

BARRY SCHECK LECTURES ON WRONGFUL CONVICTIONS

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I. INTRODUCTION

First, I have to say the American Judicature Society (AJS) is a great development. We have been working with Allan Sobel (the current president of AJS), Larry Hammond (the previous president of AJS), and former Attorney General Janet Reno now for quite some time organizing academic meetings, law enforcement exchanges, and bringing together prosecutors, police, defense counsel, and scholars in order to attack the whole problem of wrongful convictions.

The way our Innocence Project works at Cardozo Law School, which we have had now for twelve years, is to use DNA testing on cases where we can find some biological evidence. A person writes and says, “You know, I

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am innocent. I did not commit the crime.” And we go back and look for blood, semen, skin cells, biology under the fingernails, fingernail scrapings, hairs, the roots of hairs. We can get skin cells from masks found at crime scenes, or pants, or any of a number of things. We can extract the DNA, and we can put it into a data bank if we get what is known as short tandem repeat or some nuclear DNA. If you have a convicted felon or an unsolved crime, we can get a hit.

When we started this in 1991–1992 at Cardozo Law School, which is affiliated with Yeshiva University, we had just a very few students. I have been teaching there twenty-eight years. Peter Neufeld was there as an adjunct. We would have law students calling on the phone, and they would call a clerk in Virginia or North Carolina or wherever, and they would say, “Would you please go look for evidence in an old case that is twenty years old so that we can do DNA testing and prove that somebody is innocent and perhaps demonstrate that there was misconduct or mistake and upset everybody in the jurisdiction? And by the way, we are calling from Yeshiva University, Cardozo Law School, New York City. And the lawyers—yes, it is true that the lawyers that we are working for were involved in the defense of O.J. Simpson. All right? Could you give us the stuff?” And, you know, this is without being able to get transcripts or anything. I sit here in total amazement that we ever got anything done. Now our project has sort of transformed itself. I really recommend you to take a look at our website, www.innocenceproject.org,¹ so that you can read about each and every one of these cases that attest to what I am telling you. But it has grown, and now there are innocence projects affiliated with law schools, journalism schools, particularly the most famous—Northwestern University’s School of Journalism. There are over thirty of them. And it can do you no harm to get involved here in Iowa.

You have the wonderful resources of the American Judicature Society that is proceeding to work with us on so many of these fronts in terms of policy reforms that will help improve the criminal justice system, but I will just tell you what happened to me this past week.

We had one of these cases. His name was Barry Gibbs. He kept on writing for a DNA test. He started writing us for a DNA test in 1992 when he first read about testing and laboratories when it was first beginning. He always said that he was innocent of the crime. He was convicted of murder in Brooklyn, New York. What happened was that a man was observed on

1. Innocence Project, <http://www.innocenceproject.org> [hereinafter Innocence Project] (last visited Mar. 28, 2006).

the Bell Parkway taking a body wrapped in a blanket and dumping it off the side of the road near the riding stables. There was a jogger coming by who made observations from 300 feet away. There was a park ranger, too, and they both observed this, and they gave a description of a man with white hair that had tossed the body about 5' 6", 140 pounds. As the investigation progresses that day, in comes a New York City police detective named Eppolito. Eppolito all of a sudden takes over the case and starts conducting the investigation. The victim turns out to be African-American and had a history of prostitution.

Eppolito goes to a local neighborhood and starts asking around for the last white guy that had ever been seen in the presence of this woman. Before you know it, Barry Gibbs, who is over six feet tall and 190 pounds, is brought to a lineup, worked over pretty good by this cop, very fishy circumstances in the lineup. The guy identifies him, and boom, there is a case.

Gibbs went to trial, and based on the jogger's testimony, which changes all of a sudden in terms of the description, he is convicted. And then he writes us, and we want to find fingernail scrapings and maybe hairs because we think that this could prove him innocent. We start looking for it, and everything is lost. Everything is lost. Ordinarily if the evidence is lost, we close the case, but we just could not do it.

In that great movie *Double Indemnity*,² Edward G. Robinson plays an insurance adjuster, and he has what he describes as a little man inside of him. When he sees something that looks like a bad case to him, the little man talks, and he cannot get rid of him. So this was our case—Barry Gibbs. For some reason we could not close this case because the little man inside of me and my colleague, Vanessa Potkin, was saying, "Do not close this case."

Lo and behold last fall the United States Attorney's Office in the Eastern District of New York issues a spectacular indictment. They arrested two former New York City police officers in Las Vegas, Nevada, one of whom is Eppolito. The accusation is that in 1986—and this crime happened in November of 1986—Eppolito and his co-defendant, Caracappa, had decided they were working not just for the New York City Police Department, but they were working for organized crime in New York—the mafia—and, in fact, were doing hits for organized crime. It was alleged they would dispose of the bodies on the Bell Parkway in New York, not that anybody believes they did in this case.

2. *DOUBLE INDEMNITY* (Paramount Pictures 1944).

Upon reading this, the first thing we did is not go out and try to find this witness and see if we could get him to turn or admit that he was coerced into the identification, which is what we always believed. It is better if you let the government do it, if you ask law enforcement, because you can trust them in many instances to do the first interviews, they will do it. They own it, and they obviously were going to have more information about these guys than we do.

I called the Brooklyn district attorney, who I am lucky enough to have known for twenty-five years, and the U.S. Attorney in the Eastern District of New York, and they then sent out their agents. And last week they called and said, "You are right. This guy was coerced into the identification. He never believed your client was the person. He was coerced by this cop. We are dismissing the case." And they let him go. And today if you look at the Metropolitan Section of the *New York Times*, there is a wonderful article by Joyce Purnick, describing how this man gets out of prison, and he has nothing.³ Nothing. He has less than you would get if you were convicted of a crime, and you did the nineteen years that he did, and you were let out, and there are no social services. There is nothing available for him.

If you go on the Internet, and you take a look at the *New York Times* today, you can read all about it. In the earlier class I read the story and got a little choked up reading it. But that is the kind of thing that can happen if you are lucky enough to be involved in this wonderful project that my colleague, Peter Neufeld, and I are involved in.

II. POSTCONVICTION DNA EXONERATIONS

So, now what? Well, right now we have 165 postconviction DNA exonerations in the United States.⁴ These are cases where people were convicted at trial. They were sentenced by judges. They lost their appeals. They lost their federal habeas, if there is such thing as federal habeas. Soon there may not be. Watch what the United States Congress is doing, what is known as the Streamlined Procedures Act.⁵ They are stripping jurisdiction of the federal courts so we will not have federal habeas corpus.

3. Joyce Purnick, *19 Years Late, Freedom Has a Bitter Taste*, N.Y. TIMES, Oct. 3, 2005, at B1, available at 2005 WLNR 15542214.

4. See Innocence Project, *supra* note 1. As of April 20, 2006, this number had reached 175.

5. Streamlined Procedures Act of 2005, H.R. 3035, 109th Cong. (2005); Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005).

They did appeals to governors. They asked everyone in the world to look at their cases, and nothing happened. Then they were lucky enough, very, very, very lucky, because they asked for DNA testing. We were able to find the evidence, but in seventy-five percent of all our cases the evidence eventually is reported lost or destroyed. It takes us a long time to find the transcripts, because these cases are often so old, and to look through the evidence and decide, yes, the DNA test would make a difference, and it would be material. It would be determinative of guilt or innocence, or could be. Forty percent of the time, when we finally find the evidence, and we get the case to the laboratory, the results come out in favor of the inmate. Sixty percent of the time the people do not want to admit it, or they are lying or psychopaths. Now, you may say, well, wait a second. Sixty percent of the time they are lying to you. Time out. You are telling me that forty percent of the time when somebody is in prison who said, "I did not commit the crime," and asks for DNA testing on probative evidence and the results come out in their favor? That is terrifying. That is a wake-up call.

Now, this is not me alone talking about this. I called Dwight Adams, who is head of the scientific division of the FBI, who I am proud to call a friend, just a month and a half ago because of research that Gary Wells and I are doing, and I asked, is this number still sound? And it is still sound.

Since 1989, when the FBI began doing DNA testing—and these would be cases where people were arrested or indicted, and then the material was sent to the FBI—states did not have DNA laboratories. Localities did not have DNA laboratories. There were some private labs, but if you wanted a pretest, you went to the FBI. When they send the cases to the FBI, twenty-six percent of the cases where the FBI got results, the primary suspect was excluded.

Now, if there were four people in the case that were counted as just one for purposes of this statistic, it is conservative. Now, this does not mean, and I am not saying, that twenty-six percent of people in prison are innocent. Far from it. We are talking about cases where DNA was able to exclude people. And most of those cases, I think it is fair to assume, exonerate them post-arrest and prior to a trial.

There is not any doubt that tens of thousands of people in this country have been arrested based on confessions, based on circumstantial evidence, based probably more than anything else on eyewitness identifications, based on crime lab results. And then prior to the trial, when finally DNA testing was done because there are huge lag times, huge backlogs in terms of when the testing can be done, the results come in, and

they are exonerated.

When I say to you 165 postconviction DNA exonerations, that is really just the tip of the iceberg, because what law enforcement, prosecutors, police, judges, and defense lawyers are seeing all across this country over the last decade is subterranean movement. If you have tens of thousands of people that were arrested and then cleared by a DNA test before the trial, that is telling you something.

In forty-seven of the cases the real perpetrator has been apprehended, fifteen of those, incidentally, were in cases where people confessed.⁶ There have been fourteen DNA exonerations of individuals who have been sentenced to death since 1974 with the reinstatement of the death penalty.⁷ And altogether, if you look at the Death Penalty Information Center website, I think they are up to 118 cases where people have been sentenced to death, and then their convictions have been vacated with some new evidence of innocence.⁸

There are people, some prosecutors in particular, for example, a fellow in Oregon named Josh Marquis, who will attack the Death Penalty Information Center's number of 118. Maybe it is eighty. Maybe it is seventy. I do not know what he would concede, but you do not see them attacking the 165 postconviction DNA exonerations. You do not see them saying, "Oh, well, in these forty-seven cases where you found the real perpetrator we have a doubt." That is not being attacked. It cannot be attacked.

If you have any doubts whatsoever about these cases, we are trying to be perfectly transparent. Go to www.innocenceproject.org and you can look up each and every one of them, and you can make your own decision about these individuals, whose convictions have been vacated, the indictments dismissed, and in many instances, they have been pardoned by governors. Some of them have actually been lucky enough to recover in civil cases and prove their innocence by a preponderance of the evidence or in many cases by clear and convincing evidence to courts. Please do not

6. For more information on false confessions, see Innocence Project, False Confessions, <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Mar. 14, 2006).

7. INNOCENCE PROJECT, MAJOR ACCOMPLISHMENTS OF THE INNOCENCE PROJECT 1 (2006), http://www.innocenceproject.org/docs/MAJOR%20ACCOMPLISHMENTS_WEB.pdf.

8. Current statistics indicate that 122 people have been exonerated since 1973. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2005: YEAR END REPORT 1 (2005), <http://www.deathpenaltyinfo.org/YearEnd05.pdf>.

take my word for one single minute. Look it up yourself.

We are in a race against time at our project because the evidence is being destroyed. When we first started asking for the evidence, there was not one state that authorized getting access to the evidence for purposes of a postconviction DNA test. In many jurisdictions the statute of limitations had run for our opportunity to get newly discovered evidence in front of a court for purposes of having a conviction vacated. In the state of Virginia alone there is the infamous twenty-one day rule.⁹ Twenty-one days after the verdict was the time limit for putting on newly discovered evidence of innocence. Now we have thirty-four states that have statutes that permit postconviction DNA testing. We have prevailed, under § 1983 actions in federal court seeking access to the evidence for purposes of the DNA test, where we are willing to pay for it. And I believe that is the law of the land.

Let me be the first to tell you that DNA testing is not a panacea for the problems of the criminal justice system. And, indeed, this is really generous. Probably it is ten or even five percent of most serious felony cases that have any biological evidence that would be susceptible to testing that could be determinative of guilt or innocence or identity in any serious case.

Most cases just do not have any biology for which you can do a DNA test. So the question becomes: What about all of the other cases where there is no DNA? Is that some kind of a backup for coming up with hard scientific evidence that can solve a case? Indeed, I would say that the most important contribution of this whole innocence movement is that we are really at a learning moment, a learning moment to figure out what is wrong with the system and how to fix it. And this is something that is a mainstream good law enforcement political message. Anybody who cares about justice—be it a prosecutor, a police officer, a defense lawyer, a judge, a citizen, and certainly people in this community who are learning and teaching the law or practicing it—you have to agree that every time an innocent person is arrested, convicted, sent to death row, or God forbid executed, the real offender is at large, free to commit more crimes. And in our cases where we have found the real assailant, in case after case it is a serial rapist. It is a serial murderer. It is someone who has terrorized, pillaged, and hurt so many other people because of the wrongful conviction in the first place. So if you can get to the root of what is wrong with our

9. VA. SUP. CT. R. 1.1. (“All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer.”).

system in terms of what produces wrongful convictions and come up with remedies, it is a win-win for law enforcement. And that is what we are about.

III. MISTAKEN EYEWITNESS IDENTIFICATION

When you look at our cases, eighty-one percent deal with mistaken eyewitness identification.¹⁰ Now, I think that because we are dealing with either rape, rape-murder ordinarily, or homicide cases, where there tends to be biological evidence, there may be some skewing of this data in terms of the prevalence of mistaken eyewitness identification as a cause. But there is no question that in the literature of innocence, which is not inconsiderable over the last century, that, starting with Edwin Borchard at Yale Law School,¹¹ the most famous examples involve mistaken eyewitness identification. Hugo A. Bedau and Michael L. Radelet also wrote a book, *In Spite of Innocence*.¹² When you look at the studies, you will see that mistaken eyewitness identification is the single greatest cause of conviction of the innocent, even greater than false confessions or admissions.¹³ And by that I mean instances where somebody gives a confession—maybe that is coerced or is involuntary—but a reliable confession, where they falsely say they committed the crime, or a false admission, which we would define as an instance where the defendant says, “I said one thing. I did not make an admission of some kind.” And the police officer says, “Yes, you did,” and that statement turns out to be false—lots of false confession cases.

If you look at the work of Steven Drizin and Richard Leo, where they have done a count not just of conviction cases, but also of instances where people were arrested or exonerated by either DNA or other evidence, we have a few hundred documented false confession cases.¹⁴ And these are instances where either DNA has demonstrated it, or they found the real perpetrator. And the Drizin-Leo numbers are very hard. We made sure they were hard. We did not want any problems with that.

10. For more information about postconviction DNA exonerations in the United States involving mistaken eyewitness identification, see Innocence Project, Mistaken I.D., <http://www.innocenceproject.org/causes/mistakenid.php> [hereinafter Mistaken I.D.] (last visited Mar. 28, 2006).

11. See, e.g., EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932).

12. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

13. Mistaken I.D., *supra* note 10.

14. See generally Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

We live in a country—certainly when you are charged with a capital crime, the President admitted himself in the State of the Union Address if you recall, and the American Bar Association has been on record with this for years now—where defense lawyers are not given adequate money. They are not paid on par with the district attorney. They are under funded. They do not have access to experts, and nothing guarantees the conviction of an innocent person more than a lawyer that is incompetent or incapable or not willing to do the job—nothing. And when you do not have a vigorous defense for the guilty, what happens to the system? The crime labs can put junk science in front of the court. Nobody bothers to look at their data. Police can cheat and lie and get away with it because they say, “I got a guilty guy,” “I will frame him,” or “I will cheat,” or “I will lie,” and those people are not exposed. Prosecutors can suppress exculpatory evidence and get away with unreliable jailhouse snitch testimony and more. And you know what happens when that occurs? The system implodes on itself. Law enforcement loses its capability to truly sort out the innocent from the guilty. It is bad law enforcement because those people should not be there. They should not be doing the job. There is a genius to our adversary system that the defense keeps people straight. That is the truth. And if the defense function falls down, everything falls down. You know, you get a criminal justice system like Iran. That is what happens.

It is so hard to say that you have met the *Strickland*¹⁵ test for ineffective assistance, but the truth is it is the “mirror test.” What Peter Neufeld and I like to say is what really passes for ineffective assistance in this country is if you put a mirror under the nose of a lawyer, and fogs up, that is probably good enough. I mean, if you can actually get a case that passes out of the Texas Court of Criminal Appeals and halfway through the Fifth Circuit, the people on the short list of the United States Supreme Court, where a lawyer slept through the trial, admittedly through significant portions of the trial in a capital case, and then they say, “Ah-ha, well, it does not really matter because he did not sleep through the entire trial, only significant portions of the trial,” and the trial was a day and a half long, which is the *Burdine*¹⁶ case, then you really have to rethink what is going on in terms of effective assistance of counsel. It is just a national disgrace, and something has got to be done about it.

There is only one reason I am standing here before you today, and that is because of Professor Gary Wells.¹⁷ You know, it is a problem when

15. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

16. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

17. Gary Wells is a professor of psychology at Iowa State University in Ames,

you live with somebody in a community that you do not quite get the perspective of what everybody else in the country, in the world, thinks. He is not only a distinguished professor and psychologist and recognized by his colleagues in all areas of psychology as being one of the real leaders in the field and one of the most accomplished scholars, but when it comes to the whole area of eyewitness identification, he is more than just a leader. He has inspired generations of students, generations of scholars, and done such fundamental research in this area that he is changing the entire way that eyewitness identification procedures are conducted in this country. And we are pleased and proud that we can be aligned with him in this effort. And poor Gary, we just sign him up and say we have a group of prosecutors and police officers and others—could you go give a lecture? Before you know it, the State of New Jersey has completely changed the way it does eyewitness identifications, as have Massachusetts and North Carolina and other states across the country, reaching a point of critical mass.

IV. EYEWITNESS IDENTIFICATION REFORMS

I will talk a little about some of these eyewitness reforms. There are ways to reduce error. There are ways that Professor Wells has shown us that you can reduce incorrect identifications without reducing correct identification. There is simply no excuse to not do this, not in policy terms, and, frankly, not in constitutional terms. If there are things that you can do to reduce error without reducing correct identifications, then it must be done. It must be done to protect the innocent and to apprehend the guilty. And those things can be done.

Let me first talk about eyewitness reform. And here I will be a little technical because we are in a law school. Here are certain things that can be done that will reduce error. Number one, if the person that does the photo array or the lineup does not know who the suspect is—and let us characterize that as blind or double blind administration of the identification procedure—if that is done, study after study, and as they say in the trade, meta-analyses, have demonstrated that this reduces error without reducing correct identification. And there are many reasons for it. Even by body language or completely inadvertently, officers can wind up indicating to a witness which of the people that is in the array they think is the person, and that may not be the person, or there can be postidentification taint—“Oh, I am glad you identified number 3. That is

Iowa, and an internationally recognized expert on eyewitness identification. For more information, see <http://www.psychology.iastate.edu/faculty/gwells/homepage.htm>.

the guy we always thought it was,”—which falsely increases the certainty of the witness and can lead to a wrongful conviction or a wrong identification or certain belief. So, blind administration reduces error without reducing correct identification. That is what the science shows. And I do not think anybody in the field is disputing it.

Another simple thing, when you bring somebody to look at a photo array or a lineup, if the administrator says, “Please remember the real perpetrator may or may not be in this lineup or photo array. Do not worry. If you do not make an identification, the investigation will continue,” that mere admonition reduces error without reducing correct identification. Why? Well, in principle, if you were brought in for a photo array or a lineup, you would think the police had somebody. You would think they had some evidence. That is your natural instinct to believe. And, therefore, there may be a certain desire to get closure, to pick somebody that resembles the perpetrator, and that natural error can occur. If you give that warning, that immediately reduces guessing, in a sense, or the inducement to make an identification when maybe you should not. It reduces error without reducing correct identifications.

Picking the fillers, or the distracters, in either a lineup or photo array to match the description originally given by the witness as opposed to matching the suspect is another reform that reduces incorrect identifications without reducing correct identifications. Another best practice is to, right after the identification, ask the witness in his or her own words to describe their level of certainty. These are reforms that are considered best practices that Professor Wells has, through research with his colleagues, demonstrated work. And they are being adopted, as I described, in different jurisdictions.

The final reform, which is the most dramatic in terms of reducing error, is instead of placing all of the photos or all of the people in a lineup at the same time, which would be a contemporaneous display, show them one at a time. The reason for this, as Professor Wells has demonstrated, is that there is a tendency when there is a mistake in identification for natural error. The natural error is to make a relative judgment. When you make a mistake, ordinarily the witness is going to select somebody who most resembles the real perpetrator even though that person, by definition, is not the real perpetrator. That is the natural error. You can guard against that by sequential presentation. Of course, that only works if it is blindly administered. That dramatically reduces error. There is some evidence that it does diminish correct identifications. However, there are certain techniques that can be employed, like letting them go through it once again, that can reduce that diminishment in correct identification. One

must make a judgment in terms of our system of how much error we can tolerate, and what is the most important thing to do.

I say that because I think what we are seeing in terms of these reforms across the country are different ways that it is happening. The National Institute of Justice (NIJ), in a report led by Professor Wells, along with police officials, prosecutors, and some defense attorneys, essentially recommended what I have described to you as “best practices.”¹⁸ The NIJ report came out six years ago, and I think this would generally be considered best practices. There is voluntary adoption of these reforms. There is legislation in states like Illinois—after the death penalty moratorium—and examinations of this issue and reports—the Ryan Commission Report,¹⁹ for example, where, again, Professor Wells’s work was featured prominently. They actually passed legislation to implement pilot programs.²⁰ In the State of North Carolina, a conservative Chief Justice of the North Carolina Supreme Court, after actually coming to a gathering organized by the American Judicature Society I think four years ago in January where a number of us spoke, heard Professor Wells talk, and Chief Justice Beverly Lake said, “You know what? I need to form a commission in my state. Bring everybody in. Just give them the facts.” And now they are adopting eyewitness reform.

Frankly, we should be able to go to the courts. Because if lawyers make the right record—motions to suppress eyewitness testimony—if they bring in the experts, if they make their record correctly, I believe that it is a matter of the proper implementation of due process. You cannot have techniques that can reduce error without reducing correct identification and not have prosecutors use them. You cannot have police doing things that increase error without telling jurors that they have done things to increase error.

I will give you a real simple example. There was a case going up to the Connecticut Supreme Court. We filed an amicus brief laying out the social science on the issue of warning the witness that the real perpetrator may not be there and how that reduces error without reducing correct identification. And I guess it is two weeks ago that the Connecticut

18. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 29–38 (1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

19. ILL. GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf.

20. *See* 725 ILL. COMP. STAT. ANN. 5/107A-10 (West Supp. 2005).

Supreme Court said, “We are going to affirm this conviction, but we think the amicus brief from the Innocence Project is right.” The social science data is so obvious and so clear we are now under our supervisory power telling all of the police and prosecutors in the State of Connecticut, “If you do not do this, we are going to give a jury charge, and the jury charge is that by failing to give this warning, the likelihood of error was increased.²¹ Social science studies have done that, so you had better do it.” You know what is going to happen? Prosecutors are going to take one look at that, and they are going to say, “We better do it. We do not want juries being programmed.”

I think that there is a tremendous potential here for litigation, and there is actually a pretty big constitutional argument involved.

And, of course, there is synergy, because if these best practices are adopted by states and cities, the more likely it is other jurisdictions will follow; the more likely legislatures will consider this; the more likely juries will be impressed by cross-examination of witnesses; and the more likely courts will act.

We are already beginning to reach critical mass. The State of New Jersey’s Attorney General just listened to Gary Wells, and he has the power, strangely enough, to order everybody to do something—one of the few such states in the country to do so. So for years New Jersey has had it; North Carolina; Wisconsin now; Boston, Massachusetts; Minneapolis, St. Paul; St. Claire, California; and others. Virginia, Louisiana, Seattle, have adopted some but not all of these reforms.

And truthfully, these DNA exonerations have been involved in all of them. After a DNA exoneration in the *Cromedy*²² case, New Jersey authorities admitted there was an impetus for them to do it. In the *Cotton*²³ case in North Carolina, where a victim named Jennifer Thompson (there is a wonderful PBS special that you might want to get a hold of called *What Jennifer Saw*²⁴) made the mistaken identification. The real perpetrator was identified and this led the way for eyewitness reform in the State of North

21. *See* State v. Ledbetter, 881 A.2d 290, 318–19 (Conn. 2005) (requiring such an instruction to the jury).

22. State v. Cromedy, 727 A.2d 457 (N.J. 1999); *see also* Innocence Project, McKinley Cromedy, http://www.innocenceproject.org/case/display_profile.php?id=69 (last visited Mar. 28, 2006).

23. State v. Cotton, 407 S.E.2d 514 (N.C. 1991); *see also* Innocence Project, Ronald Cotton, http://www.innocenceproject.org/case/display_profile.php?id=06 (last visited Mar. 28, 2006).

24. *What Jennifer Saw* (PBS television broadcast).

Carolina. That is why the conservative Chief Justice responded as he did.

We had quite a number of exonerations in Massachusetts that led to it. Just look at the last few weeks. Here is a man, Thomas Doswell, who was convicted of rape in Pennsylvania.²⁵ Here is a guy that was a football player, prosecutor for years, opposing his application to get DNA testing. Then when Tommy was finally exonerated—and Tommy is a big guy—the prosecutor came down. He is a really big guy, and my colleague, Peter Neufeld, looked at the prosecutor and said, “You guys look like the same age. Did you play football?” The prosecutor says, “Yes, I did.” They suddenly realized that both of them were two years apart and high school football stars. What happened to Doswell is that he had been charged with a sexual assault that he did not do, but the police officer who was in charge of that case thought that he was really guilty of it or certainly had a belief in that. So when a rape was committed in the Pittsburgh area, they then created a photo array. And, this is amazing. They put Doswell’s picture in it, and under his picture was the letter “R.” So, of course, he was picked out. What is more astonishing to us is that what we found out is that that was their general practice. If they had a photo of somebody that had previously been arrested for rape, they would put the “R” under the picture and display that in a photo array. You do not have to be Gary Wells to know that is not good.

I could tell you story after story of identification practices that go on in this country that are so contrary to what everybody knows is proper.

This one kills me—The Bird Road rapist, Luis Diaz.²⁶ In Coral Gables, Florida, there is a road called Bird Road, that runs outside the Miami area. There were a series of sexual assaults going on in the Bird Road area years ago. Women would be driving in their car, and somebody would pull up behind them and start flashing lights. The women would pull over to the side of the road, and the man would take out a gun, and he would point it at them, and he would say, “Get out of your car and come into mine.”

The man spoke good English. Some of them described the individual as having a kind of Latin accent, but spoke English and said, “Please come into the car,” and would have extensive conversations. Some of the women

25. See Innocence Project, Thomas Doswell, http://www.innocenceproject.org/case/display_profile.php?id=163 (last visited Mar. 28, 2006).

26. Diaz v. State, 409 So. 2d 68 (Fla. Dist. Ct. App. 1982); see also Innocence Project, Luis Diaz, http://www.innocenceproject.org/case/display_profile.php?id=164 (last visited Mar. 28, 2006).

would come into the car. He would demand oral sex. Sometimes it was vaginal intercourse. Then the women would be forced out of the car. He would leave them and drive away. Some women escaped. Altogether there were over twenty-six assaults over a two-year period. Now, for reasons that we still do not understand, the police in this area were not telling the community that these attacks were going on even though they were extraordinarily similar in their modus operandi. They—the victims—generally described the assailant, aside from speaking English like that, as about 5' 9", 150 or 160 pounds, sometimes even taller and bigger than that.

One day Luis Diaz, a Cuban, married with three children, is in his green car, and he pulls into a service station, and one of the victims of the rape who works in the gas station takes a look at him and his car and thinks that is the car, and that is the guy who raped her, and calls the police. The police arrive, and they see that Luis Diaz is 5' 3" tall, that he weighs 120 to 130 pounds, and he does not speak English. And he has an alibi for this particular case. He was with his children playing. And they accept this, and they tell the woman, "No, no, he is not the right guy."

But then this particular victim starts talking and winds up meeting another woman who was one of the victims who is a radio talk show host. And they suddenly say, "What do you mean? They picked somebody up, and nothing happened?" Suddenly it gets into the newspapers, and it is revealed there was a Bird Road rapist who had committed all these rapes. What have the police been doing? It appears in the newspapers, and guess what? They go out and pick up Luis Diaz and bring him in for identification procedures. There were a number of photos shown to the victims. We do not know how many—we know it was quite a few—but then they conducted one big lineup where they brought in twenty-six different victims, one after another, to look at the lineup.

The lawyer for Luis Diaz was there at the time of the lineup and tried this case. His name is Roy Black. He is a lawyer that represented William Kennedy Smith. He is undoubtedly one of the best criminal lawyers in the United States.

So the women came in to do the identification procedure, and eight of them selected Diaz, but the rest did not. Out of those eight it later turns out that two of them eventually, many years later, would recant their identification and say they were not sure. They knew the police wanted them to pick number three, but they say it really looked like number six. Some of them had to be shown the lineup again. That was videotaped to make sure that they would make the identification that the police really thought was correct.

Luis Diaz went to trial on eight mistaken identifications. He was convicted of seven, and he was sentenced to life, life, life, life consecutively. Two of the witnesses eventually recant due to the work of the woman who claims she is the basis for Angela Lansbury's character on *Murder, She Wrote*,²⁷ a woman who is a private investigator, but he still has five convictions.

We got involved in the case and asked for DNA testing. There was no biology to be recovered except in one of the cases. We got a DNA result on the case that excluded Diaz, but what does that have to do with the other convictions? So then we asked the prosecutors—and they were great about this—to go out and look for some of the other unsolved cases, the ones where the women did not make identifications, and we found some biology on that. I think it was rape number six and rape-attack number nineteen. We got a result on number nineteen, and both were not Diaz, but both were the same male, and so the prosecutors agreed to let him go.

Now, what is really amazing about the Diaz case when you think about it, and it really bothers me, are his children, because they grew up being the sons and the daughter of the Bird Road rapist. Everybody knew who they were. And they also knew he was innocent because they were with him. Believe me, whether it is the victims who have been induced into a wrongful identification or just made mistakes, or the families of the murder victims, and certainly the families of those who are wrongfully convicted, there are many, many tragedies like this.

Now, the Diaz case, when you look at the number of mistaken eyewitnesses per case, we have eighty-eight cases where there is one mistaken witness, twenty-three cases where there were two mistaken eyewitnesses, seven cases where there were three mistaken eyewitnesses, three cases where there were four mistaken eyewitnesses. And our previous record was the five mistaken eyewitness identifications in the case of Kirk Bloodsworth.²⁸

Kirk Bloodsworth was a United States Marine with no criminal record who was convicted based on the testimony of five eyewitnesses who said that he came out of the wooded area in Maryland after having raped and murdered an eleven-year-old girl. He was convicted and sentenced to

27. *Murder, She Wrote* (CBS television broadcast).

28. *Bloodsworth v. State*, 543 A.2d 382 (Md. Ct. Spec. App. 1988); see also Innocence Project, Kirk Bloodsworth, http://www.innocenceproject.org/case/display_profile.php?id=21 (last visited Mar. 28, 2006).

death, and then he was tried a second time and convicted a second time. We finally got DNA testing to show that the semen did not come from him, and they let him go. And then I asked the prosecutor in Maryland for five years to use a new form of DNA testing that you can put into the data bank. You should retest it in Kirk's case, because she always said, "Well, we have to vacate his conviction, but that does not mean he is innocent." Well, we did the new set of DNA testing and we put it into the data bank, and, sure enough, it got a hit on a convicted felon—a rapist. And guess where he had been? He was maybe seven inches shorter than Kirk. He had reddish hair like Kirk. He spent months in the same jail cell with him in Maryland.

Kirk has a wonderful book called *Bloodsworth*²⁹ that he wrote with Tim Junkin. It is a wonderful account of his ordeal. Indeed, when the United States Congress passed the Justice for All Act³⁰ legislation, which mandates postconviction DNA testing if you want federal money through your DNA labs,³¹ remember the Kirk Bloodsworth Bill. I commend that book to your attention.

V. CRIME LAB REFORM

Now I will talk about crime lab reform, real oversight of crime labs by scientists from the academy, from medical science. It is not *CSI*.³² And we have discovered so many cases where there have been problems with the validation of some fundamental science and also the quality assurance. Crime labs ought to be an independent, third force within the criminal justice system. They should not be beholden to police or prosecutors in terms of their budgets. They should be independent scientists. Nothing is more important to the solution of crime, to the protection of the innocent, the apprehension of the guilty, than having a crime lab that does objective, real science, that calls it like it sees it. I think they aspire to that on *CSI*, but a lot of the technology that they are using and a lot of the things they have do not exist.

In the area of false confessions, one simple reform that is being adopted across the country is videotaping the interrogations. This gives a

29. TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* (2004).

30. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 and 42 U.S.C.).

31. See 42 U.S.C.A. § 14136a–14136e (West 2005).

32. *CSI: Crime Scene Investigation* (CBS television broadcast).

record for the judge, and for everyone else, as to whether or not there was coercion or false admission. It also protects police against false accusations that they have fed information to a suspect, or that they have coerced them. It is also really good for training officers on proper interrogation techniques, and it helps catch people.

Minnesota and Alaska have had this for years. They videotaped the interrogation. Police officers walking out of the room, and all of a sudden the suspect starts going “Ding dong, the witch is dead” and confesses. A police officer may say, “Well, you know, we are going to have to test your fingernails because maybe there will be some DNA from the victim.” And they leave the room, and the guy starts sucking his fingernails. There are all kinds of ways that the videotaping of interrogations can lead to the truth.

One of the key things that DNA testing has shown us is that there are so many forensic assays, bite marks, handwritings, and arsons that have no really strong scientific basis in terms of being able to get right or wrong answers that are now under attack by real scientists within the profession. Some of it is just plain junk science. Even fingerprints have some significant problems, as I will describe to you.

We need validation of forensic science assays—real, true, rigorous scientific validation. We need quality assurance. Labs must be accredited. They must be open to audits. They must have proficiency tests, external proficiency tests. You do a sample. You send it to the lab. Hopefully they do not even know it is a real case. They do it. We see if they can get the right result. Pretty simple. We do it for medical labs. We do it for clinical labs. We should be doing it, and it is being done, but it should be done more rigorously for crime labs.

Then we need audits when there are mistakes. One of the things that Peter Neufeld and I already helped get passed in the last Congress is section 311 of the Justice for All Act. This section says something very simple, which is that if there is misconduct or serious negligence in any crime lab, each state in this country must have an independent entity conduct an audit of that institution, or it should not be entitled to get money under the fully covered Laboratory Improvement Act,³³ which has not been funded this year, but ordinarily is funded.

We have a bill passed in Texas.³⁴ Peter Neufeld and I have been

33. See 42 U.S.C.A. § 3797k (West 2003 & Supp. 2005).

34. See TEX. GOV'T CODE ANN. § 411.0205 (Vernon Supp. 2005).

commissioners of forensic science for fourteen years. We actually got a bill passed many years ago that has a group of people—defense lawyers, prosecutors, many, many scientists from different areas and different disciplines, along with criminal and forensic people—and we oversee all of the crime labs in the State of New York and audit them and make them get accredited.³⁵ Now we have a bill. We passed it in Texas because of all their crime lab scandals. And this should be a model, frankly, for the country, because that is what we need, and you should get it here in Iowa.

Let me tell you about Texas, and let me tell you about the crime labs in Texas. First of all, the Houston Police Department crime lab, which is completely unaccredited, had a DNA laboratory that was so bad they had to close it down. They had leaks in the roof. A man named Josiah Sutton³⁶—he just got his money yesterday from the State of Texas on the grounds of innocence—was an eighteen-year-old kid who was wrongly convicted based on bad DNA tests. They had to retest every DNA case that ever came out of Houston, a thousand or more, but that is nothing. The police department crime lab—their serology, their ballistics, their trace evidence—was all subject to terrible questions.

Here is another case—George Rodriguez.³⁷ A young girl was abducted from a 7-Eleven, from the street in Houston by two men—a skinny guy and a fat guy. The skinny guy we know was Uvaldo Beltran. Beltran and the fat guy, in the fat guy's car, take her to Beltran's house. Beltran's brother is sitting on the couch. They bring her into the bedroom. They rape her. They bring her out and put a hood over her head. They drive her in a car and drop her off at the 7-Eleven. The young woman goes and reports the crime to the police. She sees a police officer. She describes Beltran. She describes the house. The police officer knows Beltran. He knows that Beltran has a friend named George Rodriguez, who is heavy set. He checks out George Rodriguez. He has an alibi. He was working that day. Nonetheless, he shows George Rodriguez's picture to this young girl, who then picks him out and says, "Yes, I think that is the guy."

So they go arrest Beltran, and they interview him and his brother. Beltran confesses, and says, "I did the crime, but I did it with a man named Isidro Yanez. He is the fat guy. He is the heavy set guy."

35. See N.Y. EXEC. LAW § 995-b (McKinney Supp. 2006).

36. See Innocence Project, Josiah Sutton, http://www.innocenceproject.org/case/display_profile.php?id=145 (last visited Mar. 28, 2006).

37. See Innocence Project, George Rodriguez, http://www.innocenceproject.org/case/display_profile.php?id=166 (last visited Mar. 28, 2006).

The police start thinking, "What about Yanez?" Well, Yanez is also under suspicion because there were two other women that were abducted and raped in Houston along with somebody who has plead guilty who says he did it with Yanez, but they do not arrest Yanez. Instead, they bring George Rodriguez to trial. And at the time of the trial they say "We have done microscopic comparison of pubic hairs that were found in the bed where the young woman was raped. They are consistent with Rodriguez. They exclude Yanez. We have done serology on the semen, and we can say that Rodriguez, who is a nonsecretor, cannot be excluded because he does not secrete blood group substances into his semen, but Yanez, who is an 'O' secreter, can be excluded from a sample where they found blood group substance 'A.'" Now, they found blood group substance "A" because the victim is "A," and it is what they call a mixed stain. Any serologist will tell you that if you have a stain that is blood type "A," then that is a mix stain from a victim and an unknown male, and somebody is an "O" secretor so you cannot exclude the "O" secretor because blood type "O"—this is a little more science than you need—is actually the "H" antigen, and if you are blood type "A," you have "A" ordinarily and some "H."

There was absolutely no basis in science for excluding Yanez. The head of the serology lab comes in and says, "We can exclude Yanez. He cannot be the guy. He is excluded by the serology tests." The prosecutor opened on that. That is how he testified. We came in. We cannot find the semen anymore, but we did DNA testing on the hairs. It excluded Rodriguez, and it is consistent with Yanez. Then we got a group of eight distinguished serologists—the most distinguished serologists on the planet—who signed an affidavit and said that this serology testimony was unreliable and that every case that this guy did who is head of the crime lab has to be reexamined and audited. We had already done this in Cleveland on a case. We attached the court order of the consent decree we had in Cleveland.

The prosecutors went back, and they retyped everything in the case. They found out that when they typed Yanez's blood, he was a nonsecretor. So they even had that wrong.

When this conviction was vacated, we were able to point out ballistic cases and serology cases, this was nineteen years of work at the Houston Police Department crime lab. Finally the city council and the mayor agreed, and they put together a commission to do an audit of it led by Michael Bromwich, former Inspector General of the United States Department of Justice, who had conducted a similar kind of audit of the FBI around the time of the Oklahoma bombing case that led to the FBI

becoming an accredited laboratory. He immediately started to look at it, and he found all kinds of misconduct.

Now, why is this important, those of you in Iowa who are considering the reinstatement of capital punishment, because this is Harris County, Texas? It is important for many reasons, but this is Harris County, Texas—Houston. The Houston Police Department crime lab is doing the ballistics, serology, hair, everything, for Harris County. Harris County has executed more people in this country than any jurisdiction, except for the State of Texas itself and Virginia. This is death penalty central. And it has a crime lab that is in receivership, that is being audited for years, and has led to already a number of demonstrable wrongful convictions.

And what about Isidro Yanez? What about him? Well, they went to interview his mother during the course of this trial, and she said, “My son raped my other son’s wife, and we reported it to the police, and they would not arrest him. And then finally he was arrested for abducting and assaulting his own ex-wife.”

He was a one man crime wave that committed all these crimes. And because of the malfeasance or misfeasance of this crime lab, an innocent man went to jail for close to two decades, and the real perpetrator was out on the street committing mayhem in the State of Texas. That is not the only case I can tell you about. We need crime lab reform in this country.

Let me talk briefly about fingerprints. We had a *Daubert*³⁸ challenge to fingerprints in a case called *Plaza*.³⁹ And there is one thing that is very, very clear. In theory, people believe that fingerprints ought to be unique as an identifier. We have relied on it for a century now. One of the reasons for it, the underlying theory, is that fingerprints are ordinarily formed by friction when the unborn child is in the amniotic sac, and the fingers are sort of rubbing against that, and they are formed randomly. That is why even identical twins, in theory, have different fingerprints. But that is not the forensically significant question. The forensically significant question is: When you have a partial latent print that is found at a crime scene, can you examine it by looking at its ridges and whirls and swirls and say, “We have this much identity, these many points of inclusion or some measurement to say that these two fingerprints came from the same person?” How many points of dissimilarity must you have before you see an exclusion? Well, it has been interesting over the years that some jurisdictions said, “We want to have thirty points of identity,” “twelve

38. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

39. *United States v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Penn. 2002).

points of identity,” or “sixteen points of identity.” At one point the FBI was saying, “Well, we look at totality, and we do not count points, and we know it when we see it,” which was their latest standard, and they never really were looking at how many dissimilarities we need.

We had a case in Massachusetts called *Cowans*.⁴⁰ Envision a *Mystic River*⁴¹ neighborhood. A police officer is walking down the block, and he sees a young black man with his hat askew. The man is looking at him suspiciously, and the white officer gives chase to him, and grabs him in the park. The man pulls out the gun from the officer and shoots him in the back, but luckily the officer is wearing a bullet proof vest. The hat falls off the young man as he scales a wall, and then he sees a man named Benjamin Pitre out of a second-floor window, and he shoots at him because the guy is looking at him. Then he runs down the alleyway, and ducks into an apartment where he sees a family—an African-American mother and two children. The young man is African-American, and he says, “Give me a glass of water.” And he has a gun. So they give him a glass of water. He drinks from the mug of water, and he puts it down on the table. He pulls off his sweatshirt. He wipes the prints off the gun and puts it in the corner, and then he leaves.

It is a hot case because it is a cop shooting, and they cannot find anybody. They look and they look and they look. Then they hear about a young man named Stephan Cowans who has been arrested for a misdemeanor selling Louis Vuitton knock-off bags in the park. They go pick him up and take a look at his fingerprints. They lifted a print from that mug, and they say there is a sixteen-point identity match. Notwithstanding his alibi, notwithstanding that the family that was with the perpetrator for twenty minutes said it was not him, notwithstanding the fact that initially the cop could not identify him from the pictures but later did, he was arrested and convicted in a nanosecond.

Eventually we were able to do DNA testing of sweat from the hat that was left in the park. We did DNA testing because the police thankfully swabbed the cup that the perpetrator drank from. Then we did DNA testing from the skin cells and sweat on the sweatshirt that was left at the scene with the gun inside of it. All of those DNA patterns came out to be one male, and that male was not Stephan Cowans.

40. Commonwealth v. Cowans, 756 N.E.2d 622 (Mass. App. Ct. 2001); see also Innocence Project, Stephan Cowans, http://www.innocenceproject.org/case/display_profile.php?id=141 (last visited Mar. 28, 2006).

41. *Mystic River* (Warner Bros. Pictures 2003).

The Massachusetts prosecutors took a look at our DNA results, and they said, “You know what? We better look at this print again.” And sure enough, they looked at it, and it was plainly wrong.

So he was exonerated, and they went to the crime lab and did an audit of the other cases. They fired the people involved, and they replaced them with competent fingerprint people.

But what about Brandon Mayfield?⁴² How many people here know the name Brandon Mayfield? Maybe this will refresh your recollection.

There was a bomb that blew up in Madrid. Remember the train? There was blue plastic attached to the bomb that had fingerprints on it that was sent out through Interpol. The FBI took a look at that print, and they matched it against our known Automatic Fingerprint Identification System (AFIS) data bank, and they came up with possible hits—twenty of them. That is the way it works, sort of like an algorithm, and you see twenty possibles, and then the FBI examiners individually look at them, and supposedly—I do not believe this completely, or I am suspicious is a better way to put it—but completely and independently they came up with a match to a man named Brandon Mayfield while not knowing anything about him in theory. He is a lawyer in Oregon. He happened to have his fingerprints in the system because he was once a member of the United States military.

Mayfield is Muslim. His wife is Muslim. He had been involved with al Qaeda. The FBI said that there was a fifteen point match between Brandon Mayfield’s print and the print that was found on the plastic in the bomb in Madrid.

The Spanish authorities said, “We do not agree with you.” They looked at it again. The FBI said that they were sure. The Spanish had already said that there are these discrepant things, and that they did not believe it was him. The FBI said, “No, you are wrong.”

Even more compelling is that a federal judge, when Mayfield was given a federal defender, allowed him to have an independent expert look at it, and the independent defense expert said, “I think they are right. It is probably his print.” Thankfully, Spanish authorities were able to identify a person who really was a member of al Qaeda, whose print was found on the blue plastic. When the FBI looked at it they agreed it was not Mayfield, and they excluded him. The government has now apologized.

42. *See* *Mayfield v. Gonzales*, No. Civ. 04-1427-AA, 2005 WL 1801679 (D. Or. July 28, 2005).

What went on there? We have different standards. We do not have any particular vigorous scientific tests to see whether people can get it right or not. Now there is a series of reexaminations being done by the FBI itself as to the underlying scientific basis of fingerprints and how we do it.

If you visit the FBI website, you will see a report by Robert Stacey.⁴³ The FBI itself commissioned this. Their first explanation is that it was a problem of examiner bias; that a higher-up in the FBI looked at these prints and said, "I think it is a match to Mayfield." The subordinates did not agree, even though in theory they were supposed to be doing independent readings, but they were afraid to disagree with him. Stacey says this—this is the FBI, not me. He says that this is the danger that we see in fingerprint examination, probably all areas of forensic science, when you do not do it blind—remember blind administration in the identification context. When you do it blind, you do not know anything about the case. The more important and pressured the case, the more likely we are going to have examiner bias. That is what Stacey said.

We need crime lab reform in this country. Believe me, that is something that we really need.

43. Robert B. Stacey, *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, FORENSIC SCIENCE COMMUNICATIONS, Jan. 2005, http://www.fbi.gov/hq/lab/fsc/backissu/jan2005/special_report/2005_special_report.htm.