

**Book Review: Henry, J.S., *Smoke but No Fire: Convicting the Innocent of Crimes that Never Happened*. University of California Press. 2020. ISBN: 9780520385801 (Hardcover). 235 Pages. \$24.95.**

Reviewed by Rick Dale<sup>1</sup>

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There are myriad reasons why innocent people become the target of an investigation then charged and convicted of a crime, and ultimately sentenced to prison. Instances such as these stem from factors that include witness misidentifications, forensic errors, mislabeling of natural and accidental events like crimes, official misconduct resulting in false confessions, and innocents' acceptance of plea-bargaining deals to circumvent the possibility of a much harsher prison sentence if convicted in a trial setting (Alschuler, 2015; Reichart, 2016; Shaw & Porter, 2015). These reasons are but a few of the mitigating factors that serve to convict the innocent or may even encourage them into accepting the blame for crimes that they did not commit; and at times, being charged with or accepting responsibility for crimes that never existed in the first place (Henry, 2020). In her book, *Smoke but No Fire: Convicting the Innocent of Crimes that Never Happened*, Jessica S. Henry expounds upon the topic of no-crime wrongful convictions, where nearly one-third of the innocents that have been arrested, convicted, sent to jail, and are then later exonerated, were from crimes that never actually happened (Henry, 2018).

The author offers decades of criminal justice experience on the topic of no-crime wrongful convictions. Henry had served several years as a public defender in New York City before she then transitioned to

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<sup>1</sup> **Rick Dale** is a graduate student at Lamar University in Beaumont, Texas. Rick is a Senior Fire and Arson Investigator with the Houston Arson Bureau. He has been employed with the Houston Fire Department for last 20 years and holds certifications as a Texas Peace Officer, Structural Fire Fighter, Fire and Arson Investigator, and Driver / Operator. Please address correspondence to: Rick Dale, e-mail: [rdale1@lamar.edu](mailto:rdale1@lamar.edu).

academia, where she has spent over a decade teaching, researching, writing, and presenting her findings on the factors and consequences related to the phenomenon of no-crime wrongful convictions (Henry, 2020). This insight has prepared the author to thoughtfully construct the chapters of her book in a way that effectively relays the stories of the innocents that have been wrongly convicted of crimes that never happened, provides analysis of data provided by the National Registry of Exonerations, affords examinations of the factors associated with this unique situation, and then offers recommendations to prevent this type of maleficence going forward (Henry, 2020).

The author postulates that no-crime convictions make up one-third of all exonerations that are known (Henry, 2018). Still, she contends that the data is likely to miss an even greater possibility of occurrences and that the exact number of no-crime wrongful convictions cannot be known (Jordan et al, 2016). The National Academy of Sciences (NAS) study released in 2014 found that over 4 percent of criminal defendants that were sentenced to death had been wrongly convicted (Jordan et al., 2016). If this ‘innocent’ percentage is then applied to the 2015 data provided by the U.S. Department of Justice, Bureau of Statistics, it would promulgate that of the 6,269,600 adults that were incarcerated or under community supervision at that time in the United States criminal justice system, that there were over 250,000 inmates and ex-convicts who were likely innocent of the crimes for which they were convicted (Jordan et al., 2016). Further, when the known one-third value is applied to those 250,000 potentially innocent individuals, approximately 80,000 of these inmates and/or ex-convicts could be considered casualties of no-crime wrongful convictions. These values are many times greater than the National Registry of Exonerations (NRE) numbers of 2,678 overall exonerations since 1989 (Keys, 2021) and the 910 figure of exonerations for crimes that never happened (Henry, 2018).

The author proclaims that the entire legal system rests on a false belief that actors within the criminal justice system can distinguish truth from lies (Henry, 2018). She stresses that false accusations, which make up fifty-nine percent of all no-crime exonerations, tend to gain traction in the criminal justice system, and if not caught and shown to be untrue allegations (Henry, 2018). She states that these false accusations are most profound in cases of adult rape and sexual abuse of a child (Henry, 2018). The author tells the story of Gary Dotson, who was the first person to be exonerated by DNA evidence in the United States (Keys, 2016). Dotson’s exoneration came 10 years after his conviction, and 4 years after his accuser came forward to recant her testimony of a rape

that never occurred (Keys, 2016). It took another 14 years for Dotson to receive a pardon by the Governor, who then had Dotson's conviction vacated (Keys, 2016). This scenario demonstrates how challenging it can be to rectify a no-crime wrongful conviction once it has been adjudicated by the criminal justice system (Scherr et al., 2020).

Perjury and false accusations are the top factors that comprise sixty-one percent of all wrongful convictions where there was no crime, which was the catalyst in Dotson's situation (Henry, 2020). Interestingly, the author points out that as of 2016, of the 347 post-conviction DNA exonerations, only two percent of that figure represents the innocents that were erroneously found guilty of a crime that never happened (Jordon et al., 2016). This is a logical variance in DNA exonerations contrasting actual and no-crime scenarios as there would only be a likelihood that biological evidence could be collected and tested if there had been an actual crime related to rape or sexual abuse (Scherr et al., 2020).

The author infers that the initial erroneous designation of an event as a criminal act starts the process that inevitably leads to a wrongful conviction (Henry, 2020). This can manifest itself in several ways, including biased forensic analysis results, errors made by forensic experts, and the cognitive biases of actors within the criminal justice system (Scherr et al., 2020). Events that are misclassified as crimes or mislabeled as criminal appear to originate in the gray areas of cases, ones that are unclear to police, medical professionals, and forensic experts (Henry, 2020). This problematic issue of misidentifying an incident as a crime appears germane and worth further consideration, especially when other non-criminal hypotheses remain viable that could explain why a certain non-criminal incident occurred (Scherr et al., 2020).

The author recounts several instances of innocents that have fallen victim to the cognitive biases of others, including tunnel vision, confirmation bias, unconscious bias, and expectation bias (Jordan et al., 2016; Keys, 2021; Reichart, 2016; Scherr et al., 2016). She describes instances of police, medical personnel, and forensic investigators mislabeling non-criminal events as crimes (Henry, 2018). One case in particular was one with Audrey Edmunds who was charged with homicide in 1995 (Henry, 2018). An hour after she had agreed to babysit for someone who dropped the baby off with her, the baby had died of symptoms related to abuse (Henry, 2018). Though Edmunds vehemently denied harming the child she had been babysitting for less than an hour, law enforcement acted on the information provided by the forensic pathologist who determined that the baby's injuries were due to Shaking Baby Syndrome (SBS); a diagnosis that is largely rejected by the

scientific community of today (Henry, 2018). Due to this forensic error and since Edmunds was the last person with the child, ipso facto, she was the prime suspect who was then charged, convicted, and sentenced to prison; although, she would later be exonerated for this misdiagnosis (Henry, 2018). Exculpatory evidence that was not disclosed to the defense or at trial revealed that the baby had previously been treated for symptoms related to brain injuries, which made it highly unlikely that a crime had ever happened under Edmunds' watch (Alschuler, 2015; Reichart, 2016; Scherr et al., 2020).

The story about Audrey Edmunds highlights how criminal justice actors tend to look at events that happen through a law enforcement lens, where everything is a crime to solve and exculpatory evidence that contradicts this biased premise is ignored (Reichart, 2016). This tunnel vision is driven by biases and stressors that tend to push criminal justice professionals to frame an event as a criminal episode that would normally be seen as non-criminal. Once a crime has been established, law enforcement then tend to focus their efforts on developing a suspect and building a case, all the while discounting any exculpatory evidence that would otherwise clear a person from such scrutiny (Reichart, 2016). These confirmation biases are described to be unconscious biases or beliefs that are held by an actor who then tends to interpret all collected data through the lens of conforming to preexisting hypotheses, despite being presented with contradicting information that would debunk this belief (Scherr et al., 2020). Further, expectation biases held by the criminal justice actor tend to narrow how the actor views the circumstances surrounding a non-criminal event. Instead of objectively collecting data with an open mind, the actor tends to view the circumstances of an incident expecting some condition or fact which is a biased approach toward that expectancy (Jordan et al., 2016; Keys, 2021; Reichart, 2016; Scherr et al., 2016). This type of unconscious bias contributes to official misconduct, which is the second most common factor leading to the exonerations of no-crime wrongful convictions, making up forty-one percent of those instances (Scherr et al., 2020). This difficulty for actors to critically approach an event with an open mind leads to the devastating consequences of misclassifying events as crimes, leaving innocents to suffer the stigma of being labeled as criminals (Blandisi et al., 2015; Reichart, 2016).

Continuing to expand upon official misconduct factors, the author references how law enforcement actors contribute to the problematic issue of no-crime wrongful convictions. Henry explains that in the policing culture, law enforcement actors tend to see themselves as the

thin blue line; protectors of the border that lies between a law-abiding society and the imminent chaos that exists. Police also tend to adhere to the unwritten code of the blue wall of silence which Henry states tends to curtail any perceived adversative action leading to the reporting of official misconduct observed by fellow officers. In addition to the cognitive biases held to some degree and in certain instances by actors of the criminal justice system, Henry describes some of the issues she has observed within law enforcement, including what she describes as organizational norms that tend to tolerate instances of official misconduct (Jordan et al., 2016; Keys, 2021; Reichart, 2016; Scherr et al., 2020). The author describes circumstances that are factors in official misconduct, including arrest quotas, coerced false confessions, covering up law enforcement actor's wrongdoing, criminal acts induced by the personal greed of some police, and a twisted sense of justice where the ends justify the means (Reichart, 2016; Shaw & Porter, 2015). The author further proclaims that these dynamics all contribute to abuses of power, and of police inventing of crimes.

Along with the same dynamics as abuse of power, the author further illustrates the official misconduct related to prosecutors. Prosecutors in the criminal justice system not only suffer from the same tunnel vision issues presented by law enforcement (Scherr et al., 2020), but their intentional prosecutorial malfeasance may be the most egregious in the form of hiding exculpatory evidence and presenting lies as truths (Henry, 2018). The adversarial system of justice, cognitive biases, political ambitions, and a complete lack of oversight and accountability, all contribute to prosecutors aiding in the no-crime wrongful convictions of innocent (Henry, 2018; Keys, 2021). Persons who have been wrongly convicted and are later exonerated, spend close to ten years in prison, on average (Keys, 2021). In the case mentioned earlier with Gary Dotson, among all the injustices that he confronted while he continued to defend himself, one of those was the official misconduct of the prosecution's violation of the *Brady* rule, by way of keeping exculpatory evidence from the defense attorney and from being introduced at trial (Keys, 2021). The author states that the prosecution is rarely admonished for a *Brady* violation due to the subjective nature of what the prosecutor deems as favorable to the defendant, which is most likely why there are so few cases of this type of prosecutorial malfeasance reported and even fewer convictions reversed due to this official misconduct (Alschuler, 2015; Henry, 2018).

Prosecutors have not only prosecuted cases where they knew the witness had lied about a crime that never took place, but they have also

pursued these weak cases by offering plea deals to the defendant (Alschuler, 2015; Scherr et al., 2020). This tactic further insulates the case from future judicial review by way of conditions of the plea agreement, which then hides the official misconduct from ever seeing the light of day (Alschuler, 2015; Scherr et al., 2020). The author illustrates the problem of no-crime wrongful convictions with the story of Devron Hodges, who was accused of aggravated robbery and aggregative kidnapping of an acquaintance, Jonathan Conrad (Henry, 2020). Due to Devron's prior convictions and the potential of a longer sentence if convicted, Hodges accepted a plea bargain agreement with the prosecutor's office (Henry, 2020). It was later learned that the accuser lied and recanted his story before Hodges had pleaded guilty to crimes that never took place (Henry, 2020). This demonstrates that once mislabeling of a crime takes place there are actors within the criminal justice system that will try to hide exculpatory evidence that clears the defendant of wrong doing (Reichart, 2016). Further, actions by the prosecutor make it almost certain that an otherwise innocent defendant will make a false confession in hopes of sentence leniency (Scherr et al., 2020). Additionally, the conditions of the plea bargaining agreement hides *Brady* violations from judicial review by design, as Alschuler (2015) explains, as disclosure of exculpatory evidence is not mandated before any plea bargain negotiation and acceptance (Reichart, 2016; Scherr et al., 2020).

A good defense lawyer can be the great equalizer that a defendant requires, especially when faced with the adversarial system of justice that exists within our criminal justice system in the United States (Henry, 2018). The factors that have been mentioned by the author that place the defendant in this adversarial environment to begin with, can be overcome with a defense lawyer's perseverance in reviewing the details of the case, pointing out forensic evidence that is outdated, mounting a solid defensive strategy, and by providing advocacy that is unrelenting in protecting their client's best interests (Henry, 2020). The author points out that in *Gideon v. Wainwright* (1963), the United States Supreme Court decision mandates that all defendants are entitled to a counsel under the Sixth Amendment to the Constitution: however, the Court failed to address the cost and quality of representation (Henry, 2020). These issues that indigent defense lawyers face with excessive caseloads and low pay, leave the poor with little to no competent legal assistance in their defense of a criminal justice system with close to limitless resources (Henry, 2018).

Appointed counsel also face the ethical dilemma of trying to serve two masters; the client with whom they have been selected to represent, and the court's judge who is in charge of selecting indigent defense lawyers to represent the accused (Henry, 2018). The author refers to the Harris County District Court System and a 2016 audit that was performed that indicated that elected judges refused to assign indigent defense cases to the public defender's office, choosing instead to only select the attorneys who had contributed to the judges' reelection campaigns or had proven their efficiency at moving the court's docket along, even when these same lawyers' caseloads exceeded the recommended levels (Henry, 2020). This indicates the gaping chasm that exists in the quality of representation that the poor receive juxtaposed with the opposing counsel with which they will be confronted with (Henry, 2018). It also explains the differences in representation that can be surmised as those persons that can afford to hire a knowledgeable, skilled, and competent attorney, and those persons without the wherewithal to do the same when facing a no-crime wrongful conviction.

As mentioned earlier, some judges want to move the court's docket along efficiently, which includes appointing attorneys that go along to get along (Henry, 2018). These appointed defense attorneys provide less than suitable representation for the accused, failing to adequately advocate for their clients, leading to the detriment of their clients' defense (Henry, 2018). Other instances of official misconduct by judges are mentioned by the author and include unconscious biases, antagonistic behaviors towards the defense, and failing to properly evaluate faulty forensic evidence via *Frye* and *Daubert* tests which challenge an expert's testimony and scientific methods (Henry, 2018).

The issue with judges allowing unreliable forensic evidence and expert testimony to be admitted in court does seem to hold water, as the author makes several references to court cases throughout her book (Henry, 2018). Some of the bullet-proof forensic sciences that were once accepted to be accurate and reliable, have since been found to be junk science by the National Academy of Sciences (Henry, 2018). The author mentions that approximately thirty percent of exonerations of no-crime wrongful convictions were due to bad forensic science (Henry, 2018). Some of the forensic evidence that was once relied upon includes fingerprint and voice identification, along with other comparative pattern forensics such as bite mark analysis, bullet-matching, hair-matching, and shoe print analysis (Henry, 2018). This demonstrates that judges should be required to keep up to date on the latest forensic sciences to better act as gatekeepers of what evidence is presented in court and to ensure that

expert testimony can stand the challenges presented by the *Frye* test and the *Daubert* standard (Henry, 2020).

The author effectively presents many compelling examples of the factors that cause innocent people to be wrongfully accused, charged, and convicted of crimes that never happened, then offers solutions to these issues in her conclusion (Henry, 2020). For the issues with forensic errors, the author explains that judges should better enforce evidentiary standards, that prosecutors need more than forensic evidence when pursuing cases, that defense lawyers be better trained in performing *Daubert* challenges, and that there be more training to recognize any cognitive biases that may exist (Henry, 2020). The author recommends that police be better trained to recognize false accusations, take steps to curtail tunnel vision, record all interviews and interrogations of suspects and persons of interest, and promote the use of body cameras and other recording technologies that would reduce the number of instances of official misconduct (Henry, 2020). The author further offers suggestions for prosecutors that include creating conviction integrity units within the Prosecutor's office and limiting the amount of immunity that prosecutors currently enjoy when faced with misconduct allegations. Lastly, it is suggested that there be increases to what defense lawyers are paid, and that their caseloads stay within a manageable number of cases, which would increase the chances of better representation provided to indigent clients that they are appointed to represent (Henry, 2020). These recommendations should encourage all actors within the criminal justice system to do better in recognizing the factors associated with no-crime wrongful convictions. These suggestions appear to address what could work in curtailing the factors associated with innocents not only being wrongfully accused and sentenced for crimes that never happened, but also addresses those same issues related to these innocents from having to live with being labeled a criminal by society (Blandisi, 2015).

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