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Book Review

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by Brandon L. Garrett**

## Book Review

### CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG, by Brandon L. Garrett<sup>1</sup>

ALAN YOUNG<sup>2</sup>

IN 1923, JUDGE LEARNED HAND naïvely opined that the “ghost of the innocent man convicted ... is an unreal dream.”<sup>3</sup> It has since become abundantly clear that the smug and complacent belief in the infallibility of criminal justice can no longer be maintained. Wrongful convictions in the United States, the United Kingdom, and Canada are not unreal dreams, and the only relevant question for the next generation of jurists is whether or not the system can be adequately reformed to prevent the perpetuation of miscarriages of justice.

Since the 1980s, there has been an explosion of documented wrongful convictions in the Anglo-American-Canadian criminal justice systems, and there has been a corresponding explosion of interest in this topic in academic literature, popular media, and cinematic arts.<sup>4</sup> Professor Garrett’s book, *Convicting the*

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1. (Cambridge: Harvard University Press, 2011) 376 pages.
  2. Professor of Law, Osgoode Hall Law School, York University.
  3. *United States v Garsson*, 291 F 646 at 649 (SDNY 1923).
  4. For an introduction to Canadian literature, see Bruce MacFarlane, “Convicting the Innocent: A Triple Failure of the Justice System” (2007) 31:3 Man LJ 403; Canada, FPT Heads of Prosecutions Committee, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004), online: <<http://canada.justice.gc.ca/eng/dept-min/pub/pmj-pej/toc-tdm.html>>; Canada, FPT Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, *The Path to Justice: Preventing Wrongful Convictions* (Ottawa: Public Prosecution Service of Canada, 2011), online: <<http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/index.html>>; Myriam S Denov & Kathryn M Campbell, “Criminal Injustice: Understanding Causes, Effects and Responses to Wrongful Conviction in Canada” (2005) 21:3 J Contemp Crim Jus 224. For an introduction to the voluminous American literature, see the following symposia: Russell L Weaver, ed, “Symposium on Criminal Procedure” (2010) 85:1 Chicago-Kent L Rev 1; “Criminal Law Symposium: Convicting the Innocent” (2008-2009) 41:1 Tex Tech L Rev 1; Lynn S Urban, ed, “The Miscarriages of Justice: Current Perspectives Conference” (2007) 7 JIJS 1.

*Innocent: When Criminal Prosecutions Go Wrong*, is the most recent contribution to this burgeoning academic interest in the “innocence movement.”<sup>5</sup> Although his book covers much of the same territory found in the dozens of scholarly articles written in the past three decades, I would suggest that it may be the most significant contribution to date in terms of illuminating the diverse causes of wrongful convictions.

Garrett sets out to address eight critical questions: (1) Why do innocent people confess in such detail to crimes they did not commit? (2) Why do victims and eyewitnesses testify that they were certain they saw innocent people commit crimes? (3) Why doesn't forensic science show at trial that these people were innocent? (4) Why do informants testify against innocent people? (5) Why don't defense lawyers prevent convictions of their innocent clients? (6) Why don't appeals or *habeas corpus* review set innocent people free? (7) Why does it take so long for innocent people to be exonerated? (8) Why don't criminal justice systems respond to exonerations? In addressing these questions, Garrett tells many stories, which together paint a picture of a Kafkaesque American trial system totally blind to truth, justice, and the “American way.” The picture is bleak and horrific, but Garrett does not sensationalize the events. The stories he tells are presented in an objective and balanced manner without hyperbole or rhetorical flourishes, yet they all are compelling and powerful renderings of a system gone astray.

More importantly, Professor Garrett is able to significantly advance our understanding of wrongful convictions beyond the inferences and extrapolations drawn from the anecdotal evidence. Since the advent of DNA testing in the 1980s, the Innocence Projects in the United States have worked hard to secure over 250 exonerations through DNA retesting.<sup>6</sup> Professor Garrett had the opportunity to review transcripts of supporting materials relating to most of these exonerations. With a formidable sample, he is able to provide some interesting empirical data on recurring patterns of error. In this book, Garrett succeeds in establishing that these disturbing stories are not criminal justice aberrations, but rather can be understood as arising in a predictable manner when inherently frail evidence is presented within the context of the adversarial trial system.

Specifically, he has established that the following causal factors are present in a large proportion of the wrongful conviction sample: 76% of convictions were based on mistaken identification evidence, 61% of convictions were based

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5. See Keith A Findley, “Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process” (2008-2009) 41:1 Tex Tech L Rev 133; Joshua Marquis, “The Myth of Innocence” (2005) 95:2 J Crim L & Criminology 501.

6. *Supra* note 1 at 5.

upon faulty forensic science, 21% of convictions were based on the testimony of jailhouse informants, and 16% were based upon false confessions.<sup>7</sup> Scholars have recognized these factors as “immediate causes” of wrongful conviction, but few have documented the frequency of occurrence and the manner in which these factors have misled judges and jurors.<sup>8</sup> In addition, by having access to court files he is then able to go beyond this general statistical breakdown of causal factors and provide more detailed empirical data, some of which is surprising and shocking. For example:

- “... 36% of exonerees were identified by multiple witnesses, some by as many as three or four or five.”<sup>9</sup>
- In 88% of cases in which identification evidence was relied upon, there was a clear indication of “police suggestion” or “evidence of clear unreliability involving prior uncertainty.”<sup>10</sup>
- Invalid forensic analysis occurred “across a wide range of forensic methods, ranging from serology, in which 58% of the testimony was invalid (67 of 116 trials); to hair comparison, in which 39% was invalid (29 of 75 trials); to bite mark comparison, in which 71% was invalid (5 of 7 trials); to shoe print comparison, in which 17% was invalid (one in six trials); to fingerprint comparison, in which 5% was invalid (1 of 20 trials).”<sup>11</sup> Also, “of cases with DNA testing, 17% had invalid testimony (3 of 18 trials).”<sup>12</sup>
- Invalid forensic analysis involved “81 forensic analysts employed by 54 laboratories, practices, or hospitals from 28 states.”<sup>13</sup>
- “... 6% of the exonerees (16 of 250) pleaded guilty.”<sup>14</sup> Moreover, “[t]en of the sixteen who pleaded guilty had already [falsely] confessed.”<sup>15</sup>

To a certain extent, it is trite to assert that frail evidence, such as confession, identification, and informant testimony, has led to numerous wrongful convictions.

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7. *Ibid* at 8-10.

8. An “immediate cause” relates to the evidence and process of a given trial, as opposed to a predisposing or environmental cause, which relates more to systemic factors that are present in all criminal cases. See MacFarlane, *supra* note 4 at 435-44.

9. *Supra* note 1 at 50.

10. *Ibid* at 64.

11. *Ibid* at 90.

12. *Ibid*.

13. *Ibid* at 93.

14. *Ibid* at 150.

15. *Ibid*.

One does not need statistics to reach this conclusion. Most people know that identification evidence is “fallible” and “malleable.”<sup>16</sup> However, Garrett’s book takes the analysis of immediate causes one step further. After an interesting and provocative analysis of these immediate causes in chapters 1–4, the author then turns to the operation of the legal system to demonstrate how legal professionals allow themselves to be misled into believing in false evidence. This is where the book starts to take on a truly ominous and disturbing perspective. For example, with respect to false confessions, Garrett demonstrates how the police subtly and secretly convey obscure details of the crime to the accused so that the confession of the accused will ring true as it discloses facts only known to the perpetrator (and the police). However, he then provides the following excerpt from an interrogation transcript in which the transmission of information from police to accused is far from subtle:

Det. 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Det. 2: Whatcha use?

Vasquez: The ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt ... Remember being out in the sunroom, the room that sits out to the back of the house? ... and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn’t a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember using the Venetian blind cords?

Vasquez: Ah, it’s the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David—tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that’s all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it ...

Det. 2: (slamming his hand on the table and yelling) You hung her!

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16. *Ibid* at 48.

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay, so I hung her.<sup>17</sup>

It is astonishing that the police could believe that this constitutes a proper interrogation, but it is far more disturbing to realize that a judge did not see fit to exclude this confession, and that the jury concluded that this type of statement constitutes probative evidence of guilt. In chapters 4–8, Garrett shows how trial courts, jurors, appellate judges, and prosecutors all fall prey to relying upon frail evidence in a manner that demonstrates a tragic indifference to the solemnity of the criminal trial process. This indifference continues through any post-conviction review mechanisms, which at times appear “byzantine.”<sup>18</sup> Garrett shows that most of the exonerations were achieved through a “series of miraculous and chance interventions.”<sup>19</sup> As Professor James S. Liebman has noted, DNA takes on the quality of “divine intervention”: “If it were not for the sheer accident that a biological sample happened to be available, the miscarriage never would have been discovered.”<sup>20</sup>

The examination of trial transcripts and appellate arguments reveals a process that is ineffective in making accurate factual findings. Not only did triers of fact rely on unreliable evidence to convict, but in 30 of 207 trials (14%), convictions were entered despite the fact that counsel for the defence presented forensic evidence of an exculpatory nature.<sup>21</sup> Apparently one cannot simply blame zealous prosecutors and indifferent judges, as Garrett shows that defence counsel are often complicit in miscarriages of justice. For example, “Jailhouse John Adams” defended his innocent client on murder charges but “met with [his client] only once before trial, hired no investigators or scientific experts, filed no motion to suppress evidence, [and] made no opening statement . . . .”<sup>22</sup> He “even got [his client’s] name wrong while addressing prospective jurors.”<sup>23</sup>

Trial courts make mistakes, but appellate review appears to be largely ineffective in identifying a miscarriage of justice. Strangely, most exonerees did not raise grounds of appeal directly related to the cause or basis for the wrongful conviction

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17. *Ibid* at 43-44.

18. *Ibid* at 195.

19. *Ibid* at 148.

20. “The New Death Penalty Debate: What’s DNA Got To Do With It?” (2002) 33:2 Colum HRL Rev 527 at 543, 546-47.

21. *Supra* note 1 at 163.

22. *Ibid* at 165.

23. *Ibid*.

(*i.e.*, the conviction may have been caused by mistaken identification, but this does not necessarily mean that the offender raised issues relating to identification on appeal). In the cases in which offenders did raise grounds of appeal directly related to the cause of their wrongful conviction, there was little success in convincing the appellate court that the conviction was unsound: Only one of thirteen false confession cases resulted in a reversal because of the unreliability of the confession;<sup>24</sup> only five of seventy mistaken identification cases resulted in a reversal because of the unreliability of the identification process;<sup>25</sup> only six of thirty-six invalid forensic science cases resulted in a reversal based upon the invalidity of the scientific method;<sup>26</sup> and only four of sixteen jailhouse informant cases resulted in a reversal based upon the unreliability of the informant.<sup>27</sup> Appellate review and post-conviction proceedings are not only ineffective, but the time period for achieving exoneration is geological—on average, exonerees spend thirteen years in prison and wait fifteen years for full exoneration.<sup>28</sup> The slow and unresponsive approach of courts may relate to the fact that the United States Supreme Court has remained “on the [s]idelines,” and has “repeatedly avoided addressing whether there should be a claim of innocence—a right under the Constitution to obtain a new trial on the grounds that one is innocent.”<sup>29</sup>

After demonstrating that the judiciary has not been an effective champion of innocence, Garrett turns to current law reform measures in the United States and discusses how legislatures are slowly addressing some of the immediate causes of false conviction. For example, in recognizing that courts may be consistently convicting on the basis of faulty identification evidence, the legislatures in six states have recently passed legislation prescribing best practices for the police to follow in administering a witness identification process.<sup>30</sup> In addition, most states and the federal government have enacted legislation to facilitate post-conviction DNA testing in certain prescribed circumstances (some of which are rather constraining).<sup>31</sup>

Although Garrett asserts that “[t]he main focus of this book is on reforming criminal investigations to prevent wrongful convictions in the first instance,”

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24. *Ibid* at 186.

25. *Ibid* at 187.

26. *Ibid* at 189.

27. *Ibid* at 190.

28. *Ibid* at 215.

29. *Ibid* at 222-23.

30. *Ibid* at 152.

31. *Ibid* at 229.



this is where the book may fall short of reaching its goal.<sup>32</sup> The illumination of the reasons and causes of wrongful conviction is lucid, persuasive, and provocative; however, in addressing potential law reform measures, the author largely repeats recommendations made by other scholars, commentators, and legislative committees. For example, Garrett proposes the mandatory videotaping of interrogations and identification parades, but this proposal has been on the legislative agenda in many jurisdictions for many years. Virtually every proposal advanced by Garrett has been the subject matter of a similar recommendation in Canada, as proposed by the eight Commissions of Inquiry conducted since 1989.<sup>33</sup> By the time Garrett completes his masterful analysis of the causes of wrongful conviction, he appears to run out of steam and is content to advance modest proposals of a band-aid nature. With Garrett's sophisticated and well-informed understanding of wrongful convictions, I would have expected recommendations for reform that address the deep structural or predisposing causes of wrongful conviction and an assessment of whether the conventional understanding of the elements of adversarial justice is skewing our perspective on what constitutes a fair trial.

The Canadian reader would be wrong to assume that the bleak landscape painted by Garrett only applies to American legal culture. With eight Commissions of Inquiry in twenty years, the track record in Canada is far from stellar. The wrongful conviction problem transcends borders and infects all adversarial systems of justice. There is nothing fundamentally different about American criminal justice that would render this experience irrelevant for Canadian jurists. In fact, Garrett's book only incidentally touches upon American legislation and doctrine in describing the problem, as the book seems to be designed with a lay audience in mind. Garrett has also authored a series of superb journal articles relating to the exoneree data, where he spends more time discussing the impact of doctrine

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32. *Ibid* at 211.

33. Royal Commission on the Donald Marshall, Jr, Prosecution, *Findings and Recommendations* (Halifax: Province of Nova Scotia, 1989); *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998); *Thomas Sophonow Inquiry Report* (Winnipeg: Manitoba Justice, 2001); *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (St. John's: Government of Newfoundland and Labrador, 2006); *Report of the Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Manitoba Justice, 2007); *Report of the Commission of Inquiry Into the Wrongful Conviction of David Milgaard* (Saskatoon: Government of Saskatchewan, 2008); *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation* (Toronto, Ontario Ministry of the Attorney General, 2008); *Report of the Inquiry Into Pediatric Forensic Pathology in Ontario* (Toronto, Ontario Ministry of the Attorney General, 2008).

and legislation on the exoneration process.<sup>34</sup> When these articles are combined with the book, it becomes clear that Garrett's scholarship in this area is the most lucid and comprehensive exploration of the wrongful conviction epidemic in the United States.

Although Garrett's writing is dispassionate and balanced, it is impossible not to be emotionally affected by the travesties described throughout the text. Like many other anecdotes in this book, the story of Marcus Lyons leaves an indelible mark on the reader:

In 1991 Marcus Lyons walked up the steps to the Chicago courthouse where he had been convicted, dressed in his U.S. Navy reserve uniform and carrying an eight-by-six-foot cross. He proceeded to lift a hammer and start to nail his foot to the cross. He later explained: "I needed someone to listen." He had just been released after spending three years in prison for a rape he said he did not commit. His lawyer never even filed his appeal. As a result, once he was released, he was registered as a sex offender. His courthouse display got him a \$100 fine for disturbing the peace, but his efforts paid off—a new lawyer took his case and requested DNA testing, which exonerated him.<sup>35</sup>

This is an excellent book and it should be mandatory reading for those aspiring to enter the world of criminal justice. This book may inspire them to achieve excellence and high ethical standards in their work in an effort to prevent miscarriages of justice. For others, this book will make them run for cover and hope they never have to enter a criminal court, whether as a legal professional or as an innocent accused.

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34. See Brandon L. Garrett, "The Substance of False Confessions" (2010) 62:4 *Stan L Rev* 1051; Brandon L. Garrett & Peter J. Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions" (2009) 95:1 *Va L Rev* 1; Brandon L. Garrett, "Claiming Innocence" (2007-2008) 92:6 *Minn L Rev* 1629; Brandon L. Garrett, "Judging Innocence" (2008) 108:1 *Colum L Rev* 55.

35. *Supra* note 1 at 225.