

Prisons Full of Innocents

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Global Research, June 20, 2013
warisacrime.org

Region: [USA](#)

Theme: [Law and Justice](#), [Police State & Civil Rights](#)

There are probably more innocent men and women in prison in the United States now than there were people in prison here total — innocent and guilty — 30 years ago, or than there are total people in prison (proportionately or as an absolute number) in most nations on earth.

I don't mean that people are locked up for actions that shouldn't be considered crimes, although they are. I don't mean that people are policed and indicted and prosecuted by a racist system that makes some people far more likely to end up in prison than other people guilty of the same actions, although that is true, just as it's also true that the justice system works better for the wealthy than for the poor. I am referring rather to men (it's mostly men) who have been wrongly convicted of crimes they simply did not commit. I'm not even counting Guantanamo or Bagram or immigrants' prisons. I'm talking about the prisons just up the road, full of people from just down the road.

I don't know whether wrongful convictions have increased as a percentage of convictions. What has indisputably increased is the number of convictions and the lengths of sentences. The prison population has skyrocketed. It's multiplied several fold. And it's done so during a political climate that has rewarded legislators, judges, prosecutors, and police for locking people up — and not for preventing the conviction of innocents. This growth does not correlate in any way with an underlying growth in crime.

At the same time, evidence has emerged of a pattern of wrongful convictions. This emerging evidence is largely the result of prosecutions during the 1980s, primarily for rape but also for murder, before DNA testing had come into its own, but when evidence (including semen and blood) was sometimes preserved. Other factors have contributed: messy murderers, rapists who didn't use condoms, advances in DNA science that helps to convict the guilty as well as to free the innocent, avenues for appeal that were in some ways wider before the 1996 Antiterrorism and Effective Death Penalty Act, and the heroic work of a relative handful of people.

An examination of the plea bargains and trials that put people behind bars ought to make clear to anyone that many of those convicted are innocent. But DNA exonerations have opened a lot of eyes to that fact. The trouble is that most convicts do not have anything that can be tested for DNA to prove their guilt or innocence. Here are [1,138](#) documented exonerations out of that tiny fraction of the overall prison population for which there was evidence to test. One study found that 6% of these prisoners are innocent. If you could extrapolate that to the whole population you'd be talking about [136,000](#) innocent people in U.S. prisons today. In the 1990s, a federal inquiry found that DNA testing, then new, was clearing 25% of primary suspects. You do the math.

Of course you can't simply do the math, because wrongful convictions could be higher or lower for the available sample than for all prisoners. What we can be sure of is that we are talking about a large number of people whose lives (and the lives of their loved ones) have been ruined — not to mention the lives of additional victims of actual criminals left free.

One way to be fairly sure that the rate of wrongful conviction carries over, at least very roughly, to a variety of criminal prosecutions is to examine how those convictions came about. Brandon Garrett's [*Convicting the Innocent: Where Criminal Prosecutions Go Wrong*](#) examines the prosecutions of the first 250 people exonerated by DNA testing. Garrett finds broad systemic problems that could be remedied but largely have not been.

Of the 250, 76% were misidentified by an eyewitness — most of the witnesses having been led to that act by police and/or prosecutor, some of them badgered and threatened, others merely manipulated. Invalid forensic science expertise contributed to 61% of the convictions, much of it willfully manipulated, some fraction perhaps attributable to well-intentioned but negligent incompetence. Informants, mostly jailhouse informants, and most of them manipulated and bribed by police or prosecutor, helped out in 21% of the trials. In 16% of the cases, the accused supposedly confessed to the crime, but these "confessions" tended to be the result of police intimidation, manipulation, brutality, and simple lying. Garrett fears that similar problems infect the U.S. justice system as a whole.

Garrett focuses on problems in policy and perspective. People who believe all eyewitnesses are correct and truthful can mean well and nonetheless get an important point wrong. People who aren't aware that false confessions exist won't look for them. But people unaware of such things are not typically part of the criminal justice system, where awareness of these problems is built in but steamrolled over. Judges ask whether witnesses were improperly led to misidentify a witness, but care little for the answers they receive. While Garrett begins and ends his book by claiming that pretty much everyone means well, the intervening pages grown under the weight of endless malevolence. In reading the book, I found myself over and over again scribbling "Did this guy mean well?" in the margin.

Do police feeding a false confession to their victim mean well? When they falsely report on that procedure to a court do they mean well? When they use tape recorders but shut them off each time they feed the prisoner new facts, do they mean well? When they hide evidence? When they destroy evidence? When they stack lineups and pressure witnesses to make identifications? When they hypnotize witnesses? When the prosecutor employs junk science and knowingly makes false claims about it? When simple procedures to avoid bias are known but avoided? When expert witnesses lie for a living? When crime labs alter reports to coverup exculpatory evidence? When police or prosecutors bribe other convicts or codefendants to testify and tell them what to say, but lie about that procedure? When the defense is denied competent counsel or the ability to call witnesses? When the judge effectively acts as part of the prosecution? When jurors pressure and threaten a fellow juror to vote "guilty"?

"It is almost unheard of for prosecutors to be disciplined or sanctioned for misconduct," writes Garrett, who is no doubt also familiar with this saying: "Power corrupts, and absolute power corrupts absolutely." Garrett believes that serious reforms are needed, and points to North Carolina where a commission has been set up to aid in freeing and not convicting the innocent. If you imagine that that's what appeals courts are for, read how they handled these 250 cases. In 23 cases, the victim was tried more than once for the same crime. One

in a blue moon the system works and frees an innocent — just often enough to keep hope floating out there like a lottery ticket in the distance. Even when DNA clears a prisoner, a prosecutor may propose to try him again, and then do nothing for years while he rots in prison waiting. North Carolina has passed legislation reforming procedures for eyewitnesses, requiring the recording of interrogations, enhancing the preservation of evidence and access to DNA testing, etc.

But one of the major reforms needed is clearly a reform of attitude. And that probably will come more quickly if we recognize what current attitudes are. Jurors and judges should be aware of how often many prosecutors and police officers pursue conviction at the expense of the truth. They should not prejudge in that direction any more than in the other, but they should be aware of what they are up against. If, as a society, we valued the freedom of innocents as much as the punishment of the guilty, we would treat judges and prosecutors and defense attorneys and police differently. We would reward protection of the innocent as much as convictions. A “successful” prosecution would be redefined as one that, first, did no harm. The police officer who found an alibi for a suspect would be praised and promoted just like the officer who found evidence of his guilt. A defendant might even someday find it possible to gain representation from an attorney who at least pretended to believe in at least the possibility of his innocence, and who behaved accordingly.

In the meantime, we are generating and compounding tragedies by the thousands. When James O’Donnell was wrongly convicted, he exploded with anger and cursed the judge and jury. Then he composed himself and said, “I am really sorry for my outburst. I tried to be as civil as possible. I would never do a crime like this. And my life is over now as I know it, my wife and kids’ life. I don’t understand how the jury did this to me. It’s really not right, what they did. I was home in bed. I was sleeping. I would never hit a woman. I have a wife. I never hit my kids, ever. I never forced a woman to do anything in my whole life. That’s the God’s honest truth . . . It’s just — I’m very sorry for my outburst. Don’t take my life away, please.”

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