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BABY STEPS AREN'T ENOUGH

Protections against miscarriages of justice must be embedded within the system



By Julius (Jay) Wachtel. Must someone be factually innocent to be convicted of a crime? If you're a criminal justice major or law student, you know the answer: of course not! All that's necessary is to convince jurors that guilt is evident beyond a reasonable doubt. Once the State meets that threshold, the rules change. In the interests of "finality" – not having to endlessly re-litigate judgments – those convicted by plea or at trial can't simply reargue the facts. To get a second bite of the apple they must demonstrate that their Constitutional rights were severely trampled or find new facts – so-called "newly discovered evidence" – that conclusively demonstrate their innocence.

That's tough to do from a prison cell. Most inmates don't have the resources to rub two nickels together, so hiring lawyers and private investigators is out of reach. But for the "lucky" few there is a way. Since 1989, the [Innocence Project](#) has helped exonerate two-hundred fifty-one persons who were convicted of a crime, often rape, where sufficient perpetrator DNA was left behind to prove their innocence.

As the number of documented wrongful convictions continues to climb, most States (but [not the Supreme Court](#)) have grudgingly conceded prisoners the right to send potentially exculpatory biological evidence to a lab – at their own expense, of course. But what if there's nothing to test? As we pointed out in an [earlier post](#), absent a miracle ([ex-cop Jeffrey Hornoff](#) was in the sixth year of a life term when the real, conscience-stricken killer turned himself in) few are cleared without DNA. State innocence projects are swamped and short-staffed, and given the time-consuming complexities of attacking circumstantial and testimonial evidence they must carefully choose which non-DNA cases to pursue. Even when there is substantial evidence of

innocence progress is agonizingly slow. (For example, check out the never-ending saga of the [West Memphis Three](#), now in its sixteenth year.)

It's not only the wrongfully convicted who benefit when mistaken convictions are made right; after all, for each innocent person rotting away in prison a guilty man or woman remains free. Yet criminal justice agencies have resisted the notion that safeguarding the integrity of the process is as important as gaining convictions. Happily, there have been a few exceptions:

- In August 2009 a Federal magistrate reviewed the evidence against [Bruce Lisker](#), a Los Angeles man who had been in prison for twenty-six years for allegedly killing his mother. After more than a decade of startling revelations, meticulously chronicled in 2005 by the [Los Angeles Times](#), it seemed obvious to everyone but prosecutors that the case should have never been brought in the first place.

Unfortunately, the person most likely to be the murderer had committed suicide years earlier. Recognizing Lisker's dilemma, the judge called the State's bluff and set aside the conviction. Prosecutors grumbled, but in the end decided against a new trial. Lisker was finally free. Of course, he's now suing.

- When [D.A. Craig Watkins](#) came into office in 2007 he discovered that Dallas County led the nation in exonerations. Regrettably, prior administrators were apparently more concerned with running up conviction stat's than with doing justice. Instead of sticking his head in the sand or going into denial the newly-elected prosecutor formed America's first (and apparently still the only) "[conviction integrity unit](#)." Working hand-in-hand with innocence projects, he set out to correct his predecessors' errors.

In October 2009 Dallas celebrated its [twenty-first and twenty-second exonerations](#), of two men who were wrongfully convicted of a 1997 murder. Notably, these also happened to be the first two Dallas exonerations where DNA didn't play a role.

- On February 17, 2010 a panel of North Carolina judges reviewed the 1993 murder conviction of [Greg Taylor](#). Now 47, Taylor had been locked up for twenty-seven years for murder. Had Taylor been a citizen of any other State he'd be out of luck, as he had exhausted his appeals and there was no DNA. But in 2006 North Carolina established the nation's first (so far, only) statewide [Innocence Commission](#), empowering it to act as "an independent and balanced truth-seeking forum for credible claims of innocence." A recourse of last

resort, the Commission employs a full-time staff of attorneys and investigators who investigate claims of actual innocence. Those deemed meritorious are referred to a three-judge panel, which makes the final decision.

Since 2007 the Commission has reviewed more than 500 applications and investigated five. Taylor's case was only the second to be sent on to the judges. In their first-ever exoneration, the jurists ruled that Taylor had been convicted on the basis of incorrect physical evidence and witness testimony, including "misinterpreted" behavior by a canine and a lab analyst's false assertion that blood was found in Taylor's vehicle. Taylor was freed.

For lack of a suitable example we left out the police, where nearly all miscarriages of justice have their root. After all, there would be no wrongful convictions without a mistaken arrest. However, we know of no law enforcement agency that has made a special effort to monitor and review prosecutorial referrals so that innocent persons aren't needlessly placed at risk.

When pressed to account for its mistakes, the criminal justice system typically responds by pointing out that [very few exonerations](#) take place. What's ignored is that there would likely be many more but for the fact that innocence must be proven to a certainty that far surpasses what's required to convict. In most cases there's no DNA. What's more, few inmates have the resources to take on the State, and even if they could, discovering compelling new evidence long after the fact may be impossible.

Compassionate judges, enlightened D.A.'s and statewide commissions are welcome, but they're only baby steps. What's needed is a formal approach, perhaps patterned after Dallas' "conviction integrity" model, that embeds active protections against miscarriages of justice within every agency, from police to the courts. Surely, getting at the truth benefits everyone. It's the smart way to fight crime.