

### 3 Takeaways Podcast Transcript

Lynn Thoman

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#### Ep. 176: A Legal Reform Expert Discusses The Horrors Of Our Criminal Justice System And How To Improve It

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**INTRO (male voice):** Welcome to the 3 Takeaways Podcast, which features short, memorable conversations with the world's best thinkers, business leaders, writers, politicians, scientists, and other newsmakers. Each episode ends with the three key takeaways that person has learned over their lives and their careers. And now your host and board member of schools at Harvard, Princeton and Columbia, Lynn Thoman.

**Lynn Thoman:** Hi everyone, it's Lynn Thoman. Welcome to another 3 Takeaways episode. Today I'm excited to be with Christina Swarns. Christina is a nationally recognized criminal legal reform expert and an attorney who defends people condemned to death. Christina is one of the few people, and even fewer Black women, to have argued before the US Supreme Court and won. She went to the University of Pennsylvania Law School and previously worked at the Legal Aid Society and the NAACP before becoming Executive Director of the legendary Innocence Project. The Innocence Project gets wrongfully convicted people out of jail based on DNA and other evidence. And the Innocence Project has gotten several hundred wrongfully convicted people out of prison, some after spending many decades in jail. I'm excited to find out why so many innocent people go to jail and how we can fix the system. Welcome, Christina, and thanks so much for joining 3 Takeaways today.

**Christina Swarns:** Thank you so much for inviting me to this conversation, Lynn, I'm excited to speak with you.

**LT:** It is my pleasure, Christina. Christina, tell us about one or two examples of wrongfully convicted people that the Innocence Project has gotten out of jail.

**CS:** The Innocence Project was founded in 1992, and so over the last 31 years, we have freed or exonerated over 245 people who were innocent people, who were wrongfully convicted of crimes. So first, the case of Huwe Burton in the Bronx. Huwe was a 16-year-old teenager who one morning got up, got dressed and went to school, and when he came home, he found his own mother murdered in their home. He of course called the police immediately to come to the scene, which they did, and after they arrived, they brought him into the police station and they interrogated him for hours without a lawyer, without a parent present. Huwe was traumatized by this horrifying experience of finding his mother dead, and at the end of this really exhaustive and intensive interrogation process, Huwe makes a false confession to murdering his own mother in his distraught and confused state as a teenager, and that sent him to prison for almost 20 years.

**CS:** Years later, the Innocence Project comes into the case and we re-investigate it with the Bronx DA's Office Conviction Integrity Unit. And all of us together, we bring in an expert on false

confessions. We all do an analysis, and it's clear that all of the factors that demonstrate that a confession is false are happening in Huwe's case. It's a young person, the trauma, the intensity of the interrogation, all of the contributing factors to a false confession are here. Plus, there was police misconduct. And so Huwe's conviction is ultimately vacated collaboratively with us and the consent of the Bronx DA's office. There's a lot of trauma in that story for him and a lot of momentum from that case. And so, since that time, Huwe has worked incredibly hard with us. He's partnered with us to ensure that no other children experience that kind of interrogation, and no other children are forced into the position of making those kinds of wrongful confessions.

**LT:** Horrifying...

**LT:** Christina, let's talk about some of the specific issues with the criminal justice system. Let's start with false confessions and plea deals, which you just said happened in the case of Huwe. Can you tell us about those?

**CS:** Yes. Both of these are huge issues for us in the criminal legal system broadly. False confessions happen more often than people realize. As I sit here talking to you, Lynn, I would say to you, I would never confess to a crime I didn't commit. That's what all of us say because we're confident that how is it even possible that those words can come out of your mouth? The reality is innocent people can and do confess to crimes they didn't commit. There are categories of folks that are more vulnerable, children. We tell our kids, you go to a police station, you're supposed to do what the police tell you to do. There's some baseline of expectation that kids should do what a police officer says, and so they do. People who have intellectual disabilities fall in the same space.

**CS:** People who don't have the ability to hold the line in the face of intense questioning. And third, people, of course, who are under the influence of drugs or alcohol. So, we learn those things through that process, and so we've begun the process of making reforms around them. Similarly, the other piece is identification. Again, I would say to you, as I sit here right now, if I were a victim of a crime, I know all the things. I know all the things. I brought the Innocence Project. So, I would do everything in the world to make sure that I would be able to say with certainty who the person is that victimized me. But the science tells us it's not that easy. That memory is more complicated, and memory, especially in the context of trauma, is really complicated. For example, if you or I are confronted by a gun, folks are more inclined to look at a gun or a weapon than they are at the face of a person that's holding it.

**CS:** We also know that there's an own race bias in identification. All of us are better able to identify a person of our own race than we are to identify a person of a different race. We also know that people are incredibly suggestible. So, if you are brought into a lineup, police conduct can lead folks to make a choice that may not be accurate in the course of a lineup. So, there are a lot of things that we know about identification and identification procedures that we're working hard to bring awareness in the criminal legal system and to create structural changes for those.

**LT:** Another issue that you see is junk science. Can you talk about how junk science is sometimes used to wrongfully convict people?

**CS:** So, we see over and over again kinds of evidence that are brought into courtrooms that do not have meaningful validity testing, meaningful accuracy testing. And so, what you're getting is someone who has all the veneer of expertise, a person who looks like a scientist, who comes in with

a pedigree that is impressive and then says a whole lot of information that the jury doesn't know. And so, it's hard for them, the jury, a jury can't test, can't say, I think that's false. They can, but it's harder for a jury to say, I think that's false when someone with all the veneer and trapping of scientific genius and titles presents it. But what we know is that folks have presented evidence with literally no scientific basis to juries, and that has been the basis of convictions of innocent people.

**LT:** How about DNA evidence? Is it always the gold standard, and is it always used?

**CS:** In 1992, the co-founders of the Innocence Project, Barry Scheck and Peter Neufeld, who were public defenders in the Bronx, had the experience of representing people that they knew were innocent or were unable to prove to be innocent using traditional courtroom tools. And so, what they did was they took a gamble on science. They said, you know what? There's DNA, and let's see if that is able to get us to a conclusion and prove what we know from our experience in courtrooms is true. And of course, we now know. Over 3,000 people have been exonerated since 1989 in this country. And so unquestionably, the science has been able to prove that criminal courthouses are getting it wrong. That said, prosecutors now use it. It's used at the front end of a criminal investigation to identify who the perpetrator is. So, it is ubiquitous now in the criminal legal system, both as a way of identifying an offender to prosecute and as a way to exonerate someone. So, the technology is used throughout the system, and it's absolutely the gold standard of scientific evidence in the criminal legal system.

**LT:** A very high percentage of cases, I think around 98 or 99% or so, are settled through plea deals. Can you talk about plea deals? Trials seem very risky because jury outcomes are uncertain or because of the issue of junk science or misleading eyewitness testimony or so many other things.

**CS:** Yeah, thank you for asking. That's also a huge issue in the criminal legal system. I started my career as a public defender here in New York City, in Manhattan, representing poor people charged with crimes. And I can tell you from experience, as can every other public defender everywhere else in the world, that given the choice between going to jail and waiting a year to go to the trial because you don't have the money to make bail, or pleading guilty and going home, especially when you're looking at lower level offenses, you're looking at misdemeanors and lower level convictions, people are going to choose to take a plea. They're going to plead guilty so they can go home so they don't lose their jobs, so they don't lose their housing, so they don't lose their kids. That happens all the time. And the same thing happens at the higher end of the spectrum with the serious cases. What we see in serious offenses are people are charged with sexual assault, murder, really heavy offenses, and they're given a similar version of that choice.

**CS:** Today [they're told], if you plead guilty, you will get five years in prison. That's a lot of time. There's no question. But that offer is coupled with a guarantee. If you take this case to trial and do lose, I will sentence you to life in prison, you choose. And so ultimately, the question that people are asked to decide and the choice people are making is just mitigating risk. How much damage am I willing to subject myself and my family to? How much can I bear? Should that be a choice that people are asked to make? I think our position is, it shouldn't be. We should be making value assessments about the case that are meaningful. If five years is enough, then why should life be on the table? How could both of those things hang together? And ultimately that's just being driven by the needs of the system to move cases through.

**LT:** How do you see race and the criminal justice system?

**CS:** The short answer is, the issues of racial justice and the criminal legal system are tied together. You can't talk about one without talking about the other. I had the privilege, as you noted at the top, of arguing a case in the United States Supreme Court that was really about the role of race in the criminal legal system. I think it's a good example of how it operates. I represented a gentleman in Texas. This was not an Innocence Project case, it was a question of sentence, whether someone should or should not get the death penalty. But that was a case where an expert testified that my client should be sentenced to death because he's Black. In Texas, the statute says that the only people who could be sentenced to death are those a jury finds are likely to commit additional crimes in the future. The expert, in my client's case, said the fact that he was Black meant that he was likely to commit additional crimes in the future, which was an astonishing, astonishing assertion for an expert.

**CS:** So, this is an expert that went into a courtroom and told the jury, race and dangerousness are tied together. And the jury accepted his testimony. The prosecutor relied on the testimony, and our client was sentenced to death. And that's terrible, astonishingly terrible.

**LT:** Wow.

**CS:** And what's doubly terrible, though Lynn, is that every court that heard his appeal over the course of 20 years denied it [the appeal]. We were losing this case everywhere. We had court after court, after court, after court, after court willing to see this gentleman executed on that record. And it was only because the Supreme Court ultimately intervened and said, no, absolutely not. And to the great credit of the court, Chief Justice John Roberts authors an opinion for the majority saying no, the law punishes people for what they do and not who they are. But it has to remind the lower courts that this is a really fundamental principle for the integrity of the criminal legal system. We expect an error that egregious, and that fundamental to the integrity of the courts, to be caught and corrected. And the fact that for years courts were willing to see this man go to his execution on that record tells me everything I need to know about how difficult it is to get the courts to grapple with the issues of race in the criminal legal system and how willing we are to turn a blind eye to that reality.

**LT:** Wow, astonishing.

**CS:** Yeah, it really is.

**LT:** Stepping back, Christina, how do you see the system and how can it be improved?

**CS:** I think the lessons from the last 31 years and us as a country and the world recognizing the problem of wrongful conviction, there are a lot of ways the system can be improved. I would point you to a real need for qualified, appropriately funded and appropriately trained defense lawyers to represent the people that go through the system. As long as we are making a structural decision that we are not going to put meaningful resources into the representation of people who are charged with crimes, we're going to continue to see people get wrongfully convicted. We have to have a real process for maintaining and ensuring that there's a baseline threshold for the evidence and the types of scientific evidence that come into courthouses. There has to be real and meaningful testing of the reliability and accuracy of that evidence... and we know that that's not going on.

**CS:** We need to really, honestly for the first time, acknowledge and grapple with the ways in which people of color are treated in the criminal legal system differently than other people. The Innocence Project is working on a lot of different reforms that we think will begin or help to push that process forward. We are working on an effort to end the trial penalty, and that's the process we talked about where people are deeply penalized sentence-wise for exercising their right to go to trial. There are problems with the way that policing is conducted in this country. And one of the reforms that we are fighting for is the elimination of qualified immunity, which is a legal doctrine that prevents people who have been harmed by the legal system from suing and receiving compensation, getting a judgment and compensation for those mistakes. For example, police officers and the errors committed by police officers, they're covered by what is called this doctrine of qualified immunity.

**CS:** It means they can't be sued. They're outside of the reach of the courts. Because we see, so many times through our cases, the errors that police officers make and the ways those errors cause catastrophic errors, we don't think it's fair for there just to be complete immunity or qualified immunity for those errors, there has to be meaningful accountability. Same for prosecutors who commit these errors, we have to... And the same for defense attorneys who commit these errors, there has to be a meaningful system of accountability.

**CS:** Compensation is also really important in this sort of all hangs together. Most states in this country now provide some degree of compensation for wrongful conviction, but there are still states that provide nothing, that literally will say sorry, if that, maybe they'll say, sorry. Someone will be exonerated and the state will just feel no obligation to that person even though they were wrongfully convicted. That's just a flagrant example of the problem of a lack of accountability in our system. You can't have a system that demands accountability to others, but not to itself. And that's a really powerful example of the integrity of the system really requires meaningful accountability, including through compensation.

**LT:** Christina, what are the 3 takeaways that you would like to leave the audience with today?

**CS:** First, wrongful convictions aren't anomalous, they are the predictable results of a system that isn't working right. And so, you have to look at the cases of the Innocence Project as the tip of an iceberg. What we are showing you is evidence of a system that's broken in many ways beyond just convicting people who are innocent. It's important for you to know, and everyone who listens to this, to know that innocent people being wrongfully convicted is a catastrophe, period. And it is the beginning of a cascading series of catastrophes within the criminal legal system that need to be addressed. Second takeaway, we touched on this, is that racial justice and criminal legal system reform will have to go hand in hand. One will not be accomplished without the other. We all want to see meaningful racial justice reform, and we want to see criminal legal system reform.

**CS:** But ultimately, those two will always walk hand in hand and one cannot be accomplished without the other. And my third takeaway is that there are things that people can do to help to get to a place where we're no longer talking about innocent people being wrongfully convicted. Number one, two, and three maybe, is voting, of course, criminal justice and criminal legal reform is an intensely, ultimately local process. You can make meaningful reforms at local levels if you're engaged in district attorney elections. The people who are controlling the criminal legal system in your jurisdiction wield enormous power, sheriff's elections. So, pushing and holding those folks accountable to real baseline norms of integrity and commitment to truth and accuracy and justice means a lot. The second thing I would say, of course, is that the Innocence Project, we are involved

in a lot of policy reforms, and we always need other voices to elevate and to activate around these issues.

**CS:** And so, if you sign up on our website, [laughter] we will send you alerts in your jurisdiction about legislation that is going on that can improve the criminal legal system in your community. The third, of course, is jury duty. Even though only a very small percentage of cases go to a jury, people are still picking jury trials and making that choice to go to jury trial. And if it happens, we need people who are concerned about the criminal legal system to participate, not to be biased, to go in there and be fair and bring all the information that you know and conduct a fair evaluation of the facts and circumstances that are presented because if we don't, we're really not going to get to a place of a truly high functioning criminal legal system.

**LT:** Christina, thank you. Thank you for your time today for 3 Takeaways. Thank you for your work getting wrongfully convicted people out of prison, and thank you also for your work to improve our criminal justice system.

**CS:** Thank you, Lynn.

**OUTRO male voice:** If you enjoyed today's episode and would like to receive the show notes or get new fresh weekly episodes, be sure to sign up for our newsletter at <https://www.3takeaways.com/> or follow us on [Instagram](#), [Twitter](#), [LinkedIn](#) and [Facebook](#). Note that 3Takeaways.com is with the number 3, 3 is not spelled out. See you soon at 3Takeaways.com (<https://www.3takeaways.com/>)

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