

Protecting the Innocent: Pretrial Actual Innocence Review as an Alternative Legal Solution

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Thesis

Broome County, NY, should establish Pretrial Actual Innocence Review procedures in its District Attorney's Office. This will reduce stress on public defender's offices, improve public trust in law enforcement, and, most importantly, reduce mistaken convictions by giving defendants another option to provide for their defense.

Background & Analysis

In the U.S there has been a historical trend in the past decades which has focused on the use of incarceration and criminalization as a solution to rising crime rates, and while crime rates have fallen, the prison population has not fallen significantly, as one in 35 American adults are in some form of correctional control.¹

Since 1995, felony charges have increased, while funding for public defenders has fallen.² In America, more than 80% criminal defendants are indigent, meaning that they qualify for public defenders.³ The increase in felonies and lack of funding caused many attorneys to be given larger caseloads than recommended by the American Bar Association.⁴ Because of this, public defenders cannot devote sufficient time to preparing their clients' defense.⁵

These increased caseloads associated with aggressive prosecutorial behavior spurred on by a trend from the 1980s which focuses on incarceration to combat crime, and 94% of state criminal cases in the U.S. end in plea bargains.⁶ This is mainly due to the overload of public defenders, and the hardship of pretrial confinement. The difficulty associated with pretrial confinement for the impoverished is such that defendants will plead guilty to be released, regardless of guilt.⁷

Talking Points

- ▶ In 2009, Attorney General Eric Holder declared that indigent defense systems in the U.S were in a "state of crisis" and needed to be addressed.⁸
- ▶ A Pretrial Actual Innocence Review Protocol would begin to relieve the stress on indigent defense systems by giving defendants an additional alternative to plea bargaining or trial.
- ▶ It is imperative that innocent people not be imprisoned due to lack of resources for legal defense.

- ▶ Eyewitness testimony has been demonstrated to be unreliable in criminal cases, and cases which rely upon identification of the defendant by a single eyewitness have repeatedly been found faulty.⁹

The Policy Idea

A Pretrial Actual Innocence Review Protocol presents a new option for those falsely accused of criminal acts by changing the process of defendant intake. Upon an initial meeting between a defendant and their lawyer, the defendant will have the option to request an Actual Innocence Review. The defendant will be subjected to a polygraph test, and if they pass, an Assistant District Attorney will review the physical evidence, witness testimony, and background on the case. If they cannot establish a “moral certainty” of guilt, then all charges will be dropped.

Policy Analysis

By intervening before trial, this policy removes the burden of a criminal record and prevents hardship for the unjustly accused. Unlike other programs such as Conviction Integrity Units, this policy will address the issue before any prison time is served. It provides the investigatory resources necessary for a proper defense to those who are innocent, helping to address the crisis of indigent defense.

This policy is similar to one in St. Clair County, Illinois, which, in its first year, resulted in nine exonerations, including a murder case.¹⁰ The review process caused exonerating evidence and details to be uncovered. In these policies, polygraphs prevent guilty people from exploiting the procedure, and failing the test will not be admissible as evidence in further proceedings.

These problems fall especially heavy on minority populations, as well as the impoverished.¹¹ These groups have been found to be disproportionately charged with crimes, and often lack the resources for defense, as they also are faced with higher poverty rates than whites, especially in Broome County.¹² In Broome, the poverty rate for African Americans is 42.2%, 41.1% for Latinos, and 15.3% for Whites.¹³ These populations have their defense undermined by both the negative impacts of poverty, and the disproportionate arrest of minorities. By implementing an Actual Innocence Policy, we can reduce the impact of these issues, and prevent the hardship of pretrial confinement, which is not only unjust, but also increases likelihood of future criminal activity and unemployment.¹⁴

Key Facts

- ▶ 646,000 Americans are held in local jails, 451,000 of them are pretrial.^{15,16}
- ▶ 73% of Public Defenders exceeded their recommended caseload in recent years.¹⁷
- ▶ Recidivism increases 51% after a week of pretrial confinement.¹⁸

NEXT STEPS

The Broome County District Attorney's Office will organize the program, in concert with the Broome County Public Defender's Office. To get the policy implemented, contact will be established with the Legal Aid Society of Mid-New York and NYPIRG, both of whom are interested in developing equal justice policies, and can give assistance in pushing for the Actual Innocence Policy. In addition to these organizations, contact can be initiated with the Binghamton University Sociology department, which has numerous members interested in developing these types of policies in Broome County. The current Broome County District Attorney is Steve Cornwell, who we can work with to implement this policy because of his inclination to improve the reputation of the County's government, alongside the new County Executive, Jason Garnar. This policy can serve as a model for other counties throughout New York, and even the entire nation.

- ¹ American Civil Liberties Union. 2016. The Prison Crisis. Accessed December 2, 2016. <https://www.aclu.org/prison-crisis>.
- ² Caplan, Lincoln. 2013. "The Right to Counsel: Badly Battered at 50." *The New York Times* , March 9.
- ³ Ibid.
- ⁴ Mosteller, Robert P. 2009. "Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness" *North Carolina Journal of International Law & Commercial Regulation*. December 14.
- ⁵ Van Brunt, Alexa. 2015. "Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them." *The Guardian* , June 17.
- ⁶ Kane, John. 2014. "Plea Bargaining and the Innocent." *The Marshall Project*. December 26. Accessed November 17, 2016. <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#JlahGTPG>.
- ⁷ Equal Justice Initiative . 2016. *Mass Incarceration: Poverty*. Accessed November 17, 2016. <http://eji.org/mass-incarceration/poverty>.
- ⁸ Holder, Eric. 2009. "Attorney General Eric Holder on Indigent Defense Reform." *Brennan Center for Justice Legacy Award Dinner* . New York : New York University Law.
- ⁹ Stambor, Zak. 2006. "How Reliable is Eyewitness Testimony?" *APA Monitor on Psychology* .
- ¹⁰ Lussenhop, Jessica. 2016 "Could 'actual Innocence' save the Broken US Justice System?" *BBC*, April 21. Accessed November 23, 2016. <http://www.bbc.com/news/world-us-canada-35971935>.
- ¹¹ The Sentencing Project. 2013. Report of The Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal justice system . Research and Advocacy Report, New York : The United Nations .
- ¹² Brown, Elizabeth and Males, Mike. 2011. "Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates? ." *Justice Policy Journal* 1-30.
- ¹³ New York State Community Action Association . 2015. New York State Poverty Report. Summary of Communities , Guilderland, NY: NYSCAA.
- ¹⁴ Lowenkamp, Christopher. VanNostrand, Marie. Holsinger, Alexander. 2013. "The Hidden Costs of Pretrial Detention ." *Laura and John Arnold Foundation* 1-32.
- ¹⁵ Wagner, Peter. 2016. "Mass Incarceration: The Whole Pie 2016." *Prisonpolicy.org*. March 14. Accessed November 23, 2016. <https://www.prisonpolicy.org/reports/pie2016.html>.
- ¹⁶ Wagner, Peter. 2015 "Jails Matter. But Who Is Listening?" *Prisonpolicy.org*. August 14. Accessed November 23, 2016. <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/>.
- ¹⁷ Van Brunt, Alexa. 2015. "Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them." *The Guardian* , June 17.
- ¹⁸ Lowenkamp, Christopher. VanNostrand, Marie. "The Hidden Costs of Pretrial Detention". (1-32)