

12-27-2000

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Repository Citation

Wilkes, Donald E. Jr., "Convicting and Unconvicting the Innocent" (2000). *Popular Media*. Paper 155.
http://digitalcommons.law.uga.edu/fac_pm/155

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CONVICTING AND UNCONVICTING **THE INNOCENT**

Published in slightly abridged form in Flagpole Magazine, p. 9 (December 27, 2000).

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Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted

Barry Scheck, Peter Neufeld, and Jim Dwyer

Doubleday, 2000

298 pp., \$24.95, clothbound

"When justice disappears," Immanuel Kant wrote, "it is no longer worth while for men to live on earth."

Justice disappears where there is injustice, and the most glaring form of injustice is the erroneous conviction of the innocent. Indeed, the greatest injustice that a legal system can perpetrate against the individual is to punish him or her for a crime they didn't commit, while the *ne plus ultra* of injustices is the wrongful conviction and subsequent execution of an innocent person. Viewed in this light, what is the current state of justice in America? Is the problem of convicting, even executing, innocent persons anything more than a theoretical problem?

The sobering message of Actual Innocence is that convictions of the innocent are not infrequent in the United States today and that these wrongful convictions are not due to accidents but instead are the result of systemic deficiencies endemic within the criminal justice system.

Actual Innocence also details the extraordinary obstacles the convicted innocent often face in getting judicial relief, even where as a result of DNA testing there is irrefutable scientific proof of their innocence.

The three authors of Actual Innocence probably know more than anyone else about the problems associated with convicting and unconvicting the innocent in today's America. The authors of Actual Innocence are attorneys associated with (two of them are founders of) the Innocence Project, a clinical program at a New York City law school that offers free legal assistance to prison inmates who assert their innocence and who challenge their convictions based on DNA testing of evidence. Since it was

founded in 1992, the Innocence Project has represented, or assisted in the representation of, 36 innocent convicted persons whose convictions were ultimately overturned and who were released from prison, some even from death row.

One difficulty faced by those seeking information about exonerations of erroneously convicted persons is the absence of official statistical information. Incredibly, the government, which collects and disseminates crime statistics "by the gigabyte and the shelf-full," as Actual Innocence notes, fails to include any information about convictions of the innocent, or about exonerations of the wrongfully convicted, in its official crime statistics. Insofar as government crime statistics are concerned, it would appear that no innocent person was ever convicted in the United States of America. "The innocent neither count nor are they counted.... Not one number is assigned to represent the distinct matter of the innocent person. No one has the job of figuring out what went wrong, or who did wrong. No account is taken of the innocent person, wrongly convicted, ultimately exonerated.... America keeps virtually no records when a conviction is vacated based on new evidence of innocence. The only place to study innocence is through accounts carried in newspapers and by broadcast news, a most haphazard net."

Almost all statistical information on convicting the innocent in America is, therefore, compiled unofficially by private or academic researchers. Such information may be found in a few authoritative books, such as Convicted But Innocent (1996), by Ronald Huff, Arye Rattner and Edward Sagarin, or In Spite of Innocence (1992), by Michael Radelet, Hugo Bedau, and Constance Putnam; and in several articles published in scholarly journals.

Actual Innocence contains a wealth of statistics on wrongful convictions derived from (1) 64 cases from 1992 to 1999 where DNA testing led to the exoneration of a convicted innocent person, and (2) a total of 80 cases between 1977 and 1999 where a death row inmate was exonerated. A number of these cases involved persons imprisoned for as long as 15 years. Some of the exonerated persons under sentence of death had spent as much as a decade or more on death row, and a few came within days of being executed.

Insofar as innocents and the death penalty are concerned, the statistics in Actual Innocence are not comforting but chilling. They certainly do not assure us that death sentences are being imposed with acceptable accuracy and reliability. Between 1973 and 1993 an average of 2.5 innocent people were freed each year from death row; for the period 1994 to 1999 the yearly average was 4.6. Between 1977 and 1999 6,000 people were sentenced to death in this country, of whom 80, or 1 in 75, have subsequently been released on account of innocence. Would we think airline safety

was acceptable if 1 of every 75 airline flights crashed, or if 1 of every 75 airline passengers was killed in crashes?

Furthermore, since between 1977 and 1999, when there were 80 exonerations of death row inmates, there were also 553 executions, it follows that for every 7 executions, 1 death-sentenced inmate was cleared and released. In Illinois during this 12-year period, there were 12 executions and 13 exonerations of death row inmates; thus, the number of innocent persons released from death row exceeded the number of persons put to death.

There is no reason to believe that every recent case of an innocent person sentenced to death, whether or not that person has been or will be executed, has come to light or will eventually come to light. And it cannot be denied that some innocent persons in recent years have come within an eyelash of being executed. (One Innocence Project client, later cleared, came within five days of being put to death. At one point he was moved to a holding cell near the death chamber and his sister was sent a form letter asking what the funeral home should do with his body.) Therefore, although thus far there are no proven cases, it seems quite likely that some of the prisoners put to death since 1977 have been innocent and that, if executions continue, some of those executed in the future will be innocent.

Actual Innocence will, therefore, renew the vigor of the opponents of capital punishment who argue that under the present system there is an unacceptably high risk that innocent persons may be put to death. "Speaking as a person who is supposed to be dead," said one of the exonerated ex-death row inmates in Actual Innocence, "I believe the death penalty should be abolished, period. Because you can't be sure."

Convictions of the innocent in this country, Actual Innocence tells us, usually are not fortuitous. Wrongful convictions are a recurring problem because of defects in our criminal justice system, defects which the criminal justice establishment--especially the law enforcement establishment--steadfastly refuses to correct. In 64 recent cases of DNA exoneration examined by the Innocence Project, mistaken eyewitness identification by the victim or a witness was a contributing factor to the erroneous conviction in 84% of the cases. Other contributing factors included police misconduct (50%), prosecutorial misconduct (42%), inept defense counsel (27%), false or fabricated confessions (24%), and misconduct by jailhouse snitches (21%). A third of the 64 cases involved tainted or fraudulent scientific evidence purporting to show the defendant was guilty. Some of this false evidence came from police crime labs. Racism is also an important consideration. Of the 64 exonerated defendants, 57% were black and 11% were Latino, whereas 29% were white.

As Actual Innocence explains: "Witnesses swear they can identify the man who held the gun or knife. Police officers then coax or force confessions from suspects they believe guilty. Prosecutors bury exculpatory evidence and defense lawyers sleep on the job. Forensic scientists shade their conclusions or skip the tests altogether, to accommodate a presumption of guilt. Racism and bigotry, written out of the books, still shadow some police precincts, courtrooms, and jury boxes."

Compounding these problems is the crime control mentality and desensitized consciences of too many prosecutors and police officers, all of which makes it predictable that innocent persons will be arrested, tried, and convicted and that efforts to unconvict the innocent will often be unwelcomed. When confronted with evidence that a convicted person they arrested was innocent, police rarely wax apologetic. They will say such things as "I think he's guilty [anyway]," or "I have no remorse for anyone I have ever arrested." Their favorite refrain is that there is nothing they would do differently if the case had to be investigated again.

"In nearly half the sixty-four exonerations," Actual Innocence discloses, "local prosecutors refused to release crime evidence for DNA tests until litigation was threatened or filed." While litigating the cases of their innocent but convicted clients, the lawyers for the Innocence Project have heard prosecutors say, "We did nothing improper," or "We're gonna needle your client (!)," or even "It's a damn shame they didn't kill him before this DNA testing (!)." When Innocence Project attorneys prove by DNA tests that the semen in the victim of a rape-murder came from someone other than the defendant, they have repeatedly come across prosecutors who contrive ingenious theories to protect the conviction. "Perhaps, they [the prosecutors] say, two men participated in the rape, or three, even though the victim only noticed one man." So often have Project lawyers heard that bizarre excuse for rejecting exculpatory evidence that they have denominated it the "unindicted co-ejaculator" theory.

Over and over, once an erroneous conviction has been exposed, local police and prosecutors close ranks and announce to the world that they are not at fault and that the system which resulted in the wrongful conviction is copacetic. Each time this spectacle happened, Actual Innocence observes, "[i]t was as if a building had fallen down and the architect, the engineer, and the contractor held a press conference to proclaim the soundness of their techniques."

Although most police officers and prosecutors, even hardnosed ones, are honest and law-abiding, there are also some police and prosecutors who tend to believe "that whatever they do is okay because the victims of their perfidy are all guilty anyhow of something." The philosophy of these law enforcement officials is: "It's legitimate to bend the rules and the truth when you have a 'greater good' as your goal." So,

convinced the suspect is guilty, some police coerce or trick the innocent suspect into falsely confessing, or they fabricate a verbal confession that was never uttered, or they conduct suggestive lineups or showups designed to ensure that a particular suspect is pointed out as the perpetrator. Similarly, some prosecutors--also convinced of the suspect's guilt--manufacture incriminating evidence, or suppress exculpatory evidence, or use clever cross-examination skills to destroy the credibility of truthful alibi witnesses for the defendant.

Not surprisingly, therefore, in almost all recent cases where an innocent person was exonerated, the exoneration resulted from the investigative efforts of people outside the criminal justice, including academics and students. The achievements of the Innocence Project furnish an obvious example. It is well known that journalism students at Northwestern University, as part of a college course project, helped prove the innocence of a man who escaped execution in Illinois by two days. "[I]t's sad and scary," one of those students later wrote, "that it's come down to dedicated law clinics and journalism students to do some of these investigations. It shows there's a breakdown in the system at some level."

Attorney General Janet Reno has acknowledged that, because "[t]he criminal justice system is not infallible," innocent persons are sometimes convicted. Reno is correct. Police are not infallible. Prosecutors are not infallible. Victims and witnesses are not infallible. Judges and juries are not infallible. "Sometimes," Actual Innocence reminds us, "eyewitnesses make mistakes. Snitches tell lies. Confessions are coerced or fabricated. Racism trumps the truth. Lab tests are rigged. Defense lawyers sleep. Prosecutors lie."

Actual Innocence concludes with a list of proposed criminal justice reforms designed to protect the innocent from wrongful conviction. The proposals include such commonsense suggestions as (1) improving police lineup procedures to eliminate suggestiveness and misidentifications, (2) curbing abusive interrogation of suspects in police custody, (3) restricting the increasing tendency of American prosecutors to rely upon the testimony of jailhouse snitches who invariably claim the defendant made breathless incriminating revelations to them, (4) making government crime laboratories independent by separating them organizationally and budgetarily from police departments ("too many crime labs have long served as arms of local police and prosecutorial agencies rather than as independent forces"), and (5) improving the funding and quality of criminal defense representation. They also propose an adequate system for compensating the wrongfully convicted; the Innocence Project's figures show that only 37% of those exonerated of crimes they never committed receive monetary compensation. It is incomprehensible that these suggested reforms, which would have such beneficial effects on the problem of the convicting the innocent, were not enacted a long time ago.

English writer Cyril Connolly once wrote, "The test of a country's justice is not the blunders which are sometimes made but the zeal with which they are put right." By this test America is doing poorly. Tragically, painfully, our criminal justice system breeds injustice.

Practices are in place which regularly facilitate convicting the innocent; at least four score innocent persons have recently been sentenced to death, and some of them have only narrowly escaped execution; information on convicting the innocent and on exonerations of the convicted innocent is excluded from government crime statistics; efforts to assist the convicted innocent may be opposed by police or prosecutors; courts are hesitant to redress the injustice done to the convicted innocent and make it difficult to overturn wrongful convictions; and exonerated defendants usually receive no compensation for their ordeal. This is what journalist David Moberg calls "the human price of tough-on-crime politics."