

Genetic Justice

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An interview with Professor Rothstein can be heard at www.nejm.org.

On December 21, 2004, Brandon Moon was released from prison in El Paso, Texas, after having served 16 years of a 75-year sentence for three counts of aggravated sexual assault. Moon, who was 43 years of age at the time of his release, had been convicted in 1988 on the testimony of the three victims, who had had only a fleeting or partial view of their assailant. In 2004, after undergoing DNA testing, Moon was excluded as the contributor of the DNA collected after all three rapes. As a result, Moon became the 154th person in the United States to be exonerated on the basis of DNA evidence that came to light after the person was convicted for a crime.¹

The Innocence Project, founded in 1992 by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law in New York, pioneered the use of forensic DNA testing to provide scientific evidence of guilt or innocence after conviction. As described by Gill in another Perspective article in this issue of the *Journal* (pages 2669–2671), the technology has improved in the past decade, but the basic purpose of forensic DNA testing has not changed. The success of the Innocence Project led to the establishment of similar projects throughout the country, staffed by lawyers and law students working pro bono. Other persons and similar organizations not affiliated with the Innocence Project also use DNA evidence to free wrongfully convicted prisoners.

Cases such as Brandon Moon's elicit mixed emotions. One cannot help feeling sadness at the miscarriage of justice that resulted in the incarceration of an innocent man for 16 years while the perpetrator escaped justice. Furthermore, the passage of time makes the discovery and conviction of the per-

petrator unlikely, given the cold trail of evidence and the statute of limitations. Nevertheless, one feels relief that at least some degree of justice has finally been achieved, admiration for the volunteer and public-interest lawyers who worked long hours—in some instances years—to free a wrongfully convicted client, and appreciation of the forensic DNA technology, which can provide compelling new evidence that may cast doubt on past convictions.

The phenomenon of postconviction exonerations based on DNA evidence must be put into perspective. At the end of 2003, more than 2 million people were incarcerated in the United States, and of those convicted, those exonerated during the past decade make up a tiny percentage of the total inmate population. Nonetheless, the exonerations raise three fundamental questions about the U.S. criminal justice system.

First, do these cases of wrongful conviction represent the tip of the iceberg, indicating the existence of deeper structural problems in the criminal justice system? As a study by Gross et al. revealed,² most of the exonerations that have occurred since 1989 involved faulty eyewitness testimony, as in the case of Brandon Moon, coerced or false confessions, or perjurious testimony by prison inmates. Other cases involved poor crime-scene processing or poor evaluation of evidence by forensic laboratory workers, ineffective defense counsel, or even police and prosecutorial misconduct. Studies of errors in these cases often indicate the presence of systemic problems in forensics, law enforcement, or the criminal courts.³ For example, officials in several states ordered the review of hundreds of convictions after they determined that state and local crime laboratories might have made numerous errors in handling and testing evidence or, worse, might have deliberately falsified the results or interpretations of forensic testing.

Second, aside from those already exonerated, how many other innocent people have been convict-

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ed of serious crimes and have served, or are now serving, long prison sentences or are facing execution in one of the 38 states that permit capital punishment? Although there may not always be crime-scene evidence available for DNA testing, new federal legislation should make DNA testing more widely available to those who have been convicted. On October 30, 2004, President George W. Bush signed the Justice for All Act of 2004, which grants any inmate convicted of a federal crime the right to petition a federal court for DNA testing to support a claim of innocence. The law provides funding to the states to preserve evidence and to make DNA testing available to those who have been convicted by the state as well. It also increases the financial compensation of wrongfully convicted federal prisoners. Under Texas law, Brandon Moon is eligible for up to \$25,000 for each year he was wrongfully imprisoned. Many states, however, have no provision for compensation.

Third, what is the proper role of DNA evidence in criminal investigations? DNA has the power not only to exculpate but also to inculpate. Forensic DNA analysis was first used in the United Kingdom in 1985 to solve two related sexual homicides. The use of such evidence soon became internationally accepted as a method for linking suspects with crime-scene evidence. In 1990, the Federal Bureau of Investigation established a series of federal–state forensic DNA data banks, called the Combined DNA Index System, or CODIS. In every state, certain convicted felons are required to submit a sample of DNA to be typed and the profile entered into a computerized data bank. Law-enforcement officials can then compare the DNA profiles obtained from evidence from a crime scene with all the DNA profiles in the local, state, or national system.

The power of DNA analysis in the investigation of crimes has led many law-enforcement officials to use DNA profiling in increasingly aggressive and controversial ways. One example is the DNA “dragnet,” which typically involves a request by police that all men in an area where a sex crime has been committed “voluntarily” submit a sample of their DNA. Although such dragnets have had only limited success in helping to solve crimes, they have caused concern about the infringement of civil liberties. Critics argue that it is unfair to regard as suspects all men who decline to submit a sample and that the DNA profiles of those who volunteer to submit a sample should not be entered into the state DNA data bank.

Another controversial practice is the expansion of the scope of the DNA data banks. Many states have extended the requirement of submission of DNA by convicted felons to submission of samples by convicted misdemeanants, four states authorize the collection of samples from persons when they are arrested, and some forensic experts have proposed the collection of DNA from everyone in the country. These practices and proposals raise the question of whether the benefits to law enforcement of expanding the use of forensic DNA testing are worth the cost in civil liberties.⁴ Meanwhile, the exonerations continue to occur at a disquieting pace.

1. Innocence Project: Brandon Moon. (Accessed June 9, 2005, at http://www.innocenceproject.org/case/display_profile.php?id=155.)

2. Gross SR, Jacoby K, Matheson DJ, Montgomery N, Patil S. Exonerations in the United States, 1989 through 2003. (Accessed June 9, 2005, at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-US.pdf>.)

3. Bieber FR, Lazer D. Lessons learned from a miscarriage of justice. *Boston Globe*. April 12, 2003.

4. Rothstein MA, Carnahan S. Legal and policy issues in expanding the scope of law enforcement DNA data banks. *Brooklyn Law Rev* 2001;67:127-78.

