



Episode 1,201: The Innocence Project: Helping the Wrongfully Convicted

Guest: Rebecca Brown

WOODS: What an interesting and important thing it is that you and the Innocence Project are doing. I found out about it because my friend Ben Settle on Facebook did a fundraiser for it on his birthday, which I guess is a relatively new thing. You can ask your friends that, if you really want to make me feel good on my birthday, you can donate to my cause. And that was how I found out about the Innocence Project. Can you tell me just the basic history of the organization, how long it's been around, and what was the catalyst in getting the organization started?

BROWN: Sure. So the Innocence Project was founded 25 years ago at the Benjamin Cardozo School of Law here in New York City in 1992, and it became an independent nonprofit organization in 2004. And the catalyst was really that our cofounders, Barry Scheck and Peter Neufeld, who are criminal defense lawyers, were really seeing the probative value of DNA evidence, just the power of DNA evidence and its ability to help to solve crimes. And it occurred to them that DNA evidence could also be used to prove the innocence of people who had been wrongfully convicted. So that was really the catalyst, that they really were recognizing the value of DNA and how it could be applied in a post-conviction setting to free the innocent. And since that time, the Innocence Project, along with a network of innocence organizations around the country, have freed 358 people through post-conviction DNA testing.

WOODS: Wow, that's amazing. Now, is it just DNA testing, or can it also be a case where a key witness changes testimony? I don't even know legally how that works, if you could retry in that case. How does that work?

BROWN: You can, and that's a great question. And yes, more and more cases are also being proven through non-DNA evidence, and actually, there's another registry called the National Registry of Exonerations, which tracks both DNA and non-DNA cases around the United States, and they've identified approximately 2,200 wrongful convictions that have been overturned through both DNA and non-DNA. So non-DNA, the way that works is people go back into court after their convictions, but generally are very limited in the types of claims they can make. They really can only present newly discovered evidence. And in many instances, there are time bars or time restrictions around how people can get back into court or whether they can even get back into court. So for instance, in the state of Pennsylvania currently, you have 60 days from your conviction to introduce newly discovered evidence of innocence. So we're really trying to kind of change those frameworks, those time limitations in state after state, so that innocent people who don't have the benefit of DNA can get back into court and prove their innocence.

WOODS: You must get quite a few requests from people to review their cases, so what kind of criteria do you use to decide on which cases you're going to take on?

BROWN: That's a great question. So we have a very strong intake and evaluation unit here at the Innocence Project, and they are a team of I believe 11 people who are constantly culling through mail, court documents, police reports, crime lab reports, all sorts of reports to determine whether or not a case rises to the level of being taken on by our legal team. And there are many questions that they ask. Certainly, traditionally we've only looked at cases where DNA could prove guilt or innocence. We are broadening that a bit now for the first time into non-DNA cases. Certainly, innocence organizations around the country, though, have been looking at non-DNA cases for quite some time.

But we evaluate cases on their merits as they come in, and if we feel that there is a strong claim of innocence, we either try to push for post-conviction DNA testing where DNA exists, or we have to basically reinvestigate the case where DNA does not exist to try to uncover other indicia of innocence.

WOODS: Here's what I find most interesting, are the various factors contributing to these tragic outcomes. So there are problems of eyewitness misidentification and a number of other factors. In fact, I think you even have a section of the website dealing with these. So what would you say, out of all the factors tending to lead to wrongful conviction, is the most common?

BROWN: So in the DNA cases, the single largest contributing factor wrongful conviction is eyewitness misidentification. But when you look at the non-DNA cases as well, the numbers shift a bit. But what we do know is that the common contributing factors are present across DNA and non-DNA cases. We know what they are. It's eyewitness misidentification. We know false confessions play a large role in wrongful convictions. For instance, about a quarter of the DNA-based exonerations involve someone confessing to a crime they did not commit, and these are very serious crimes. They're rapes and murders, generally, cases where DNA is available for testing. So we know that that's a huge problem.

We know that misapplied forensics is an enormous problem. Using forensic disciplines that have not been validated in a clinical setting. We don't know the error rates, but yet we have forensic analysts at times on the stand basically attesting to the probative value of a particular kind of evidence without a known error rate, but yet referring to it as a match. So there are a lot of forensic issues that plague our cases.

And the use of jailhouse informants is really creeping up as a huge contributing cause. 20% of the nation's DNA-based exonerations – I'm sorry, I think 15% – involved a jailhouse informant coming forward to say that a person confessed that they committed a crime to them. These people are inherently unreliable. They themselves are facing their own charges, and there's obviously a great incentive for them to come forward and to say that another person confessed to a different crime in order to get their charges reduced or to somehow receive some benefits, so a huge problem also in our cases.

So there are many contributing factors. There's also sort of more traditional reasons for wrongful convictions, like ineffective assistance of counsel, poor lawyering, prosecutorial misconduct. So there's a whole range of issues, and often in our cases, when you look at a case, it looks like there's piles of evidence against somebody, but it's actually more of a house

of cards when you really unpack the evidence. So if folks are interested in reading more about the causes of wrongful conviction, we encourage them to go to our website: InnocenceProject.org.

WOODS: I'd like to pursue the issue of misconduct by prosecutors. I think that would be of particular interest to my audience. I'm looking on your site, and it says:

"Common forms of misconduct by prosecutors include: withholding exculpatory evidence from defense; deliberately mishandling, mistreating, or destroying evidence; allowing witnesses they know or should know are not truthful to testify; pressuring defense witnesses not to testify; relying on fraudulent forensic experts; and making misleading arguments that overstate the probative value of testimony."

Can you elaborate on any of these? So to the naive ear, this sounds rather shocking.

BROWN: It does, and I think we really do have an enormous problem in this country relating to the disclosure of exculpatory material, meaning evidence that seems to negate the guilt of somebody not being turned over to the defense at trial. And I think that that is just a major cause of wrongful conviction. We've seen it in case after case. Here in New York State, for instance, there was a case of a man; I believe his name was Jonathan Fleming. He was convicted of a crime that took place in Brooklyn while he was down at Disneyland with his family, and there were actually hotel employees that attested to the fact that he was at the hotel, there were family photographs, there was actually even I think a record of him paying a phone bill while he was down in Florida. And all of that information was suppressed by the prosecution, not handed over to the defense, and Mr. Fleming ultimately spent more than two decades behind bars for a crime he didn't commit. And had that information been handed over, the defense would have been in a position to actually investigate the different leads in that case, so it was really just tragic.

WOODS: Is there any way to — of course obviously there's no way to really come up with an estimate, but I'm just trying to come up with an answer for somebody who asks me how common this kind of miscarriage of justice is. I mean, maybe people might say this is extremely uncommon, but these outliers still involve individual lives that are ruined, and so we need to be attentive to that. Or do you think it's more than just a series of outliers that are statistically insignificant? What does your gut instinct tell you?

BROWN: Well, my gut instinct tells me that we live in a system that's built on a series of incentives that are just baked into the system, and certainly in a prosecutor's office, you're incentivized to win a case. And so, I mean, am I arguing that all prosecutors are therefore unethical? Absolutely not. I think there are a ton of prosecutors doing their jobs and doing it well and right. But do I think that there's also sort of a cultural element of winning? Yes. A win-at-all-costs sort of notion, yes, that can happen, and I think that the best way that we can sort of protect against that is to have various systems in place to sort of almost protect us from ourselves as humans. If there's a built-in incentive to win cases, there's going to be a built-in incentive to overlook evidence that appears to be exculpatory.

I don't think all of this is intentional. I think sometimes this is based on cognitive bias or tunnel vision, meaning that a prosecutor believes they have the right guy, they're prosecuting the right guy, and new information comes in that seems to negate that in some way, and they overlook it or they underestimate its importance because they're convinced they have the

right guy. So I think all the more important that we have a discovery process, meaning a process whereby the prosecution hands information over to the defense, that is open, early, and broad, meaning that it's open to the defense, it's handed over early enough that the defense can investigate, and it's broad, meaning that there aren't assessments that are permitted by the prosecution about what is material evidence or not. It is all ultimately evidence that belongs to the people, and so it's information that both sides are entitled to put forward their best cases.

WOODS: I want to also ask you about the role of law enforcement officials, because also on your website I read that:

"Common forms of misconduct by law enforcement officials include: employing suggestion when conducting identification procedures; coercing false confessions; lying or intentionally misleading jurors about their observations; failing to turn over exculpatory evidence to prosecutors; and providing incentives to secure unreliable evidence from informants."

Again, rather a shocking list.

BROWN: Right, and again, I think that these are all things that can happen, and we don't want to suggest that this is how law enforcement conduct themselves broadly, but I do think that these are elements that we've seen in many of our cases time and again, so they certainly represent more than just an anomaly. There are times that we have seen patterns of misconduct and patterns of problems.

And I think to speak to one of the first ones that you raised, suggestion during a lineup procedure, a lot of suggestion that is provided during the course of an identification procedure is done so unintentionally. Again, this goes back to human factors. If law enforcement believes that they've zeroed in on the right suspect, they might sort of communicate in their conduct to the eyewitness information about their hope that the eyewitness will select a particular person. And sometimes that's done inadvertently. Sometimes it's done really with not intentional suggestion at all, but it's just still communicated to the eyewitness, and we've seen that play out in study after study. And so as a result, one of the reforms we call for in our policy shop is for law enforcement to use a blind administrator when they're conducting lineups, namely a person who does not know the suspect's identity so that they can't provide any sort of suggestion to the eyewitness.

And so there are different things that we can do at various points in the process that really sort of protect people from their human nature. And this would be any one of us, and I don't mean to suggest that this is only the fault of prosecutors or only the fault of law enforcement. I mean, defense lawyers, all of us are subject to all sorts of biases, cognitive bias, and various other human factors that will impact how we both investigate, prosecute, and defend cases.

WOODS: What are the means used to coerce a false confession?

BROWN: Well, sometimes it can be intentional means, like through certain deceptive interrogation methods. There are methods — well, I should rephrase that. There are methods that are used — one is a very commonly used interrogation method called the Reid method, which actually permits deception, trickery, and it's a guilt-presumptive technique. It really

assumes that the person being interviewed is guilty and you're trying to just extract that confession from them. So that's already sort of a lens that is not a helpful lens through which to get information in a non-biased way. So sometimes it's the interrogation methods themselves.

Sometimes it's the mental state of the person being interviewed. They might be exhausted. They might be addicted to nicotine or drugs and not have access to those things. There are other instances where the person is subjected to hours and hours and hours of interrogation and all they want to do is get out of the room. And I will say, when you're talking about innocent people, innocent people aren't seeking the protections that guilty people do. They don't even ask for a lawyer. They think, I'm going to just tell the truth and this will all get sorted out and then I'll be able to go home.

WOODS: Right. Yeah, that is a big problem. A lot of people just talk and talk and think that, well, there's justice in the world and surely I'll be exonerated. You gave us one example; can you give us one or two more examples of people the Innocence Project has helped? Because I've looked at some of the cases, some of the individuals, and I think that really is the most evocative kind of aspect of what you do, is, in other words, for us to get familiar with actual people whose lives were transformed by the work you guys do.

BROWN: Absolutely. Well, you asked before about DNA versus a non-DNA case. This case sort of has elements of both, and I raise it because I think it's a really interesting one. It's a case out of Virginia of a man named Keith Harward. Keith had been in the military at the time of the case. I believe that he was in the Navy. And there was a woman who had been brutally raped, and he I believe was ultimately convicted on the basis of a couple of pieces of evidence. One was a hypnotized eyewitness, who was actually not the victim of the crime, but just somebody who was I believe near him where he was stationed. And so she misidentified Keith after being hypnotized, so, you know, put that aside.

He was also convicted on the basis of bite mark evidence, which is evidence that has been basically entirely delegitimized at this point, but this is evidence that was used to convict him, that basically a bite mark left by a victim matched the dental imprint that he would have left with his teeth. And in fact, we were able to many, many years later, conduct DNA testing on the saliva that surrounded the bite mark in that case. Of course it did not match him. It was not Keith at all. Keith had spent years upon years behind bars. This was a person who served our country and basically was proven innocent based on the DNA of the saliva that surrounded the bite mark that originally convicted him.

WOODS: Wow.

BROWN: It's pretty incredible.

WOODS: That's astonishing. I mean, a person's life was ruined over that.

BROWN: Correct. And we have unbelievable — we have folks that have served upwards of 35, 40 years behind bars for crimes they didn't commit. So it really does turn people's lives absolutely upside down. It ruins lives, but it also ruins the lives of their loved ones. If you have a father stuck behind bars, that is not insignificant. That is something that you absolutely carry through with you throughout your life. So we shouldn't also forget the ripple

effects of a wrongful conviction. They really implicate everyone. They hurt everyone. They hurt the community. They hurt loved ones. They hurt law enforcement when law enforcement learns they were involved in a wrongful conviction, that's very harmful. And certainly the victim of the original crime never gets justice.

WOODS: I wonder, even though obviously the legal procedure's where your responsibility is and you wouldn't do anything like follow-up job training or anything like that, but you might still have some anecdotal evidence about what these people's lives are like now once they are suddenly released and they're back out in the world after years and years of incarceration. Do you have any kind of follow-up stories?

BROWN: We do. We have a social work department here that works with our clients once they come out and –

WOODS: Oh, okay. I actually didn't know that.

BROWN: Right, and we do have the opportunity to meet and spend time with several of our clients once they come out, and you know, there are various – it's a mixed bag. There are some people who really had incredibly strong family ties or are incredibly faith-based, and a lot of those folks tend to do better, but I will say that there is not one client who comes home that doesn't suffer minimally from post-traumatic stress disorder. I mean, the unique horror of wrongful conviction is probably everyone's worst nightmare, and so people are coming home really mentally crushed and having to kind of rebuild their lives again. And of course, don't forget they missed many years of professional development. They missed years of being able to have a family or raise children. A lot of people are robbed of the opportunity to even have children. So there are a lot of feelings of what could have been and what would have been had the wrongful conviction not happened.

So again, I don't want to suggest that everyone is doing horribly once they come home. That's not the case, and I've really been just so inspired by so many of our clients who really just have so much positivity and who really move forward in a really positive way, but you know, I would be remiss to suggest that it's a Cinderella story or a happy story on the other side. It's really – people don't have anything and they get less than folks who are leaving prison and have some services, because they're sort of in a no-man's land. They're innocent. And that's not to suggest that people shouldn't get probation or parole services once they come home, guilty or innocent, but the fact is, because our clients are really in a no-man's land, they're legally innocent, they don't really get much of anything unless a state passes a compensation law to make sure that they are compensated. And that varies widely state to state.

WOODS: Can you trace out and possibly with a timeline, which I know is variable, but the entire process from the moment I submit to you the details of my case to the moment I am either exonerated or not?

BROWN: Well, it's a good question, but it really varies widely. In many instances when people write to us, it can take years because we have a backlog of cases just to get through those cases. We're really tightening that window now, so hopefully folks are going to be hearing from us much sooner because we have more staff dedicated to that. But that can just take a long time, and when they first write to us, we often have to then go about collecting tons of records: police reports, court documents, crime lab reports, hospital records. That takes time. We are, in many instances when we believe there's a strong claim of innocence, then

going to the prosecutor in that jurisdiction and asking them to consent to post-conviction DNA testing. And if we are unsuccessful in receiving their consent, we are then engaging in protracted litigation, which can take years and years just to get a post-conviction DNA test.

So on average, our clients spend – I believe it's 14 years behind bars before they're exonerated. And those are the DNA-based cases. And the non-DNA cases are that much more difficult, because you're basically reinvestigating an entire case. You don't have a simple test that you can do that gives you answers. You have to really reconstruct the entire case.

WOODS: Right, okay. All right, I get the difference. So how are you guys funded? Is it just voluntary contributions, and is it just voluntary contributions from individuals, or are there foundations helping you out?

BROWN: Sure. So there are a few federal to state grant programs that fund both DNA and non-DNA work. Our office, the Innocence Project, does not receive them, but we do work to make sure those funding streams stay alive to fund the rest of the innocence network, namely the innocence organizations around the country that are not as large as us and really need those resources to stay afloat. So there's some government funding, but by and large, most of these projects are funded through individual donations and foundation funding, and certainly ours is entirely funded that way.

WOODS: So when you say "a network," you have a bunch of – it's not like it's run from one central office. You have places at universities, for example, in other parts of the country?

BROWN: That's exactly right. So we have almost 60 innocence organizations around the country which are their own organizations. They're not affiliates of ours. They're independently run. But we are all together part of a loose network of organizations that – we, for instance, have an annual conference together where we all get together. We have an annual policy conference where just the folks who are engaged in the policy work get together from around the country. But these are projects that are run independently and are doing their own fundraising, and so obviously we are supportive of the federal to state funding that supports their work, but generally speaking, they are raising their own money.

WOODS: Well, what you've told us so far is – I mean, I want to say it's very uplifting, but of course, at the same time, if these people's lives hadn't been ruined in the first place, you wouldn't have to uplift them. But at least somebody's out there doing this. They have a voice. There is an institutional structure in place that is able to review cases and pursue justice, and that's certainly something. That is a candle in the darkness, so to speak. So InnocenceProject.org is the website where people can find out more and where they can help out?

BROWN: That's it, and we're really grateful to listeners who want to learn more and support our work.

WOODS: Well, absolutely. I'll link to it at – this is Episode 1,201, so I'll link to that at TomWoods.com/1201, and I urge people, without a doubt, to check out InnocenceProject.org. Rebecca, thanks so much for your time today.

BROWN: Oh, thank you. We're so thankful to you all.