

Actual Innocence —case studies of DNA testing freeing the wrongfully convicted in the US

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14 September 2000

Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted, by Barry Scheck, Peter Neufeld and Jim Dwyer. Doubleday, 289 pp., \$24.95.

Barry Scheck and Peter Neufeld have played a key role in developing DNA testing to free wrongly convicted prisoners. They are the founders of the “Innocence Project,” a student clinic at Cardozo Law School at Yeshiva University in New York City, which has worked towards the exposure and overturning of wrongful convictions, mainly through the use of DNA testing.

Actual Innocence, co-authored with *New York Daily News* columnist Jim Dwyer, takes this work forward in an important way. The book presents a very readable and dramatic narrative of 10 of the 37 prisoners, Scheck, Neufeld and the “Innocence Project” have freed from prison and death row across the country. *Actual Innocence* also poses the question of how these wrongful convictions took place and what this says about the legal system that has convicted, jailed and sentenced to death so many innocent people.

Each chapter and story in *Actual Innocence* describes a horrible human tragedy, oftentimes beginning even before the person is wrongly accused and convicted. As each individual gets caught up in the machinery of the criminal justice system, a human life is changed and forever disrupted. The accused is branded as the perpetrator of a heinous crime; he is convicted, ostracized from society, family and friends, and sentenced to a life of punishment in which the simple truth of innocence is brutally transformed into its opposite.

The first wrongful conviction discussed is that of Marion Coakley, a black man born in Beaufort, South Carolina who moved to New York City. He has an IQ in the 70s. He was a day laborer who worked all his life, and he was at a prayer meeting in his neighborhood on the evening of October 13, 1983 when the rape he was charged with took place.

Marion Coakley's case was also significant in bringing the two former Legal Aid lawyers, Scheck and Neufeld, back together, paving the way for the founding of the “Innocence Project”, and highlighting an important problem in developing DNA testing as a tool of forensic science.

Scheck and Peter Neufeld, who had left the practice of law to write and produce a play, were called in on the Coakley case in 1986 because the New York Legal Aid defense attorney who had defended Coakley did not have adequate time to prepare the case, and lost at trial. The Legal Aid defenders called on Scheck and Neufeld, who had worked with Legal Aid in the 1970s, to appeal Coakley's case.

At the time of this case, DNA testing, or the “DNA fingerprint test” as it was known in the 1980s, was just becoming accepted as valid physical evidence in criminal trials. There were problems with all the

forms of physical evidence used in criminal proceedings. Fingerprints were unique, but not always available at crime scenes. Hair was introduced as evidence in a courtroom for the first time in Germany in 1861, but proved very unreliable. Blood typing was generally reliable, but not unique, as it only divides the population into type A, B, AB, O, negative and positive, which therefore includes hundreds of millions in each type.

Dr. Alec Jeffries was the first to start using what was described as the “DNA fingerprint test” in England in the 1980s. The problem was that it took a great deal of biological material to get results with these tests, called RFLP tests (Restriction Fragment Length Polymorphism). This was the problem in Marion Coakley's case. When Scheck and Neufeld had the biological evidence from the rape tested, they consumed all the evidence in the DNA test and did not get any results.

In 1983, however, Kary Mullins, a California biotech lab technician, developed the polymerase chain reaction to replicate and expand any DNA sample, no matter how small. Mullins won the 1993 Nobel Prize in chemistry for this discovery, and forensic DNA testing suddenly became a very powerful investigative tool.

Although the problems with “DNA fingerprint testing” closed off that avenue of proof, the newly reunited team of Scheck and Neufeld were able to free Marion Coakley with the assistance of students from the Cardozo criminal law clinic based on evidence of prosecutorial misconduct and markers of the rapist's blood type, which showed up in the semen from the rape and did not match Marion Coakley's blood type.

Each chapter in *Actual Innocence* depicts a different element of the criminal justice system recognized as responsible for wrongful convictions. The first is mistaken identity by an eyewitness or the victim. The authors report that 84 percent of the wrongful convictions exonerated by DNA testing and investigated by the Innocence Project, resulted, completely or in part, from mistaken eyewitness evidence.

The authors report on the famous 1902 experiment by Professor Von List in Berlin, in which a classroom disruption was witnessed by all the students in a large seminar. When the students were tested about their memories of the staged incident they had just witnessed their recollections were notoriously inaccurate.

The authors cite a comment in the 1932 book, *Convicting the Innocent*, on the longstanding problem of mistaken identifications by eyewitnesses: “Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these [sixty-five] convictions.” Then the authors report how the Supreme Court has systematically dismantled the protections against bias and prosecutorial abuse in the eyewitness identification process, that had

been established in the *Wade, Gilbert and Stovall* cases.

Scheck, Neufeld and Dwyer then describe cases involving prosecutorial abuses of different varieties. There is the “false confession” of Robert Miller, an unemployed heating and air conditioning repairman who said he had a psychic ability to see from the killer's eyes in a dream. He offered to help Oklahoma City police with a murder investigation which resulted in Miller facing the death penalty when his “help” was retooled into his “confession” by the prosecutors. Then there is the use of jail house snitches; white-coat fraud and junk science; and outright prosecutorial abuse.

Rolando Cruz was convicted and sentenced to death twice, based on a dream confession concocted by police and prosecutors. Three prosecutors and four sheriff's investigators from DuPage, Illinois were tried on charges of perjury and obstruction of justice for the Cruz death sentences, but were acquitted of the charges on June 4, 1999.

One significant aspect of prosecutorial power and abuse highlighted in *Actual Innocence* is the subservience of the crime labs that investigate forensic evidence to the prosecutors' office. These labs are unregulated in almost every state. In 1970, the federal Law Enforcement Assistance Administration (LEAA) tested 240 laboratories across the country that provide evidence for criminal prosecutions. This investigation found disturbingly high error rates in the identification and matching of many substances common in criminal prosecutions, including paint, glass, rubber and fibers. The crime labs did their worst work matching hair samples, where the error rate in hair matching tests often approached the 50 percent probability of pure chance.

The authors discuss the West Virginia case of Glen Dale Woodall, a gravedigger from Charleston, West Virginia, who spent nearly half a decade in jail for crimes he didn't commit. In their chapter on white coat fraud, the authors describe how Woodall and many other West Virginians were jailed on the strength of the scientific evidence and testimony of one Fred Zain, a serologist. “He was a god,” one West Virginia prosecutor was quoted saying about Zain. Fred Zain was the state serologist most sought-after by state prosecutors.

At Woodall's insistence, his lawyer commissioned a DNA-PCR test by the pioneer expert in the country, California scientist Dr. Edward Blake. The DNA test proved Woodall was innocent, and Dr. Blake recommended that Scheck and Neufeld be brought in to get Glen Woodall out of jail. It was West Virginia serologist Fred Zain's evidence and testimony that had convicted Woodall.

Woodall filed a civil suit against the state of West Virginia, and the state did a secret investigation to determine its liability in the case. Scheck and Neufeld explain that the state of West Virginia found that “Zain had given evidence in hundreds of serious felony cases, including murder and rape. With help from the American Association of Crime Lab Directors, a prominent group of forensic scientists, the investigator reviewed Zain's testimony and evidence where it still existed, in a representative sampling of thirty-six cases. The findings were breathtaking. For a period of ten years, Fred Zain faked data in every case.”

The book also reports that there has been a two-pronged attack on high-quality legal defense for poor defendants. First, the courts have failed in many cases to discipline even the most egregious examples of incompetent defenses for indigent defendants. Second, Congress has continued to de-fund the centers of excellent post-conviction advocacy across the country.

The authors also discuss the issue of race in the criminal justice system and the death penalty. They condemn the attack on democratic

rights carried out in the passage of 1996 Anti-Terrorism and Death Penalty Reform Act by the Clinton administration and the Republican Congress before the 1996 elections. Scheck, Neufeld and Dwyer describe how this legislation impacts defendants:

“Historically, the relief valve for state prisoners was the federal courts. This was all but shut down by Congress under its 1996 Anti-Terrorism and Death Penalty Reform Act. In its zeal to achieve finality in death-penalty litigation, Congress eviscerated the great writ of federal habeas corpus, the mechanism used for almost 200 years by state prisoners who wanted a federal court to review the justice of their state convictions. The 1996 law gives condemned prisoners six months after their state appeals to ask for federal intervention, and sets a one-year time limit for all other cases. This ‘reform’ legislation also requires federal courts to presume state courts are right about many things that state courts often are wrong about. Everyone agrees that it is a terrible thing for an innocent person to be imprisoned. Far worse, though, would be for a politician to take a moderate line on crime.”

In 1999, the “Innocence Project” analyzed 62 exonerations in the United States. They found that mistaken eyewitnesses were a factor in 84 percent of the wrongful convictions, police misconduct was a factor in 50 percent of the cases, prosecutorial misconduct was a factor in 42 percent, fraudulent or tainted evidence in 33 percent, incompetent legal defenses in 27 percent, false confessions 24 percent, and snitches or informants in 21 percent.

Many reformers and many of the proponents of a moratorium on the death penalty, advocate a few common sense changes to recalibrate the balance of resources between the prosecutors and the legal defenders of the accused. According to this outlook, after a blue ribbon panel studies the matter and a series of more or less cosmetic reforms are adopted, the criminal legal system will be pronounced fine, fair and fit to return to the business of meting out punishment—including the barbaric practice of capital punishment.

However, this conviction and imprisonment of innocents also suggests the need for a more profound analysis of the legal system in America, which incarcerates two million men, women and juveniles in its prisons and jails, the overwhelming majority of whom come from the poorest and most oppressed sections of society. While Scheck, Neufeld and Dwyer present a powerful indictment of the current criminal justice system in specific cases and in its general procedures, they don't probe these more fundamental questions.

They confine their criticism to the question of governmental accountability, concluding in their preface, “Some six thousand people have been sent to death row since 1976. As of this writing, eighty of them have been cleared through a variety of means, including DNA tests.... 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. The moment has come to do so.”



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