EXTRAORDINARY WRONGFUL CONVICTIONS, ORDINARY ERRORS—WHY MEASUREMENT MATTERS

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We are here today to talk about an extraordinary event in our criminal justice system: a wrongful conviction that can be proved with per se evidence. I am here, however, to tell you that the occurrence is not so extraordinary. There are places in America where the ordinary has become so degraded that it is in fact extraordinary, or ends up with extraordinarily catastrophic consequences, as in the case of the wrongful convictions that we are here to discuss today.

The question is how and why these instances occur. I published a book last year that describes a journey through American courtrooms where such injustice is allowed to continue until it becomes impossible to ignore.1 When I began my book eight years ago I believed the wrongful conviction literature’s analysis. The problems with wrongful convictions could be contained to a neat bar graph which names reasons such as junk science, bad serology, overemphasis on single eyewitness identification, a sleeping lawyer (metaphorical or actual), and overzealous law enforcement who elicited a false confession. Today, I propose to you that there is a root cause underneath these reasons.

I. ORDINARY INJUSTICE

Now I want to take you back to 2001 when I first saw the court

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1 AMY BACH, ORDINARY INJUSTICE (2009).
that made me decide to write a book. I had just graduated law
school from Stanford and clerked for a federal judge in Miami on the
Eleventh Circuit Court of Appeals, and I had the opportunity to
write a series of journalistic stories about civil rights for the Nation
Magazine.

I sat in a bunch of different courts. One was in Greene County,
Georgia, a beautiful town two hours east of Atlanta where President
George Bush’s largest fundraiser lives. It was an early morning. I
walked up the stairs outside the courtroom and there was a swarm
of people all surrounding a man who was the public defender. Most
had called him but not heard back. They had never had a
substantive conversation about the facts of their cases with their
lawyer. But yet standing outside of court, their lawyer would spend
five minutes where he would tell them, the prosecutor is offering
you this deal. Then, they would go wait in court where another
lawyer, who knew even less about them or their cases, would stand
at their sides and they would plead guilty before the judge.

During the first two days 48 people pleaded guilty in this way. As
I looked on in court, several cases broke down with people crying,
saying that they didn’t understand what was happening to them.
One woman was saying over and over again, “I didn’t know I was
going to jail.”

Afterwards, the prosecutor, defense attorney, and the judge all
told me they saw nothing wrong with the process. I found out later
that that year the public defender represented about twice as many
people as the American Bar Association (“ABA”) recommends as the
absolute maximum that an attorney can handle. But the people
who shaped justice didn’t seem taxed. “We have successfully done a
10 page calendar in one day,” the public defender boasted on that
first day I saw him. He said it proudly as if speed equals success.
When I asked him if he felt people were treated fairly he said
something I would never forget: “Nobody could say that they didn’t
have their day in court.”

What fascinated me then and now is how smart, committed, hard-
working professionals can routinely act in ways that fall short of
what people in their positions are supposed to be doing. And still,
they did not even realize that anything was missing. Many did not
realize that their behavior had devastating consequences for
ordinary peoples’ lives. Their mistakes had become so routine that
they could no longer see their role in them. This is ordinary
injustice.

There was something else I noticed in that Georgia courtroom. As
I watched the cases proceed, it became increasingly harder to hear what was going on. The judge, prosecutor and defense attorney were huddled around the bench, speaking softly. It looked like they were all on the same team—rather than two opposing advocates “duking” it out before a neutral arbiter.

The harder it became to hear, the more restless people became. All you could hear was the creaking of the dark wooden benches. I was in the second row. Sitting next to me was Steve Bright of the Southern Center for Human Rights, an advocacy agency in Atlanta. He was there because the Center was bringing a series of lawsuits against the state claiming that the counties didn’t have enough money to defend the poor. I told him I was going to sit in this court. And he decided to join me. Anyway, we couldn’t hear a thing. So he says to me, “Amy, why don’t you ask the judge to speak up?” And I say, I am not going to do this. This is court after all and I wanted to be a neutral observer. He stands up and bellows, “Your honor, would you please speak up? Thank you very much.”

Court all of a sudden got really quiet. The judge looked like she had been slapped in the face. She said to Steve, “please come before me.” But Steve stays sitting down and says, “No your honor that’s ok I will just stay right here, thanks, I just wanted you to speak up. Thank you very much.”

The judge ordered Steve to come before him.

So Steve crawled over everyone’s legs and he takes over the courtroom.” Your honor there are a lot of people here today, they are all here missing work, or left their children in the care of others. This is a public hearing. So if you wouldn’t mind, please speak up.”

The place went wild. People were clapping screaming “amen” and laughing and in the break went up to him and hit in the arm to say, thank you. Some asked if he would be their lawyer. After the break, the judge installed a microphone. Steve was a hero. And everyone could hear.

The next day Steve went back to Atlanta and the microphone was gone. I was able to follow up in this court for the next five years where I watched this court function with different judges at the helm. There was never another microphone. And there was always a huddle. Ordinary Injustice is about that huddle. It’s about people—people like you and me—who become more attached to the people we work with than making the adversarial system work.
II. ORDINARY INJUSTICE AND WRONGFUL CONVICTIONS

Now I want to tell you a story of another huddle. This one occurred in a Chicago over a front-page heater case. This is the sort of a trial for which the system marshals up all its forces because the state wants to show the community it wants to keep it safe. For this reason I call these trials “show trials.” The one that is featured in my book involves two seventeen year old boys charged with raping and murdering a little girl named Lisa Cabassa in the 1970s.

The prosecutor in the case was a man named Tom Breen. Back in 1977, Breen was the most popular prosecutor in the office—for his personality as well as his skill. Here, he successfully prosecuted two boys: Michael Evans and Paul Terry, who were sentenced to two hundred to four hundred years for murder and rape. About twenty years later, Breen, like so many prosecutors, had become a successful defense attorney—arguably one of the best in the city. One late night, he was talking with a colleague who investigates wrongful convictions. This colleague said to him, do you ever think you could have prosecuted someone wrongly? “No, Breen said, we did things differently back.” But then a few days later Breen went back to that friend and said, “there’s one case that gives me pause,” and told him to look into Michael and Paul’s case.

As a result of Breen’s speaking up, an investigation was launched and twenty-seven years later, the two boys, now men, were freed on the basis of DNA evidence. Why did that prosecutor Tom Breen wait so long to say something? There are many answers to this; some have to do with his personal life. But he said this one thing that exemplifies the problem of ordinary injustice: “It’s hard to rock the boat when you’re in the boat.”

What Breen is referring to is a community of law enforcement that had strong ties. The reaction of his former colleagues shows how strong these bonds were. One said to me of Breen, “He is the most despicable human being that I know.” Breen never said that he and his fellow law enforcement officers were negligent or made an error. Just, this case gave him pause. Many of his law enforcement colleagues still claim that the boys are guilty even in the face of DNA evidence to the contrary. The inability of law enforcement to admit the possibility of a mistake in the face of contrary DNA evidence is a symptom of ordinary injustice.

Of course, these personal allegiances can exist everywhere: schools; hospitals; accounting firms; banks; universities. But they are more surprising in the criminal justice context because here are
supposed to be the checks and balances on the adversarial system to make sure that wrongful convictions don’t happen. The problem is that the burden of proof gets lowered too easily. Jurors and judges have too much faith in the prosecutor’s decision to bring a case forward. No one wants to be a Mike Huckabee who sets free a man only to have him go on a crime spree years later. If judges, prosecutors, and jurors players stop doing their jobs, what is the check on prosecutorial discretion? Just a prosecutor’s gut check. His alone. As Kenneth Culp Davis observed in his landmark book, *Discretionary Justice*, “the plain fact is that more than nine-tenths of local prosecutors’ decisions are supervised or reviewed by no one.”

A good example of the problems of prosecutorial discretion occurred in another place I studied, Quitman County, Mississippi. Here, there was no assembly line in court. At the same time, my phone was ringing off the hook. I asked the court clerk, a woman named Miss Wiggs what was going on and she showed me a list of cases in which people had been arrested but never brought to a grand jury. I took the list of cases and used it as a road map to find out what was going wrong. The list led me to one woman who had been beaten up by her boyfriend with a tire iron under a bridge. There was a police report documenting what happened. A hospital report showed she was admitted for two days; she had severe bruising to her back. And there were pictures of bloody bruises on her face. Plus, her daughter and niece had been watching the beatings from inside a locked car. This woman never went back to live with her boyfriend. She moved in with her mother the morning after the assault.

Why wasn’t her case prosecuted? I interviewed the players. I couldn’t figure it out. Until Miss Wiggs examined the records and found that there hadn’t been a domestic violence case prosecuted in twenty-one years.

What I learned from talking to the prosecutor was that he would often thoroughly investigate and prosecute cases that he thought he could win. He would go whole hog for a big murder case that would make the front pages. But in a case where no one seemed to be watching, where there was a chance he could lose, he or his investigators would simply put it aside.

We must change the scorecard. So that there is not so much pressure on prosecutors to have a decent win loss records. So that

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the only measure of injustice isn’t the wrongful conviction cases. So that when we flip the switch in the ballot box to vote for the district attorney we understand what he does and doesn’t prosecute. Don’t get me wrong: wrongful conviction cases are extraordinarily important for providing a window into the types of errors that are made in the system. Without these, there would be far less public understanding. But they mean little in terms of numbers: A couple of years ago, U.S. Supreme Court Justice Antonin Scalia concurred in a death penalty decision and took stock of the American criminal justice system. He pronounced himself satisfied. The rate at which innocent people are convicted of felonies is, he said, less than three-hundredths of 1 percent—.027 percent, to be exact. That rate, he said, is acceptable. “One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly,” he wrote.

But the truth is we know almost nothing about the success rates. Leading scholars agree that courts are the most unexamined public institution in America. No one is keeping track of what kinds of cases go and don’t go to court. We have no idea how many cases are being pled, what kinds of crimes are not being prosecuted and for what reasons, whether people are being forced to plead guilty without lawyers. We still have not yet figured out how to quantify what exactly a case is—does it begin when a person has been charged with a crime or when a prosecutor lands an indictment? Without this basic number we are at a loss to create national standards of caseloads.

Yet in terms of education, communities know how much they spend per pupil, and what that investment yields in terms of test scores, teacher-student ratios, and graduation rates. Reliable data simply do not exist on how much we invest in protecting constitutional rights in the legal system. We need to answer questions like how many cases get put aside for what reasons; how many people spend in jail before pleading guilty; how high bails are for what crimes; and what the costs are of holding people in jail, not only to the county but in terms of collateral consequences, such as loss of homes and jobs, and expenditures on social programs like welfare.

Wrongful convictions look at the problem from the top down. Here, what is the failing grade? If you believe Justice Scalia, then

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4 Id. at 199.
we are passing. Perhaps you believe the failing grade is one person wrongly convicted. Then we get an F. But I suggest to you that we have no idea what grade we deserve.

Jeremy Travis, president of John Jay College of Criminal Justice, writes that forty-seven million people have criminal records—approximately twenty-five percent of the nation’s adults. Yet a public institution that affects one quarter of the nation’s adults goes completely unmonitored and is unaccountable. We don’t leave other public services unexamined—our schools, our water supply, our hospitals. Why do we turn our eyes away from the ordinary business of the courts? We must start paying attention to the ordinary, because the ordinary is where it all begins.

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