

Edward Radin wrote more than forty years ago in *The Innocents* (1964) that a judge told him confidentially that five percent of convictions in the United States were of an innocent person. Since then there have been a number of attempts to quantify the incidence of wrongful convictions based on techniques that include analyzing compilations of known wrongful convictions. These estimates have ranged from 1/2% to 15% of all convictions.¹

Estimates are relied on to have some understanding of how often wrongful convictions occur, because there is no official repository of the final disposition of all state and federal criminal cases in the U.S.

1983 Ohio survey

The results of a 1983 survey that expanded on Radin's idea of querying people directly involved in the criminal prosecution process about the incidence of wrongful convictions, was published in 1986 in the journal, *Crime and Delinquency* (Vol. 32, 518-544). That survey queried Ohio state prosecutors, judges, public defenders, sheriffs and police chiefs. Overall, 5.6% of the respondents believed there were zero wrongful convictions in Ohio, 77.4% believed they occurred in less than 1% of cases, and 22.6% believed that more than 1% of Ohio convictions were wrongful.

New Ohio survey

Twenty-one years later, in 2007, *Crime and Delinquency* (Vol. 53, 436-470) published the results of an expanded version of the 1986 Ohio survey. Professors Robert J. Ramsey and James Frank sent out over 1,500 questionnaires to sheriffs and police chiefs, chief and assistant prosecutors, private defense lawyers and public defenders, and common pleas and appellate judges in Ohio. They received 798 responses. Three of the questions were: (a) their perception of the percentage of wrongful felony convictions in their own jurisdiction; (b) their perception of the percentage of wrongful felony convictions in the United States; and (c) what they believed to be an "acceptable level" of wrongful convictions. Each question allowed a percentage response ranging from "0%" to "over 25%".

One of the survey's striking findings is the degree to which "not in my backyard" (NIMBY) is a very prevalent attitude. Other than defense lawyers, more than four out of five (83%) respondents reported that less than one out of a hundred (1%) convictions in Ohio are erroneous, while less than half (47%) of those same people believe that is true outside of Ohio. Likewise, other than defense lawyers, only about one in fourteen (7%) of the respon-

Ohio and Michigan Legal Professionals Acknowledge Wrongful Convictions Are Real

By Hans Sherrer

dents believe that more than 3% of convictions in Ohio are erroneous, while one in four (24%) of those same people believe that is true outside of Ohio. In contrast, 60% of defense lawyers think that more than 3% of Ohio convictions are erroneous, while 83% believe that is true outside Ohio. Overall, the survey respondents believe a wrongful conviction occurs in 4.5% of the cases outside of Ohio, and 2.7% of cases in Ohio.

In contrast with the wide difference of opinion about how often a wrongful conviction occurs, 63% of the respondents agreed that only a zero wrongful conviction rate is acceptable. The four Ohio groups believe on average that wrongful convictions occur nationally at a rate more than eleven times what they consider acceptable (4.5% v. 0.4%). (See the survey results in the tables at the end of the article.)

Michigan survey

To find out if the results of the Ohio survey would be replicated in Michigan, Professor Marvin Zalman (Professor of Criminal Justice at Wayne State University in Detroit) and two colleagues sent out questionnaires to the same four groups of professionals as the Ohio survey. They received 467 responses. The 55% response rate was similar to the Ohio survey's 53% response rate. Their findings were reported in March 2008 in the journal *Justice Quarterly* (Vol. 25:1, 72-100). The number of prosecutors who responded was less than for the Ohio survey because they were discouraged from participating by the state prosecutors association. However, the responses of the Michigan prosecutors that participated were similar to the responses by Ohio prosecutors.

The responses to the Ohio and Michigan surveys overall were comparable. For example, 99.3% of the Ohio respondents and 99.6% of the Michigan respondents believe that wrongful convictions occur in the United States. Although the NIMBY attitude is as alive and well in Michigan as it is in Ohio, its prevalence isn't the most notable finding of the studies. That is the degree to which each of the four professional groups in both studies acknowledged that the conviction of actually innocent persons does in fact occur in the United States. Overall, the professionals in the Michigan survey think a wrongful conviction occurs in 5.7% of cases nationally, and in 3.5% of Michigan cases.

Consistent with the Ohio results, more than half of the respondents (51%) believe that only a zero wrongful conviction rate is acceptable. Also consistent with the Ohio survey the four Michigan groups believe on average that wrongful convictions occur nationally at a rate more than eleven times what they think is acceptable (5.7% v. 0.5%). (See the survey results in the tables at the end of the article.)

Observations about the Ohio and Michigan wrongful conviction surveys

The following are observations about the results of the Ohio and Michigan surveys.

Wrongful convictions are recognized as a national problem

The Ohio and Michigan surveys are important because they cover a cross-section of the law enforcement system's four dominant groups in two populous states, and each of those groups recognize wrongful convictions occur nationally at rates they consider unacceptable. The surveys are also valuable by providing evidence that the prosecutors and judges who garner publicity by pooh-poohing the idea that wrongful convictions are a problem nationally are in the minority among their peers who believe otherwise. For example, 71% of the judges believe that at least 1% of convictions nationally are wrongful.

Judge's responses are "schizophrenic"

Although it isn't surprising that prosecutors and police think wrongful convictions occur with the least frequency, or that defense lawyers think they occur with the most frequency, the attitude of judges is unexpected. More than 8 out of 10 (84%) Michigan judges think wrongful convictions occur in more than 1% of cases outside of their jurisdiction, while almost half (47%) think they occur in more than 3% of cases, and more than one in eight (13%) think they occur in *more than 10% of cases*. Almost half (46%) of the Michigan judges think that a wrongful conviction occurs in more than 1% of cases within Michigan. A lesser, but still significant percentage of judges in Ohio think wrongful convictions are a problem. Yet, in both Ohio and Michigan about three out of four judges think the acceptable rate of wrongful convictions is 1/2% or less, and roughly nine out of ten judges think a rate of 1% or less is acceptable.

So there is a degree of disconnect between what many judges believe about the actual occurrence of wrongful convictions and what they profess is an acceptable rate of wrongful convictions. The articles about the

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two studies don't explore this anomaly – even though there is something schizophrenic about the attitude of the judges.

The judge is the single most important variable determining the fairness and likely outcome of a prosecution. The judge makes the pretrial rulings on what physical items and testimony will be admissible as evidence, the judge dictates the scope of witness examination by denying or sustaining objections, the judge decides the jury instructions, and the judge's tone of voice, mannerisms and courtroom rulings convey his or her attitude about the defendant's guilt or innocence – which can be expected to influence the judgment of jurors. Consequently a trial judge who wants to decrease the incidence of wrongful convictions can immediately contribute to their reduction by their rulings and behavior that will help ensure respect for a defendant's presumption of innocence. Appellate judges that want to decrease the incidence of wrongful convictions can immediately do so by not skewing their rulings to disfavor the defendant's position.

Since trial and appellate judges have it in their power to affect a reduction in the wrongful convictions they acknowledge are occurring at an unacceptable rate, the question is – why don't they? A prime reason can be the paralyzing effect of the "law and order" mentality that dominates public discourse about property and violent crimes. This mentality, sometimes referred to as "crime control," has been reflected in recent decades by expanding the number of crimes, harsher penalties imposed by both state and federal courts, the elimination or stingy granting of parole, and the creation of new laws and post-release reporting requirements for person's convicted of particular crimes – such as "sex" related offenses.

The law and order mentality also affects the election and nomination of judges. It is nothing short of the kiss of death for a judicial candidate or nominee to be painted as "soft on crime." That is a code phrase the prospective judge (or a state judge seeking reelection) does not believe "the book" should be thrown at a convicted criminal. It is particularly damaging for a judicial candidate or nominee to be saddled with the label of being a coddler of criminals by suggesting a sentence should be crafted to fit the individual and the circumstances of the crime, since that view can be considered as lenient on criminals.

Why isn't there more support for reform?

The results of the studies raises the question: Why isn't there widespread support by law enforcement professionals for meaningful

structural reforms that can be expected to reduce the incidence of wrongful convictions? Over-all about two-thirds of the respondents of both studies (72% MI and 65% OH) think that more than 1% of convictions in the U.S. are false, and about one-fourth think that more than 5% are false (29% MI and 23% OH). A 1% error rate is significant – and 90% of the respondents expressed the opinion that a 1% wrongful conviction rate is unacceptable. Yet, other than defense lawyers, there is no visible support among the respondents to enact meaningful reforms to reduce the incidence of false convictions that a large majority acknowledge are occurring nationally at a rate they consider unacceptable.

One reason for that could be that reforms would be at the state level and neither police nor prosecutors – both powerful political lobbies – in either Michigan or Ohio think that wrongful convictions are a problem in their respective state. Together they believe that 1/2 of 1% of convictions in their jurisdiction are wrongful – while they consider the acceptable rate of wrongful convictions is also 1/2 of 1%. Since overall they believe the rate of wrongful convictions in their "backyard" is the same as what they consider to be acceptable – there is an absence of support for reforms that could be expected to meaningfully reduce their incidence. From their perspective there is no need for reforms because the system in their state effectively weeds out the innocent from the guilty.

Judges in the two states believe wrongful convictions occur in their respective jurisdictions at a rate four times what they consider acceptable (1.9% v. 0.5%). The fear of being labeled "soft on crime" could be a reason why more judges don't support structural reforms that could be expected to reduce the wrongful convictions that they acknowledge are occurring at a significant rate. In contrast defense attorneys, who are politically weaker than the other three groups, support reforms to reduce wrongful convictions that they believe are occurring at pandemic levels in their state and nationally.

Is concern with wrongful convictions less than 25 years ago?

The surveys found that slightly more than four out of five of the Ohio and Michigan respondents believe wrongful convictions occur in their home state. That means that almost one out of five don't think they occur in their respective state. Considering there have been highly publicized exonerations in both states, it almost seems a denial of reality for anyone in this day and age to doubt that wrongful convictions occur.

The 1983 Ohio survey was conducted before DNA testing had been invented, so the attitude of the participating professionals was based on their awareness of wrongful convictions that had been detected in ways available at the time. Those included witness recantation, new evidence corroborating an alibi, new exclusionary forensic evidence such as blood typing or fingerprints, etc. Yet in 1983, 94% of the respondents believed that wrongful convictions occurred in Ohio. Thus almost four times as many legal professionals in Ohio believed in the 1983 survey that wrongful convictions occur in their state than believed it two decades later – even though at the time of the survey there had been publicity about more than 100 exonerations across the country attributable to DNA evidence.

That there was such a high awareness of wrongful convictions in Ohio in 1983 is not surprising. The first DNA exoneration in the U.S. wasn't until six years later in 1989, and even today the majority of exonerations in the U.S. and virtually all those in other countries are based on non-DNA evidence. In 2008, 20 of the known exonerations in the U.S. were attributable to DNA, while 76 were based on non-DNA evidence.²

So while DNA evidence is important in individual cases, publicity in the U.S. focused on DNA exonerations is disproportionate to its over-all impact as evidence to aid a convicted person seeking to establish that he or she did not commit a crime.

England, Scotland and Norway each established a Criminal Case Review Commission (CCRC) between 1997 and 2004, because of an awareness the level of uncorrected wrongful convictions was intolerable. That awareness existed even though there was only one DNA exoneration in England and none in Scotland or Norway.

Although DNA testing is an effective option in a very limited number of cases, it is nevertheless trumpeted in the U.S. as a safety net to correct wrongful convictions. Consequently, the Ohio and Michigan surveys suggest it is possible the focus on DNA exonerations in the U.S. during the last 15 years or so has distorted the discussion about wrongful convictions in this country to the point that it may be considered to be less of a problem than it was in the 1980s.

Ohio and Michigan Surveys Provide Data For New Wrongful Conviction Estimates

The articles describing the Michigan and Ohio surveys of law enforcement professionals break-down the percentage estimates

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of how often they believe wrongful convictions occur within their state jurisdiction, and in the United States as a whole. Although the survey's authors make no effort to do so, an estimate of the wrongful conviction rate can be adduced from their findings.

The surveys show that a large percentage of the professionals perceive false convictions to be both real and occurring in significant numbers nationally. The Michigan and Ohio respondents believe on average that 5% of convictions in the U.S. are false. Based on that estimate the 1,145,000 state and federal felony convictions in 2004³ resulted in 57,250 wrongful felony convictions in that one year. That is more than 1,100 per week and more than 220 per court day.

There were 1,540,805 prisoners in state and federal prisons in June 2008. A 5% wrongful conviction rate nationally means that 77,040 of those prisoners are innocent.

The 5% average of the legal professionals queried in the two surveys is in the mid-range of wrongful conviction estimates, and it is identical to the 5% estimate by the judge interviewed for Edward Radin's 1964 book, *The Innocents*.⁴ There has long been an acute awareness of wrongful convictions in this country. Although the actual number of wrongly convicted people is unknown, the Ohio and Michigan surveys document that it is perceived to be unacceptably high by the professionals involved in the arrest, prosecution, defense and adjudication of people accused of committing a crime.

Sources:

Huff, R. C., Rattner, A., & Sagarin, E. (1986). Guilty until proved innocent. *Crime & Delinquency*, 32, 518-544.
 Ramsey, Robert J., & Frank, J. (2007). Wrongful conviction: Perspectives of criminal justice professionals regarding the frequency of wrongful conviction and the extent of system errors. *Crime & Delinquency*, 53, 436-470.
 Zalman, Marvin, Smith, Brad and Kiger, Angie (2008). Officials' Estimates of the Incidence of "Actual Innocence" Convictions. *Justice Quarterly*, 25:1, 72-100.

Endnotes:

1. This author is intimately aware with the difficulty of getting a handle on the number of wrongful convictions. In 1996 I estimated, based on data available at the time, that almost 15% of convictions in the United States were of an innocent person - which means slightly more than one out of seven convictions are wrongful. Although that is on the high end of estimates, nothing I have been exposed to during the intervening 13 years compels me to think it is erroneous. In fact, 11.4% of

U.S. Supreme Court Orders Evidentiary Hearing For Troy Davis

Troy Anthony Davis was convicted in 1991 of murdering a Savannah, Georgia policeman and sentenced to death. From the time of his arrest, Davis has proclaimed he is the innocent victim of mistaken identification.

Davis has amassed significant new evidence supporting his innocence, including that seven of nine prosecution eyewitnesses have recanted, and three witnesses have identified the prosecution's primary witness as the shooter

On August 17, 2009 the U.S. Supreme Court took the extraordinary action of granting Davis' original writ of habeas corpus (i.e., it was filed directly with the USSC). The Su-

preme Court ordered that the U.S. District Court conduct a hearing to, "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."

Justice Steven's wrote in the Court's majority opinion: "no court, state or federal, has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence. The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."

For a copy of the USSC's 8-17-2009 ruling in Troy Davis' case, send \$2 or 5 first-class (44¢) stamps to: Justice Denied; PO Box 68911; Seattle, WA 98168

Table 1 - Estimates of wrongful convictions in U.S. (Several "rate of occurrence" categories are combined in these tables.)

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	0	0.5	0	0	0.6	1.1	4.5	1.0	0.4	0.7	0.6
<1%	4.8	7.9	16.0	37.3	50.0	44.9	59.1	61.5	27.7	34.5	32.0
1 to 5%	31.7	40.3	56.6	46.4	45.4	43.8	22.7	34.4	42.5	42.0	42.2
6 to 25%	54.5	43.5	26.5	15.6	3.5	9.6	13.6	3.1	25.9	20.2	22.4
>25%	9.0	7.9	.7	.6	0	0	0	0	3.4	2.5	2.8
Average	11.1%	9.0%	4.9%	3.3%	2.1%	2.7%	1.8%	1.6%	5.7%	4.5%	5.0%

Table 2 - Estimates of wrongful convictions in respondent's jurisdiction

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	0	1.8	5.3	15.5	41.0	33.2	47.8	29.0	19.7	19.5	19.6
<1%	7.0	11.5	48.7	52.4	51.7	56.9	47.8	62.0	36.7	43.2	40.8
1 to 5%	41.3	45.1	36.2	25.0	6.8	9.5	4.3	7.0	24.7	23.1	23.7
6 to 25%	45.5	39.0	8.9	7.2	0.6	0.4	0	2.0	16.7	13.4	14.6
>25%	6.3	2.7	0.9	0	0	0	0	0	2.2	0.8	1.3
Average	8.9%	7.2%	2.3%	1.6%	0.4%	0.5%	0.2%	0.6%	3.5%	2.7%	3.0%

Table 3 - Acceptable level of wrongful convictions

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	49.1	66.2	51.1	53.4	54.6	64.6	48.5	81.8	51.4	63.1	55.8
<1%	37.9	24.1	40.2	32.8	35.4	29.2	42.4	9.0	38.1	27.5	34.2
1 to 5%	11.3	8.3	8.6	12.1	7.4	5.6	9.1	9.1	9.0	8.2	8.7
6 to 25%	1.7	1.4	0	1.7	2.6	0.6	0	0	1.4	1.1	1.3
>25%	0	0	0	0	0	0	0	0	0	0	0
Average	0.6%	0.4%	0.4%	0.6%	0.6%	0.3%	0.4%	0.2%	0.5%	0.4%	0.5%

Estimated wrongful convictions based on Ohio and Michigan surveys

	U.S. Wrongful conviction rate	Felony convictions in U.S.	Wrongful felony convictions in U.S.	State prisoners (sentenced)	In-state wrongly convicted prisoners
Nationwide	5%	1,145,000 (2004)	57,250 (2004)		
Michigan	5%			46,638 (Sept 09)	2,332
Ohio	5%			50,889 (April 09)	2,545

the MI & OH survey respondents think the wrongful conviction rate is more than 15%.

2 The Innocents Database at, www.forejustice.org/search_idb.htm
 3 Criminal Sentencing Statistics 2004, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited 5-12-09) This is the most current sentencing

data available as of June 2009.

4 Radin also wrote in referring to the ability of the legal system in 1964 to determine the innocent from the guilty, "... lawyers who have specialized in freeing illegally convicted prisoners reduce it to eighty per cent." (9) That is, 20% of convicted persons are innocent.