, the vast majority of exonerations are by governors and other political leaders because the courts are so skeptical about non-biological evidence that indicates innocence.⁹

The courts’ failure to release defendants in cases where the evidence overwhelmingly indicates a wrongful conviction occurred makes advocating the release of an innocent defendant who was wrongly convicted in the courts a very frustrating experience. Current research indicates that wrongful conviction cases are increasing.¹⁰ The credibility of the legal system continues to suffer as reports of the courts refusing to release the wrongfully convicted mount. Wrongful convictions researcher Brandon Garrett compares legal professionals to Nazi Adolph Eichmann for being a banal people caught up in a twisted system that make normal people do evil things, commenting that looking banal can even improve their image and mask the fact that they are “plodding, incompetent, misguided, or even malicious.”¹¹ Longtime trial researcher Robert Burns compares the wrongful conviction process to the legal process in Kafka’s *The Trial*,¹² while wrongful conviction researchers Gould and Leo comment, “it is incredible to the point of embarrassing that the American system of justice has been so resistant to

6. *Id.* at 120. Garrett reports that each of the twelve was later exonerated by an executive or higher court granting relief.

7. *Id.*

8. *Id.* at 131.

9. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 857 (2010).

10. See Newton N. Knowles, *Exonerated, but Not Free: The Prolonged Struggle for a Second Chance at a Stolen Life*, 12 HASTINGS RACE & POVERTY L.J. 235, 235 (2015) (Knowles reports that the research on wrongful convictions shows “That between 2.3% and 5% of United States prisoners have been wrongfully convicted.”); see also Hugh M. Mundy, *Free, But Still Behind Bars: Reading the Illinois Post-Conviction Hearing Act to Allow Any Person Convicted of a Crime to Raise a Claim of Actual Innocence*, 35 B.C. J.L. & SOC. JUST. 1,1 (2014) (Mundy writes that the number of wrongful convictions is rising each year with about 80% being non-DNA cases).

11. Brandon L. Garrett, *The Banality of Wrongful Convictions*, 112 MICH. L. REV. 979, 980 (2014).

12. See generally ROBERT P. BURNS, *KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE* (2014).

innocence commissions or post-conviction review.”¹³ For Gould and Leo, criminal justice professionals, policymakers and politicians need to take the reform process seriously to prevent and correct wrongful convictions much more seriously, writing that “the stakes are simply too high to put our heads in the sand and pretend that the research uncovered on erroneous convictions does not warrant attention.”¹⁴

To understand how legal professionals come to conclusions that support the continued incarceration of obviously innocent defendants, this article is going to investigate three socio-legal aspects of the decision making process. In Part II, the sociolinguistics of “legal thinking,” or how legal professionals construct their legal arguments will be discussed. In Part III, how lawyers use the “power” aspects of legal language in wrongful conviction cases will be explored. In Part IV, the ability of the adversary system to overturn wrongful convictions will be assessed. The article will conclude by explaining how legal professionals use power relations and the adversary system to construct legal arguments in wrongful convictions cases. Reforms will be suggested.

II. LEGAL THINKING

Using sociolinguistics to study legal language and how it affects the way lawyers think is a relatively new research topic dating back to the 1960s and 1970s.¹⁵ Most sociolinguistic researchers credit Susan Philips with the first study on legal thinking with her 1982 study on how law students “acquire the cant” or learn legal language, *The Language Socialization of Lawyers: Acquiring the “Cant.”*¹⁶ To research how law students learned the law, Philips, an anthropologist with a specialization in linguistics, did a participant observations study that involved attending classes at the University of Arizona School of Law for a year.¹⁷ Philips explained that the term “cant” refers to language and expressions understood by members of a particular sect, class or occupation.¹⁸ For Philips, legal jargon fits the definition of

13. Gould & Leo, *supra* note 9, at 866.

14. *Id.* at 867. See generally Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955 (2013-2014), for an overview of the innocence reform process.

15. See generally JOHN M. CONLEY & WILLIAM O’BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* (1998), for a short history of sociolinguistic studies of legal language.

16. See generally Susan Urmston Philips, *The Language Socialization of Lawyers: Acquiring the “Cant,”* in *DOING THE ETHNOGRAPHY OF SCHOOLING: EDUCATIONAL ANTHROPOLOGY IN ACTION* 176-209 (George Spindler ed., 1982).

17. *Id.* at 179.

18. *Id.*

“cant” since it is only fully understood by lawyers and judges.¹⁹ For the new law student, the “legal cant” consists of new words with new oral and written usages.²⁰

Phillips reports that in acquiring the “legal cant,” familiar terms are given new meaning while other words have no common meaning outside of law. All of the terms, familiar and unfamiliar, have new rules regarding their usage. For example, the familiar term “despose” will transform to mean taking a deposition from a witness outside of court. Examples of terms that are not used in everyday conversation and completely unfamiliar to the law student include terms like “torts,” “collateral estoppel,” and “plaintiff’s intestate.”²¹ The law students learn the “legal cant” using the casebook method.²² This involves studying legal textbooks that consist almost entirely of legal cases, briefing the cases, and going to class where law professors use the “Socratic Method” to ask students questions about the cases they have read and briefed. Philips describes the Socratic Method as a process where the law professor uses a seating chart to ask a student a series of questions about a case whether the student has volunteered or not to answer.²³ The professor typically calls the student by his or her title and last name (Mr. Smith, for example) and each question asked of the student are based on the student’s previous answer. Philips reports that the Socratic Method allows the law student to learn the “legal cant” by hearing how both law professors and fellow students use legal language.²⁴

Philips found that there is much more to the law school experience than students learning the “cant.” First, law students are segregated from the rest of the university.²⁵ A typical law school is usually located in buildings separate from the rest of the university and each law term is usually run on an academic calendar that starts and ends at different times than the rest of the university.²⁶ Even the dates of Spring Break are usually different.²⁷ The building segregation and differences in schedules work to discourage non-law students from taking law classes and to discourage law students from

19. *Id.*

20. *Id.* at 180.

21. *Id.* at 181.

22. *Id.*

23. *Id.* at 182.

24. *Id.* Christopher Langdell, the Dean of Harvard Law School in the late 1800s, is credited with first using the Socratic Method to teach law. See generally Dennis Patterson, *Langdell’s Legacy*, 90 NW. U. L. REV. 196 (1995), for more on Langdell and the Socratic Method.

25. See Philips, *supra* note 16, at 183.

26. *Id.*

27. *Id.* at 183-84.

taking non-law classes.²⁸ In addition, law students have their own separate student and political organizations.²⁹ The segregation results in an environment where law students generally only socialize with other law students and lawyers. Within this segregated environment, all first year law students often take the same classes and have the same schedule, fostering an environment where students form small study groups where they further practice the “legal cant.”³⁰

In all, Philips concludes that the classroom experience teaches students how to conduct themselves in courtrooms before judges.³¹ The law student’s socialization resulting from the segregation of the law students teaches the law students how to socialize with other lawyers outside of law school.³² The law students soon learn that their newly acquired legal language will be understood only by members of the legal profession.³³ However, Philips criticizes that the students too often take on the belief that the activities of lawyers are too complicated to try to explain to others and that the public, who can never be competent in their understanding of legal matters or their ability to judge the actions of lawyers.³⁴

To date, Anthropologist Elizabeth Mertz has conducted the most detailed study on how law students learn legal language, reporting her results in her 2007 book, *The Language of Law School: “Learning to Think Like a Lawyer.”*³⁵ Rather than doing a participant observation study of one law school, Mertz studied the linguistic transformation that takes place during law school by doing an ethnographic study that involved researching Contracts I, a first semester law class, at eight law schools.³⁶ To do her study, Mertz sat in on one class herself and trained seven other researchers to attend a Contracts I class in the seven other schools.³⁷ Varying the strength of the law schools, of the eight law schools, she classified three as “elite,” two as “regional” and three as “local.”³⁸ Each class was taped, transcribed and coded

28. *Id.* at 184.

29. *Id.*

30. *Id.* at 184-85.

31. *Id.* at 187.

32. *Id.* at 196.

33. *Id.* at 196-97.

34. *Id.* at 197.

35. See generally ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: “LEARNING TO THINK LIKE A LAWYER”* (2007).

36. *Id.* at 33-34.

37. *Id.* at 33.

38. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 488 (2007).

by the trained observers.³⁹ While Mertz found differences between law schools on the surface level, she found that on a deeper level each law school was similar in that they each taught law students “how to think like a lawyer” through a “recontextualizing” linguistic practice that involved the students developing new meanings for concepts by giving up their old meanings for the same concepts.⁴⁰ Based on this similarity, Mertz concluded that all law schools teach students how to “think like a lawyer.”⁴¹

In her study, Mertz documents how the new law students at each of the eight schools lose sight of everyday cultural conceptions of right and wrong, morality and whether something is ethical in favor of learning legal interpretations for events during interactions with law professors.⁴² To illustrate the transformation of the law student’s worldviews, Mertz uses a linguistic theory which depicts textual interpretation as a continual process.⁴³ In accordance with this theory, she designs her study to examine the process of “recontextualizing” legal texts that takes place in law schools.⁴⁴ The first step in this process involves legal texts becoming “entextualized” or reconstituted, meaning the text is extracted or lifted out of its interactional setting.⁴⁵ Removing a text from its context renders a text “decontextualizable,” and allows the law professor to “recontextualized” the text or place it into another context.⁴⁶ For Mertz, the process of a case becoming legal precedent illustrates this process well since it involves an appeals court “recontextualizing” the original content of a lower court decision to give it a new “appellate” court meaning.⁴⁷ Legal textbooks, which consist almost entirely of appellate opinions, provide the material suitable for the “recontextualizing” process to occur as the law students learn new legal meanings for facts in the textbooks in their in class interactions with law professors.⁴⁸

Text meanings are transformed in classrooms by law professors who use the Socratic Method of teaching.⁴⁹ Mertz reports that in a typical law class, the law students are assigned readings (usually cases) before each class

39. *Id.*

40. *Id.* at 491-92.

41. *Id.* at 492.

42. Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 103-04 (2000).

43. MERTZ, *supra* note 35, at 45.

44. Mertz, *supra* note 38, at 493-94.

45. MERTZ, *supra* note 35, at 45.

46. *Id.*

47. *Id.* at 46.

48. *Id.* at 52-53.

49. *Id.* at 51-52.

and that the first year students are assigned to a cohort for the entire first year of classes.⁵⁰ Mertz continues by noting that the law professors maintain seating charts for each class, using the seating chart to call on students at random each day.⁵¹ Typically, the professor will address the student using a surname such as “Mr.” or “Mrs.” and will spend the entire class time by calling on one or two students, putting pressure on students to prepare for class and to take the questioning seriously.⁵²

Mertz observed that the Socratic style of questioning used by law professors utilized the process of “uptake,” which linguistically is a “mirroring” question and answer sequence which involves the questioner incorporating material from preceding responses into subsequent questions.⁵³ She concludes that “uptake” is a part of the Socratic questioning structure that allows the law professor to break down the ordinary meanings of texts and replace them with legal meanings.⁵⁴ Mertz also observes that the Socratic method of teaching is dialogic, which is an argumentative form from which the truth emerges.⁵⁵ She further observes that the dialogic nature of the classroom parallels courtroom discourse, helping the student construct his or her legal identity.⁵⁶

Mertz criticizes that law professors using the Socratic method alienates students from stories of human conflict, pain, moral dilemmas and social injustice in teaching them to “subjugate texts to the structure and strictures of law.”⁵⁷ She observed that this transformation was accomplished in three ways by law professors in their questioning of students about cases: (1) the attention to precedent or authoritative guidance in the cases discussed; (2) the procedural history of the case, which determines the issues a court can address and the types of standards applicable to those issues; and (3) related strategic questions involving framing legal questions within this authoritative backdrop.⁵⁸ The focus on authority allows the law professor to suspend moral and ethical readings of texts in favor of legal readings focused on what the law says you can or cannot do, or what the law says is fair.⁵⁹

50. *Id.* at 52.

51. *Id.*

52. *Id.*

53. *Id.* at 54.

54. *Id.* at 58.

55. *Id.* at 59.

56. *Id.*

57. *Id.* at 58-59.

58. Mertz, *supra* note 42, at 101.

59. MERTZ, *supra* note 35, at 76.

Mertz also reports that law students learn to form their legal identities and the legal identities of others through their classroom interaction with law professors.⁶⁰ To grasp the complexity of the cases, for example, many times the professors will ask the students to take the roles of farmers or businessmen.⁶¹ Mertz notes that the professor will then deem the non-legal aspects of these roles as irrelevant to further reduce these personal roles to legal roles such as “buyers” and “sellers.”⁶² However, she criticizes that this process further pushing the law student away from a personalized understanding of people to placing people in distanced legal categories.⁶³ The law professors will also invite students to take on the roles of legal personae such as parties, lawyers and judges.⁶⁴ Under this situation, once a student takes on a legal role, he or she is forced to construct a legal argument and convert social referents into legal categories which may work to further alienate the student from the cultural and moral aspects of the situation.⁶⁵ Mertz criticizes that this process can teach students to learn a new legal self with the power to rise above emotional and cultural judgments in favor of legal doctrine.⁶⁶

In sum, Mertz’s main conclusion is that law school teaches the law students “how to think like lawyers” by altering the way law students view the emotional and moral character of everyday human events.⁶⁷ Much of this way of thinking is done by law professors who use the Socratic Method in class to push students into a metapragmatic restructuring of text and authority and the formation of legal identities.⁶⁸ However, she criticizes that too often the legal interpretation of events may not be an improvement over the morality and ethics of the everyday version of the events, fearing that eventually the law student and legal professional will become alienated from ordinary conceptions of emotionality, morality and ethics as they take on their legal identities.⁶⁹ In the end, Mertz compares the process of learning the law by new law students to how medical students learn their trade by dissecting human cadavers in labs.⁷⁰ Noting that medical students begin by

60. *Id.* at 97.

61. Mertz, *supra* note 42, at 107.

62. *Id.*

63. MERTZ, *supra* note 35, at 120, 124.

64. *Id.* at 126, 129; *see also* Mertz, *supra* note 42, at 108.

65. MERTZ, *supra* note 35, at 127-28.

66. *Id.* at 132-33.

67. *Id.* at 205-06.

68. *Id.* at 97.

69. *Id.* at 115.

70. Mertz, *supra* note 42, at 100.

joking and taking a casual attitude toward cultural taboos and notions of death and the body, but soon adopt a “clinical attitude” toward the body during lab, Mertz comments, that just as the dissection of the body ruptures the student’s reverential attitudes toward the body and replaces it with a new professional attitude, the “Socratic” method is used to reconstruct text, morality and authority for the law student.⁷¹

Mertz concludes her study with ethical concerns and the fear that “legal discourse can also conceal the injustices and power inequalities that continue to be enacted through the legal system.”⁷² This certainly describes the wrongful conviction appeals process. The Carnegie Foundation verified Mertz’s ethical concerns in an influential study of 16 law schools they published called the “Carnegie Report.”⁷³ Mertz has received recognition for her research on law schools and legal thinking among legal educators. For example, the American Bar Association funded much of her research on legal education.⁷⁴

III. LAW, LANGUAGE, AND POWER

Mertz feared that lawyers and judges could use the metalinguistic structure to direct attention away from norms and social contexts to support inequities in the legal system.⁷⁵ In her study on legal thinking, Mertz refers to research by Conley and Barr and Susan Phillips to illustrate how the metalinguistic structures can be used to mask inequities in the courts.⁷⁶ Conley and O’Barr explore the relationship between law, language and power in *Just Words: Law, Language and Power*.⁷⁷ In their study, beginning with the premise that the law is not neutral but rather reflects power relations in society, Conley and O’Barr explain how legal systems can produce and reproduce unfair relations between people such as discrimination based on race, religion, gender, disability, age and sexual orientation.⁷⁸ Their

71. *Id.*

72. MERTZ, *supra* note 35, at 213.

73. Elizabeth Mertz, *Social Science and the Intellectual Apprenticeship: Moving the Scholarly Mission of the Law Schools Forward*, 17 J. LEGAL WRITING INST. 427-28 (2011). *See generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

74. Mertz, *supra* note 38, at 484. *See generally* James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511 (1996), for a viewpoint of how a law professor sees ethical problems in using the Socratic Method in teaching law.

75. MERTZ, *supra* note 35, at 217.

76. *Id.* at 218 n.43.

77. CONLEY & O’BARR, *supra* note 15, at 13.

78. *Id.* at 2-3.

conclusions also can readily be applied to explain how courts produce and reproduce wrongful convictions.

Conley and O'Barr's study is unique in that they specifically explain the sociolinguistic concepts they use in their study in order to make their study more understandable. The authors begin by defining language as something that includes "sounds, units of meaning, grammatical structures and the contexts in which they occur."⁷⁹ For Conley and O'Barr, law is language.⁸⁰ The language of law is what contracts, statutes, judicial opinions and other legal documents are composed of as well as the daily dramas that occur in the courtrooms and mediation centers.⁸¹ Based on this definition, Conley and O'Barr employ a discourse analysis to study the language of law, further providing definitions for the two types of discourse analyses they use in their study: linguistic and social. Linguistic discourse refers to connected segments of speech or writing, and a linguistic discourse analysis refers to how language is structured and used in communication in certain contexts.⁸² In the context of law, this can refer to courtroom testimony, closing arguments, and mediation sessions. A linguistic discourse analysis is always a microanalysis of a specific court setting or case.⁸³

The other type of discourse analysis identified by Conley and O'Barr, the social discourse analysis, is a macro level analysis.⁸⁴ Conley and O'Barr focus their social discourse analysis on the relations between courtroom participants. For example, in their research of rape trials they examined the relationship between the male attorneys and the female defendants.⁸⁵ Conley and O'Barr then examined how social relations in the courtroom during the rape trials between the male attorneys and female defendants reflected the macro relations in society between males and females and how the structure of society produced the social relations in the rape trials and other court settings.⁸⁶

To study the relationship of power to law, Conley and O'Barr borrowed from political science to define power as who gets what, when, how and why.⁸⁷ In researching the relationship between law, language, and power, the authors conducted linguistic and social discourse analyses of rape trials,

79. *Id.* at 6.

80. *Id.*

81. *Id.*

82. *Id.* at 6-7.

83. *Id.*

84. *Id.*

85. *Id.* at 16-17.

86. *Id.*

87. *Id.* at 8.

mediations, civil trials, cross cultural legal systems and historical trials.⁸⁸ Working from the bottom up, Conley and O'Barr stressed that the micro level linguistic discourse analysis cannot be separated from the macro level social discourse analysis because societal social relations will always structure and influence the same social relations at trial.⁸⁹ Providing support for the conclusion that law is not neutral but rather reflects power relations in society, Conley and O'Barr write, "language is the essential mechanism through which the power of law is realized, exercised, reproduced and occasionally challenged and subverted."⁹⁰ Based on the premise that law is primarily language, the authors conclude that their microdiscourse analyses demonstrated how the language of law was used to exercise real power over people.⁹¹

Susan Philips also concludes that the legal system is not neutral in her 1998 study on how judges administer guilty pleas, *Ideology in the Language of Judges: How Judges Practice Law, Politics and Courtroom Control*.⁹² Philips 1998 study is significant because she further develops Conley and O'Barr's conception of the relationship between law, power, and language by putting it in the form of a theory on how ideology is constituted through language in legal discursive practices.⁹³ Borrowing from Marxism, Philips begins by defining ideologies as thought systems that are used to justify the use of power in current political orders and the place of subordinated interests within them.⁹⁴ However, Philips is critical of Marxist theory for presenting an overly simplistic dualist theory to explain how a dominant ideology is used to justify the existence of organizational structures and the struggle for control between dominant and subordinate class interests within them.⁹⁵ Turning to the work of Althusser and Gramsci, Philips then develops a concept of hegemonic ideology that is based on multiple struggles for state control or is polysemous.⁹⁶ Defining hegemony as the dominant ideology in a society resulting from multiple struggles for control, Philips argues that current legal scholarship predominantly views law as ideologically plural.⁹⁷

88. *Id.* at 3-4.

89. *Id.*

90. *Id.* at 129.

91. *Id.*

92. See generally SUSAN U. PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS AND COURTROOM CONTROL* (1998).

93. *Id.* at 10.

94. *Id.* at 8.

95. *Id.*

96. *Id.* at 9.

97. *Id.* at 10.

While she credits legal scholars for recognizing the role of language in the constitution of legal ideologies, and for their work on the hegemonizing role of law as the vehicle of the state, she criticizes that such studies are not grounded in the reality of actual legal discursive practices, leading to misconceptions the relationship of law to ideology.⁹⁸ Philips addresses this criticism by developing a sociolinguistic method grounded in anthropology to study the discursive practices of trial judges in Pima, Arizona while administering guilty pleas.⁹⁹ In all, she identifies three ideological levels that trial judges operate on: (1) the political level; (2) the due process level; and (3) on a practical level of courtroom control.¹⁰⁰ She studied the political ideological levels of the judges by interviewing the judges in the study on the process in which the judges were appointed.¹⁰¹ She found that the political level ideologies for trial judges are the same of those of the Democratic Party and Republican Party and represent the relationship between the citizen and the state.¹⁰² The Democratic judges she studied took on an ideology that the government acted to protect the people, while the Republican judges took on the attitude that the people could look after themselves with minimum intervention from the government.¹⁰³

Philips then examined the due process level by examining each judge's guilty plea protocol, which consisted of asking defendants who were pleading guilty a series of questions that are mandated by the State Legislature and Arizona law to ensure that the defendant plead guilty according to U.S. Constitutional specifications.¹⁰⁴ Arizona law and the U.S. Constitution are written in terms which give trial judges some discretion in what order to ask questions, what questions to ask, and how elaborate answers need to be.¹⁰⁵ She found two types of judges: a "procedure" orientated judge who asked for lengthy and specific answers to a long series of questions and "record" orientated judges who asked for shorter answers to a minimal number of questions.¹⁰⁶ She determined that the basis for the differences in guilty plea protocol were ideological.¹⁰⁷ The democratic judges conducting "procedure" orientated protocols to protect the rights of the citizen versus the state by

98. *Id.*

99. *See id.* at 27-47.

100. *Id.* at 119.

101. *See id.* at 18-20.

102. *Id.* at 87.

103. *Id.* at 79.

104. *Id.* at 78.

105. *Id.* at 48-49, 63.

106. *Id.* at 48.

107. *Id.* at 79.

ensuring the defendant knew what he was doing, while the republican judges conducting “record” orientated protocols that reflected the Republican ideology of minimum government intervention with fewer questions requiring shorter answers.¹⁰⁸

Philips then identified a third ideological level in courtroom control, or the control judges had over participants during the guilty plea sessions.¹⁰⁹ Studying guilty plea transcripts, she found that the democratic, procedure orientated judges, were more down to earth; did not consider themselves above others in the courtroom; and attempted to create relaxed atmosphere conducive to fostering participants with the freedom to express themselves.¹¹⁰ On the other hand, she found the Republican, record orientated judges to be more aloof and formal in their treatment of others in the courtroom, demanding precise answers to the questions they asked of others in the courtroom.¹¹¹ In all, she concluded that the judge’s style in controlling the courtroom was ideologically driven to accomplish objectives consistent with the judge’s view on the role of the citizen to the state and due process, attributing the relaxed atmosphere created by the democratic due process judges as an effort to get defendants to talk to enable the judges to look after the defendant’s rights in the courtroom. On the other hand, the more formal, direct style of the republican, conservative judges reflected their views on minimal government intrusion into the personal life of others.¹¹² On a theoretical level, Philips argued that her study supported the idea that judges were not neutral, and their actions were guided by a polysemous ideology that took place on the political, due process and practical courtroom levels.¹¹³

After reviewing several wrongful conviction studies, Law Professor Keith Findley concludes that ideological problems with our adversarial system are resulting in inequalities that too often result in a wrongful conviction.¹¹⁴ Arguing that the adversary system in the United States was designed to produce the truth in a contest between two equal adversaries, Findley maintains that our adversarial system is “anything but equal.”¹¹⁵ In

108. *Id.*

109. *Id.* at 87.

110. *Id.* at 88, 110.

111. *See id.* at 110.

112. *Id.* at 113.

113. *Id.* at 117.

114. Keith Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y.L. SCH. L. REV. 911 (2011-2012). See BARTON INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES* (1987), for a description of the adversarial process. See also JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY TRIAL* (2003).

115. Findley, *supra* note 114, at 914.

support of his argument Findley first reports that representation for indigent defendants is so chronically underfunded that the prosecution often tries the case without an effective opponent to challenge allegations and evidence.¹¹⁶ While Findley does explain how abuses result from the power imbalances in the relationships between the underfunded public defenders and the prosecutors, other researchers have found power imbalances affecting relationships between prosecutors and underfunded defense attorneys, indicating they are most likely a factor in the wrongful conviction process. For example, Lanza, Keys and Guess (2005) directly found a Janus-faced justice system in their study of the Missouri Capital Punishment system.¹¹⁷ Concluding that prosecutor discretion was a major factor in determining who received the death penalty in Missouri, Lanza et al. found that prosecutors often abused their power by selecting death defendants based on particular combinations of offender-victim characteristics that afforded the greatest personal, social, and racial imbalances to portray the offenders in the worst comparative light.¹¹⁸ Lanza, et al. also found evidence that indicated that “jurors may be using the low social status of offenders to justify death sentences, rather than the facts of the case.”¹¹⁹

Findley does find that the imbalance of power affects relationships in other areas of the criminal justice process. For example, after determining that most criminal cases are resolved in the pre-trial trial investigative stage, he explains that in a typical criminal prosecution the defense often conducts no independent investigation.¹²⁰ Abuse in the relationship between prosecution and defense occurs when the prosecution fails to share the investigative evidence with the defense. Findley finds evidence for this often occurs in pre-trial discovery, claiming that disclosure is often the exception to the rule in criminal cases, which often go off without any discovery.¹²¹ He finds further imbalance of power relationship issues present in evidence produced by crime laboratories, claiming such evidence is often acquired to assist the police in their investigations rather than to find the truth.¹²² Further complicating the use of scientific evidence, the underfunded defense rarely has the resources to competently hire experts to challenge the evidence and

116. *Id.*

117. Michael Lanza, David Keys, & Teresa Guess, *The Prevailing Injustices in the Application of the Missouri Death Penalty (1978 to 1996)*, 32 SOC. JUST. 151, 163 (2005).

118. *Id.*

119. *Id.*

120. Findley, *supra* note 114, at 914.

121. *Id.* at 915.

122. *Id.* at 915-16.

must rely on the state's experts, who Findley says may refuse to talk to the defense while being coached on what to say by the prosecution.¹²³

Garret also finds that an imbalance of power between attorneys is at work in the wrongful conviction process.¹²⁴ Garrett thinks racism is at work in his study of the first 200 DNA exonerees after finding that 71% were minorities, a figure much higher than in both the prison and general populations.¹²⁵ Garrett also found that 73% of the innocent rape exonerees were minorities, while 37% of all those convicted of rape are minorities.¹²⁶ Further evidence that wrongful convictions are plagued by imbalance of power issues come with his finding that 11% of the exonerees were juveniles and 6% were mentally retarded, groups typically taken advantage of by criminal justice authorities. In all, Garrett testifies to the imbalance of power being present in the cases with his conclusion that the wrongful convictions contain a disproportionate representation of minorities because of the high number of such as cross-racial eyewitness identifications, the lack of resources available to minorities, and patterns of bias in the criminal justice system.¹²⁷

IV. WRONGFUL CONVICTIONS AND THE ADVERSARIAL PROCESS

In his study of the ability of the first 200 people exonerated by postconviction DNA testing in the United States to obtain appellate relief before the DNA results, Garret concluded that "our criminal justice system failed to address, much less remedy, the sources of wrongful convictions."¹²⁸ Finding that only 14% of the 133 who received written court opinions were able to obtain any kind of appellate relief before the DNA test results came in, Garrett determined that the exonerees could not effectively litigate their factual innocence due to a combination of unfavorable legal standards, unreceptive courts, faulty criminal investigation by law enforcement, inadequate representation at trial, and a lack of resources for factual investigation that might have uncovered miscarriages.¹²⁹

Garrett's study uncovers several disturbing tendencies regarding our legal system. For example, Garret found that constitutional criminal

123. *Id.* at 916.

124. *See generally* Garrett, *supra* note 5.

125. *Id.* at 66.

126. *Id.* at 66-67.

127. *Id.* at 129.

128. *Id.* at 130-31.

129. *Id.* at 98, 131.

procedural measures designed to protect defendants were generally ineffective in preventing the wrongful convictions. He found that while 79% of the cases involved eyewitness misidentification, including 48% of which were cross racial misidentifications, no defendants were able to obtain a favorable ruling in a *United States v. Wade*¹³⁰ claim to have counsel present at postarrest lineups or a *Manson v. Brathwaite*¹³¹ claim that the police engaged in suggestive identification procedures.¹³² Furthermore, in the thirty-one cases that involved false confessions, no defendant was able to use a *Miranda* claim to overturn the coerced confession.¹³³ The exonerees were also unsuccessful in challenging faulty forensic evidence and faulty informant testimony used against them.¹³⁴

While all 200 exonerees filed direct appeals, they did not do so well filing postconviction or habeas corpus appeals.¹³⁵ Of the 133 opinions Garrett researched, 60 (or 45%) of the exonerees filed state post-conviction appeals, 30 (or 23%) filed federal habeas corpus petitions, and 31 (or 23%) appealed to the U.S. Supreme Court.¹³⁶ The courts reversed 18 of the cases (or 14%).¹³⁷ Of these reversals, six involved state evidentiary claims, four involved ineffective assistance of counsel claims, three were *Brady*¹³⁸ claims, two were prosecutorial misconduct claims, one was a *Jackson*¹³⁹ claim, one was a due process and right to counsel claim, and one was a fabrication of evidence claim.¹⁴⁰ However, despite these successes, Garrett reminds readers that the vast majority of the exonerees (or 86%) did not receive any relief in court despite being wrongfully convicted.¹⁴¹ Garret notes that the lack of resources on the part of the defendants is one reason for this, finding that the lack of resources prevented most inmates from hiring experts to challenge the faulty

130. See *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (The U.S. Supreme Court held that defendants had a Sixth Amendment right to counsel at lineups).

131. See *Manson v. Brathwaite*, 432 U.S. 98, 114-15 (1977) (The U.S. Supreme Court set out a procedure for invalidating “suggestive” police identifications).

132. Garrett, *supra* note 5, at 80-81.

133. *Id.* at 90.

134. *Id.* at 96.

135. *Id.* at 94.

136. *Id.* at 95.

137. *Id.* at 98.

138. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (The U.S. Supreme Court ruled that the prosecution cannot withhold any exculpatory evidence from the defense that they discover during an investigation).

139. See *Jackson v. Virginia*, 444 U.S. 307, 316 (1979) (The U.S. Supreme Court ruled that a defendant can have a verdict overturned if he or she can show that due to insufficient evidence, no reasonable juror could have found guilt beyond a reasonable doubt).

140. Garrett, *supra* note 5, at 97.

141. *Id.* at 106.

scientific evidence and that few inmates could afford to bring actual innocence claims in court based on new evidence or evidence that could not be presented at trial because of the costs associated with investigations to uncover such evidence.¹⁴² Given the problems defendants have had using the adversarial process to overturn their wrongful convictions, it is not hard to conceive of prosecutors and appellate judges using legal thinking and language to justify the results of the adversarial process and the continued confinement of a defendant with a strong case of innocence.

V. CONCLUSION

Three aspects of the legal process were examined to explain the trouble lawyers and legal professionals are experiencing in exonerating wrongfully convicted people who have proved their innocence: (1) the way lawyers think; (2) the power relationships between legal personnel that result from the legal system; and (3) the adversarial process itself. Research of each area separately indicated a wrongful conviction could result if the process studied went awry. First, regarding legal thinking, in *Undervaluing Indeterminacy: Translating Social Science into Law*,¹⁴³ Mertz sums up her study of first year law classes by discussing how law students learn the adversarial model of justice, which pits one side against the other.¹⁴⁴ She comments that this way of thinking becomes problematic for law students because their attention is focused “on abstract argumentation rather than on the practical realities and ethical dilemmas they will confront as practicing lawyers.”¹⁴⁵ This is consistent with her conclusion from her study on legal thinking that “legal discourse could conceal the injustices and power inequalities that continue to be enacted through our legal system.”¹⁴⁶

Second, research by Findley and Garrett documents how imbalances in power give rise to abuses in relations between the prosecution and defense in wrongful conviction cases, confirming research by Conley and O’Barr and Susan Philips that legal language is infused with social power with the potential for abuse. Third, Findley and Garrett both construct arguments using wrongful conviction evidence that the adversarial trial system in this country is too dysfunctional to reliably produce the truth.

142. *Id.* at 112.

143. See generally Elizabeth Mertz, *Undervaluing Indeterminacy: Translating Social Science into Law*, 60 DEPAUL L. REV. 397 (2011).

144. *Id.* at 402.

145. *Id.* at 403.

146. MERTZ, *supra* note 35, at 213.

Combining all three factors to explain the wrongful conviction process, envision the police using “tunnel vision” to limit their focus of their investigation of a crime to a poor, minority defendant. Strapped for time, and having limited resources themselves, the police abuse their power in the investigation by gathering evidence against the main suspect by “beating” a confession out of a defendant, planting evidence, getting the crime lab to manufacture evidence against the defendant, and/or make a deal with a co-defendant or snitch who knows little about the crime to testify against the defendant. The investigation is handed to the prosecutor who works in an environment where further imbalances in power due to unequal resources between prosecution and defense attorneys have resulted in the prosecution and defense not cooperating with each other in the pre-trial discovery process in cases against poor, minority defendants. Not having access to discovery, the trial takes place without the underfunded defendant conducting any further investigation of facts to show innocence. At trial, the defendant is wrongfully convicted after his or her inadequately funded defense attorney did not call a witness on behalf of the defendant or challenge the scientific evidence brought at trial. The case is then appealed in an adversary system where judges deliver legal justifications that support the wrongful conviction even though common sense and practical notions of morality and justice dictate that the courts should release defendants whose arguments of appeal strongly indicate innocence. Exasperating the entire process, the legal system blocks the defendant from re-arguing his or her case based on new evidence because that evidence was discoverable at trial.

Garrett advocates making numerous reforms to our legal system in order to prevent and remedy such wrongful convictions.¹⁴⁷ To prevent the wrongful convictions from developing in the pre-trial investigative stage, he recommends that the legal system make a better effort at generating evidence by conducting and recording videotaping interrogations, eyewitness identifications, forensic analysis, and at any other crucial investigative step.¹⁴⁸ At the trial stage, he advocates that juries should be assisted in their understanding of expert witnesses and warned of the pitfalls of potentially faulty investigative evidence such as cross racial eyewitness identifications.¹⁴⁹ The appellate and post appeals systems should be reformed to allow more factual claims of innocence by providing more money to

147. See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465 (2010-2011), for a full discussion of reform of the criminal justice system to prevent wrongful convictions.

148. Garrett, *supra* note 5, at 125.

149. *Id.*

defense lawyers to investigate wrongful convictions cases.¹⁵⁰ Laws should make it easier to present the factual evidence, and alternative “innocence commissions” should be established to supplement to current system’s efforts at overturning wrongful convictions.¹⁵¹ Finally, Garrett recommends that we make it easier for defendants to receive DNA testing, finding that it is too difficult under the current system.¹⁵²

Mertz (2011), an anthropologist, casts serious doubts on whether the legal system by itself is capable of deciding all problems. On a paradigm level, she compares how the adversarial system reaches results with social science based research. Mertz begins by noting that the purpose of linguistic exchanges in the adversarial process are to come to a decision based on the versions of the two parties as to what had occurred, while the ideal of social science research is to produce the most accurate account or explanation of the social phenomena in question.¹⁵³ She further reports that the goal of the legal system is to resolve indeterminacy by coming to a decision provided the evidence it has at the time, while the social scientist does not have to resolve indeterminacy.¹⁵⁴ The social scientist only has to explain what they can and can leave what he or she cannot explain or indeterminacy to future research.¹⁵⁵ Evidence is approached differently with lawyers discrediting important facts that undermine their cases, while the social scientist is trained not to ignore important social facts they come across.¹⁵⁶

As documented above, too often, either prohibitive laws or the lack of resources on the part of defendants do not allow for all the facts necessary for a fair assessment of the defendant’s guilt to take place at trial or the appeals process. Without the proper evidence, but consistent with its purpose, too often the legal system is forced to resolve the indeterminacy regarding the defendant’s guilt by wrongfully convicting the defendant. Over time, new evidence surrounding the case not admitted at the trial surfaces, or evidence available at trial is reevaluated, leading the public to think the wrongfully convicted defendant is innocent. More likely to think like social scientists, the public is likely to view the wrongful conviction as indeterminate and the new evidence as a legitimate way of resolving the indeterminacy. However, when the public moves to free the defendant, they are confronted by judges and prosecutors who for the most part think that they have resolved all the

150. *Id.* at 126-27.

151. *Id.* at 127.

152. *Id.* at 129.

153. Mertz, *supra* note 134, at 403.

154. *Id.* at 403-04.

155. *Id.* at 404.

156. *Id.*

indeterminacies of the case at trial and mistrust the new evidence. Locked in to the ill-conceived decision, the judges and prosecutors appear arrogant and detached from reality as they construct legal arguments that appear distanced from common conceptions of social justice as they support the wrongful conviction. To remedy these type of problems associated with legal thinking and the adversarial process, Mertz (2011) recommends integrating social science into both the law school program and the legal profession in general.¹⁵⁷

157. See generally Mertz, *supra* note 73.

