

# **Race** and **Justice**

**Wrongful  
Convictions  
of  
African  
American  
Men**

**Marvin D. Free, Jr., and Mitch Ruesink**

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Marvin D. Free, Jr.  
Mitch Ruesink



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# **RACE AND JUSTICE**

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# Preface

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It is inevitable that even in the optimal situation some innocent individuals will be declared guilty in a court of law. Until recently, however, the assumption that held sway was that wrongful convictions were both infrequent and the result of the failure of individual actors in the criminal justice system to carry out their assigned responsibilities properly. Few attributed this failure to properties inherent in the criminal justice system. As the science of DNA progressed, however, and as numerous miscarriages of justice surfaced, those previous assumptions were called into question. Psychological studies of eyewitness accounts further raised issues regarding the infallibility of such accounts. As cases of wrongful convictions began to accumulate and the mass media started publicizing these cases, interest in wrongful convictions accelerated. Yet, the data on wrongful convictions remain largely fragmented and incomplete. Although some flagrant miscarriages of justice (e.g., the Tulia, Texas, drug bust and the abuse of prosecutorial power in Dallas, Texas) receive considerable attention from the media, numerous other cases of wrongful conviction receive meager exposure. Moreover, the current preoccupation of the media with economic and global issues makes it doubtful that this topic will dominate the news for the foreseeable future.

Although numerous books on wrongful convictions exist, none has exclusively focused on the wrongful conviction of African American men. By focusing on this racial minority, our intention is not to dismiss the impact that wrongful convictions have had on other marginalized groups in society. Rather, the exclusive focus on a single racial minority is meant to provide the reader with an appreciation of a group that is disproportionately impacted by the criminal justice system. Whether one analyzes arrest, conviction, or incarceration data, the overrepresentation of African Amer-

icans becomes immediately apparent. Numerically, the bulk of those found in these statistics are male rather than female, although both genders are disproportionately found in criminal justice statistics. Since the number of known wrongful conviction cases is substantially larger for the male African American population, this study limits its investigation to African American men.

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# 1

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## Wrongful Convictions in the United States

It is better that ten guilty escape than one innocent suffer.

—English jurist Sir William Blackstone (1723–1780)

It is hard to envision a criminal justice system that never produces erroneous convictions, yet for many years few questioned the US criminal justice system. When a wrongful conviction was detected, it was typically attributed to a failure of some of the actors within the system to carry out their assigned responsibilities correctly. After all, it was reasoned, because defendants are presumed to be innocent until proven guilty, the system was more inclined to release guilty individuals than to convict innocent ones. This reasoning, however, ignores some very important facts. First, public defenders frequently believe that their clients are guilty, if not of this crime then of some other crime (Blumberg 1967; McIntyre 1987). Second, prosecutors share this view of the defendant's guilt as do many jurors (Christianson 2004). Further complicating the problem is the financial inability of many defendants to afford adequate legal representation. Moreover, many defendants are not only destitute but disproportionately drawn from racial and ethnic minorities, because they frequently inhabit the areas of the city in which police surveillance is most heavily concentrated. To the extent that the dual stigma of poverty and minority status contributes to the stereotypic perception that they are criminals, receiving a verdict of not guilty becomes more problematic. And because many wrongfully convicted individuals have prior criminal records (whether justified or not), the presumption of innocence becomes more tenuous. Thus, wrongful convictions are a reality in the US criminal justice system. What remains open to debate is the relative frequency with which these miscarriages of justice occur.

The chapter begins with a succinct review of the study of wrongful convictions in the United States. This is followed by a discussion of the estimated prevalence and incidence of wrongful convictions as well as a critique of these estimates. The chapter then examines factors frequently attributed to wrongful convictions and the effect of race on the conviction of innocent persons. A discussion of the focus and scope of the study is found at the end of Chapter 1.

### **A Selective Overview of the Study of Wrongful Convictions**

Empirical investigations of wrongful convictions in the United States can be traced back to 1932, when Edwin Borchard published *Convicting the Innocent: Sixty-five Actual Errors of Criminal Justice*. Since that time other books with similar themes followed, including *Court of Last Resort* (Gardner 1952), *Not Guilty* (Frank and Frank 1957), *The Innocents* (Radin 1964), and *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (Brandon and Davies 1973). What Richard Leo (2005, 204) describes as “the beginning of the modern era of the study of wrongful conviction[s]” began in 1987 with Hugo Bedau and Michael Radelet’s seminal article in the *Stanford Law Review*. In “Miscarriages of Justice in Potentially Capital Cases,” Bedau and Radelet provide evidence that the problem of wrongful conviction is more prevalent than previously thought and raise the specter that wrongfully convicted individuals have been executed. They document at least 350 wrongful convictions that occurred in capital trials in the United States from 1900 to 1985. Although Stephen Markman and Paul Cassell (1988) have been critical of their findings, the sheer volume of erroneous convictions suggests that the problem is potentially much more serious than previously envisioned.

Interest in wrongful convictions was further piqued as a result of DNA testing. In 1989 Gary Dotson’s 1979 rape conviction was overturned after a DNA sample absolved him of any wrongdoing. His case represents the first time that a convicted individual had been exonerated on the basis of DNA evidence (Gross et al. 2005). More cases of wrongful conviction were soon forthcoming. An early study by the United States Department of Justice (1996) identified twenty-eight cases in which convicted individuals were exonerated through DNA evidence. According to the Innocence Project (2011), the number of DNA exonerations for the United States currently stands at 267.

In addition to DNA testing, the problem of the wrongful conviction of innocents received substantial press coverage when in 2000 the governor

of the state of Illinois imposed a moratorium on executions, given the increasing number of wrongful convictions being discovered at that time (Huff 2002). At the time of the moratorium more death row inmates had been exonerated than had been executed since capital punishment was reinstated in Illinois during the 1970s (Leo 2005). Moreover, according to the Center on Wrongful Convictions (2009a),

In the quarter century between restoration of the Illinois death penalty and Governor George Ryan's blanket clemency order, 298 men and women were sentenced to death in Illinois. Of those, 18 have been exonerated—a rate of 6%, the highest exoneration rate of the 38 states with death penalties on their books.<sup>1</sup>

Innocence projects have furthered our understanding of the significance of the problem of wrongful convictions, although the data are fragmented and limited in scope. The earliest innocence project was initiated by Barry Scheck and Peter Neufeld in 1992 at Yeshiva University's Benjamin N. Cardozo School of Law. According to their website, "The project is a national litigation and public policy organization dedicated to exonerating people through DNA testing and reforming the criminal justice system to prevent future injustice" (Innocence Project 2009b). The Center on Wrongful Convictions at Northwestern University's School of Law also boasts a multifunctional innocence program. Structured around three components, the Center on Wrongful Convictions provides not only legal representation but research and community service to raise public awareness and to promote reform within the criminal justice system (Center on Wrongful Convictions 2009b). Today approximately forty law schools in the United States have programs that focus on the exoneration of innocent individuals (Zalman 2006).

Arguably, the most extensive body of information on wrongful convictions is available at Hans Sherrer's Forejustice (2011) website. With an international list of over three thousand wrongfully convicted individuals, this database represents the largest enumeration of wrongful convictions. The website also provides the user with a link to *Justice Denied*, a magazine devoted exclusively to those who have been wrongfully convicted. Printed at least four times annually, *Justice Denied* is published by the Justice Institute, a nonprofit organization in Seattle, Washington.

A steady stream of recent books has further stimulated interest in the problem of the conviction of innocents. For example, *Presumed Guilty: When Innocent People Are Wrongly Convicted*, by Martin Yant, was published in 1991. Michael Radelet, Hugo Bedau, and Constance Putnam in 1992 documented over four hundred wrongful convictions in potentially

capital cases. Four years later C. Ronald Huff, Arye Rattner, and Edward Sagarin published *Convicted but Innocent: Wrongful Conviction and Public Policy*, which further highlighted the problem of failed justice. Innocence Project founders Barry Scheck and Peter Neufeld (along with Jim Dwyer) published *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* in 2000. A collection of readings appeared in 2001. Edited by Sandra Westervelt and John Humphrey, *Wrongly Convicted: Perspectives on Failed Justice* examined the causes of wrongful convictions and the demographic characteristics of those wrongly convicted. Additionally, Westervelt and Humphrey included case studies and a section that proposed ways to ameliorate the situation. Some other notable books on wrongful convictions include Stanley Cohen's (2003) *The Wrong Men: America's Epidemic of Wrongful Death Row Convictions* and Scott Christianson's (2004) *Innocent: Inside Wrongful Conviction Cases*.

### **Estimating the Prevalence and Incidence of Wrongful Convictions**

Determining the frequency and number of cases in which individuals have been wrongly convicted is problematic at best. Because investigations of wrongful convictions in the United States typically concentrate on the most serious offenses, given the potential for severe sanctions (including the possibility of death in capital-eligible cases), less serious cases go largely undetected. To the extent that these less serious crimes may result in suspended sentences or probation, the wrongly convicted defendant may lack the incentive to pursue a legal remedy. The defendant's limited financial resources may further result in an acceptance of an erroneous guilty verdict (Gross et al. 2005). And because wrongfully convicted defendants may possess a prior criminal record, there is often little outcry from the public. Nor can an estimate of wrongful convictions rely on statistics derived from successful appeals: innocence alone does not guarantee a successful appeal and a successful appeal does not necessarily demonstrate *factual innocence*, given that convictions may be overturned on the basis of procedural errors alone. Thus, estimates of wrongful convictions that rely on known cases of wrongful conviction will tend to understate the scope of the problem.

To avoid these pitfalls some researchers have derived their estimates by surveying individuals who work within the criminal justice system. These estimates, however, are based on perceptions that are of unknown

validity. There are few prosecutors, for example, willing to acknowledge that they have convicted innocent persons. It is therefore reasonable to assume that criminal justice personnel are conservative in their estimates of the number of cases of failed justice. With these caveats in mind, a brief review of research in this area follows.

The number of known wrongful convictions varies considerably from study to study. Many researchers have focused exclusively on wrongful capital convictions. While these are the most egregious miscarriages of justice, death sentences comprise only a miniscule amount of all felony sentences.<sup>2</sup> As previously noted, Bedau and Radelet in 1987 identified 350 capital cases involving erroneous convictions. Their study, however, examined only a fraction of the 7,000-plus executions that occurred during the twentieth century. This figure was revised to at least 416 cases involving wrongful conviction in 1992 (Radelet et al.). Combining data from DNA exonerations, a sample of capital sentences, and information obtained from the Innocence Project, D. Michael Risinger (2007) estimates that between 3.3 percent and 5 percent of all capital rape-murder convictions in the 1980s involved innocent defendants. In an examination that includes capital cases from 1970 to 1992, William Holmes (2001) suggests that more than 106 individuals were erroneously convicted of capital crimes in the United States. Using more recent data, Samuel Gross and colleagues (2005) uncovered 340 convictions of innocents from 1989 through 2003.

Other researchers have concentrated on exonerations that resulted from DNA testing. As noted previously, the earliest of this research dates back to the 1996 Department of Justice study, which analyzed 28 wrongful convictions overturned by DNA evidence. Four years later, Scheck, Neufeld, and Dwyer (2000) documented 62 cases in which convicted individuals were later found to be innocent through DNA testing. Today there are 267 cases in which DNA evidence has culminated in the exoneration of convicted innocents (Innocence Project 2011).

Surveys of criminal justice professionals typically disclose a small percentage of cases that are thought to have resulted in the wrongful conviction of an innocent person. In *Convicted but Innocent: Wrongful Conviction and Public Policy*, Huff and colleagues (1996) report on the results of a questionnaire mailed to Ohio criminal justice personnel (judges, prosecutors, public defenders, sheriffs, and chiefs of police) and state attorneys general. Of those who responded, 72 percent believed that wrongful convictions constituted less than 1 percent of all criminal cases in the United States. An additional 20 percent of those surveyed felt that innocent individuals had been wrongly convicted 6 to 10 percent of the time. A more recent survey of judges, defense attorneys, prosecutors, and police from

Ohio suggests similar perceptions (Ramsey 2007). Inquiring about the frequency of system errors that result in wrongful conviction, Robert Ramsey found that his respondents believed that wrongful convictions occur at a rate of 0.5 to 1 percent in felony cases in their own jurisdictions and at a slightly higher rate (1 to 3 percent) for the United States as a whole. A replication of the Ohio survey using criminal justice personnel in Michigan revealed almost identical estimates (Zalman, Smith, and Kiger 2008). Respondents estimated a wrongful conviction rate of less than 0.5 percent in their own jurisdictions and a wrongful conviction rate of 1 to 3 percent for the country overall, although defense lawyers perceived more wrongful convictions than judges, prosecutors, and police officials. While these estimates suggest the perception that relatively few cases result in wrongful conviction, even if only 0.5 percent of all cases culminate in a wrongful conviction, in a given year there will be approximately five thousand wrongful felony convictions.

### **Criminal Justice System Factors Associated with the Conviction of Innocents**

Although wrongful convictions are commonly the result of the coalescence of multiple factors, the most frequently cited contributor to false convictions is *witness error*. Since Edwin Borchard's observation in 1932 that witness error was present in over half of his wrongful convictions, researchers have found that witness error is a prominent factor in the conviction of innocents. According to the Innocence Project (2009c), witness error is a factor in over three-fourths of DNA exonerations. Nor are individuals employed by the criminal justice system unaware of this problem. Witness error (primarily witness misidentification) was perceived to be the number one reason for wrongful conviction by 78.6 percent of the criminal justice personnel surveyed in a recent study (Huff et al. 1996, 67). While most witness error is not deliberate (Huff et al. 1996),<sup>3</sup> a number of factors can contribute to misidentification. As Mitch Ruesink and Marvin Free (2005, 4–5) note:

Psychological factors, including exposure time, amount of light, distance from observer, level of violence, and post-event factors (e.g., eyewitnesses given leading information) can influence the perceptions of eyewitnesses. Misidentification is also more likely when the observer and the observed are of different races. Empirical research demonstrates that cross-racial identifications are most problematic when white eyewitnesses are attempting to identify African American subjects (Rutledge

2001). Systemic factors associated with misidentification include lineups that contain only one person who looks like the alleged perpetrator and lineups in which the suspect is of a different racial group than others in the lineup. Finally, societal and cultural factors such as personal prejudice, expectations based on past experience, and stereotypes may affect what we “see.”

*Police and prosecutorial misconduct* are present in a number of the known wrongful conviction cases as well. A study of DNA exonerations by the Innocence Project disclosed the presence of police misconduct in half of their cases. Similarly, prosecutorial misconduct was present in 42 percent of the wrongful convictions (Scheck et al. 2000, 246). Moreover, a recent national examination of the judicial system found that prosecutorial misconduct led to charge dismissals, conviction reversals, or reduced sentences in over two thousand cases. Yet a number of questionable prosecutorial practices did not result in any action being taken. According to Steve Weinberg (2003a), “In thousands more cases, judges labeled prosecutorial behavior inappropriate, but allowed the trial to continue or upheld convictions using a doctrine called ‘harmless error.’”

The organizational culture of the police and district attorney’s office can produce a climate in which the probability of wrongful convictions is enhanced if expedience and winning at all costs is emphasized. Perhaps nowhere was this more apparent than in the Dallas County District Attorney’s Office (DCDAO), where prosecutors are alleged to have stated, “Anyone can convict a guilty man; it takes a real prosecutor to convict an innocent one” (cited in Huff et al. 1996, 43). This climate of permissiveness has not gone unnoticed. Since Texas began allowing postconviction DNA testing in 2001, Dallas County has had the most exonerations of any county in the United States. Consequently, a conviction integrity unit has been established to review old conviction cases for prosecutorial misconduct, and District Attorney Craig Watkins, an African American, has been hired to oversee the process. Moreover, in 2008 CBS’s *60 Minutes* featured a story on the DCDAO; and in 2009 Investigation Discovery, a sister station to the Discovery Channel, televised six episodes of *Dallas DNA*, which examined the convict integrity unit of the DCDAO and DNA exonerations in Dallas County (Barta 2008; Emily 2009).

Police and prosecutorial misconduct can manifest itself in a myriad of ways. Police, for example, may “coach” the witness during the lineup; use unscrupulous methods (e.g., brutality, threat, force, or deceit) to obtain a confession; “plant” evidence; mishandle physical evidence; or threaten potential witnesses for the suspect. Prosecutorial misconduct may involve improper behavior during the grand jury proceedings; dismissal of poten-



tial jurors because of their race, ethnicity, or gender; harassment or bias toward the defendant or defense attorney; use of known false or misleading evidence; suppression of exculpatory evidence; withholding information that the witness testifying against the accused was offered immunity (or other rewards) for testifying; and use of improper closing arguments (Gershman 1991; Huff et al. 1996; Weinberg 2003a). Other examples of prosecutorial misconduct include the use of inappropriate or inflammatory comments during trial; the mischaracterization of the facts or evidence of the case; mishandling the evidence; and “threatening, badgering, or tampering with witnesses” (see Davis 2007, Chapter 7, for a more complete discussion). Additionally, the likelihood of a wrongful conviction is enhanced when the police and prosecutors fail to adequately investigate other possible perpetrators of the crime and ignore evidence that fails to support their views (Humphrey and Westervelt 2001).

*False confessions* represent another factor that is associated with the conviction of innocents. Duress, coercion, intoxication, diminished capacity, mental impairment, a misunderstanding of the law, fear of violence by the police, actual harm by the police, the threat of a harsh sentence if a confession is not given, and a misunderstanding of the situation have all been found to be associated with the admission of guilt by an innocent. The extent to which false confessions contribute to wrongful convictions varies in the research. The Innocence Project (2009d) reports that false confessions (in the form of an incriminating statement, confession of guilt, or a guilty plea) are a factor in one-fourth of all DNA exonerations. On the other hand, a 2003 report examining forty-two wrongful murder convictions in Illinois since 1970 noted that 59.5 percent of the convictions “rested in whole or part on false confessions” (Warden et al. 2003).

The *use of informants/snitches* is another leading contributor to wrongful convictions. In over 15 percent of all DNA exonerations, testimony from informants or jailhouse snitches was a factor in the erroneous conviction (Innocence Project 2009e). In many of these cases the jury was unaware that the informant/snitch had been paid to testify against the defendant or had been released from prison in exchange for the testimony and therefore had an incentive to lie. The Center on Wrongful Convictions suggests that the problem of using testimony from snitches is even more acute. An examination of 111 death row exonerations since the reinstatement of capital punishment in the 1970s revealed that 45.9 percent of the wrongful convictions were the result “in whole or part on the testimony of witnesses with incentives to lie—in the vernacular, snitches” (Warden 2004, 3), thus making the testimony of snitches the main cause of conviction in known wrongful conviction capital cases.



Moreover, racial disparity in drug enforcement may be exacerbated by the use of police informants in minority communities. According to Alexandra Natapoff (2009), a law professor at Loyola University in Los Angeles and expert on criminal snitching, because the police focus attention on the communities where their informants reside, high-crime urban communities, which are typically overrepresented by people of color, tend to come under closer scrutiny than their more affluent (and more white) suburban counterparts.<sup>4</sup> And because police informants commonly have an incentive to lie, they are often unreliable sources of information. The overexposure of urban minority inhabitants means that “false accusations, mistaken warrants, erroneous raids, and wrongful convictions associated with snitches will be more frequent in communities in which the practice is prevalent” (113).

*Ineffective defense counsel* represents yet another possible factor contributing to the conviction of innocents. Again, research is inconclusive regarding the extent to which this problem is responsible for wrongful convictions. Whereas ineffective defense counsel contributed to only 2.8 percent of the wrongful capital convictions examined by Bedau and Radelet in 1987, it was present in 27 percent of DNA exonerations (Scheck et al. 2000, 246). Ineffective defense counsel can be influenced by a number of factors, including insufficient funding, lack of mechanisms for monitoring the quality of legal representation provided to the defendant, an unmotivated defense counsel, the presumption of guilt that pervades the criminal justice system, and the difficulty of proving the presence of ineffective counsel on appeal (Bernhard 2001).<sup>5</sup>

*Unvalidated or improper forensic science* is the second most common factor leading to the conviction of innocent defendants based on DNA exonerations (Innocence Project 2009f). Unvalidated or improper forensic science includes

the use of forensic disciplines or techniques that have not been tested to establish their validity and reliability; testimony about forensic evidence that presents inaccurate statistics, gives statements of probability or frequency (whether numerical or non-numerical) in the absence of valid empirical data, interprets nonprobative evidence as inculpatory, or concludes/suggests that evidence is uniquely connected to the defendant without empirical data to support such testimony; or misconduct, either by fabricating inculpatory data or failing to disclose exculpatory data. (Innocence Project 2009f)

In 2003 the US Department of Justice estimated skewed testimony, sloppy work, and tainted evidence by the Federal Bureau of Investigation