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Justifying Justice: Six Factors of Wrongful Convictions and Their Solutions

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Justifying Justice: Six Factors of Wrongful Convictions and Their Solutions

Abstract

There have been over 300 post-conviction DNA exonerations in the history of the United States. While this number may initially seem significant, there is still an unfathomable population of wrongfully convicted prisoners who have yet to be considered for retrials. Unaddressed wrongful conviction cases highlight the unacceptable weaknesses in the U.S. justice system, weaknesses that include poor investigative tactics and the acceptance or allowance of inaccurate and unreliable evidence. This paper will dutifully analyze the causes that lead to wrongful convictions and amply discuss potential solutions, all of which includes eyewitness misidentification, improper forensics, false confessions, informants, government misconduct, and insufficient lawyering.

Keywords

Post-Conviction DNA Exonerations, Wrongful Convictions, U.S. Justice System, Weaknesses

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There have been over 300 post-conviction DNA exonerations in the history of the United States. While this number may initially seem significant, there is still an unfathomable population of wrongfully convicted prisoners who have yet to be considered for retrials. Unaddressed wrongful conviction cases highlight the unacceptable weaknesses in the U.S. justice system, weaknesses that include poor investigative tactics and the acceptance or allowance of inaccurate and unreliable evidence. This paper will dutifully analyze the causes that lead to wrongful convictions and amply discuss potential solutions, all of which includes eyewitness misidentification, improper forensics, false confessions, informants, government misconduct, and insufficient lawyering.

Introduction

Since the first post-conviction DNA exoneration in the United States in 1989, there have been 364 exonerations with 20 of those affected individuals having served time on death row (Innocence Project, 2019). As it is taught to those who become involved with law, the purpose of justice is simply to convict the guilty and to protect the innocent. The unfortunate rationale behind why the justice system failed 364 now exonerated people—and the innumerable more who have not yet been (or may never be) exonerated—has six main contributors: eyewitness misidentification, invalidated or improper forensic, false confessions, informants, government misconduct, and insufficient lawyering.

Despite the surfeit of wrongful conviction cases, there is a common notion that wrongful convictions are infrequent or unlikely to occur in the United States (U.S.). This culture of doubt stems from within the system, as court judges are often hesitant, if not aggressively reluctant, to accept new evidence that could overturn a past court ruling. Analysis of wrongful convictions and their contributors yields the need for policies which ideally would diminish the number of individuals who have been wrongfully convicted. From underpaid and underprepared public defense attorneys to the common occurrence of witnesses misidentifying suspects and of jurors misjudging the reliability of memory, there is a multitude of flaws in the U.S. justice system which require attention if the system is to operate as it is expected to function.

Literature Review

The Innocence Project (2019) reports that 70% of wrongful convictions are caused by eyewitness misidentification, 44% by invalid forensics, 28% by false confessions, and 17% by police informants. There are five issues that should be analyzed

in-depth to better understand the causation of wrongful convictions. First, jurors do not have an understanding of how memory works and place far too much credence on eyewitness testimony. Second, forensic science testimony by prosecution experts are occasionally invalid due to a misunderstanding or misrepresentation of data. Third, interrogators contaminate confessions in various ways, such as providing evidence to interviewees, which can induce an incriminating confession. Fourth, police informants can be incentivized to provide testimony that incriminates the defendant. Fifth, government-appointed defense counsels are often underpaid and underprepared to properly defend their clients. Altogether, the factors that these theories describe drastically increase the occurrence of wrongful convictions in the U.S.

Eyewitness Misidentification

Eyewitness misidentification is the most frequent contributor to wrongful conviction cases. In the fall of 2003 and early winter of 2004, Hart Research worked together with attorneys at the Public Defender Service for the District of Columbia and Dr. Elizabeth Loftus to prepare a survey to test average jurors' understanding of which eyewitness testimonies are more or less reliable than others (Schmechel, O'Toole, Easterly, & Loftus, 2006). It consisted of twenty questions regarding the jurors' opinions on eyewitness identification, as well as their opinions on which factors make eyewitness testimony more or less reliable. In late February of 2004, Hart Research conducted the survey by phone using randomly chosen residential phone numbers with a District of Columbia area code, which ultimately resulted in 1,007 potential jurors completing the survey. The survey results suggest that jurors generally do not understand how memory works or how certain factors affect memorization (Schmechel et al., 2006).

These jurors were not aware of the selectivity of human memory, or of how memory can be greatly altered by information—it receives after the initial event due to its reconstructive nature. Memories can also be altered during the questioning process, when information that has been stored blends with what is provided.

Not only is the issue of wrongful convictions by way of witness misidentification born from human error, but it is allowed to progress because of the system's historical preference of eyewitness testimony and because of a lack of studies that rightly discredit eyewitnesses with false information. The best solution to rectifying these wrongful convictions is perhaps tripartite: allowing expert testimony when the only evidence against the defendant is eyewitness testimony; improving procedures for collecting eyewitness evidence; and properly educating the principal participants in a trial about the effects of eyewitness factors (Wise, Dauphinais, & Safer, 2007).

For the first component, an expert witness would be asked to explain to jurors how memory works and what factors may have affected the testimony's reliability. This would occur before the eyewitness statement, so jurors do not internalize the elements of the testimony before considering its probative value. The second component would rectify the three types of errors that police officers generally take during procedures for collecting eyewitness evidence: they do not obtain much of the information that an eyewitness knows about a crime; they contaminate the eyewitness' memory of the crime; and they accede to the motivational bias that comes from pro-prosecution culture. Wise et al. (2007) state that psychologists propose two solutions to improve the procedures of collecting eyewitness evidence. First, the police officer who conducts the eyewitness interview should

not know the identity of the suspect to prevent unconscious or subconscious incrimination. Second, defense attorneys should be present during the interviews so members of the court can be informed of any improprieties that may have occurred. The third component involves educating the principal participants in trials. In a survey of 160 judges, 57 law students, and 121 undergraduates, Wise et al. (2007) found that most people in these groups had limited knowledge of eyewitness factors. The more knowledgeable subjects of these studies believed that reducing eyewitness errors could include being less willing to convict defendants solely on the basis of eyewitness testimony, giving more accurate information about wrongful convictions based on witness misidentification reporting greater skepticism about jurors' knowledge of eyewitness factors, and becoming more willing to permit legal safeguards (Wise et al., 2007). Educating the principle participants in a trial could mean the preemptive screening of witness testimony for its probative value before it is presented to the jury.

Invalid Forensic Science

The second most frequent contributor to wrongful convictions is perhaps unexpected for some people because science is often found to be the most reliable. That is why a study was conducted to determine how frequently forensic evidence provided at trial was later proven to be invalid; it found that sixty percent of wrongful conviction cases were influenced in part by a misstatement or misrepresentation of scientific evidence by forensic experts (Garrett & Neufeld, 2009). This evidence included serological analysis, microscopic hair comparison, and the analysis of bite marks, shoe print, soil, fiber, and fingerprints. In 137 exonerees' trials, the trial transcripts in which forensic scientists were called to testify by state or local law enforcement

were obtained and analyzed for misstatements or misrepresentations of scientific evidence. Such misstatements or misrepresentations include non-probative evidence being presented as probative; exculpatory evidence being discounted; inaccurate frequencies or statistics being presented; statistics being provided without empirical support; non-numerical statements being provided without empirical support; and conclusions that evidence originated from the defendant (Garrett et al., 2009). These misrepresentations are largely the fault of the scientist, who should not only ensure that all statements are supported with accurate data but also clarify the probative value of the evidence and avoid making conclusions on the likelihood of a defendant's involvement.

False Confessions

The next most frequent contributors to wrongful convictions are false confessions. These are confessions wherein any element is untrue, but usually end in the interviewee falsely identifying a suspect, confessing to a crime, or providing other incorrect information. In contrast to a more general focus on psychological techniques that would cause a person to give a false confession, Garrett's (2010) analysis focuses on the substance of false confessions to determine external factors. Typically, studies are conducted to determine psychological techniques that would cause a person to give a false confession; however, Garrett's (2010) analysis focuses on the substance of false confessions to determine external factors. Forty DNA exonerees' interrogations were studied and determined to have been conducted while in custody: Each delivered self-incriminating statements and admissions of guilt to police. Courts found these confessions admissible at trial and post-conviction, so all were required to seek post-conviction DNA testing (Garrett, 2010). Pretrial materials,

trial materials, and confessions were collected and the substance of the content was assessed. This brings into question the contamination of interrogations by police.

Police Informants

Police informants also contribute to wrongful convictions. Typically, police informants are seen as criminals who are willing to do whatever necessary to stay out of prison, and often they have no qualm with falsifying testimony to make a deal (Thompson, 2012). This common occurrence makes it difficult for police to reach out to individuals who might have accurate information but are too afraid to come forward. Thompson (2012) proposes that the courts take a more active role in screening all incoming evidence to avoid false testimony based on his analysis of police informants as well as heavy-handed tactics used by the police, such as pressure, tricks, lies, or fear. For those informants who have not yet entered the criminal justice system, police threaten incarceration or deportation (Thompson, 2012). These methods are highly suggestive, coercive, and deceptive. Informants of this nature are more vulnerable, and police purposefully manipulate this vulnerability to derive information. Thompson (2012) asserts that jurors are generally unable to discern the reliability of police informants because they do not have an appreciation of how enticing government incentives are or the coercion that would cause informants to lie. It is possible that even prosecutors are unaware of a police informant's witness history or of rewards they may have received for past testimony.

Different organizations recommend increasing education and records regarding police informants. The Justice Project suggests the jury be administered special instructions on the unreliability of jailhouse informants (Thompson, 2012). The

Center on Wrongful Convictions at Northwestern University School of Law recommends that all incarcerated police informants be wired to record statements made by suspects, which would eliminate the element of hearsay (Thompson, 2012). Additionally, all photographic lineups should be included in discovery for the defense.

Government Misconduct

Another contributor to wrongful convictions is government misconduct. This can be defined as overly suggestive witness coaching, offering incendiary and inappropriate closing arguments, or failing to disclose critical evidence to the defense (Gould & Leo, 2010). Although research in this area is limited, mainly because the government refuses to supply researchers with data on misconduct, though there was one article that could be discriminated from the others. However briefly, the article does support the claim that this occurs and asks professionals to learn from a century of mistakes made in wrongful conviction cases by enforcing policies that would prevent them from occurring, such as electronically recorded interrogations and double-blind eyewitness identification procedures (Gould & Leo, 2010). The Innocence Commission for Virginia finds that improving this factor of wrongful convictions must be a holistic process with input from experts and stakeholders at every step of the process. Political scientist John Kingdon explains that policy change will only occur if an actor, an initiative, and a policy window all converge at the same time (Gould & Leo, 2010). Awareness of the role of government misconduct in wrongful convictions will make the overall justice system more equitable.

Insufficient Lawyering

The last of the main contributors to wrongful convictions is currently inevitable: insufficient lawyering. Forcing new and

inexperienced defense counsel to represent individuals with potentially large cases presents many issues, such as elevated anxiety and an unfamiliarity with the inner workings and nuances of a trial (Brown, 2005). These issues make it difficult for innocent defendants to receive appropriate verdicts and thus increase false conviction rates.

Other elements of insufficient lawyering include failures in fact-finding; the structures and limits of prosecutors' and investigators' roles; the limited capacity of defense attorneys; the effects of prosecutorial and investigative resource constraints; the ineffectiveness of procedural rules at trial; legitimacy, conflict resolution, and error-obscuring processes; and plea bargaining and truth-obscuring incentives. Brown (2005) suggests structuring costs to improve accuracy in verdicts. He asserts that better crime lab funding could effectively function as a diminished defense counsel. Other factors, such as expanded and mandatory evidence disclosure practices, judicial depositions and access to evidence files, and the expansion of discovery, would also contribute to reducing issues with insufficient lawyering.

Post-Conviction DNA Testing

For those who have already been wrongfully convicted, there is hope. It begins with the courts being open to post-conviction DNA testing, which includes analysis of aged, degraded, limited, or otherwise compromised biological evidence. These samples could not previously be analyzed because DNA technology had low specificity and sensitivity. There is now a post-conviction DNA statute in every state, so any convicted person with the correct paperwork can have their DNA tested for inconsistencies. However, the paperwork varies by state, so a convicted person should research whether they are considered to be qualified in their state.

In California, the current statute declares that any person who was convicted of a felony may make a written motion for post-conviction DNA testing (Motion for DNA Testing of 2015). A convicted person may request the appointment of public counsel in order to prepare this motion. The court will then request that copies of DNA lab reports, notes, evidence logs and their chains of custody, and records of evidence location or destruction be made available to the defendant. The motion for DNA testing will be granted as long as the following is determined: the evidence is available and in a condition that would permit DNA testing; the evidence in question has been subject to a chain of custody that establishes it has not been altered in any way; the identity of the perpetrator of the crime is a significant issue in the case; the convicted person demonstrates that the DNA testing would be relevant to the issue of identity; the requested DNA testing results would raise a reasonable probability that the convicted person's verdict or sentence would have been more favorable if the testing results had been available at the time of the conviction; the evidence had either not been tested previously or this requested testing would provide results that have a reasonable probability of contradicting past results; the requested testing employs a method generally accepted within the scientific community; and the motion is not made solely for the purpose of delay (Motion for DNA Testing of 2015).

These developments show progress since 2007, when the U.S. allowed for highly conditional post-conviction DNA testing in all except eight states (Steinback, 2007). This article analyzes the reasoning behind the lack of progression in these states and discusses steps that must be taken in order to bring them up to standard.

Implications and Recommendations

It has been supported in a study by Schmechel (2006) that jurors do not fully understand the validity of witness testimony, or the effects certain factors, such as stress, can have on memory and recall, and that they too often decide to convict based on witness testimony. The main reason this has a significant impact on wrongful convictions is due to the fact that up until recently, eyewitness evidence made up the majority of evidence admitted in court. Prior to modern day technology, there were few scientific tests that could support or deny accusations made against an individual. Eyewitness testimony was preferred and became known as strong supportive evidence. Today, however, the courts are finally starting to dispel this notion, and circumstantial evidence is becoming increasingly more common and accepted in trials.

Courts are also beginning to recognize that forensic science is not infallible. After analyzing over forty cases in which the expert witnesses called by the prosecution were later found to have presented invalid forensic evidence, Garrett and Neufeld (2009) consider that forensics presented in court are not always as reliable as they seem, thus creating the crucial need to be properly cross-examined by the defense. If circumstantial evidence is too readily accepted without the proper proceedings of the court to determine the credibility of each new piece of evidence, a new weakness within the system presents itself. There is no scientific test that can be conducted with 100% accuracy at any given time, which is why the term ‘prove’ is not used when discussing results. Although many of these errors made by forensic scientists are unintentional, there are also many situations in which these scientists present data in a way that favors the police’s statements, regardless of whether or not the majority of the evidence found supports the statement.

If interrogations are contaminated by the party that is looking to convict, then the process of interrogation must be reformed. Coercing juveniles, and especially the mentally disabled, into giving false testimony goes against basic rights. Unfortunately, this is an extremely common occurrence within police forces (Garrett, 2010). The police are trained to pressure the individuals they interrogate into giving whatever information they have. This negatively contributes to a growing epidemic where most police begin to treat everyone as if they are criminals who are hiding information. The police have also been known to feed information to those they are interrogating; in doing so, they hope the suspect will release more information without realizing they are giving them information that they would otherwise only have if they committed the crime. This further incriminates these individuals because they now have this information.

The extent of law enforcement's effect on individuals does not end there. Police informants are typically either vulnerable individuals who are easily manipulated with incentives or jailhouse informants who are unconcerned with committing perjury. If they are offered money, a lesser sentence, or to be kept out of jail or prison in return for testimony against the defendant, it cannot generally be considered unbiased or truthful testimony. When police call informants from within prisons to the stand as witnesses, informants often claim the defendant disclosed information to them or confessed to various crimes (Thompson, 2012). While some testimonies are accurate, the overwhelming proportion of instances in which inmates lie to make a deal with prosecutors in another case is staggering. It makes distinguishing between truthful and untruthful testimony difficult for police.

Furthermore, individuals who cannot afford attorneys are left with public defenders. Although some attorneys do not have

the knowledge necessary to defend a client in a high-profile case, they may also simply be unmotivated to work in the long and stressful proceedings ahead. Brown's (2005) solution of structuring of costs to improve accuracy is necessary.

Conclusion

For the 364 people who have been exonerated by post-conviction DNA testing, the system failed them in at least one of the following six ways: eyewitness misidentification, invalid forensics, false confessions, police informants, government misconduct, or insufficient lawyering. To avoid eyewitness misidentification, jurors need to be taught the difference between reliable and unreliable witness testimony based on factors that affect an individual's ability to recall memories. These lessons are simple to teach and understand and should not present themselves to be especially time-consuming. This will make it easier for jurors to base their opinions on scientific evidence and not evidence that can easily be inaccurate.

The issue of invalid forensics is a bit more complicated, because society generally views science as infallible. To avoid having forensic evidence misrepresented, the defense should always question the prosecution's expert witnesses and cross-examine any evidence presented. Though this is admittedly a retroactive solution, it should be expected at every trial. Moreover, it is necessary for forensic tests to be valid if the results of such tests are to be used as evidence against defendants. The additional issues of corrupted forensic scientists and their motivations for committing fraud extend beyond the scope of this paper; however, the issue of contaminated interrogations has simple solutions.

One such solution is that interrogations should always be recorded from beginning to end, and there must be further restrictions on heavy-handed interrogations of children and the

mentally ill to avoid contamination of interrogations. It is questionable that the police do not always follow policy on fully recording interrogations, and this gives way to speculation on their true intentions. Any interrogation that involves the feeding of information from a police officer to the individual being questioned should not be considered as evidence against the defendant.

Additionally, police should not offer unreasonable incentives to criminals in return for testimony if they intend to solve the issue of police informants giving false testimony. Incentives, such as a lighter sentence or immunity, should only be offered after a criminal comes forward with information and should be limited to offenders whose crimes do not overshadow those of the defendant they are testifying against. Currently, there are many inmates who are offered either a lesser sentence or the ability to be released immediately on parole if they give testimony concerning another case. These incentives fuel the issues the system is currently dealing with. Incentives should remain reasonable and undisclosed until after testimony is offered.

Although there will always be issues with the public defense system, there are ways to gradually improve it. More experienced attorneys should be incentivized by the government to take cases of accused individuals who cannot afford their own attorney. As previously stated, these individuals do not have the final say in determining a defendant's guilt, and therefore, could not become corrupted by these incentives. It may be argued that the government does not have the funds to offer incentives for every public defense case, but it should be noted that not all incentives are monetary. It is completely within the government's power to offer incentives of other sorts to public defenders, such as deals that would not be made otherwise in future cases or

connections they previously did not possess. It should also be noted that these attorneys would not be asked to defend their clients at any cost but in the least ensure their clients' rights are not infringed upon.

There is a need for more research to be conducted in regard to government misconduct and on how it can be stopped. If there is less information on this topic because of the insecurity employees feel in reporting their coworkers and bosses, then the justice system is not operating as it is expected to function. Individuals who realize wrongdoing in their workplace should feel safe to report it without fear of alienation or of being fired. The justice system can only succeed if every person within it is held accountable for their actions and if they seek justice in every aspect of their lives.

Research on wrongful conviction is important for making the justice system more equitable. Any innocent person who is wrongfully convicted has not only been failed by this system but is subsequently tasked with the undue burden of proving their innocence. This is made more difficult through their dealings with less knowledgeable principle participants in a trial, as attorneys and judges who are uneducated in factors of wrongful convictions inhibit the flow of the appeals process. While some argue that the U.S. justice system is effective since it allows for post-conviction motions, others may also argue that a system that works retroactively is not effective.

References

Brown, D. K. (2005). The decline of defense counsel and the rise of accuracy in criminal adjudication. *California Law Review*, 93(6), 1585-1645.

- Garrett, B. L., & Neufeld, P. J. (2009). Invalid forensic science testimony and wrongful convictions. *Virginia Law Review*, 95(1), 1-97.
- Garrett, B. L. (2010). The substance of false confessions. *Stanford Law Review*, 62(4), 1051-1118.
- Gould, J. B., & Leo, R. A. (2010). One hundred years later: Wrongful convictions after a century of research. *The Journal of Criminal Law and Criminology*, 100(3), 825-868.
- Motion for DNA Testing*, Cal. Penal Code § 1405. (2015).
- Schmechel, R. S., O'Toole, T. P., Easterly, C., & Loftus, E. F. (2006). Beyond the ken? Testing jurors' understanding of eyewitness reliability evidence. *Jurimetrics*, 46(2), 177-214.
- Steinback, R. (2007). The fight for post-conviction DNA testing is not yet over: An analysis of the eight remaining "holdout states" and suggestions for strategies to bring vital relief to the wrongfully convicted. *The Journal of Criminal Law and Criminology*, 98(1), 329-361.
- The Innocence Project. (2019). DNA exonerations in the United States. *Innocence Project*. Retrieved from <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>
- Thompson, S. G. (2012). Judicial gatekeeping of police-generated witness testimony. *The Journal of Criminal Law and Criminology*, 102(2), 329-395.
- Wise, R. A., Dauphinais, K. A., & Safer, M. A. (2007). A tripartite solution to eyewitness error. *The Journal of Criminal Law and Criminology*, 97(3), 807-871.

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