

WRONGFUL CONVICTIONS THEN AND NOW:
LESSONS TO BE LEARNED

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Thank you very much, Chief Judge Lippman. I'm going to stand because my back would be to most of the room if I were to do otherwise. Thank you, Professor Bonventre, wherever you are, and to Jill Kasow and Matt Laroche and everybody associated with the *Albany Law Review*, thank for making this forum happen. It's a privilege to be associated with it.

My remarks are going to be very loosely based on a forthcoming article that will be published in the law review that I co-authored with Catherine Bonventre, who is a graduate of this school and presently a doctoral student in my school, the School of Criminal Justice.

In that article, we review the recently completed New York State Bar Association Task Force Report on Wrongful Convictions. And Judge Bamberger's here, as is Professor Laurie Shanks of your school, who were members of that Task Force.

It's a very comprehensive, 187-page-long report. I'm not going to try to go point-by-point with respect to what the Task Force concluded, but let me just share with you some conclusions about the principal factors that contribute to wrongful convictions.

And I quote:

- "Perhaps the major source of these tragic errors is [mis]identification of the accused" by the crime victim or a witness.
- "Cases in which the perjury of prosecuting or other witnesses was the main factor in the conviction are not inconsiderable"
- "In several of these cases, . . . undue influence produced 'confessions'—[false confessions]—from the

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accused.”

- “The unreliability of so called ‘expert’ evidence is disclosed” in several cases.
- “In the majority of these cases the accused were poor persons, and in many of the cases their defense was for that reason inadequate. . . . The inability to engage competent attorneys makes it often impossible for the accused to establish his innocence.”

Now these conclusions are not from the 2009 New York State Bar Association Task Force Report; they are from a 1932 study, *Convicting the Innocent*, that was completed by Professor Edwin Borchard of Yale Law School, who studied sixty-five cases of known wrongful convictions.

Nineteen thirty-two was also a year that brought to the United States Supreme Court the landmark case of *Powell v. Alabama*, involving the so-called Scottsboro Boys, one of the most infamous sets of wrongful convictions in this country’s history. They were not among the sixty-five cases that Professor Borchard studied, but they well could have been because their cases evidenced virtually all of the elements that he identified. And it is not unusual, it is in fact typical, for wrongful conviction cases to have more than one contributing factor.

The *Scottsboro Boys* case involved nine young African Americans who were convicted of and sentenced to death for raping two white women while on a train going through Northern Alabama.

There were false confessions in those cases. A number of the defendants falsely accused their colleagues of having committed the rapes.

Eye witnesses testified they had seen what was going on up at that train from vantage points that would have made it impossible for them to observe what they said they saw.

Witnesses lied. One of the alleged victims, Ruby Bates, recanted her testimony after the first trial. The other alleged victim, Victoria Price, never did.

Medical experts testified that injuries suffered by the women were consistent with the gang rape, as semen was found in them.

There was prosecutorial misconduct; one of the district attorneys prosecuting the case railed to the jury: “Show them that Alabama justice cannot be bought and sold with Jew money from New York.” And that was in reference to Samuel Leibowitz, a New York City attorney who represented several of the Scottsboro Boys on retrial. Leibowitz objected and moved for a mistrial, but that was denied.

The defendants, of course, were poor and were provided ineffective assistance of counsel in the first trials, and that is what resulted in *Powell v. Alabama*.

Now, it's unsettling, I think, that the lessons we learned from Professor Borchard's 1932 study and that we see evidenced in the *Scottsboro Boys* cases are so similar to the findings and recommendations that are included in the 2009 New York State Bar Association Task Force Report.

For a long time we have understood that wrongful convictions occur and we have understood why they happen, although we know more now about why they happen than we used to.

Let me just make three observations if I might, and, Chief Judge Lippman, I want you to keep me to my twelve minutes. Then, I'll try to link these observations about 1932 and today. And forgive me if these three points seem simplistic and obvious, but I'll get them on the table anyway.

First, reports and recommendations are not very useful without follow-up action. Professor Borchard in 1932 made a series of recommendations about what should be done to address the problems of wrongful convictions.

Numerous people have studied wrongful convictions between the time of Borchard's study and today, and now numerous recommendations have been made. It's puzzling to me why we are waiting so long for action to be taken. These are not unpopular causes. It's hard not to be against convicting innocent people. It's hard to be for letting guilty people go free.

The New York State Bar Association Task Force made several useful recommendations that are not going to be of much use to us unless action is taken on them.

Now the upside of this is that there is no need in many respects to wait for constitutional mandates coming from Chief Judge Lippman's court or the United States Supreme Court. There is no need in many respects, thank goodness, to await legislation on some of these issues. Many of these reforms can be implemented through administrative action. They're quite simple and they're quite cost effective.

The second point I want to make, however, is that the governing legal rules are important. Changing several of them and then implementing them would help make a difference with respect to wrongful convictions. And again, the Task Force report included a number of very useful and important recommendations, including such matters as: video recording all custodial interrogations in

felony cases; changing eye witness identification procedures so that we'll have double-blind administration of the procedures; and simply instructing the identifying witness, that the real perpetrator may or may not be among those that you're viewing.

Recommendations were made about the forensic science commission's jurisdiction and giving it authority. They promote standards to preserve, retain, and catalog all forensic evidence.

There were recommendations made about informant testimony; that it should be corroborated and subjected to a pre-trial judicial review before it's allowed to be presented to a jury.

And several recommendations were made with respect to *Brady* issues, including pre-trial conferences, more regular procedures to police *Brady* violations, and to oversee those issues.

The corollary, however, is that changing rules alone won't be fully responsive to the deeper problems of wrongful convictions.

The Scottsboro Boys won twice before the United States Supreme Court, in two separate cases. Nevertheless, on remand they were convicted in re-trial after re-trial after re-trial. They all spent between six and nineteen years in prison.

Changing the rules was not up to the challenge that they confronted in going back to Alabama at that time in a racially charged case and confronting those juries.

Among the deeper causes of wrongful convictions are systemic issues including: funding and oversight of indigent defense; structural concerns regarding plea bargaining; the crushing caseloads the police, defense attorneys, and prosecutors encounter; organizational incentives; and lack of accountability are factors in the criminal justice system. These root causes are much more difficult to eradicate, but of course they can't be ignored.

My final point is that there is much that we still do not know about wrongful convictions. We are working from a very small and doubtlessly unrepresentative sample of known wrongful conviction cases. For the most part, what we know has emerged from DNA exonerations that largely occur in sexual assault cases. There are many reasons to believe that neither these types of crimes nor the cases in which the evidence may be available are necessarily representative of the much broader universe of wrongful convictions.

There is potential to learn more through continued and extended partnerships between the legal community and others, including the research community. And I believe that social scientists would welcome the chance to work closely with the legal community on the

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Task Force; that social scientists would jump at the chance to engage in research, systematic research about wrongful convictions if data could be collected by actors in the criminal justice system—the courts, the police—and made available to them for analysis, and would want to take part in education and training initiatives, continuing legal education, in law schools, for the police, and others.

The Bar Association Task Force made a number of recommendations along these lines with respect to the forensic science community. To involve the social science community in similar research and educational efforts, I think, would be a wonderful step forward, and I'm delighted that this symposium represents something of a step in that direction.

You'll hear more about the continuing partnership between the Law Review and my school, the School of Criminal Justice. Chief Justice Lippman's Task Force is going to be doing terrific things, but still there's a lot more to be done.

I'll conclude with this observation. There are many estimates about how good the criminal justice system is in terms of getting it right and I think among the more optimistic are that we get it right 99.5 percent of the time. The less optimistic estimates are about a three to five percent error rate. Even if we're talking about a one percent error rate, that means right now there are 2,000 New Yorkers in prison or jail doing time for crimes they did not commit; that every year 2,000 misdemeanor and felony defendants will be convicted for crimes they didn't commit.

We can't purport to be perfect; this is a human system. But because it is a human system, we need to do better, we can do better, and I think we will do better as we see these partnerships move forward.

Thank you very much.