

INTERVIEW

Janet Reno on Wrongful Conviction

JANET RENO *
WITH
BRUCE MACFARLANE **

MACFARLANE: What, in your view, are the principal causes of wrongful conviction, and what should we be doing about them?

RENO: One of the clear causes of wrongful convictions are flawed eyewitness identifications, and we should be doing everything we can to have lawyers work with the behavioural scientists to follow up on the recommendations made as a result of the National Institute of Justice study in [the United States] that made recommendations as to how lineups could be conducted that would ensure greater accuracy. I don't see us rejecting eyewitness identification or eyewitness testimony totally, and I think that means that we have got to do everything we can to promote the most accurate forms and concepts possible.

Another cause of wrongful convictions are flawed confessions and flawed interrogations that lead to inaccurate confessions. I think videotaping the confession and the interrogation has had a very salutary effect on the process and I think that is one of the keys. I think we should understand how deceptions are used in the process now of interrogation, and come to conclusions as to whether this can be justified. I don't think it can.

Then we see one of the major problems, I think, that leads to wrongful conviction is the tunnel vision that develops on the part of the investigators and the prosecutors. They get a case that may involve, for example, an eyewitness identification and a confession and they think they have a strong case, and they pursue the case as vigorously as possible. When they receive exculpatory infor-

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** Mr. MacFarlane's article on wrongful conviction, "Convicting the Innocent: A Triple Failure of the Justice System", appears in this issue of the *Man. L.J.* at 403.

mation, they don't really pursue it. Some of these cases lead to saying—not all prosecutors, but there is a tendency to say and to rationalize and to explain away the information, the clues that are in conflict with the judgment initially made at the time of the charging. I think we can do a great deal to develop a process whereby a prosecutor would have to respond to the court with a checklist before going to trial or accepting a plea, a checklist that identified all the suspects, identified any inconsistency, identified all the exculpatory information and clues that might be followed. If we can automate this so that it is presented to the court through an automated system, I think it can have a very good effect on the process of charging, of making sure that the prosecutor is aware of all the information, all the data, all the witnesses. The prosecutor will know that this representation has been made to the court and that he will have to answer as to why something wasn't followed up in the course of the investigation.

Those are some of the causes of wrongful conviction that I think we can have a real impact on.

MACFARLANE: Despite the reality that wrongful convictions do occur from time to time, some prosecutors in the United States continue to oppose the post-conviction release of exhibits or DNA testing. Are they still in a state of denial, or are there other forces at play that prompt these positions by the prosecutors?

RENO: I think they are coming to recognize more and more clearly, with the help of some prosecutors who are plowing new ground, that it is in the best interest of everyone to say, "Let's look at it." No one wants to see an innocent man convicted, and if an innocent man is convicted that means that a guilty person may be walking the streets continuing to commit the same type of crime. What I think is essential is that DNA gave us such a wonderful tool that has a solid basis in science, and we can, thanks to the work that was done leading up into the late 1980s, with this work we can conclusively determine that somebody is innocent. I think we've got to set those cases out and understand that this is not a matter of judgment, this is not a matter of a hard-nosed prosecutor refusing to give in to those that are trying to undermine the criminal justice system by being soft on crime. This is the prosecutor who has got to face the fact that this DNA test was conclusive, conclusive as to the fact that he did not commit the crime. Now, in the studies that have been done, there are also cases where the DNA test puts a big question mark on the case but does not conclusively prove innocence. As a consequence, a lot of prosecutors tend to say that you have just a few cases in which you're actually proving innocence; in these other cases, you just can't prove it, we can't charge it. My hope is that we can develop an ability in this country, through an institute that I have suggested, that would permit us to analyze clearly what's happened in the case and to take first the cases of exoneration, where evidence is in that clearly proves innocence, and to find out the exact details of the crime and what was done in the

course of the investigation, and then see what we can learn from those cases where there is clear innocence and no one can object to it, and use those cases as the foundation for developing the reforms that I think can go a long way towards preventing wrongful conviction.

MACFARLANE: In Canada, the public is often outraged when it has been shown that a wrongful conviction occurred. However, in some corners, people are more quietly expressing concern that we are paying too much attention to the very few miscarriages of justice when we should be concerned about criminals who “beat the system” or get off on a technicality—they are more concerned about wrongful acquittals. What is your sense of the situation in the United States, and what are your own views?

RENO: Well I think that is what I’ve been talking about, that people are saying if you find a case that is not a clear case of exoneration, they’ll say you’re just getting him off on a technicality. What we’re trying to do is use the DNA which, if it tests out so that it’s shown that this person absolutely could not have committed the crime consistent with the DNA that was found, is that case the same. Look, let us learn from this case, and see what we can do to avoid this in the future, to correct laboratory procedures, to audit lab procedures that have contributed to this miscarriage of justice. What I find from talking to people in this country is when they understand that what we’re trying to do is show that there is somebody else that committed that crime, and he’s walking the streets, and he may be continuing to commit crimes, let’s take the cases that we have identified to date (and there are still many to be reviewed in the States), but let us take these cases and show just why the wrongful conviction took place and then take steps to prevent it for the future.

MACFARLANE: The administration of criminal justice is a human process, and almost certainly the determination of guilt will forever remain in human hands. Given that reality, what assurances can attorneys general give to the public that wrongful convictions will not occur, and if they can’t provide that assurance, why should the public have any confidence in their justice system?

RENO: You can’t give 100 percent assurances that people will be convicted correctly, because we presume them innocent until proven guilty. I think it’s that double burden on the prosecutors that we have got to address, through a checklist that I described, through a system whereby the court takes a greater role in reviewing the facts of the case before it goes to trial, ensuring that the matter has been as thoroughly investigated as possible, and looking at these cases where exonerations have occurred and applying lessons learned to the case at hand to make sure that you have done everything you can to follow up on a lead, a lead that indicated there was a lady that saw what was happening, she

had blonde hair. You check, you find the piece of information about the lady with the blonde hair. Who is she? Follow up on that, and make sure that you have a system in place that can ensure a checklist has been completed before you proceed to trial. It is absolutely essential that lawyers come to grips—even those lawyers that have rejected the DNA exoneration, too few to really count—it is absolutely essential that we understand that unless we come to grips with these issues, we are not going to have a criminal justice system that people have confidence in and it will undermine our entire system of law.

MACFARLANE: There have been a number of cases where long-serving inmates shown to be innocent have been quickly released from jail, unable to cope with the outside world and made into instant millionaires. Is there a better way of handling these types of situations, and who should take the lead in handling these situations?

RENO: One of the things I think is imperative is that we develop a capacity to provide support and counselling for that person, that we have a system in place that [provides it] one step earlier in the process. In the States we do not have a uniform system for determining compensation and awarding compensation in situations like this, and I think it is imperative that the States develop the [impetus] to correctly compensate people for the mistake that was made.

MACFARLANE: Some commentators have contended that insufficient attention has been given to the role that the judiciary may play in the occurrence of a wrongful conviction. What are your views on that point?

RENO: I think the judiciary can play an important role in reviewing the case prior to it going to trial. After charges are filed, there is still a lot to be done in case preparations, and I would envision the checklist that I described being made available to the trial judge, who reviewed it in detail and determined whether there was any conflict in the process that would argue against filing charges. I can foresee, for example, the prosecutor and public defender agreeing on a process for resolving issues that were raised by the checklist analysis and the court taking action prior to trial. I think one person made a very interesting comment to me. He was an academic who said as long as judges are elected and not appointed for life, we're going to have problems with this issue.

MACFARLANE: What role should truth-seeking play in a criminal justice system? Is it an essential element of a fair trial? Has truth-seeking become undervalued in our trial process, and how do we reconcile it as a goal of the criminal justice system with the constitutional, evidentiary, and procedural protections that are intended to safeguard against convicting the innocent?

RENO: I think truth is the ultimate goal of the criminal justice system. I don't think that adherence to due process requirements, by itself, will satisfy the system. That's the reason I emphasize the fact-finding nature of what the prosecutor does, and why I stress how important it is that the prosecutor do a thorough analysis of the case before taking it to trial or giving in to a plea. There are others in this country that argue that if you have a fair trial and the defendant got due process, even if he's factually innocent, that's not something the court can correct. It was Chief Justice Rehnquist at the time, I think, who said the problem lies with the governor, that the governor should grant a pardon. I disagree. I think that truth is an essential part of the work of the criminal justice system.

MACFARLANE: Many people have noted that the executive, the courts and prosecutors are reluctant to acknowledge wrongful convictions. Why is this the case, and do we have a situation of institutional resistance that arises where the contention is made that there was a wrongful conviction?

RENO: I think that one of the reasons they do that is some of them argue that wrongful convictions have occurred and they have not relied on DNA. I'm convinced that with the conclusive nature of the DNA test we can, if we order these cases and show them to prosecutors and go over them in detail and show them what went wrong, in most instances it is not ill will or malice or bad faith that causes them to do this, it is partially a problem of lack of time and resources. When you have somebody facing the death penalty or life in prison or a substantial term of years, it is important that we do everything we can to find the truth, and I think prosecutors, if they are faced with the number of cases in which there has been clear exoneration, ought to be willing to say, "Let us learn from these cases what we can apply in other cases in which DNA will not be relevant."



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