Rediscovering Our Historic Mission: Defending The Falsely Accused Inside and Outside the Courtroom

By

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Rediscovering Our Historic Mission:
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Inside and Outside the Courtroom:_

Presented by Bruce M. Lyons, Esq.

It were better that ten suspected witches should escape than one innocent person should be condemned.

Increase Mather, *Cases of Conscience*, 1692.

I. FALSELY ACCUSED? ACTUALLY INNOCENT? WRONGFULLY CONVICTED? IT'S A QUESTION OF EVIDENCE.

It's the evidence, dummy! In court and in the media, there is little practical difference in defending the falsely accused or those who are actually innocent. As attorneys, we deal with the validity and sufficiency of the evidence. Although many cases of wrongful conviction have been revealed in recent years, they all resulted from some change in the evidence. While the extent of proven wrongful convictions has been surprising, we should take our lead from the Supreme Court: "what we have to deal with [on habeas re-view] is **not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.**" *Moore v. Dempsey,* 261 U.S. 86, 87--88, 67 L.Ed. 543, 43 S. Ct. 265 (1923*).* If we zealously defend our client's rights, we will acquit our responsibility.

Cutting swaths through the law. Back in 1765, William Blackstone identified "the Rights of Englishmen" as: due process, the attorney-client privilege, equality before the law, the right to confront adverse witnesses, and the prohibitions against attacking a person through his property, bills of attainder, self-incrimination, retroactive law, and crimes without intent.[i] These common law rights are supposed to be preserved in our Constitution. Name one that has not been eroded—not by the forces of evil—but by well-intentioned people seeking to control such evils as drug dealers, environmental polluters, white-collar criminals, child abusers, and now terrorists. In our zeal, we have forgotten Sir Thomas More's warning against cutting swaths through the law in order to chase after devils.

A. A RECENT CASE CLOSE TO HOME—FALSE CONFESSION, ABUSIVE POLICE TACTICS.

SENTENCED TO LIFE AS RETARDED TEEN, ADMITTED TO BAIL AS "ACTUALLY INNOCENT." In May in Ft. Lauderdale, Timothy Brown, was admitted to bail—after 12 years in jail that began when he was 15. In 1993, he was a mentally retarded teen, tried as an adult, and sentenced to life imprisonment without possibility of parole for the murder of Broward Sheriff's Deputy Patrick O. Behan. His conviction was mainly based on his statement to police that he was with the actual shooter. For years later, Brown insisted that he falsely confessed under mental and physical coercion by sheriff's detectives. Nonetheless, his case languished until last year when another man—on undercover audio and videotape—claimed that he shot the Deputy.

Then, in Federal Habeas proceedings, the court ruled that the confession was illegally obtained, commenting that, "BSO specifically decided to arrest Brown at a time when HRS workers would not be around to invoke his rights for him," The court made the unusual finding of "actual innocence," saying: "no reasonable jury would have found him guilty beyond a reasonable doubt . . ., had it heard the competent evidence presented during the federal habeas proceedings." Although, the confession was the mainstay of his conviction and despite the unwitting admission of the new suspect, the State has not yet decided whether to retry Brown. The actual shooter, Keith King, who was seventeen years old at the time of the murder, pleaded guilty to manslaughter and was sentenced to fifteen years imprisonment, and has since been released.

B. THE problem—EVERYONE KNEW—NOBODY ACTED.

There is nothing new about the problem of false accusation/wrongful conviction. It is as old as Genesis—at least—but only recently has been considered as a discrete problem. The news is that it is much more common than anyone thought. That has resulted in a flurry of activity on behalf of individuals and considerable insights as to the problem. Some reforms are occurring. Nonetheless, there are fears that the current circumstances create a danger that wrongful convictions may continue unabated—or even increase. We will look for remedies in ourselves, in court, in the criminal justice system, and in legislation.

C. EVERYONE KNEW—SALEM TO THE PRESENT.

The first documented wrongful conviction case in the United States (not counting the Salem witch trials) was in 1820, after two men were sentenced to death in Vermont the murder "victim" was found living in New Jersey. Over the next 181 years, hundreds of additional cases have come to light, including 65 memorialized by Yale Law Professor Edwin Brochard in his 1932 book Convicting the Innocent, more than 400 Twentieth Century cases identified by Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam in their 1992 book In Spite of Innocence, and 13 Illinois cases in which innocent men were exonerated and released from death row during the last 15 years.

The first "DNA exoneration—Gary Dotson (1989) opened the path. He had served 10 of 25 years of a wrongful conviction for rape based on perjured forensic testimony, prosecutorial misconduct, and a suggestive police photographic array based on an fictional description of the rapist by the victim. He had been in trouble with the law before, so, when the victim recanted the Governor of Illinois refused pardon and called the recantation false. Finally, DNA testing proved to be the crucial exculpatory evidence.

D. A constituency WAS CREATED.

The Dotson case and others soon thereafter not only showed a way for absolute proof of some wrongful convictions, but also illustrated many of the precipitating abuses. By 1996, the National Institute of Justice was able to document 28 cases reversed on the basis of DNA.[ii] By Oct, 2001, they reported that 50 States have laws requiring DNA typing of convicted offenders—typically for violent crimes such as rape or homicide. Also, reported then was the FBI's Combined DNA Index System (CODIS) with the anticipation that several million DNA profiles will be entered into this database in the next decade.

E. THE INNOCENCE PROJECTS—KNOWLEDGE IS POWER.

As the scope of the problem became clear, Innocence/Wrongful Conviction Projects flourished. One of the forerunners is The Innocence Project at the Benjamin N. Cardozo School of Law, created by Barry C. Scheck and Peter J. Neufeld in 1992. In December 2000, the Innocence Project joined with another leader, the Northwestern University School of Law Center on Wrongful Convictions, to establish a national Innocence Network to foster wrongful conviction projects in other states. By now, there are wrongful conviction projects in 31 States plus Australia.

F. WRONGFUL CONVICTION DEFINED.

"Convicted but innocent" has been defined [iii] as referring to people who have been arrested on criminal charges, most often armed robbery, rape, or murder (the kinds of cases that come to public attention), who have either pleaded guilty to the charge or have been tried and found guilty, and who, notwithstanding plea or verdict, are in fact innocent. The most common pattern of wrongful conviction involves factors such as eyewitness misidentification, community pressure, and character evidence that the defendant "was in trouble with the law before."

The definition includes: Repeat offenders who are innocent of the specific charge for which they have been arrested or convicted. **Innocent people who plea bargain or confess:** when overwhelmed by such things as wrongful identification, perjury, or forged documentation.

The definition excludes: People "lost in the system", wrongfully imprisoned (held without trial for long periods of time without trial), or **who have escaped justice** by some loophole, exclusion or evidence, violation of constitutional rights, or reversal upon appeal.

II. COMMON CAUSES OF WRONGFUL CONVICTION.

A. THE INNOCENCE PROJECT RANKINGS.

The Innocence Project identified and ranked the frequency of the most common factors leading to wrongful convictions that were found in the first 70 DNA exonerations. For the present discussion, they are distributed to four groups, that show that Witnesses and Science each occurred in about 30% of the cases, while about 20% of the cases involved bad lawyering (one side or the other) or Cops & Cop-outs.

#	%	FACTOR	WITNESS	SCIENCE	COUNSEL	COPS
61	0.20	Mistaken I.D.	0.20	0	0	0
40	0.13	Serology Inclusion	0	0.13	0	0

38	0.13	Police Misconduct	0	0	0	0.13
34	0.11	Prosecutorial Misconduct	0	0	0.11	0
26	0.09	Defective or Fraudulent Science	0	0.09	0	0
23	0.08	Bad Lawyering	0	0	0.08	0
21	0.07	Microscopic Hair Comparison Matches	0	0.07	0	0
17	0.06	False Witness Testimony	0.06	0	0	0
16	0.05	Informants / Snitches	0.05	0	0	0
15	0.05	False Confessions	0	0	0	0.05
6	0.02	Other Forensic Inclusions	0	0.02	0	0
2	0.01	DNA Inclusions	0	0.01	0	0
299	1.00		0.31	0.32	0.19	0.18

B. NORTHWESTERN Center on Wrongful Convictions—principal CLASSIFICATIONS.

The Northwestern Center on Wrongful Convictions offers detail on principal causes classified in a somewhat different way, but makes the point that the extent of any problems that lead to wrongful convictions can never be known because they can be measured only when innocence is clearly established.

1. Eyewitness Error & Perjury.

Rob Warden, Executive Director of the Center, concluded in a recent speech that, "Erroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system." The Center's analyzed the cases of 86 defendants who had been sentenced to death but legally exonerated since capital punishment was restored following the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*.

Of the 86 legally exonerated persons, the analysis shows:

- Eyewitness testimony played a role in the convictions of 46 - 53.5%.
- Eyewitness testimony was the only evidence against 33 defendants - 38.4%.
- Only one eyewitness testified in 32 of the 46 defendants' cases - 69.6% - and multiple eyewitnesses testified in the other 14 - 30.4%.

- The eyewitnesses were strangers to 19 of the defendants - 41.3% - and were non-accomplice acquaintances of 9 - 19.6%.

1. The Snitch System.

In another speech, Warden reminded us of America's most infamous snitch—Leslie Vernon White—who faked confessions in at least a dozen cases, with details culled from newspapers or by phoning police and prosecutors from jail. White reported the jailhouse slogans: "Don't go to the pen — send a friend" and "If you can't do the time, just drop a dime."

The Center's analysis of the role of snitches and other incentivised witnesses in the cases of 97 persons who have been released from the nation's death rows since capital punishment was reinstated following *Furman*.

cing causes of wrongful conviction—where incentivised testimony was used:

53.5% Incorrect or perjured eyewitness testimony, found in

39.2% Incentivised witnesses.

14.0% False or fabricated confessions

10.5% Incorrect or fabricated forensic evidence.

The factor that was most prevalent in concert with incentivised testimony was police and/or prosecutorial misconduct, which was documented in 14 cases, or 36.8% of the cases in which incentivised testimony was used.

Factors in of exoneration—where incentivised testimony was used:

Recantations occurred in 17 cases — 44.7% of the cases in which prosecutors used incentivised testimony.

News media investigations in 14 cases (36.8%)

Apprehension of the actual killer or killers in 10 cases (26.3%)

DNA testing in 5 cases (13.2%)

Discovery of new witnesses in 5 cases (13.2%)

Miscellaneous new evidence in 10 cases (26.3%)

Investigations by anti-death-penalty activists in 2 cases (5.3%).

1. False Confessions.

Most of people—including jurors and judges—find it hard to believe that someone in their right mind would confess to a crime they did not commit.

ıe 45 defendants whose wrongful convictions in Illinois murder cases have been documented in the 56 years since 17-year-old William Heirens made a dubious confession to three highly publicized Chicago:

- 33.3% either falsely confessed or authorities claimed they had confessed during questioning.
- 31.1% were charged and convicted based in whole or part on a codefendant's false confession or perjured testimony.
- 6.7% both confessed — or were said to have confessed —and were implicated by a codefendant's false confession or perjured testimony.

- **51.1% might have been avoided if authorities had diligently pursued viable alternative suspects known before trial.**
- **17.8% might have been avoided had the defendant received effective assistance of counsel.**

ıe 26 wrongfully convicted defendants who confessed or were convicted based at least in part on a codefendant's confession:

- 69.2% were inculpated in part by police misconduct.
- 42.3% by prosecutorial misconduct.
- 42.3% by false or misleading forensic evidence.
- 23.1% by non-eyewitness perjury — most often testimony of informants who claimed the defendant confessed while in jail.
- 23.1% by incorrect or perjured eyewitness identification testimony.
- **50% might have been avoided if authorities had diligently pursued viable alternative suspects known before trial.**
- **20% might have been avoided had the defendant received effective assistance of counsel.**

1. Police Torture.

The Center on Wrongful Convictions provides summaries of torture allegations in fourteen Illinois death sentences—since 1984—predicated on confessions allegedly extracted by torture:

Frank Bounds — Struck in the head and kicked in the groin. **Madison Hobley** — Handcuffed to a wall ring and beaten, handcuffed to a chair, kicked, and smothered with a typewriter cover. **Stanley Howard** — Beaten and smothered with plastic bag. **Grayland Johnson** — Beaten with telephone book and smothered with plastic bag. **Leonard Kidd** (half brother of Leroy Orange) — Electrically shocked. **Derrick E. King** — Beaten with baseball bat and telephone book. **Ronald Kitchen** — Beaten with telephone book, blackjack, and telephone receiver. **Jerry Mahaffey** (brother of Reginald) — Threatened, kicked, beaten, and smothered with plastic bag. **Reginald Mahaffey** (brother of Jerry) — Gun pointed at head, punched, kicked, thrown against wall, and smothered with plastic bag. **Andrew Maxwell** — Handcuffed to wall ring and beaten by officers. **Leroy Orange** (half brother of Leonard Kidd) — Beaten, suffocated, and electrically shocked by detectives. **Aaron Patterson** — Chained to a wall ring, beaten and repeatedly smothered with plastic bag by officers, and threatened with gun. **Andrew Wilson** (brother of Jackie) — Punched, kicked, smothered with plastic bag, electrically shocked, and forced against hot radiator. **Jackie Wilson** (brother of Andrew) — Smothered, threatened with gun, beaten, and electrically shocked.

A. SIGNS OF THE (ABUSIVE) TIMES:

States with the highest rates of capital punishment sentences also have the highest rates of reversals, research finds. A study released February, 2002, by Columbia University law professor James S. Liebman, showed that a disproportionately high percentage of death sentences tend to be reversed in states where death verdicts are rendered the most often. All but one of the 10 states with the highest death-sentencing rates had overall reversal rates that exceeded 68%--the national average--according to the review of more than 5,000 capital cases over 23 years assisted by criminologists and statisticians. "Heavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur," said Liebman.

County Sues Mississippi Over Public Defenders MARKS, Miss. (AP, 4/30/03) - In order to defend two men charged with murder, Quitman County officials were so strapped for cash that they had borrow several hundred thousand dollars to pay for public defenders. The County is suing the state of Mississippi, arguing that the constitutional rights of the poor are being breached because there is no statewide system of paid public defenders. Mississippi has no statewide program for indigent counsel and proposals to create one have been rejected as too expensive. Only three Mississippi counties have full-time public defenders. In many counties, they are private attorneys who are under contract to take on indigent cases part time. **NOTE:** Professor James S. Liebman's, 2002 study above showed that Mississippi is one of the 10 states with the highest death sentencing rates and had the highest reversal rate of all—92%!

The National DNA data base, managed by the FBI, is at risk. The Forensic Justice Project is collecting information about failures like those recent revealed within DNA units of crime labs in Florida, Houston, Dallas and the FBI. The FBI manages the National DNA data base. If crime labs whose DNA units are failing without detection are altering that data base by placing their DNA data into it, the data becomes suspect. That DNA labs in Florida, Texas and the FBI have had technicians in place for months if not years whose work product was flawed without legitimate oversight means that very possibly the FBI has not established effective controls over the DNA data base. The failures therefore are very significant and mean that DNA evidence all over the country may be in doubt if the controls the FBI has put in place in FBI trained DNA labs are not working.

Will The New FBI Lab Quell Quality Concerns? The FBI's Laboratory has moved to a new $130 million laboratory complex, which FBI leaders hope will help in overcoming the scandals and controversies over the past decade that raised serious doubts about the reliability the FBI Laboratory. In the mid-1990s, a whistle-blower's allegations of shoddy scientific practices resulted in a Justice Department investigation that found misconduct, including misleading reports, inaccurate testimony and prosecutorial bias. To this day, prosecutors are still reviewing some of the 3,000 convictions that may have been tainted by the scandal. New incidents involve two of the most modern forensic techniques used by bureau scientists:

- **DNA fingerprinting**, where it appears that a technician failed to compare 103 DNA samples with control samples as required by testing protocols. The mistakes have already become a major issue in a New Jersey civil rights case against five police officers charged in the death of a prisoner. The officers are challenging blood evidence that analyzed by the technician.

- **Lead-Bullet Analysis**, is coming under fresh scrutiny from defense attorneys, some scientists and one of the FBI's own former metallurgists, William Tobin, who has written reports and offered testimony questioning the method. The controversial technique compares trace chemicals found in bullets at crime scenes with ammunition found in the possession of suspects. It has been used by the FBI for more than two decades, Critics say the FBI has overstated the certainty of matching bullets using trace elements, and that hundreds of convictions may be in doubt. The FBI, which stands by lead analysis as a proven forensic technique, has nonetheless asked the National Academy of Sciences to conduct an independent review of the lab's work.

A. is plea bargaining a root cause:[iv]

The deleterious effects of false plea bargaining are generally admitted but many consider it a necessary evil—U.S. Department of Justice estimates that only about one case in 20 goes to trial. While many believe that it undermines the deterrent effect of punishment, the true problem is far more serious.

- **Police diligence is relaxed.** Police have learned that their evidence is seldom tested in the courtroom. Carelessness creeps in, while the Northwestern Center review of one group of wrongful convictions suggest that about half "might have been avoided if authorities had diligently pursued viable alternative suspects known before trial.

- **Coercive prosecutorial tactics are enabled.** Prosecutors have found that plea bargaining increases their conviction rates and that they can coerce a plea by raising the number and seriousness of the charges they throw at a defendant. Defendants are swayed by the cost of a defense and by the realization that conviction at trial on even one of the charges can carry more severe punishment than a plea to a lesser charge. The sentencing differential alone is enough to make plea bargaining coercive.

- **Prosecutors can to bring charges in the absence of crimes.** Plea bargaining was intended to facilitate prompt, fair punishment. Now it corrupts the justice system by creating a fictional crime in the place of a real one. The practice of having people admit to what did not happen in order to avoid charges for what did happen creates a legal culture that, as it develops, eventually permits prosecutors to bring charges in the absence of crimes.

- **It amounts to judicial torture.** Systematized falsehoods about crimes make the facts of the case malleable and enables prosecutors to supplement weak evidence with psychological pressure. John Langbein, a noted legal scholar, compares "the modern American plea bargaining system" with "the ancient system of judicial torture." When innocent people cop a plea just to end their ordeal, we have resurrected torture, because confession and self-incrimination have replaced the jury trial.

A. general conclusions based on reports.

Purposeful or negligent abusive practices by law enforcement, prosecutors, defense counsel, and snitches are common. That will change only when people change or when the system imposes more severe penalties for such behavior.

Problem areas that offer prospects for solution: Control of plea bargaining. More diligent investigation of known suspects, better defense counsel, more care regarding eyewitness testimony, more caution as to confessions, and better controls for scientific testimony.

V. remedies—possibilities in court.

When there is little to lose and a great deal to gain—by all means try!

A. Eyewitness Evidence PRACTICES. BE AWARE.

In 1999, the Department of Justice issued, Eyewitness Evidence: A Guide for Law Enforcement in an attempt to integrate sound methods as well as psychological knowledge regarding eyewitness evidence with the practical demands of day-to-day law enforcement. It is followed in whole or part in most jurisdictions. Some provisions have raised concern. For example:

> 6. Consider that complete uniformity of features is not required. **Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.** [Emphasis supplied.]

B. Confrontation clause LIMITS on USE of NON-HEARSAY STATEMENTS.

Out-of-court statements not offered to prove the truth of the statement but for another purpose are admitted as non-hearsay pursuant to Rule 801(c). The theory is that there is little need to confront or cross-examine when there is no claim that the statement is true. Supposedly, balance is maintained under the Rule 403, prejudicial/probative test.

The principal has been a troublesome centerpiece in trials such as *Shepard v. United States* where the entire court agreed that a jury could not hear, "Dr. Sheppard has poisoned me," and use it only to discount the likelihood of suicide.

Stephen Salzburg[v] suggests that a Confrontation Clause objection also be made because many courts would hold that an "undue prejudice" objection is not sufficient to preserve a constitutional claim. See *Thomas v. Hubbard,* 272 F.3d 1164 (9th Cir. 2001) where the court found that the trial court's instruction to disregard was inadequate and, also, found that the "opened door" doctrine allows only evidence relevant to the "door" that was opened.

C. The right not to be framed.

Does your case include conduct by government officials that they should know is unlawful and that effectively created false evidence? Try a due process argument.

> [W]e are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, we are not aware of any prior cases that have expressly recognized this specific right, but that does not mean that there is no such right. Rather, what is required is that government officials have "fair and clear warning" that their conduct is unlawful.

Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 09/05/2001), en banc. Devereaux brought § 1983 claims against many governmental entities and employees based on conduct during a child sexual molestation investigation in which 43 adults were ultimately charged with over 29,000 counts of sexual molestation. All felony counts were dropped for lack of evidence. All § 1983 claims failed based on the qualified immunity of the defendants. Nonetheless, the en banc opinion leaves room for success on better facts—or perhaps on the same facts better marshaled. Dissent arguments were cut off for the "simple reason that we are not Devereaux's attorneys." The critical element in Devereaux's deliberate fabrication-of-evidence claim, was identified: "that the defendants who questioned the children knew or should have known that they were eliciting false accusations."

In a similar vein, don't forget *United States v. Hodges*, 556 F.2d 366, 369 (5th Cir.1977), cert. denied, 434 U.S. 1016, 98 S. Ct. 735, 54 L. Ed. 2d 762 (1978). "We have held that a convicted defendant 'retains the right not to be sentenced on the basis of invalid premises.' United States v. Espinoza, 5 Cir., 1973, 481 F.2d 553, 555."

D. Deliberate Indifference.

Building on *Devereaux,* a recent law review article[vi] argued persuasively that the subjective deliberate indifference (or criminal recklessness) standard applicable to prison-conditions cases in the context of the Eighth Amendment should also be applied to child sexual abuse investigation cases, where the person being charged with child abuse needs protection from overzealous officials investigating the allegations of abuse.

In *Farmer v. Brennan*, an Eighth Amendment prison-conditions case, the Supreme Court defined the term "deliberate indifference" and the test for it. "Deliberate indifference entails something more than mere negligence ... [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." The courts of appeals, as noted in Farmer, usually equate deliberate indifference with recklessness. In determining the level of culpability required for deliberate indifference, the Court in Farmer rejected an objective test for deliberate indifference in favor of a subjective test, holding that: [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

However, the Court added that the concept of constructive knowledge could be applicable to deliberate indifference so that deliberate indifference "would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness."

The purpose, as discussed in Estelle v. Gamble, of the subjective deliberate indifference standard applicable to prison-conditions cases is to protect prisoners from the infliction of cruel and unusual punishment by—possibly overzealous—officials. Similarly—the argument runs—in child sexual abuse investigation cases, the person being charged with child abuse needs protection from overzealous officials investigating the allegations of abuse.

VI. remedies—The Innocence Protection Act.

The Innocence Protection Act is a package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Most urgently, the bill would afford greater access to DNA testing by convicted offenders; and help States improve the quality of legal representation in capital cases. It would provide critical new safeguards in capital cases by:

- Ensuring convicted offenders can request DNA testing on evidence from their case that is in the government's possession to prove their innocence.
- Helping states provide professional and experienced lawyers at every stage of a death penalty case.
- Requiring states to inform juries of all sentencing options, including the option to sentence a defendant to life imprisonment without the possibility of parole.
- Providing those who are proven innocent after an unjust incarceration some measure of compensation.
- Making sure the public has more reliable and detailed information regarding the administration of the nation's capital punishment laws.

The Innocence Protection Act gained enormous momentum during the last Congress, with 32 Senators and 250 Representatives—well over half the House—signed on in support. Hearings were held in each House, and a version of the bill was reported out of the Senate Judiciary Committee in July, 2002.

VI. remedies—other POSSIBILITIES.

The following suggestions were culled from many sources, including Scheck, Neufeld, and Dwyer (2001) of the Innocence Project. Most are aspirational, some appear to be practical impossibilities.

Better training for police officers. The U.S. Attorney General's office has made the following recommendations: (1) the officer working with the witnesses should not know which person is the suspect; (2) the eyewitness doing a photographic lineup understands that the suspect might or might not be in the lineup; and (3) the witness is absolutely certain they have identified the right person.

Stronger penalties for officers and/or prosecutors who knowingly conceal, fabricate, or otherwise distort evidence.

Public Education to reduce the community intimidation and bias factor.

Special training on wrongful convictions for all enforcement personnel—and judges.

Sanctions for judges who have had their cases overturned.

Limit or eliminate the death penalty, never applying it in cases relying upon eyewitness testimony and circumstantial evidence.

Prompt Interrogation of eyewitnesses to reduce memory distortion over time**.**

All ID procedures conducted in presence of defendant's attorney.

Eliminate plea bargaining in bad faith.

Special pretrial (Daubert) hearings were held in cases involving eyewitness testimony. Information about accuracy, validity, and reliability should come out. The use of expert witnesses on eyewitness testimony and appropriate cautionary instructions to juries should be routine.

DNA Testing pass statutes modeled after New York and Illinois.

Videotaping all police ID practices, especially confessions. Note: Illinois on the verge of requiring audio-or videotaping of most homicide-related interrogations and confessions.

Snitch Committees -- to vet the informant's testimony before being used.

More restrictions on disclosing criminal record to jury. The prejudicial effect can be overwhelming, the probative value is rarely significant.

Crime Lab Reviews -- to ensure quality control.

Eliminate Junk or Sloppy Science -- anything w/o controls or error rates. CAVEAT: The commentary by Edward J. Imwinkelried to the 1996 NIJ Research Report on DNA success is relevant: "The "junk science" controversy has made it tempting to propose special restrictions for scientific evidence, especially testimony resting on relatively new scientific techniques. . . . before succumbing to that temptation, we should pause to pose two questions. [I]s it] proven that the type of testimony in question presents a unique probative danger. . . .[I]f we impose a unique restriction on scientific testimony, on balance are the courts more likely to reach just results — or are we condemning the courts to reliance on suspect types of testimony that call into question the caliber of justice dispensed in our courts?

Increase Public Defender salaries -- and standards, investigative resources.

Victim Assistance -- for those who were wrongfully convicted.

Innocence Projects -- at law schools and around the country

Evaluation of all officers, prosecutors, defense attorneys, and judges in known cases of wrongful conviction. The Bar should take on this task, suggesting the evaluation of judges to the appropriate authority.

VII. remedies—SOME PROGRESS.

Broward County Sheriff institutes videotaping and other changes. Sheriff Ken Jenne, stung by the adverse publicity of the Brown case reported above and others described in the press as "botched," told the press that the test of a good agency is its willingness to change when it needs improvement. "In our case, we've instituted videotaping of interrogations, improved our crime lab, given detectives additional training on how to handle interviews with the mentally challenged, and improved our interrogation techniques in general,"

ABA Biological Evidence Resolution. The Criminal Justice Section of the ABA has lobbied the following resolution for Biological Evidence collected in conjunction, with the investigation of a criminal case, that:

1. All biological evidence should be preserved.
2. All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may-seek appropriate relief notwithstanding any other provision of law.
3. All necessary funding to accomplish these principles should be provided.
4. Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence .

ABA NO EXCEPTIONS Campaign. On the 40th anniversary of *Gideon v. Wainwright*, The American Bar Association has launched No Exceptions, A Campaign To Guarantee A Fair Justice System For All. It identifies 10 principles that, if adopted and fully implemented by states, would strengthen public defense in America and increase public confidence that the system is fair. The 10 principals:

_ The public defense system is independent;

_ Both public defenders and the private bar actively participate in the system;

_ An attorney is provided promptly to anyone who cannot afford representation;

_ Attorneys have confidential access to – and sufficient time to meet with – their clients;

_ Each attorney 's workload is controlled to enable them to provide quality representation;

_ Attorneys have the necessary ability, training and experience to handle their cases;

_ The same attorney represents the client from initial assignment until the case is completed;

_ Attorneys have on-going legal education and training;

_ Attorneys are regularly supervised according to national and local standards; and

- The workload, salaries and resources of defense attorneys are on par with those of prosecutors, and defense counsel is an equal partner in the justice system.

$1 billion dollars to be spent on DNA analysis over the next five years. The Administration's recent proposal will fund existing programs aimed at eliminating the DNA backlog crisis — and the backlog of untested rape kits.

$5 million a year for DNA testing of convicted offenders who may be wrongfully incarcerated. Administration's new commitment to post-conviction DNA testing shows the Justice Department's recognition of the importance of ensuring that the power of DNA testing, is available to help prosecutors and defendants.

Illinois to tape homicide-related interrogations and confessions. On May 8, 2003, the Illinois House approved and sent to the Governor a bill requiring audio-or videotaping of most homicide-related interrogations and confessions. Although the Governor had feared that the new rules would prove burdensome on police, he vowed to sign it. Three years ago when it was first discussed, Police voiced serious concerns about the idea and it was considered one of the most politically difficult of death penalty reforms. Now, it passed House on a 109-7 vote, after Senate approval 58-0. The overwhelming support was a reflection of how the measure had gained general acceptance even in the once-wary law enforcement community through years of study and the compelling stories of wrongfully convicted Death Row inmates.

Two Justices Express Concerns About Fairness in the Administration of the Death Penalty. Justice Sandra Day O'Connor has said: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." She has pointed out that DNA tests are only a small part of the problem and that ensuring competent legal counsel is a bigger part. In a similar vein, Justice Ruth Bader Ginsburg said last April that in dozens of instances where she has reviewed requests for stays of executions on the high court, she has yet to see one "in which the defendant was well represented at trial."

A. let's not forget attorneys.

The traditional elevated concept of the legal professional is reflected in Dean Roscoe Pound's description of the practice of law as "the pursuit of a learned art, a common calling in the spirit of public service, no less a public service because it is incidentally the means of a livelihood."

Has the dog eaten the master? ..As a profession are we rendering effective assistance of counsel?[vii] Have we reversed the order of Pound's definition, to place pursuit of a livelihood before the spirit of public service? The integrity of the profession is challenged by things like the proliferation of strident attorney ads and "Rambo" litigation tactics. Winning appears to be the end all and be all in every practice.

Professional fellowship and respect once marked our profession. They have declined and, with that decline, the integrity of attorneys has become the stuff of jokes. As one commentator noted, "A profession lacking collegiality is a profession lacking integrity."[viii] In criminal law, what do we tell about our profession—and ourselves—when we declare open season on "Persecutors"?

It is not about winning. Roughly, half of the participants in civil suit lose. Over eighty percent of criminal defendants are convicted. Less than twenty percent of cases are reversed on appeal.

Its not about the Sixth Amendment. That merely guarantees most defendants the right to counsel, and the right to effective assistance of counsel. It was not meant to define what is acceptable professionally. Conduct far below the norm may be implicitly validated when it tested under the Sixth Amendment because a defendant must show prejudice and that counsel's performance was deficient—despite a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, and that counsel's decisions were strategic or tactical. Sixth Amendment's effective assistance guarantee was "not to improve the quality of legal representation, [but] simply to ensure that criminal defendants receive a fair trial."[ix]

Its about each of us. The low standard for effective assistance of counsel under the Sixth Amendment should not be mistaken for competent representation. For our individual clients, effective assistance of counsel means giving the best we have, after thorough investigation, research, and preparation. We cannot ignore those who do not provide such representation. Trial judges and opposing counsel may be ignoring the fact that incompetence is unethical and judge and lawyer alike are equally culpable for not taking steps to report the particular practitioner. All of us must be cognizant of our professional duty to assist in and improve the legal system—our positive obligation to monitor, encourage and enforce adherence to the rules of professional conduct. This means doing something about impaired attorneys, those who are no longer fit to practice or a new practitioner who is simply in over his or her head and cannot deliver adequate representation.

Some causes. Paul J. Kelly, Jr., Circuit Judge, Tenth Circuit Court of Appeals, suggests that caliber of law school entrants and the scholarship of law school faculties is better today than in the past so that the causes of professional decline may include:

- Pressure for billable hours that deprives the newer lawyer of the training that thirty or thirty-five years ago was routinely expected by the newer lawyer, as well as the experienced practitioner
- Law schools that grant social promotions in order to improve retention rates.
- Bar exams watered down such that a certain percentage of those passing simply will never be fit to practice law.
- Judges condoning, implicitly or otherwise, less than competent representation in their courtrooms?

VIII. EXONERATED—THEN WHAT.

GOOD LUCK TO TIM BROWN. The Ft. Lauderdale press reports that Timothy Brown, now admitted to bail, thanks to a family friend, has lined up a job in a car wash. His family won't comment on plans to sue the Sheriff.

Damages For The Exonerated Are Available By Law In Only 15 States and the District of Columbia. Some of those statutes aid very few people, either because they severely restrict awards—in California the ceiling is $10,000, no matter how long the unwarranted prison sentence—or limit relief to those lucky enough to get a pardon from the governor instead of relief from a judge. Most leave prison with nothing of value. Louisiana, for instance, gives the innocent what it gives all other released prisoners: $10 and a denim jacket.

Gary Gauger, was pardoned in Illinois after two years wrongfully imprisonment on death row, got a pair of

prison-issue shoes. Sunny Jacobs, exonerated in two murders for which she'd served 16 years of a life sentence, was mailed $100 by the state of Florida a few months after she was released.

Personal-injury claims are possible but usually fail. The exonerated usually lose when they file personal-injury claims, because it's extremely difficult to prove "malicious prosecution" or "wrongful arrest." As a threshold, they must show that that the arresting officer lacked "probable cause." It that succeeds, the police and prosecutors are generally immune from suit for errors they make in investigating a crime, unless they acted in bad faith.

Section 1983 for acts by government officers runs afoul Qualified immunity. Redress of deprivations of federal constitutional rights by government officers is available under Section 1983 if a plaintiff can show that a constitutional right exists, that the defendant violated that right under color of state law, and that the defendant's acts proximately caused the plaintiff's injury. Then, the plaintiff "must also maneuver through an elaborate maze of constitutional remedies doctrine that imposes substantial barriers on the road to recovery. Among the most important of these barriers is qualified immunity."[x] The rationales for qualified immunity include: **Alleviating The "Social Costs**" to individual defendants: the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office;" **The Over-Deterrence Rationale** that the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties;" **Fairness Concerns**: It is unfair to subject government officials to liability for actions that do not clearly violate constitutional rights. Public officials, who "regularly face situations that require them to evaluate the application of some existing structure of law to new circumstances" should not have to "predict[] the future course of constitutional law."

The wrongfully convicted lack political clout - they're former prisoners. About half of have prior records. Mostly they can hope for a "moral obligation" bill, which state legislatures enact in high profile cases to award damages to one innocent person at a time.

IX. how long will you stand idle? how far have we come since salem?

THE SALEM TRIALS HAD IT ALL:[xi] **No appointed counsel (**pro se defense including cross-examination was allowed), **torture**, **false confessions** (some for **plea bargains**), **false witnesses**, suggestible **child witnesses**, **overzealous prosecutors**, **bad science** (Cotton Mather had recently published a popular book, *Memorable Providences*), **admitted over objection** (the judges decided to allow the so-called "touching test" where defendants were asked to touch afflicted persons to see if their touch, as was generally assumed of the touch of witches, would stop their contortions), **hearsay and opinion testimony**, The original **dynamite charge** (When the jury found one defendant not guilty, the Chief Justice told the jury to go back and consider other evidence—a guilty verdict resulted), **forfeiture**, (possessions of the convicted went to the state). **AT THE END, THE RULE OF LAW.** By the time of the later trials—when rumors began that his one wife would be accused as a witch—Increase Mather, the father of Cotton, published what has been called "America's first tract on evidence," a work entitled *Cases of Conscience*, which argued that it **"were better that ten suspected witches should escape than one innocent person should be condemned."** On that basis, spectral evidence and touching tests were excluded in later trials, and proof of guilt by clear and convincing evidence was required. With those changes, twenty-eight of the last thirty-three witchcraft trials ended in acquittals, and the three convicted witches were later pardoned. Finally, all remaining accused or convicted witches were released from prison. Box scores: 156 innocent people accused, 30 convicted, 20 killed.

WILL YOU STAND IDLE NOW? 300 years after Salem, 250 years after Blackstone, 40 years after Gideon—what can you do?

- _ **Support the organizations that make a difference.**
- _ **Be informed by those organizations and their websites.**
- _ **Volunteer to assist in release efforts.**
- _ **Mentor new attorneys.**
- _ **Foster congeniality in the legal profession.**
- _ **See what your law school is up to. Tell them what you think.**
- _ **Resist coercive plea-bargaining.**
- _ **Know your ethical responsibilities.**
- _ **Don't hesitate to file ethics complaints.** (Incompetence is unethical.) Is it ethical for a prosecutor to pile on charges he knows he can't prove—just to create bargaining chip? Is it ethical to offer bargain for a lesser crime that really didn't happen? Is it ethical to coerce a defense attorney by such tactics.
- _ **Resist efforts to politicize the judiciary,** not only on the national level, but also in your state. In Florida, for example, Jeb Bush is advancing a plan where the governor makes all appointments to the Judicial Nominating Commission, with the result that the governor would have almost complete power in filling judicial vacancies.

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[i] These comments are generally informed by From Blackstone to Bentham: Why Wrongful Conviction Is On The Rise by Paul Craig Roberts, 2001 LewRockwell.com.

[ii] *Case Studies in Use of DNA Evidence*, NIJ Research Report, Published: June 1996

[iii] C. Ronald Huff, A. Rattner, & E. Sagarin (1996) *Convicted But Innocent* Thousand Oaks, CA: Sage Publications.

[iv] See note 1.

[v] Stephen A. Salzburg, LIMITS on Non-Hearsay Use of Statements, Criminal Justice, Vol 18, No. 1, 2003.

[vi] Erika A. Swanson, Student Note, Who Framed Robert Devereaux? Devereaux v. Perez, a deliberate indifference standard, and a right not to be framed in the context of child sexual abuse investigations. 77 Chi.-Kent. L. Rev. 901, 2002.

[vii] These comments are generally informed by Paul J. Kelly, Jr., Speech: Are We Prepared To Offer Effective Assistance Of Counsel?, 45 St. Louis L.J. 1089, 2001.

[viii] Roger J. Miner, Professional Responsibility in Appellate Practice: A View from the Bench, 19 Pace L. Rev. 323, 338 (1999).

[ix] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[x] Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, 81 Iowa L. Rev. 261, 270-71 (1995).

[xi] Douglas Linder, An Account of Events in Salem, http://www.law.umkc.edu/faculty/projects/ftrials/salem/