

# The Wisconsin Innocence Project

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UW-Madison Law School Professor John Pray, cofounder of the Wisconsin Innocence Project.

## INTRODUCTION

*Actual Innocence; Five Days to Execution, and Other Dispatches From the Wrongly Convicted*, is the title of a recently published book. The authors are defense attorneys Barry Scheck and Peter Neufeld. They spoke in Madison, Wisconsin on March 1, 2000, at an early stop on their book tour. Their tour not only promotes the book, cowritten with Pulitzer Prize winning author Jim Dwyer, but also promotes The Innocence Project and its cause of exonerating the wrongly convicted. The Innocence Project was created by Scheck and Neufeld at the Cardozo Law School in New York in 1992. Since then, approximately 70 persons have been exonerated, many of them while on death row and some within days of execution. The majority of these exonerations were Innocence Project cases.

Wisconsin was one of the first stops on the book tour, as the UW-Madison Law School's Frank Remington Center has housed the Wisconsin Innocence Project, under the direction of Professors John Pray and Keith Findley, for nearly two years. In addition, author Peter Neufeld has ties to the University of Wisconsin as a graduate, class of 1972.

The UW Law School's Frank Remington Center has, for nearly 30 years, assisted Wisconsin prisoners via the LAIP (Legalized Assistance for Institutionalized Persons) program. Through this program law students provide legal assistance to convicted persons. Professor John Pray sees the Wisconsin Innocence Project as a good fit for the Law School, with its long history of assistance to those in prison.

However, The Innocence Project goes far beyond providing legal assistance; it holds the hope of exoneration for those wrongly convicted. Recently John Pray talked about the Wisconsin Innocence Project and how modern science in the form of DNA testing may not only result in exonerations but may also spark reforms throughout the criminal justice system.

## THE WISCONSIN INNOCENCE PROJECT

John Pray's office is quite new and relatively uncluttered, if you ignore boxes of files stacked in several places. Pray points to the boxes apologetically, explaining that some are from Cardozo Law School in Manhattan — and that they contain files for Innocence Project cases, which have been sent for the Wisconsin Innocence Project students to work on. Obviously Cardozo cannot handle the number of cases arriving from around the United States on its own. The Wisconsin Innocence Project handles primarily Wisconsin cases. Pray estimates that 95% of the cases involve Wisconsin inmates, although his students are currently working on cases from Michigan and Minnesota as well.

The Wisconsin Innocence Project involves UW Law School students, who volunteer for the project as part of their curriculum. Begun in the fall of 1998, 10 students have been accepted into the program per year. Their assignments include coursework and cases. Pray says that interest in the program has recently doubled; 20 students have enrolled for fall 2000. Why this increase in interest; the fact that project originators Neufeld and Scheck spoke on campus recently or the publication of their book *Actual Innocence*? Perhaps an increase in philanthropy? Whatever the reasons, new students mean that more cases can be examined.

The job of the law students is to meet with the defendants and examine evidence surrounding the case, determining if there is new evidence in the form of additional information or testimony, or evidence on which new scientific tests (such as DNA typing) can be performed. The

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students also interview new witnesses to determine what potential there is for a reversal or a new trial. As Professor Pray puts it, although our legal system deems the accused innocent until proven guilty, “Once convicted the burden is on the defendant to prove innocence.” Only serious crimes, such as sexual assault and murder, are considered as potential cases. Pray notes that it can take years to reach an exoneration.

Innocence Project cases involving samples that may be used for DNA evidence are given a high priority, as improvements in DNA testing technology provide ever more sensitive tests and thus a powerful and definitive source of proof of innocence.

### DNA TESTING – CHANGING THE FACE OF CONVICTIONS

DNA testing, conducted by the Innocence Project and others, has led to the exoneration of more than 70 individuals in recent years. It is likely that this number will grow as newer, more sensitive DNA testing methods are developed. During their talk in Madison, Barry Scheck and Peter Neufeld pointed out the power of DNA testing to determine identity, allowing wrongly convicted persons to be freed, and sometimes also identifying the true perpetrator. But even more powerful are the lessons learned from studying convictions overturned by DNA evidence. Because the Innocence Project involves not just the introduction of new evidence, but also examines existing evidence, and how it was collected and presented at trial, it has been possible to look back and determine that some forms of evidence commonly used may not be accurate. When DNA testing can be done and is used to exonerate a convicted person, the original trial is also examined to determine what led to the wrong conviction.

These cases tend to share certain characteristics, including testimony from jailhouse informants, eyewitness testimony and coerced confession. Pray explains that jailhouse informants are usually those imprisoned with the defendant, who later testify that the defendant gave details of the crime, bragged of committing the crime or confessed to the crime. Pray and authors Scheck and Neufeld believe that the problem with this sort of testimony is that informants have a propensity

to lie, especially when there is reward money involved, or when they are seeking a reduction in their own sentence and wish to gain favor with the district attorney or judge.

Eyewitness testimony, considered by many to be the gold standard in prosecutorial testimony, has been shown in numerous demonstrations to be, at best, inaccurate. Professor Pray has done his own study on eyewitness accuracy each of the past two years. During a normal classroom lecture a man dashes into Pray’s classroom, grabs his

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briefcase and runs. Pray immediately halts class and within 20 minutes of the incident, has the 50 students write down estimates of the height and weight of the “thief”. In addition, Pray presents photos of 5–8 persons in a mock “line-up”. He notes “Only about 30 percent of the students can correctly identify the man twenty minutes after witnessing the event. In the case of a trial eyewitnesses may be called days, weeks, even years after the event to identify the defendant.” Perhaps Pray says it best: “Eyewitness testimony is not rock solid”. He notes that studies have shown that fear and stress associated with a traumatic event can block the ability to recall details. In one Wisconsin Innocence Project case, it was two years before the eyewitness saw a line-up of suspects, yet this identification was the primary evidence used to convict a man of attempted murder.

A confession, according to Professor Pray, sometimes is merely the arresting officer’s interpretation of something the defendant said. A police officer’s testimony naturally carries a lot of weight in court. Pray asserts that videotape would be a more reliable means of documenting confessions.

Pointing to these potential flaws in evidence gathering, Professors Scheck, Neufeld and Pray have all spoken before the Wisconsin legislature this year in an

attempt to enact new laws. Pray notes, “Legislation is needed on many fronts.” They are working to pass legislation in Wisconsin requiring the videotaping of confessions. In addition, Pray pointed out that in Wisconsin there are no laws requiring preservation of evidence at this time; each county deals with evidence differently. Without a requirement for evidence preservation, materials can be destroyed upon conviction, preventing the possibility of post-conviction DNA testing. The goal is to enact a law stating that DNA evidence cannot be destroyed without first giving notice to the defendant. This law was nearly passed this year; Pray is confident that the measure will be taken up in the next session.

Additionally, legislation is needed to allow post-conviction DNA testing. Currently only two states authorize such testing — New York and Illinois. Pray commented that such legislation should be simple to pass; it is politically popular and everyone seems to feel that it is needed. And Pray noted that it “is no accident that the two states that have laws requiring preservation have had the most reversals”.

Professor Pray noted that in just the past few months Northwestern journalism students won a reversal for a man on death row and Illinois Governor Ryan announced a moratorium on executions in that state. Statistics now show that only 60% of Americans approve of capital punishment, down from 70% a year ago. Could it be that DNA testing, the most definitive form of evidence from the crime scene at this time, has the power not only to free the innocent and convict the guilty, but to also teach how to best distinguish between the two? DNA evidence is not always available in criminal cases, but it may eventually influence the outcome of all trials by forcing changes in how all forms of evidence are gathered and used. In this manner, DNA testing will have an affect on Wisconsin Innocence Project cases, and perhaps, eventually, all criminal trials.