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# Innocent and Found Guilty: In an Imperfect Justice System, Responsiveness and Disclosure Can Help Prevent Wrongful Convictions

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# Innocent and Found Guilty

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*By Professor Leonard Sosnov*

When individuals charged with crimes are factually innocent, they usually get the verdict they deserve—not guilty. For others, there are guilty verdicts, long-term incarceration, and bleak prospects for vindication. Why does the system produce such results in these cases? This is partly because the very nature of the system is imperfect. There are no video cameras on when the crime took place, or physical evidence to test for DNA to tell us conclusively who the perpetrator is. Thus, the jury must sort out the testimony of witnesses who may be lying or sincerely mistaken. Other variables come into play, including the relative skills of the attorneys for the prosecution and the defense. It is no wonder then, that guilty persons are sometimes found not guilty, and innocent individuals sometimes convicted. There are, however, other factors that adversely affect the innocent, which are not natural by-products of an imperfect justice system.

One problem is the tunnel vision some police and prosecutors possess once a crime is “solved” with an arrest. Any investigation before police concluded that the defendant was the perpetrator, even when fairly conducted, usually ceases once an arrest is made. The resources of the prosecutor and police are then directed toward building a case for conviction at trial. Not infrequently, this means ignoring leads and evidence, which may show that someone else did the crime.

For example, often a crime is deemed “solved” when a crime victim, attacked by a stranger, identifies a picture of an individual from an array of photographs. The identified person is arrested as a result. In some cases, the victim (or eyewitness) attends a post-arrest lineup, in which police include the defendant. On occasion, the victim positively identifies an individual other than the defendant. Countless times, I have seen the same thing happen: The individual positively identified is not investigated, the identification is treated by authorities as a “mistake,” and the prosecution proceeds.

Because defense counsel is present at the lineup, or otherwise informed of the result, the jury might be apprised that someone other than the defendant was identified as the perpetrator. In other situations, however, defense counsel is kept in the dark about evidence that might exculpate the client. The United States Supreme Court has held that a prosecutor’s duty is to seek justice, and therefore the Due Process Clause requires disclosure of any material evidence tending to show the defendant is innocent or which discredits the state’s witnesses. Because this is a self-policing obligation, overzealous police officers or prosecutors can bury significant evidence they are duty-bound to disclose.

Once the innocent defendant is convicted, exoneration becomes much more difficult. The United States Supreme Court has held that, unlike some trial errors, a claim of innocence does not even raise a constitutional question that

can be litigated in the federal courts. Reconsideration of a case is frequently unattainable in state courts as well, once the jury “has spoken”—no matter how uninformed or misled because of lawyer incompetence, prosecutorial misconduct, or other factors. Once, in a case where I had convincing new evidence of the defendant’s innocence, the prosecutor rejected it, telling me, “We have to respect the sanctity of the verdict.” Fortunately, in a few of these cases, relief is possible because a judge is concerned with justice, rather than finality.

In a small percentage of cases, DNA testing can scientifically prove the perpetrator’s identity because physical evidence such as sweat, blood, saliva, or another bodily secretion may be tested. It is of vital importance that this evidence be preserved and made available for testing. While the law is

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generally improving, many states still have no provisions guaranteeing the preservation of this evidence for testing or re-testing as scientific methods advance. Even where the evidence is available, many states have statutes of limitations on testing requests, or difficult evidentiary hurdles.

Post-conviction DNA testing, it is hoped, will become increasingly available. Both commentators and the courts have recognized DNA as nothing less than a truth machine that ensures justice. With the increasing availability of large DNA data banks, DNA testing has the potential not only to exonerate an innocent, incarcerated defendant, but also to lead to the arrest and conviction of the real perpetrator who has been free to commit more crimes. Additionally, if test results confirm the defendant’s guilt, society is served because any question of innocence has been put to rest.

Our imperfect system needs to be more responsive to the possibility of error both before and after conviction. “Justice” system is a misnomer when there is not enough attention paid to fairly disclosing and analyzing *all* evidence in an effort to determine the truth. ■

Professor Sosnov teaches and writes in the areas of Criminal Law, Criminal Procedure, and Evidence. He has extensive litigation experience, including briefing and arguing two cases before the United States Supreme Court.