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Book Review:
Understanding Failed Evidence

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Understanding Failed Evidence

BY KEITH A. FINDLEY

The jacket cover to David Harris's book, Failed Evidence: Why Law Enforcement Resists Science, quotes Dr. Richard Leo, one of the world's foremost authorities on false confessions, as saying that the book brilliantly synthesizes the social science research on wrongful convictions and its implications, astutely connecting the dots from the reasons why wrongful convictions occur to the solutions necessary to prevent them. If there is one book that I would recommend to policymakers, criminal defense attorneys and prosecutors, police or members of the general public about the subject of wrongful conviction, it is [this book].

That pretty well sums up Harris's contribution to the field in this book—and a not-insignificant contribution it is.

The book does a neat and comprehensive job of covering some of the most significant lessons from the wrongful convictions that have been exposed in the last 25 years. The book focuses in particular on three types of flawed evidence: eyewitness identification, confessions, and forensic science evidence. In its discussions of these types of evidence, it doesn't so much add new insights—most of this has been said before by a number of times—as it does bring it all together in one place. Nor do its prescriptions for reform break new ground, although again the book usefully pulls together a number of reform threads into one coherent outline for improving the reliability of the criminal justice system in ways related to these three types of evidence. As Leo puts it, Harris “astutely connects the dots.”

Where Harris makes his most significant contributions are in his exploration of two additional issues. First, Harris examines why the criminal justice system—and especially police and prosecutors—have largely not yet accepted and incorporated the lessons from scientific learning about these types of evidence. And, second, he extrapolates from those reasons to identify not only what needs to be done to improve the truth-seeking functions of the system, but also how we might possibly break free of stasis to get where we need to be. That these insights are such a central part of this book should come as no surprise, given that Harris subtitiles his book, Why Law Enforcement Resists Science.

Flawed Evidence

Harris focuses his analysis on these three types of evidence for good reason. These are types of evidence that are not only common in police investigations, but also are frequent contributors to false convictions. Harris notes that mistaken eyewitness identification testimony was present in approximately 75 percent of the DNA exonerations; false confessions or false, self-inculpatory statements were present in nearly one-quarter of such cases; and flawed forensic testimony was present in more than half of such cases. Moreover—and this is a central theme of Harris's book—these are types of evidence about which there is now considerable scientific research that suggests flaws in the current methods of producing and analyzing the evidence—and importantly, better methods. Harris does a truly impressive job of summarizing the flaws with these types of evidence and the lessons of the scientific research about them. For that accomplishment alone, the book is worth the read.

Oddly, however, Harris omits one type of evidence that is frequently included in the analyses of wrongful convictions: jailhouse snitch testimony. The omission is curious because this type of evidence satisfies Harris's inclusion criteria. Jailhouse snitch testimony in its classic form involves testimony offered by a cellmate of the accused, in which the cellmate claims to have heard the accused confess to the crime. Typically, the cellmate offers this testimony under circumstances in which he or she likely hopes to obtain some benefit in his or her own case in return for the testimony. Like the types of evidence Harris does address, snitch testimony appears frequently in wrongful conviction cases—Professor Brandon Garrett's detailed analysis of the first 230 DNA exonerations found jailhouse snitch testimony in 16 percent of all such cases. (BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).)

Moreover, while the risks of such incentivized testimony might appear obvious, snitch testimony is in fact little understood by law enforcement, judges, and juries, and has been subjected to scientific research that provides helpful insights. The research shows that, while people generally understand that such

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testimony is incentivized, they tend nonetheless to believe it because it sounds like confession testimony (which is inherently convincing), and it is often rich with details that make it even more convincing because the uninstructed find it hard to understand how the snatch could have made up such a rich narrative if it were not true. (See Jeffrey S. Neuschatz et al., The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making, 32 LAW & HUM. BEHAV. 137, 146 (2007).) And, as with the types of evidence Harris discusses, the research on snatch testimony offers guidance on better ways of handling such testimony to minimize its risks. (See Alexandra Natapoff, Switching: Criminal Informants and the Erosion of American Justice (2009).)

**Failures to Embrace Best Practices**

That omission aside, Harris then helpfully analyzes why it might be that police and prosecutors have resisted the lessons from the scientific research about these types of evidence. At the outset, it is worth understanding why Harris focuses on police and prosecutors in his treatment of this flawed evidence. That is an especially important question given that Harris himself goes to some lengths to reassure us that “[t]he purpose of this book is not to condemn police officers or policing, or to paint prosecutors as intransigent.” (FAILED EVIDENCE, supra, at 16.) Instead, Harris offers that he focuses on the failure of police and prosecutors to embrace the lessons of the science because “police and prosecutors have the dominant position and the most leverage in shaping the way criminal justice works in our country, whether focusing on individual cases or on systemic issues.” (Id. at 13.)

Note that there is an apparent irony here. One of Harris’s central themes is that police and prosecutors resist science-based change because they feel attacked. To the extent that is so, this book’s focus on the failings of police and prosecutors runs the risk of feeding that sense of persecution. But it should not; the significance of the book really has to do with its ultimate respect for police. The book goes to lengths to make clear this is not a personal challenge to police as good-faith actors. Moreover, the book implicitly pays homage to police, because it recognizes the extent to which lawyers and courts are dependent upon them. At the same time, the book implicitly recognizes the extent to which lawyers, courts, and the adversary process have proved unable to distinguish between good evidence and bad. Hence, the book makes the argument that sorting out the truth at trial or in the plea process comes too late; evidence must be improved upstream from the litigation process, and police are just the ones to do that. Police uniquely, and prosecutors secondarily, have the ability to make the system work better: in this regard.

Harris quickly and easily dispenses with the standard reasons offered by defenders of the status quo for resisting the science—costs, fear of letting the guilty escape punishment, limits on police autonomy, distrust of science, a sense that the scientific-based critique is just meant to besmirch the professionalism of police, concern that the new methods are just tools to help slick defense lawyers get their clients off, and simple denial that there is any problem of wrongful convictions. He then moves on to the much more interesting and insightful analysis of what he calls the real reasons police and prosecutors resist science. And here he focuses on cognitive barriers and political and institutional obstacles. While the discussion of both is enlightening, it is his discussion of cognitive barriers that is most telling.

Others—myself included—have examined the role that cognitive biases play in producing wrongful convictions by leading police, prosecutors, defense lawyers, judges, and courts to focus on the wrong suspect and fail to recognize evidence of innocence. (See Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. REV. 291.) Harris takes the lessons from the cognitive sciences a step further, using them to understand not just how they can produce errors in individual cases, but also how they can impede institutional change and reform.

Harris importantly draws on cognitive science to make clear that his indictment of police and prosecutors for failing to embrace science-based reforms is not an indictment of them as bad people, but rather little more than recognition that they are human beings, subject to the same kinds of cognitive distortions to which all human beings are subject. Harris identifies, in particular, that resisting science-based change is a natural consequence of cognitive barriers such as cognitive dissonance, group polarization, and resistance to status challenges. He also draws important insights from behavioral economics, including prospect theory, loss aversion, endowment effect, and status quo bias.

Cognitive dissonance, he argues, for example, works this way in this context: Police see themselves as honorable, moral persons—"the instruments of right, truth, and justice in the system." (FAILED EVIDENCE, supra, at 83.) The science related to these types of evidence, however, tells us that, using their traditional investigative tools, police have contributed to errors that have put innocent people in prison and permitted the guilty to remain free. These two cognitions create dissonance, which, Harris notes, is most easily resolved by "adjustments to the second cognition"—that is, by rationalizing that "this stuff might have happened before, but it's a tiny problem and steadily growing smaller," and by disregarding the science as simply wrong. (Id. at 85.)

Harris could have identified other cognitive biases.
that also contribute to the problem, such as confirmation bias and belief perseverance (Findley & Scott, supra, at 309); hindsight and outcome bias (Id. at 317); as well as anchoring effects, role effects, conformity effects, and others (see D. Michael Risinger et al., The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion, 90 Cal. L. Rev. 1, 12-21 (2002)). But the cognitive distortions he does discuss make the point well. More importantly, these insights about cognitive biases help us understand better how to approach reform efforts.

**Toward Reform**

The specific reforms Harris identifies are important, even if incomplete (deliberately so—Harris proposes only what he deems to be modest reforms that are practical and achievable in the near term, while recognizing that there are others). To this end, drawing on implications from the groundbreaking 2009 report of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward, he recommends, among other things, that evidence from some of the most questionable forensic techniques, such as microscopic hair analysis, bite mark comparisons, and shoe and tire impressions, should be inadmissible until reliability of such evidence can be established through empirical research. For all other forensic techniques, he urges more and better research, set protocols, and requirements for quality assurance, certification of analysts, and accreditation of laboratories. And he advocates efforts to eliminate human cognitive biases, as is required in any endeavor that claims to be science. (Failed Evidence, supra, at 14-15.)

Harris’s focus on modest, achievable, near-term solutions, while understandable and reasonable, comes with tradeoffs. For one, it renders his recommendations about how to overcome cognitive biases a bit unsatisfactory, especially given the prominent role that understanding cognitive distortions plays in his bigger thesis. While he advocates addressing cognitive biases, he says comparatively little about how to do it. His modest approach to reforms means he does not discuss at all one of the National Academy of Sciences’ key suggestions—that forensic laboratories must be made independent of law enforcement. And while he properly advocates for measures to blind forensic analysts from potentially biasing case information, he doesn’t say much about how that can happen, given that analysts often need some case information in order to do their work. Others have thoughtfully addressed this problem, proposing things like “sequential unmasking” of information—a process in which case information and testing results are disclosed to analysts in steps, only providing the information as needed as the analysts work the case. (See Dan E. Krane et al., Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation, 53 J. Forensic Sci. 1006 (2009).) Some discussion about matters like these would have made Harris’s analysis even richer.

In the interrogations arena, Harris recommends the widely acknowledged and essential requirement that police electronically record custodial interrogations from start to finish. With interrogations he goes even further, recommending more controversially that the law should prohibit some interrogation tactics known to produce false confessions, such as threats and promises of leniency and some but not all forms of deceit, focusing first on banning the practice of lying to suspects about the presence of forensic test results. (Failed Evidence, supra, at 143.) Significantly, he recommends presumptive limitations on the length of interrogations, given that most confessions are obtained within an hour or so, but false confessions often arise in interrogations that take four hours or even much longer. (Id. at 141.) And he calls for an absolute requirement to provide counsel prior to the interrogation of vulnerable individuals—all juveniles and any individuals suffering from mental or cognitive disabilities. (Id. at 143.)

Harris’s recommendations for improving eyewitness identification are well known by now. He includes a partial list of the common reform suggestions, including requirements for blind administration of identification procedures; proper witness instructions (advising witnesses that the perpetrator might not be present); proper selection of fillers based on the witness’s description of the perpetrator; and recording confidence statements before the witness receives any confirming or disconfirming feedback on the identification. (Id. at 15, 140.) He makes one additional recommendation optional: sequential, rather than simultaneous, presentation of suspect and fillers to the witness. He makes this recommendation optional because he recognizes that much of the research suggests that sequential procedures not only dramatically reduce the rate of false picks of innocent suspects, but also more marginally reduce the number of accurate picks of true perpetrators. Thus, he says, this trade-off presents a policy choice that policy makers will have to resolve.

This caution on this issue may be politically understandable, but in the framework of this book it is unsatisfactory. First, as Harris notes, there are explanations for why sequential procedures might marginally reduce accurate picks in the laboratory—the effect may reflect nothing more than elimination of lucky correct guesses by witnesses, representing picks that are not real evidence at all. Moreover, Harris’s analysis fails to address the most recent, in-depth field research that indicates that, in practice in real cases, sequential procedures actually reduce errors.
without loss of any accurate picks. (See Gary L. Wells, Nancy K. Steblay & Jennifer E. Dysart, A Test of the Simultaneous Vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies (Am. Judicature Soc'y 2011), available at http://tinyurl.com/ntxuy42.) Moreover, Harris's caution in this recommendation is hard to square with his more aggressive stance on forbidding other types of police practices and evidence, such as some unreliable forensic techniques and confessions obtained through risky interrogation tactics. Those types of practices will undoubtedly sometimes produce true evidence too, even if only by chance, so banning them involves the same type of policy trade-off that Harris sees with sequential identification procedures. Yet Harris does not hesitate to propose banning those practices.

How to Get There

Harris's prescriptions for achieving reform are especially helpful, as they draw directly on his analysis of the barriers to reform. While he recommends a list of steps that might be taken, most significantly in this regard he recommends two key guiding principles: First, he says, focus on the future, not the past. He notes that, if indeed the failures of the past cause significant cognitive dissonance, "we must focus, in our public debates, on fixing the system prospectively." (Failed Evidence, supra, at 156.) Key to this idea is the understanding that, while the typical impulse when confronted with a wrongful conviction is to assign blame, doing so can act as an impediment to systemic reform. It acts as an impediment both because it tends to focus on individual failings and error rather than systemic error, and because, as Harris argues, affixing blame creates dissonance with law enforcement's self-perception as the "good guys." Asking how the system can be improved frees law enforcement to "participate while maintaining their unshakeable 'good guys' perception of themselves." (Id. at 157.)

While there is a lot of wisdom in this prescription, it requires a caveat. Moving forward should indeed be the focus, but recognizing and confronting past wrongful convictions can still be important. Nothing motivates reform like a proven wrongful conviction. The stories of such injustices, rich with images of an innocent person wronged and the harm suffered, can be important, sometimes even necessary, catalysts for reform. But Harris's focus is nonetheless correct: while building off of wrongful convictions, the focus must be forward-looking in the sense that reformers need to focus on how to implement best practices, and not on affixing blame. Only in that way can law enforcement and prosecutors be expected to participate willingly and constructively.

Equally importantly, Harris advises that innocence reformers partner with law enforcement and policy makers from the political right. Those players have the credibility to change the system, and can avoid the perception of a threat from outsiders. Harris cites numerous examples where law enforcement and conservative policy makers have taken the lead on these reforms; indeed, most (although not all) successful innocence-based reform efforts have followed this pattern. Harris notes that police, prosecutors, and the political right can become partners in reform because they are "concerned about the integrity of the criminal justice system from the viewpoint of preserving the power to convict, rather than the damage to the wrongfully convicted." (Id. at 160.) Harris is right as far as he goes with this, but he is perhaps not as optimistic as he should be. Police, prosecutors, and the political right can be and are, in fact, for the most part deeply committed to ensuring that innocent people are not wrongly convicted. To the true conservative, nothing is more offensive than the prospects of the government unjustly depriving an innocent person of his or her liberty.

Thus, the problem here is not a lack of shared values. The core values at stake are virtually universal. The problem here, which Harris has so eloquently described, is how to help all involved in the process of investigating and prosecuting crimes understand how the best practices revealed by scientific research can help them convict the guilty while protecting the innocent. Harris's book goes a long way toward helping us break through the barriers—cognitive, institutional, and political—that make that difficult. If his prescriptions for reform were to be adopted, we would make a good start on improving the fact-finding reliability of the criminal justice system.