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# HAVE YOU NO SENSE OF DECENCY?\*

PETER J. NEUFELD\*\*

## I. INTRODUCTION

This essay on forensic DNA litigation focuses on the practical problems which arise when two dissimilar disciplines—science and law—collide in court. My experience as defense counsel in four cases<sup>1</sup> focusing on DNA evidence,<sup>2</sup> as a consultant in dozens more, and as an observer of the manner in which scientific evidence, and DNA evidence in particular, is processed by the courts, compels the conclusion that practitioners need to scrutinize evidence more carefully before making case-dispositive decisions. Further, our society needs a comprehensive regulatory scheme to protect defendants, crime victims, and the rest of us from shoddy laboratory practices which can generate unreliable results. Not only does DNA evidence often go unchallenged and unregulated; this article will describe how, when a serious challenge is made, some prosecutors and the FBI also have actively and improperly interfered with the scientific debate over the limitations and reliability of DNA evidence. Finally, this article will expose the hypocrisy of prosecutors who relish DNA testing as a tool to convict, but bristle when such evidence is offered by an unjustly convicted prisoner to prove his innocence.

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\* The late Senator Joseph McCarthy and his counsel Roy Cohn were both revered and reviled for their eagerness to resort to character assassination to thwart their adversaries. One day, during the Army-McCarthy hearings, they went too far. A young lawyer associated with Joseph Welch, counsel to the Army, was publicly denounced for his membership years earlier in the National Lawyers Guild. Welch's tearful but stinging rebuke precipitated McCarthy's fall from grace: "Have you no sense of decency, sir, at long last? Have you no sense of decency?" NICHOLAS VON HOFFMAN, *CITIZEN COHN* 237 (1988). As this article will demonstrate, some prosecutors also have resorted to unprincipled attacks.

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<sup>1</sup> In each of these four cases, my colleague and co-chair of the National Association of Criminal Defense Lawyers, Barry C. Scheck, served with me as counsel.

<sup>2</sup> *People v. Castro*, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989); *United States v. Yee*, 134 F.R.D. 161 (N.D. Ohio 1991); *People v. Kotler*, No. Cr. 2480-81 (Suffolk Co., N.Y. Sup. Ct. 1992); *Commonwealth v. Snyder*, No. F-8118-1986 (Alexandria Co., Va. Cir. Ct. 1986).

Currently, there are no enforced standards or programs to ensure the quality of proffered DNA evidence. Practitioners rarely attempt to cultivate an adequate appreciation of the limitations of the scientific evidence. For instance, according to my calculations, over the last five years the Federal Bureau of Investigation has produced DNA results in more than 10,000 criminal cases. Notwithstanding a few well-publicized admissibility hearings, the reality is that in fewer than two percent of the cases have there been pretrial hearings challenging the reliability of the evidence. Based upon my own informal poll of public defenders and scientists, in fewer than five percent of the cases where DNA test results were inculpatory did defense counsel bother to seek an independent assessment. For the vast majority of criminal prosecutions, with or without DNA evidence, there are no trials and no pretrial hearings—only plea bargains.

Usually, in cases where the genetic evidence is the core of the case, if a DNA laboratory declares a match, the defendant pleads guilty; if a laboratory excludes the accused, the prosecution is aborted in the absence of a satisfactory explanation.<sup>3</sup> Thus, practitioners must not unquestioningly accept the quality of the DNA evidence before embarking on a non-trial disposition of the case. The lawyer must first have a fundamental grasp of the science and its application to crime scene evidence before retaining an expert to independently assess the quality of the results.<sup>4</sup> Continuing legal education programs and acquisition of the National Research Council's report entitled "DNA Technology in Forensic Science" is an excellent place to start.

In addition to teaching lawyers the absolute necessity of independently evaluating an opponent's evidence, we must have regulation and external oversight of the laboratories to protect not only defendants but crime victims and the general public from the risk of having cases wrongfully adjudicated on the basis of inferior laboratory practices.

The FBI and some prosecutors decry the need for external oversight. They concede that clinical laboratories need government regulation, but argue that forensic laboratories do not because forensic evidence is adequately tested in the crucible of court. But not

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<sup>3</sup> Some prosecutors have suggested that a DNA match or exclusion is but one piece of the puzzle. In sexual assault cases, however, where identification is the sole issue, the DNA evidence will generally be dispositive. The fact that, in several litigated cases, there was other strong evidence of guilt demonstrates that shrewd prosecutors know when to bring test cases. Furthermore, once there is a DNA databank, suspects may be selected for prosecution where the only evidence is a DNA match.

<sup>4</sup> I have found geneticists and molecular biologists at universities ready and willing to carefully analyze the data, often without charge.

only are judges ill-equipped to evaluate critically the reliability of scientific evidence;<sup>5</sup> lawyers routinely fail to assess, much less challenge, the reliability of the particular test. The “crucible of the court” is therefore a meaningless safeguard.

Unlike the FBI and some prosecutors, scientists agree on the need for a government regulatory scheme. There is a consensus in the scientific community that, although the laboratory procedures for comparing genetic evidence are fundamentally sound, the validity of any particular laboratory’s approach or the execution of that approach in a particular case will depend on the inclusion of proper quality controls and the performance of laboratory personnel.<sup>6</sup> The scientists recommend ensuring high standards and quality results not simply through judicial review on a case-by-case basis, but by authorizing the Department of Health and Human Services to institute mandatory accreditation and licensing.<sup>7</sup>

Although there is a consensus among scientists on the reliability of the laboratory procedures, the statistical methods relied upon to give meaning and significance to the laboratory results have been, and continue to be, hotly disputed. The mere fact that DNA patterns “match” is meaningless unless one knows, with a scientifically defensible numerical estimate, the rarity of the matching pattern. Although each individual has a unique genetic code, the FBI and other forensic DNA laboratories do not “read” the genetic code in the DNA. Instead, the test simply breaks the long strands into fragments and measures the lengths of four or five of the more than 150,000 fragments which are found in each person’s DNA. For the length of any one of these fragments measured, no one is unique, but the population as a whole exhibits some degree of diversity. If two samples have fragments of clearly different lengths, they are declared a non-match; the samples could not have come from the same person. However, if two samples have fragments of similar lengths for each of the four or five fragments examined, the samples are declared a match. The major dispute among scientists, which is echoed in the decisions of appellate courts nationwide, is just how small the likelihood is of a coincidental match over four or five frag-

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<sup>5</sup> The Supreme Court apparently disagrees. Speaking for seven of the justices in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796 (1993), Justice Blackmun expressed confidence in the capacity of federal judges to undertake this task. The Chief Justice was considerably less sanguine on this subject.

<sup>6</sup> COMMITTEE ON DNA TECH. IN FORENSIC SCIENCE, NAT’L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 97-109 (1992) [hereinafter NRC REPORT].

<sup>7</sup> *Id.* at 106-09.

ments, and what method is scientifically acceptable for estimating that likelihood and expressing it in a court of law.

If two samples are different, statistics obviously play no role in excluding the accused. Thus, a considerable portion of my DNA cases involve representing prisoners convicted before the availability of DNA testing, who now seek a genetic analysis of the critical crime scene evidence to clear themselves. The problems I have encountered in pursuing claims of innocence shall be discussed in the second half of this essay.

The substance of the scientific debate concerning statistical methods can be found elsewhere.<sup>8</sup> My concern here is the manner in which that debate has been conducted and, in particular, the extent to which prosecutors have attempted to exploit their status to affect its outcome, not simply in the courts, their proper domain, but in the scientific community itself.

## II. INSTANCES OF PROSECUTORIAL MISCONDUCT

When I first became involved in the forensic application of DNA typing five years ago, I entertained a naive view of the sanctity of science, the independence of its institutions, and the integrity of its leaders.<sup>9</sup> Five years later, I no longer feel so sanguine, for I have repeatedly seen prosecutors succeed in interfering with scientific thought and suppressing scientific debate.

In December 1990, Laurence D. Mueller, Ph.D., a geneticist at the University of California who had testified for the defense in several pretrial DNA admissibility hearings, submitted a technical comment critical of forensic DNA typing for publication to the journal *Science*. Shortly thereafter, this submission was disclosed to a prosecutor through normal discovery in a criminal proceeding. Two months later, Alameda County Senior Deputy District Attorney Rockne Harmon wrote to the editors of *Science* in an attempt to thwart the publication of Mueller's paper.<sup>10</sup> In his letter to *Science*, written on official government letterhead, Harmon, a criminal prosecutor with no special education or training in laboratory science, much less the intricacies of population genetic theory, derided Dr.

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<sup>8</sup> See, e.g., William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the "DNA War"*, 84 J. CRIM. L. & CRIMINOLOGY 22 (1993).

<sup>9</sup> See Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 46 (1990).

<sup>10</sup> Affidavit of Laurence Mueller, March 12, 1992, at 2, United States v. Yee, 134 F.R.D. 161 (N.D. Ohio 1991) (No. 91-3610) in support of defense motion to set aside conviction. See also Leslie Roberts, *Prosecutor v. Scientist: A Cat-and-Mouse Game*, 257 SCIENCE 733 (1992).

Mueller's technical criticisms as "knuckle-headed," suggested that the doctor was unethical, and cautioned the editors that publication "could conceivably result in a vicious, violent criminal being freed to continue to prey on society."<sup>11</sup> The editors took Mr. Harmon's prosecutorial meddling seriously. The journal notified Mr. Harmon, long before it notified Dr. Mueller, that it was rejecting Dr. Mueller's submission.<sup>12</sup>

In the summer of 1991, Daniel Hartl, Ph.D., a geneticist currently at Harvard University, who had testified for the defense in one DNA *Frye* hearing,<sup>13</sup> co-authored a research paper on the statistical problems of forensic DNA profiling. By early September, *Science* had accepted the manuscript for publication. On September 27, 1991, Dr. Hartl received the first of two telephone calls from James Wooley, the prosecutor in that case, who attempted to pressure Hartl into withdrawing the paper. According to Dr. Hartl, Wooley "badgered" him for more than an hour, "asserting that the article would do incalculable harm to government prosecutions and the criminal justice system."<sup>14</sup> Dr. Hartl "had no doubt," both "from the tone and intensity of his remarks, that Mr. Wooley, on behalf of the FBI and the Department of Justice, was trying to get me to withdraw the article."<sup>15</sup>

Dr. Hartl refused to withdraw the article from publication, but the lobbying efforts did not cease. A concerted effort was made to influence the journal directly. Dr. Thomas Caskey of Baylor College of Medicine, a long-time supporter and user of the FBI's forensic DNA methods, both in and out of court, as well as the recipient of a \$200,000 grant from the Department of Justice for his forensic DNA research, approached the editors of *Science* to lobby against publication of Hartl's piece.<sup>16</sup>

Dr. Caskey's intervention succeeded in delaying publication, altering the content of the article, and expediting an unprecedented simultaneous publication of a rebuttal co-authored by Ranajit Chakraborty, Ph.D., a collaborator of Dr. Caskey's in the \$200,000 grant. Remarkably, I discovered the Chakraborty/Kidd rebuttal was exempted from the normal peer review process.

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<sup>11</sup> Letter from Rockne P. Harmon, Senior Deputy District Attorney, Alameda County, to the editors of *SCIENCE* (Feb. 27, 1991) (on file with Peter J. Neufeld).

<sup>12</sup> Affidavit of Laurence Mueller, March 12, 1992, at 2, *Yee* (1991) (No. 91-3610); Roberts, *supra* note 10, at 733.

<sup>13</sup> *Yee*, 134 F.R.D. at 161.

<sup>14</sup> Affidavit of Daniel Hartl, March 16, 1992, at 1-4, *Yee* (1991) (No. 91-3160).

<sup>15</sup> *Id.*

<sup>16</sup> Christopher Anderson, *DNA Fingerprinting Discord*, 354 *NATURE* 500 (1991); Leslie Roberts, *Science in Court: A Culture Clash*, 257 *SCIENCE* 732 (1992).

For prosecutors to misuse their law enforcement power and prestige to suppress and define scientific thought in pursuit of a particular government policy is unacceptable and represents a serious breach of ethics in science and in law. Moreover, when an official in the Department of Justice seeks out a private citizen and asks the private citizen to refrain from an action the citizen is both entitled to and intends to take, official coercion and intimidation have been attempted.

The prosecutors' attempted intimidation of Drs. Mueller and Hartl are but two of the more blatant efforts by law enforcement to improperly influence not only the legal controversy, but also the scientific debate on the reliability of the statistical methods for forensic DNA profiling. But they are by no means the most pernicious. That prize goes to the Federal Bureau of Investigation, which has continually interfered with the National Academy of Science's efforts to bring order to the dispute and reach a consensus on the proper use of forensic DNA typing.

Shortly after forensic DNA typing was introduced in the late 1980s, a few well-publicized cases raised serious scientific questions about the reliability of the transfer of the technology from research and clinical laboratories to crime scenes and courtrooms.<sup>17</sup> The choice of appropriate statistical methods to interpret the evidence became a critical focus of the controversy. In response to the controversy, "calls for an examination of the issues by the National Research Council of the National Academy of Sciences came from the scientific and legal communities."<sup>18</sup>

The forensic DNA study was initiated in January 1990, and completed and published in April 1992. The FBI was a sponsor and a major underwriter of the project. The president of the Academy selected a committee to investigate the issues and collectively author a report. The committee consisted primarily of pre-eminent scientists in the fields of population and molecular genetics, along with some equally notable forensic scientists, legal academics, ethicists, and a federal judge (Hon. Jack B. Weinstein). To my knowledge, all but one of the nine committee members who had testified as experts

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<sup>17</sup> See, e.g., *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989); *People v. Castro*, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989).

<sup>18</sup> NRC REPORT, *supra* note 6, at vii. The National Academy of Science ("NAS") is a private, nonprofit society of distinguished scientists. In 1863, Congress chartered the Academy with the mandate to advise the federal government on scientific and technical matters. The National Research Council ("NRC") was organized by the NAS as its principal operating agency to serve the public by furthering scientific knowledge and advising the government.

in DNA admissibility hearings testified in favor of admissibility.<sup>19</sup>

Although the FBI was a sponsor of the committee, the rules of the Academy prohibit government agencies and other sponsors from influencing the outcome of the report. Preliminary drafts are kept strictly confidential and sponsors are not permitted to comment until the process is completed.<sup>20</sup>

The FBI's attempt to undermine the committee's independence and the report's legitimacy began when John Hicks, the Assistant Director of the FBI, violated the committee's confidentiality and accepted a preliminary draft of the report leaked by two disgruntled committee members.<sup>21</sup> Hicks responded to this draft with a stinging critique of the chapter of the report that focused on statistical methods and population genetics.<sup>22</sup> However, Mr. Hicks is neither a geneticist nor a statistician, and the chapter focused on statistical and population genetic theory. His scientific opinions are unreliable and irrelevant. His opinions as a top official of the Bureau, however, can be, regrettably, highly influential.

It is extraordinary that one of the most senior officials in the nation's principal law enforcement agency would willingly receive and review data, when he knew that disclosure of that data to him was prohibited. It is inexcusable that Mr. Hicks compounded his breach of confidentiality, and exploited his status as Assistant Director of the FBI, by filing a formal attack on the draft with the NAS Committee.<sup>23</sup>

Notwithstanding the Bureau's interference, the final version of the NRC Report rejected the validity of the statistical methods used by the FBI and all other forensic DNA laboratories. In its place, the National Academy recommended a more conservative method for calculating the frequency of a DNA profile.<sup>24</sup> The differences between the two approaches are not trivial.<sup>25</sup> For instance, in *United*

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<sup>19</sup> At the Committee's inception, there were nine. But along the way, one committee member, Dr. Thomas Caskey, resigned from the Committee following disclosures about his commercial interest in marketing "kits" for forensic DNA analysis. Celia Hooper, *Rancor Precedes National Academy of Sciences' DNA Fingerprinting Report*, 4 J. NIH RES. 78, 80 (1992).

For biographical information on the Committee members, see NRC REPORT, *supra* note 6, at 173-76.

<sup>20</sup> Telephone Interview with Frank Press, President of the NAS (1993). See also Hooper, *supra* note 19, at 79.

<sup>21</sup> Hooper, *supra* note 19, at 79-80.

<sup>22</sup> John Hicks, *Message from the Assistant Director in Charge of the FBI Laboratory*, 18 CRIME LABORATORY DIG. v (1991).

<sup>23</sup> *Id.*

<sup>24</sup> NRC REPORT, *supra* note 6, at 94-95.

<sup>25</sup> See Thompson, *supra* note 8, for a discussion of these two approaches.



*States v. Yee*,<sup>26</sup> when one applies the FBI method, the probability of matching the DNA profile of the blood stain found at the crime scene by coincidence is a mere 1 in 35,000; if the National Academy method is applied, the probability is 1 in 17.<sup>27</sup>

When the report was released, the FBI put its best spin on it. The Bureau held a press conference on April 14, 1992, and announced that the report essentially vindicated its scientific approach. When the *New York Times* announced the release of the report carrying a page one headline, *U.S. Panel Seeking Restriction on Use of DNA In Courts*,<sup>28</sup> an unprecedented page one retraction appeared the following day and acknowledged that the previous day's article had the wrong slant.<sup>29</sup> Despite the Bureau's public claim that the NRC Report endorsed its approach, state appellate courts refused to rely on that representation and instead reviewed the NRC Report themselves. The result has been startling. Since the report was released, a majority of appellate courts addressing the statistical issue have ruled DNA evidence inadmissible due to the lack of agreement on statistical methods.<sup>30</sup>

The FBI reacted to this unwelcome trend by resuming its attempt to improperly influence the outcome of the debate. This past spring, the Bureau sponsored a symposium on forensic DNA typing at its Quantico headquarters. Some of the judges who had authored opinions rejecting the admissibility of the FBI's statistical methods were among the invited guests. The guests heard condemnation heaped upon the NRC report and on the judicial opinions extolling its virtues.<sup>31</sup> This was not, however, an open forum or public gathering of scientists. Instead, the FBI restricted attendance at the meeting and limited the range of opinions that were expressed there. The only lawyers and scientists in attendance were sympathetic to the FBI's position. The Bureau made it abundantly clear to me and other lawyers interested in the subject, as well as to scien-

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<sup>26</sup> 134 F.R.D. 161 (N.D. Ohio 1991).

<sup>27</sup> Appellant's Brief at 24-25, *Yee*, 134 F.R.D. at 161.

<sup>28</sup> Gina Kolata, *U.S. Panel Seeking Restriction on Use of DNA in Courts*, N.Y. TIMES, April 14, 1992, at A1.

<sup>29</sup> N.Y. TIMES, April 15, 1992, at A1.

<sup>30</sup> See, e.g., *People v. Wallace*, 17 Cal. Rptr. 2d 721 (Cal. Ct. App. 1993); *People v. Barney*, 10 Cal. Rptr. 2d 731 (Cal. Ct. App. 1992); *United States v. Porter*, 618 A.2d 629 (D.C. 1992); *People v. Atoigue*, No. CR91-95A, 1992 WL 245628 at \*1 (Guam Dist. Ct. App. Div. Sept. 11, 1992); *Commonwealth v. Lanigan*, 596 N.E.2d 311 (Mass. 1992); *State v. Vandebogart*, 616 A.2d 483 (N.H. 1992); *State v. Anderson*, 853 P.2d 135 (N.M. Ct. App.), cert. granted, 848 P.2d 531 (N.M. Mar. 11, 1993); *State v. Cauthron*, 846 P.2d 502 (Wash. 1993).

<sup>31</sup> Memorandum from Miron Straf to Frank Press, President of the NAS (April 7, 1993) (on file with Peter J. Neufeld).

tists critical of the Bureau's methods, that we would not be allowed to attend, much less address this gathering.

This spring, the FBI asked the National Academy of Sciences to convene another committee comprised of different scientists to re-examine the statistical issues that the Academy had just spent two years studying. The Bureau's request went through the normal Academy channels and was initially rejected.<sup>32</sup> Undaunted by this rejection, Director Sessions reiterated his request, this time formally to the president of the Academy, with an offer to underwrite the project. The normal procedures were dispensed with, and in May, 1993, the president gave Sessions the green light for an entirely new committee.<sup>33</sup> So much for the integrity of the Bureau and the independence of science.

### III. POST-CONVICTION DNA EXCLUSIONS

As distressing as law enforcement's encroachment into free scientific thought is, I am no less troubled by the hypocrisy of prosecutors who delight in DNA testing as a tool for prosecution, yet refuse to embrace DNA testing when the results clear someone unjustly convicted.

While imprisoned in New York State for over eleven years and three months, Kerry Kotler continually protested his innocence. He claimed that his 1982 conviction on rape charges occurred because a politically ambitious prosecutor and an unscrupulous detective concealed exculpatory evidence at his trial. Despite the discovery of undisclosed police reports providing substantial proof of these claims, Kotler's post-conviction motions fell on deaf judicial ears. However, on December 1, 1992, Kerry Kotler walked out of court a free man. Kotler's innocence was definitively established by DNA tests showing he could not have been the source of semen left in the underwear of a rape victim who had mistakenly identified him as her rapist.<sup>34</sup>

Walter Snyder, Jr. served nearly seven years of a forty-five year sentence in a Virginia state prison for the rape of a neighbor. Based upon the white victim's description of the perpetrator as a well-built, young black man, albeit a stranger, the police asked Mr. Snyder, a nineteen-year-old black man who lived with his parents across the street from the victim, to be photographed. Although the victim

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<sup>32</sup> Telephone Interviews with Eric Fisher, Ph.D., Administrative Head of the Board of Basic Biology of the National Academy of Sciences (May 1993).

<sup>33</sup> *Id.*

<sup>34</sup> Jim Dwyer, *Free Man's Sermon on a Mountaintop*, *NEWSDAY*, Dec. 2, 1992, at 2.

failed to initially identify Mr. Snyder in a photo spread, when she looked out her window a few days after inspecting the photos and saw Mr. Snyder washing his car, at that moment she became certain he was her assailant. Six and one-half years after he was convicted by a jury, the prosecutor consented to a re-examination of the rape kit using DNA testing. The DNA test excluded Snyder as the rapist.<sup>35</sup>

Under Virginia law, motions for a new trial based on newly-discovered evidence must be made within twenty-one days of conviction.<sup>36</sup> Thus, Mr. Snyder's only recourse was to ask the governor for clemency. His petition was processed quickly because the Commonwealth Attorney agreed that the DNA evidence proved his innocence and thus joined in the petition for clemency. On April 23, 1993, Governor Douglas L. Wilder granted Walter Snyder an absolute pardon.

#### IV. LESSONS TO BE LEARNED FROM POST-CONVICTION DNA TESTING

To my knowledge, there have been more or less a dozen prisoners like Kotler and Snyder whose innocence has been proven by post-conviction DNA testing over the last three years. There are at least four important implications that arise from these cases.

##### A. HUNDREDS OF INNOCENT PEOPLE MAY LANGUISH IN OUR NATION'S PRISONS

There may be hundreds, perhaps thousands, of other prisoners across America, convicted before the introduction of forensic DNA testing in the late 1980s, who could prove their innocence with a DNA test. This extraordinary proposition is supported, ironically, by the unexpectedly high exclusion rates reported by the FBI and other DNA laboratories working for law enforcement. The FBI, for example, reports that in more than thirty-percent of their sexual assault cases which generated interpretable results, the primary suspect is excluded through DNA testing.<sup>37</sup> These exclusion rates are particularly striking since state and local police ordinarily do not refer cases to the FBI lab unless they already have probable cause, based on independent non-DNA evidence, to arrest or indict the

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<sup>35</sup> Patricia Davis, *DNA Evidence Frees Virginia Prisoner; Wilder Grants Clemency to Man Convicted of Rape who Served Almost 7 Years*, WASH. POST, Apr. 24, 1991, at B1, B7.

<sup>36</sup> Va. Sup. Ct. Rule 3A:15(b).

<sup>37</sup> OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, GENETIC WITNESS: FORENSIC USES OF DNA TESTS 17 (1990) (reporting a 37% exclusion rate).

primary suspect.<sup>38</sup>

Over the past three years, the FBI has conducted DNA tests in more than four thousand sexual assault cases and excluded hundreds of defendants who would have otherwise been prosecuted. Even if one assumes a very low conviction rate in these sexual assault cases (fifty-percent), and further assumes that some of the exclusions have nothing to do with the case—such as when the assailant fails to ejaculate, but the victim is unaware of it and does not disclose recent consensual sex—it seems plain that many of those whom the FBI excluded and exonerated by DNA testing would have been convicted, despite their innocence. Therefore, it can be reasonably assumed that before the arrival of forensic DNA testing in the late 1980s, many innocent men were not exonerated. Instead, they were wrongly convicted and may still languish in our nation's prisons.<sup>39</sup> If the rape kits and other evidence have been preserved in those cases, then DNA testing may prove that these men, like Mr. Kotler and Mr. Snyder, were unjustly convicted.

#### B. THE CAUSES OF UNJUST CONVICTIONS

The remarkably high exclusion rates reported by forensic DNA laboratories reveal our criminal justice system to be more fragile and susceptible to producing wrongful convictions than many want to believe. One obvious way the innocent can be convicted is misconduct by the prosecutor and police. In Kerry Kotler's case, prior to the DNA testing, the misconduct was erroneously shrugged off as inadequate to create the possibility of a reasonable doubt.<sup>40</sup> As our underfunded state court systems struggle with overcrowded dockets, far too much law enforcement misconduct is tolerated as harmless error.

Another way the innocent can easily be convicted is through ineffective defense counsel. The lack of funding for public defenders and court-appointed counsel for the indigent has reached crisis proportions in the last decade. Despite appellate courts condemning cash-starved state and local defender systems, and despite repeated reports from national and state bar associations deploring

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<sup>38</sup> Personal Communication with John Hicks, Assistant Director, Federal Bureau of Investigation (1993).

<sup>39</sup> Persons convicted of forcible rape routinely receive sentences in excess of 10 years. For instance, in 1991, 65% of those sentenced to prison in New York State for forcible rape received sentences exceeding 10 years. More than 25% received sentences exceeding 20 years. DIVISION OF CRIM. JUST. SERV., 1991 ANN. REP. 190 (1991).

<sup>40</sup> *People v. Kotler*, No. Cr. 2480-81 (Suffolk Co., N.Y. Sup. Ct. 1992) (denying motion to vacate conviction).

this crisis, there has been negligible support from the federal government to redress this crisis. One by-product of this neglect is undoubtedly unjust convictions.

Finally, the most significant factor producing wrongful convictions is the phenomenon of mistaken eyewitness identification. Since DNA testing would rarely be requested in a sexual assault case if identification were not at issue, it is quite likely that most of the people cleared by genetic testing were initially accused on the basis of mistaken identifications. A woman who innocently misidentifies someone as her rapist is not lying—she is just mistaken. All too often the witness's sincerity and certainty induces the jury to convict even the falsely accused. Wrongful convictions resulting from faulty eyewitness identification are, unfortunately, an old story—and a persistent fear—for those who practice criminal law. Forensic DNA testing, however, adds a new dimension to our understanding of this problem. It is apparently much worse than most people dared to believe.

#### C. THE PROSECUTOR'S DOUBLE STANDARD

Many prosecutors hypocritically resist post-conviction DNA tests. Just as law enforcement agencies across the country embrace DNA profiling as a potent tool for prosecuting the guilty, they fear its potential to re-open hundreds, or possibly thousands, of convictions. Kotler was the first convict to request DNA testing in Suffolk County. The District Attorney consented to his test. Once Kotler was exonerated, however, the prosecutor reversed his position, arguing instead in favor of a blanket prohibition against post-conviction DNA testing. From coast to coast, district attorneys have thrown up familiar roadblocks. Two of the typical arguments—no statute authorizes post-conviction discovery, and the defendant's claim that the test will be exculpatory is too speculative—have been overcome by courts which find that a fundamental right to exculpatory evidence exists.<sup>41</sup>

The third and most cynical argument against testing is that the system simply cannot afford to open the floodgates to convicted offenders who are trying to prove their innocence. To deny a defendant, even one convicted long ago, the opportunity to prove his innocence with newly discovered evidence simply to ensure the fi-

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<sup>41</sup> See, e.g., *State v. Hammond*, 604 A.2d 793 (Conn. 1992); *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992); *State v. Thomas*, 586 A.2d 250, 254 (N.J. Super. Ct. App. Div. 1991); *Dabbs v. Vergari*, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. 1990); *Jenkins v. Scully*, No. 91-CV-298E, 1992 WL 205685 at \*1 (W.D.N.Y. July 16, 1992).

nality of conviction, may be legally justifiable,<sup>42</sup> but is morally untenable. Prosecutors who suggest that it is their sworn duty to protect guilty verdicts, whether the verdicts are right or wrong, as the prosecutor in Kotler's case asserted for two years following the DNA exclusion, have become blinded to justice.

D. THE DATA COMPELS PUTTING THE BREAKS ON CAPITAL PUNISHMENT

Finally, DNA testing brings new focus to the debate over the death penalty and the right of habeas corpus.<sup>43</sup> One of the issues the Supreme Court decided this term in *Herrera v. Collins*<sup>44</sup> is that state statutes that limit motions for a new trial based on newly discovered evidence to a mere thirty days (Texas) following imposition of sentence are constitutional.<sup>45</sup> Moreover, federal habeas review is unavailable if the only claim raised by petitioner is newly discovered evidence of innocence.<sup>46</sup> In a concurring opinion, Justice Scalia carried this hard-nosed approach to its logical end when he suggested that it would be perfectly constitutional to let stand an injustice, including the execution of an innocent man, "who has received, though to no avail, all the process that our society has traditionally deemed adequate."<sup>47</sup> In the overwhelming majority of states, Kotler's claim of innocence, asserted for the first time almost a decade after his conviction and sentence, would not be heard.<sup>48</sup> This problem would be present in most post-conviction DNA cases since the convictions were secured several years ago, before DNA testing was available. Unlike the prosecuting agency in Mr. Snyder's case, which supported a request for relief, the prosecutors in Mr. Kotler's case opposed such a request for two years. Thus, the safety valve of clemency or pardon may not be available for those like Kotler, who

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<sup>42</sup> *Herrera v. Collins*, 113 S. Ct. 853 (1993).

<sup>43</sup> In two of the post-conviction DNA exclusion cases, the defendant had been convicted of murder. In *Linscott*, Steven Paul Linscott was initially sentenced to 40 years. His conviction was reversed on other grounds, and his case was dismissed before retrial due to DNA exclusion. Andrew Fegelman, *12-year Nightmare Ends for Murder Defendant*, CHI. TRIB., July 17, 1992, at C3. Similarly, Kirk Bloodsworth originally received a death sentence, but following a reversal and retrial was convicted and sentenced to life. He served seven years before a DNA test compelled his release on June 28, 1993. Paul W. Valentine, *Jailed for Murder, Freed by DNA; Md. Waterman, Twice Convicted in Child's Death, is Released*, WASH. POST, June 29, 1993, at A1.

<sup>44</sup> 113 S. Ct. at 853.

<sup>45</sup> *Id.* at 866.

<sup>46</sup> *Id.* at 861; see also *Townsend v. Sain*, 372 U.S. 293, 317 (1963).

<sup>47</sup> *Herrera*, 113 S. Ct. at 875.

<sup>48</sup> *Id.* at 866 nn.8-11. As the *Herrera* Court notes, New York is only one of nine states that have no time limit on post-conviction motions rooted in newly discovered evidence of actual innocence.

are opposed by district attorneys who see their duty as defending jury verdicts at any cost.

DNA evidence, almost uniquely, can provide definitive evidence of innocence. Moreover, the tests can be performed on samples, as in the Kotler case, that are over a decade old. No one can credibly argue that a DNA exclusion is a trumped-up claim of innocence raised to delay the imposition of the death penalty.

Twenty-five years ago, Supreme Court Justice Abe Fortas cautioned that, "the State's obligation is not to convict, but to see that, so far as possible, truth emerges."<sup>49</sup> Now that DNA technology makes it possible for convicted defendants to prove their innocence, we must make certain the courthouse doors are not slammed in their faces.

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<sup>49</sup> *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring).