

## ARTICLES

### REFLECTIONS ON INNOCENCE

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#### I. INTRODUCTION—CRIMINAL JUSTICE IN THE AGE OF INNOCENCE

It appears, at least on the surface, that we are at the beginning of an exciting new period of American criminal justice, one directly related to the acknowledgment that we convict innocent people. As late as the first half of the 1990s, most people within and outside of the American criminal justice system believed that allowing too many guilty people to get off on “technicalities” was the major deficiency in the system.<sup>1</sup> Judges, including justices of the U.S. Supreme Court, blithely dismissed the possibility of innocent people being convicted in serious cases.<sup>2</sup> Unwilling to provide avenues for the presumptively guilty to obtain relief, legislators sharply curtailed the avenues available to convicted defendants to challenge their convictions.<sup>3</sup> The public clamored for

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1. See, e.g., HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 15-35 (1996) (citing cases where prosecutorial or court error has led to “guilty” defendants going free to demonstrate that legal technicalities obfuscate the truth-seeking function of the justice system); Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 170-73 (1991) (“The criminal justice system is experiencing a popular legitimization crisis exacerbated by the public perception that criminals ‘get off on technicalities.’”).

2. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993). Chief Justice William Rehnquist referenced the numerous constitutional provisions, especially in capital cases, that “have the effect of ensuring against the risk of convicting an innocent person,” *id.* at 398-99, and argued that “the guilt or innocence determination in our system of criminal justice is made ‘with the high regard for truth that befits a decision affecting the life or death of a human being,’” *id.* at 406 (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)). Justice O’Connor commented that a high degree of confidence is rightly placed in the findings of criminal trials because “the Constitution offers unparalleled protections against convicting the innocent.” *Id.* at 420 (O’Connor, J., concurring). Justice Scalia expressed doubts that an innocent defendant would nonetheless be executed given “all the process that our society has traditionally deemed adequate.” *Id.* at 428 (Scalia, J., concurring). Judge Learned Hand made similar comments in *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (“Under our criminal procedure, the accused has every advantage. . . . Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”).

3. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (2000) (creating new barriers to the writ of habeas corpus by imposing

swifter executions, sure that only the guilty would be executed.<sup>4</sup> Even defense attorneys commonly described their roles with little reference to the possible innocence of their clients.<sup>5</sup> Claiming that the possibility of convicting innocent people was totally ignored may be an oversimplification. Perhaps it is more accurate to say that wrongful convictions just were not considered enough of a problem to warrant a lot of attention.

Things have changed. With the rash of exonerations over the last decade, many indisputable because of DNA testing,<sup>6</sup> convicting the

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a one-year time limit on the filing of claims, restricting successive habeas petitions, and limiting the ability of federal judges to grant a petition); *see also* Florida Death Penalty Reform Act of 2000, 2000 Fla. Laws 4, which was struck down in *Allen v. Butterworth*, 756 So. 2d 52 (2000) on separation-of-powers grounds, and discussed in Ken Driggs, *Regulating the Five Steps to Death: A Study of Death Penalty Direct Appeals in the Florida Supreme Court, 1991-2000*, 14 ST. THOMAS L. REV. 759, 777 (2002), as creating a “dual track” system in which postconviction appellate review ran almost simultaneously with direct appeal and “limit[ing] the kinds of representation [which] court appointed post conviction counsel could [t]ake on behalf of indigent death row [clients].” For commentary on Idaho’s death penalty statute, see Paula L. Kluksdal, *The New Idaho Death Penalty Statute: Will It Reduce Appeals?*, 33 IDAHO L. REV. 259, 281-82 (1996) (discussing the 1995 amendments to Idaho Code §§ 19-2719(5) and 19-2719(11) limiting the appeals process available to defendants sentenced to death).

4. *See* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 670-71 (1999-2000) (noting the public support that occurred in the 1990s for harsher punishments and more executions); Steven V. Roberts & Ted Gest, *A Growing Cry: ‘Give Them Death’*, U.S. NEWS & WORLD REP., Mar. 26, 1990, at 24 (remarking on the political effects of a “[public] chorus demanding harsher, swifter justice”).

5. For instance, according to a former public defender and ardent defense attorney, empathy and heroism are key motivations for successful defense attorneys, but the “guilt or innocence of the client . . . [is] extraneous.” Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1250 (1993). In his novel *The Burden of Proof*, Scott Turow describes the struggles of his defense attorney protagonist, Sandy Stern, who chooses to remain a defense attorney instead of accepting a prestigious position as a U.S. Attorney. SCOTT TUROW, *THE BURDEN OF PROOF* (1990). Defense of the innocent was not something Stern saw as at the core of his role. Instead, “[h]e was Sandy Stern—a proud apologist for deviation.” *Id.* at 132. Ironically, in this novel, Stern’s primary client turns out, to the surprise of Stern and everyone else, to be innocent of the crime for which he was prosecuted. For an even more cynical view of a defense attorney’s role in a big-city-mill system of justice, see SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* (1981) (describing the role of an attorney in helping speed clients through a largely administrative system of processing defendants).

6. Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, J. CRIM. L. & CRIMINOLOGY 523, 527-28 (2005), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (charting the increase in overall exonerations, from an average of twelve per year from 1989 through 1994 to an average of forty-two per year since 2000, as well as those exonerations due to DNA, from an average of six per year from 1992 through 1995 to an average of two per year since 2000). In addition, the website of the Innocence Project, a nonprofit group based at the

innocent has become a hot topic. Print, electronic media, movies, and television shows all vie to portray the latest real or fictionalized saga of an innocent person locked up for years, maybe even on death row.<sup>7</sup> The same justices who so easily assumed in 1993 that innocent people could not be convicted now gnash their rhetorical teeth over the possibility of executing the innocent.<sup>8</sup> Death sentences have plummeted; the possible execution of the innocent is undoubtedly one of the causes for this phenomenon.<sup>9</sup> It is now beyond argument that the police arrest innocent

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Benjamin N. Cardozo School of Law that works to exonerate individuals through DNA testing, offers a database of cases in which DNA testing has been successful in overturning wrongful convictions, as well as a more general discussion about the causes of wrongful convictions and how DNA testing and other reforms can be effectively used to limit them. The Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 20, 2006).

7. See, e.g., SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE: THE UNTOLD STORY OF THE FREEING OF RUBIN "HURRICANE" CARTER* (1991); TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* (2004); Bob Herbert, Op-Ed., *Convicted, Executed, Not Guilty*, N.Y. TIMES, July 14, 2005, at A25; *American Justice: Presumed Guilty* (A&E television broadcast 2000); *THE EXONERATED* (Court TV 2005); *THE FUGITIVE* (Warner Bros. 1993); *A LESSON BEFORE DYING* (HBO NYC Prod. 1999); *Prison Break* (Fox television broadcast 2005); *THE WRONG MAN* (Warner Bros. 1956).

8. In a speech to the Minnesota Women Lawyers Association on July 2, 2001, Justice O'Connor said that "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed." *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001, at A9. Later that same year, she expressed similar concerns to the Nebraska State Bar, stating, "More often than we want to recognize, some innocent defendants have been convicted and sentenced to death." Death Penalty Information Center, *New Voices*, <http://www.deathpenaltyinfo.org/article.php?did=482&scid=16#nv-judg> (last visited Feb. 7, 2006); see also Stephen B. Bright, *The American Bar Association's Recognition of the Sacrifice of Fairness for Results: Will We Pay the Price for Justice?*, 4 GEO. J. FIGHTING POVERTY 183, 183 (1996) (describing three U.S. Supreme Court justices "all of whom voted to uphold death penalty statutes in 1976 and in the following years" and subsequently "expressed broad concerns [about] the promise of fair and consistent application of the death penalty"). Bright quotes Justice Stevens's speech to the ABA in August 1996 where he stated "'a disturbing number of persons who ha[ve] been sentenced to death were actually innocent.'" *Id.* at 183. Stevens again acknowledged the reality of wrongful convictions in *Atkins v. Virginia*, stating: "[W]e cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit." 536 U.S. 304, 320 n.25 (2002). Stevens was joined in this opinion by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer. See *id.* at 305.

9. In 2003, 144 defendants were sentenced to death, the lowest number in thirty years. DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2004: YEAR END REPORT* (2004), available at <http://www.deathpenaltyinfo.org/DPICyer04.pdf>. The Death Penalty Information Center report also noted that one of the main reasons for this drop was the fear of innocent defendants on death row: "The reasons for the attrition in death penalty use are many, but certainly the number of high-profile cases of innocent people freed from death row in recent years has had a profound effect on the system." *Id.* at 3-4.

people, the government prosecutes innocent people, and the courts convict innocent people.<sup>10</sup> Similarly, only the most naïve would suggest that all innocent people convicted of crimes manage to exonerate themselves.<sup>11</sup>

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*But see* Humphrey Taylor, *Support for Death Penalty Still Very Strong in Spite of Widespread Belief that Some Innocent People Are Convicted of Murder*, HARRIS INTERACTIVE POLL No. 41 (2001) (“Almost everyone (94%) believes that innocent people are sometimes convicted of murder. . . . But the two-thirds of the public that support the death penalty seem to feel that that is acceptable.”); Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 748 (1996) (finding that the innocence narrative has a “limited effect in persuading people that capital punishment should be abolished”).

10. *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1328-29 (2000) (pointing out that “[t]he evidence that at least a modest number of innocent defendants are arrested and charged each year [although] sparse [is] persuasive” and that the prosecution and conviction rate of these defendants is high). For example, Leipold remarks, “[A]ssuming that even a small fraction—say five percent—of the acquitted and dismissed defendants are factually innocent, the numbers are impressive: it would mean that nationwide, well over ten thousand innocent defendants are charged each year, a rate of more than two hundred people per week.” *Id.* at 1329. *See also* Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 75 (2003) (noting that even by conservative estimates, thousands of innocent people are in prison and dozens are on death row). Rosen also points out that there is persuasive evidence that at least a modest number of innocent defendants are arrested and charged each year, and that some number of those innocent defendants are prosecuted and convicted. *See id.* at 74-75.

11. Still, there have been recent examples of those who question the possibility that innocent people are convicted or executed. *See, e.g.*, Ward A. Campbell, Critique of DPIC List, [http://www.prodeathpenalty.com/DPIC.htm#\\_ftnref1](http://www.prodeathpenalty.com/DPIC.htm#_ftnref1) (arguing that the total number of innocents sentenced to death between 1973 and 2000 equals less than 0.5 percent) (last visited Mar. 26, 2006); *Inside Politics: Bush Offers Reprieve for Death Row Inmate* (CNN television broadcast June 1, 2000) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0006/01/ip.00.html>) (quoting then-presidential candidate George W. Bush as stating that, “[T]here’s no doubt in my mind that each person who has been executed in our state was guilty of the crime committed.”); Jeff Johnson, *Researchers Challenge List of Death Penalty “Innocents,”* CNSNEWS.COM, Jan. 8, 2003, <http://www.cnsnews.com/ViewNation.asp?Page=\Nation\archive\200301\ NAT20030108b.html> (citing various studies asserting that the majority of innocence claims are fraudulent). Nonetheless, there has been an increasing recognition that sometimes innocent people are convicted. *See, e.g.*, SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL CONVICTIONS* (2005). The latest story involving the likely execution of an innocent man involves Ruben Cantu, an executed Texas man. Associated Press, *Witness Clears Man Executed in Texas for 1985 Slaying*, WASHINGTONPOST.COM, Nov. 22, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/21/AR2005112101384.html>. According to recent revelations, the crime’s sole eyewitness has recanted his testimony, and Cantu’s codefendant also has admitted that he allowed his friend to be falsely accused under police pressure. *Id.* Even prosecutors are beginning to accept such a possibility. The latest example of such recognition is St. Louis District Attorney Jennifer Joyce reopening a 1981 murder investigation that led to the execution of Larry Griffin in 1995. Terry Ganey, *Case Is Reopened Ten Years After Man Was*

The participants in the criminal justice system, and those who write about this system, are just now beginning to grapple with the recently accepted acknowledgment that innocent people are convicted. So far, much of the focus has been on curing the most egregious causes of wrongful convictions—reforming pretrial identification procedures, videotaping interrogations, providing access to postconviction DNA testing, and the like.<sup>12</sup> However, there has been little discussion about the wider issues raised by wrongful convictions. What do the so-called innocence cases say about the effectiveness of the criminal procedure revolution of the 1960s, which supposedly provided “unparalleled protections” to protect criminal defendants?<sup>13</sup> Can the wrongful conviction problem be solved by the latest wave of reform? If not, what limitations, if any, does that place on how the criminal justice system operates? Given the acknowledgment that innocent people are convicted, what are the tasks for the future? What, if anything, do wrongful convictions say about our conceptions of criminal justice, about how and why we punish? It may be too early in the discourse to claim definitive answers to the problems raised by the belated recognition that innocent people are convicted, but it is clearly not too early to start the conversation.

The purpose of this Article is to help begin the discussion of these questions. Part II discusses the efficacy of the Warren Court criminal procedure reforms to prevent convicting the innocent. Part III focuses on the promises and limitations of the current spate of reforms. In Part IV, the topic is the future—not only what should be done to protect the innocent, but how the inevitable persistence of wrongful convictions should shape our thinking about the criminal justice system.

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*Executed*, ST. LOUIS POST-DISPATCH, July 12, 2005, at A1; see also Samuel R. Gross, *NAACP Legal Defense and Educational Fund Report on Larry Griffin*, STLtoday.COM, June 10, 2005, <http://www.stltoday.com/stltoday/news/special/srlinks.nsf/story/9270DD9B25C367FB8625703B007B8C70?OpenDocument> (analyzing further the innocence of Larry Griffin).

12. Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, CRIM. JUST., Winter 2005, at 18 (discussing resolutions adopted by the ABA in 2004 that were “designed to improve the justice system’s accuracy in convicting the guilty while acquitting the innocent,” including ways to improve eyewitness identification procedures and videotaping interrogations); NORTH CAROLINA ACTUAL INNOCENCE COMM’N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION (2003), available at <http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf>.

13. *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O’Connor, J., concurring; see also, Note, *Custodial Engineering: Cleaning up the Scope of Miranda Custody during Coercive Terry Stops*, 108 HARV. L. REV. 665, 674 (1995) (noting that in *Miranda*, the Court created an “unprecedented prophylactic safeguard for the Fifth Amendment”).

## II. IMPLICATIONS FROM THE PAST: THE LIMITS OF THE WARREN ERA REFORMS

In the United States, a smug confidence about the scarcity of wrongful convictions undoubtedly persisted because of the perceived effectiveness of the criminal procedure reforms initiated by the Warren-era Supreme Court. The number of exonerations in the last decade has made it clear that reliance on these reforms was misplaced. In retrospect, it is not hard to see why.

Many of the criminal procedure rules propounded by the Court—the Fourth Amendment exclusionary rule, for example—have nothing to do with protecting the innocent.<sup>14</sup> The same can be said about the Sixth Amendment restrictions on police questioning, the so-called *Massiah* rule,<sup>15</sup> and the Eighth Amendment prohibition against cruel and unusual punishment.<sup>16</sup> The rules may be worthwhile, even necessary to further

14. Akhil Reed Amar & Johnnie L. Cochran, Jr., *Do Criminal Defendants Have Too Many Rights?*, 33 AM. CRIM. L. REV. 1193, 1197 (1996) (“The exclusionary rule is upside down [because] [i]t protects the guilty and it doesn’t protect the innocent at all . . . .”); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (describing the exclusionary rule as “both conceptually sterile and practically ineffective in accomplishing its stated objective”); *Irvine v. California*, 347 U.S. 128, 136 (1954).

That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . [The exclusionary rule] protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

*Id.* But see Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1264 (1983) (arguing that the primary purpose of the Fourth Amendment should be to protect the innocent and that the guilty should be, at most, incidental beneficiaries).

15. *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that the government may not, in the absence of counsel, deliberately elicit incriminating information from a person against whom criminal proceedings have begun); see also *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (“[A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972))). But see *Brewer*, 430 U.S. at 424-26 (Burger, C.J., dissenting) (arguing that voluntary statements made by the defendant in the absence of egregious police conduct should not be excluded because, in such a situation, the cost to the truth-seeking function of the criminal justice system outweighs the nonexistent deterrent effect such a rule would have). As Professor Amar states, “Current caselaw under the . . . Sixth Amendment[] is often perverse. The words and spirit of the Constitution are too often ignored, the truth too often suppressed, the guilty too often rewarded, and the innocent too often victimized.” Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 711-12 (1996).

16. For a history of the cruel and unusual punishments clause of the Eighth Amendment, see Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*”

constitutional values, but they do little to promote accurate fact-finding.<sup>17</sup>

Arguably, other reforms were enacted that could be seen as directed towards enhancing the accuracy of the fact-finding process, thus protecting innocent defendants from conviction as well as convicting the guilty. For example, the Supreme Court made a major effort to regulate two areas of police pretrial behavior that play a significant role in producing false convictions: police interrogations and eyewitness identification procedures. In both of these realms, what seemed at the time to be earthshaking constitutional decisions—*Miranda v. Arizona*<sup>18</sup> in the interrogation area and *United States v. Wade*<sup>19</sup> and its companion cases<sup>20</sup> in the identification area—were thought to have drastically

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*The Original Meaning*, 57 CAL. L. REV. 839 (1969); see also *Weems v. United States*, 217 U.S. 349 (1910) (holding that a sentence was disproportionate to a crime and was therefore unconstitutional under the cruel and unusual punishments clause). Most recently, the cruel and unusual punishments clause has formed the basis for the Court's attempt to regulate the imposition of capital punishment. In *Furman v. Georgia*, 408 U.S. 238 (1972), and subsequent cases, the Supreme Court focused not on the risk of sentencing innocent people to death, but on the need to develop a scheme where the death penalty was not imposed arbitrarily and capriciously, presumably among guilty defendants. See *id.* at 255-56. To meet this end, capital sentencing schemes have been required to meet the twin objectives of being "at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). In more recent years, the Court has attempted to apply these principals to specific categories of offenders and offenses. For example, in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court held that the death penalty for one who does not intentionally kill is only permissible if the defendant was a major participant in a felony resulting in death and demonstrated a reckless disregard for human life. In other cases, the Court continued to draw lines as to who can be sentenced to death, but never directly addressed procedural protections that would keep innocent people from falling into unprotected categories. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that the death penalty cannot be imposed on a fifteen-year-old); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that a defendant who is incompetent and insane at the time of execution cannot be put to death).

17. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1370-71 (1997) (commenting that the Court's "most significant rulings" with regard to the Fourth Amendment "tend to reduce rather than increase the information available to the factfinder," and that combined with Sixth Amendment jurisprudence, the Court is sending the message that while "[f]actual accuracy is desirable . . . as a Constitutional matter, [it is] hardly paramount").

18. 384 U.S. 436 (1966). Of course, it is possible to view *Miranda* as being less concerned with preventing false confessions than with preserving the dignitary rights against self-incrimination at the core of the Fifth Amendment. See *id.* Even if that were so, *Miranda* still represents the Supreme Court's primary effort to control pretrial police interrogation.

19. 388 U.S. 218 (1967).

20. *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

reshaped the balance between criminal defendants and the police, and to have tipped the balance towards protecting defendants.<sup>21</sup> In fact, these decisions were anything but earthshaking and have done little to protect the innocent.

#### A. *Miranda and False Confessions*

For years, *Miranda*<sup>22</sup> was the most reviled of all of the Warren Court cases. Looking at the ensuing criticism of the decision, one would think that the Court had opened the prisons and handed guns to departing murderers.<sup>23</sup> In fact, despite language in *Miranda* condemning secret police interrogations,<sup>24</sup> which was repeated from sentiments voiced in earlier cases,<sup>25</sup> the actual *Miranda* ruling did little to change the way interrogations are carried out in this country.

21. See, e.g., *Miranda*, 384 U.S. at 542 (White, J., dissenting).

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. . . . There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

*Id.*; *Wade*, 388 U.S. at 250-51 (White, J., dissenting) (predicting that the rule of the majority opinion will have a drastic impact on the use of identification evidence at trials).

22. 384 U.S. 436, 475 (holding that statements obtained from defendants during incommunicado interrogation, without full warning of constitutional rights, were inadmissible as because they violated the Fifth Amendment privilege against self-incrimination).

23. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (finding support for the claim that *Miranda* would "handcuff the cops"); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. CHI. L. REV. 938, 945-47 (1987) (citing numerous empirical studies to show that *Miranda* imposed a costly burden on effective law enforcement).

24. 384 U.S. at 455-58 (describing and condemning the "evils" of incommunicado custodial interrogation).

25. See *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) ("[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."); see also *Bram v. United States*, 168 U.S. 532 (1897) (noting that a person subject to custodial interrogation is likely to be coerced by any promise or threat made, however slight).

The *Miranda* Court turned away from the hints in several immediately preceding cases—*Massiah v. United States*<sup>26</sup> and *Escobedo v. Illinois*<sup>27</sup>—that it might be moving towards requiring the presence of counsel for custodial interrogation, a rule that would stop many a defendant, guilty and innocent, from confessing. Instead, the *Miranda* Court settled on a formula that provided far less protection for a defendant. In a later decision, the Court described *Miranda* as a “carefully crafted compromise” designed to provide dignitary rights to suspects while keeping confessions flowing without serious interruptions.<sup>28</sup>

This compromise did little to prevent wrongful convictions based on real or alleged confessions.<sup>29</sup> As a result, interrogations are still secret, carried on away from the eyes and ears of everyone but those asking and those answering police questions.<sup>30</sup> If the alleged confession was oral and unrecorded, the law still requires the courts to depend on the testimony of those who were in the room (for example, police officers) to confirm that the statement was made.<sup>31</sup> If the confession was written or taped, courts and juries are still likely to rely on the testimony of these same officers to determine whether the confession was obtained in a way that undermined or confirmed its reliability.<sup>32</sup> In the end, *Miranda* only

26. 377 U.S. 201 (1964) (finding a Sixth Amendment right prohibiting police questioning of an indicted defendant in counsel’s absence).

27. 378 U.S. 478.

28. *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) (“As any reading of *Miranda* reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect both the defendant’s and society’s interests.”).

29. Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 482 (1996) (“*Miranda* not only fails to do much about false confessions but, speaking more generally, may in fact positively harm innocent persons by making it more difficult to separate guilty defendants from innocent ones.”); Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1227 (2001) (noting that post-*Miranda*, the percentage of wrongful convictions based on false confessions dropped only 3.5 percent).

30. Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability of Confessions*, 52 DRAKE L. REV. 619, 633 (2004) (remarking that despite *Miranda*, the Court has “lost the war to end secrecy in the interrogation room” because there is “continued secrecy” of interrogations); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. L. REV. 1084, 1118 (1996) (noting that the “concerns that *Miranda* does nothing to end the secrecy of interrogations are widely shared”).

31. Heath S. Berger, *Let’s Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 172-75 (1993) (describing the problems of relying on in-court testimony regarding oral confessions).

32. Given the almost inevitable court deference to the credibility of police officers, as opposed to the credibility of criminal suspects, *Miranda* left the courts almost

requires the police to recite a litany of rights to the suspect, including a right to have a lawyer present. This ensures that the right to a lawyer arises only on the rare occasion when a suspect actually requests one.<sup>33</sup>

Whatever slight protection against false confessions the *Miranda* rule could be said to offer in 1967, the Supreme Court made clear over the following decades that it would not interpret *Miranda* in a way that would seriously interfere with secret police interrogations.<sup>34</sup> In the years since *Miranda*, the Court has restricted its deterrent effect by allowing statements taken in violation of a valid recitation or waiver of *Miranda* rights to be used in numerous circumstances.<sup>35</sup> In fact, the Court's

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totally dependent on the willingness of the officers to accurately recount what happened. See Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 *DRAKE L. REV.* 619, 638 (2004) ("Because most interrogations are not recorded, however, judges must rely on credibility contests between police officers and the suspects for information about the 'totality of the circumstances.' In practice, this means that judges and juries almost always side with the police."); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 *HARV. L. REV.* 1826, 1843 (1987). Ogletree points out that courts must reconstruct the interrogation, often weeks after it occurred. *Id.* at 1843. Under such circumstances, "the interrogator usually prevails. When faced with a police officer who testifies under oath that a valid waiver was obtained, a judge will have difficulty believing that the police officer would commit perjury." *Id.*

33. 384 U.S. 436, 471-74 (1966). For a discussion of the impact (or lack of impact) of the *Miranda* rule, see WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 76-101, 190-95, 201-14 (2001) (describing "pernicious" interrogation practices still in use that are likely to move innocent suspects to incriminate themselves). Other commentators agree that *Miranda* did nothing earthshattering:

[A]ll the *Miranda* decision did was assure to the uninformed and the poor the same rights that reasonably knowledgeable and prosperous citizens had asserted all along. But bitter and persistent attacks—originated in large measure by policeman and prosecutors who had failed to do their jobs properly in the first place, and then taken up by the right wing as a handy weapon to belabor the 'Warren Court' with for a number of its decisions—finally convinced most conservatives and even many moderates that the Court had done something wildly radical.

RICHARD HARRIS, *JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA* 235 (1970).

34. See, e.g., *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that an ambiguous or equivocal reference to an attorney is not sufficient to trigger *Miranda* protections and require the cessation of questioning); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (noting that police deception of an attorney is not forbidden by *Miranda*); *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (concluding that a defendant can terminate custodial interrogation, but after such right has been scrupulously honored, *Miranda* does not mandate the presence of counsel before questioning may be resumed).

35. See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that the questions are derived from evidence obtained in an unlawful search); *Harris v. New York*, 401 U.S.

efforts to neutralize *Miranda*'s impact were so successful that police officers had little incentive to give the warnings, or even to honor a suspect's request that they honor his rights. By the 1990s, many police were trained to intentionally ignore the *Miranda* rule altogether, a practice which may or may not have been ended by the Court's recent disapproval in *Seibert*.<sup>36</sup>

### B. Wade and Misidentifications

Because misidentifications are the single largest factor in producing wrongful convictions,<sup>37</sup> the Warren-era reforms could have made the most impact on reducing the convictions of innocent people by enacting reforms in this area. The Court decried the misidentification problem<sup>38</sup> in *United States v. Wade*;<sup>39</sup> propounded new constitutional rules in *Wade, Gilbert v. California*,<sup>40</sup> and *Stovall v. Denno*;<sup>41</sup> and the *Wade*

222 (1971) (holding that a statement made without proper *Miranda* warnings may still be used for impeachment purposes).

36. *Missouri v. Seibert*, 542 U.S. 600 (2004). While the *Seibert* Court denied that police en masse were ignoring *Miranda*, it did acknowledge that "some training programs advise officers to omit *Miranda* warnings altogether or to continue questioning after the suspect invokes his rights." *Id.* at 610 n.2. The Court quoted from various training manuals to demonstrate this practice. *Id.* The Court in *Seibert* was not the only one to acknowledge that police were being trained to work around *Miranda*. Various empirical studies examining the real-world effects of *Miranda* have found that "police are systematically trained to violate *Miranda* by questioning 'outside *Miranda*'—that is, by continuing to question suspects who have invoked the right to counsel or the right to remain silent." George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, in *CRIME & JUSTICE: A REVIEW OF RESEARCH* 203, 244 (Michael Tonry ed., 2002).

37. The Innocence Project: Causes and Remedies, <http://www.innocenceproject.org/causes/index.php> (last visited Feb. 6, 2006) (finding that mistaken identification was a contributing factor leading to conviction in 101 of the first 130 cases in which DNA exonerated an individual); C. Ronald Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 *RES. SOC. PROBS. & PUB. POL'Y* 99, 102-03 (1987) (stating that mistaken eyewitness identification was implicated in 60 percent of the more than 350 cases of wrongful conviction studied); Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 *LAW & HUM. BEHAV.* 283, 289 (1988) (finding that more than 52 percent of wrongful convictions are attributable to mistaken identification).

38. Huff, *supra* note 37, at 228 ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

39. 388 U.S. 218 (1967) (holding that a suspect has a Sixth Amendment right to counsel's presence at a postindictment lineup).

40. 388 U.S. 263, 272-73 (1967) (creating a per se exclusionary rule for out-of-court identifications made outside the presence of counsel).

41. 388 U.S. 293, 301-02 (1967) (holding that whether a "confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification [so as to

dissenters issued apocalyptic warnings about the coming destruction of the criminal justice system.<sup>42</sup> Once again, the Court opted for rules that were more symbolic than effective.<sup>43</sup>

At the time *Wade* was decided, the Justices may have actually believed that imposing a rule giving a defendant the right to a lawyer at a lineup<sup>44</sup> would deter police practices that produce erroneous identifications.<sup>45</sup> Whether such a rule could have any significant impact is debatable—at most, it amounts to an indirect attempt to change any practices that might lead to misidentifications. However, any such impact was weakened when the Court overruled the Court of Appeals for the Fifth Circuit and held that there should not be an automatic exclusion of the eyewitness’s in-court identification testimony because of a constitutional violation during the pretrial procedure.<sup>46</sup> Apparently concluding, perhaps understandably, that automatically excluding the eyewitness testimony was too high a price to pay for a Sixth Amendment violation, the Court chose a rule allowing the prosecution to use the subsequent in-court identification by the witness so long as the state

deny the defendant] due process of law . . . depends on the totality of the circumstances surrounding it”).

42. *Wade*, 388 U.S. at 250, 255 (White, J., dissenting in part and concurring in part) (bemoaning the majority rule in *Wade* that will “bar[] [the] use of a wide spectrum of relevant and probative evidence” and predicting that the rule will virtually eliminate pretrial identifications, thus leading to fewer convictions).

43. See Frederick Emerson Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 739 (1985). The author points out that:

[C]onstitutionally-based safeguards established by the *Wade-Gilbert-Stovall* trilogy are insufficient because first, the attorney may not be sufficiently aware of all of the factors which could cause misidentification, and second, because the presence of counsel at the line-up cannot eliminate or weaken those factors which are unrelated to the identification procedure itself.

*Id.*; see also Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529, 550 (analyzing the reasons why “the current constitutional safeguards promulgated by the U.S. Supreme Court . . . do not adequately prevent misidentifications”).

44. *Wade*, 388 U.S. at 236-37 (holding that the pretrial lineup was a critical stage of the prosecution and therefore the defendant was entitled to the aid of counsel).

45. *Id.* at 236 (noting that there is an obvious risk of police suggestion in lineups that poses a “grave potential for prejudice” and that the presence of defense counsel “can often avert prejudice and assure a meaningful confrontation at trial”). Justice Brennan suggested that the presence of counsel can protect the defendant against improper police conduct both at the actual lineup itself and during the subsequent trial because the presence of counsel enables the defendant to reproduce at trial any unfairness that occurred at the lineup, an unfairness that might not otherwise be observed. See *id.* at 240-41.

46. *Id.* at 239-43.

could show an “independent source” for the testimony.<sup>47</sup> This provided little incentive for the state to change its eyewitness procedures because the prosecution is usually perfectly happy to rest on the testimony of the eyewitness in court—as in *Wade*, it is most often the defendant who introduces evidence of the pretrial procedure in an attempt to impeach the eyewitness.<sup>48</sup>

Similar to the *Miranda* rule, the force of *Wade*’s rule has been whittled away by later decisions.<sup>49</sup> The Court restricted the *Wade* rule to identification procedures occurring after indictment or other adversarial judicial proceedings.<sup>50</sup> The Court then held that the Sixth Amendment is not at all concerned with a witness’s viewing of photographic arrays, no matter when it took place,<sup>51</sup> thus removing one of the most common types of pretrial identification procedure<sup>52</sup> from Sixth Amendment scrutiny.

It is not quite so easy to dismiss the efficacy of the due process test, which was first articulated in *Stovall v. Denno*, prohibiting police use of unnecessarily suggestive pretrial identification procedures.<sup>53</sup> This rule should offer some measure of protection to innocent defendants snared

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47. *Id.* at 240 (“[A] *per se* rule of exclusion of courtroom identification would be unjustified.”). Instead, the Court held that in determining whether the in-court identification is admissible, the rule of *Wong Sun v. United States*, 371 U.S. 471 (1963) should be followed to determine whether it came from an “independent source.” *Id.* at 241-42. *Wade* actually lost in the Supreme Court because he was challenging the admission of the in-court identification testimony, and the court below had held that this testimony was automatically inadmissible because he had been deprived of his right to counsel at the lineup. *Id.* at 242.

48. In *Wade*, the defendant was charged with the robbery of a bank. *Id.* at 220. Two employees of the bank were asked to identify the robber in the courtroom, and both pointed to *Wade*. *Id.* On cross-examination, defense counsel elicited testimony with regard to the prior lineup identification from both witnesses. *Id.* The defense then moved for a judgment of acquittal, or alternatively to strike the employees’ statements on the basis that conduct of the lineup, without notice to and in the absence of counsel, violated the defendant’s Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. *Id.*

49. Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079, 1080-81 (1973) (arguing that reforms initiated by *Wade* have been eroded by later decisions and that the courts in general have withdrawn from the area of eyewitness identification).

50. *Kirby v. Illinois*, 406 U.S. 682, 688-90 (1972).

51. *United States v. Ash*, 413 U.S. 300, 321 (1973) (“[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.”).

52. *Collins*, *supra* note 43, at 557 (noting that photo arrays are one of the three primary identification techniques used by law enforcement).

53. 388 U.S. 293, 301-02 (1967) (deciding that a confrontation “so unnecessarily suggestive and conducive to irreparable mistaken identification” denied due process of law).

by misidentifications because it directly focuses on police procedures that produce erroneous identifications. Why then has this rule proved to be of such little value, at least as it has been applied so far, in improving pretrial police identification procedures and protecting innocent defendants from damning misidentifications?

There are a number of possible reasons the due process test prohibiting unnecessarily suggestive pretrial procedures has been ineffective. First, as in the interrogation arena, in most cases the account of what happened when a pretrial identification took place is dependent on the memory of the police and the eyewitness. At best, these individuals are not focused on discovering improper suggestivity. At worst, they are hostile to admitting that any occurred.<sup>54</sup> Second, science has now shown that the Court was empirically wrong as to some of the factors that it thought would make an identification reliable, factors that courts still use.<sup>55</sup> Finally, the deterrent impact of the due process test most certainly has been weakened by the Court's holding in *Manson v. Brathwaite*.<sup>56</sup> There, the Court held that even the most unnecessary and most suggestive pretrial identification procedure can satisfy due process if the trial court could determine that the witness's identification was "reliable."<sup>57</sup>

54. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 154 (1997) ("[Videotaping interrogations] is necessary not only because the police may misrepresent the facts relating to the interrogation, but also because even honest testimony relating to police questioning will not adequately capture the interactions that transpire in the interrogation room."); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871 (1981) (book review) ("[A]t trial, there is little to prevent police from describing the interrogation in terms consciously or unconsciously slanted to favor admissibility of the confession").

55. Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 276 (1991).

The five-factor reliability test that the Supreme Court set forth in *Biggers* and *Manson* is not a satisfactory method of measuring [eyewitness] reliability. Psychological studies demonstrate that each of the factors identified by the court [certainty of witness, accuracy of the eyewitness's description, eyewitness's degree of attention, eyewitness's opportunity to view the assailant, and the time elapsed between the criminal incident and the pretrial identification procedure], and subsequently applied by the inferior federal courts and state courts, is either unsupported as a scientific matter or dangerously incomplete. Moreover, a host of other factors exist, not all of which are understood, that may influence the reliability of an eyewitness identification.

*Id.*

56. 432 U.S. 98 (1977).

57. *Id.* at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony . . ."). The Court acknowledged in *Manson* that a rule

These shortcomings probably are not as significant as one that has gone largely unnoticed. If the trial judge finds that the identification was so bad that it runs afoul of the due process clause, only one remedy is available—the witness is not allowed to identify the defendant as the culprit. This places an almost intolerable burden on an (often elected) trial judge who must not only find that the identification procedure was so flawed that the witness cannot be believed, but then has to tell the witness, often the victim of the crime, that she will not even be allowed to tell the jury what she honestly believes she saw. This would be a difficult thing to tell any witness, but imagine looking a rape victim in the eye, one who swears that she can identify the man who violated her, and telling that woman she will not even be allowed to tell her story to a jury. It is no wonder that few identifications have been suppressed for due process violations.<sup>58</sup>

### C. *Gideon and the Right to Counsel*

In discussing wrongful convictions and the Warren-era criminal justice reforms, some attention must be given to the Court's holding in *Gideon v. Wainwright* guaranteeing the right to counsel for an indigent criminal defendant.<sup>59</sup> If applied vigorously, the *Gideon* guarantee should substantially diminish wrongful convictions. A good lawyer cannot guarantee that an innocent person will not be convicted, but an aggressive advocate might discover exculpatory evidence, or might uncover fatal flaws in the prosecution's case, either of which can change the balance to make it less likely that an innocent person will be convicted. Of course, this type of protection requires a *good* lawyer. As the years have so unfortunately demonstrated, giving a defendant a warm body as his protector, or even providing the defendant with a modestly skilled lawyer with insufficient resources, does little to save the innocent from conviction.<sup>60</sup>

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suppressing any unnecessary identifications would provide more deterrence, but found that the cost of suppressing otherwise reliable identifications was not worth the added measure of deterrence. *See id.* at 112-13.

58. *See* Levine & Tapp, *supra* note 49, at 1126-27 (commenting that “courts have invalidated only the most flagrantly unfair procedures, leaving untouched convictions in many cases where improper suggestion was clearly present” and that “courts generally have displayed a marked unwillingness to condemn any procedure where the suggestion was any less blatant than [in *Foster v. California*, 394 U.S. 440 (1969)]”).

59. 372 U.S. 335, 342-44 (1963) (holding that the Sixth Amendment right to counsel is a fundamental right in criminal cases, and further requiring appointment of counsel to represent indigent defendants).

60. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 75-75.

It is no secret that the Supreme Court's decision to announce a right guarantees nothing without a meaningful implementation of that right—any African-American student in the Deep South in the years after *Brown v. Board of Education*<sup>61</sup> could attest to that.<sup>62</sup> Once the Court announced the right to counsel, meaningful steps by the states were required to provide the money to pay the attorneys, as well as the resources and training necessary to present an effective defense. To realize the right, the Court would have to force states to implement these measures if they did not do it on their own.

Meaningful implementation still has not happened. The Supreme Court has never imposed on the states an obligation to create and fund indigent defense systems adequate to provide vigorous representation.<sup>63</sup> Instead, states have been left free to provide counsel in any way they see fit.<sup>64</sup> In *Strickland v. Washington*,<sup>65</sup> despite holding decades earlier that counsel must be “effective” to meet constitutional mandates,<sup>66</sup> the Court

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Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA. Although criminal defendants have a right to counsel, the Supreme Court has so watered down the standard for ineffectiveness that even death sentences have been upheld in notorious cases where attorneys slept through trial, were drunk, used heroin and cocaine during trial, did not interview witnesses, or were absent for lead prosecution witnesses.

*Id.*

61. 347 U.S. 483 (1954).

62. There is general agreement that the Court's bold announcement of the rule prohibiting school segregation in *Brown* was a hollow promise for many years. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 72-106 (1991) (discussing the various constraints on the Court to explain why, “despite Supreme Court action, nothing changed in the first decade after *Brown*” and more generally why the Court is an ineffective vehicle in bringing about significant social change, as well as pointing out that the desegregation policies articulated in *Brown* had little practical effect until Congress and the executive branch began to actively support and implement them); Susan H. Bitensky, *The Constitutionality of School Corporal Punishment of Children as a Betrayal of Brown v. Board of Education*, 36 LOY. U. CHI. L.J. 201, 202-03 (2004) (noting the disconnect between the “glorious” ruling in *Brown* and the “somewhat less glorious” and “disappointing” implementation of it).

63. For an argument that the Court has an obligation under the Eighth Amendment to require systematic implementation of adequate counsel in capital cases, see Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1311-12 (1997).

64. See Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1468, 1479-80 (2003) (critiquing the Court for the “nominal guidance” *Gideon* gave and suggesting that a more exacting ruling would have made the *Gideon* right more meaningful).

65. 466 U.S. 668 (1984).

66. *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that due process requires effective assistance of counsel in a capital case).

interpreted “effective” in a way that placed as light a burden as possible on the states. Attorneys in criminal cases only have to meet minimal standards of effectiveness, with due deference to any decisions that could even remotely be called “tactical” or “strategic,” and with a strong emphasis on the need for finality in criminal convictions.<sup>67</sup>

In many states, the *Gideon* rule has resulted in a scandalously low level of representation. Drunken, felonious, sleeping, and disbarred lawyers have been, and still are, commonplace in criminal defense, even in capital cases.<sup>68</sup> Defendants not only are given bad lawyers, they are tethered to them because defendants have no right to replace even the most incompetent and unsympathetic lawyer.<sup>69</sup> Making matters worse,

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67. *Strickland*, 466 U.S. at 689, 693-94, 699 (holding that “[j]udicial scrutiny of counsel’s performance must be highly deferential . . . the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy” and further that the minimal standard “reflects the profound importance of finality in criminal proceedings” (internal quotations omitted)).

68. See generally Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1990-1991); Sheila Martin Berry, “Bad Lawyering”: How Defense Attorneys Help Convict the Innocent, [http://www.truthinjustice.org/Lawyering\[1\].doc](http://www.truthinjustice.org/Lawyering[1].doc) (last visited Feb 6, 2006). One only has to see how difficult it was for the Fifth Circuit to determine whether a lawyer who slept through “substantial portions” of a capital trial was constitutionally ineffective to understand how weak the *Strickland* standard is. See *Burdine v. Johnson*, 262 F.3d 336, 340 (5th Cir. 2001). *Burdine* filed a petition for writ of habeas corpus claiming that he was denied effective assistance of counsel when his court-appointed attorney slept through parts of the guilt-innocence phase of his 1984 capital murder trial. *Id.* at 338. *Burdine* presented testimony from the court clerk and jurors, all of whom testified that they noticed *Burdine*’s attorney doze off for up to ten minutes at a time. *Id.* at 339. The district court concluded that “sleeping counsel is equivalent to no counsel at all” and granted *Burdine*’s petition. *Id.* at 338. A divided panel of the Fifth Circuit reversed, finding that the circumstances of *Burdine*’s representation did not require a presumption of prejudice to ensure the fairness of *Burdine*’s capital murder trial. *Id.* This astonishing ruling was reversed after an en banc rehearing. *Id.* at 336, 338.

The Supreme Court has given some indication in recent cases of imposing a more exacting standard, at least in capital trials. See, e.g., *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reversing a capital case for defense counsel’s failure to examine a file of the defendant’s previous conviction); *Williams v. Taylor*, 529 U.S. 362 (2000) (overturning the Fourth Circuit’s denial of relief to Terry Williams, whose attorney failed to discover and present mitigating evidence in the penalty phase of Williams’s trial).

69. See, e.g., *Morris v. Slappy*, 461 U.S. 1 (1983) (holding that an indigent defendant has neither the right to choose defense counsel nor the right to a meaningful attorney-client relationship); *Miller v. Smith*, 115 F.3d 1136, 1143 (4th Cir. 1997) (“[A]n indigent criminal defendant has no constitutional right to have a particular lawyer represent him.”); see also *Dziubak v. Mott*, 503 N.W.2d 771, 778 (Minn. 1993) (Gardebring, J., dissenting) (noting that an indigent criminal defendant has no right to choose his lawyer, but must depend on whoever is appointed); Jeffrey H. Rutherford, Comment, *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 991 (1994) (acknowledging that

the lawyer's actions, or failure to act, are deemed to be the defendant's, even if this means sacrificing the defendant's significant procedural and substantive rights.<sup>70</sup> Thus, a defendant can be forced to proceed to trial, plea, or sentencing with a lawyer he has unsuccessfully tried to replace. Then, a court can hold that the defendant forfeited a challenge to the results of the proceeding because of that lawyer's failure to act. This is hardly a recipe to protect the innocent.

Maybe the Warren Court's failure to create a criminal justice system that protects the innocent signifies most clearly that it was always foolish to rely on the Supreme Court to carry out this task. After all, thirty-five years ago, well before the Court turned hostile to the Warren-era reforms, Professor Anthony Amsterdam pointed out that it would be hard to imagine a more ineffective way to administer a criminal procedure system than by relying on constitutionally based decisions in individual cases made by nine Justices sitting in splendid isolation in Washington, D.C.<sup>71</sup> Limited by constitutional text, divorced from the day-to-day

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for the unsatisfied indigent, the avenues open to him afford "no remedy to replace inadequate counsel before any damage is done").

70. JAMES LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 127-28 (discussing procedural default); Sean L. Dalton, *Carved in Sand: Actual Innocence in United States v. Maybeck*, 73 N.C. L. REV. 2388, 2394 (1995) (discussing *Murray v. Carrier*, 477 U.S. 478 (1986), where the defendant was denied habeas relief because his counsel failed to include various claims on appeal, and noting that "[t]he defendant, in effect, was held to bear the cost of his counsel's failure"); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 683 (1990) (explaining that procedural default means that "criminal defendants are often bound by the mistakes of their lawyers"); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 965-67 (1991) (discussing procedural default; that is, the federal courts' refusal to review the merits of constitutional claims "when state courts have refused to consider the merits because the claims were waived under state law through failure to comply with state procedural rules governing the manner in which they should be raised").

71. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970). Amsterdam discusses the numerous limitations upon what the Supreme Court can do in the field of criminal procedure. See *id.* at 785-93. To begin with, most cases involving the violation of a suspect's rights never make it to the Supreme Court for a variety of reasons including practical considerations, how the lower court has ruled, and whether or not the exclusionary rule is implicated. *Id.* at 785. For those cases that do make it to the Supreme Court, the ruling is mostly limited to a pronouncement about the evidence and not the underlying practice that led to it. *Id.* at 788. Further, the Supreme Court is often acting blindly in making these decisions because as Amsterdam describes it, police conduct is "essentially rule-less," so judges cannot know whether the practice is atypical or connected with other practices. *Id.* at 791. Thus, the Court is incapable of making "any coherent response to, or to develop any organized regulation of, police conduct." *Id.* Finally, any right announced by the Supreme Court gets filtered and refracted in the lower courts, where alliance with the police turns the Supreme Court's declarations into the appearance of rights, rather than actual rights. *Id.* at 791-92.

realities of the criminal justice system, and with no direct administrative or enforcement authority to turn their oracular pronouncements into meaningful action, the Justices, however laudable their intentions, could never hope to fundamentally alter many parts of the criminal justice systems administered in large part by each individual state.

Time has proved Amsterdam right. Although one can pay tribute to the Court's constitutional decisions in criminal justice, these decisions have not protected the innocent. In cases like *Miranda*, *Gideon*, and *Wade* the Justices affirmed important constitutional values and set worthwhile goals for the participants in the criminal justice system. Maybe they did all that they could do, but it was not enough to protect the innocent.

### III. IMPLICATIONS FROM THE PRESENT: POST-DNA REFORMS

Victims beget sympathy, and public awareness of victims' plights can be potent fuel for change. In support of this, refer to the use of crime victims' stories in the law-and-order campaign of the past three decades.<sup>72</sup> An innocent person who is convicted of a crime, especially one who is imprisoned or placed on death row for a crime he or she did not commit, is no less a victim than the innocent person harmed by criminal activity. The wrongfully convicted person's story is no less compelling. The scientific certainty of DNA evidence has made it hard for skeptics to question the exonerations of the last decade, and to bury the accompanying powerful narratives under counternarratives of crime victims' suffering. Perhaps inevitably, the heart-wrenching stories of wrongfully convicted defendants has sparked at least the beginnings of a new wave of reforms.

This latest spate of reform differs from the Warren Court criminal procedure "revolution" in several ways. Unlike the Warren-era criminal justice reforms, which were enacted to further an ambitious and broad agenda of overhauling American criminal procedure to further norms rooted in notions of fundamental fairness and equal protection,<sup>73</sup> the post-DNA reforms are not part of any larger agenda. They stem directly from wrongful convictions, and are targeted at their perceived causes.

Up to this point, the impetus for these new reforms has not come from the Supreme Court, or from any federal court. Rather, this subconstitutional movement comes from an assortment of other actors:

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72. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

73. Mark Tushnet, *The Warren Court as History: An Interpretation*, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 2 (Mark Tushnet ed., 1993) (noting that the Warren Court's agenda was to implement "the modern liberal agenda, enforcing norms of fair treatment and racial equality").

legislatures, law enforcement, quasi-judicial commissions, and a few state supreme courts.<sup>74</sup> These differences present unique opportunities, but also engender significant limitations. Both can be seen by examining several of the most significant post-DNA reforms now percolating in this country.

#### A. *Eyewitness Identification Reforms*

Any improvement in the accuracy of pretrial and in-trial identifications should have an impact on lessening wrongful convictions. This is because eyewitnesses so often make mistakes<sup>75</sup> and eyewitness-identification evidence is frequently used in criminal trials.<sup>76</sup> In stark contrast to the inefficacy of the constitutionally based reforms of the Warren era, the most recent changes in eyewitness identification procedures hold great promise.

There seems to be a relatively painless way to minimize, although not eliminate, problems with eyewitness-identification procedures. Social scientists have been studying eyewitness identifications for decades. They have gathered quite a bit of empirical evidence about the causes of mistaken identifications as well as the ways to ameliorate the problem.<sup>77</sup> They have even arrived at a strong, although not unanimous, consensus about the best ways to conduct the procedures, ways that differ in significant respects from the most common police practices.<sup>78</sup>

In 1998, after closely examining the available science, a commission created by U.S. Attorney General Janet Reno adopted recommendations for overhauling the way law enforcement officers

74. See *infra* Part III.A-D.

75. See The Innocence Project: Causes and Remedies, <http://www.innocenceproject.org/causes/index.php> (last visited Feb. 6, 2006) (listing mistaken identification as a factor leading to wrongful conviction in 101 of the 130 cases in which individuals were exonerated via DNA evidence).

76. Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 338 (1997) (“[E]yewitness identifications are among the most common forms of evidence presented in criminal trials . . . [t]here is little question that eyewitness identifications are among the most important forms of evidence presented in criminal trials.”).

77. For a summary of social science research on eyewitness identification, see BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995); Gary L. Wells, *The Scientific Status of Research on Eyewitness Identification*, in *SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES* (David L. Faigman et al. eds., 2002) (discussing the scientific research on eyewitness identification as well as the areas of agreement and disagreement among the researchers).

78. See Wells, *supra* note 77, at 407-13.

conduct pretrial identifications.<sup>79</sup> The proposed reforms included: completely recording initial descriptions by witnesses<sup>80</sup> and all identification procedures;<sup>81</sup> uniform witness instructions, including one stating that the person who committed the crime may or may not be among those to be viewed;<sup>82</sup> sequential presentation of photos or live suspects;<sup>83</sup> and, perhaps most important of all, a suggestion that police should move towards using double-blind procedures where the person conducting the procedure does not know the suspect's identity.<sup>84</sup> As the

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79. U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3 (1999), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/178240.htm>. The National Commission on the Future of DNA Evidence was originally created in response to a 1996 National Institute of Justice Report reviewing cases of individuals exonerated by DNA. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 590-92 (2000). The report found that 80 percent of those exonerated had been wrongly identified by eyewitnesses. *Id.* Attorney General Janet Reno, concerned with the findings of this report, met with its authors to discuss the next step. *Id.* As a result, in 1998, a panel was established to develop national guidelines for eyewitness identification. *Id.* The commission was comprised of researchers, prosecutors, defense attorneys, and various law enforcement personnel. U.S. DEP'T OF JUSTICE, *supra*, at 5. The end product of this commission was *Eyewitness Evidence: A Guide for Law Enforcement*, which provided recommendations regarding the procedures used to obtain eyewitness evidence. *Id.* at 7-8.

80. U.S. DEP'T OF JUSTICE, *supra* note 79, at 15-16 (instructing that, upon preliminary investigation, "it is important that [witness] information be accurately documented in writing").

81. *Id.* at 20 (instructing the officer, with regard to mug books and composites, to document in writing the procedure employed, the items used, and the results of the procedure); *id.* at 23-24 (discussing the recording (audio, visual, and written) of witness recollections during interview of the witness); *id.* at 28 (instructing the documentation of the time and location of a showup, the identification or nonidentification results, and witness certainty); *id.* at 38 (instructing that, with regard to lineups, officers should record the results as well as witness remarks about certainty).

82. *Id.* at 19 ("Instruct the witness that the person who committed the crime may or may not be present in the mug book."); *id.* at 27 ("Caution the witness that the person he/she is looking at [in the showup] may or may not be the perpetrator."); *id.* at 32 ("Instruct the witness that the person who committed the crime may or may not be in the set of photographs [in the lineup] being presented [or] may or may not be present in the group of individuals [in the lineup].").

83. While the Guide provides instructions for both simultaneous and sequential identification procedures, it also notes that "[s]cientific research indicates that identification procedures . . . produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially—one at a time—rather than simultaneously." *Id.* at 9. This is because a sequential procedure forces the witness to choose whether the person being viewed is the actual culprit rather than whether the person is the closest match or best choice among the alternatives as in a simultaneous procedure. Wells, *supra* note 77, at 411-12.

84. Although the double-blind technique was not officially adopted as a guideline, it is recommended as a direction to take in the future. U.S. DEP'T OF JUSTICE, *supra* note 79, at 9. Some states have already decided to move in that direction. *See*

commission reported, research suggests that police could substantially lessen, although not eliminate, the number of mistaken identifications by adopting all of these procedures.<sup>85</sup>

The commission's report also noted that these reforms represented an unusual, but obvious win-win situation for all sides in the criminal justice system.<sup>86</sup> Using the newer procedures would cause fewer innocent people to be identified, brought to trial, and convicted. This could be accomplished without any appreciable diminishment in the number of guilty people identified, tried, and convicted. Moreover, other potential costs, such as new training and some additional marginal

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State of New Jersey: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (listing the double-blind procedure as the number one precaution officers should take when conducting eyewitness identifications) (last visited Mar. 26, 2006); *see also* Wells, *supra* note 77 (critiquing the guidelines for not including a double-blind requirement as well as discussing the debate that went into making that decision); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 253 (2000).

The concept of 'double-blind' investigation is familiar to scientists as a means to address the threat to the validity of research results posed not only by the possibility of data contamination (through communication, perhaps unintentionally, of misinformation to the witness) but also by the natural human tendency, known as the 'confirmatory' or 'expectancy' bias, to take the mental short-cut of attending more closely to information that confirms existing beliefs. 'Double-blind' procedures also reduce the distorting effect of the phenomenon known as 'demand characteristics,' in which the subject's responses are distorted by his or her understanding of the investigator's goals.

*Id.*

85. U.S. DEP'T OF JUSTICE, *supra* note 79, at 2 (claiming that the practices and procedures described "will tend to increase the accuracy and reliability of eyewitness evidence, even though they cannot guarantee the accuracy (or inaccuracy) of a particular witness' testimony in a particular case"); *see also* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 286-87 (2003) (noting that the "'might or might not be present' instruction" has been shown to reduce the "mistaken identification rates in culprit-absent lineups by 41.6% whereas accurate identification rates in culprit-present lineups were reduced by only 1.9%"); Gina Kolata & Iver Peterson, *New Jersey Is Trying New Way for Witnesses to Say, "It's Him,"* N.Y. TIMES, July 21, 2001, at A1 (discussing a study showing that the use of a sequential lineup reduces the rate of false identification from between 20 and 40 percent to less than 10 percent).

86. *See* James M. Doyle et al., *The Eyes Have It—or Do They?: New Guides for Better Eyewitness Evidence Procedures*, CRIM. JUST., Fall 2001, at 12 (describing the ways in which the guidelines can be used to the benefit of prosecutors, investigators, and defense attorneys alike); *see also* Donald P. Judges, *supra* note 84, at 290-91 (explaining that the need to create guidelines benefiting all sides resulted in guidelines somewhat different from what the research suggested should have been done).

expenditures to implement the double-blind requirement, promise to be minimal.<sup>87</sup>

In 2001, the Attorney General of New Jersey ordered all law enforcement agencies in the state to adopt identification procedures similar to the commission's recommendations.<sup>88</sup> Several years later, the chief justice of the North Carolina Supreme Court created the Commission on Actual Innocence.<sup>89</sup> After consulting with experts and New Jersey officials involved in the eyewitness reforms, the commission recommended changing all law enforcement training in the state to reflect the latest scientific recommendations.<sup>90</sup> Implementation of these changes began within the following year.<sup>91</sup> Wisconsin has recently moved towards enacting similar reforms.<sup>92</sup>

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87. See Letter from John J. Farmer, Jr., N.J. Attorney General, to All County Prosecutors (Apr. 18, 2001), available at <http://www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf>.

Technological tools, such as computer programs that can run photo lineups and record witness identifications independent of the presence of an investigator, as well as departmental training of a broader range of agency personnel to conduct lineups and photo identifications may also assist agencies and departments with staff and budget constraints in implementing [the double-blind] recommendation.

*Id.*

88. *Id.* (requiring, when practical, the use of the double-blind and sequential lineups).

89. This is a body personally chaired by the Chief Justice of the North Carolina Supreme Court, with a membership comprised of representatives from all sides of the North Carolina criminal justice system, including the attorney general, the head of the State Bureau of Investigation, the Governor's Secretary of Crime Control and Public Safety, police chiefs, and prosecutors. See The Innocence Project, Benjamin N. Cardozo School of Law, North Carolina Actual Innocence Commission—Mission Statement, Objectives, and Procedures: Commission Composition, [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Mission.html](http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html) (last visited Mar. 26, 2006).

90. The North Carolina Actual Innocence Commission looked at both the U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999) and the New Jersey Division of Criminal Justice training manual, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (August 2001), and it conducted a study of identification practices within the state to develop a list of recommendations based on "best practices" for identification procedures. N.C. ACTUAL INNOCENCE COMM'N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION 1 (2003), available at [http://web.pointpark.edu/~innocence/NC\\_Recs\\_for\\_Eyewitness\\_ID.pdf](http://web.pointpark.edu/~innocence/NC_Recs_for_Eyewitness_ID.pdf). These recommendations included a double-blind requirement, sequential lineups, minimum numbers of individuals in lineups, no feedback to witnesses, and collecting witness statements regarding the level of certainty in their identification. *Id.* at 1-2.

91. Scott Ehlers, *Eyewitness Identification: State Law Reform*, CHAMPION, Apr. 2005, at 32, 34 n.1 ("In North Carolina, police departments across the state are implementing eyewitness identification reforms since the North Carolina Actual

In these jurisdictions, the number of eyewitness misidentifications used to convict the innocent has been reduced. This is not happening by mandate from a distant federal court, but by order of state officials. In several cases, the very state officials and agencies (such as the attorney general and the law enforcement training agencies) that are an integral part of law enforcement ordered the reforms.<sup>93</sup> Enforcing the new rules in these jurisdictions should be easier, lessening police resistance and evasion. Thus, there is every reason to believe that these reforms will prove far more effective than the Warren Court's stab at dealing with eyewitness misidentifications through the right to counsel and due process rules.

### B. *Taping Interrogations*

Although not as prevalent as mistaken identifications, false confessions have been a significant contributing factor in a disturbing proportion of convictions later overturned due to DNA evidence.<sup>94</sup> Several of the most highly publicized wrongful convictions that involved false confession have also caught the public's eye. For example, the so-called Central Park Jogger case<sup>95</sup> and several capital cases in Chicago<sup>96</sup> served to thrust the false confession problem into the national spotlight.

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Innocence Commission, convened by the chief justice of the state supreme court, issued its 'Recommendations for Eyewitness Identification' in September 2003.").

92. See AVERY TASK FORCE, EYEWITNESS IDENTIFICATION PROCEDURE RECOMMENDATIONS 2 (2005), available at [http://www.legis.state.wi.us/assembly/asm84/news/janaveryrecommend\\_dd.pdf](http://www.legis.state.wi.us/assembly/asm84/news/janaveryrecommend_dd.pdf) (recommending the double-blind requirement and the use of sequential identifications). The Avery Commission was formed in response to the wrongful conviction of Steven Avery. *Id.* It closely resembled the North Carolina Actual Innocence Commission and made similar recommendations. *Id.*; see also Assemb. B. 648, 2005-2006 Leg., Reg. Sess. (Wis. 2005), available at <http://www.law.wisc.edu/fjr/innocence/05-34921.pdf>.

93. See Ehlers, *supra* note 91, at 34 (discussing the various state responses to eyewitness identification reform). Most of the reform efforts cited by Ehlers started within agencies outside of the court including public defenders, criminal defense lawyer associations, attorney general commissions, and police departments. *Id.*

94. See The Innocence Project: False Confessions, <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Jan. 27, 2006). Of the first seventy cases documented by the Innocence Project in which individuals were exonerated by DNA evidence, false confessions led to wrongful conviction in fifteen (or 20 percent) of the cases. *Id.*

95. See Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. The Central Park Jogger case involved the conviction of five teenage black and Hispanic boys for the rape and assault of a white female jogger in 1989. *Id.* Their convictions were based in large part on confessions made to detectives. *Id.* Another man, Matias Reyes, later confessed to the crime, claiming to have acted alone. See *id.* DNA evidence supported Reyes's version of the

The most commonly considered ameliorative measure for the false confession problem is requiring the audiotaping, or, preferably, videotaping of the entire custodial interrogation process.<sup>97</sup> Under this approach, any confession produced by an unrecorded custodial interrogation is inadmissible as evidence unless the police have a good excuse for not taping.<sup>98</sup>

While not a foolproof method against false confessions, the taping requirement can help lessen wrongful convictions in several ways. Interrogations involving torture or outright brutality<sup>99</sup> should be rare because police officers will be deterred from the most egregious

facts, and prosecutors asked that the convictions of the five boys be overturned. *See id.* That request was granted in late December 2002. *Id.*

96. In December 2001, the Chicago Tribune ran a four-part series entitled *Cops and Confessions*, which exposed how Cook County law enforcement was using various tactics to obtain dubious confessions. Ken Armstrong et al., *Cops and Confessions: Tainted Confessions*, CHI. TRIB., Dec. 16, 2001, at 1. The investigation examined murder cases over a ten-year period, and found in that in 247 of them, though a confession was originally obtained, it was either thrown out, the defendant was acquitted, or the charges were dropped. *See id.*

97. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 997-1001 (2004) (discussing the benefits of recording interrogations and the various localities that have already adopted the practice). The authors point out that videotaping interrogations preserves an accurate record of the process so that the fact finder need not choose between the after-the-fact recollections of the interrogators and the defendants in trying to piece together what happened during the interrogation. *Id.* at 997. Furthermore, they note that videotaping deters police misconduct and puts the fact finder in a better position to judge the accuracy of the defendant's statements. *Id.* at 997-98. In 2004, the ABA adopted as policy five resolutions aimed at improving the accuracy of the justice system, one of which dealt with the problem of false confessions. ABA CRIMINAL JUSTICE SECTION, RESOLUTION 008A (2004), available at <http://www.abanet.org/crimjust/policy/cjpol.html#my048a>. This resolution urged all law enforcement agencies to videotape the entirety of interrogations and, where this is impractical, to at least audiotape them. *Id.*; *see also* THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATION app. A at A1-10 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (providing a nationwide list of law enforcement offices that record interrogations). An older study commissioned by the Department of Justice found that in 1993, one-third of large police and sheriff's departments throughout the U.S. were already videotaping at least some interrogations or confessions. WILLIAM A. GELLER, U.S. DEP'T OF JUSTICE, VIDEOTAPING INTERROGATIONS AND CONFESSIONS 2 (1993).

98. *See, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/103-2.1 (West 2005) (requiring taping in interrogations absent certain excusing conditions such as recording being infeasible).

99. For a discussion of the police torture tactics in Chicago's Area Two Precinct and how videotaping interrogations can be used to prevent such tactics, see Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001).

interrogation tactics if they know that both the judge and the jury will view their actions; the judge determines whether the officers stepped beyond constitutional bounds<sup>100</sup> while the jury determines both the voluntariness of the confession<sup>101</sup> and the weight to be given to the confession.<sup>102</sup> In some of the false confession cases, defendants apparently never made the alleged confessions at all, or their words were distorted and presented out of context to the jury.<sup>103</sup> This will either no longer occur (the former), or be less likely to happen (the latter) because taping will make outright fabrication of a confession impossible, and distortion difficult.<sup>104</sup>

Of equal importance, taping the interrogation will give the fact finder a *full* record to use in judging the defendant's guilt. "Full" is worth emphasizing because recording only the confession, or only part of the interrogation, does little to guarantee that an accurate portrayal of the interrogation is being presented to the jury.<sup>105</sup> Full recording does not

100. Before the prosecution can use a confession, of course, it has to show compliance with due process, *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Fifth Amendment, *Miranda v. Arizona*, 384 U.S. 436 (1966), and the Sixth Amendment, *Massiah v. United States*, 377 U.S. 201 (1964).

101. See *Jackson v. Denno*, 378 U.S. 368 (1964).

102. See, e.g., *Hendricks v. Swenson*, 456 F.2d 503, 506 (1972) (pointing out that videotaping interrogations will show whether the defendant is "hesitant, uncertain, or faltering" and whether "he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily").

103. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 462-63 (1998) (describing various cases of false confession including that of Gary Gauger). After eighteen hours of interrogation, Gauger asked police if it was possible that he blacked out and did not remember murdering his parents. *Id.* Police considered his question a confession. *Id.* Gauger was convicted and sentenced to death, but his conviction was later overturned after the real killers were overheard confessing to the crime. *Id.*

104. See Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997). White points out that videotaping interrogations protects against false confessions by deterring police from trickery that may lead to so-called confessions such as in the case of Gary Gauger and others. *Id.* at 153. White also notes that videotaping interrogations is a necessary safeguard "not only because the police may misrepresent the facts relating to the interrogation but also because even honest testimony relating to police questioning will not adequately capture the interactions that transpire in the interrogation room." *Id.* at 154 (footnote omitted).

105. See Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 553 (2001).

To be of maximum value, the entire interrogation session must be recorded. . . . [M]erely videotaping the recapitulation without also taping the prior police interrogation can result in 'sham' cases being filed against innocent suspects. Without taping the entire process, officers could mentally

guarantee that the jury will reach the right decision on the reliability of the confession, but it is likely that a more accurate rendition of the interrogation process will lead to more reliable fact determinations.<sup>106</sup>

As with the eyewitness identification reforms, there is a strong argument that taping interrogations produces a win-win situation for both sides of the criminal justice system.<sup>107</sup> While much of the impetus for taping has come from those primarily concerned with protecting the rights of the accused and protecting against false confessions,<sup>108</sup> law enforcement officers that have used taping have largely turned into enthusiastic advocates despite initial reluctance.<sup>109</sup> In their eyes,

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or physically torture suspects until they would be willing to confess on tape just to end the ordeal.

*Id.*

106. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 689 (1996) (noting that videotaping creates an objective record that allows courts to independently evaluate the voluntariness and veracity of a confession that is much more accurate than when the court is left to make that determination from the conflicting accounts of the defendant and interrogator); see also Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1030-32. White argued that there is a need for expert testimony regarding the circumstances surrounding police interrogations because:

[m]ost lay people would not realize, for example, that people with compliant personalities may be so eager to gain approval of authority figures that they will confess to crimes that they did not commit to please police interrogators; similarly, most lay people do not understand the powerful effect of specific interrogation tactics, such as promising the suspect leniency or misrepresenting forensic evidence, much less the effect that a skillful combination of these tactics could have in the emotionally charged atmosphere of the interrogation room; and most lay people clearly do not believe that several hours of continuous police interrogation can lead even a normal person to give a false confession to end the interrogation.

*Id.* (footnotes omitted); *60 Minutes: Did He Do It?* (CBS television broadcast June 30, 1996) (reporting that jurors at the trial of Richard LaPointe, a brain damaged man who confessed after nine hours of intensive interrogation, “refused to believe that anyone would confess to a crime he did not commit”).

107. In fact, not only does videotaping fail to decrease the number of guilty people identified, it actually helps *increase* the rates at which they are identified, tried, and convicted. Leo, *supra* note 106, at 683. (“[V]ideotaping interrogations also facilitates the identification, prosecution, and conviction of guilty offenders.”). Leo further notes that videotaping leads to more effective police work by allowing police to better assess the guilt or innocence of suspects. *Id.* at 683; see also GELLER, *supra* note 97, at 9 (noting that videotaping helped secure guilty pleas and convictions).

108. See, e.g., Drizin & Leo, *supra* note 97, at 997 (discussing the need to videotape interrogations to remove “the secrecy of interrogation and make[] it accessible to criminal justice officials and triers of fact, thus rendering the fact finding process more accurate and reliable”).

109. See GELLER, *supra* note 97, at 10. The 1993 study found that, despite initial disapproval of the practice (60 percent of those agencies adopting videotaping reported initial disapproval), most that adopted the practice found that it provided definite

advantages to law enforcement outweigh any disadvantages. For example, police are protected against unwarranted claims of abuse and fabrication of confessions.<sup>110</sup> In addition, juries get to see what the defendant was like at the time of arrest and interrogation, before being spruced up for trial.<sup>111</sup> And, it appears that the omnipresent television crime shows have conditioned jurors to accept some level of police trickery and coercion. They have proven surprisingly forgiving of police interrogation tactics that produce apparently truthful confessions, but fall just short of outright brutality.<sup>112</sup> Finally, those police officers who do not coerce confessions and disapprove of improper and brutal methods used by others may take comfort from the deterrent effect on their less decorous colleagues.<sup>113</sup>

As with the identification reforms, the costs of taping interrogations appear to be minimal.<sup>114</sup> Properly drafted statutes can take into account

benefits (55.4 percent found that it “helped a lot,” 27.3 percent found that it “helped somewhat”). *Id.* at 10. The study also found that 97 percent of all departments that have ever videotaped statements continued the practice. *See id.* A more recent study noted that in its survey of police “[v]irtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice.” SULLIVAN, *supra* note 97, at 6. The study goes on to give actual remarks from police departments reflecting their approval of the practice. *See id.* at 14-16.

110. The Geller report indicated that over 43 percent of police departments surveyed indicated that, because of videotaping, fewer allegations of coercion or intimidation were made by defense attorneys. GELLER, *supra* note 97, at 6. The report also indicated that “[t]hose officers interviewed also noted they felt less pressure in the courtroom and faced fewer defense assertions that police had fabricated confessions.” *Id.* at 6. The Sullivan report found much the same. Sullivan remarked that “recordings dramatically reduce the number of defense motions to suppress statements and confessions,” and spared officers “from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations.” SULLIVAN, *supra* note 97, at 8; *see also* Marie L. Leahy, Comment, *Booking Procedures for the Mentally Ill or Handicap Suspect: Justice Undone*, 29 NEW ENG. J. CRIM. & CIV. CONFINEMENT 293, 324 (2003) (“There would be an actual record of the interrogation to protect interrogators from accusations of improper techniques.”).

111. SULLIVAN, *supra* note 97, at 7 (“Recordings permit the viewer to see how the suspect looked and acted before being ‘cleaned up’ for court.”).

112. *See* Thomas P. Sullivan, *The Police Experience Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24 (noting that many police departments that videotape interrogations “have found that judges and juries understand that devious tactics are sometimes needed to induce suspects to confess,” and thus concerns that juries would be offended by some tactics are unfounded).

113. *See* SULLIVAN, *supra* note 97, at 16 (“[R]ecordings deter officers who might be inclined to engage in improper tactics or misstate what has been said or done by the suspect . . .”).

114. Costs of videotaping interrogations include the cost of video equipment, remodeling interrogation rooms, storing tapes, maintaining equipment, and transcribing tapes. But these costs do not have to be enormous.

good-faith failures to tape<sup>115</sup> (for example, equipment failure or unavailability) such that the only confessions that would be lost as evidence would be those produced by improper measures. In addition, many police stations, and even some police vehicles, already have taping capabilities,<sup>116</sup> and digital technology can now ameliorate problems with storage space.<sup>117</sup>

### C. Other Post-DNA Reforms

A smattering of other reforms have emerged in response to the exoneration phenomenon. For example, the Illinois legislature adopted some, but not all, of Governor George Ryan's commission recommendations.<sup>118</sup> The commission was formed after Illinois

[T]here is no evidence that expensive technical production crews or other technical assistance is required in order to produce a reliable and accurate video recording of the interrogation. The cost of basic equipment can range from \$1,000, if purchased at a local discount electronic store, to \$25,000 for broadcast quality equipment. Furthermore, such costs can be distributed through different departments such as district attorney's offices, police departments and the courts in order to alleviate the financial burden on one department.

Heath S. Berger, Comment, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 179 (1993) (footnotes omitted); see also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1262 (2002) ("A growing number of American police departments have experimented with routine videotaping of interrogations; the overwhelming majority have found the costs negligible and the benefits considerable.").

115. See, e.g., Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 app. at 1141-44 (2005) (providing a model statute with examples of excusable failures to record); In *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985), the Alaska Supreme Court indicated that recording could be excused in the case of "an unavoidable power or equipment failure, or a situation where the suspect refused to answer any questions if the conversation is being recorded." The court noted that additional exceptions could be established if the government could prove "by a preponderance of the evidence, that recording was not feasible under the circumstances." *Id.*

116. See GELLER, *supra* note 97, at 2 (finding that as of 1990, "most [police] departments [surveyed] had been videotaping interrogations for at least 3 years").

117. See, e.g., Editorial, *No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at 6 (noting that due to digital technology that allows interrogations to be stored on computer, lack of shelf space to store recordings can no longer act as an excuse for not videotaping interrogations); SULLIVAN, *supra* note 97, at 5 ("Many departments are acquiring digital technology in order to improve picture resolution and conserve storage space.").

118. See Richard A. Devine, *The Death Penalty Debate: A Prosecutor's View*, 95 J. CRIM. L. & CRIMINOLOGY 637, 639 (2005) (noting that many, although not all, of the

experienced an astounding number of exonerations in capital cases. Similarly, North Carolina enacted a broad discovery law in direct response to several exonerations,<sup>119</sup> and several states seem to be trying to improve their indigent defense systems.<sup>120</sup>

Many, but not all, states now provide defense access to DNA testing at both the pretrial and postconviction stages.<sup>121</sup> State statutes allowing testing have been supplemented by federal legislation.<sup>122</sup> There is also some indication that courts are likely to hold that there is a constitutional right of access to testing, at least in cases where the testing may provide

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Illinois commission's recommendations have since been adopted by the Illinois legislature).

119. N.C. GEN. STAT. § 15A-1415(f) (2005) (requiring the disclosure of police and prosecutorial investigative files in all capital cases where the defendant has been sentenced to death); Death Penalty Information Center, Changes in Death Penalty Laws Around the U.S.: 2000-2005, <http://www.deathpenaltyinfo.org/article.php?did=236&scid=40#NC> (last visited Mar. 26, 2006). The Death Penalty Information Center discusses the background of the open discovery statute, stating that “[t]he bill was approved in the wake of allegations that prosecutors withheld evidence in the capital murder trial of Alan Gell, who was later exonerated.” Death Penalty Information Center, *supra*.

120. *See, e.g.*, Georgia Indigent Defense Act of 2003, GA. CODE ANN. § 17-12-1 to -128 (West 2004) (increasing the number of public defender offices and funding, and providing standards for public defenders); Texas Fair Defense Act, TEX. GOV'T CODE ANN. § 71.062 (Vernon 2005) (creating the Equal Justice Center to provide resources, contacts, and advice to aid public defenders, as well as increasing the funding to indigent defense).

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4240 (2001); CAL. PENAL CODE § 1405 (West 2006); DEL. CODE ANN. tit. 11, § 4504 (2001); D.C. CODE ANN. § 22-4133 (LexisNexis Supp. 2005); FLA. STAT. ANN. § 925.11 (West 2006); IDAHO CODE ANN. § 19-4902 (2004); 725 ILL. COMP. STAT. ANN. § 5/116-3 (West 2002 & Supp. 2005); IND. CODE ANN. §§ 35-38-7-1 to -19 (LexisNexis Supp. 2005); LA. CODE CRIM. PROC. ANN. art. 926.1 (2006); ME. REV. STAT. ANN. tit. 15, § 2137 (2003); MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2001 & Supp. 2005); MICH. COMP. LAWS ANN. § 770.16 (West 2005); MINN. STAT. ANN. § 590.01 (West 2000 & Supp. 2006); MO. ANN. STAT. § 547.035 (West 2002); NEB. REV. STAT. ANN. § 29-4121 (LexisNexis 2003); N.J. STAT. ANN. § 2A:84A-32a (West 2005); N.M. STAT. ANN. § 31-1A-2 (LexisNexis 2004); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2005); N.C. GEN. STAT. § 15A-269 (2005); OKLA. STAT. ANN. tit. 22, §§ 1371.1-2 (West 2003); S. 667, 71st Legis. Assemb., Reg. Sess. (Or. 2001); TENN. CODE ANN. § 40-30-303 (2003); UTAH CODE ANN. §§ 78-35a-301 (2002); VA. CODE ANN. § 19.2-327.1 (2004 & Supp. 2005); WASH. REV. CODE ANN. § 10.73.170 (West 2002 & Supp. 2006); WIS. STAT. ANN. § 974.07 (West 2005).

122. *See* Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of 18 & 42 U.S.C. (2006)). The Justice For All Act includes the Innocence Protection Act, which provides federal prisoners with a right to DNA testing, provides incentive grants to states to implement reasonable measures to preserve biological evidence, and provides postconviction access to testing. *Id.* at §§ 411, 413 (codified as amended in 18 U.S.C. § 3600 & 42 U.S.C. § 14136 (2006)).

answers to the guilt-or-innocence question.<sup>123</sup> The problem, of course, is that so few cases yield evidence susceptible to DNA testing,<sup>124</sup> rendering empty the illusion that DNA testing will cure the problem of false convictions.

#### D. *The Slow Pace of Reform*

It is easy to get excited about the latest reforms recounted above. In truth, though, little has changed in the way most jurisdictions in the United States prosecute and defend those charged with a crime. For example, New Jersey, North Carolina, and Wisconsin do not exactly represent a tidal wave of reform in eyewitness identification practices. Despite the science, and prodding by the Attorney General and the Justice Department,<sup>125</sup> pretrial identification procedures are being conducted the same way they have been for the last forty years in the overwhelming majority of American jurisdictions. They are shaped to avoid findings of unconstitutionality, but are doing little to minimize the misidentifications that lead to convicting the innocent.<sup>126</sup>

Much the same can be said about the move towards taping interrogations. Complete audio or videotaping of all custodial interrogations in felony cases, starting from the beginning of questioning,

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123. See, e.g., *Harvey v. Horan*, 119 F. Supp. 2d 581, 584 (E.D. Va. 2000) (holding that denial of access to possibly exculpatory DNA evidence is sufficient to state a claim of denial of due process); *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 767-68 (Sup. Ct. 1990) (holding that a defendant has a constitutional right to exculpatory evidence, and therefore, “where [DNA] evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction”). Several other courts have provided for postconviction access to evidence for the purpose of DNA testing. See, e.g., *State v. Hammond*, 604 A.2d 793, 807 (Conn. 1992) (acknowledging the state’s duty to disclose exculpatory evidence); *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. Ct. 1992) (holding that the defendant had the right to DNA testing); *State v. Thomas*, 586 A.2d 250, 253 (N.J. Super. Ct. App. Div. 1991) (finding a duty to provide access to exculpatory evidence based on fundamental fairness); *State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989) (finding that the right to a fair trial and due process require that the defendant have access to DNA evidence).

124. C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003, at 14, 15 (“[T]he biological evidence upon which DNA tests are performed is not available in most cases . . .”).

125. See *supra* notes 79-87 and accompanying text.

126. For example, before implementation of the Avery reforms in Wisconsin, the Wisconsin Supreme Court adopted procedures to safeguard against misidentification. Collins, *supra* note 43, at 568. Nonetheless, “[l]aw enforcement interviewing and identification techniques . . . exacerbated the problem of eyewitness identification as investigators continue[d] to use procedures based upon tradition and intuition rather than science.” *Id.*

has only been mandated by two state supreme courts.<sup>127</sup> Several jurisdictions now require taping in specific categories of cases,<sup>128</sup> and a number of local jurisdictions or individual police departments have implemented taping on their own.<sup>129</sup> Yet, in the vast majority of the nation's police stations, interrogation goes on in virtual secrecy as it has for the last century.<sup>130</sup> Without a recording, courts reviewing these secret interrogations for constitutionality, and juries assessing reliability, are still forced to depend on the frequently inadequate or biased memory and testimony of the interrogators to determine what actually happened.<sup>131</sup>

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127. See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (“[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, under the Alaska Constitution, and . . . any statement thus obtained is generally inadmissible.” (footnotes omitted)); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (“If law enforcement officers fail to comply with th[e] recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.”).

128. This includes looking at both the type of suspect being interrogated, and the type of crime for which a suspect is being interrogated. For example, the Wisconsin Supreme Court recently announced a rule requiring that all custodial interrogations of juveniles be electronically recorded. *In re Jerrell C.J.*, 2005 WI 105, ¶ 59, 283 Wis. 2d 145, ¶ 59, 699 N.W.2d 110, ¶ 59. Wisconsin’s Avery Legislation, which passed both in the State Assembly and Senate in November 2005, codifies *Jerrell* and makes it a state policy to record adult interrogations. Assemb. B. 648 §§ 51(1)-(2), 2005-2006 Leg., Reg. Sess. (Wis. 2005).

129. Editorial, *supra* note 117 (“An increasing number of police departments around the country have adopted [taping interrogations] on their own.”); see also SULLIVAN, *supra* note 97, at 2-3.

130. This fact has been noticed by judges and commentators alike. For example, in *Miranda*, Chief Justice Warren noted that “interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room.” *Miranda v. Arizona*, 384 U.S. 436, 448 (1966). The problem of incommunicado interrogation persists today. As one commentator put it, “What was true when *Miranda* was decided is equally true today: interrogation ‘takes place in privacy.’” Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1940 (2005).

131. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 686-88 (1996).

Since police interrogation continues to take place largely incommunicado, we do not know what transpires between an officer and suspect during custodial questioning. Nevertheless, courts are called on to establish a factual record of the interrogation in light of the conflicting testimony of police officers and criminal defendants . . . such testimony may inadvertently lead different individuals to forget specific facts and selectively interpret past events, thus producing an inaccurate court record.

*Id.* Problems in determining the voluntariness of confessions “essentially derive from the invisible process of police interrogation and the difficulty of recreating the details surrounding interrogation by means of after the fact narrative testimony in court.” Wayne T. Westling & Vicki Wayne, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 502 (1998).

Despite the strong impetus provided by the DNA exonerations, it is too early to conclude that the American criminal justice system has made the fundamental changes that would appreciably diminish the incidence of wrongful convictions. Yet, the picture is not entirely gloomy—the false assurances of the post-Warren era have yielded to a general acceptance that we do in fact convict innocent people, and we now know of several ways we can reduce this horror. However, the task of crafting a meaningful response to the wrongful convictions problem still lies in the future.

#### IV. IMPLICATIONS FOR THE FUTURE

An open acknowledgment that our system of prosecuting and convicting those charged with crimes is imperfect, that it falsely convicts as well as falsely acquits, is a necessary first step for thinking about the implications of wrongful convictions for the future of the criminal justice system. The acceptance of error also raises other questions. First, to what extent can we take steps to minimize wrongful convictions in the future? This question occupies much of the energy of the innocence movement today. Second, how do we incorporate the inevitability of mistake into our thinking about criminal justice? This question has garnered far less attention and the answer requires an understanding that, although things can get better, they cannot be perfect. Some innocent people will always be convicted, just as some guilty people will always be acquitted. What follows is an attempt to further the discussion of these questions.

##### A. *The Need for Increased Transparency*

A transparent criminal justice system, one which provides full disclosure of information to the opposing parties in as timely a manner as possible, should help to reduce the number of miscarriages of justice. Although some innocent people have been convicted solely because of honest mistakes,<sup>132</sup> the DNA inspired exonerations have revealed far too many cases where it was later revealed that exculpatory evidence, or information that could have led to this evidence, was ignored by the

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132. See, e.g., Michael Higgins, *Tough Luck for the Innocent Man*, A.B.A. J., Mar. 1999, at 46, 49 (discussing how honest mistakes can lead to wrongful convictions and specifically addressing the case of David Shepard, who was wrongfully convicted after a witness made an honest mistake); H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11, 12 (noting that wrongful convictions are sometimes the result of honest mistakes by eyewitnesses and even defense counsel, prosecutors, and police).

police or was not provided to the defense.<sup>133</sup> Cases where hidden evidence has caused an innocent person to be convicted not only harm the wrongly convicted individuals, but also go a long way towards undermining public confidence in the criminal law and those sworn to enforce it.<sup>134</sup> Increasing the transparency of our criminal justice system can help remedy both of these problems.

Despite the constitutional requirement for public trials,<sup>135</sup> American criminal trials are the result of a remarkably opaque process. Discovery in criminal cases is far more limited than in civil cases—neither side is required to reveal much information to the other before or during trial.<sup>136</sup> Under the laws of many jurisdictions, the parties can enter the courtroom for a criminal trial without even knowing the names of the witnesses the other side will offer.<sup>137</sup> While discovery by both sides is limited—if anything, there is a constitutionally required asymmetry in favor of the defense<sup>138</sup>—the state’s monopoly on initiating criminal litigation and its superior resources provide the prosecution with most of the advantages from such a closed system.<sup>139</sup>

133. See, e.g., Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1301 n.234 (2001) (“The majority of wrongful convictions arise from conduct that occurs during [the pretrial investigative] stage, either because of (1) the failure to give the defense meaningful access to exculpatory proof; or (2) a one-sided investigatory process in which exculpatory proof is simply ignored.”).

134. See, e.g., Marshall Dayan, *The Problem with Brady: Expectations of Support from the Bar*, N.C. ST. B. J., Summer 2004, at 15, 16 (discussing cases in which prosecutors have failed to meet their *Brady* obligations and how “[e]ven these few cases that represent the tip of the iceberg have created a serious public relations problem for the criminal justice system—people are beginning to lack confidence in the system to catch and convict the right people”).

135. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

136. See Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 UDC L. REV. 7 (1998) (discussing the history of criminal discovery statutes, their lag behind discovery provisions in the civil arena, and the debate over whether criminal discovery should be liberalized to match civil discovery).

137. See, e.g., LA. CODE CRIM. PROC. ANN. arts. 716-729.6 (2003); N.H. REV. STAT. ANN. § 604:1 (LexisNexis 2003) (providing that only defendants in capital cases are entitled to pretrial disclosure of prosecution witnesses, with this disclosure required only twenty-four hours prior to trial).

138. See Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1572 (1986) (discussing how the Fifth and Sixth Amendments impose limitations on discovery against the criminal defendant).

139. See, e.g., Steve Holden, Case Note, *Izazaga v. Superior Court: Affirming the Public’s Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721, 1728 (1992) (“[T]he defendant enters a criminal proceeding at a disadvantage to the superior power of the state. For example, the state controls the initiation of a proceeding with its powers of indictment, and has theoretically limitless investigative powers. Therefore, a fair criminal trial must have an asymmetric shape.” (footnotes omitted)). *But see infra*

This means that evidence that may allow an innocent defendant to prove innocence—names of other suspects, physical evidence not used at trial, and leads that did not pan out—are often considered the private property of the prosecution.<sup>140</sup> Although the prosecution has a constitutional duty to reveal “exculpatory” evidence to the defense,<sup>141</sup> there is ample evidence that this so-called *Brady* requirement is regularly violated.<sup>142</sup>

Complaints about the lack of legal or ethical sanctions for even the most egregious *Brady* violations,<sup>143</sup> and about the “tunnel vision” that leads both police and prosecutors to dismiss evidence countering their theory of the defendant’s guilt,<sup>144</sup> are certainly justified. Yet, punitive

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Part IV.E (noting that some resource-rich defendants might benefit from limited discovery more than the prosecution).

140. *Thirty-Second Annual Review of Criminal Procedure: Preliminary Proceedings*, 91 GEO. L.J. 301 (2003) (outlining what is and is not discoverable by criminal defendants, specifically noting the limitations on discovery). For example, the authors point out that “neutral, irrelevant, speculative, or inculpatory” evidence and “evidence that the prosecutor could not reasonably be imputed to have knowledge of or control over” need not be disclosed. *Id.* at 310-11.

141. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

142. *See, e.g.,* Maurice Possley & Ken Armstrong, *Trial & Error: How Prosecutors Sacrifice Justice to Win: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1 (reporting that a nationwide survey found that, since 1963, 381 cases had been reversed as a result of prosecutorial misconduct including *Brady* violations and use of false evidence).

143. *See* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997) (describing the obstacles to sanctioning *Brady* violations); *see also* Janice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 44 (2004) (“In fact, in many cases, the only sanction a prosecutor receives is in the form of a critical judicial opinion concerning prosecutorial misconduct.”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 899 (1995) (“The practical reality is that few prosecutors are ever disciplined by [state bar associations for *Brady* violations.]”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (describing the infrequency of disciplinary actions against prosecutors for *Brady*-type misconduct and the leniency of the sanctions actually imposed).

144. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Postconviction Claims of Innocence*, 84 B.U. L. REV. 125, 140 (2004) (defining tunnel vision: “once the police pinpoint a chief suspect, they neglect to subject exculpatory evidence or alternative perpetrators to critical examination”); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327 (“[T]he tunnel vision problem has been widely noted in wrongful conviction cases. Officers and prosecutors either don’t realize the

sanctions may not be the most effective way to deal with this problem. It may be too much to expect a prosecutor who is trying to convict a defendant he or she believes is guilty to simultaneously look for information that would help that defendant. The same can be argued for a police officer who is focusing on a likely crime suspect. As a result, the answer to *Brady* violations might be finding a way to relieve police and prosecutors of the responsibility for identifying “exculpatory” evidence rather than punishing them for perceived misconduct.

To relieve police and prosecutors of this task, disclosure equivalent to that in civil cases should be required in criminal cases.<sup>145</sup> The change needed is really rather simple—the presumption should change to favor disclosure rather than secrecy. The entire police file should be provided to the defense, with reverse discovery as allowed under constitutional strictures.<sup>146</sup> To avoid harm to witnesses or ongoing investigations, and to satisfy any further legitimate governmental interest, appropriate provisions for protective orders should be implemented. This change would remove the burden of looking for, and recognizing, exculpatory evidence from the prosecutor. Instead, this burden would be placed on the defense, who has, or should have, an interest in following up on evidence of innocence. In addition, police tunnel vision will no longer preclude the reasonable investigation of other suspects because leads and witnesses that the police discount can be pursued by the defense.

There is one potential problem with this solution. The effectiveness of full disclosure to protect the innocent would still depend to a large degree on the quality of the defense counsel. As noted earlier, this is

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significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect’s guilt.”).

145. In fact, New Jersey has taken this approach, providing the equivalent of civil procedure discovery in the criminal setting. See N.J. R. Ct. 3:13-3 (2006). Commentators support this approach as the best practice for criminal discovery. See, e.g., J. Robert Russell, *Criminal Discovery and Psychological Defenses in West Virginia: “Squeezing a Lemon” or “Kicking a Dog,”* 99 W. VA. L. REV. 207 (1996); Bennett L. Gershman, *State Constitutionalization of Criminal Procedure and the Prosecutor’s Disclosure Obligations*, 18 WESTCHESTER B.J. 101, 104 n.17 (1991) (providing a hypothetical demonstrating the current gaps in criminal discovery law that would allow prosecutors to not disclose potentially exculpatory evidence, and remarking that such a situation would not occur were criminal discovery rules more like those in civil litigation). Gershman goes on to suggest a liberalization of criminal discovery laws and remarks that some states, like New York, have proposed broadening criminal discovery rules. *Id.* at 104 n.17.

146. See Mosteller, *supra* note 138 (noting that, ironically, broadening criminal discovery for the defense has in some ways shifted the balance back in favor of the prosecution because such liberalization comes at a price of reciprocal discovery to the prosecution, and urging that in order to create a fairer discovery system, reciprocal prosecutorial discovery must abide by constitutional limitations, including the Fifth and Sixth Amendments).

certainly an area that continues to need great improvement.<sup>147</sup> Despite this concern, requiring disclosure at least places the burden on the shoulders of the actor in the criminal justice system who has the responsibility to locate and develop evidence for the defense.

Requiring discovery disclosure in criminal cases is not a revolutionary idea. In the European continental justice system, the defense and prosecution have access to the same collection of evidence.<sup>148</sup> In addition, several states now have discovery procedures allowing for this degree of transparency.<sup>149</sup> There is not a shred of evidence that these criminal justice systems have suffered any drop in efficiency as a result.<sup>150</sup>

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147. See *supra* Part II.C.

148. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 413 (1992) (describing the defendant in the continental system as enjoying “broad discovery rights” and stating that “[a]t an early stage of the proceedings the defendant has an absolute right to inspect all of the evidence collected by the police, the prosecution, and the investigating magistrate”); see also Richard S. Frase, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 807-08 (2000) (comparing the “open files” policy practiced by the continental system with pretrial discovery practices in some states).

149. See, e.g., N.C. GEN. STAT. § 15A-903(a)(1) (2005) (requiring complete disclosure of prosecution file and police investigative file); MINN. R. CRIM. P. 9.01(1) (requiring disclosure of all evidence the prosecution intends to use at trial as well as any other witness statements, the names of grand jury witnesses, any other documents, tangible objects, or reports of examinations or tests); Tara L. Swafford, Note, *Responding to Herrera v. Collins: Ensuring that Innocents are Not Executed*, 45 CASE W. RES. L. REV. 603, 633-34 n.214 (1995) (noting that six states now require open file discovery in capital cases: Maryland, Florida, Colorado, Oregon, New Hampshire, and Alabama); Frase, *supra* note 148, at 807-08 (comparing pretrial disclosure practices in some states with the “open files” policy practiced by the continental system).

150. On the contrary, there is an argument that early open-file discovery may actually increase efficiency. As one body argued, open-file discovery promotes efficiency by:

providing a speedy and fair disposition of the charges, whether by diversion, plea, or trial; providing the accused with sufficient information to make an informed plea; permitting thorough trial preparation and minimizing surprise, interruptions and complications during trial; avoiding unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues; eliminating as much as possible the procedural and substantive inequities among similarly situated defendants; and saving time, money, judicial resources and professional skills by minimizing paperwork, avoiding repetitious assertions of issues and reducing the number of separate hearings.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW AND PROCEDURE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 3-4 (2003), available at <http://www.courts.state.ny.us/ip/judiciary/legislative> (follow 2003 Reports: “Criminal Law and Procedure” hyperlink). Others have also identified how open-file discovery promotes efficiency. See Martha Rayner, *New York City’s Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1062 (2004) (“[O]pen-file

Once again, another benefit from increased transparency is that it offers a significant boost to the legitimacy of the criminal justice system. Transparency dissipates the negative impact on the criminal justice system's reputation for integrity and accuracy that occurs when it is revealed that an innocent person has sat in prison or on death row while evidence of innocence was lying hidden in official files. Mistakes may be inevitable, but they produce different perceptions when they are caused by honest mistakes made openly.

### B. *Making Better Use of Science*

DNA evidence has provided a taste of what science can offer in terms of improving the accuracy of our criminal justice system. Even at the present technological level, science offers far more than the criminal justice system is prepared to use.<sup>151</sup> With the rapid evolution of technology, it is safe to assume that in the coming years even more scientific tools that can help solve criminal cases will become available.<sup>152</sup>

Without downplaying possibly competing interests such as the privacy concerns that make the development and use of DNA data banks such a troubling prospect,<sup>153</sup> it is beyond argument that more and better

discovery could alleviate the need for some court appearances and contribute to earlier resolutions of cases based on the merits.”).

151. Paul C. Giannelli, *Forensic Science*, 33 J. L. MED. ETHICS 535 (2005) (discussing the various limitations on the use of science in the courtroom including limited access to defense experts because of an “underfunding of essential expert services” and “the lack of funding for independent research in non-DNA forensic sciences” which has handicapped research in those areas preventing those sciences from meeting the *Daubert* standard).

152. For example, DNA research has constantly revealed new means of DNA identification, such as PCR-STR, which replaced the then-used method of DNA identification (RFLP-VNTR). NAT'L INST. OF JUSTICE, AUTOMATED DNA TYPING: METHOD OF THE FUTURE (1997), available at <http://www.ncjrs.org/pdffiles/13102-9.pdf>; see also NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP (2000), available at <http://www.ncjrs.org/pdffiles1/nij/183697.pdf>.

153. Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 536-38 (1990) (discussing the potential abuses resulting from DNA profiling and the threats such abuses pose to the privacy of not only criminal defendants, but all of society); Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 279, 288 (2005).

The potential for misuse of this vast information is real. And because genetic information pertains not only to the individual whose DNA is sampled, but also to everyone who shares in that person's bloodline, potential threats to

science is a good thing from the viewpoint of an innocent defendant snared in the criminal justice system. Expanded DNA data banks may be used in a way that hurts some people, or that endangers one or another important societal value,<sup>154</sup> but they can only help the innocent defendant looking to escape from a wrongful conviction. From the standpoint of an innocent defendant, and those acting in his or her interest, this not only argues for extensive data banks, but also for maximum utilization of these resources in the criminal investigation process. Thus, there is a strong incentive for those interested in preventing wrongful convictions to support the addition of whatever resources are necessary to fund the science that can help them prove innocence.

On the other side, just as the DNA exonerations have enhanced the need for maximizing the use of science in criminal cases, they have also revealed the misuse of science. Many of the DNA exonerations have come in cases where “science” was used to produce the initial wrongful conviction.<sup>155</sup> As a result, a hard examination of much of what passes for science in the courts is necessary.

In the last decade, a number of types of supposedly “scientific” evidence commonly used in criminal cases have proven to be of questionable value, if not worthless.<sup>156</sup> For years, experts testified that they could look at hairs under a microscope and determine whether a specific hair most likely came from a specific individual.<sup>157</sup> It is now

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genetic privacy posed by their collection extend well beyond the millions of people whose samples are currently on file.

*Id.*

154. See Simoncelli & Steinhardt, *supra* note 153, at 286, 288 (remarking that the expansion of DNA data banking to arrestees will exacerbate racial biases, and will only fuel claims “that there are genetic markers for aggression, substance addiction, criminal tendencies and sexual orientation”). Additionally, Simoncelli and Steinhardt note that similar DNA data banking in the United Kingdom has already been used for purposes beyond identification. *Id.* at 288.

155. See The Innocence Project: Junk Science, <http://www.innocenceproject.org/causes/junkscience.php> (listing ways in which alleged scientific evidence was misused by the state to wrongfully convict) (last visited Mar. 26, 2006).

156. See, e.g., Flynn McRoberts et al., *Forensics Under the Microscope: Unproven Techniques Sway Courts, Erode Justice*, CHI. TRIB., Oct. 17, 2004, at 1 (providing a description of so-called scientific evidence used in the courtroom that has been shown to be less reliable than previously thought, including fingerprinting, firearm identification, trace evidence, arson investigation, odontology, DNA testing, and brain fingerprinting).

157. See Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois: Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, at 1 (discussing the number defendants wrongfully convicted through hair comparison evidence and later exonerated through DNA); Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227 (1996) (discussing the use of hair analysis in the courtroom and criticizing its validity).

clear that no such conclusions can be drawn without molecular analysis.<sup>158</sup> Similarly, FBI agents were once traveling around the country testifying that lead from the victim's body came from the same box of ammunition found in the defendant's house.<sup>159</sup> This testimony ceased after a scientific study found that such conclusions were unsupportable.<sup>160</sup> On top of this, there have been cases of outright fraud by dishonest "scientists." Some worked for the state—the Joyce Gilchrist<sup>161</sup> and Fred Zain<sup>162</sup> and their like. Others were freelancers like Louise Robbins, an anthropology professor who provided bogus testimony for years, purporting to be able to identify a specific individual from a barely discernible shoe print.<sup>163</sup>

Even the most hallowed "scientific" evidence, the venerable fingerprint, has been called into question lately.<sup>164</sup> Critics have pointed

158. See Smith & Goodman, *supra* note 157 (critiquing hair analysis as junk science).

159. William A. Tobin & Wayne Duerfeldt, *How Probative Is Comparative Bullet Lead Analysis?*, CRIM. JUST., Fall 2002, at 26, 27.

Comparative bullet lead analysis has been used in courtrooms for more than 35 years by expert witnesses who have testified that they can tell where a bullet or bullet fragment was manufactured and even from which box it originated—all based on an analysis of the composition of the lead.

*Id.*

160. See *id.* at 33-34; see also NAT'L RESEARCH COUNCIL COMM. ON SCIENTIFIC ASSESSMENT OF BULLET LEAD ELEMENTAL COMPOSITION COMPARISON, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE (2004) (providing a comprehensive report on bullet lead analysis).

161. See Belinda Luscombe, *When the Evidence Lies*, TIME, May 21, 2001, at 38. Gilchrist was an Oklahoma City police department forensic scientist who specialized in hair analysis. *Id.* After DNA evidence proved that a number of her conclusions were wrong, Oklahoma City governor Frank Keating ordered a review of every case she had worked on. *Id.* An FBI study found that in five of eight cases where Gilchrist testified, "she had made outright errors or overstepped 'the acceptable limits of forensic science.'" *Id.* Gilchrist also "appears to have withheld evidence from the defense and failed to perform tests that could have cleared defendants." *Id.*

162. See *In re Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (W. Va. 1993). The West Virginia Supreme Court ordered Judge James O. Holliday to investigate Zain, who was then Chief of Serology at the Department of Public Safety in West Virginia, to determine whether any habeas relief should be granted to defendants convicted in trials where evidence was presented by Zain. *Id.* at 503. The report found that "Zain falsely reported that testing had been performed when it had not been performed and falsely reported results stronger than those which testing had actually reflected." *Id.* at 515.

163. Robbins's fascinating career as a forensic fraud is described in detail in Mark Hansen, *Evidence: Believe It or Not*, A.B.A. J., June 1993, at 64 (discussing Robbins's testimony, scientific debunking of it, and cases in which she testified).

164. In 2002, a federal district court judge in Pennsylvania startled the legal world by finding that a forensic fingerprint analysis failed to meet the requirements for admission as expert evidence. *United States v. Llera Plaza*, 179 F. Supp. 2d 492, 517-18

out that there has never been a controlled scientific study to prove the assumptions underlying the use of fingerprint evidence, and several high profile mistakes by skilled fingerprint examiners have raised doubts about the accuracy of such testimony.<sup>165</sup>

While society needs to provide the resources so that the available technology can be used whenever necessary, it is of equal importance that greater care be exercised to make sure that what is presented as scientific evidence is valid. Courts have traditionally performed the gatekeeping role for scientific evidence,<sup>166</sup> and need to provide more rigor in their analyses.<sup>167</sup> Legislators can also play an important role in

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(E.D. Pa. 2002) (depublished). Just two months later, however, the court reversed itself and held the evidence admissible. *Id.* at 492. For a description of recent challenges to forensic fingerprint analysis, see Paul Sarmousakis & Stephen Meagher, Legal Challenges to Fingerprints, [http://onin.com/fp/daubert\\_links.html](http://onin.com/fp/daubert_links.html) (last visited Jan. 15, 2006).

165. Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings From Jennings to Llera Plaza and Back Again*, 41 AM. CRIM. L. REV. 1189, 1205-06 (2004) (noting the complete absence of validation studies regarding fingerprint evidence); Kristin Romandetti, Note, *Recognizing and Responding to a Problem with the Admissibility of Fingerprint Evidence Under Daubert*, 45 JURIMETRICS J. 41, 42 (2004) (analyzing “the scientific foundation of fingerprint expert testimony to reveal that the ‘science’ is not supported by any empirical findings”); Jennifer L. Mnookin, *The Achilles’ Heel of Fingerprints*, WASH. POST, May 29, 2004, at A27 (discussing the Brandon Mayfield case in which FBI fingerprint experts erroneously matched the fingerprints of the Oregon lawyer to those found on explosives in Madrid, and criticizing such evidence and other cases where fingerprint identification has led to wrongful conviction).

166. Under the *Frye* admissibility test, courts were supposed to admit scientific evidence only if it had “gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The Supreme Court later rejected the *Frye* test, and adopted a new test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* test created a set of nonexclusive factors used in determining the admissibility of scientific evidence including: 1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community. *Id.*; Kenneth S. Broun, *Daubert Is Alive and Well in North Carolina—in Fact, We Beat the Feds to the Punch*, N.C. ST. B.J., Fall 2002, available at [http://www.ncbar.com/Journal/Journal\\_7,3.asp#1](http://www.ncbar.com/Journal/Journal_7,3.asp#1) (last visited Jan. 16, 2006). The final factor listed above was the original *Frye* test. *Id.* The *Daubert* test puts the onus on the “trial court judge to engage in a gatekeeping function to determine whether the offered evidence is reliable.” *Id.*

167. David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 43 (2003) (“Several recent federal cases, again, support the notion that trial judges need to be more rigorous in applying the *Daubert* guidelines.”); Tara Marie La Morte, Comment, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence Under Daubert*, 14 ALB. L.J. SCI. & TECH. 171 (2003)

the process by enacting rules proscribing “junk” scientific evidence, or by providing funds for empirical testing of proposed scientific evidence.

C. *Providing a Constitutional Basis for Post-DNA Reforms*

The Warren-era reforms’ failure to protect innocent defendants provides a cautionary tale against overreliance on constitutionally based regulation of the criminal justice system. Yet, looking at the landscape of the post-DNA reform movement, one can reasonably ask whether there might be a role for constitutional norms in ensuring a reasonable degree of protection for innocent defendants.

The fact that criminal justice reform to protect the innocent remains far from a dominant political theme in American life argues in favor of providing a constitutional basis for the reforms. That so few jurisdictions have implemented the latest reforms in eyewitness identification procedures or have moved to fully record interrogations despite the obvious advantages of both to innocent suspects and law enforcement,<sup>168</sup> seems to demonstrate that the historical reluctance of American legislatures and administrative agencies to impose significant obligations or limitations on police investigative activity remains in place. Thus, the same vacuum that motivated the Warren Court reforms argues for further action by the courts today.<sup>169</sup>

Providing a constitutional mandate for the reforms, at least in the identification arena, can easily be done without stretching the present constitutionally based rules governing eyewitness identification procedures. Under current constitutional doctrine, conducting eyewitness identifications using procedures that produce a substantial likelihood of misidentification violates due process.<sup>170</sup> The factually

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(discussing the need for federal courts to be more rigorous in their gatekeeping function when determining whether fingerprint evidence should be admitted).

168. See, e.g., Bill Moushey & Nathan Crabbe, *Sight Unseen Series: Most Local Police Unaware of Witness Guidelines*, PITT. POST-GAZETTE, May 9, 2005, at A1 (discussing how law enforcement officials in Pennsylvania are unaware of the suggested reforms and how many disapprove of them). But see Scott Ehlers, *Eyewitness Identification: State Law Reform*, CHAMPION, Apr. 2005, at 34 (noting several states that have implemented new eyewitness identification procedures).

169. See Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 138 (1995) (remarking that the Warren Court acted “out of the need to remedy the effects of governmental paralysis” and to “ensure fairness and equity . . . in cases where other governmental processes had not secured such results”).

170. *Neil v. Biggers*, 409 U.S. 188, 196-201 (1972); see also *Manson v. Brathwaite*, 432 U.S. 98, 114-17 (1977); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Foster v. California*, 394 U.S. 440 (1969); *Simmons v. United States*, 390 U.S. 377 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967).

contraindicated *Manson v. Brathwaite* criteria can be discarded.<sup>171</sup> Instead, the courts can easily replace them with new, scientifically based criteria that will produce a substantially lower risk of misidentification with minimal cost.<sup>172</sup>

Whether such a change would have a marked impact on police practices is a separate question because it will still be up to the trial judge to make the difficult ruling not to allow an eyewitness to testify. However, one could certainly expect that requiring courts to evaluate identification procedures using scientifically based criteria, as opposed to inappropriate criteria, will be an added spur to the reform movement. As long as there is no ensuing overreliance on the constitutional rules, the new criteria will be a positive development.

Whether a federal constitutional basis for requiring the presumptive taping of interrogations can be recognized is an interesting question. A taping requirement seems to meet the core concerns that led to the *Miranda* decision more forthrightly than the alternative actually adopted in *Miranda*—a cursory reading of the rights to a suspect interrogated in isolation and secrecy. A constitutional basis for taping could lead to a rule that a nontaped custodial confession is presumptively coerced, which is basically a new and improved version of *Miranda*'s prophylactic rule. Given the present makeup of the Supreme Court, such a ruling is highly unlikely. But, this does not preclude a finding by a state supreme court that a particular state's constitution imposes such a requirement—one court has already held that taping is required to ensure fundamental fairness.<sup>173</sup> At the very least, it can be argued that courts should be reluctant to accept the police version of what happened during

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171. 432 U.S. at 114-15 (considering the witness's level of certainty in analyzing the admissibility of identification testimony). For example, in *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005), the Supreme Court of Georgia ruled that an instruction telling jurors that they may consider an eyewitness's level of certainty when determining the reliability of the witness's identification of the defendant is no longer proper given scientific research that points to a lack of correlation between a witness's certainty and the accuracy of the identification.

172. For an example of a court adopting more scientifically based criteria in determining the admissibility of eyewitness identifications, see *State v. Ramirez*, 817 P.2d 774, 779-80 (Utah 1991) and *State v. Long*, 721 P.2d 483, 488-92 (Utah 1986). See Anne E. Whitehead, *Admissibility of Eyewitness Identifications Under the Due Process Clause of the Utah Constitution*, 1992 UTAH. L. REV. 191, 193 ("The court adopted reliability factors that are more scientifically based than the United States Supreme Court's factors.").

173. See *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985). In *Stephan*, the Alaska Supreme Court found that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution." *Id.* at 1158. But see *State v. Spurgeon*, 820 P.2d 960, 961-63 (Wash. Ct. App. 1991) (holding that due process rights are not violated by the failure of the police to record interrogations).

an interrogation when the suspect contests the police version, and when the police had an opportunity to record the entire interrogation but failed to do so.<sup>174</sup>

In sum, looking to the courts for constitutional rules that would minimize the chance that an innocent person will be convicted cannot hurt. At the same time, it would be a mistake to rely solely on the courts to solve the problem.

*D. Providing for the Reality of Innocence After Conviction*

For any system of criminal justice to operate, there has to be a presumption of guilt after conviction. Otherwise, it would be impossible to punish people who commit crimes. There are a few areas, though, in which the almost irrebuttable presumption of guilt that comes with a conviction is unnecessary and unfairly burdens the innocent people who have been convicted. Because it is now clear that wrongful convictions occur, thought should be given to changing those aspects of the system that unfairly burden innocent people who find themselves among the convicted.

Capital punishment is a prime example. Regardless of the validity of the argument that capital punishment is necessary to punish those guilty of a horrible crime, the inclusion of even a few innocent people among those who are executed raises another set of issues. It is not hard to formulate an argument that the execution of innocent people makes capital punishment intolerable.<sup>175</sup> At the very least, the reality of innocent people being convicted, sentenced to death, and executed should shift the burden onto those who support capital punishment to

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174. Both Alaska and Minnesota have taken this approach, excluding statements made in interrogations where recording was feasible, but unused. See *Stephan*, 711 P.2d 1156; *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). Although the Illinois Commission on Capital Punishment recommended that interrogations be taped, it also commented that it “did not believe that a police failure to comply with [the taping] requirements would necessarily lead to the exclusion of a defendant’s confession.” Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1026.

175. Evan J. Mandery, *Innocence as a Death Penalty Issue*, CRIM. L. BULL., Jan.-Feb. 2004, at 78, 82 (“Some innocent [people] will be executed. Given that the death penalty offers no demonstrable benefit to offset this intolerable cost it is, to my mind, a conclusive argument.”); Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1091 (2003) (analyzing how execution of the innocent violates both societal norms and legal standards including the Eighth Amendment and the due process clause: “In the face of evidence that the innocent sometimes suffer the ultimate consequence of the current capital punishment system, maintaining that system without alteration is not only immoral, it is unconstitutional”).

prove, decisively, that capital punishment measurably advances significant societal interests more than life imprisonment.<sup>176</sup>

Another way that innocent people are unfairly burdened involves the extra measure of punishment meted out to those unfortunate enough to stubbornly insist on their innocence not only before, but even after conviction. Before conviction, the defendant who insists on innocence loses the advantage of a plea bargain. This is not the place to debate the wisdom of the American reliance on plea bargaining to keep the system moving,<sup>177</sup> but it is worth noting that a system relying on plea bargains inevitably punishes those who claim innocence with longer sentences.<sup>178</sup>

After conviction, an innocent defendant who refuses to discard his claim of innocence continues to be in a disfavored position vis-à-vis his guilty counterpart. It is not uncommon for parole boards to require an admission of guilt before considering an inmate for release.<sup>179</sup> Many rehabilitation programs inside and outside of prison, most notably programs for sex offenders, also require an acknowledgment of criminal activity.<sup>180</sup> A convicted defendant who refuses to admit guilt can be

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176. For a more complete discussion of this burden shifting, see Rosen, *supra* note 10, at 109-11 (arguing that the State should carry the burden of demonstrating that the death penalty, as opposed to life imprisonment, is necessary because societal gains from using the death penalty are viable and essential).

177. For a discussion of the pros and cons of plea bargaining, see Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505 (1999) (outlining the plea bargaining debate). See also Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998) (evaluating and responding to criticisms of plea bargaining).

178. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011-12 (1992) (pointing out the biases against the innocent defendant in the plea bargaining system and commenting that a plea bargaining system that penalizes innocent defendants who go to trial will maximize the amount of punishment each one of those innocent defendants who lose at trial receives).

179. See, e.g., KY. REV. STAT. ANN. §§ 197.400-.440 (LexisNexis 1998) (requiring an admission of guilt from convicted sex offenders before they can be paroled); *Quegan v. Mass. Parole Bd.*, 673 N.E.2d 42 (Mass. 1996) (holding that considering a prisoner's admission or refusal to admit guilt in the parole decision does not violate the state constitution); see also Martha Waggoner, "Fatal Vision" Army Doctor Seeks Parole, Maintains Innocence, CHI. SUN-TIMES, Jan. 18, 2005, at 28 (discussing the case of Jeffrey MacDonald, who, though eligible for parole since 1991, "declined to seek his freedom because he said he would have to admit guilt for the slayings at the family's Fort Bragg apartment Feb. 17, 1970"). MacDonald finally relented and filed a request for parole consideration in 2005. *Id.*

180. Jonathan Kaden, Comment, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347 (1998) (discussing the difficulties with the requiring an admission of guilt in sex offender treatment programs); Jamie Tanabe, Recent Development, *Right Against Self-Incrimination v. Public Safety: Does Hawaii's Sex Offender Treatment Program Violate*

denied entry into these programs as well as significant privileges in prison, including upgrades in custody.<sup>181</sup>

A defendant whose probation is dependent on participation in a program that requires a confession of guilt faces an even more severe sanction for refusing to make the required admission—activation of a prison sentence.<sup>182</sup> Thus, requiring an admission of guilt puts a convicted innocent person in an impossible situation—either lie and claim guilt, or continue to claim innocence and be treated worse than the guilty. This is the tragic narrative of the innocent defendant who claims innocence.

The postconviction requirement for acknowledging guilt is based in part upon the belief that one cannot be rehabilitated without acknowledging wrongdoing.<sup>183</sup> It is also based on the assumption that anybody who refuses to admit guilt is either lying or in denial, and thus is not a fit candidate for rehabilitation.<sup>184</sup> This latter assumption is wrong. Some of those who refuse to admit guilt do so because they are not guilty, and any extra punishment they suffer for maintaining their innocence is perverse. If an open admission is required for rehabilitation, an insolvable dilemma results because the rehabilitative needs of the guilty are in direct conflict with fairness to the innocent. Perhaps allowing parole and probation officials to consider the possibility that the protestations of innocence are legitimate is the most mitigation that can be hoped for. However, if there is any doubt about

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*the Fifth Amendment?*, 23 HAWAII L. REV. 825 (2001) (discussing the interplay between the Fifth Amendment and mandatory admission of guilt as part of sex offender treatment programs).

181. *McKune v. Lile*, 536 U.S. 24 (2002) (holding that state prisons can impose sanctions on incarcerated sex offenders who refuse to admit guilt, including moving the prisoners to maximum security areas, loss of television privileges, and reduced wages).

182. Seth A. Grossman, Note, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of McKune v. Lile*, 25 CARDOZO L. REV. 1111, 1136 (2004) (noting that in some states, “[i]f the participant refuses to admit his guilt, he is terminated from the program, and the state will revoke his conditional parole and give him a prison sentence”). The author cites *State v. Imlay*, 813 P.2d 979, 982 (Mont. 1991) (revoking the probation of sex offender who failed to admit guilt as part of a sexual therapy program and sentencing him to five years in prison), as an example of this approach. *Id.* at 1136 n.173.

183. Tanabe, *supra* note 180, at 852 (“[I]t is the conventional view that treatment will not be beneficial to an offender who refuses to acknowledge his guilt.”).

184. See *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991). In *Mace*, the defendant pled guilty, but denied guilt at the treatment phase. *Id.* at 848. Although there was evidence and testimony to support his claim of innocence, his therapist insisted he was lying and that such denial was a “stumbling block” to treatment. *Id.* at 848-49. The court, noting that the state has a legitimate interest in the rehabilitative purpose of such an admission, nonetheless found that the issue in the case was not the purpose of the disclosure, but the disclosure itself, and that such disclosure violated the defendant’s privilege against self-incrimination. *Id.* at 852.

the assumption's rehabilitative efficacy, the admission of guilt requirement before being granted parole (or to continue on probation) should be eliminated.

The close to irrebuttable presumption of guilt after conviction also has a marked impact on an innocent person's chance to overturn the conviction. The common belief that the multiple levels of appeals and postconviction reviews provide extraordinary protections against the unjust punishment of innocent people is a myth.<sup>185</sup> Defendants in the United States can raise almost any claim of legal error in a direct appeal, but they cannot present new evidence of innocence or argue that the jury got it wrong.<sup>186</sup> The chance of overturning a conviction based on innocence is not much better at the post-appeal stages where defendants can at least raise claims related to innocence, like newly discovered evidence or prosecutorial suppression of exculpatory evidence.<sup>187</sup>

Unable to hire a lawyer or investigator, with no right to an appointed lawyer, the typical indigent, convicted, and innocent person is unlikely to be able to uncover any evidence that would prove that he or she did not commit the crime. Even if the wrongfully convicted person is fortunate to find evidence that casts doubt upon guilt, and can either initiate litigation pro se or find a lawyer willing to take the case, the person still has to navigate the perilous waters of retroactivity, time limits, procedural defaults, finality, difficult burdens of proof, and downright judicial hostility in order to gain relief.<sup>188</sup> It is no wonder that many exonerated individuals first suffer multiple appellate and

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185. See David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 106 (2000) (noting the limitations of appeals and postconviction review and commenting that "institutions in place to provide postconviction remedies function inadequately"). But see Anne-Marie Moyes, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 VAND. L. REV. 953, 988 (2002) ("Proponents explain that these exonerations provide convincing evidence that the appeals process works—that every miscarriage of justice is uncovered during the multiple layers of appeals.").

186. See Horan, *supra* note 185, at 106 ("Following a conviction imposed by a trial court, defendants can appeal their convictions or sentences, but generally based only on alleged legal, procedural, or constitutional infirmities in the process.").

187. See, e.g., CAL. CIV. PROC. CODE § 657 (West 1976) (detailing the grounds for a new trial, including newly discovered evidence); OKLA. STAT. ANN. tit. 22, § 952 (West 2003) (same); *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that prosecutorial suppression of exculpatory evidence violates due process).

188. See Patchel, *supra* note 70 (discussing habeas cases and the various obstacles they face including retroactivity and finality); Rosen, *supra* note 10, at 76-77 (discussing how concerns with preserving finality and time limits seriously limit the review of claims of innocence).

postconviction rejections in their attempts to overturn their convictions.<sup>189</sup>

As a first step, resources must be provided to investigate credible claims of innocence. At present, inmates claiming innocence can turn to one of the burgeoning number of innocence projects around the country, most located in law schools and relying heavily on volunteer student labor.<sup>190</sup> While these projects have been responsible for some marvelous exonerations,<sup>191</sup> they suffer from lack of funding and expertise.<sup>192</sup> More importantly, they often do not have access to police and prosecutorial files and cannot exercise subpoena power unless a court grants a hearing in the case.

Another potential solution is to create procedures that would treat postconviction claims of innocence separately from other claims. Much of the indifference or hostility to postconviction innocence claims undoubtedly occurs because these claims get lost amid the myriad legal claims of defendants who are undoubtedly guilty. The common assumption is that defendants seeking relief after appeal are trying to get released on a “technicality.” Leaving aside the fact that a constitutional deficiency is in no way a “technicality,” finding a way to separate claims of innocence from other claims is worth considering.

A claim of innocence is not based on a technicality—it is a claim that the legal system made the most fundamental of errors, that the imposition of punishment was unjust from the inception. Notions of comity, retroactivity, finality, procedural default—all of the means we use to keep the system from being overwhelmed by guilty defendants

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189. See Nina Martin, *Innocence Lost: What Happens When the Toughest Criminal Justice System in the World Keeps Locking Up the Wrong People—for Life*, SAN FRANCISCO, Nov. 2004, at 78-107 (providing various statistics regarding wrongful conviction including the fact that 93 percent of the wrongful convictions in California were upheld on direct appeal).

190. See *Innocence Projects Multiply*, CHARLOTTE OBSERVER (N.C.), Jan. 16, 2005, at 4P (noting the increasing number of innocence projects, most affiliated with law schools, throughout the nation).

191. Anna Gould, *Freed Inmate Thanks U. Wisconsin Project*, DAILY CARDINAL (Madison, Wis.), Mar. 2, 2001 (discussing the involvement of the Wisconsin Innocence Project in overturning Christopher Ochoa’s conviction); Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Postconviction DNA Testing*, 41 CRIM. L. BULL. 575, 592 (2005) (“To date, these student-driven programs are responsible for the vast majority of DNA exonerations.”).

192. Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003) (discussing the resource and faculty coverage issues faced by innocence projects); Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. L. BULL. 169, 188 (2005) (noting that innocence projects are “small and resource-starved” (quoting Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98 (2002))).

trying to escape their punishment—have no place when the claim is that the trial ended in a miscarriage of justice.

Allowing guilt or innocence to be litigated on appeal is one possible approach. In some judicial systems, appellate courts can hear new evidence, reverse convictions, order new trials, or even find the defendant innocent if they find that the decision at the trial stage was wrong or against the weight of the evidence.<sup>193</sup> Even in England, where the trial by jury most closely resembles ours, the appellate courts can hear “fresh evidence” and throw out convictions if they find that the conviction was “unsafe” or that the jury would not have necessarily returned the guilty verdict if they had known of the fresh evidence.<sup>194</sup> Similarly, allowing innocence to be litigated as a separate claim at the post-appeal stage is preferable to litigating it in the guise of a *Brady*, ineffective assistance, or newly discovered evidence claim (each of which has its own technical obstacles to overcome),

In addition, the English Criminal Cases Review Commission (CCRC), an independent agency charged with reviewing cases for miscarriages of justice, has provided a model.<sup>195</sup> A claim of wrongful conviction presented to the CCRC is subjected to multiple levels of review, with claims passing initial muster getting a full investigation by the commission, acting with full subpoena power.<sup>196</sup> If the CCRC concludes that a guilty verdict was “unsafe,” the commission refers the case to the courts for appropriate action.<sup>197</sup> Interestingly, the chief justice’s Commission on Actual Innocence submitted a proposal based on the CCRC model to the North Carolina legislature and the ensuing bill

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193. See generally RICHARD J. TERRILL, *WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY* (3d ed. 1997) (describing the judicial systems, including the appeals process, in various countries).

194. See Griffin, *supra* note 133, at 1243-46, 1277 (discussing the appeals process in England, including the “unsafe” standard for reversal and the courts’ power to review “fresh evidence” to correct wrongful convictions).

195. For a description of the CCRC, see Griffin, *supra* note 133, at 1275-78. As Griffin explains, the function of the CCRC “is to review the applications of convicted defendants who claim they have been wrongfully convicted and to refer cases to the court of appeal for review where there is a ‘real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.’” *Id.* at 1276 (quoting Criminal Appeal Act, 1995, § 13(1)(a) (Eng.)).

196. See *id.* at 1278-79.

197. *Id.* at 1277. In *R v. Criminal Cases Review Comm’n*, (1999) 3 Eng. Rep. 498 (Q.B.), the English court of appeals described the standard for referral from the CCRC as “more than an outside chance or a bare possibility, but which may be less than a probability, or a likelihood, or a racing certainty” that the conviction will be found “unsafe.”

actually passed in the North Carolina House of Representatives before stalling in the state senate.<sup>198</sup>

*E. Crossing the Adversarial Lines*

Innocence does, and should, blur the hard adversarial lines that characterize the American criminal justice system. In the individual criminal case, the American system depends on police officers to investigate crimes and arrest those they believe are guilty, prosecutors to try to convict those they believe are guilty, and defense attorneys to defend regardless of their client's guilt. The system works on the assumption that if each pursues their role zealously and ethically, justice will most likely prevail.

In the criminal justice system, neither side wins when an innocent person is convicted. The victim is denied justice because the real culprit remains unpunished. Police and prosecutorial resources are squandered. Public confidence in the system is undermined if and when the mistake is revealed. And, of course, the innocent person who is convicted suffers most of all.

With a few notable exceptions,<sup>199</sup> the wrongful convictions movement has been largely the effort of those who would place themselves within the criminal defense community. This is natural because most exonerations are produced by the hard work of a defense attorney. Laudably, there have been several notable instances where prosecutors have taken the lead in uncovering and remedying wrongful convictions, or at least have not opposed the defense efforts.<sup>200</sup>

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198. Andrea Weigel, *Panel Approves Innocence Plan: General Assembly Will Get Proposal*, RALEIGH NEWS & OBSERVER (N.C.), Mar. 8, 2005 (discussing the proposal sent by the Innocence Commission to the legislature whereby an agency like the CCRC would be created to screen and investigate innocence claims).

199. The most notable exception is Attorney General Janet Reno, who in 1995 commissioned the Department of Justice to study the phenomena of convicted defendants later exonerated through DNA. *See supra* note 79. The Department of Justice published the results of that study in EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996). In response, Reno created the National Commission on the Future of DNA Evidence. *See supra* note 79. For another example, see the North Carolina Actual Innocence Commission, created by North Carolina Chief Justice I. Beverly Lake in 2002. *See supra* note 89.

200. *See* Brendan Riley, *Innocence Project Urges DNA Test Changes in Nevada Crime Cases*, ASSOCIATED PRESS, Mar. 18, 2002 (“[S]ome Nevada prosecutors have their own ‘innocence projects’ to re-examine old capital cases for errors.”). A more ambiguous prosecutorial response occurred in Kirk Bloodsworth's case. After opposing Bloodsworth's efforts to gain a new trial, even after initial DNA testing indicated his innocence, prosecutors eventually agreed to DNA testing; when the results identified a different assailant, prosecutors joined Bloodsworth's attorney in a petition to grant

Lamentably, there are also the cases where prosecutors or police, even in the face of overwhelming evidence of innocence, fought to perpetuate the injustice.<sup>201</sup>

It is important for prosecutors and police officers to be willing to acknowledge the possibility that mistakes are made in individual cases. There are even more compelling reasons for prosecutors and police officers to join others—academics, defense attorneys, and judges—in a cooperative effort to find remedies for the causes of wrongful convictions.

Accuracy, the ultimate goal of the system, needs to be emphasized. Any conviction of the innocent, like any acquittal of the guilty, detracts from this ultimate goal. Moreover, false convictions have a double negative impact: they punish an innocent person and allow a guilty person to go free. With this in mind, it is imperative that all participants in the criminal justice system join together to study the causes of false convictions, and to propose remedies.

It would be a mistake only to place the onus on prosecutors for not joining a collective innocence movement, or only to ask prosecutors to quash their competitive natures when looking at ways to avoid and cure wrongful convictions. In pursuit of this overarching goal, defense attorneys also need to be willing to think outside of their usual bounds and consider supporting policies that may work to their competitive disadvantage in the usual run of cases in which the clients are guilty.

Although some needed improvements benefit the guilty and the innocent defendants alike (the provision of better defense attorneys, for example), many of the reforms that would substantially work to the advantage of the innocent do not necessarily help the guilty. Additional funding for DNA testing means that more DNA testing will be done, more sophisticated tests will be performed, and, hopefully, more meticulous protocols will be observed. If this happens, not only will more innocent defendants be exonerated, but more guilty defendants will be convicted. This means that defense attorneys will “lose” more cases. Similarly, while open discovery probably benefits the majority of defendants, whether guilty or innocent, more thorough discovery from the prosecution may require more reciprocal discovery from the defense. Requiring defense attorneys to provide more information to the

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Bloodsworth a pardon. The Justice Project, Campaign for Criminal Justice Reform, Profiles of Injustice, <http://ccjr.policy.net/proactive/newsroom/release.vtml?id=30121> (last visited Mar. 26, 2006).

201. See, e.g., Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1 (discussing Florida prosecutors’ fight against the use of DNA to exonerate defendants, and the Josiah Sutton case in Houston, TX where prosecutors resisted an appeal for an unconditional pardon even though Sutton was cleared by DNA testing in a 1998 rape and has since been freed).

prosecution may work to disadvantage those defense attorneys representing defendants whose resources outpace the prosecution's—those defendants who can hire good attorneys and the accompanying private investigators and experts.

Better eyewitness identification procedures minimize eyewitness mistakes, but also lessen opportunities for effective cross-examination and produce stronger arguments that the eyewitness testimony should be believed. Defense attorneys might also reasonably be nervous about reforms in postconviction and appellate procedures that differentiate claims of innocence because this tends to relegate claims of the remaining defendants to “legal technicalities” by guilty people. However, if the goal is protecting innocent people from conviction, defense attorneys have an obligation to join prosecutors and others in arguing for: 1) more funding for state DNA laboratories, 2) a more open discovery system, 3) scientifically based eyewitness identification procedures, and 4) postconviction procedures that provide an innocent defendant with a reasonable chance to prove his or her innocence.

Ultimately, the wrongful convictions phenomenon should remind everybody, prosecutors and defense attorneys alike, that while the criminal process operates as a contest, it must retain the goal of determining guilt or innocence. Reforms that advance this goal, which help convict the guilty and acquit the innocent without violating norms of fair procedure, should be pursued by prosecutors and defense attorneys alike.

## V. CONCLUSION

There are no easy answers to the problems posed by wrongful convictions. The DNA cases have illuminated the reality of the criminal justice system and its fallibility, but neither DNA nor any other science can provide a solution.

There is an obligation on all who have been touched by the DNA revolution to continue the discussion on innocence and its implications for the criminal justice system. The discussion needs to be open, and unhampered by adversarial jousting. Concern for the innocent people convicted must be balanced with concern for the innocent people who are harmed by crimes. The path to reform is clear where their interests are consistent—for example, when the best eyewitness identification procedures are known. But, the interests of the two classes of innocent people can also clash. The oft-repeated shibboleth, “better that ten guilty people go free than to convict one innocent” person is a nice-sounding phrase, but one wonders whether political and justice systems can, or should, really operate on a premise that would let ten guilty child murderers walk free to kill again.

When the interests of innocent victims are pitted against the interests of innocent defendants, there must be an honest weighing of the competing costs and benefits. Perhaps the most that can be hoped for is a system that does the best that it can to arrive at accurate results, that implements reforms to protect the innocent without exacting an undue cost by freeing the guilty. That is far from the system we have now.