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### **F26 Culture of Infallibility: The Inability of the Criminal Justice System to Concede Scientific Uncertainty**

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The goal of this presentation is to discuss new research which demonstrates how the investigative process by which cases come to court is frequently comprised of a mix of good and bad evidence that the judicial system cannot always adequately evaluate.

This presentation will impact the forensic science community by explaining how it is necessary to understand the adversary process by which the judicial system resolves claims and the effects this process has on the quality of evidence both as presented and as understood. The cooperation of all stakeholders — law enforcement, attorneys, forensic scientists, and judges — to understand the need to reform the practices of each must underlie true reform.

Social and behavioral scientific research demonstrates that bias infects the criminal justice system; forensic science, police departments, prosecutors, the criminal defense bar, and even the judiciary. It is directly related to unsafe judicial results and wrongful convictions. The revealing of motivational, relational, and confirmation bias that can affect forensic testing has incited obloquy from the forensic science community against anyone speaking of it, but that is far from the whole story. The conformational bias (tunnel vision) that can lead police investigators to pursue only the evidence most consistent with their pre-existing theory while rejecting confounding facts similarly leads to prosecutors failing to consider other possibilities (assuming a complete set of facts is even available). Similarly, prosecutors considered that their need for absolute guilt made any uncertainty in evidence, even what might be subject to ready explanation, intolerable as somehow indicative of reasonable doubt. Defense attorneys, accustomed to slam-dunk cases being brought against their clients, have learned not to seriously question forensic evidence, the reliability of which judges say can be “taken for granted” because they have been used for decades. The process by which evidence is evaluated to determine criminal liability is demonstrably unstable when the discernment of truth and falsehood are often most critical. Despite knowing about solvable problems, change is resisted.

Years ago, as prosecutors began to have confidence in the seeming certainty of forensic science, evidence technicians were trained to use phrases like “absolute certainty,” “100% accurate,” and “to the exclusion of every (fill in item) in the world.” Eyewitnesses were considered the “gold standard” of criminal trial evidence, particularly when they were victims. Driving while intoxicated/impaired cases, tried on the basis of “under the influence,” became inconvenient because of a flexible relationship between alcohol levels and impairment, necessitating the adoption of a “science-based” per se offense based on a number—the blood alcohol concentration. A mythological impression of infallibility accompanied the forensic expert to court, where prosecutors neglected to understand the evidence they presented, defense attorneys missed opportunities to question what might be questionable, and judges were happy with quick-moving cases that conformed to what were often their own preconceptions of the evidence. The adversary system masked what needed to be an open-ended search for the best evidence for the case.

Then came DNA. With its arrival, two important things were discovered: (1) what it looked like when laboratory-validated molecular science was practiced to rigorous standards and applied with equal statistical rigor to predict probable outcomes; and, (2) that in the face of irrefutably unique chemical bonding, when this new scientific evidence was used in old cases, it exposed the wrongful convictions of innocent persons. Since forensic evidence is a creation of the law, used by the law, and has little application outside the law, the fact that it had been used in so many cases proven to result in wrong outcomes began to draw scrutiny and the result of the scrutiny was not always favorable. There being no “tolerable” number of wrongful convictions, the traditions embodied in the law and its use of evidence in criminal cases, required reassessment. Inertial resistance to change, a “chicken little” attitude within forensic science, and a lack of widely-accepted standards for forensic science work and the way its results were expressed in court were all exposed as impediments to progress.

Recent books point to the influence of a great number of failings in the criminal justice system, many of which are so inherent to various police, forensic, and legal practices that they have escaped evaluation. Exposure breeds resistance by these actors. The need for the infallibility of the court system and proof beyond a reasonable doubt have created a culture that supports uncritical myths of infallibility. Resistance to change does not reward team playing, consistency of opinion, and critical thinking.



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This presentation will discuss the directions in which legal scholarship is attempting to identify and correct many of these quite unintentional sources of error in judicial determinations. A message is that the overarching quest for justice is best served by cooperation and greater examination of best practices to avoid exonerating the guilty and convicting the innocent.

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## **Change, Resistance, Judicial System**