

ADVERSARIES AS ALLIES:
JOINING TOGETHER TO PREVENT CRIMINAL INJUSTICE

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Thank you, Chief Judge Lippman. I'd also like to thank the *Albany Law Review* for organizing this symposium, because the topic is critically important and I appreciate the opportunity to participate.

Today, I will try to address what's necessary to understand and correct the criminal injustice of wrongful convictions. I'll do so by sharing my perspective on the general obstacles to reform, why they exist, and what can be done to overcome them. That sounds nice and tidy—as if I know how to get to the promised land and will, through this presentation, deliver us there. I know, however, that I can't accomplish that. My hope is that this presentation can help us recognize our joint interests in this struggle, and how we can best navigate the road ahead to perpetually minimize the possibility of wrongful convictions and criminal injustice.

As many of you know, The Innocence Project is dedicated to promoting wrongful conviction reform at both the federal level and all fifty states. As the Innocence Project's Policy director, and in my previous work as an attorney and criminal justice policy advocate, I have worked for implementation of the improvements that can prevent criminal injustice—both in the wrongful conviction realm and otherwise. In the course of this work I've gained perspective on the various ways to enable reform, as well as what tends to block it.

While I wish I had the key to overcoming resistance to criminal justice reform, I do not. I have, however, learned a thing or two along the way, and hope that by sharing my experiences with you, we can not only understand what's blocking reform but also be in a better position to more effectively enable change. And perhaps that's all we should be seeking, because "reform" is not a static place

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at which we can arrive and stop. Preventing wrongful convictions—and criminal injustice generally—requires perpetual work on constantly moving targets. The unfortunate truth is that the quest for preventing criminal injustice will never end. What we need, therefore, is not to identify “the” path to reaching a goal, but a means to regularly overcome obstacles to reform.

Before we launch into that, though, let’s just stipulate that our criminal justice system is fundamentally imperfect. It is a system that *seeks* to discern the truth, and *seeks* to provide justice. Those are extremely difficult assignments. Given its essential imperfection, the high expectations placed upon it, and the imperfections of the individuals involved in the system, it’s not surprising that our justice system can and does err. This becomes clearer with each passing year, particularly as DNA evidence continues to exonerate innocent people at various points within the criminal process, i.e. after arrest, indictment, and conviction. These cases have helped us understand those aspects of the criminal process that mislead police, prosecutors, judges and juries—and even defense lawyers—into thinking that an innocent person committed a serious crime. This recognition has not only humbled us, but also enabled us to better recognize the reality that our criminal justice system can and does “get it wrong” far more often than we ever thought.

The task now is to transform that recognition into practice, to perpetually explore how to integrate improvements into our systems to prevent wrongful convictions. Success will enable us to spare the innocent the inadvertent torment and agony of a wrongful conviction. It will also enable us to better apprehend the guilty, and thus protect the public and enhance faith in our criminal justice system—the latter of which being as valuable as it is intangible.

How to realize that transformation is a question that we all want to answer, because obviously no one wants to see wrongful convictions occur. The victim certainly doesn’t, nor does the criminal defense lawyer. The prosecutor’s job is to seek justice, so we can count her out, too. The police don’t want to collar the innocent, judges have no interest in sending innocent people to prison, and jurors do their best to correctly assess whether in fact a person committed a specific crime. The only person who wants the system to fail is the actual perpetrator of a given crime, who enjoys our system’s failures. Yet, given this broad and concerted interest in identifying the guilty and preventing wrongful convictions, our criminal justice systems have been extremely slow to make the

available improvements. Why?

One major reason the desired reforms have not already been implemented is that in the criminal justice system, change rarely comes from within. As Amy and District Attorney Vance noted, the crushing demands of peoples' respective roles within the system do not encourage—and rarely allow—they as individuals to seek to alter the system. Prosecutors, defense lawyers, police and judges know what they know, and have to work their tails off to simply establish their version of the story and otherwise keep their end of the system working. So it's hard to break out of the daily onslaught and say "I'm going to do it differently today. I'm going to tell the judge I'm not going to proceed with my cases because I haven't taken the necessary time." Or for the judge to say "From now on I'm going to take the time necessary to really appreciate what's going on in each of these cases." Or for the police officer to say "I don't care if this is how we've always done things, I'm going to research and apply best practices in my own work."

Even if an individual does overcome the workload and culture to exercise such initiative, it is typically not rewarded by superiors. This is because managers must also struggle to provide the justice system with the services demanded of them—despite, almost without exception, not being provided the proper resources to meet the demands placed upon them to ensure justice. Supervisors, therefore, are not looking for innovation, but for people who can process their caseloads. That is their job, and their work is measured by their ability to do so. Essentially, then, when an individual seeks to rise up from within the system, and overcome it in order to ensure justice, the system keeps them down—or at the very least, tends not to reward or encourage their efforts.

On a much more basic level, change rarely comes from within—if at all—because change is difficult. Even if people up and down the line appreciate the potential value of reform, it is challenging, and perhaps even threatening, to transform that desire into reality. Reform is resisted for a number of reasons: people either don't understand why the proposed reform would be an improvement or they are simply more comfortable with the old way and uncomfortable with their ability to properly perform under the new way. Perhaps most importantly, people are often afraid that if they are required to perform under a new system, they might not succeed as they had before. I'd like to give you a few examples to demonstrate this reality. Let me start with a personal example, i.e. the mundane. We recently installed the new Microsoft Office at the

Innocence Project and my first reactions—literally—were just about as follows. “What the hell is *this*? I don’t know how to use this. Where is my old Office? What was wrong with it as it was? Why are we doing this?” (I’ve spared you the expletives.) After I settled myself down a bit, though, I actually laughed when I realized that this was the same “simple” change I’m typically urging upon the criminal justice system, and the same reactions I should therefore expect of those who would have to deal with the changes.

Then again, I also had to think for a minute. If I’m so eager to urge change on others, and I could actually see how changes to my software could make things better, why was my initial reaction to it so strongly resistant? I realized that resistance to change is not about “other people” who just don’t want to change; it’s that change challenges us by taking us out of our comfort zones and asking us to do something differently—ostensibly for the better, but on first impression that’s typically not so clear.

In this situation I had neither known nor understood why the new Office was installed on my computer. That the decision was imposed by others, without educating me or explaining to me why it was needed, certainly fostered my resistance to that change. Having had someone explain the value of the change and how to navigate the new system could have transformed my resistance to at least grudging acceptance—maybe even interest, or in the best case, excitement.

But that’s just a personal example. Let’s also look to some examples of needed change in the criminal justice system and the resistance it has engendered. The National Academy of Sciences report on forensics, *Strengthening Forensic Science in the United States: A Path Forward*, firmly establishes that we need widespread improvement in the scientific integrity and reliability of our forensic evidentiary processes. While the report’s findings are not being seriously questioned, many in the criminal justice community are going to great lengths not to have reform implemented as the report recommends. In large part, this seems to be because reform would require major changes in forensic practice, and alter the dynamics of how forensic analyses are used as evidence.

The Innocence Project is advocating strongly for policy changes that would enact the report’s recommendations, and many members of Congress see the value in that as well. But I think it’s safe to say that many leaders from the various stakeholder communities would just assume it’s sufficient to have read the report and consider, as they always do, how they can better perform their

work, as opposed to having those recommendations transformed into policy and law that they must follow. Or if change is to be required of them, that the responsibility for enacting change is placed in their hands, to be directed as they choose and required of their stakeholder communities when those communities deem fit.

The reason for this appears to me that while the forensic reforms recommended by the National Academy of Sciences would make the system better, they would also threaten the status quo of forensic evidence from top to bottom, and across the board. Therefore, while the need is great, the resistance to change—especially as directed from “the outside”—is even greater. For these individuals who know how to manage things as they have been, maintaining the status quo is money in the bank. The alternative, reform, is an investment for the system, but provides little in the way of tangible rewards for those having to implement the reform. As a result, despite their sincere interest in justice and society, the majority of the players would—like most people—rather just keep their money in the bank than risk that money for general and not necessarily tangible public benefit. At the individual level, this resistance is understandable.

Another example worth mentioning is that of Harris County, Texas, where there is a strong move to create a public defender system because the appointed counsel system is patently failing. Guess who is leading the fight against the public defender system? The criminal defense bar, because change will upset the status quo regarding who gets paid to do criminal defense work and how those decisions are made.

Now, having said that, I want to be clear that I’m not trying to single out any group or groups as being selfish. I referenced those situations just to provide examples of why, because of the challenges they present, systemic improvements are fairly, naturally and understandably resisted by the individuals of whom change would be required.

I’ve noted many of the reasons why we can’t assume that important changes in the criminal justice system will be driven from within. But what about change coming from our elected officials, whose responsibility it is to establish policies that make our society work as well as possible, and to whom the need for reform is also obvious? There are reasons why change has been slow to come from them, too. If we are to understand the perpetuation of criminal injustice, we need to understand the political—and thus policymaking—challenges presented to

politicians who otherwise see the need for reform.

One reason change is slow in coming from politicians is that there is typically little profit in being associated with criminal justice reform. In most districts, especially the more powerful districts, very few (of the more potent) constituents care enough about it to make it worthwhile for elected officials to take on the work and political risk attendant to such efforts. Yet wrongful conviction reform has proven unique. There presently exists strong and clear media and public support—one could even say demand—for the identification and prevention of wrongful convictions. Yet despite the demonstrated need and support, elected officials have proven loathe to act decisively to prevent this criminal injustice,

This reticence can be explained, at least in large part, by the political power and potential of the stakeholder groups that would be affected by change. The consistent response to potential legislation in states across the nation, and in Congress, is essentially, "we know that change is needed, but it would be inappropriate for you to legislate such change. Leave it to us." It is no secret that these stakeholder groups will use their clout to express their unhappiness if reform is thrust upon them, so such a message has an understandable impact on legislators, and dampens the possibility of legislative reform.

Police, for example, have a strong voting bloc. A question I often hear back from legislators when advocating on a generally acceptable wrongful conviction reform is "what do the police want to do? If you don't have law enforcement on board, I'm not voting for it."

Prosecutors also have tremendous political power. Their leaders are typically elected, and thus they are both politically savvy and have their own constituencies, which overlap with those of other elected officials. Prosecutors generally act to retain the discretion and power they possess for dispensing justice; meddling by other policymakers is strongly resisted and discouraged, typically in a concerted fashion. Of course we're fortunate to have an elected prosecutor like District Attorney Vance who is making concern about wrongful convictions a priority, and I know that many prosecutors around the country are also opening up to properly addressing these issues, but such people are still very much in the minority. And even they don't like having reform legislated upon them.

Criminal defense lawyers are typically the leading advocates for wrongful conviction reforms, but are generally not organized for

political power. In fact, it seems that many have a distaste for engaging in the political arena. (This is perhaps because there, as in the public, they are somewhat demonized.) Public defenders are also saddled with the need to seek funding from the same government whose positions they attack in court. Their task of seeking annual budget allotments to do so, i.e. to bite the hand that feeds them, requires the expenditure of much of their political capital, thus tempering the thrust of their advocacy for needed reforms.

Judges, at least where they're not elected, tend to see themselves as neutral and rarely engage in wrongful conviction policymaking discussions—Judge Lippman, with a handful of others nationwide, being a clear exception. And even where they are elected, on the whole, judges tend not to exist as a strong political force in legislative and executive criminal justice decision-making.

"Leave it to us," the stakeholders say. Yet if they recognize the need for change and expect policymakers to leave it to them, why are there so few indications that they're pursuing it? In most of these instances, the move to reform has not begun, and there are few tangible indications that it will. What is tangible, though, is the resistance to reform. What reason does the public have to think it will happen? Is it possible that stakeholders take that position just to wait out the storm of public interest in reform, until they can just go back to doing things as they please? That is a somewhat cynical set of questions to ask, but given history I think they're fair. Fortunately, given my many conversations with leaders from these stakeholder groups, and the progress that is slowly evolving in some quarters, I have reason to believe that reform is beginning to evolve from within.

Stakeholder consideration must endure, and our criminal justice communities must be educated about the reforms that can prevent wrongful convictions—including the research and practice that supports their implementation, how reforms can improve the potential for safety and justice, and how to readily integrate reforms into their respective practices. The question is whether, given the potential criminal injustice at stake, internal reform is happening quickly enough, or is being implemented in as robust a fashion necessary. Given the demonstrated need, and the potential injustice and public safety at stake, despite the progress that can and will be made from within, legislation and executive action must never be taken off the table; it must always be actively considered. Having said that, let me sound the most hopeful note of my

message. When it comes to the issue of identifying and preventing wrongful convictions, it seems that we might not have to rely solely on change from within or for reform to arrive through legislation. There is a third way to achieve criminal justice reform. That route to reform comes through convening respected stakeholders from across the system to talk with each other about their joint interests in preventing wrongful convictions, and about how to best pursue that joint goal, in order to serve the interests of no one group but the system as a whole.

While to any outsider this must sound like the most obvious and simplest path, the fact is that such discussions in criminal justice policymaking circles are rare. As noted earlier, in states across the nation, the different communities within the criminal justice systems simply tend not to talk with each other, and if they do it's rarely nice, and typically not with an olive branch in hand. A clenched jaw and fist might be the more appropriate vision.

I have to believe that this approach to discussing needed reforms with each other flows from stakeholders' regular jobs, in police proceedings and criminal court, where defense lawyers tend not to associate with police and prosecutors, and vice versa. Instead, they are complete adversaries. This is as it should be, as our criminal justice systems rely upon them to bring their cases in a manner that will overcome the arguments of the other, and for the judge and jury to determine what is accurate and just. Judges, as befits their court role, tend to stay out of the policy fray. And when it comes to changing criminal justice policy jurors are essentially spectators, like the regular members of the public that they are, i.e. not organized to act upon reform.

So, despite the valuable efforts of bar associations to convene these players for the benefit of criminal practice generally, their courtroom positions have historically carried over to the policymaking arena. The people engaged in the gathering and arguing over evidence (think they) don't like each other, don't like talking with each other, and thus they don't come together to solve those common shortcomings that they could uniquely identify and together to reform.

As I have noted, at the Innocence Project, we talk with leaders from all of these communities, in order to gain their perspectives on the ways to implement the changes that can prevent wrongful convictions. I'll admit that at the outset of these conversations many are unsure of us. What we've found, however, is that if we come to these discussions seeking to both share and learn, we arrive

relatively quickly at a point of general consensus about the value of preventing wrongful convictions, and establish a willingness to work toward that goal—even if we recognize that our respective visions of any goal may be somewhat different. But at least we're talking and listening to each other, which is critical to advancing reform.

Because of the possibilities we've seen from such conversations, the Innocence Project has for years encouraged stakeholders to convene and talk with each other about wrongful conviction reform. And in states across the country, that has happened.

These assemblies tend to be referred to as “Criminal Justice Reform Commissions,” “Innocence Commissions,” or something to that effect. States such as Texas, North Carolina, California, Wisconsin, Pennsylvania, Mississippi, and our home state of New York are among those to have formed such commissions. In every one of those states this work has led to broad consensus on the need for reform within those criminal justice communities. This co-education and consensus has provided the impetus for stakeholders to continue discussions and paths toward enactment of specific reforms, to choose to change their own community's practice, to affect judicial decision-making and rules, and to even enable necessary legislation.

This is not, of course, to suggest that at the conclusion of such discussions, stakeholder communities join hands and skip through wildflowers until they blissfully arrive together at the promised land. What lies ahead after such progress is the exercise of political will by various groups over the parameters of any internal adoption, legislation, executive action and court rules for reform to be considered and enacted in the wake of such discussions. But what also lies ahead in the course of that continued debate is more respectful and open conversation among courtroom adversaries, which tend to result in more agreement about the need for improvement and a willingness to communicate while on the road toward reform. Therein lies great potential—indeed, our greatest hope—for meaningful and lasting reform to prevent criminal injustice.

Everyone in this room wants to prevent wrongful convictions, and more broadly, criminal injustice. We might even, individually and with the ability to speak honestly, agree on many of the appropriate means for doing so while ensuring the public safety. Yet because of the culture of the communities from which we come to such conversations, because of a lack of our own understanding and/or

that of the public, because we are deluged in our daily work, and because of what change would demand of us and our colleagues, too often we don't speak honestly with each other about that need, or how best to approach it. If we are to best implement the change necessary to prevent wrongful convictions, however, we must overcome those reasons why we don't talk with each other about what we know. To prevent criminal injustice, we must learn from the wrongful conviction reform effort to understand that we can talk with each other, about this and other areas of practice, to identify our joint interests in reform, to understand why we may need to compromise on some elements of reform, to work on all fronts to enact the reforms agreed upon, and to agree to respectfully disagree while pursuing issues on which consensus could not be reached. The alternative is the status quo, stalemates, unfulfilled reform potential, more wrongful convictions, and more intense criminal injustice—at the hands of those of us who comprise the criminal justice system. I hope the examples of our colleagues from around the country and right here in New York demonstrate that it is worth breaking free from our entrenched positions to work—together—to realize criminal *justice*.

Thank you.