

FLIA Dialogue: Interview of Margareth Etienne

The Problem of Wrongful Convictions in U.S. Criminal Justice System

Recently, the documentary – *Making a Murderer* – has caught a global attention to the criminal justice system in U.S. It explores the story of Steven Avery, a man in Wisconsin, who served 18 years in prison for the sexual assault and attempted murder of Penny Beerntsen. He was exonerated with the aid of the Innocence Project in 2003. After he was released from prison, he filed a \$36 million civil lawsuit against government officials associated with his arrest. However, in 2007, he was convicted of murder of Teresa Halbach. *Making a Murderer* generated considerable controversy both in U.S. and around the world. A petition to the White House to pardon Avery garnered more than 500,000 signatures. In response, President Obama stated that he had no authority to act in a state case.

Because of this documentary, FLIA is interested in discussion of the problem of false convictions in U.S. criminal justice system. Margareth Etienne is the associate dean for graduate and international programs in College of Law, University of Illinois at Urbana-Champaign. Dean Etienne earned her J.D. degree from Yale Law School in 1995. Before joining the Illinois Faculty in 2001, she practiced criminal law for several years. Her research focuses on legal decision-making and ethics in institutions ranging from criminal courts to schools and families. Please see the full interview below:

FLIA: Do you think what is the main factor contributing to wrongful convictions in U.S.? There is an article claiming that a significant number of trial judges are bad judges whose strong biases and prejudices usually control their decision-making. Do you think whether it is biased judging or misjudging that poses a major obstacle to the fair administration of U.S. criminal justice?

Dean Etienne: I think there are many points where things go wrong in the U.S. criminal justice system. What happened in the court room is only one part of it, but before a case even gets to the court room, a lot of different things have to happen. Sometimes errors occur at the time of arrest, for example, sometimes people are misidentified. Identification errors are very common, especially eyewitness identification. The literatures are very clear that the rate of success for eyewitness identification is very low, but we rely on them very strongly. People tend to be mistaken in what they think they see. Also, police are not well-trained sometimes. They may have so much pressure to arrest someone. They might not investigate as thoroughly as they might need to. Once the case is charged, then it goes to the prosecutor. I think there is prosecutorial biases. Prosecutors also have to make a lot of decisions about what cases to charge, what cases to dismiss, and what evidence is enough before the case even goes to court. When the case goes to court, we have found that people who tend to have false convictions are usually those who are poor, or who are from racial minorities, or who have maybe mental health issues, or who have any difficulty to assist in their trial. Sometimes the lawyers who represent them make mistakes. There are also biases or errors that occur with the defense lawyers as well as the prosecutors. Then when the case goes to trial, you have the potential errors or biases by the judge as you mentioned, but you also have the jury. We take a lot of efforts to select impartial jury, but that does not always happen. There are lots of different places in this system. If you only try to fix the problems at the very end with the

trial, which are usually addressed on appeal, it is hard to solve all the problems that could have happened before the trial.

FLIA: Based on the data from the National Registry of Exonerations, there have been 1,740 exonerations in the U.S. since 1989 and the number has climbed since 2011. Do you think what this tendency may imply? Does it imply that the capability to discover false convictions has been improved? Or, does it imply that the U.S. criminal justice system has become less reliable?

Dean Etienne: That is a very good question, but it is hard to know the answer. I suspect that the system has not necessarily become less reliable. We are paying more attention now to the possibilities of false convictions. DNA evidence has been very helpful. There is also the possibility that we have people are pleading guilty for crimes that they did not necessarily commit. That is a very complicated situation that occurs because the sentences are so extreme. I will give you an example. If somebody is charged with a homicide, and there is an eyewitness who says I saw this person do it. That person may have a prior criminal history. It is possible that the prosecutor can say that if you plead guilty to the homicide, I will give you ten-year sentence and maybe you can finish in five if you are good-behavior. If you do not plead guilty, I will seek life in prison. It may be a good deal for the defendant like that because he know that he may not get a good lawyer or jury if he goes to trial. Since 1980s, our sentencing system has become so severe that the risk of going to trial is so high, and I think that is another reason that false convictions happen. Later, the person might seek DNA evidence or other evidences to show that he is not guilty. No one wants to risk life in prison or fifteen years in prison.

FLIA: The data from the National Registry of Exonerations shows that exonerations that include DNA evidence have been outnumbered by those that do not. For example, from 2000 through 2010, DNA exonerations constitute 40% of the total. Does it imply that in the absence of DNA evidence, innocence is extremely difficult to prove?

Dean Etienne: I think DNA evidence has been very useful in proving innocence even in some cases that court rejects and says that it is not good enough evidence of innocence. In cases where there is no DNA evidence, it is almost impossible to prove actual innocence. The question for me as a legal scholar is whether or not actual innocence is the right standard. When you are going to trial, the prosecutor needs to prove that you are guilty beyond reasonable doubt, which is the standard. But once you are convicted, to undo that conviction, you have to prove that you are actual innocence. It is very hard to prove that. It would be easier to prove that you are not guilty beyond reasonable doubt. Why do we have the different standard? There have been cases where the eyewitness would come and say that I was wrong and I made a mistake, but the court said it is not good enough. There have been cases where DNA evidence suggested that the person did not commit the crime, the rape for example, but the court said it is not necessarily good enough. They often find that DNA evidence might prove that someone else did it, but it does not disprove that the defendant did it. They say that you have to prove not just somebody else is guilty, but you yourself are innocent. So DNA evidence have become very critical in proving actual innocence, and that is good. But it also reveals that there are other problems in our system even in cases where there is no DNA evidence.

FLIA: Do you think whether there is any negative outcome if we rely on DNA evidence too much?

Dean Etienne: No, I don't. DNA evidence is expensive, and it takes a lot of time. It slows down the trial and the appeal, but it is still better than the alternative. The DNA evidence has some downsides, but it is grateful to have it in our system.

FLIA: The data shows that eighty-three percent of the exonerations were in rape and homicide cases. What makes rape and murder the most afflicted areas of exonerations? Does it relate to the DNA evidence?

Dean Etienne: That is what I think. There are possibilities that we have DNA evidences in those cases, but I don't think they are the only cases where people are wrongfully convicted.

FLIA: The data shows that the overall average from conviction to exoneration is 11.9 years. It is really a long time. Do you think a state's criminal justice system is in need of reform to overturn false convictions in time?

Dean Etienne: I think that is a really good question because it is a long time. If the court moves quickly, you might be able to shorten that time. But in the past, what has happened when the critics have said that this is too long a time, the legislatures and some courts tried to eliminate the appeal rights as the solution. The legislatures said that we would change the law so that the defendants do not have the right to appeal, or they can only appeal certain issues, or they can't appeal after the particular date. I don't know what to do about that question. On the one hand, you want things to move more efficiently through the system, but on the other hand, you have to give people time to appeal and to find the evidences. Also, you have to give the government time to investigate, to do their own DNA tests, and so forth. I don't know how to solve the timing problem, but I know that

in the past, when we tried to solve the problem, we almost always did it by penalizing the defendants, by reducing the kinds of claims they can be brought, or eliminating certain courts. So it would be good to make it shorter, but I don't know how to do that in order to be fair to the prosecutions and the defendants at the same time.