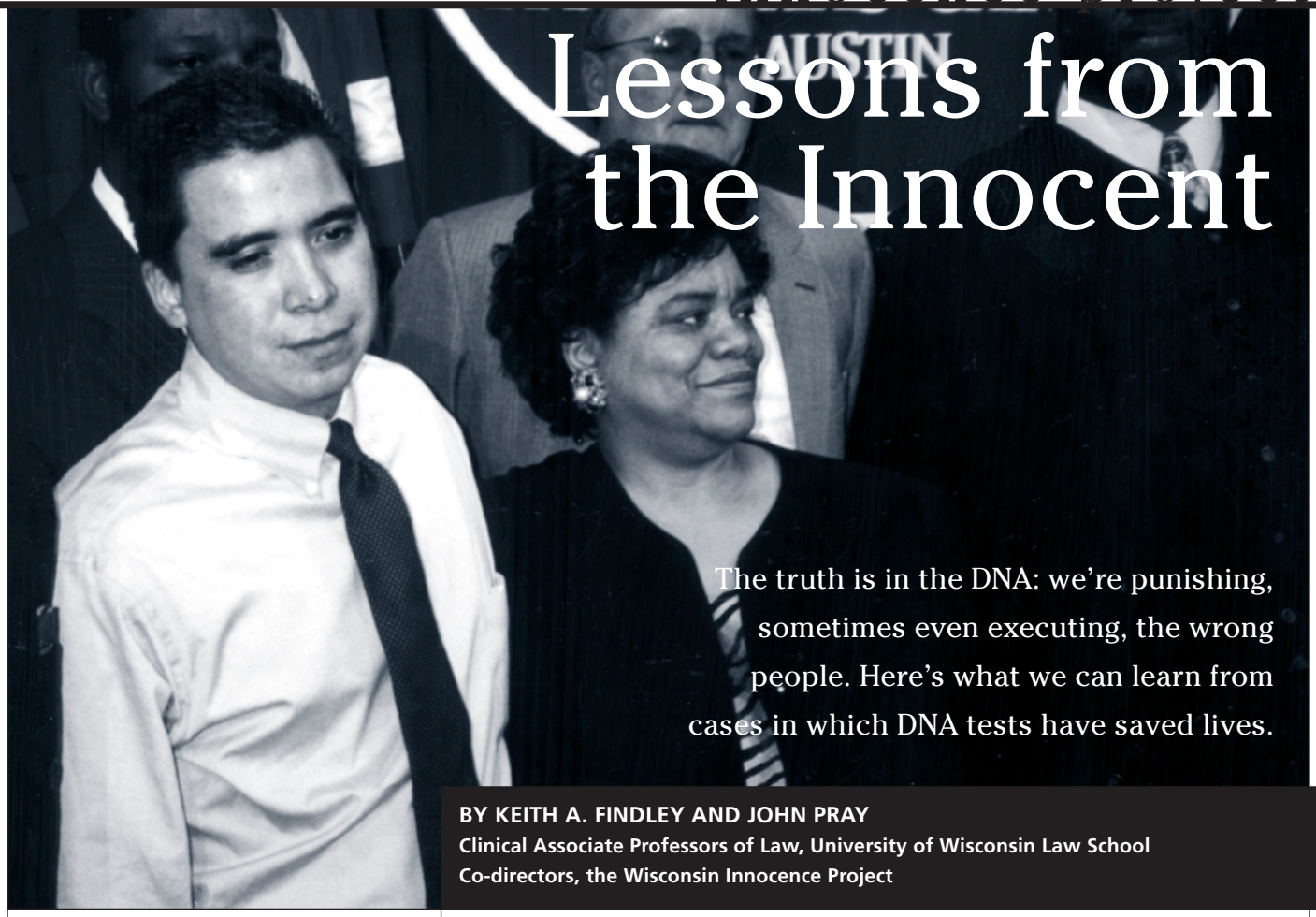
Lessons from the Innocent



The truth is in the DNA: we're punishing, sometimes even executing, the wrong people. Here's what we can learn from cases in which DNA tests have saved lives.

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Sprung by DNA: Chris Ochoa and other exonerated individuals at the Texas state capitol shortly after release.

Photo courtesy of John Pray

CHRISTOPHER OCHOA SPENT 12 YEARS IN PRISON for a rape and murder he did not commit. As co-directors of the University of Wisconsin Law School's Innocence Project, we were fortunate to be part of the team of lawyers and law students who helped to secure his freedom. His release was powerfully rewarding and moving to those of us involved. More than that, his release provided poignant reminders of the value of freedom and lessons about our system and our society. His case is important not only because finally we got it right, but also because we had it so wrong.

His case, like many cases of wrongful conviction, is also a story about race in America. As a young 22-year-old Mexican American man in 1988, with absolutely no criminal record, Chris was picked up by police for questioning following the rape and murder of Nancy DePriest, a 20-year-old Pizza Hut manager who was attacked as she prepared to open the restaurant. There were no witnesses to the crime and few leads for police to pursue. But several weeks later, Chris and his friend, Richard Danziger, happened to go to the restau-

rant where the murder had occurred. Skittish Pizza Hut employees thought they looked suspicious and called the police. Chris was picked up at his workplace and brought to the police station. His nightmare had begun.

Chris was subjected to prolonged, intensive interrogation by police officers bent on obtaining a confession at any cost—even the cost of ruining an innocent life. Over two 12-hour interrogations, interspersed by a weekend of confinement in a hotel room, police lied to Chris and threatened him.

Although there was no evidence linking Chris to the crime, they told him they knew he was guilty. They told him that he would be placed in a cell where he would be "fresh meat" for other inmates. When he didn't provide the information they wanted, they yelled, pounded the table, and threw a chair at him, narrowly missing his head.

They made him believe that he would certainly get the death penalty unless he confessed. They tapped him on the arm to show him where the needle would be inserted and they showed him pictures of death row. They told him, falsely, that Richard was being interrogated in the next room and was ready to implicate Chris.

Over time, Chris wore down and became convinced that he was doomed and that his only choice was whether that doom would be death or prison. He chose to live, and accordingly signed confessions concocted by the police. As part of his plea bargain with the state to avoid the death penalty, he also agreed to testify against Richard at his trial. Both men were convicted and sentenced to life in prison.

THE PATH TO VINDICATION

In 1996 the real killer, Achim Josef Marino, found religion in prison and confessed that he alone had assaulted and killed Nancy DePriest. He sent letters to authorities in Austin admitting his guilt and insisting that he had never heard of the men who had been convicted of the crime. Unfortunately, the letters generated little interest from Texas authorities.

In 1999 Chris wrote to the Wisconsin Innocence Project at the University of Wisconsin Law School, asking us and our law students to help him prove his innocence. The law students investigated, discovered that the physical evidence from the case still existed, and requested DNA tests. Finally, late in 2000, new DNA tests and other corroborating evidence proved beyond any doubt that both Chris and Richard had nothing to do with the crime, and that Marino alone was responsible.

On January 16, 2001, the district attorney's office and the defense filed a joint application to set aside Chris's conviction and free him on the ground that he is innocent. He walked out of court that day into the arms of his sobbing mother and into a world he hadn't seen firsthand in more than a decade. Richard's release was delayed until March because while in prison he was severely beaten by another inmate and suffered brain damage. He could not be released until adequate arrangements could be made for his care.

When Chris walked out of that courtroom a free man, not one but two mothers shed bittersweet tears. The other mother was Jeanette Popp, the mother of the victim. The wrongful conviction meant that she had to revisit the pain of losing her daughter. And she came to realize that police had perpetrated a lie against her for 12 years, including making her believe that her daughter had suffered in ways she had not. The confession the police concocted wrongly included unnecessary brutality, including false claims that her daughter had been repeatedly sodomized and had been forced to beg for her life before she was killed.

Jeanette Popp rose above her own sorrow to connect with Chris Ochoa. The two became friends even before he was released, and in the first hour of his freedom the two asked for time alone to share private words. She gave him his first gift upon his release—a watch, because, she thought, time matters again to him now.

For his part, Chris was forgiving and thoughtful. He eschewed bitterness and anger, but also pleaded for reforms. He asked for an end to the death penalty and for greater checks on police to prevent such coercive investigative tactics.

LESSONS FROM THE INNOCENT

Chris and Richard became the 81st and 82nd convicted persons to be exonerated by DNA evidence in the United States. Several others have been exonerated since then, and there will be more in the months and years to come. No doubt each will be as exhilarating to those involved in the effort as Chris's release was to us. But after celebrating such an event, disturbing questions inevitably arise. How could a normal and intelligent person like Chris become so terrorized that he would falsely confess to such a horrendous crime? What if Achim Marino's DNA had not been preserved in a police locker for all those years? What if Marino had murdered but not raped Nancy, thereby leaving behind no DNA—would Chris and Richard ever have been able to prove their innocence? How many other innocent people are in prison who will never be able to prove their innocence because no biological evidence was left at the crime scene by the perpetrator, or if it was, it was destroyed before it could be DNA tested? What can we learn from this and the other cases?

We can learn much. DNA has opened a window to our criminal justice system. Because of new DNA tests, we know that we convict and—since some of the exonerated have been on death row—almost certainly execute innocent men and women. Through this open window we can study the causes of the system's failures. For the first time in the history of the criminal justice system, we have a body of cases in which we know the system malfunctioned. These cases can offer insights into our errors and suggest reforms.

But DNA is no panacea, and this window will not always remain open. Unfortunately, DNA evidence exists in

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only a small minority of criminal cases; the run-of-the mill robbery, shooting, or burglary involves no exchange of genetic material. Moreover, where biological evidence exists, DNA is increasingly tested early in the investigative stage, which means that people like Chris and Richard can quickly be eliminated as suspects. The body of wrongful convictions exposed through postconviction testing is destined to decline.

We should not become complacent in believing that, now that we have DNA, we have fixed the system. More DNA testing does not mean we will stop convicting the innocent. It just means we will often prevent mistakes in the few cases that have DNA evidence. Instead of becoming complacent, we must analyze the exonerations and isolate the factors that lead to the convictions of innocent people. Unfortunately, many of the contributing factors remain firmly entrenched in the system and will continue to cause errors that DNA can't correct.

The DNA cases highlight a number of frequent causes of wrongful convictions and necessary reforms. They confirm that the single most common cause of wrongful convictions is mistaken eyewitness identifications. The criminal justice system relies too heavily on eyewitness identifications obtained without sufficient safeguards, often under highly suggestive circumstances. Too often, the criminal justice system ignores what a growing body of scientific literature teaches about the need and methods for obtaining greater protections against tainted and unreliable identifications.

Cases like Chris Ochoa's also demonstrate that people do indeed confess to crimes they did not commit, and that we should not view confessions as indisputable proof of guilt. They also point to remedies, such as the simple solution of requiring police to videotape their interrogations, so as to prevent or at least expose the types of coercive tactics that can produce false confessions.

The DNA cases also point to the need to guard against fraudulent or sloppy forensic science and police and prosecutorial misconduct, as well as the need to limit the reliance on always-suspect testimony of jailhouse informants (or "snitches"), who offer their testimony in return for favorable consideration in their own cases. And they highlight the importance of competent defense counsel and underscore the importance of improving the quality of defense representation for the indigent.

THE OVERLAY OF RACE

The DNA exonerations also give us new insights about the role of race. They show that race often works in combination with or exacerbates each of these other factors that lead to wrongful convictions.

It is, of course, no great revelation that race matters in the criminal justice system. We have long known that minorities in prison far outnumber their proportion of the society at large. Although African Americans make up about 13 percent of the population nationwide, they constitute half the prison population. About 9 percent of the adult African American population is currently incarcerated or under supervision. The lifetime chance of imprisonment for African American males is greater than one in four.

In Wisconsin the numbers are even starker. Although African Americans make up less than 6 percent of the state population, they constitute 51 percent of new prison admissions. According to UW-Madison sociology professor Pamela Oliver, African Americans in the United States are imprisoned at 6.6 times the rate of whites, and Wisconsin has the second largest racial disparity of this kind in the nation.

In capital cases, the record is as unbalanced. Until recently, in many states rape was a capital offense. Rarely was the death penalty invoked against white men; when invoked, it was almost always against black men convicted of raping white women. In 1987, lawyers for black defendants collected sophisticated racial data in Georgia and presented it to the Supreme Court to establish that the death penalty was imposed in a racially discriminatory manner. The data showed that those who killed white victims were 4.3 times more likely to get the death penalty than those who killed black victims. The data also showed that blacks who kill whites were sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than seven times the rate of whites who kill blacks.

In McCleskey v. Kemp in 1987, the Supreme Court accepted this and other data of racial disparity. But by a 5-4 vote, the Court held that this was insufficient evidence upon which to conclude that the Constitution requires the cessation of executions. In large part, the Court concluded that a certain amount of disparity is simply inevitable in the administration of criminal justice.

Plenty to celebrate: (From left) Keith Findley, John Pray, Chris Ochoa, Cory Tennison, and Wendy Seffrood of the Wisconsin Innocence Project. Photo courtesy of John Pray

Not only does such disparity indeed exist, but at each stage of the criminal justice system the disparity increases. For example, although blacks make up approximately 13 percent of the population, and although social scientists tell us that blacks and whites use illegal drugs at approximately the same rate, blacks in 1999 made up some 35 percent of the drug arrests nationwide. After arrest, the disparity increased—blacks made up 55 percent of those convicted of drug offenses. And at sentencing the disparity again increased—blacks made up an enormous 74 percent of those sentenced to prison for drug offenses. Of all people in prison for drug possession, 90 percent are black or Latino.

In Wisconsin, again, the disparity is even greater than the national norm. Although African Americans comprise less than 6 percent of the state's population, they constituted 71 percent of those admitted to prison in 1996 for drug offenses. In Wisconsin, the imprisonment rate for drugs is 13 per 100,000 for white males, but 689 per 100,000 for African American males.

Southern capital defense attorney Bryan Stephenson argues that the legacy of the Supreme Court's decision in McCleskey v. Kemp is judicial acceptance of the inevitability of racial bias in the criminal justice system. This, in turn, permits the disproportionate representation of minorities in the criminal justice system and creates a presumption of criminality that attaches to black and Latino men. Given the high arrest, conviction, and imprisonment rates for minorities, it becomes rational to assume that blacks and other minorities are more likely to be criminals. Such a presumption of criminality rationally then leads to racial profiling.

The results are apparent. In New Jersey, black motorists who speed on the New Jersey Turnpike are five times more likely to be stopped than white drivers. New York Police Department statistics show that in 1998, of 175,000 reported stop-and-frisk encounters, 84 percent of those stopped were African Americans or Hispanics. Yet such encounters produced grounds for an arrest in only one in 16 of the cases involving an African American, and one in 14 involving Hispanics, but one in 10 of the cases in which whites were stopped. Illinois State Police statistics show that, while Hispanics make up 8 percent of the Illinois population, they comprise 30 percent of the individuals stopped by police in drug interdiction attempts. In Philadelphia during one week, police made 500 stops and recorded racial information in 262 of the cases. Of those, 79 percent were African American. In Volusia County, Florida, police produced 148 hours of videotape of more than 1,000 traffic stops. The videos showed that 5 percent of the drivers on the highway were dark-skinned. But 70 percent of those stopped were African American or Hispanic, and 80 percent of the cars searched were driven by African Americans or Hispanics. Only nine of the 1,000-plus stops resulted in a ticket. Racial profiling is both a product of racial bias in the system and a cause of the bias.

The wrongful conviction cases give us more confirming evidence of these biases. More than half (56 percent) of those who were wrongly convicted and then exonerated by DNA are African American, 12 percent are Hispanic, and 32 percent are white. Barry Scheck, Peter Neufeld, and Jim Dwyer, in their book *Actual Innocence*, report that in their study of DNA exonerations they found that 40 percent of the sexual assaults or murders involved black men and white victims. The rate at which such crimes actually take place is much lower, they note: "The Justice Department reports that 15 percent of sex murders involve black assailants and white victims."

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But more than just confirming the existence of racial bias in the system, the wrongful conviction cases give us a glimpse of the processes that produce these racial disparities. They give us cases in which we know the system has failed, and in which we can often identify racial factors that contributed to the system failure. In some, all-white juries have wrongly convicted black men of committing crimes against white victims. In others, the already thorny problem of eyewitness identifications has been complicated by the difficulties of asking eyewitnesses to make cross-racial identifications (the psychological literature confirms that people have greater difficulty identifying strangers of other races than of their own). In others, the poverty that disproportionately affects minorities makes it more difficult to obtain competent counsel.

Rarely is the racism overt. Often it is not based on even hidden racial animus. In Chris Ochoa's case, for example, it was his special vulnerability, his life experiences as a minority, that contributed to his susceptibility to coercive interrogation techniques.

Chris's status as a Mexican American was used as part of the pressure to induce him to confess to a crime he did not commit. The interrogating officer was likely not motivated by racial animus; he too was Mexican American. Rather, during the interrogation he told Chris that his friend Richard Danziger, a white man, was in the next room preparing to confess and that Richard would get the deal if he did so first. He told Chris that the "white guys always walk, and the Hispanics always get the needle." He urged Chris to confess quickly so that he could get the deal instead this time. As a man whose whole life gave those words the ring of truth, Chris felt a special pressure to make a deal.

THE NEXT STEP

The criminal justice system will never be perfect. But it certainly can be better. Most of the problems that contribute to wrongful convictions are at least to some extent remediable. Race is perhaps the most difficult to address, because no police or judicial procedure is likely to be effective at eliminating such a deep-rooted social problem.

Despite the intransigence of such problems, the innocence cases also give cause for hope. The wrongful conviction cases have created a climate of reflection and a new measure of apparent receptiveness to reforms. They have identified measures that can reduce the risks of errors. And because race so often works in combination with other factors, such as coercive police interrogation tactics or faulty eyewitness identification procedures, addressing those problems will in turn minimize at least to some extent the pernicious effects of race. In Chris's case, if police had been required to videotape his interrogation, the false confession could have been prevented, and the racial bias that infected the interrogation would not have been expressed with such tragic consequences.

At a very fundamental level, cases like Chris Ochoa's not only highlight the flaws in the system, but also reveal how innately we value justice. On Chris's second day of freedom he flew home from Austin to El Paso with his mother, part of his legal defense team, and a media crew. One of the irrepressible Wisconsin law students who worked on the case convinced the flight crew to let him announce over the loudspeaker that Chris was on the flight, on his way home after 12 years of wrongful imprisonment. The passengers erupted in applause and cheers. A man from the back approached, congratulated Chris, and handed him a $20 bill. This man then took up a collection on the plane and presented Chris with more than $500 in an airline sickness bag to help him get started again.

It was hard to imagine that it was these same good citizens in whose name the State of Texas had threatened to kill Chris, and then wrongly imprisoned him for so many years. They and the other Chris Ochoas of the world deserve better, and can have better. We only need to listen and learn.

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