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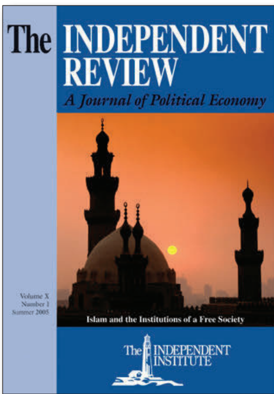

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REFLECTIONS

The Causes of Wrongful Conviction

PAUL CRAIG ROBERTS

The execution of an innocent person cannot be remedied. This fact, together with mounting evidence of innocents on death row, has strengthened opposition to the death penalty. Nevertheless, the death penalty has proved to be a divisive issue. The divide between liberals and conservatives on the death penalty could be bridged by changing the emphasis in the issue to wrongful conviction.

Many people support the death penalty from a sense of justice. The same sense of justice would cause them to oppose wrongful conviction. The injustice lies in the wrongful conviction, not in the penalty. A wrongfully convicted person who loses good name, family, and career or who suffers a life sentence of prison rape and execution by AIDS deserves our concern as much as the innocent on death row.

Abolishing the death penalty might worsen the problem of wrongful conviction. Death penalty cases receive far more scrutiny than other criminal cases. If police and prosecutors cannot identify and convict the guilty party in capital crime cases, where evidence and procedures are more closely examined, what must be the rate of wrongful conviction for less-serious crimes, especially those for which conviction is obtained by plea bargain? Abolishing the death penalty might reduce the attention given to the issue of wrongful conviction in general.

Most of the scrutiny given to death penalty cases is a search for legal error. It is much more difficult to detect suborned perjury and the suppression of exculpatory

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evidence because they are not in the legal record. Nevertheless, innocence projects and people convinced of a convicted person's innocence do sometimes succeed in bringing to light prosecutorial misconduct that secured the conviction. DNA evidence has been especially productive of success in overturning wrongful convictions based on junk science, false testimony, and mistaken identity.

A consensus against wrongful conviction is hampered by ideology that portrays wrongful conviction as a racially motivated phenomenon or as the operational result of "the white male hegemonic order." Wrongful conviction is too widespread and serious a problem to be politicized. In fact, inner-city black juries are more suspicious of cases brought by police and prosecutors than are white suburban juries. If it were not for coercive plea bargains, inner-city blacks would face a lower risk of wrongful conviction than whites. The focus on racial bias cloaks the real problem of prosecutorial misconduct.

The older Marxist view that justice is a function of the size of the pocketbook—the rich get it and the poor don't—has no credibility in our time of asset freezes and prosecutors in search of high-profile cases. Vast sums of money could not protect Michael Milken and Leona Helmsley from wrongful conviction, nor did money protect Exxon, Michael Zinn (Zinn 1999), Charles Keating (*Keating v. Hood* 1996), and the law firm of Kaye, Scholer, Fierman, Hays & Handler (Roberts and Stratton 2000).

It is easier to frame a white-collar defendant than to frame a poor member of a minority group. The common-law crimes associated with the poor—theft, assault, murder—are well defined. Frame-ups for such crimes require prosecutors to suborn perjury, suppress exculpatory evidence, and coerce false confession. To frame a white-collar victim, a prosecutor need only interpret an arcane regulation differently or with a new slant.

Politicizing wrongful conviction as a manifestation of racial or class prejudice does not serve the cause of justice. In our time of asset freezes, asset forfeitures, coercive plea bargains, and budget-driven conviction rates, as well as the demise of the prosecutorial ethic and the erosion of what William Blackstone ([1765–69] 1979) called "the Rights of Englishmen," no one is safe.

The Causes of Wrongful Conviction

In this article, I am focusing on the causes of wrongful conviction. Correcting the problem will require both changing the incentives that police and prosecutors face and resurrecting the belief that the function of justice is to find the truth. Procedural and evidentiary reforms—such as those suggested by Barry Scheck, Peter Neufeld, and Jim Dwyer (2000, 255–60)—would reduce the rate of wrongful conviction. However, such reforms alone cannot remedy the inroads that a Benthamite view of law has made on the Blackstonian view. Blackstone conceived of law as the people's shield. It is better, he said, for ten guilty men to go free than for one innocent man to

be convicted. In contrast, Bentham viewed the law as a weapon the government wields to punish criminals or anyone else in the name of the greatest good for the greatest number. He believed in rounding up people who *might* commit crimes. He wanted to restore torture to aid in securing convictions, and he believed that a defendant's lawyer had an obligation to aid the prosecution.

Wrongful conviction is on the rise because the protections against it have been eroded by the pursuit of devils—drug dealers, child molesters, environmental polluters, white-collar criminals, and terrorists—all of whom must be rounded up at all cost. In doing so, we have done what Sir Thomas More warns against in the play *A Man for All Seasons:* we have cut a great swath in the law.

Blackstone called the legal principles that made the law a shield "the Rights of Englishmen." These rights include due process, the attorney-client privilege, equality before the law, the right to confront adverse witnesses, and the prohibitions against crimes without intent, bills of attainder, self-incrimination, retroactive law, and attacks against a person through his property. Each of these principles has been breached. Today prosecutors create bills of attainder by tailoring novel interpretations of law to fit the targeted defendant. A favorite tactic is to criminalize civil infractions, as in the Charles Keating savings-and-loan case (Roberts and Stratton 2000, 51–54). Clark Clifford and Robert Altman were indicted not for a statutory violation but on a prosecutor's "novel theory" that two separate legal transactions comprised a "conspiracy" (Roberts and Stratton 2000, 54–60). Even accidents and mistakes in filling out government forms have been criminalized, as in the Exxon Valdez and Benjamin Lacy cases ("Bad Apples" 1996, A12; Boot 1995, A14; Roberts and Stratton 2000, 50, 60–61). The ancient principle of mens rea—no crime without intent—has been obliterated.

The New Deal made its own contribution to wrongful conviction. An important feature of much New Deal legislation was congressional delegation of law-making power to regulatory agencies. Delegation combined statutory authority and enforcement authority in the same hands. The bureaucrats' ability to define criminal offenses by their interpretation of the regulations that they write gives regulatory police vast discretion. A cooperative "offender" may get off with a civil penalty, whereas a person who sticks up for his rights or a person who presents a high-profile opportunity to an ambitious prosecutor may receive a criminal indictment. The bureaucrats' ability to create criminal offenses spontaneously by interpretation makes law uncertain and renders it unable to fulfill its purpose of commanding what is right and prohibiting what is wrong.

In 1990, U.S. assistant attorney general Stuart M. Gerson expressed Bentham's belief about the proper function of lawyers when he indicted the blue-chip law firm Kaye, Scholer as "an abettor of crime" for not divulging to thrift regulators information pertaining to its client Charles Keating and his Lincoln Savings and Loan (Roberts and Stratton 2000, 107–10). The Justice Department's indictment ignored the fact that Keating's crime had not been established at the time of the law firm's indictment.

In 1996, federal district judge John G. Davies overturned Keating's later conviction as a violation of mens rea and the constitutional prohibition of ex post facto law *(Keating v. Hood),* but Kaye, Scholer still suffered the loss of the $41 million it paid to settle the Justice Department's indictment.

The Justice Department coerced the law firm into that settlement by freezing its assets and its four hundred partners' personal assets (Roberts and Stratton 2000, 107). Many prominent legal authorities regard the government's action as illegal, but Kaye, Scholer, unable to meet its payroll or pay its bills, was powerless to resist the coercion. Not even a prominent law firm can hold the Justice Department accountable if its assets and those of its partners are frozen. Prosecutors enjoy an enormous degree of immunity from prosecution and civil lawsuit even when their unlawful and improper actions are exposed.

The asset-freeze and forfeiture laws were intended to be applied to mobsters and drug dealers. However, the laws' application was quickly expanded. The majority of people whose assets are confiscated are innocent property owners. In 80 percent of forfeitures, no charges are filed against the owners of confiscated property (Levy 1996, 127). For law enforcement agencies, the forfeiture laws have created an off-budget funding source beyond the control of legislators. In 1990, a Justice Department memo for U.S. attorneys stressed: "Every effort must be made to increase forfeiture income during the remaining months of 1990" (Roberts and Stratton 2000, 126; see also Miniter 1993, 33). House judiciary committee chairman Henry Hyde warned that the forfeiture laws target property, not crime. The result, he said, is that Americans face "endless possibilities to be caught in the snare of government forfeiture" (Hyde 1995, 10).

Every area of law reflects widespread disregard for the "Rights of Englishmen." Superfund law takes retroactive law back generations and places liability on people and organizations that never contributed an ounce of hazardous waste to a Superfund site (Roberts and Stratton 2000, 70–81). In child abuse cases, due process and the right to confront one's accusers do not exist. Anonymous allegations serve as grounds for seizing children and placing them in the hands of "therapists" who coax them into accusations (Lyon 1998; Roberts and Stratton 2000, 144). The Justice Department and the Housing and Urban Development Department have coerced neighborhoods that are legally using local zoning ordinances to keep out commercially operated halfway houses and drug-treatment clinics into abandoning their right to equal standing under the law (Roberts and Stratton 2000, 113–21).

The law as Blackstone understood it has been lost. Formerly, prosecutorial behavior was regulated by conscience and by the carefully inculcated ethic that the prosecutor's duty is to serve justice by finding the truth. The purpose of a trial was to weigh the evidence for and against the defendant, not to convict him at any cost. A prosecutor's career and self-esteem did not depend on his conviction rate. A prosecutor who suborned perjury or withheld exculpatory evidence in order to win a case was regarded as a shameful figure and an embarrassment to the law.

Crowded court dockets (springing in large part from the conservatives' war on drugs), bureaucracy, budgetary pressures, and careerism have contributed to elevating ambition above justice. The emergence of moral causes or ends that justify the means, such as "saving our children from drugs" and "making environmental polluters pay," has contributed greatly to the breakdown of prosecutorial restraint. Today a prosecutor who gives the defendant the benefit of the doubt is regarded as a failure. Robert Merkel, a U.S. attorney during 1982–88, says that prosecution "is a result-oriented process today, fairness be damned" (Moushey 1998, 3). Merkle says prosecutors are pressured to justify budgets with convictions, "and that causes them to prosecute absolutely bogus cases to get those statistics" (Moushey 1998, 4). In 1998, former deputy U.S. attorney general Arnold I. Burns wrote in the *Wall Street Journal* that "it is time for a sober reassessment of the power we have concentrated in the hands of prosecutors and the alarming absence of effective checks and balances to prevent the widespread abuse of that power" (A23). A law school textbook, *Prosecutorial Misconduct,* now in its second edition (Gershman 1991), is evidence that the problem is not going away on its own.

Honest prosecutors have the same interest as defendants in the integrity of the criminal justice system. It is in their interest that withholding exculpatory evidence not become routine and that suborned perjury not become the only evidence in a case. Juries alone are not a deterrent. Juries are often unaware that the witness giving incriminating testimony not only has been rehearsed in the role but also has been paid by the prosecutor with money or reduced prison time or dropped charges.

In 1998, the *Pittsburgh Post-Gazette* summed up its investigative reports of prosecutorial misconduct as follows:

> hundreds of times during the past 10 years, federal agents and prosecutors have pursued justice by breaking the law. They lied, hid evidence, distorted facts, engaged in cover-ups, paid for perjury and set-up innocent people in a relentless effort to win indictments, guilty pleas and convictions. Rarely were these federal officials punished for their misconduct. . . . Perjury has become the coin of the realm in federal law enforcement. People's homes are invaded because of lies. People are arrested because of lies. People go to prison because of lies. People stay in prison because of lies, and bad guys go free because of lies. (Moushey 1998, 40)

A new practice known as "jumping on the bus" has taken the prosecutorial ethic to the rock-bottom depth. Informants sell information on unsolved cases to an inmate, or prosecutors and federal agents feed this material to an inmate. The inmate memorizes the case, thereby seeming to have inside knowledge when he comes forward with information to trade in exchange for a reduced sentence. In the absence of evidence, this practice is used sometimes against a person only believed to be guilty. Sometimes it is used to close unsolved cases, and sometimes it occurs at an inmate's

initiative. Formerly, self-serving accusations by criminals were treated only as leads to be investigated. If the leads proved helpful, evidence still had to be marshaled. Today the accusation is the evidence. Thus, the criminal element itself has a big say in who goes to prison.

Weak and fabricated evidence suffices because seldom is it tested in court. According to the Justice Department, only approximately one case in twenty goes to trial; the rest are settled with pleas (Maguire and Pastore 1995, 461–63, 483–86). Conservatives believe that the problem with plea bargaining is that it permits criminals to get off too lightly, thus undermining the deterrent effect of punishment. However, the problem with plea bargains is far more serious.

Plea bargains have corrupted the justice system by creating fictional crimes in place of real ones. The practice of having people admit to what did not happen in order to avoid charges for what did happen creates a legal culture that elevates fiction over truth. By making the facts of the case malleable, plea bargains enable prosecutors to supplement weak evidence with psychological pressure. Legal scholar John Langbein compares "the modern American plea bargaining system" with "the ancient system of judicial torture" (1978, 8). Many innocent people cop a plea just to end their ordeal. Confession and self-incrimination have replaced the jury trial. Just as Bentham wanted, torture has been resurrected as a principal method of conviction. As this legal culture now operates, it permits prosecutors to bring charges in the absence of crimes.

Plea bargaining is a major cause of wrongful conviction. First, plea bargains undermine police investigative work. Because few cases go to trial, police have learned that their evidence is seldom tested in the courtroom. Carelessness creeps in. Sloppy investigations are less likely to lead to apprehension of the guilty party. Second, plea bargaining greatly increases the number of cases that can be prosecuted. Prosecutors have found that they can coerce a plea and elevate their conviction rate by raising the number and seriousness of the charges that they throw at a defendant. Counsel advises defendants that conviction at trial on even one charge can carry more severe punishment than a plea to a lesser charge. The sentencing differential alone is enough to make plea bargaining coercive.

A circularity of reasoning justifies plea bargaining. Without plea bargaining, the argument goes, the courts would not be able to handle the caseload. This argument is unconvincing. The obvious solution is to create enough courts to handle the caseload or to reduce the caseload by eliminating victimless crimes, such as drug possession and trumped-up charges based on regulatory interpretation. Without the war on drugs, asset forfeiture, and months-long court disputes over the meaning of a lengthy arcane regulation, there would be enough courts and judges to handle the serious crimes.

Every law, regulation, or reform has unintended consequences. A case can be made that the exclusionary rule changed the culture of the criminal justice system and led to the coerced plea bargain. By releasing criminals known to be guilty, the exclusionary rule turned the criminal justice system into a lottery for police, prosecutors,

and criminals alike. The result was demoralized prosecutors who began to see in the plea bargain a way to game the system back toward conviction. The unintended consequence of the exclusionary rule was cultural change. The criminal justice system deemphasized pursuit of the truth and focused on convicting the defendant.

Once we understand that the law has been lost, it is easy to understand why there are innocents on death row. As important as it is to get these innocents off death row, new victims of the system can be put there faster than innocence projects can rescue them. Moreover, the preoccupation with capital offenses and with cases in which DNA evidence can resolve the doubt about innocence leaves the vast majority of wrongfully convicted persons without a prayer.

To make a dent in wrongful conviction, we must rethink the approach. Innocence projects and law professors who find injustice a burden on the conscience can work to reestablish the inculcation of the ethic in law school, an ethic so well expressed by George Sutherland (*Berger v. U.S.* 1935) and Robert Jackson (1940): that the prosecutor's duty is to see that justice is done, not to win convictions. If the law schools can be carried, so can the bar association and the journalism schools. Stories about wrongful prosecution should become a media priority.

Law schools must deal as well with the Benthamite influences that have eroded the "Rights of Englishmen" and have made law a weapon in the hands of government. If Benthamite collectivism, aided by deconstructionism and cultural Marxism, has undermined the legal principles that protect individuals from government power, nothing can be done about wrongful conviction until the Blackstonian principles are restored.

Progress against wrongful conviction also requires a return to constitutionalism. To many lawyers, "constitutional protection" means the granting of protected minority status by a federal judge. If antipathy to guns is more important that the Second Amendment, offense to preferred minorities more important than the First Amendment, and race and gender quotas more important than equality before the law, it is little wonder that a prosecutor's conviction rate is more important than a fair trial and that justice plays second fiddle to clearing the court docket.

It is often said that Americans live under the rule of law. It is closer to the truth to say that Americans live under the rule of regulators. Theodore Lowi (1979) has argued that accountable law in the United States ceased seventy years ago with the delegation of law-making power to the executive branch in violation of the principle that a delegated power cannot itself be delegated. The people delegated law-making power to Congress, where under our system of government it must reside forever. First, however, law must be put back in the hands of Congress, an unlikely event when government is so large that it involves itself in every aspect of life. It is just as unlikely that trials will take the place of plea bargains as long as so many laws create so many crimes, and so few resources are devoted to courts and trials.

The problem of wrongful conviction is much larger than many of its antagonists appreciate. We will spin our wheels expending vast energies in freeing a few innocent

people, and we must do what we can. But we also must gird for battle and restore the lost law. Once the "Rights of Englishmen" are no longer even a memory, justice will be gone as well.

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