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THE TEN DEADLY SINS

Why do miscarriages of justice keep happening?



By Julius (Jay) Wachtel. How do we address the problem of wrongful conviction? We could analyze cases where things went astray, draw up lists of poor law enforcement practices, then tackle them one by one. The problem with that approach is that it's like swatting flies: it makes a mess and you'll never kill them all. Why not see what's attracting them in the first place? To that end here are ten factors that can set the stage for a miscarriage of justice:

Overconfidence. When Supreme Court Justice-to-be [Samuel Alito](#) was asked during his confirmation hearing if executing an innocent person was Constitutional, all he could say was that the judicial process has many built-in safeguards. Knowing just how fallible humans are, the notion that witnesses, police, courts and juries don't make serious mistakes seems ridiculous, yet in practice we pretend that it's true.

Substituting measures for goals. If we could be certain that only the guilty are arrested and convicted, measuring success with numbers might make sense. Yet in the real, imperfect world, where skills vary and resources are limited, evaluating agencies and individuals based on numbers of arrests and convictions and on clearance rates encourages haste and sloppiness, with predictable consequences.

Illusion of an adversarial process. [O.J. Simpson](#), Michael Jackson, Robert Blake and Phil Spector could afford to hire teams of lawyers, investigators and expert witnesses, matching if not bettering the authorities blow by blow. Most defendants can't. When one has nothing beyond an appointed lawyer or harried public defender

their chances of discovering exculpatory evidence that police overlooked are very small.

Rush to judgment. As the [FBI's anthrax](#), Atlanta Olympics and other fiascos demonstrate, pressures to solve violent crimes can lead agencies and investigators to prematurely narrow their focus. Concentrating investigative resources on a single target inevitably produces a lot of information. As facts and circumstances accumulate, some can be used to construct a theory of the case that excludes other suspects, while what's inconsistent is discarded or ignored. That's how a "house of cards" gets built.

Narrowly interpreting the State's obligations. Prosecutors aren't like defense attorneys, whose sole interest is the welfare of their client. D.A.'s are supposedly there [to do justice](#), not merely win one for the State. Yet in example after example they have [relentlessly battled on](#) even when it was obvious that the police may have the wrong man or that someone was wrongfully convicted.

Ignoring mistaken arrests. Wrongful conviction gets plenty of attention. Meanwhile few concern themselves with the underlying problem of [mistaken arrest](#). Not only are these events highly traumatic for those arrested, but they cause the police to stop looking, allowing the real perpetrator to continue making victims. Worse, after an arrest takes place it may be too late to fix things: system inertia, public pressures and a "let the jury decide" mentality have allowed many innocent persons to be taken to trial.

Absence of reflection and self-criticism. One would think that police and prosecutors are eager to address the issue of mistaken arrest and wrongful conviction. With a few notable exceptions, such as the new [Dallas County D.A.](#), one would be wrong. Despite a litany of goofs, up to and including wrongful executions, the law enforcement community keeps insisting that mistakes are much too rare to justify altering current practices. But how can we possibly know the [prevalence of error](#) when the deck is stacked against its discovery? What's more, protecting one's own is so ingrained that some police and prosecutors shield unprofessional colleagues who plant evidence and use force, threats and coercion to get suspects to confess.

Aura of invulnerability. Even the most skilled and well-intentioned detectives and prosecutors have inadvertently caused innocents to spend decades in prison. ([Faulty eyewitness identification](#) is a common culprit.) Unfortunately, eyewitness ID or circumstantial evidence may be all there is. Whether one should proceed without substantial corroboration is a critical decision that must be made in a dispassionate setting and given a lot of thought.

Picking on the usual suspects. Detectives faced with “whodunits” often [look for suspects](#) in the pool of past offenders. While potentially useful, the approach can set up an innocent person for a nasty fall, particularly if they resemble the real criminal, can’t account for their whereabouts or might know or live near the victim. It’s surprising just how readily juries will convict someone with a prior record no matter how sketchy the evidence.

Applying poor investigative practices and junk science. Suggestive interviews and flawed identifications have led to many wrongful convictions. [Polygraphy](#) and [investigative profiling](#) have been thoroughly debunked yet continue to be used to screen and identify suspects. There are also serious issues with fiber, arson, ballistics and blood-spatter evidence and, most recently, with [DNA probability assessments](#). Yet old habits die hard.

Fine, you say, but now what do we do? Three things must change:

- Prosecutors and police must perceive their roles more broadly, in terms of securing justice rather than only making arrests and gaining convictions.
- They must change how they actually do their work.
- Finally, they need to acknowledge that serious errors *will* happen. Knowing that, they must implement strategies to identify and correct mistaken arrests and wrongful convictions after the fact.

More on this next week. Stay tuned!