Smoke but No Fire: Convicting the Innocent of Crimes That Never Happened

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In *Smoke but No Fire*, Jessica Henry discusses the phenomenon of "no-crime wrongful convictions," where individuals are convicted of crimes that never happened, such as when someone is convicted of homicide when the alleged victim is still alive. This is a remarkable and disturbing phenomenon that stands in contrast to the more commonly discussed situation where an individual is incorrectly identified as the perpetrator of a crime that was committed by someone else. In fact, one of the most surprising revelations in the book is just how common no-crime wrongful convictions are. Relying on the *National Registry of Exonerations*,[1] a database maintained by three American universities of wrongful criminal convictions in the United States since 1989, Henry asserts that "nearly one-third of all known exonerations of innocent people involve no-crime wrongful convictions." [2] This is clearly a phenomenon worth studying.[3]

Smoke but No Fire is an engaging read that offers a damning indictment of the American criminal justice system and its pervasive indifference to the possibility of innocence, perhaps especially in minor crime cases. As an academic study of no-crime wrongful convictions, however, the book falls a little short. While Henry sometimes isolates and analyzes the characteristics and causes of no-crime wrongful convictions specifically, the book for the most part addresses factors contributing to wrongful convictions more broadly – and sometimes unfairness or impropriety in the delivery of American criminal justice generally. In truth, it would be challenging to distinguish how something like cognitive biases play a role in a particular subset of wrongful convictions as diverse and extensive as no-crime wrongful convictions; analyses of mental states are almost always inferential and inexact. Henry also fairly notes that it is not surprising that a subset of wrongful convictions is "in general caused by the same factors as wrongful convictions or that there are some similarities between actual-crime and no-crime wrongful conviction exoneration data." [4] But the real value in isolating a subset of wrongful convictions lies in what it can reveal

[1] See online: https://www.law.umich.edu/special/exoneration/Pages/about.aspx.
[2] *Smoke but No Fire*, 4 [*Smoke*].
[3] I say this even though the Registry's criteria for labelling a case as an exoneration allow for inclusion of some cases in which the evidence of innocence is incomplete and, arguably, insufficient: see online: https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx. Indeed, Henry sometimes discusses cases where, based on the description given, it is not entirely clear that an innocent person was convicted. See, for example, *ibid* at 54 (discussion of the Anthony Cooper case). Nonetheless, even if one might quibble at the margins, it is clear that a large number of individuals have been convicted of crimes that never occurred. Henry also quite defensibly argues that, over and above the individuals listed in the Registry, many others have very likely been convicted of phantom crimes in misdemeanor cases.
[4] *Smoke*, *supra* note 2 at 11.

about the unique or distinctive characteristics of the subset, the factors that contribute to it, the ways in which those factors interact, and so forth. Indeed, that is Henry's stated goal.[5] For much of the book, however, Henry establishes what *can* cause a no-crime wrongful conviction without explicitly analyzing whether and how that differs from what can cause an actual-crime wrongful conviction.

This is not to say that the book offers no insights specific to no-crime wrongful convictions. The introductory chapter in particular includes some interesting data, such as the relatively high incidence of no-crime wrongful convictions in drug cases and child (but not adult) sex abuse cases[6] and the general irrelevance of eyewitness misidentification as a contributing factor. Perhaps most striking is the finding that women are disproportionately susceptible to being convicted of a crime that never occurred.[7] The ways that gender and sexual identity play a role in wrongful convictions, while not ignored, have not been the subject of sufficient study to date. Another chapter quite germane to an understanding of no-crime wrongful convictions is the one on police misconduct, which describes troubling incidents where police framed innocent individuals, sometimes to cover up their own crimes.

Some aspects of the book are of interest because of the issues addressed, irrespective of any demonstrated connection to no-crime wrongful convictions. The chapter on false accusations discusses some of the research on lie-detection. There is actually a treasure-trove of research on the subject,[8] research that is critically important to assessing and enhancing reliability in the criminal justice system. To the extent that credibility is at issue in cases, the system relies fundamentally on the truth- and lie-detection capacities of triers of fact. Triers are the last defence against untruthful and exaggerated testimony unnoticed (or ignored) by police, prosecutors and other actors in the system. Yet research consistently shows that people are not very good at detecting deceit and that they often rely on unhelpful and misleading cues (such as gaze aversion). This raises questions about the importance the legal system attaches to testimonial demeanour, the ability to see a witness' full face in court, the so-called preferred position of trial courts in determining credibility, and so forth.

The chapters on misdemeanors and judges are also of note. Wrongful convictions may be most common in minor crime cases, largely because of the prevalence of false guilty pleas. This is almost impossible to prove given that the ability and incentive to uncover factual error in such cases is so limited. But it is not hard to understand why an innocent defendant might falsely admit culpability for a relatively minor offence, even when the ultimate penal and collateral consequences are non-trivial. Years ago, Malcolm Feeley argued that in minor cases the process can be the punishment, referring to the sometimes overwhelming costs associated with contesting a charge (paying counsel, repeatedly missing work or child-care responsibilities for court dates, enduring bail restrictions for months on end, etc.). [9] Relying on her experience as a New York

[5] *Ibid* at 13: "Although the factors that contribute to actual-crime wrongful convictions are similar to those that cause no-crime wrongful convictions, this book examines how those contributing factors play out specifically in no-crime cases."
[6] Henry appropriately discusses the limitation of this finding: *ibid* at 12-13.
[7] *Ibid* at 25, 26.
[8] See, for example, Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, 2nd ed (Hoboken, NJ: John Wiley & Sons, 2008).
[9] *The Process is the Punishment*, (New York: Russell Sage, 1992).

public defender, Henry vividly describes a system in which defendants – especially poor and marginalized ones – routinely experience costs that would make a false guilty plea an entirely logical decision.

The role of judges in wrongful convictions has probably been too often disregarded. In truth, it is a complex topic and, in my view, Henry is not always sufficiently nuanced or careful in her remarks. She rightly calls out judges who display prejudice, bias, or incompetence. But she goes further and asserts that "[a]t every stage of the criminal process, judges have the power to prevent or correct no-crime wrongful convictions" yet "often fail to do so." [10] She argues that, most of the time, judges fail in their duty to respond to bad lawyering – "sleeping or drunk lawyers, lawyers who are unaware of the law or the facts, lawyers who did no investigation, lawyers who call the wrong witnesses or make the wrong arguments." [11] She claims that judges "accept pleas from innocent people without an established factual basis, such as in drug cases without lab tests,"[12] even though they "could ensure that defendants plead guilty to crimes that have a factual footing."[13] It is not clear to me that matters are so simple. Judges are neutral arbiters in an adversarial system of justice. The are usually presented with an incomplete and selective picture of the facts of a case, filtered by police and/or counsel. They are routinely confronted with accused individuals willing, even eager, to admit facts. They are limited in their ability to interfere with the decisions and tactics of (especially defence) counsel, and subject to what are sometimes liberal rules of evidence and procedure. Henry herself notes the lax standard for assessing the competence of counsel in *Strickland v. Washington*.[14] Once one moves past the proverbial bad apples, it can be hard to identify exactly when a judge contributed to a wrongful conviction, other than in a technical sense.

The final chapter in the book contains a series of recommendations for reform. Most of the recommendations are sensible but only a small number are new and a couple are curious.[15] Among the most significant are the recommendations to liberalize the bail system and expand the discovery rules in the United States. Unfortunately, Henry chose not to explore any individual reform in detail. Perhaps that is understandable in a book designed to introduce the world to an important and substantial phenomenon, but I would have preferred to see Henry examine in depth a smaller number of reforms of particular importance to the prevention of no-crime wrongful convictions.

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[10] *Smoke, supra* note 2 at 129.
[11] *Ibid* at 141.
[12] *Ibid* at 143.
[13] *Ibid* at 150.
[14] *Strickland v. Washington,* (1984) 466 US 668.
[15] For example, Henry says "prosecutors should decline to pursue cases that rely exclusively on forensic evidence": *Smoke, supra* note 2 at 176. Ignoring the fact that only a rare case would rely *exclusively* on forensic evidence, this recommendation seems overly broad. Some forensic sciences are reliable and it will sometimes be appropriate for a prosecutor to pursue a charge even when a particular science or its application in a case is contestable. Prosecutors should drop cases that have obvious weaknesses but we cannot expect them to withdraw from consideration all cases that rely heavily on a category of evidence, especially one as broad as forensic evidence. Prosecutors are not judges and they are entitled to bring forth claims that have a plausible basis in fact and law. If the trial system is too fallible to identify the inaccurate claims (as it sometimes appears to be), it is the trial system that must be changed.