



Actual Innocence:

The Justice System Confronts Wrongful Convictions

Steve Leben

Jim Dwyer, Peter Neufeld & Barry Scheck, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED*. Doubleday, 2000. 304 pp. \$24.95.

In some abstract, impersonal way, all of us are aware that mistakes are made in our justice system. It is, after all, a human institution, and human beings make mistakes.

Even as we read occasional stories about the release of an innocent person, the issues raised by that apparent mistake may remain abstract, without a sense of urgency attached to them. After all, this may have been an isolated error. Or the person may actually have been guilty, but not provably so.

If you read this book, the mistakes made in our criminal justice system will no longer be abstract ones.

Barry Scheck and Peter Neufeld are lawyers who started their careers in a legal aid office in the Bronx. Although they have long ago left legal aid for other, arguably greater pursuits—Scheck is a law professor and Neufeld is in private practice; they have teamed up to represent big-name clients like O.J. Simpson and to develop national reputations for their understanding of DNA evidence—they retain the zeal of idealistic young lawyers who have just started legal aid work and, as beginners, been given only a single client to represent.

The book tracks the work done by Scheck and Neufeld through the Innocence Project, a clinic they co-founded at the Cardozo Law School that uses volunteer law students and attorneys to review cases in which DNA testing might prove a convicted person's innocence. Their co-author, Jim Dwyer, is a reporter at *Newsday* who championed—prior to their release—the cases of some of those who had been wrongfully convicted.

The majority of the book consists of separate chapters detailing specific cases that illustrate typical ways in which the justice system may go awry and the innocent may be found guilty. The authors present overall data on 62 cases through August 1999 in which convictions were overturned based on DNA evidence. In 52 of 62 cases, there were mistaken eyewitnesses; in one case, there were five eyewitnesses, all of whom were wrong. The authors show how common techniques for police interrogations and lineups can suggestively lead witnesses to identify an innocent person. They also show how other factors—including false confessions, scientific fraud, junk science, poor defense counsel, and unethical prosecutors—have led to conviction of the innocent in specific cases in which DNA evidence has, after-the-fact, conclusively proved the defendant's innocence.

Two aspects of the book give a sense of urgency about reading it. First, it takes you vividly behind the scenes of real-life cases in which innocent men were convicted. We get to share not only the horror of the innocent who is sent to prison; we

also get to see, in context, how such a terrible mistake could have occurred. Second, it provides a number of suggestions for improving the system to avoid these results, including a helpful, six-page appendix detailing the authors' suggested reforms.

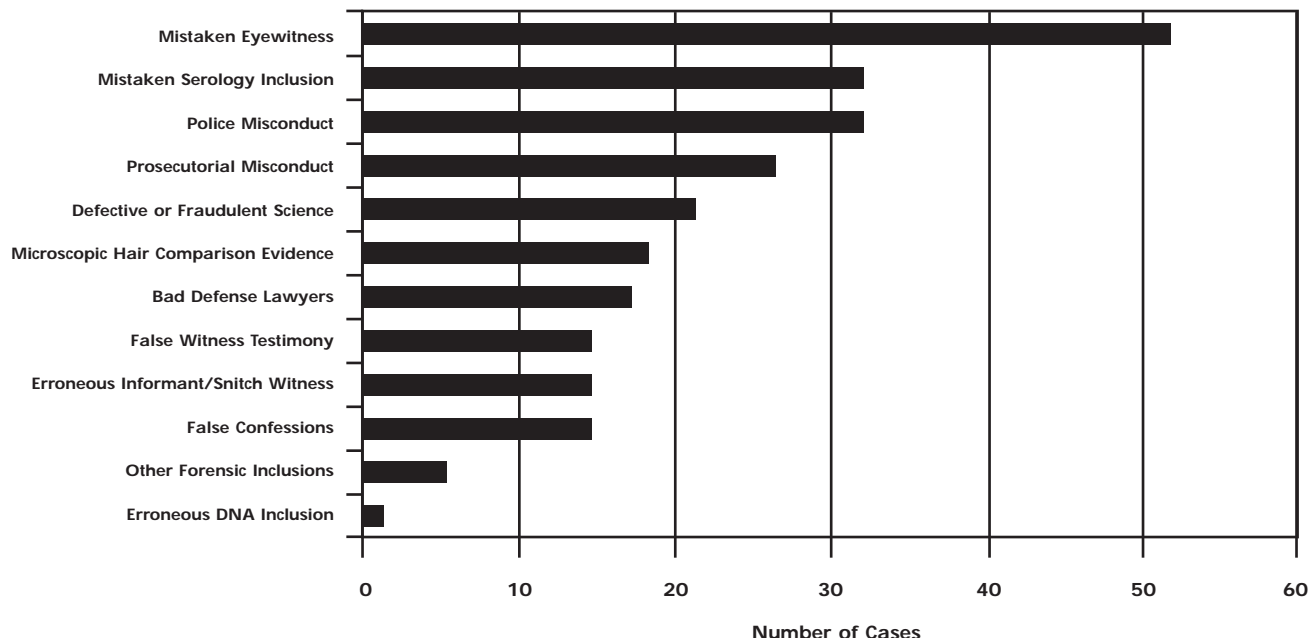
Perhaps the most intriguing proposal is the establishment of governmental Innocence Commissions at the federal and state levels. The authors appropriately note that government agencies investigate the causes of air crashes for the purpose of figuring out what went wrong so that future accidents can be prevented. Surely the specter of placing innocent people in prison for long terms—or even capital punishment—is worthy of a similar effort.

The book is not without flaws. The authors have no doubt good-naturedly poked fun at whichever of them—or the editor—who mistakenly referred to “Brett and Scarlett” as the leading characters from *Gone with the Wind*. More relevant is the sense that the authors have a consistent pro-defense slant and do not always give fair consideration to opposing views. It is interesting that they suggest that the immunity enjoyed by prosecutors should be ended so that they could be sued for intentional misconduct. They do not, however, suggest any civil remedies against incompetent defense counsel, even as they note that 27 percent of the wrongfully convicted in their study had “subpar or outright incompetent legal help.” When discussing the case of David Shephard, who had spent more than 11 years in prison for a rape he did not commit, the authors note that Shephard was unable to sue the prosecutor, the state, or the victim who had testified that he was the rapist. They ignore any possible claim against the defense counsel, who they have previously told us got so mad at Shephard when he refused to accept the plea bargain she had obtained (under which he would, no doubt, have served many years in prison) that she refused even to prepare him for his testimony in court.

There is also a sense that the authors generally accept whatever the wrongfully convicted man has to say about his dealings with attorneys, police and prosecutors as being accurate. Though they carefully attribute statements to the defendant, the stories are certainly told with an air of presumed truth to their statements. Yet there is certainly a chance that some of the police or prosecutorial misconduct was not as bad as reported if some of these recollections by the now-released defendants are exaggerated or wrong. Given the problems dutifully noted with eyewitness recollections, it would perhaps be appropriate to note more clearly that some of these recollections, potentially enhanced by years of wrongful imprisonment, may themselves lack accuracy as well.

Despite any limitations the book may have, it powerfully details problems in the system that anyone seriously concerned about justice must, at least, carefully consider. By

**FACTORS LEADING TO WRONGFUL CONVICTIONS IN 62 U.S. CASES
AS CATEGORIZED BY DWYER, NEUFELD & SCHECK**



“Mistaken serology inclusion” refers to ABO and protein blood typing of semen, saliva, and blood stains. “Other forensic inclusions” refers to comparisons of fingerprints, fibers, and other physical evidence. Source: ACTUAL INNOCENCE, p. 263.

reviewing in detail cases in which it is beyond doubt that the wrong person was convicted, the book itself likely is better than any work product that could ever be produced by one of the authors’ suggested Innocence Commissions: the written work of a committee rarely approaches the scope, clarity, or depth of research reflected in this book. The proposal for an Innocence Commission—in each state and at the federal level—is still worth pursuing, however, because it is only through getting all of the relevant players to sit down at the same table and to collaborate about the potential solutions that real change in the system can be achieved.

Judges are among those who must give careful thought to whether the existence of these cases—and the apparent causes of these wrongful convictions—demand change from us. In many, if not most, of the cases examined, the appeals process

had included an appellate court’s finding that whatever errors had occurred were harmless because the evidence of guilt was overwhelming. In the cases examined in this book, the one thing we know for sure is that the errors in those cases were *not* harmless ones. We can’t know how many other cases are out there in which innocent men and women have been convicted—DNA evidence is not available to give definitive findings in most cases. The book makes a strong case, however, for careful thought about how a justice system of humans, with procedures already refined over the centuries, can be further improved.

Steve Leben, a general jurisdiction state trial judge in Kansas, is the editor of Court Review.