

JUNE 27, 2009

DNA and Innocence

By Patricia Williams

Johnnie Earl Lindsey spent twenty-six years in prison for a rape he did not commit. He was convicted based on the victim's misidentification of him from a photograph shown to her a year after the crime occurred. The jury found her perception more credible than the word of Lindsey's supervisor, who had testified that Lindsey had been at work at the time of the assault. Today's extremely precise technologies for analyzing DNA were not dreamed of two decades ago, when Lindsey was arrested and tried. By ordinary measures, therefore, he had had his day in court. The victim asserted his guilt; he asserted his innocence; a jury of their peers believed that her story was true beyond any reasonable doubt. As a formal matter, the conviction withstands the requirements of due process, no reason to look back.

Luckily, Johnnie Earl Lindsey's case fell within the jurisdiction of Dallas County District Attorney Craig Watkins. Watkins, who in 2008 became Dallas's first black district attorney, inaugurated a unit within his office in conjunction with the Innocence Project of Texas to re-examine the forensic material in closed cases using improved methods of DNA analysis. The results have been nothing short of stunning: of forty cases reviewed, almost half have ended with complete exoneration of the men originally convicted—nineteen men who lost an average of twenty years each while wrongly imprisoned.

Nationwide, the Innocence Project has facilitated 240 post-conviction exonerations, seventeen of which were of death row inmates. Perhaps the most famous reversal was that of the young men so noisily and ultimately wrongly convicted in the Central Park Jogger case. But outside Dallas County, most of these successes have been the result of individual convicts mounting numerous appeals to have the evidence against them reopened. Craig Watkins's program in Dallas suggests that the overall numbers would be even more staggeringly high if prosecutors in all states took it upon themselves to test available DNA samples from old or suspect cases.

Indeed, in recognition of the probative value of this new technology, all states now admit DNA testing at trial; and all but three states honor requests for some form of post-conviction testing. If the end of our justice system is the protection of all of us through the restraint and detention of actually dangerous people, then the potential accuracy of DNA testing is an opportunity to be embraced and enlarged.

But last week, in the case of *District Attorney's Office for the Third Judicial District v. Osborne*, the US Supreme Court's conservative majority marched stolidly backward in time, ruling that there is no constitutional right to post-conviction analysis of DNA samples. The facts of the case unfolded in Alaska, one of those three states where post-conviction DNA testing remains a matter of prosecutorial and judicial discretion. In 1993, one William Osborne was convicted of kidnapping and sexually assaulting a prostitute on the outskirts of Anchorage. The victim identified Osborne "with some uncertainty," from a photograph and again at trial. The condom used in the rape was found at the scene, but was not tested for a match using the most precise DNA technology of the time. Osborne maintains that he requested that it be so tested and that the results be presented at trial; but apparently his defense counsel believed he was guilty and thought it better not to conduct such a test as a tactical matter. So no such request was presented to the trial court.

The condom was preserved, however, and is still in the possession of the district attorney's office. Osborne, now having served nearly sixteen years, sued to have the semen in the condom analyzed at his own expense. On June 18, 2009, however, the Supreme Court of the United States held that he had no right to a new test—or as Justice Alito's concurrence bluntly expressed it, no "right to rummage through the State's genetic-evidence locker."

How can this be? To most lay people, the merits of permitting such testing seem clear. To understand the Supreme Court's reasoning requires some understanding of how much the Roberts-led majority adheres to formal devices and cost-benefit analysis, even if the results remain substantively suspect. First of all, it must be acknowledged that statistics regarding DNA exoneration represent a profound challenge to the legitimacy of our entire criminal justice system. If nearly 50 percent of convictions are shown to be in error—in one jurisdiction alone—then why wouldn't a coin-toss be better than the expense of the trial process? I daresay most of us would agree that this mockery of the Constitution's most cherished liberty interest urgently requires a top-to-bottom examination of the entire system—as a constitutional matter in the courts, but also requiring political and legislative evaluation of police investigative techniques, the adequacy of defense counsel, the ethics of prosecutors, the notoriously inaccurate and suggestible recollections of stressed eyewitnesses, and the relative carelessness in handling forensic material, to say nothing of the prejudicial influence of tabloid media upon juries.

In the face of such a rapidly unfolding landscape, the Roberts opinion responds by passing on any constitutional oversight of this quintessentially juridical quandary. Instead, the majority posits its expressed preference for letting the "elected governments of the States...[confront] the challenges

DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords.”

Noam Biale, a writer with the ACLU’s program on technology and liberty, worries that this language effectively buries any chance of a coherent response to the problem: “While couched in a reluctance to ‘short-circuit what looks to be a prompt and considered legislative response to new technology, the disparate impact this will have on criminal defendants is well illustrated by the Alabama Legislature’s recent passage of a bill that severely restricts access to dna testing for individuals convicted of capital offenses.” (Yet even as the law would restrict access for those whose fates are most in the balance, the bill also mandates the state’s DNA collection from anyone, including juveniles, arrested for a felony, thus increasing and hoarding the inaccessible stock of the state’s impenetrable “genetic evidence locker.”)

Secondly, reopening old cases is normally predicated on “new evidence.” Although it might seem a technicality to some, improved technological means of interpreting long-stored samples of semen or blood do not literally make those samples “new evidence.” Still, one may wonder why we shouldn’t simply concede that extracting new information from old data amounts more or less the same thing. But retrospectivity of any sort is not easily embraced by our justice system, double jeopardy being the least of it. The rule permitting re-examination of “new evidence” is accompanied by a very high standard for showing materiality, and generally assumes the rarity of such *post hoc* discovery. DNA analysis, by contrast, conceivably opens the door to re-examining hundreds of thousands of cases. And the Roberts opinion explicitly shies away from the “costs” associated with constitutionalizing DNA access on a broad scale: “We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested.... If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?” The majority opinion dismisses such concerns as policy issues that courts should not be deciding. And Alito’s concurrence laments the economic costs of DNA analysis even more specifically, citing the “severe backlogs in state crime labs across the country.” But even the substance of this latter point is contentious: while there may be backlogs in many generally underfunded forensic labs, that stress has little to do with post-conviction dna requests. Stephen Saloom, policy director for the Innocence Project, points out that forty-seven states have such laws with little indication of “floods of litigation’ or inappropriate costs related thereto. Therefore, Alito’s concern would seem to be a red herring.

Fourthly, the Roberts court expresses both naïveté and alarming cynicism about the proper function of both defense counsel and prosecutors. The ethical responsibility of a prosecutor is not only to prove the guilt of a defendant beyond a reasonable doubt, it is also to provide access to materially

exculpatory evidence at any stage. In the Osborne case, the victim claimed that only one man raped her. If Osborne's DNA were ruled out as that in the condom, it would be pretty definitively and materially exculpatory. But it is hard to extract that responsibility from Alito's image of an ironclad "locker" of genetic property presumptively belonging to the State of Alaska and Alaska alone, figured as though it must be guarded from the random "rummaging" of convicts who just want to "play games" with the system. "The procedures that the state labs use to handle these hundreds of thousands of DNA samples provide fertile ground for litigation," Alito complains.

Similarly, the role of a defense attorney is not only to put the prosecution to its burden of proof but also to be a responsible spokesperson or "mouthpiece" for the wishes of the defendant. In this case, Osborne's attorney made a tactical decision not to request a DNA analysis at the time of trial, despite Osborne's contention that he requested the same. The attorney's failure to make a request on the record at the time of trial is held against Osborne in his seeking the test post-conviction. In a footnote, Roberts passes over the problem as follows: "Given the reasonableness of trial counsel's judgment, the state court held that respondent's protestations (whether or not he made them) were irrelevant." Justice Alito seems even less inclined to respect counsel's responsibility to zealously represent the interests of her client, implying that resources are just plain wasted when "no detail of laboratory operation, no matter how minute, is exempt as a potential point on which a defense attorney will question the DNA evidence."

We are undeniably in the midst of a scientific revolution. DNA, properly handled, allows us to collapse time, to peek into the past with more accuracy than virtually any other tool. By the same token, improperly handled, corrupted DNA samples have singular power to implicate the innocent. For example, European police spent years trying to track down a mysterious female "serial killer" whose DNA showed up at murder scenes across France, Spain and Switzerland. None of the crimes seemed related but for the presence of the mystery woman's genetic print. Finally, it was discovered that the DNA belonged to a sloppy German assistant who worked in the lab where police sampling kits were produced.

For another example of the risks of misreading what DNA can tell us, one need do no more than return to the Osborne case. Justice Roberts refers to the fact that at the time of Osborne's trial—some sixteen years ago, when testing was much more primitive than now—the state of Alaska performed "DQ Alpha" testing, an older, "relatively inexact" form of DNA test. Not only has this earlier test since been supplanted by the indisputedly more accurate "STR" test that Osborne is presently seeking, but DQ Alpha was not nearly as discriminating as the then-available so-called "RFLP" test that Osborne had asked his attorney to seek. Osborne also sought mitochondrial DNA testing of pubic hairs found

at the scene, mitochondrial data being far more accurate than the visual examination to which the state's expert witness subjected the hairs.

Yet Justice Roberts refers to the results of that outdated DQ Alpha test as though it were dispositive: "The semen found on the condom had a genotype that matched a blood sample taken from Osborne, but not ones from Jackson, K. G., or a third suspect named James Hunter. Osborne is black (as were all the suspects), and approximately 16% of black individuals have such a genotype. In other words, the testing ruled out Jackson and Hunter as possible sources of the semen, and also ruled out over 80% of other black individuals. The State also examined some pubic hairs found at the scene of the crime, which were not susceptible to DQ Alpha testing, but which state witnesses attested to be similar to Osborne's."

Worst of all, however, is the opinion's casual implication that DNA can reveal "race." DNA can reveal direct family relationship; it can reveal broad migratory patterns in human history. What it cannot do is reveal race; race is an incoherent social construct defined by malleable, ever-changing social and cultural perceptions rather than by biological phenomena. Furthermore, the data cited by the court assumes a neat biological distinction between "black" and "non-black." In other words, using racial taxonomies to read DNA results ignores the reality that—particularly in the miscegenous melting pot of the United States—many people who look, and even identify themselves as, "white" or "Hispanic" or "Asian" could also have a recent West African ancestor. What's missing from the primitive interpretations to which Roberts refers is any analysis of how "black" was defined; or how large the sample set was from which such a statistic was drawn; or what the frequency of that genotype might be in so-called "white" or other socially defined ethnic groups. Indeed, the use of racial category in this particular kind of DNA analysis has been rejected as unscientific time and again by the National Institutes of Health's consideration of the ethical, legal and social implications of the Human Genome Project; as well as in refereed journals like *Science*, the magazine of the American Association for the Advancement of Science.

In sum, the importance of this new technology begs for unprecedented investment in the upgrading of labs, in maintaining the security of collection methods and in the integrity of its interpretation. The truth that DNA evidence offers us should also give us pause about other, non-forensic failings of justice. Johnnie Earl Lindsey, for example, refused ever to waiver in maintaining his innocence. As a result, he was denied parole repeatedly. He explains that in order to make parole you have to express remorse, and remorse is considered the equivalent of a confession. Unlike Lindsey, Osborne did confess—in order, he says, to be granted parole. That confession is one reason Alaska has refused to permit him access to the condom. Similarly, many of the people subsequently exonerated by DNA had confessed to crimes they didn't commit, almost always in return for the promise of a more

lenient sentence, as with the Central Park Jogger defendants, or in order to be eligible for parole. The lesson we must take from this is that the methods by which police, prison guards and parole boards extract confessions must also be thoroughly scrutinized.

For those interested in supporting these and other efforts at reform, you may donate to the Innocence Project by visiting its website. It also sponsors local projects all over the country, for which volunteer opportunities abound. (See the section on the website titled "What Can I Do?") For more information about Dallas District Attorney Craig Watkins, you can go to the website of the Discovery Channel's series chronicling of that office's work, "Dallas DNA."

For some lucid summaries about the misuse of racial category in DNA analysis, a good place to start would be "Race and Reification in Science," in the February 2005 volume of *Science* magazine, written by Troy Duster, director of NYU's Institute for the History of the Production of Knowledge; or medical anthropologist Duana Fullwiley's article, "The Biological Construction of Race: 'Admixture' Technology and the New Genetic Medicine," in volume 38 of the journal *Social Studies of Science*, 2008. See also, "Among Many Peoples, Little Genomic Diversity," in the June 22, 2009, edition of the *Washington Post*. And for the more scientifically inclined, see "The Role of Geography in Human Adaptation," by Coop, Pickrell, et al., in volume 5 of *PLoS Genetics*, June, 2009. And the forthcoming (July/August) issue of *Genewatch*, the magazine of the Council for Responsible Genetics, will devote its entire issue to "Genetics And Race: Past Abuses, Present Prospects And Future Solutions."

Finally, the bittersweet, nearly ignored after-life of the young men accused in the Central Park Jogger case will be the subject of a book and a PBS series by Ken Burns and his daughter Sarah Burns, probably out sometime next year.