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, Jim0.893.86 22bystrsd

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, misgu] s | b]me p s]A] s

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,

"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

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 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.
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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

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

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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. L

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 "sou "

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.

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] Lenza, 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 Lenza, David Keys, & Teresa Guess, *The Prevailing Injustices in the Appl*

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

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