
Book Review

Indicting America's 'Justice' System

by Marianna Wertz

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

by Barry Scheck, Peter Neufeld and Jim Dwyer
New York: Doubleday, 2000
298 pages, hardbound, \$24.95

This book has already changed history. The stories recounted in *Actual Innocence*, documenting the incarceration of dozens of innocent Americans, many of them on death row, has figured importantly in the near-Damascus Road conversions going on now across America by rock-ribbed conservative Republicans: Illinois Gov. George Ryan (R), who declared an execution moratorium in his state on Jan. 31, after 13 people had been freed from death row for actual innocence; Rev. Pat Robertson, who recently called for a national moratorium on executions; the majority of the New Hampshire Legislature, which voted May 18 to end capital punishment; and columnist George Will, who, in an April 6 column, said, of *Actual Innocence*, "You will not soon read a more frightening book." The book, Will said, "should change the argument about capital punishment and other aspects of the criminal justice system. Conservatives, especially, should draw this lesson from the book: Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order."

These men, and many others like them across the country, have been affected either by this book, or by the work of its authors, the founders of The Innocence Project at the Benjamin N. Cardozo School of Law in New York, which has helped to exonerate 37 people and taken up the cases of hundreds more, based on the new science of DNA testing.

What makes this book different from many recent works on the same subject by critics of the justice system, is that it is irrefutable. Its argument is based not on an appeal to the reader's emotions, but on the stories of dozens of men proven innocent, sometimes decades after being incarcerated, by the "biochemical videotape" that only the evidence of DNA (the helix of genetic material known as deoxyribonucleic acid, unique to every human being) can provide. And, because these stories are real, *Actual Innocence* appeals to the pro-

found sense of moral indignation that any thinking human being must feel when confronted with such injustices, particularly in a nation which prides itself on its human rights record.

Sharp Sense of Irony

Actual Innocence also appeals to the funny bone. The authors have a sharp sense of the ironic, and wield it with precision at those who would and do cheat, lie, and steal their way through wrongful prosecutions and incarcerations.

Take, for instance, the fact that, even after definitive exonerations, authorities rarely try to find the real criminal, much less examine what went wrong. "Among some prosecutors, the belief that even discredited convictions must be protected from challenge has forced them to take bizarre positions. They cling to the original verdicts by contriving new theories to explain why the semen of another man, not the convicted party, was discovered in the rape kit. Perhaps, they say, two men participated in the rape, or three, even though the victim only noticed one man. The foreign semen is explained by these new parties to the crime, first mentioned years after the fact: the unindicted co-ejaculator."

This is the case for Virginia prisoner Earl Washington, Jr., the mentally ill man who is rotting away in prison even after a DNA test proved that he had not committed the 1982 rape for which he was convicted. Since the test didn't preclude him from having killed the victim after she had intercourse with someone else (though the victim, before dying, said only one man was involved), then-Gov. Doug Wilder (D) commuted Washington's sentence from death to life in prison. But advances in DNA technology made since the original 1994 test are now such, that a new DNA test could exonerate Washington of the murder charges as well.

The authors' ironic bite is evident also in respect to the allegedly fool-proof "eyewitness accounts"—which have convinced thousands of jurors of defendants' culpability. In fact, they say, the eyewitness account is perhaps the *least* reliable type of evidence. They recount the history-making 1902 "von List" demonstration in Germany. Professor von List, in the first scientific test of eyewitness accuracy, staged a fake shooting in his class, then assigned his startled students to write an "eyewitness" account of what they had seen. "These healthy young German university students not only made history," say the authors, "they also made it up!"

The student with the best recollection of the event made errors on about 26% of the significant details. Others were wrong in their account of 80% of what they had seen.

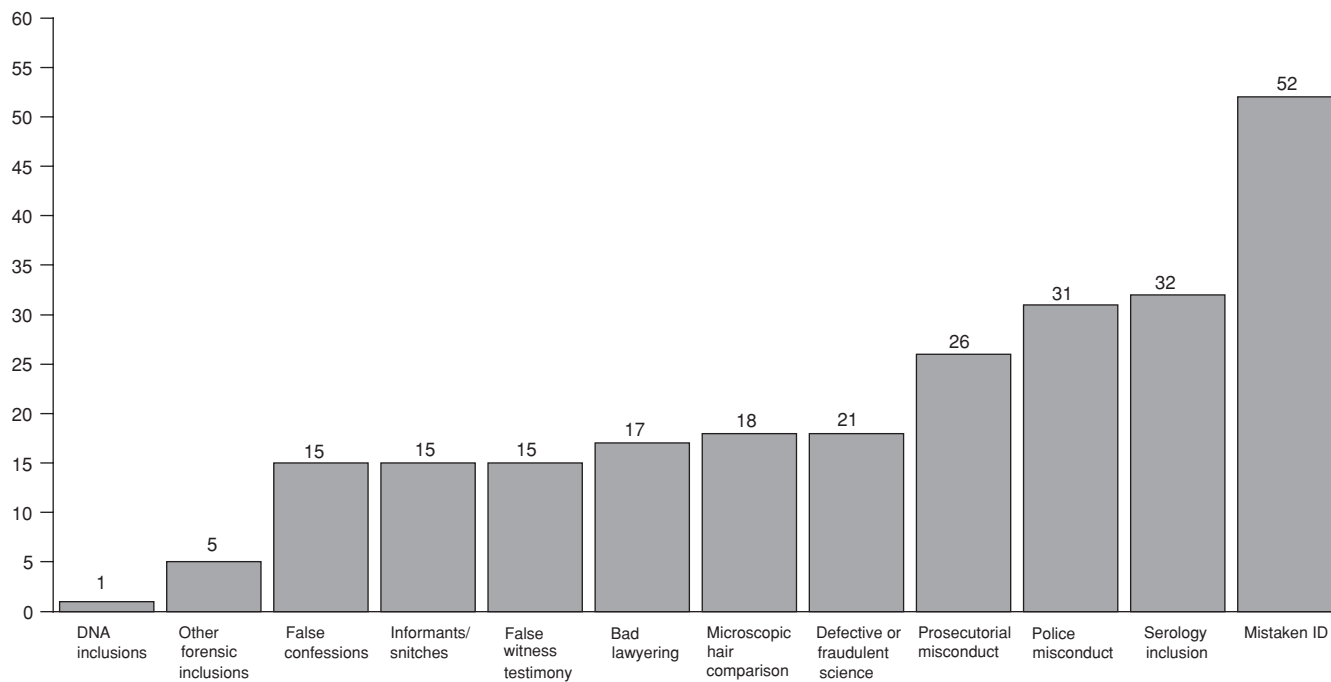
The authors are civil rights attorneys Barry Scheck and Peter Neufeld, who run The Innocence Project, and Pulitzer Prize-winning columnist Jim Dwyer, a columnist for the *New York Daily News*, who was among the first journalists in the country to report the startling revelations of innocence which the application of the science of DNA testing has brought to the world since 1983.

In that year, Kary Mullis, described in the book as "a bored genius" who worked for a Bay Area biotechnology

FIGURE 1

Factors Leading to Wrongful Convictions in 62 U.S. Cases

(numbers of cases)



Source: *Actual Innocence*, by Barry Scheck, Peter Neufeld, and Jim Dwyer.

“Serology Inclusion” refers to ABO and protein blood typing of semen, saliva, and bloodstains. “Other Forensic Inclusions” refers to the comparisons of fingerprints, fibers, and other physical evidence. The DNA inclusion comes from the Timothy Durham case, discussed in Chapter Seven.

company, while driving along a curling mountain road, invented the polymerase chain reaction, or PCR, in a “series of acrobatic mental leaps.” As *Actual Innocence* describes in detail, PCR makes it possible to test fragments of semen, hair, blood, or any other bodily tissue left behind at a crime scene, which will identify the unique person who left it there.

The chapter titles make clear the kinds of injustices which are routinely perpetrated in America’s so-called “justice” system: Seeing Things (eyewitness accounts), False Confessions, White Coat Fraud, Snitch, Junk Science, Broken Oaths, Sleeping Lawyers, and Race.

Bush’s Texas: No Innocent People In My State

Some of the more brutal injustices recounted here are in Virginia and George W. Bush’s Texas, the states which lead the nation in executions and whose governors adamantly deny that an innocent could be executed in *their* state.

GOP Presidential candidate George W. Bush’s stance was recently called into question by a most unlikely source—his own Illinois campaign director, Gov. George Ryan. On May 11, Ryan declared that he does not expect “an execution will ever happen again” in Illinois during his tenure, and that he would consider supporting the abolition of capital punish-

ment, if it were recommended by the special panel he appointed to review Illinois’ death penalty system.

Asked about his relationship to Bush, who, as Texas Governor, has been responsible for the execution of 124 men and women since 1995—an American record—Ryan said he discussed the death penalty with Bush recently. “But George told me he’s confident of the system he has in place in Texas and that it works well,” Ryan said. “Now, I thought our system was OK, too,” he said. “But I never spent a lot of time looking at it. Maybe [students and journalists—who uncovered the 13 innocent men on Illinois’ Death Row] can find a case that will make him think twice about what he is doing,” said Ryan.

Actual Innocence gives a trenchant account of one of G.W. Bush’s most notorious experiences with “actual innocence.” After Kevin Byrd spent 12 years in a Texas prison, convicted of a rape by tainted victim testimony, he was exonerated by DNA testing. “Then came the amazing performance of George W. Bush,” the authors write.

Byrd’s attorney was joined by the district attorney in petitioning for a gubernatorial pardon of Byrd, based on the grounds of actual innocence. The judge and sheriff sent similar pleas. The Board of Pardons and Paroles unanimously recommended that Governor Bush pardon Byrd.

Then, “Bush denied the pardon and suggested the whole matter belonged in court. The Governor’s spokeswoman pointed out that the victim still believed Byrd was her attacker. The Bush political calculus was clear: Duck not only the tough calls but any that might carry the slightest risk of having a crime victim get on TV and call you an accessory to rape.” Instead, the national press started covering the case, and Bush reversed himself and signed the pardon.

Up to One-Third of Prisoners Innocent

William Sessions, the director of the FBI under Presidents Reagan and Ford, recently told the newly formed National Committee to Prevent Wrongful Executions (of which he is a member), that he found one-third of Federal prisoners tested while he was FBI director to be innocent! “When I came to the FBI, we had no capacity to use and review DNA evidence, but by December of 1988, we had a program that became the national model. Out of the first 100 cases where we tested prisoners, 33 people who had been identified by witnesses and by serology [blood-type identification] as being the criminals involved, were exonerated by DNA testing. There are 3,500 people on death row and many have been there for years, long before DNA evidence was available. As a prosecutor and a judge and an FBI director, I want to be sure we’ve got the right people. And now we can be.”

While this appears to be a shocking revelation — that one-third of the individuals in Federal prison were found to be innocent, once tested for DNA — it would not shock anyone who read *Actual Innocence*. In fact, this author would be shocked if the figure weren’t even higher.

Consider that what motivated Governor Ryan to declare a moratorium on executions, was that more people had been released from death row for innocence (13), than had been executed since the death penalty was restored in 1976 (12). Also consider that, while more than 620 people have been executed in the United States since the reinstatement of capital punishment in 1976, eighty-seven people have been found innocent and released from death row. Thus, for every seven executions, one person has been wrongly convicted.

And that is death row, where presumably a jury must really be convinced of guilt before convicting a man or woman of a capital crime, and, where juries also impose the sentence, send them to their deaths. What about your run-of-the-mill rape, burglary, or robbery trial?

This is not to deny that crime exists, or that it is not bad. But it is to make the point, which *Actual Innocence* profoundly does, that any society which so casually allows hundreds, if not thousands, of innocent men and women to be incarcerated, based on the conniving of prosecuting attorneys, judges, and police, will rot from the *inside* faster than any amount of crime will destroy it from without.

Remedies

On Feb. 11, Sen. Patrick Leahy (D-Vt.) introduced the Innocence Protection Act of 2000, the first Federal bill to

address the problems in the administration of capital punishment. At a press conference where he was joined by Sen. Russ Feingold (D-Wisc.) and others, Leahy said, “Whether you support the death penalty or not, executing an innocent person is abhorrent. . . . We have a moral duty to make the criminal justice system accurate and fair, especially when innocent lives are at stake.”

The Innocence Protection Act of 2000 is a comprehensive package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Most urgently, the bill would 1) ensure that convicted offenders are afforded an opportunity to prove their innocence through DNA testing; 2) help states to provide competent legal services to the accused at every stage of a death-penalty prosecution; 3) enable those who can prove their innocence to recover some measure of compensation for their unjust incarceration; and 4) provide the public with more reliable and detailed information regarding the administration of the nation’s capital punishment laws.

Actual Innocence makes clear, however, that such legislation is only the minimal necessary to ensure that justice prevails. Because, while the technology for linking DNA evidence to crimes is becoming faster and cheaper every day, it requires *political will* to make sure it is used. According to Scheck et al., “hundreds of thousands of rape kits (containing DNA evidence) from unsolved cases are thrown out or sit in dead storage for years, with no effort made by the authorities to run DNA tests.”

Until recently, only New York and Illinois permitted DNA tests after conviction, and these two states have the most exonerations. Washington State recently enacted similar legislation. In most states, a convicted prisoner has no right to obtain tests that might prove innocence. “The failure to take full advantage of this technology, both for solving crimes and freeing the innocent, is a national scandal,” the authors charge.

They conclude with a “short list of reforms to protect the innocent.” The implementation of these reforms would go a long way to preventing the kinds of atrocities we are seeing today, in such instances as the Los Angeles Rampart Division police scandal.

Actual Innocence should be must reading for every level of the American justice system, and an informed citizenry should demand that these reforms be implemented, now. While DNA testing can exonerate the innocent today, in a few years, the authors point out, the era of DNA exonerations will come to an end: “The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been used widely since the early 1990s, clearing thousands of innocent suspects before trial. Yet blameless people will remain in prison, stranded because their cases don’t involve biological evidence. The debt of justice will remain unpaid to innocent people accused of crimes in which the criminal did not ejaculate, spit, bleed, or shed tissue.”

Actual Innocence demands *actual justice*, and not just that which is forced upon a corrupt judicial system by the potent weapon of DNA testing.