Chapter 2

The Myth of the Rule of Law in Capital Cases

> The thing is, you don't have many suspects who are innocent of a crime. If a person is innocent of a crime, then he is not a suspect.
>
> Edwin Meese, Attorney General of the United States, 1986

> Perhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent.
>
> William J. Brennan, Jr. U.S. Supreme Court Justice

DNA technology was first used in a criminal trial in 1986, and first played a role in an exoneration in 1989. But in the last two decades there has been a virtual revolution in DNA technology. In the beginning stages of this technological revolution, a relatively large sample of blood or other genetic material was needed to produce a "DNA signature." Today such signatures hardly need any genetic material at all, and have been taken from the smudges left on automobile head rests. The dramatic impact of this DNA revolution can be witnessed nightly on television programs which portray crime and its investigation. Contemporary court personnel have noted what they call "the C.S.I. effect," named after the popular television program Crime Scene Investigation, which refers to the changed and new expectations of jury members to demand for a conviction the kinds of evidence they have seen dramatized on television programming.

Today, as of the summer of 2007, there have been 175 convicted criminals who have been completely exonerated as a result of DNA evidence. These include capital and non-capital crimes. Only 14 of these 175 have been death penalty cases. Since there have been about 6,000 individuals sentenced to a death penalty over the last three decades, only could plausibly argue that 14 exonerations out of about 6,000 is pretty good, an acceptable error rate. Some cite this as evidence that the legal system (of appeals) is working. Others find this larger number of 175 very disturbing, however, because it represents 175 instances where the criminal justice system clearly got it wrong. They demand to know how this happened.

Despite the best intentions and the best known institutional practices, there have always been mistakes and errors in the legal system. In 1964 Hugo Adam Bedau published an early paper documenting 74 erroneous convictions in capital cases, in the U.S. between 1893 and 1962, representing the first such attempt by a scholar to bring all of these cases together for analysis. Later, in a 1992 book Bedau and colleague Michael Radelet provided an update of erroneous capital case convictions, and documented 416 cases where an individual had been falsely convicted of a capital crime between 1900 and 1990, out of a total of about 7,000 total capital convictions.(1) Surely one of the main points documented in this early research concerned the importance of <u>false eyewitness testimony</u> in producing erroneous convictions. A subsidiary point made by the researchers concerned the conditions under which false eyewitness testimony was most likely; cases which involved little or no physical evidence, cases which involved little or no corroborating evidence (either physical or other eyewitnesses), high profile mass media cases where local officials were under pressure to "do something" about a

notorious crime, and cases where the victim was white and the alleged perpetrator a minority. There are two important points to be made about this early line of research. First, in so far as there were documented errors, the sources of error seemed to be outside the criminal justice system itself. If eyewitnesses make a false identification of a perpetrator in a line up, how can one blame officials or the legal institutions? If there is no physical evidence to support or corroborate what eyewitnesses report, how can one plausibly blame police or officials for this? Second, in many cases of the "erroneous convictions," the results overturned on appeal remained contested despite the change of decision. For example, if a criminal conviction was overturned because it was shown that a jailhouse snitch had fabricated testimony against an accused in order to obtain "favorable considerations" (such a dropped charges or lowered sentence or better plea bargain), this in and of itself does not mean that the perpetrator did not do the crime. Even in an instance of a false eyewitness identification, showing the identification to be false is not necessarily the same thing as proving the accused innocent.

The 175 DNA exonerations have changed all of that, primarily because there is a degree of decisive and conclusive certainty which attaches to a DNA exoneration which may not be present in other forms of exoneration. They point to the fact that the main sources of legally reversible errors are to be found within the legal system itself. These errors are not "rare mistakes" in the usual meaning of that phrase. They are produced by the social organization of the legal institutions themselves. One persistent source of these legally reversible errors is the occupational culture of prosecutors' offices. There is a pervasive emphasis on "winning," which means obtaining convictions. This greatly overshadows any concerns with due process or constitutional safeguards. In the U.S.

today, over 95% of all criminal convictions are obtained by plea bargain. Unlike the impression one might gain from television sitcoms, most criminal cases do not go to trial. This is common knowledge to all those who work within the criminal justice institutions. The pervasive use of plea bargains to obtain criminal convictions is what produces the tendency to use the "eyewitness testimony" of jailhouse snitches (other jail inmates who claim a defendant told them about their crime, and will testify in court about it for "considerations," usually a reduced plea agreement or sentence) or other co-defendants or co-conspirators who want to gain some advantage by testifying against an alleged perpetrator. Eyewitness testimony which is not corroborated by other evidence has been found to be the most consistent cause of false convictions, and using these jailhouse snitches has been found to be one of the most common sources of this kind of legally reversible error. The prosecutorial office's emphasis on winning (convictions) also produces a tendency for coerced confessions, and for faulty forensic work. Another way the legal institutions systematically produce legally reversible errors is termed "ineffective assistance of counsel," which usually means several things. First, the resources available to the prosecution and defense are vastly unequal. Prosecutors' offices commonly have relatively few constraints on their resources for investigating cases, compared to those of the defense. Second, capital case defense requires great experience and legal sophistication, but defendants can rarely afford to pay for it themselves, so the defense counsel is court-appointed, commonly from lists of lawyers with no or little experience in litigating capital cases. While some of the notorious instances of "ineffective assistance of counsel" are now legendary, like the Texas defense attorney Joe Frank Cannon who fell asleep during the trial, these man-bites-dog cases

misdirect our attention away from the more important facts of the resource and investigative inequality of the two sides in a capital trial. Third, the resources for the appellate processes are also vastly unequal.

The systemic nature of erroneous criminal convictions is dramatically emphasized by a 2002 study done by James Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, and Alexander Kiss at the Columbia University Law School.(2) In a large scale statistical analysis of 4,578 American capital cases between 1973 and 1995, they found an overall rate of prejudicial error of 68%. This means that in almost 7 of 10 of the thousands of capital sentences made during a 23 year period, after a full review there were found to be serious, reversible error. In a comparable study done just at the state level for the State of Arizona, the rate of serious, reversible error was found to be 72%. (3) This means that, when Republican Illinois Governor George H. Ryan ordered a moratorium on Illinois executions in 2000 when he became upset that when the 13th (out of a total of 25 capital cases reviewed) exoneration of a death row prisoner occurred, the disturbing Illinois average of legally reversible errors was actually better than most of the other states in the U.S. These high error rates persisted over a very long period of time. In 20 of the 23 years reviewed in the Liebman study, more than 50% of all cases were found to be seriously flawed with reversible errors. In the cases where serious errors were found, it took an average of three appellate reviews to catch them, and it took an average of about ten years to produce the final result. Unlike the earlier studies of false convictions which tended to emphasize the important of false eyewitness identification, the Liebman 2002 study found egregiously incompetent assistance of counsel to be the number one source of reversible error, followed by police and/or prosecutorial

misconduct. This emphasizes the fact that reversible errors are routinely produced by the operations of a criminal justice system organized to do this. The following parts of this chapter explore these issues.

What is an Erroneous Conviction?

The phrases "false conviction," "wrongful conviction," and "erroneous conviction" are commonly used as synonyms, and the meaning is usually that of a person who has been convicted of a crime they did not commit. This is one, and arguably the most important meaning. There is another important meaning however. An erroneous conviction can additionally mean that a person was convicted of a crime improperly, meaning in some cases that perhaps an individual did in fact commit the act, but perhaps the legal conviction involved a coerced confession, or the falsification of evidence by police or prosecutors, or the use of perjured testimony, or evidence obtained by an illegal search, or any one of many other prejudicial errors that compromise the constitutional rights of the accused. So the above phrases may include two classes of people; those who are convicted of a crime they did not do, and those who did do the crime but are legally convicted in some compromised manner. When the latter kinds of cases are reported in the mass media, it is commonly reported that their appeals were successful because of a "technicality." While the use of the word "technicality" in this context of popular vernacular is not a legal usage, it is nevertheless a very prejudicial usage.

When an appellate court orders a review of a criminal conviction, it is common that their instructions for the review advise the subsequent review/trial to eliminate or

dismiss one element of the case (for example, the coerced confession), and then to re-evaluate the complete evidentiary case without this. While this might sound rational and logical in theory, in practice the distinction breaks down because the evidentiary bits and pieces of a case are often linked to each other in time sequence, discovery, investigation, and presentation. Analyses of false convictions generally show that evidence in cases is not a matter of discrete units, but there is more commonly a compounding of errors, so that earlier errors are compounded by later errors, and so on. In the false conviction of Dale Nolan Johnston (to be discussed below), for example, the false confession was irremediably linked to the coerced and unprofessional hypnosis sessions, which were linked to the improper searches. The searches and hypnosis sessions would not have happened without the coerced confession in the first place, so an appeal which directs a court to strike one element of the case likely ignores how it is linked to the other elements.

There are now so many false, wrongful, and erroneous convictions that we have a burgeoning library of books to document them.(4) In almost all of these, the authors or editors claim that they restrict their attentions to only those cases where people are convicted when they did not do the crime. They push to the side the other meanings of false, wrongful, or erroneous. This is understandable. This is the strongest position for one who wishes to construct an argument or position concerning false convictions. While this is arguably the strongest foundation for making a moral argument about the death penalty, for those who are additionally interested in constitutional issues and the inner-workings of legal institutions in a democratic society, we would additionally make the point that we should not ignore the other meanings of the phrases false, wrongful, and erroneous. While most of the case examples cited below are those involving the first

meaning of wrongful conviction, we think it is important to pay attention to the broader constitutional issues as well.

The Organized Production of Erroneous Convictions: Winning at all costs

Most local prosecutors define themselves as "tough on crime," and promote their records of winning criminal convictions. This is pervasive in the United States today, and making this observation is hardly novel or controversial. In all fairness, however, it is important to point out the larger social, cultural, and political context within which local prosecutors are elected and live their organizational lives. Four decades have passed since the U.S. government declared a "War on Crime," and as this long-standing war has developed, there have been many iterations and modifications, including secondary wars on drugs, gangs, organized crime, child molesters, hate crimes, and terrorists. When these wars and mini-wars are combined with various other legal developments such as determinant sentencing or "three strikes laws," the result is that the U.S. now incarcerates more people than any other nation on earth; three million individuals now populate U.S. jails and prisons. Politicians of all parties have contributed to the larger cultural context of fear and anxiety over crime, and this is persistently fueled by mass media and cinematic fear production. Today all politicians and legal institutional leaders (such as judges who stand for either re-election or re-affirmation) pander to this larger cultural context, or face defeat. All have learned the lesson of U.S. Presidential candidate Michael Dukakis who was labeled as "soft on crime" as a result of the Willie Horton ads. These larger cultural messages are reaffirmed

at the local level by various victim advocacy groups, who apply political pressures to local actors in the legal institutions.

Prosecutors have a constitutional duty to do two things, investigate cases and seek convictions in cases where the evidence indicates that charges are justified. It is a pervasive organizational fact, however, that the organizational emphasis on seeking convictions dominates as an organizational reality. In a study of the first 70 exonerations produced with the assistance of DNA evidence, prosecutorial misconduct was found to be present in 34 or almost 50% of theses cases.(5) When local police and prosecutors are under pressure to respond and "do something" to an especially heinous local crime, there exist enhanced inducements to move rapidly on what appears to be a likely suspect. This was the case in the false conviction of Dale Nolan Johnston in the small southeastern town of Logan, Ohio. On October 4, 1982, Johnston's eighteen year old stepdaughter Annette Cooper Johnston was brutally killed and dismembered, along with her nineteen year old fiancé Todd Schultz. Police found their two torsos about ten days after the killings, floating in a local river, and then found their heads, arms, and legs buried by the river's edge. Their genitals were removed and never recovered. This is the kind of dramatic crime which creates a moral panic in a small community. In the immediate aftermath of the murders, wild and unsubstantiated theories were promoted, including Satanism, drugs, gangs, and sexual abuse. No one was arrested for over eleven months after the killings, but as the police investigation uncovered allegations of some kind of sexual contact between Annette Cooper Johnston and her stepfather Dale.

As the police investigation focused on Dale Nolan Johnston, they ignored other investigative leads, and other physical evidence. They enticed a confession from

Johnston, concerning the earlier sexual contact with his stepdaughter, and this was used in his trial. He was convicted of the two murders in September, 1983, was sentenced to death, and served on death row until 1990, when his case was overturned by the State of Ohio Supreme Court. The court ruled as inadmissible the coerced confession and police-conducted hypnosis sessions with Johnston.(6) In a later analysis of this case, William Lofquist argues that the false conviction of Dale Nolan Johnston was not produced by one or some set of "mistakes" made by local police and/or prosecutors.(7) The false conviction was produced by the same set of routine, organized practices of the legal institutions which produced the outcomes of other cases. One of these identified by Lofquist is the "winning at all costs" organizational ideology, where the organizational standards of success emphasize convictions, and not some other organizational criteria which emphasize following constitutional rules and procedures. In the current fear-charged U.S. atmosphere of wars and mini-wars on crimes of all sorts, promotions within police departments and elections to local/state political offices are made by claims to organizational success, which is today measured in convictions, however obtained.

The Dale Nolan Johnston case is an unusual, atypical case for the U.S. criminal justice system. It involved a homicide (less than one percent of all crimes), even a multiple homicide (less than one percent of all homicides), combined with bodily vivisection and mutilation (a very minor percentage of all homicides). These facts make the case dramatic and sensational. These kinds of case produce local moral panics, perhaps even runs on local gun shops (which is what happened in Logan, Ohio). But it is very important to recognize that these kinds of dramatic, sensational cases are inevitably reported in the mass media, they are not typical to the U.S. criminal justice system. The

typical, routine, normal case in the criminal justice system is very undramatic and very unsensational. Since slightly over half of all the 4,000,000 individuals in local jails, state prisons, and other detentions are there for drug possession or drug use crimes (not including drug dealing for sale), the typical criminal case is not one of violence at all. Most likely the typical case in the criminal justice system is a young, minority male detained for drug possession for private use, one unlikely to have the financial resources for a fancy "dream team" legal defense. In his artful 1987 book Bonfire of the Vanities, Tom Wolfe refers to these kinds of cases as "the chow," meaning that these undramatic, unsensational, routine cases of poor and minority males are the mainstay foodsource of the day-to-day criminal justice processing, the unsavory meal needed for the daily upkeep of the voracious beast of incarceration. In his popular book The Rich Get Richer and the Poor Get Prison, Jeffrey Reiman also acknowledges this reality, observing that the criminal justice would break down if it had to go to trial for any significant numbers of cases it processed on a routine basis. The normal or routine cases processed by the system, then, are overwhelmingly and disproportionately those of the poor, minority males of society. (In 2005, for example, blacks were 12.8% of the U.S. population, but 49.4% of the prison population.)

For the routine "chow," then, their cases typically begin with differential law enforcement resource allocation, a fancy way of saying that there are more police assigned to the poorer and minority areas of the community. The organizational rationale for this differential allocation is that these are the areas with the highest crime rates, but no one ever asks what role this differential allocation plays in the organizational production of those differential rates in the first place. Police decisions to stop, detain, or

arrest are the first decisions in a long progression of discretionary decision-making for the criminal justice system; studies over five decades consistently show that an individual's deference and demeanor towards police authority is the most decisive factor in these initial decisions (not legal criteria concerning the seriousness of the offense). If a decision to arrest is made, it is common to "pad the charge sheet," which means that secondary, tertiary, and even more charges are added to the one for the initial stop, done with the prior knowledge that many if not all of these additional "offenses" or "charges" will be dealt away in a probable plea agreement. This padding of the potential charges can occur at the level of the local police or local prosecutors. They know in advance that over 95% of all criminal convictions are obtained via a plea bargain, so this is done in anticipation of the likelihood that these offenses or charges will be thrown out or dropped, perhaps done as an inducement or incentive for the offender to accept a deal. If one has the financial resources to hire adequate legal representation to confront all of this, then most knowledgeable insiders feel that it is relatively easy to gain some leverage on this institutional rationality, if not to thwart it altogether. But when one lacks these resources, then one becomes "the chow," the fodder of unknown, unrecognized, undramatic cases which feed the prison-industrial complex. This bureaucratic food-chain is dependent on prosecutors' organizational ideology of winning-at-all-costs.

In recent decades the use of determinant sentencing, "zero tolerance" and "broken windows" programs (which vastly increase arrests for minor offenses), and "three strikes" legislation have enhanced the inducements for plea bargaining for many criminal defendants. These legal developments force an individual to entertain a complicated calculus of weighing different pleas versus different possible outcomes, perhaps even the

consideration of pleading out to an offense one did not commit in the first place, versus standing trial on an offense which would trigger a determinant or multiplier sentence if convicted. One actual case of this is the 1989 murder conviction of Derrick Lee of Florida. With a record of several prior arrests, but no convictions, Lee pled guilty to a second degree murder charge, even though he was innocent, because he felt that his prior record would raise the likelihood of a death penalty sentence if convicted.(8) This is the observation of former chief judge David Bazelon of the Washington, D.C. Court of Appeals: "The battle for equal justice is being lost in the trenches of the criminal courts where the promise of Gideon and Argersinger goes unfulfilled. The casualties of those defeats are easy to identify….The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed….represented all too often by 'walking violations of the Sixth Amendment'."(9) The presumption of innocence has been superceded by the pervasive presumption of guilt, by all parties, and is now "a core belief shared by virtually all personnel within the criminal justice system."(10) Judges who have seen their discretionary powers diminished if not stripped by these "get tough on crime" laws often feel relatively powerless to alter this continuing constitutional tragedy.(11)

The Legal Production of Erroneous Convictions:

Prosecutorial and Police Misconduct

The institutional presumption of guilt, the occupational ideology of winning at all costs, and the lack of any effective oversight produces what many sociologists would call "work crimes," and when they are very rarely acknowledged in a legal sense "police

misconduct" and "prosecutorial misconduct." The conviction of James V. Landano in 1976 involved one of the rare cases where the prosecutor was ultimately sanctioned for failure to reveal exculpatory evidence which would have cleared the defendant. Landano was convicted and sentenced to life in prison for the murder of a Newark, New Jersey police officer. He was convicted despite having a strong alibi and bearing no resemblance to the killer as described by witnesses to the police. In 1981 the prosecutor admitted that the trial witnesses had been coerced in their testimony, and that other records and evidence of possible exculpatory value had not been given to the defense. In 1987 the federal district court rejected a reconsideration of this case, even though these later facts were then known, and Landano ultimately served 13 years in prison before he was ordered released by a federal judge in 1989. A case like this reveals the courts' complicity in lower level prosecutorial misconduct, and the grave difficulties of bringing these official crimes to light.

The 1974 conviction of Chol Soo Lee for murder became very famous for the San Francisco Asian-American community. While in prison he was convicted of killing a fellow inmate before an appellate review indicated that his first conviction was a miscarriage of justice because local prosecutors had withheld potentially exculpatory evidence. His 1982 trial overturned the first murder conviction, and his 1983 retrial overturned the second one.

Clifford Henry Bowen was a fifty-year old professional poker player when he was convicted of killing three men at an Oklahoma City motel on July 6, 1980. The prosecutor in the case was Oklahoma County's district attorney Robert Macy, known

locally as “Cowboy Bob.” He had earned his Wild West reputation by putting fifty-three defendants on death row. In an earlier case appealed to the federal courts, a federal judge said that Cowboy Bob was guilty of “blatant misrepresentation” in his prosecutions. The local legal writer for the Oklahoma Tribune said this about Macy’s methods in a 1999 article: federal appellate rulings have repeatedly found that “Macy has cheated. He has lied. He had bullied. Even when a man’s life is at stake, Macy has spurned the rules of a fair trial, concealing evidence, misrepresenting evidence, or launching into abusive, improper arguments that had nothing to do with the evidence.”(12) Bowen was convicted of the triple-murder and sent to death row with a capital sentence. The U.S. Court of Appeals for the tenth district overturned the conviction, in 1986, and chastised district attorney Cowboy Bob Macy for failing to reveal potentially exculpatory evidence about Bowen’s innocence to the defense. Later in 1987 Cowboy Bob was re-elected to office with 80% of the vote, and he was named the state’s outstanding district attorney, also in 1987. Several years later his colleagues elected him as President of the National District Attorney’s Association. While most readers will find this ironic, it nevertheless emphasizes the occupational culture and ideology of real-world (as opposed to television or cinematic) prosecutors.

Confessions coerced by police are not common, but not rare either –20% of the DNA exonerations involved false confessions. Ordinary people find it implausible that an individual would confess to a crime they did not commit, and perhaps for most people under ordinary circumstances this is true. What an especially vulnerable individual might do, however, or what someone might do when placed in a situation of extraordinary stress, is more problematic. Studies have shown that confessions carry special weight with

juries, and it is for this reason that one finds cases where a conviction rests solely upon a confession even when there is no other corroborating evidence.

An extraordinary situation occurred in Phoenix, Arizona, during the summer of 1990, when nine Buddhist monks and nuns were shot execution style, and their bodies arranged head-to-head in a circle inside Wat Promunkanem, a Teravadan Buddhist temple in the West Phoenix area. This was a high profile crime, and brought considerable mass media publicity. After about two weeks local police revealed that they had detained in custody four young Hispanic males from Tucson, each one of whom had confessed to the shootings. Before the cases went to trial, this all unraveled, when it was revealed that the police had taken each one of the suspects to a separate hotel room in the downtown Phoenix area, and had interrogated them continuously over many days to obtain the confessions. Months later the actual killer Jonathan Dooty was apprehended, and the four Tucson suspects released; they eventually won a civil rights violation suit from Maricopa County. Dooty still awaits his execution in Arizona.

In 1998 Richard Ochua confessed to a rape and murder he did not commit, after two days of police interrogation in Austin, Texas. On October 24, 1998 a twenty-year old Pizza Hut manager Nancy DePriest was found handcuffed to a counter inside her Reinli Street Pizza Hut, shot in the back of the head. Initially the police had no good leads or suspects, so they put a watch on the Pizza Hut on the theory that the culprits might return to the scene of the crime. About two weeks later Richard Ochua and his fellow worker from another Pizza Hut Richard Danziner visited the Reinli Street Pizza Hut. Police detectives later brought Ochoa to the station for questioning, and they threatened to “throw the book at him” if he did not cooperate with them. He asked for an

attorney, but police refused, telling him he could not have an attorney until he was officially charged. The Hispanic cop Hector Polanco told Ochoa that he would be "fresh meat" in prison, which Ochoa interpreted as potential rape. The police repeatedly threatened Ochua with the death penalty during the two day interrogation. He decided to go along with what Polanco wanted, and he signed a confession, also implicating Danzinger. He agreed to testify against Danziner as well, for which he received a life sentence rather than a death sentence. He served in prison 13 years, being eventually released in 2001. Another prison convict Achim Josef Marino had undergone a prison conversion and confessed to the Pizza Hut murder of Nancy DePriest, and a 2000 DNA analysis confirmed Marino's guilt, and the innocence of Ochoa and Danziner.(13)

Another notorious case of a coerced confession is that of Gary Gauger, who has since become a regionally known public speaker against the death penalty. On April 8, 1993 Gary's parents Morris and Ruth Gauger were found murdered at their home, near Richmond, Illinois. The police took Gary Gauger into custody, and subjected him to an all-night interrogation, during which they asked him a series of hypothetical questions about how such murders could have happened. Gauger's responses to these hypothetical questions were later presented as a confession. He was convicted of the murders in October, 1993, and on January 11, 1994 sent to Stateville prison to await a death sentence. He served three and one-half years in prison before being released and ultimately exonerated. The actual killers of Morris and Ruth Gauger were Randell Miller and James Schneider, members of a Wisconsin mototcycle gang known as the Outlaws, who had planned the robbery of Morris Gauger's home for some time. Gauger received an official

pardon from Illinois Governor George Ryan in 2002, and went on to write the well-received play The Exonerated.

Police and prosecutors lie. They seek to dominate their opponents (the defense) in these routine, on-going dominance struggles. They want to win. These observations are not new or novel. Over three decades ago the top U.S. police scholar Peter K. Manning published his research "Police Lying" made these observations, and he interpreted routine police lying to be embedded in the organizational and occupational structure and culture of police work.(14) Police officers do not lie in court testimony because they are "bad apples" in an otherwise pristine criminal justice system "barrel," but they do so because they are competent organizational actors. (When university professors want to fill out a change-of-grade form to change a student's grade after one has been submitted, they know to write "clerical error" as the reason, because this is the only reason the bureaucracy will accept unproblematically –this is a comparable "work crime," in Manning's parlance, one fostered by the organizational environment itself.)

The Legal Production of Erroneous Convictions: Eyewitnesses & Snitches

Criminologists and other specialists in crime have long known about the special vulnerability of eyewitness testimony, but this issue gained national notoriety in 1998 when Anthony Porter was released from death row in the State of Illinois, after serving 16 years for a 1982 crime he did not commit. He was within two weeks of being executed. One reason this case gained national publicity is that new evidence was uncovered by two Northwestern University journalism professors, Lawrence Marshall and David Protess, and their undergraduate students at the Medill School of Journalism.

Anthony Porter was convicted for the August, 1982 murders of Marilyn Green and Jerry Hillard, ages 18 and 19, shot near the bleachers of a swimming pool on the south side of Chicago, Illinois. Anthony Porter was an African American male with a measured IQ of 51. He was convicted solely on the basis of the testimony of William Taylor who reported that, even though he did not see the shooting directly, he saw Porter fleeing the murder scene soon afterwards. It was known that Porter was a former member of one of the south side gangs. Even though the mother of the victim Marilyn Green, Ofra Green, later told police she had seen another man by the name of Alstory Simon engage in a heated argument about drugs with the male victim Jerry Hillard, this lead was not pursued by the police. The family of Anthony Porter retained private counsel for his defense, but when there occurred a subsequent dispute over the payment of the $100,000 retainer, the attorney Akim Gursel cut short his investigations into the case. Sixteen years later, the Northwestern University journalism students completed some of this laborious investigative work. When they interviewed William Taylor, he told them that he had been pressured by police to identify Porter. They additionally had the good fortune to locate the actual murderer, Alstory Simon, living in Milwaukee in 1998, who confessed to the murders. Porter received one stay of execution so that the courts could review the issue of whether the mentally retarded should be executed (which the U.S. Supreme Court ruled against in 2002), and had it not been for this related issue, he would not have been alive to see his eventual exoneration.

The 1998 Porter exoneration was one of nine which stimulated Illinois Governor George Ryan to halt in 2000 the scheduled executions in Illinois, and commute 142 of 155 death row sentences. Governor Ryan later observed, “Our capital system is haunted

by the demon of error." (15) It also led Rob Warden at the Northwestern University School of Law to hold a National Conference on Wrongful Convictions, in 1998, and create the Center on Wrongful Convictions. Their early study of 86 cases of true exonerations indicated that fully 53% had been convicted in cases where eyewitness testimony played the key role in the conviction, and in 38% of the total number of cases the eyewitness testimony was the only evidence against the defendant. In 17% of the cases the testifying witness had some relationship to the defendant, and in all of these instances they were given some incentive to testify against the defendant. In 6% of the total, the testifying witness was a "jailhouse snitch," a person unrelated to the defendant, but one claiming to know about the crime on the basis of something said in jail, and in all of these cases there existed an incentive to testify against the defendant.(16)

The vast majority of erroneous eyewitness identifications are unintentional. Many factors can effect the ability of an individual to correctly identify another. Drugs, alcohol, and mental conditions influence the abilities of eyewitnesses to be correct. Accuracy also depends on whether or not the witness is involved in the crime scene, and whether or not there is a "weapons focus" to the scene. Not surprisingly, psychological research shows that incidents which involve a "weapons focus" are related to much lower levels of identification accuracy. The level of stress makes a big difference. Research shows that situations of extremely low stress may have as high as three times the degree of eyewitness identification accuracy compared to those situations which are enhanced by the threat of bodily violence. Racial differences also come into play in this area. While less than 10% of all rapes involve white women victims and black male perpetrators, a

U.S. Justice Department study found that 45% of 120 rape exonerations involved black men erroneously identified by white women.(17)

Barry Scheck and Peter Neufeld, co-founders of The Innocence Project, noted in the 2006 film After Innocence that 78% of their first 150 exonerations involved false witness identification.

The snitch system is an especially egregious source of erroneous convictions. The term snitch is prison argot for a person who becomes an informer for the authorities, usually in return for some kind of "consideration," such as a reduced plea or sentence, but in legal vernacular they are known as "incentivized witnesses." They have been around for a long time, dating at least to eighteenth-century England, when they were known as "crown witnesses." These crown witnesses usually either escaped their own sentences, or received "blood money" for their testimony. Scores and scores of innocent Americans have been convicted by the testimony of snitches or informants. One especially well known case is that of James Richardson of Arcadia, De Soto County, Florida, who was convicted and sentenced to death for killing all seven of his children, by poisoning, in 1967. James Richardson was a black fruit picker, of low intelligence. This was a high profile case for a small community, involving the deaths of seven children, ages one to seven, and there was intense pressure on local authorities to "do something." Even though there were many signs which should have made local police and court personnel suspicious of the evidence in the case, the conviction came with relative ease when two jail inmates, Ernell Washington and James Weaver, came forward to testify that they had heard Richardson confess to the killings while in jail. While the defense attorney tried to impeach these witnesses by pointing out the incentives they had received for their

testimony against Richardson, the jury took just 90 minutes to convict. A subsequent attorney to represent Richardson was Mark Lane, the well known author of the book about the Kennedy assassination, Rush to Judgement, and he later wrote a book about the Richardson case as well, Arcadia.(18) While Richardson's death penalty sentence was set aside in 1972 as a result of the U.S. Supreme Court decision Furman v. Georgia, he would ultimately spend 22 years in prison before his exoneration.

Another false conviction was that of Joseph Green Brown, also known as Shabaka, a Swahili word meaning "uncompromising." Brown was convicted in Hillsborogh County, Florida, in 1974, for raping and murdering Earlene Treva Barksdale, the wife of a well known Tampa attorney, and the main testimony against Brown came from his former partner-in-crime Ronnie Floyd. Floyd not only received a lesser sentence on a robbery charge, in exchange for his testimony, but he gained some satisfaction from getting back at Brown, who had "dropped a dime" on Floyd at an earlier time. Brown served a total of 13 years on Florida's death row before his eventual exoneration. The U.S. Court of Appeals for the Eleventh District overturned the case because "the prosecution knowingly allowed material false testimony to be introduced at the trial." (19)

At the Center on Wrongful Convictions at Northwestern University, Rob Warden analyzed the cases of ninety-seven wrongful convictions in the U.S. between 1976 and 1999, and found "incentivized witnesses" to be involved in 39 percent of the exonerations. Almost half of these were convicted by jailhouse snitches who claimed that they had heard the defendant confess to the crime while in jail. This phenomenon has become more pervasive and widespread in the U.S. in recent decades as determinant sentencing

and “three strikes” legislation has created new incentives for detainees to lessen their charges or sentencing.

The Legal Production of Erroneous Convictions: Ineffective Counsel

In the 1963 case Gideon v. Wainright the U.S. Supreme Court held that defendants had a right to be represented by an attorney, and later decisions such as the 1970 decision in McMann v. Richardson and 1985 in Evitts v. Lucey have elaborated on that to mean the right to an effective, meaningful defense. But this has yet to be an organized reality in the U.S. criminal justice system.

Money is surely the main problem, although some critics would point out that the money problems would not be so great if legislatures had not criminalized so many acts and behaviors in the first place. The trends of increasing prisonization have persisted in the face of declining crime rates in the late 1990s, so this is clearly a complex, multi-faceted problem. There are several ways local and state governments have tried to respond to the requirements of Gideon. Some maintain lists of attorneys who are willing to be assigned to cases of criminal defense, some have tried to maintain full time offices of public defenders, and others have tried subcontracting arrangements. Various legal researchers and The American Bar Association have studied all of these arrangements, and there is a small but impressive literature on the topic. Nevertheless, criminal defense is not equal, and criminal defense in capital cases is the most unequal of all.

Defense in capital cases is very complex and demanding, yet the states who assign attorneys to capital cases commonly pay such a low hourly rate that it prohibits a truly effective investigation. Others may place an unrealistic cap on the total costs for a capital

case, such as $1,500, which again prohibits an effective defense. Established attorneys usually refuse to work for such low remuneration, so recent law school graduates (or perhaps lawyers trying to rehabilitate themselves from disbarment) or those working to establish their career are the ones on the list. Whether the attorneys are assigned, contracted, or public defender staff, all are involved in "managing a caseload," meaning they make pragmatic decisions about how to allot their limited time and resources, and which cases are ignored so that others can be served. In one instance of contracted defense services reported by Stephen Bright, the county commission of McDuffie County, Georgia, hired a lawyer by the name of Bill Wheeler to handle all of their defense services, for a $25,000 total fee, which was about $20,000 lower than the next lowest bid, but in four years Wheeler entered 313 guilty pleas while only trying three cases.(20)

Erroneous convictions stemming from ineffective counsel are legion; again, this was the number one factor to emerge in the 2002 study of 4,578 American cases by James Liebman and his associates at the Columbia University Law School. One notorious case is that of the "Ford Heights Four," Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams. They were convicted for killing Lawrence Lionberg and his fiancé Carol Schmal on May 12, 1978 in Homewood, Illinois. They lived in the black section of East Chicago Heights, also known as Ford Heights. The jury in the case consisted of eleven whites and one black woman. Physical evidence in the case was very weak, a few hair fragments which could not be conclusively analyzed, and an eyewitness so compromised she was never called to testify. The attorney Archie Weston didn't challenge any of the potential jurors, and didn't talk to any of the forensic experts. This is one of the cases eventually investigated by the journalism students at

Northwestern University under the direction of Professor David Protess, and in 1983 Dennis Williams won a retrial on the grounds that he had not received effective legal assistance. Ultimately, in 1995, DNA evidence later cleared all four of the defendants, but only after Jimerson had spent a total of eleven years on Illinois' death row, and the others a total of 18 years of incarceration. DNA evidence was also able to identify the actual killer in the case, Arthur Robinson. Eventually three of the lawyers who had initially represented the Ford Heights Four were suspended from the practice of law. The defendants eventually won a $36 million settlement from Cook County for violations of their civil rights.

Other cases of ineffective assistance of counsel include an attorney who feel asleep during the trial in a capital case, an attorney in Kentucky who listed his business address as the local watering hole, Kelly's Keg, and a San Diego attorney who ignored exculpatory evidence because he didn't know how to submit it.(21) While it is plausible in some few cases to interpret these malfeasant performances as individual laziness or incompetence, this overlooks the critical structural issues involved. The dictates of the Gideon case are widely and universally ignored, and the systems of "indigent defense" which have emerged since 1963 are woefully inadequate to provide any kind of reasonable defense, especially in capital cases. The State of Texas puts an $800 limit on what a court-appointed attorney can charge off on a capital case, Mississippi's limit is $1,000 plus office expenses, and the State of Virginia $305 for a felony defense. This asymmetrical funding produces very high rates of occupational burn out among the professional public defenders, and it additionally means that the bottom feeders of the legal profession will be drawn to such cases as the others move on. This is not a matter

of a few "bad apples" spoiling the barrel, it is a matter that the barrel (the institutional structure) itself is rotten. This is what Michael Radelet, Hugo Adam Bedau, and Constance Putnam said in their book In Spite of Innocence:

> "Southern justice in capital murder trials is more like a random flip of the coin than a delicate balancing of the scales. Who will live and who will die is decided not just by the nature of the crime committed but by the skills of the defense lawyer appointed by the court. And in the nation's Death Belt, that lawyer is too often ill-trained, unprepared, and grossly underpaid." (22)

There is a virtually complete lack of monitoring or quality control for criminal defense work. Since attorneys tend to discount lay judgments of their work, complaints are rarely taken seriously, even when made to local or state Bar Associations. In addition, there are even some recent court decisions which protect public defenders from liability for their actions from clients.(23)

The Legal Production of Erroneous Convictions: Inept Science

The notorious 1994 televised double-murder trial of former professional football star O.J. Simpson was arguably the most important educational lesson for the American public on the nature and complexity of DNA evidence. In addition to the materials on DNA, however, long and laborious testimony from a host of forensic experts educated

many on the "evidentiary chain of control," and the collection, preservation, analysis, and transportation of physical evidence in a criminal investigation. Simpson's "Dream Team Defense" had a field day demonstrating the incompetence of lower level L.A. Medical Examiner's Office officials. It is arguable whether the eventual "jury nullification" was principally related to this.

While the O.J. Simpson trial may have been what brought many Americans to an awareness of the woeful inadequacy of these offices and their staff, many additional reports about this have followed this 1994 trial. The growing recent history of wrongful criminal convictions has brought many of these cases to light. Clearly the worst and most notorious is that of former West Virginia State Trooper Fred Zane. He fabricated and falsified hundreds of serology and other test results in West Virginia, then moved to central Texas, where he fabricated and falsified perhaps one thousand more, in a three-cornered geographic area which officials derisively called "Zane's World. The subsequent investigation of Zane's occupational crimes by the West Virginia State Police Crime Laboratory said that his acts of misconduct included: (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory results; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with

the victim, and (11) reporting scientifically impossible or improbable results.(24) Zain's hundreds of erroneous convictions not only went undetected for years in West Virginia and Texas, but he was highly respected and regarded within the system, earning awards and promotions along the way. Zain's performance has created a major havoc in these two states, and over one thousand cases remain to be reviewed and resolved, even now over ten years later.

DNA testing is not some unproblematic "magic bullet." Take the case of Robert Hayes, convicted of rape and murder of Pamela Albertson in Broward County, Florida, in 1991, and sentenced to death. DNA testing not only produced a "match" for his blood, but for his semen as well. After spending over four years on Florida's notorious death row, Hayes' new attorney Barbara Heyer was able to win a new and more complete DNA testing, with proper controls. The new tests completely exonerated Hayes, in 1997,and correctly identified the actual murderer, also then in custody.

Fred Zain is not unique. Other states and federal agencies have struggled with these issues of faulty, inept or incompetent scientific testing. New York, New Jersey, Texas (cases other than Zain), North Carolina, Canada and the F.B.I. Crime Lab have had to confront these issues, often concluding in costly and embarrassing civil suits and/or settlements.(25) Testing and storage facilities are woefully inadequate, and funding meager for the most part. This is the material infrastructure forming the foundation for producing erroneous convictions.

Concluding Remarks

Law does not rule or govern capital cases. The Rule of Law is a myth. To use the words in the title of the Liebman research, the system is broken. The erstwhile presumption of innocence no longer holds sway as an operational assumption in the everyday life of our criminal justice institutions. The presumption of guilt rules the day, and the legal institutions routinely operate to produce plea bargained convictions. We now know for sure what was only known with uncertainty before; mistakes or errors are not rare happenstances in our system. They are routinely produced by how the system operates on a daily basis, and it is the revelation of the mistakes which is rate. The advances in DNA technology have played an important role in our certainty of these facts.

In 2006 Showtime Independent Films produced a 95 minute film After Innocence which publicized the first 150 DNA exonerations achieved by The Innocence Project, founded by Barry Scheck and Peter Newfeld. The Innocence Project was created to investigate prisoners' claims to innocence, and it gained national publicity in 1993 when their efforts were publicized on The Phil Donohue Show. This show produced hundreds and hundreds of requests from prisoners, but The Innocence Project restricted their investigations to those cases where DNA was present. By 2006 they had produced 150 exonerations, of which 14 were from death row. The film highlights the lives of seven men who were exonerated. One was Vincent Moto, who spent ten and one-half years in Pennsylvania prisons on a wrongful conviction for rape, and another Nick Yaris, who spent over 23 years in solitary confinement on a rape conviction, also in Pennsylvania. Another case was that of Wilton Dedge, who spent over 22 years in Florida prisons, on a rape conviction, including three years after the exculpatory evidence was revealed. Also falsely convicted was Dennis Maher, who spent over 19 years in prison, for a 1983 rape

conviction in Lowell, Massachusetts. One police officer Scott Hornoff Spent over six years in prison, following a murder conviction in Warwick, Rhode Island, being freed by the confession of the actual murderer. Calvin Willis of Shreveport, Louisiana spent over 22 years in prison on a false conviction, and Herman Alkins of Los Angeles was freed after 12 years on prison, following his false conviction of rape. Films such as After Innocence are now seen by hundreds of thousands, potentially even millions of Americans. This issue of wrongful convictions is a wedge issue for the death penalty, and gains the attention of all partisans. Even pro-death penalty advocates do not want to execute innocent individuals, and so they too are deeply troubled by the issues and trends in this arena.

Endnotes

1. Radelet, M.L., Bedau, H.A., & Putnam, C.E. In Spite of Innocence: Erronious Convictions in Capital Cases. Boston: Northeastern University Press, 1992.

2. Liebman, J.S., Fagan, J., Gelman, A., West, V., Davies, G., & Kiss, A. "A Broken System Part II: Why there is so much error in capital cases and what can be done about it." Available at: http://www.law.columbia.edu/brokensystem2/index2/html

3. Arizona, State of. State of Arizona Capital Case Commission: Final Report, 2004.

4. Yanni, M. Presumed Guilty: When Innocent People Are Wrongfully Convicted. Buffalo, N.Y.: Prometheus, 1991; Radelet, M.L., *et alia, loc. cit.*; Scheck, B., Neufeld, P., & Dwyer, J. Actual Innocence. Boston: Doubleday, 2000; Westerveldt, S.D., & Humphrey, J.A., eds. Wrongfully Convicted: Perspectives on Failed Justice. New Brunswick, New Jersey: Rutgers University Press, 2001; Cohen, S. The Wrong Men: America's Epidemic of Wrongful Death Row Convictions. New York: Carroll & Graf Publishers, 2003; Prejean, H. The Death of Innocents. New York: Random House, 2005; Vollen, L., & Eggers, D. Surviving Justice: America's Wrongfully Convicted and Exonerated. San Francisco: McSweeney's Books, 2005.

5. Vollen & Eggers, *ibid.*

6. See State v. Johnston 580 NE 2nd 1162, 1990.

7. Lofquist, W.S. "Whodunit? An Examination of the Production of Wrongful Convictions." Pp. 174-96 in Westervelt & Humphrey, *loc. cit.*

8. Radelet, *et. alia, loc. cit., p. 342.*

9. David Brazelon, quoted in Bernhard, A. "Effective Assistance of Counsel." Pp. 220-

240 in Westervelt & Humphrey, *loc. cit.*

10. Gilverber, quoted in Bernhard, *loc. cit.,* p. 226.
11. Gerber, R.J. "On Dispensing Injustice," University of Arizona Law Review, 2002.
12. Ken Armstrong, quoted in Cohen, *loc. cit.,* p. 102.
13. Vollen & Egger, *loc. cit.*, pp. 13-16.
14. Manning, P. K., "Police Lying," Urban Life and Culture, 1977.
15. George Ryan, January 11, 2003, quoted in After Innocence. Showtime Independent Films, 2006.
16. Center on Wrongful Convictions, 2004.
17. Vollen & Egger, *loc. cit.*, p. 122.
18. Lane, M. Arcadia. New York: Holt, Rinehart & Winstron, 1970.
19. See Cohen, *loc. cit.,* p. 171.
20. Bright, S.B. "Neither Equal or Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake," Annual Survey of American Law, 4:783-836, 1997.
21. Scheck & Newfeld, *loc. cit.*, pp. 183-192.
22. Radelet, *et alia.*
23. See Bernhard, *loc. cit.*, p. 231.
24. West Virginia State Police Crime Laboratory, 1993, p. 503.
25. Castelle, G., "Lab Fraud: Lessons Learned from the 'Fred Zain' Affair," Champion 23 (May): 12-16, 52-57; Castelle, G. & Loftus, E.F., "Misinformation and Wrongful Convictions." Pp. 17-35 in Westervelt & Humphrey, eds., *loc. cit.*

References

Arizona, State of. State of Arizona Capital Case Commission: Final Report, 2004.

Bernhard, Adele. "Effective Assistance of Counsel." Pp. 220-40 in Saundra D Westervelt and John A. Humphrey, eds., Wrongly Convicted: Perspectives of Failed Justice. New Brunswick: Rutgers University Press, 2001.

Bright, Stephen B., "Neither Equal nor Just: the Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake," Annual Survey of American Law 4:783-836, 1997.

Castelle, George, "Lab Fraud: Lessons Learned from the 'Fred Zain' Affair," Champion 23 (May): 12-16, 52-57.

Castelle, George, and Elizabeth F. Loftus. "Misinformation and Wrongful Convictions." Pp. 17-35 in Saundra D. Westervelt and John A. Humphrey, eds., Wrongly Convicted: Perspectives of Failed Justice. New Brunswick: Rutgers University Press, 2001.

Cohen, Stanley. The Wrong Men: America's Epidemic of Wrongful Death Row Convictions. New York: Carroll & Graf Publishers, 2003.

Gerber, Rudolf J., "On Dispensing Injustice," University of Arizona Law Review, Vol. XX, pp. XXX-XXX, 2002.

Lane, Mark. Arcadia. New York: Holt, Rinehart & Winston, 1970.

Liebman, James S., Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, and Alexander Kiss," A Broken System Part II: Why There is So Much Error

in Capital Cases and What Can Be Done About It." Available at; http:// www.law.columbia.edu/brokensystem2/index2/html

Lofquist, William S., "Whodunit? An Examination of the Production of Wrongful Convictions." Pp. 174-96 in Saundra D. Westervelt and John A. Humphrey, eds., Wrongly Convicted: Perspectives of Failed Justice. New Brunswick: Rutgers University Press, 2001.

Manning, Peter K., "Police Lying," Urban Life and Culture, 1977.

Prejean, Helen. The Death of Innocents. New York: Random House, 2005.

Radelet, Michael L., Hugo Adam Bedau, and Constance E. Putnam. In Spite of Innocence: Erroneous Convictions in Captial Cases. Boston: Northeastern University Press, 1992.

Scheck, Barry, Peter Neufeld, and Jim Dwyer. Actual Innocence. Boston: Doubleday, 2000.

Warden, Rob. Center on Wrongful Convictions, Northwestern University. Web site.

Westervelt, Saundra D., and John A. Humphrey, eds. Wrongly Convicted: Perspectives on Failed Justice. New Brunswick: Rutgers University Press, 2001.

Yanni, Martin. Presumed Guilty: When Innocent People Are Wrongfully Convicted. Buffalo, N.Y.: Prometheus, 1991.