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INNOCENT CONVICTS

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COVER STORY

Innocent convicts

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Exoneration of the innocent through DNA testing in the U.S. breaks the silence on the ills besetting the criminal justice system.

ADRIAN DENNIS/AFP

Brian Capaloff holdsa placard beside a cardboard cut-out picture of Linda Carty while standing on the fourth plinth in Trafalgar Square in London on September 10, 2009. Capaloff used his one-hour slot on the plinth to highlight Linda Carty's legal case. She is currently on death row in Texas. The fourth plinth project invites members of the public to stand and speak on Trafalgar Square's empty plinth.

The first DNA exoneration in the United States took place in 1989. Since then, the Innocence Project, which is a network of an incredible band of people, including an extended network of lawyers, has been working to "exonerate wrongfully convicted individuals through DNA testing". Since 1989, they record, 292 persons have been exonerated on the basis of DNA evidence; 17 cases involved inmates who had served time on death row and 15 were cases where people were charged with capital crimes but not sentenced to death. This, as is evident to anyone watching the criminal justice system, is an indication of a deeply flawed system that is creating an oxymoron: the innocent convict.

Exoneration is not acquittal. It is about wrongful conviction resulting in innocent persons spending long years in prison, sometimes with the spectre of the death sentence hanging over them.

Johnny Lindsey, 26 years in prison for "aggravated rape" until DNA proved his innocence.

Earl Washington, 17 years in prison of which nine years were on death row, until DNA proved his innocence. Ronald Jones, 15 years before he walked out of death row to freedom, the DNA test having affirmed that his plea of innocence was genuine. James Gits, exonerated after 10 years in prison and 14 years on parole during which he was hounded by the legal restrictions and stigma that accompanies a convict of "aggravated sexual assault" wherever he goes. Victor Thomas, who spent 15 years, seven months and six days in prison before DNA testing proved that he was no rapist. The list is long, and growing.

The exonerees' stories speak about how the innocent are found guilty. The Innocence Project identifies six main routes to undeserved guilt.

Mistaken identification

Eyewitness misidentification is a common feature of wrongful convictions. Amidst the growing body of literature on wrongful convictions is a 2010 publication titled Tested: How Twelve Wrongfully Imprisoned Men Held Onto Hope. Christopher Scott is one of the twelve. A man was murdered in the presence of his wife, and Christopher and his friend were picked up and put away despite the total absence of physical evidence that could link them to the murder. The wife of the victim was escorted into the room where Christopher was and asked whether he was the shooter. This was in 1997. Twelve years later, Alonzo Hardly made a confession while in prison serving sentence in another case that it was he and another man who had committed the robbery and murder for which Christopher was serving sentence.

Steven Phillips was put in a line-up to be identified by more than 20 women who were brought in by police personnel to identify a serial rapist. Steven Phillips had green eyes, and many of the victims had spoken of a blue-eyed attacker; but after collective discussion with the police, the victims began identifying him. It was 24 years before he was released, after the Innocence Project had his DNA tested and it was conclusively proven that he was innocent.

Brandon L. Garrett dug into court transcripts to uncover what had led to the wrongful convictions in the first 250 cases of wrongfully convicted people who were exonerated by DNA testing. In his 2011 book Convicting The Innocent: Where Criminal Prosecutions Go Wrong, he says, "The role of mistaken eyewitness identification in these wrongful convictions is now well-known. Eyewitnesses misidentified 76% of the exonerees (190 out of 250 cases).... I obtained trial materials for 161 or 85% of the 190 exonerees (out of 250) who were misidentified by eyewitnesses. Two related problems recurred: suggestive identification procedures and unreliable identifications." And "with judges taking a hands-off approach, most police departments have few procedures and little formal training on eyewitness identification, despite the importance of eyewitness identification in so many criminal cases".

'Flawed forensics'

Unvalidated and improper forensic science, as the Innocence Project experience reveals, leads to wrongful convictions. Forensic techniques often deployed in investigating crimes have not been the subject of rigorous scientific evaluations, and these include hair microscopy, fingerprint comparison, bite mark comparison, firearm tool mark analysis, and shoeprint comparison.

A 2009 report of the National Academy of Sciences on “Strengthening forensic science in the U.S.: The path forward” states that many of these methods are “supported by little rigorous systematic research to validate... basic premises and techniques. There are other techniques that have been improperly conducted or inaccurately conveyed in trial testimony.” In some cases, the Innocence Project has found “forensic analysts have fabricated results or engaged in other misconduct”.

Garrett calls it “flawed forensics”, identified as recurring issues of reliability and validity. Then there are the problems that have been brought on by “analysts who concealed evidence, made errors in the lab, or failed to test evidence”.

Unveiling a shocking statistic, Garrett’s finding is that over half the exonerees, or 128 of them, had had invalid, unreliable, concealed or erroneous forensic analysis influencing the decision to convict in their cases.

Police and prosecutorial misconduct is known to be a route to wrongful conviction. Michelle Moore, a public defender for Dallas County, has been tasked with reviewing the cases of convicted persons seeking exoneration, a process that is a consequence of the DNA statutes that have begun to be enacted since the opening years of this century in many States in the U.S.

In a conversation that is reproduced in Tested (2010), she is asked: “What about this job has most challenged your belief in the justice system?” Her response: “I have trouble with the Brady violation. That’s where either the District Attorney or the police department did not disclose evidence which could have proved the defendant innocent. The prosecution should by law have handed it over to the defence in the trial. We’ve got a lot of that... it’s just disheartening to think someone didn’t hand over exculpatory evidence – it’s disheartening to think that there was a win-at-all-costs attitude.”

Michelle Moore was referring to Brady vs Maryland, a 1963 decision of the U.S. Supreme Court. Brady was charged with murder along with Boblit. Brady did not deny that he had been involved in the murder but claimed that the actual killing was the work of Boblit. This would have changed the nature of the offence and the extent of the punishment. Boblit had confessed that it was in fact he who had done the act of killing, but the prosecution withheld this evidence. The court ruled that withholding exculpatory evidence violated due process where the evidence could materially affect matters of guilt or punishment.

Yet “Brady violations” are par for the course. Richard Miles was 19 when he was picked up on charges of murder and attempted murder. He walked out of prison 15 years later after a prison advocacy group, Centurion Ministries, found a police memo that identified the actual offender by name. This information had been withheld from the defence. In the 250 cases of exonerees that Garrett investigated, “in at least 22 cases, it emerged the police had failed to disclose forensic analysis helpful to the defence. In still other cases, it later emerged that informants who had denied receiving any kind of deal had in fact obtained a deal. In still other cases, prosecutors or police had concealed evidence supporting the defendant’s alibi or third-party guilt.” The sorry image of the police and prosecutors as procurers of convictions, and not as enablers of a fair trial, runs through the evidence emerging from the exoneration experience.

Snitch system

The use of informants and jailhouse snitches to secure convictions has been in practice for so long that its origin eludes memory. It has been defended as a "necessary evil", but its reliability now stands challenged. In 2004, the Northwestern University School of Law Centre on Wrongful Convictions released a report entitled "The snitch system: How snitch testimony sent Randy Steidl and other innocent Americans to death row". According to it, from the 1970s when the death penalty was given constitutional endorsement by the Supreme Court and there had been 111 exonerations, 51 (45.9 per cent) involved the testimony of an informant or a snitch. For snitches, as Jim Petro, the former Attorney General of Ohio, writes in a co-authored book False Justice: Eight Myths That Convict The Innocent (2011), the incentives to testify have been consistent over decades: to reduce their sentence or speed up their release from prison. Actual killers snitch to incriminate others. And he quotes Robert Berke, who was a lawyer with the California Attorneys for Criminal Justice: "When you dangle rewards, furloughs, money, their own clothes, stereos, in front of people in overcrowded jails, then you have an unacceptable temptation to commit perjury."

The accused has a right to a lawyer, but that is no guarantor of competence or commitment. The "systemic lack of funding for indigent defence in the United States," Garrett observes, "leads to shoddy representation and miscarriages of justice."

False confessions

False confessions pose a serious threat to the credibility of the criminal justice system. Why would an innocent person admit to a crime he did not commit? This is a fair question, and yet, the Innocence Project reports that about 27 per cent of the DNA exonerees confessed, made incriminating statements, or pleaded guilty. Duress, physical torture, fear of violence, exhaustion, incomprehension about their situation or about the law, and diminished capacity are now known to induce false confessions.

What is striking is the detail that is in these confessions. How did a person who was not involved in the crime know so much about it? Gísli Hannes Guðjónsson is a forensic psychologist in London. It was his expert testimony that formed the basis for reversing the convictions of the Guildford Four – Gerry Cohen, Paul Hill, Patrick Armstrong and Carole Richardson – who were said to have confessed to the Guildford pub bombings. Prof. Guðjónsson worked on the "Guðjónsson suggestibility scale", which tests the susceptibility of individuals to suggestibility during interrogation. Interrogative suggestibility results in false statements that are made not in an attempt to deceive, but to comply with what the person interrogated perceives the investigator wants him to say. Guðjónsson is a co-generator, with James MacKeith, of the term "memory distrust syndrome", in which a person may develop distrust in their memory of events and things, making them vulnerable to external sources to guide their memory. False memories get created, and innocent people may not merely confess to a crime but may provide details and specifics that they could not possibly have known. Garrett calls it "contaminated false confession".

DNA exonerations have established that confessions are often not dependable. Recording confessions, and the process of interrogation that leads to the confession, may provide the means to validate, or question the credibility of, confessions. Guðjónsson was awarded a CBE (Order of the British Empire) in 2011, and the citation refers to his role in establishing the innocence of the Guildford Four and the Birmingham Six – an admission by the British government of fallibility that strains the credibility of the criminal justice system as now

constituted. In another admission of fallibility, a Criminal Cases Review Commission was set up as an independent public body in March 1997 by the Criminal Appeal Act, 1995. The purpose is to "review possible miscarriages of justice in the criminal courts of England, Wales and Ireland", and the vision is "to enhance public confidence in the criminal justice system, to give hope and bring justice to those wrongly convicted, to contribute to reform and improvements in the law".

Alford plea

These errors and faults have made the innocent uncertain of the outcome of their trial, leading to a piquant situation in law. When the Memphis Three – Damien Echols sentenced to death, and Jason Baldwin and Jessie Misskelley Jr to long prison terms – were freed from custody in August 2011, after 18 years of incarceration and a sustained and public campaign, the key to their exit from the prison was the "Alford plea". This plea comes from a 1970 decision of the Supreme Court, North Carolina vs Alford, where the court held that "an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime". That is, a person may plead guilty and bargain for a lesser offence – even while maintaining that he is innocent. As prosecutor Scott Ellington reportedly explained, the Alford plea would protect the state from being sued by the Memphis Three. They would continue to be guilty on record, even as they, and the various campaigns that had over the years proclaimed a miscarriage of justice that had happened on the basis of a confession from Jessie, maintained that they were innocent. Such are the uneasy compromises to which law has been drawn.

Sometimes it is too late. Carlos DeLuna was executed by the state in December 1989. He protested until the very end that he was innocent and it was Carlos Hernandez that they wanted. In 2012, James Liebman from the Columbia Law School and his students released a 430-page report, "Los Tacayos Carlos: Anatomy of a wrongful execution", establishing through investigation and beyond doubt that the State of Texas had executed one Carlos in place of another.

Exoneration through DNA testing has irreversibly altered perceptions about the criminal justice system. Yet, as Barry Sheck says in his recent blog, "Unfortunately, DNA testing is not a panacea for the inadequacies of the criminal justice system because only 5% of serious felony cases have any biological evidence where DNA testing could be used to solve the crime. The other 95% of prosecution turn on much less reliable evidence." He cites the case of Troy Davies, where no DNA evidence was available but substantial evidence came to light subsequent to his trial indicating innocence. He was executed by the State of Georgia last year.

These are narratives of fallibility and innocence.

The Indian experience is replete with these problems – eyewitness misidentification, flawed forensics, police and prosecutorial pursuing of conviction and not justice, false witnesses, dearth of defence lawyers for the indigent, false confessions and miscarriages of justice. The breakdown of the criminal justice system is common knowledge, yet wrongful convictions have not detained us. Instead, it is a preoccupation with better conviction rates that drives policymaking, as the Malimath Committee report illustrates.

The American, and British, acknowledgment of the injustices that the system has wrought, including execution of the innocent, holds lessons that only deep cynicism and a profound disrespect for life and justice will allow us to ignore.

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