David A. Harris: Failed Evidence: Why Law Enforcement Resists Science

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As *Failed Evidence* went to press, more than 250 convicted criminals had been exonerated by post-conviction DNA testing since 1989 in the United States (there are now more than 300). As David A. Harris notes, these exonerations showed that wrongful convictions were more common than most in the U.S. criminal justice system had imagined, and they convinced many within the system and in the general public that the American criminal justice system had a wrongful conviction problem. This realization led to inquiries into the contributors to this problem, and these inquiries pointed to a number of factors, including eyewitness identification, confession evidence, forensic evidence, informant evidence, poor defense lawyering, and police and prosecutorial misconduct. This list included some of the most trusted forms of evidence used in the American criminal justice system.

These findings have led to calls for the reform of the criminal justice system and its component parts: changing lineup procedures, recording interrogations, improving forensic science, better funding indigent defense counsel, tightening prosecutorial ethics, better controlling and documenting the use of informants, creating innocence commissions, enhancing the writ of *habeas corpus* and post-conviction access to the courts, and so on. Some progress has undoubtedly been made, but most scholars concerned about innocence would probably agree that the progress has been insufficient. As Harris notes, the criminal justice system has been distressingly resistant to proposed changes that seem to flow logically from an analysis of the post-conviction exoneration cases.

None of this is news: it was discussed more than ten years ago in Barry Scheck, Peter Neufeld, and Jim Dwyer's *Actual Innocence* (2000) More recently, Brandon L. Garrett's *Convicting the Innocent* (2011) offered an updated, more thorough, and more scholarly account of the Innocence Project cases. Several other books have discussed this material as well. Given this scholarly landscape, the contribution of *Failed Evidence* is twofold. First, it offers a book-length treatment focused more narrowly on just three contributors to wrongful conviction: eyewitness identification, false confessions, and forensic evidence. *Failed Evidence* does not present original research in these areas, but rather a readable summary of existing scholarly research.

The more significant contribution comes in the core chapters 3 through 5, where Harris seeks to explain *why* "law enforcement" has been so resistant to the reforms that innocence scholars have claimed are so obviously necessary. This is a topic that has received less attention in the innocence literature. Harris's emphasis is on "law enforcement"—police and prosecutors—rather than other actors in the criminal justice system, such as judges, jurors, defense lawyers, forensic scientists, or legislators, because, Harris argues, police and prosecutors are the key actors with the most power to truly effect change.

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Harris begins by dispensing with the explanations that police and prosecutors themselves offer for resisting the proposed changes. These include cost arguments, concerns about failing to convict the guilty, insistence on professional autonomy, claims that police and prosecutors have special access to the "reality" of law enforcement that others lack, claims that the wrongful conviction issue is being exploited by the defense bar, denials that some or all of the claimed wrongly convicted were in fact innocent, and denial of the magnitude of the problem. Harris concludes that "none of the claims police and prosecutors make hold up under close examination. Something else is at work here" (p. 77).

Harris emphasizes two explanations. The first is "cognitive dissonance." Drawing on the work of the social psychologist Leon Festinger, behavioral economics, and the work on decision-making by Daniel Kahneman and Amos Tversky, Harris argues that police and prosecutors have difficulty reconciling their self-images as forces for good in the justice system with the emerging evidence of wrongful convictions that suggests that in some cases police and prosecutors have done great harm. They resolve the dissonance by convincing themselves that the wrongful conviction problem has been overstated, and, therefore, reforms are not necessary.

Harris labels his second explanation "institutional and political barriers." Here he notes the structural conditions that prevent police and prosecutors' occupational incentives from aligning perfectly with the criminal justice system's ostensible goal of "doing justice." Police are evaluated for their proficiency at closing cases, not at closing them accurately. Prosecutors are evaluated for their proficiency at winning cases, not at achieving just outcomes. Public fascination with crime ensures that the media is rewarded for the sensationalism of its crime coverage, rather than its accuracy. And, legislators are rewarded for tough-on-crime talk and actions, rather than for measures designed to ensure justice.

These explanations are well-taken and well explicated, but they are surely not complete explanations for the resistance to criminal justice reform. The role played by courts, which has been emphasized by legal scholars, and defense attorneys is relegated to around four pages. The forensic scientists who supply forensic evidence to police and prosecutors are scarcely mentioned. Nonetheless, Harris has undoubtedly identified some important obstacles to reform. This allows him in the last two chapters to explore the issue of *how* to effect reform, a topic that has only recently begun to attract attention from innocence scholars like Marvin Zalman and Nancy Marion.

The potential of *Failed Evidence* to contribute to the debate on criminal justice reform, however, is marred by the overarching framework in which its arguments are situated. This framework is aptly summed up by the book's subtitle: "Why Law Enforcement Resists Science." The book is structured around a neat framework in which each of the three topics consists of a practice (eyewitness identification, interrogation, forensic science), which is opposed by "science" which mandates that certain reforms be undertaken. Police and prosecutors who oppose or resist these reforms are then cast as "resisting science." This framework allows Harris to make sweeping general charges that police and prosecutors fail to "comply with the latest scientific findings" (p. 2), " ignore[] . . . science" (p. 8; see also p. 193), "do not recognize the power of the scientific method" (p. 9), "use methods that researchers have found to have no scientific basis" (p. 13), fail to heed "solid research that tells us that what we are doing that [*sic*] makes us less

accurate than we can be, and also how to be more accurate," and "reject[] science" (p. 193).

The rhetorical value of this framework is obvious. By framing law enforcement resistance to reform as "resistance to science," Harris can draw upon the considerable cultural legitimacy that "science" enjoys in contemporary society. Police and prosecutors are not resisting the proposals, however well reasoned and supported, of a bunch of defense and civil rights lawyers, activists, journalists, liberal do-gooders, and academics. They are resisting "science."

The definitions and uses of the term "science," however, are contested. It is neither accurate, nor politic, nor intellectually interesting for the analyst to simply decide that one side of controversy owns "science" and the other "resists" it.

First, how accurate is this framework in describing the current situation? Many in law enforcement might in all sincerity profess to be puzzled at being cast as resisters of science when they are enthusiastic, and even indiscriminate, *users* of science. Police and prosecutors who have hastened to utilize any forensic technique that appears useful—whether it has been validated or not—may be puzzled to find themselves charged with "resisting science." As Harris notes, the Reid-Inbau interrogation technique itself purported to be a "scientific process" (p. 40), which may have given law enforcement the impression that it uses science, rather than resists it. What Harris means in both cases is something a bit more complicated than "Law enforcement resists science." He means that law enforcement has chosen not to heed the warnings of scientists—mostly, but not exclusively, social scientists—that claims made on behalf of these supposedly scientific techniques have been inadequately supported by empirical evidence or claim degrees of accuracy or discrimination that they cannot support. "Law enforcement resists science" seems an inapt phrase for summing up this complicated situation. "Law enforcement resists change" would seem more apt.

This sense of inaptness is heightened by the repeated references to "better, empirically proven techniques" (p. 3; see also pp. 7, 10, 13, 77, 78, 79, 111, 116, 127, 130), "new, scientifically proven methods of investigation" (p. 8; see also pp. 15, 16, 56, 96), and "the best, most rigorous scientific findings" (p. 2; see also pp. 57, 195). Social scientists have recommended improvements and reforms to eyewitness identification procedures, interrogation practices, and forensic science. Generally these reforms would entail data collection, performance measurement, standardization, transparency, and the embrace of basic research. While I am certainly in favor of all these reforms, it does not seem entirely accurate to describe them as "better, empirically proven techniques" or "new, scientifically proven methods of investigation." When Harris refers to "better investigative practices created by science" (p. 127) and to "detailed blueprints for how to do better in the future" (p. 193), some readers might conjure images of new lineup procedures, interrogation techniques, and forensic technologies being cleverly devised by white-coated scientists in psychology laboratories. But, in general, social scientists have not devised new techniques, but rather exposed and identified flaws in existing ones and, in some cases, proposed bias- minimizing changes in procedure.

Moreover, it seems misleading to describe all of these improvements as "created by science." The primary proposed reform for interrogation, complete recording, seems rooted as much in arguments about transparency, open government, efficiency, ethics, and common sense as in claims that could be called "scientific" in any meaningful sense.

In forensic science, the closest thing to a "new" technique "created by science" would probably be the idea of "sequential unmasking," proposed and developed by a number of scholars and supported by experiments by Itiel Dror and others. Since sequential unmasking is a bias-minimizing procedure inserted into an existing protocol for a forensic technique, describing forensic analyses conducted under masking protocols as "new, scientifically proven methods of investigation" seems questionable at best.

The strongest justification for the claim of "new" techniques "created by science" probably lies in the area of eyewitness identification, where social scientists have amassed strong social science evidence that double blind and sequential lineup procedures reduce erroneous identifications. The double blind lineup procedure, however, was advocated and, in some cases adopted, on theoretical and commonsensical grounds prior to social scientific proof that it reduced false positives. The sequential lineup does seem "new" and required social scientific evidence in its favor. But, as Harris himself notes, the devil's advocacy of Steven Clark has shown that the superiority of these procedures is not inherently dictated by "science," but also depends on the system's preferences regarding the undesirability of false positive and false negative outcomes.

The reason all of this matters is that the anointing of certain processes as possessing so much cultural legitimacy that they should be deemed irresistible contributed to wrongful convictions in the first place. As Harris notes, forensic evidence was historically characterized in the criminal justice system as "unassailable" (p. 143). And, according to Harris, the Reid-Inbau technique, when first developed, purported to be a "scientific process" (p. 40). While eyewitness identification was not cast as "science," similar claims to unassailability were commonly advanced on its behalf. As *Failed Evidence* shows, all these techniques contributed to wrongful convictions in part because they invoked a mantle of unassailability that allowed them to overcome any contravening evidence. With its "resistance to science" framework, *Failed Evidence* invokes that same mantle on behalf of social science critiques of those techniques: "At this point in the debate over what to do about police investigative techniques and forensic methods, the main question is no longer what the science indicates because the science itself is largely unassailable" (p. 155). When Harris uses phrases like "science tells us how" (p. 78; see also p. 128) to properly investigate crimes, he is indulging on behalf of social science the same claims of unassailability that were invoked on behalf of fingerprints, polygraphs, DNA, confessions, and, to a lesser extent, eyewitness identification.

Strategically, casting police and prosecutors as anti-science seems a curious choice, given that Harris asserts that police and prosecutors are "the only advocates" (p. 158) with the power to convince the law enforcement establishment to implement the reforms he advocates. Subtitling a book "Why law enforcement resists science" seems a poor way to begin this persuasive undertaking.

Finally, the "resists science" framework detracts from the book's potential interest to a scholarly audience. *Failed Evidence* erases all the nuances of the struggle for the mantle of science by treating "science" as a self-evident entity whose presence or absence can be unproblematically determined by the author, rather than as a rhetorical resource that the various actors engaged in the struggle over criminal justice system reform seek to capture and control. Law enforcement seeks to frame science as purely instrumental—techniques to solve crimes and apprehend criminals. Social scientists, and others, assert

their own legitimacy to evaluate the accuracy of these techniques and to recommend theoretically and empirically grounded improvements. Their adversaries, as Harris notes, "do not accept social science as real science" (p. 20). And, social science does not speak with one voice. But, rather than analyzing and telling the story of social scientists' struggles to establish their legitimacy, Harris merely asserts that that there is a correct answer to the question: "social science is unambiguously real science" (p. 21). By claiming that what "science tells us" is self-evident, rather than contested terrain, *Failed Evidence* misses the larger story of the use of "science" as a contested resource in the ongoing struggle over criminal justice system reform.