

## FOREWORD

*Allan Sobel\**

This symposium issue is the third collaboration of the *Drake Law Review* and the American Judicature Society (AJS). In 2004, the symposium on wrongful convictions included nine impressive and thought-provoking articles discussing innocence projects, police interrogation methods, compensation of wrongfully convicted exonerees, and other topics on the administration of justice and needed improvements to the criminal justice system. In 2005, the AJS-*Drake Law Review* symposium issue on criminal justice system reform included important articles addressing the legal issues in restorative justice, the state of criminal sentencing after *United States v. Booker*<sup>1</sup> and *Blakely v. Washington*,<sup>2</sup> the fairness of the Texas death penalty, and other timely subjects. This year's symposium issue addresses the intersection of law and science.

The science of DNA technology has established that the wisdom of the law alone cannot lead us to absolute truth in all cases. The law strives for truth, justice, and finality, one case at a time, in its own insular way. Science searches for absolute truth by constantly raising questions and testing hypotheses in hopes of finding answers. Science does not recognize finality. Our citizens look to science and law as pathways to truth.

A complex society functions best when its constituent parts are working together cooperatively. Only by fostering cooperation among the members of various disciplines of our society charged with finding the truth—scientists and academics, lawyers, courts, law enforcement, journalists, politicians—can America maintain its seat at the pinnacle of world justice. To find the truth we must work wisely and diligently in all circumstances and in all ways, and not from law books alone. We now know that it is where the wisdom of the law and the knowledge of science intersect that the greatest strides towards justice for all can be made. We

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\* President, American Judicature Society; B.S., Eastern Michigan University, 1973; J.D., Lewis & Clark College, Northwestern School of Law, 1977.

1. *United States v. Booker*, 543 U.S. 220 (2005).  
2. *Blakely v. Washington*, 542 U.S. 296 (2004).

must therefore encourage the courtship of law and science.

In this effort, we must not lose sight of the fact that the justice system is hugely successful, accurate, and effective, and is operated by highly trained, qualified, and devoted professionals from diverse backgrounds and from every degree of the political spectrum. Despite the too frequent problem of incompetent or ill-trained defense counsel and the disgrace of a chronic lack of resources, the American system of justice does garner respect. Its lofty reputation, however, has suffered from the many DNA exonerations publicly disclosed with some regularity during the past two decades.

Because of these exonerations, the question is no longer whether any innocent people have been wrongfully convicted of crimes they did not commit; rather, the questions now are about the frequency with which this happened and what the legal system can do to prevent future occurrences of wrongful conviction. The existence of wrongful convictions wrought by failings of our criminal justice system has galvanized the media, scientists, legal scholars, law enforcement, judges, lawyers, victim advocates, and members of the public in an effort to remedy and prevent the inevitably tragic consequences resulting from putting innocent people behind bars and allowing guilty perpetrators to walk the streets.

By its nature and design—and for good reason—the legal system steps deliberately when entering emerging fields of human knowledge and understanding, and reacts cautiously when confronted with novel or innovative scientific methods. Reluctant or uninformed acceptance of innovation, however, can cause disastrous results and weaken public trust and confidence in the justice system, which is the cornerstone of a strong and functioning democracy.

The advent of forensic DNA testing was barely twenty years ago. The evolution of DNA technology has provided an unprecedented window of introspection for law enforcement and the criminal justice system. The opportunity to address problems of tunnel vision, racial bias, junk science, and other infirmities of the justice system is now upon us.

In 1986, English geneticist Alec Jeffreys was the first to use DNA forensic testing not only to eliminate a prime suspect—a 17-year-old boy, who had confessed to the crime—but also to help convict the actual killer-rapist.<sup>3</sup> Within months DNA evidence was being used by prosecutors in

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3. The Development of Serology and DNA, <http://www.historybytheyard.co.uk/dna.htm> (last visited Apr. 17, 2006).

the United States, and by 1989, scores of criminal cases relying on DNA evidence had gone through U.S. courts, despite a lack of regulating protocols on testing procedures and an unfamiliarity of the courts with the science of DNA. Today DNA analysis often supplies strong proof of guilt, and is important to those claiming to have been wrongfully arrested, charged or convicted, in those cases where biological evidence may identify who committed a crime and is available for testing. Of course, in most cases, biological evidence is not available to establish guilt or innocence.

By the end of March 2006 there had been 175 reported exonerations based on DNA evidence.<sup>4</sup> While DNA has allowed many people to be exonerated, DNA did not contribute to their wrongful convictions. Instead, those convictions were caused by a variety of underlying systemic defects, such as misleading eyewitness interview techniques; coercive interrogations; faulty pattern recognition analysis concerning fingerprints, fiber, bitemarks, toolmarks, tiremarks and other comparisons; tunnel vision; and under-resourced and ineffective defense counsel.

To regain and maintain a high level of trust and confidence in the criminal justice system, we must seek out and embrace the knowledge of science. It is time for the law to better utilize the methodology of scientific inquiry, testing, and verification and conduct research accordingly to identify weaknesses in the criminal justice system and propose practical solutions. When the court system does readily embrace science, as it has with DNA technology, we must be sure there is reliability in that science and we must ensure that the lawyers, judges, and members of the jury fairly comprehend that science.

Other scientific breakthroughs no doubt are on the horizon. For example, promising and emerging biometric techniques abound, such as facial recognition, brain “fingerprinting,” and retinal iris scans. As new discoveries are made and opinions and beliefs change ever more rapidly, it is imperative that the law embrace a multi-disciplinary approach to better serve society. The challenge both for the law and science is to make a difference together in the twenty-first century.

There are nearly 20,000 law enforcement agencies or departments in the United States, and many of these lack adequate forensics lab resources and would benefit from better access to comprehensive training opportunities. The United States criminal justice system has no uniform standards or comprehensive oversight mechanisms. Public defenders often

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4. Innocence Project, <http://www.innocenceproject.org> (last visited Apr. 17, 2006).

lack adequate resources. The expense of retaining qualified private defense counsel and relevant support services that can match the forensic science expertise of the government is beyond the means of many criminal defendants. Courts, as monitors of fair play and reliable expert testimony, are neither designed nor equipped to effect systemic change in matters beyond the courthouse steps, especially involving scientific inquiry into methods of law enforcement investigation, identification, and custodial interrogation.

We must spare no effort to improve the likelihood of getting it right in each case, early on, to avoid whenever possible a wrongful arrest, prosecution, conviction and punishment, and the simultaneous problem of allowing a guilty person to escape responsibility and remain free possibly to commit other offenses. While every exoneration should be celebrated, every exoneration also taints the justice system.

In the summer of 2005, the Conference of Chief Justices passed Resolution 18, "In Support of Increasing Public Confidence in the Criminal Justice System by Reducing the Risk of Wrongful Convictions."<sup>5</sup> The Resolution touts the value of searching for new methods and practices to improve the accuracy and reliability of the criminal justice system and the value of science and technology in furthering such endeavors.<sup>6</sup>

Of particular importance and promise in these efforts is the recent formation of the AJS Institute of Forensic Science and Public Policy, located in Greensboro, North Carolina.<sup>7</sup> The Institute will work to ensure that the best knowledge of science is used to serve the administration of justice in America and to increase the reliability of outcomes in both criminal and civil cases. A multi-disciplinary approach will be taken to educate law enforcement, legislators, prosecutors, defense attorneys, judges, and the public about the value of tapping into the knowledge of science when evaluating and designing the processes and procedures used

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5. Conference of Chief Justices, Policy Statements and Resolutions, Resolution 18, In Support of Increasing Public Confidence in the Criminal Justice System by Reducing the Risk of Wrongful Convictions, <http://ccj.ncsc.dni.us/CriminalAdultResolutions/resol18ReducingRiskofWrongfulConvictions.html> (last visited Apr. 17, 2006).

6. *Id.*

7. The American Judicature Society, founded in 1913 and now based in Des Moines, Iowa, is an independent, national, nonprofit, and nonpartisan organization of judges, lawyers, and other members of the public who seek and work to improve the justice system. AJS, which brings a public and broad-based perspective to justice system issues, has the mission to secure and promote an independent, impartial, and qualified judiciary and a fair system of justice.

in administering justice. The Institute's focus is on areas at the nexus of law and science, with an emphasis on developing methods to improve the use and understanding of science and forensic evidence throughout the justice system. Specific initial areas of inquiry include the following:

- Improving comprehension of scientific methods and information in the legal profession;
- Developing standards for evaluation and certification of forensic laboratories;
- Improving the reliability of eyewitness testimony;
- Researching and evaluating pattern recognition techniques used in developing forensic evidence in solving crimes; and
- Assuring fair access to and the preservation and accurate scientific testing of evidence.

The Institute's research will be guided in part by the AJS Commission on Forensic Science and Public Policy, based in Alexandria, Virginia. The Commission, using the Institute's findings, will work to set national forensic science standards or guidelines—such as those used for the collection, testing, preservation, and admissibility of evidence—for law enforcement agencies and crime labs, prosecutors, practicing attorneys, and courts and to inform legislative and public policy decisions.

Dr. Donald Kennedy, president emeritus of Stanford University and editor in chief of *Science Magazine*, is Honorary Chair of the Commission. Former United States Attorney General Janet Reno, former FBI and CIA Director William Webster, and renowned statistician Dr. Stephen Feinberg of Carnegie Mellon University, are Co-Chairs of the Commission. United States Attorney General Alberto Gonzales has designated the Office of Legal Policy (OLP) as the Department of Justice Liaison to the Commission and Richard Hertling, Principal Deputy Assistant Attorney General, as representative of the OLP. Thirty-four other distinguished academics, scientists, judges, lawyers, law enforcement officials, and other experts in fields related to law and science from all parts of the nation serve as members of the Commission.

The cold fact of wrongful convictions has been a primary impetus for the launching of the AJS Institute and Commission, just as the advent of DNA technology has spawned Innocence Projects and Innocence

Commissions across the country. Such efforts must not be confined only to the study and prevention of wrongful convictions. If the stringent proof requirements and considerable expertise and resources of the criminal justice system cannot prevent wrongful convictions, imagine the potential scope of problems in the civil system with its increasing emphasis and reliance on scientific expertise and technology in the courtroom.

Justice Anthony Kennedy, standing in the splendid Great Hall of the National Academy of Sciences in Washington, D.C., in November 2005 at the launch of the AJS Institute of Forensic Science and Public Policy, warned of the legal system's obsession with determining guilt at the expense of prevention, correction, and rehabilitation and eloquently stated the following:

[P]eople have argued for years—does science make progress, and then the law has to conform, or does the law set the system, and then science has to follow it? It's probably a mixture of both.

In the end, science . . . seeks for truth. In the end law seeks for truth. And in the end, both of us use our disciplines to shape our destiny and to ensure human progress, and we must do this together. And that is the meaning and the purpose and the mission and the vital organizing principle of this magnificent [Institution].<sup>8</sup>

Science and law are not natural partners perhaps, but neither are they natural foes. There has always been tension between the two and probably there always will be. Exonerations flowing from DNA testing and other forensic science innovations, however, have served as the clarion call for cooperation among otherwise disparate disciplines in an effort to protect and serve society.

Much has been accomplished, and we continue to make great strides. There is much, much more, however, to be done. We are all stakeholders in the administration of justice; it is imperative that we remain steadfast in uncovering and addressing the weaknesses and entrenched infirmities that can hinder the goals of fairness, accuracy, and certainty in the criminal justice system, which so many see as the hallmark of the American legal system.

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8. AJS Launch of Institute of Forensic Science and Public Policy and National Commission on Forensic Science and Public Policy 25–26 (Nov. 10, 2005) (transcript available at The Opperman Center at Drake University).