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Innocence politics weighs heavy on Senate hearing – and the law

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On January 23, 2008 the Senate Judiciary Committee heard testimony from powerful voices in the forensic science community, Justice Department, and the Innocence Network. The question under consideration focused intensely on the administration of forensic science grants and the enforcement of innocence protections set forth in the *Justice for All Act of 2004*.

Passed into law with widespread bipartisan support due to its protections for both defendants and victims, the *Justice for All Act* was a sweeping legislative achievement that incorporated multiple criminal justice reforms including the *Crime Victims' Rights Act*, the *DNA Sexual Justice Act*, the expansion of DNA databases, and funding of the *Paul Coverdell Forensic Sciences Improvement Grant Program*.

Also included were comprehensive provisions packaged under what became known as the *Innocence Protection Act*. At the center of this legislation was language named after Kirk Bloodsworth, a prisoner exonerated through DNA testing, which was supposed to encourage states to establish their own post-conviction DNA testing programs. By doing so, it was hoped, states would grant worthy prisoners an opportunity to demonstrate their innocence through DNA.

Another innocence protection of interest to the committee was the requirement that *Coverdell* grantees certify that an external government agency is in place to investigate forensic misconduct.

Interestingly enough, the man who first introduced the Innocence Protection Act in 2000 was Senator Patrick Leahy (D-VT) who now presides over the Senate Judiciary Committee as it considers a scathing report released last week by the Office of the Inspector General (OIG). The report accused the Office of Justice Programs (OJP) of failing to properly administer the Bloodsworth and Coverdell grants.

In a statement posted at his website, Senator Leahy complained "I am troubled to find that more than three years later, with Congress having appropriated almost \$14 million to the Bloodsworth program, not a dime has been given out to the states for this worthy purpose."

Peter Neufeld, cofounder of the Innocence Project in Manhattan, concurred with Senator Leahy during his testimony. "OJP created so many barriers to potential grantees for Bloodsworth fund money that only three [states] applied and all three were rejected."

As for the Coverdell grant, from 2006 through 2007, the OJP successfully distributed a total of more than \$31.5 million to forensic science agencies. But according to testimony offered by Inspector General Glenn A. Fine, "while complying with the minimum requirement of the statute - to obtain written certification from applicants that a government entity is in place to investigate allegations of serious misconduct or negligence affecting forensic results - OJP has been

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reluctant to do more to exercise oversight over this important external investigation certification requirement."

After reviewing all of the documented testimony given on January 23, 2008, we came to appreciate the neutral and cooperative tone adopted by Peter Marone and Dr. John Morgan who were called to appear before the committee. Peter Marone is the Chairman of the Consortium of Forensic Science Organizations and Director of the Virginia Department of Forensic Science. John Morgan is the Deputy Director of the National Institute of Justice (NIJ), which is the OJP bureau responsible for administering forensic science grants and other justice programs.

Both gentlemen, in our opinion, communicated what should have been one of the key points of the day: Forensic science is in desperate need of help - and NIJ has been desperately trying to provide it.

Crime Lab Report recognizes that improvements can likely be made in how the Office of Justice Programs conducts its business. The same probably holds true for just about every other federal agency. But we also believe that NIJ has largely served the public well in its support of forensic scientists and has acted with a degree of urgency that is appropriate for the overwhelming challenges that many public crime laboratories face on a daily basis.

But like so many times before, forensic science finds itself treading deep water with heavy political hands pushing down on its shoulders.

As *Crime Lab Report* reviewed the submitted testimony of Inspector General Fine and the statement prepared by Chairman Leahy, we began to realize that there are two debatable assumptions being taken for granted. The first is that wrongful convictions are frequent in the United States and are highly attributable to fraudulent or incompetent forensic practices. The second is that *post*-conviction remedies are superior to *pre*-conviction quality control. These assumptions have been stamped into the public consciousness by the Innocence Project for more than a decade and, to our dismay, are now accepted as true by powerful people who would be wise to take a closer look.

Fine, for example, testified that "Negligence and misconduct in forensic science laboratories can undermine the criminal justice system, and have led to wrongful convictions in several states."

Peter Neufeld agreed. "The Innocence Project views the [investigation of forensic misconduct] as a crucial step toward ensuring the integrity of forensic evidence, because we know that lab errors, both inadvertent and calculated, contribute significantly to wrongful convictions."

Crime Lab Report was particularly intrigued by Mr. Neufeld's comments. Only recently, an Innocence Project representative was quoted by the Shreveport Times (Louisiana) as estimating that 75% of 212 overturned convictions were attributable to eyewitness misidentifications. This seems to refute Neufeld's argument that forensic science "contributes significantly to wrongful convictions" especially when one considers that the statistic leaves out factors that have, in fact,

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been clearly identified as contributing to miscarriages of justice. These factors include coerced confessions, improperly conducted line-ups, and an over-reliance on jailhouse informants.

The sloppiness of the Innocence Project's policy rhetoric pertaining to forensic science is startling but not new. On September 24, 2007 *Crime Lab Report* publicly asked the Innocence Project to furnish data that serve as the statistical basis for claims such as those made by Peter Neufeld. It seemed like a fair request considering how frequently innocence advocates and their supporters characterize forensic scientists as failing to report conclusions that are based on sufficient data and research. We thought we would simply hold the Innocence Project to the same standard.

We never received a response.

During our watch, we have even asked academic professors of law and economics who are publicly critical of forensic science to help us understand their positions. The responses we receive are either ambiguous or fail to demonstrate an even marginally scientific methodology that would prompt a well-informed person to believe that forensic science is a leading cause of wrongful convictions in the United States.

In fact, we have gone so far as to question if wrongful convictions really comprise a statistically significant percentage of all convictions that occur, or have occurred, in the United States. Our inquiries, however, are generally met only with anecdotal evidence that, while heartbreaking, fails to authoritatively estimate the actual number of innocent people that might go to prison during a given period of time.

In his groundbreaking book *Courtroom 302* - an inside look at the busiest felony courthouse in the country - prizewinning author and reporter Steve Bogira acknowledged that "Recent reporting about criminal justice has focused heavily on two important issues: the death penalty, and the conviction of defendants later proven innocent. Death penalty cases are rare, however, and, even though DNA technology has proven that innocent defendants are convicted more often than once believed, such blatant miscarriages of justice are also unusual."

Judge Morris Hoffman made a similar point in his article entitled "The Myth of Factual Innocence" in the *Kent Law Review*. He explained convincingly that if we don't know how many defendants are *rightfully* convicted, it is difficult to assess the magnitude of the problem of *wrongful* conviction. Hoffman concedes that the Innocence Project has identified hundreds of people that were wrongfully convicted during the last twenty years, but also estimates that more than forty million felony cases were filed during that same time frame.

The fact of the matter is that wrongfully convicted people are not identified by random sampling of the prison population. They emerge through targeted research, information sharing, and other channels of communication that are available to persons who are committed to proving their innocence - and to organizations like the Innocence Project who are trying admirably to find them. While we agree that these channels of communication are important and could likely be

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improved, it is very dangerous to misinterpret their statistical significance without comprehensive research overseen by competent experts in statistical analysis.

The Innocence Project would never tolerate forensic scientists issuing analytical conclusions based on strong feelings, anecdotal evidence, and heartfelt emotions - nor should they. Therefore, in the absence of appropriate research, no one should tolerate our criminal justice system being diagnosed with terminal diseases it might not actually have.

Given this apparent absence of a reliable statistical expression of wrongful-conviction frequency in the United States, the Senate Judiciary Committee should take notice of the fact that the National Institute of Justice, directed by Dr. Morgan, was mandated to enforce a certification (external investigations) in the Coverdell grant that had no basis for even existing. If NIJ can be blamed for not appropriately enforcing an unreasonable and awkward requirement, who is to blame for creating it in the first place?

Innocence Politics. It is clearly a force to be reckoned with and is spreading rapidly. For inmates trying to prove their innocence, this is a promising trend. But for those who are justifiably frustrated with the acidity and one-sidedness of innocence politics in the public policy arena, it's fair to ask tough questions and demand accurate answers.

Crime Lab Report would like to see representatives of the Innocence Project work collaboratively with the forensic science community and discontinue its unfair and unjustified attempts to micromanage a profession with a long track-record for progress and innovation.

Furthermore, until the Innocence Project or any other policy advocates can present statistically sound evidence that forensic-science misconduct and incompetence are frequent and pervasive problems in our justice system, it would be wise to dispense with public comments that embitter honest forensic science leaders who might just have some constructive ideas to put on the table.

Alternatively, the Innocence Project can simply risk its own credibility by appearing to be more motivated by outrage over isolated instances instead of a defensible statistical model that actually justifies their policy recommendations.

Crime Lab Report certainly understands that there are serious problems in a few forensic-science laboratories and crime-scene units, just as there are serious problems with some police officers, lawyers, and judges. If we agree that these problems warrant institutional reforms, then we recommend that the efforts of innocence-advocates and elected officials be directed towards the development of more effective *pre*-conviction quality-control measures.

After all, most organizations that produce critical products and services employ strict mechanisms to prevent catastrophic failures that are likely to bring harm to consumers. Criminal trials should be no exception. As *Crime Lab Report* explained on June 1, 2007, "all professions have bad apples in the barrel, but it brings little comfort to know that [post-conviction remedies are] in place to investigate bad evidence after it's already ruined someone's life."

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Despite their political posturing, *Crime Lab Report* sympathizes with Peter Neufeld and the Innocence Project in a fundamental and very human way. We choose to believe that they are good people trying to do good things. We can only imagine how heart-wrenching and exhausting it must be to witness even one horror inflicted upon an innocent person by an imperfect criminal justice system.

At the same time, we also acknowledge the pressure and volume of work being managed by Dr. John Morgan and his staff at the National Institute of Justice. They are trying their best to support the forensic sciences during a time when the demand for crime laboratory services far outweighs the resources made available to help get the job done.

In the end, the real answer to all of these problems is reducing crime so that our justice system is not overworked. *Crime Lab Report* is not smart enough to figure out why our citizens and their elected officials continue to tolerate such high levels of crime and social decay. But we *are* smart enough to know that when you subject a 100-horsepower engine to a 500-horsepower workload it will quickly burn out.

Our criminal justice system is burning out. Wrongful convictions may be the most compelling - but necessarily the most frequent - evidence of that. This is a bad time to mistake the symptom for the disease.

We hope the members of the Senate Judiciary Committee keep this in mind.

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