

TOWARD A NEW PARADIGM OF CRIMINAL JUSTICE:
HOW THE INNOCENCE MOVEMENT MERGES
CRIME CONTROL AND DUE PROCESS

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At least since 1964 when Herbert Packer introduced us to two competing models of criminal justice—the Crime Control Model and the Due Process Model—we have become accustomed to thinking in terms of a conflict between society’s interest in convicting the guilty and the rights of criminal defendants.¹ The question posed to this symposium panel—“Could we convict fewer innocents without acquitting too many guilty?”—is premised on such a paradigm of competing goals. In this essay, I want to respond to that question in two ways. First, I want to suggest that the question, at least to a large degree, is the wrong question to ask under our constitutional system. Our constitutional system has clearly chosen protecting the innocent as a highest-order value, which preferences innocence-protection over the interest in convicting wrongdoers. Second, even confronting the question on its own terms (because of course there is and must be a limit to our willingness to protect the innocent at the expense of public safety), happily the answer is yes, we can reduce the number of wrongful convictions without sacrificing too many convictions of the guilty. Indeed, the Innocence Movement has shown us that those goals are not inherently contradictory, but rather are quite complementary. In this sense, the Innocence Movement has begun to alter our understanding of the criminal justice system, to give us a new paradigm—a Reliability Model based on best practices—that in many ways supplants or transcends the competing Crime Control and Due Process Models.

THE PRIMACY OF INNOCENCE PROTECTION

Asking if we could convict fewer innocents without acquitting too many guilty assumes an inherent tradeoff

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¹ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

between those objectives. I will argue in this article that the choice is false, that the two goals are not mutually exclusive.

But even accepting the question under its implicit assumption that the two goals conflict, asking if we could convict fewer innocents without acquitting too many guilty begs another question: What is “too many” convictions of the innocent and “too many” acquittals of the guilty? Put another way, what is the proper balance between an acceptable number of wrongful convictions and an acceptable number of acquittals of the guilty?² The question suggests perhaps a rough parity, that perhaps we are no worse for it if we lose one valid conviction so long as we prevent one conviction of an innocent.³ Or, perhaps to some, the real palpable fear is the fear of crime, so much more so than the fear of wrongful conviction that virtually *any* loss of valid convictions is too great a price to pay. But that cannot be the proper balance, for if that were the case, there would be no stopping point; *any* measure to detain, convict, or otherwise incapacitate great numbers of people based on minimal (or even no) suspicion would be justified, because surely some of those people, even if by chance, would be guilty of a crime. *Any* restrictions on the government’s ability to imprison or sanction people necessarily runs some risk of losing some convictions of guilty people.

But any presumption of rough parity (or worse) between the value of avoiding false convictions and false acquittals is misguided. Wrongful conviction of the innocent and failure to convict the guilty are not equal evils, either as a matter of policy or as a normative constitutional principle. Under our

² See Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICHMOND L. REV. 897, 904 (2007) (noting the need to know “the proper error ratio” for purposes of evaluating reform proposals).

³ Professor D. Michael Risinger has suggested what he calls the “Reform Ratio”:

Any wrongful Conviction that can be corrected or avoided without allowing more than one or two perpetrators of similar crimes to escape ought to be corrected or avoided; in addition, system alterations (reforms, if you will) that there is good reason to believe will accomplish this ought to be embraced.

D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. OF CRIM. L. & CRIMINOLOGY 761, 796 (2007). Given the constitutional preference for protecting innocent, this ratio would have to be considered a rather conservative one, as Risinger himself notes. *Id.* He proposes compensating for this conservative ratio, however, by placing “a rather low standard of proof concerning the effects of reform onto the proponents, and a correspondingly high standard of proof for those opposing such reform.” *Id.*

constitutional value scheme, wrongful conviction of the innocent is by far the greater evil. As we ponder the question presented to this panel, that value scheme must be our starting point.

Our constitutional scheme recognizes that some error is inevitable, and that we therefore must decide how we want to apportion the risk of error in our criminal justice system. Reflecting the judgment that wrongful conviction of the innocent is a greater evil than is failure to convict the guilty, our constitutional scheme purports to put most of the risk of error on the prosecution (even if in practice our system is not always true to that asserted value preference).⁴ Accordingly, despite the powerful intuition to believe otherwise, we instruct our factfinders that the defendant is presumed innocent, and we require the government to prove guilt beyond a reasonable doubt.⁵ We extend to the defendant a panoply of procedural protections, most of which are not similarly enjoyed by the government, including rights against self-incrimination (even the right to withhold truthful information helpful to the prosecution's case), confrontation clause rights, compulsory process rights,⁶ speedy trial rights, ex post facto protections, and the right to a jury trial.⁷ We guarantee the right to assistance of counsel, even to defendants who cannot afford counsel.⁸ And we guarantee criminal defendants a constitutional right to present a defense, which can overcome even legislative judgments about the scope of admissible evidence in ways that in theory would

⁴ Elsewhere, I have argued that, while we purport to put most risk of error on the government, in practice our system in fact puts considerable, even most, risk of error on the accused. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893 (2008). Nonetheless, while our system does not operate as we think or proclaim that it does, as a matter of constitutional doctrine, even if not practice, our system at least professes to preference innocence-protection as a highest-order value.

⁵ *In re Winship*, 397 U.S. 358, 363 (1970). See also Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621 (1998).

⁶ See Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1352 (quoting *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). Hoeffel argues that "the purpose of the [Compulsory Process] Clause was to allow for the introduction of evidence by the accused through the adversarial process," and that "[t]he Clause aids in the search for truth across all cases by giving the defendant a procedure that allows his side of the case, and not just the prosecution's, to be heard by the jury." *Id.* at 1277.

⁷ Goldwasser, *supra* note 5.

⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

not be applicable to evidence offered by the prosecution.⁹ In sum, we embrace the value preference expressed by Blackstone's ratio, which proclaims that it is better that ten guilty go free than that one innocent be wrongly convicted.¹⁰ While that ratio is not meant to create a rigid mathematical formula¹¹—indeed the acceptable ratio of wrongful convictions to failures to convict cannot be set with any mathematical precision—the maxim does at least express a value preference that has been incorporated into Constitutional doctrine.¹² Wrongful conviction of the innocent is a greater constitutional wrong than is failure to convict the guilty.¹³

⁹ See *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Washington v. Texas*, 388 U.S. 14 (1967). *But see* *Scheffer v. United States*, 523 U.S. 303 (1998).

¹⁰ 4 W. BLACKSTONE, COMMENTARIES *358. See also Michael S. Pardo, *On Misshapen Stones and Criminal Laws' Epistemology*, 86 TEX. L. REV. 347, 358 (2007); George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFFALO L. REV. 947, 978 (2007).

¹¹ While Blackstone chose the ratio of 10-1, others over the centuries have expressed the same sentiment using ratios varying from 1-1 to 1000-1. Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

¹² Risinger, *supra* note 3, at 791 (“In general, it is fair to say that the ratio image is meant as a general declaration that, for any given crime, the relative disvalue of a wrongful acquittal is less, perhaps significantly less, than the disvalue of a wrongful conviction. This ratio was not conceived of by statisticians, and it was never meant, nor should it be used, in my opinion, to announce the acceptability of a system of criminal justice so long as no more than ten percent of those convicted are innocent.”).

¹³ Some critics challenge the notion that this preference can be found in the Constitution. See Ronald Allen, ___ [in this symposium issue?]. To the strict constructionist, the truth-finding function, not protection of the innocent, is the primary purpose of the criminal justice system. But primacy of truth-finding is also nowhere expressly mentioned in the Constitution or the legislative history. And the list of special rights expressly granted to defendants at least powerfully suggests a preference for protecting the wrongly accused, and the Supreme Court has interpreted the Constitution to recognize such a preference for protecting the innocent. See, e.g., *In re Winship*, 397 U.S. 358, 363-64 (1970) (citing *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *id.* at 372 (Harlan, J., concurring) (stressing the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”). Whether all agree with that interpretation or not, it is now settled constitutional doctrine. As Donald Dripps has put it, “in constitutional terms the relevant value is not finding the truth but preventing unjust punishment.” Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 593 (1990). Accordingly, “Constitutional criminal procedure . . . should assume for its premises the preference for avoiding unjust conviction . . .” *Id.* See also Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) (“Whether treated as a moral,

From a policy perspective as well, preferencing innocence protection makes sense. *Every* wrongful conviction of an innocent person is an intolerable event.¹⁴ The injustice and harm to the innocent defendant wrongly convicted is staggering. Moreover, it is an injustice inflicted directly by the State itself, which undermines respect for and faith in our criminal justice institutions and the rule of law. And those wrongs are compounded by an additional wrong, the same wrong that attends to failures to convict the guilty: when we convict the innocent, the truly guilty avoids sanction and remains free to victimize the community again.

It is not similarly true that every failure to convict the guilty represents an intolerable event. While failure to convict the guilty is also problematic, it simply is not as intolerable as the wrongful conviction of the innocent. Our system, any system, inevitably lacks the capacity to apprehend, prosecute, and incarcerate every person, or even most people, guilty of serious crimes for which incarceration would be an appropriate sanction. Selective incapacitation is the most we can hope for. Moreover, not every guilty person will recidivate, so not every failure to convict translates into a loss of public safety. Indeed, Donald Dripps has observed that

false acquittals may not cost anything in terms of unprevented crimes. Who can say that Willy Horton committed graver outrages than would have been committed by the felon confined in the prison space his furlough made available? As for deterrence, how many street criminals count on being arrested, bound over, indicted, and then freed on a “technicality”? Invisible lost convictions do not affect general deterrence. Given that freeing the guilty for constitutional reasons has become virtually exotic, the suggestion that crime will decrease if the Warren Court precedents are overruled is “inutterable nonsense.”¹⁵

constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.”) (footnote omitted); Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 198 (1983) (“At least in theory, our system prefers erroneous acquittals over erroneous convictions.”).

¹⁴ See Risinger, *supra* note 3, at 789.

¹⁵ Dripps, *supra* note 13, at 609 (quoting Controlling Crime Through More Effective Law Enforcement, Hearings Before the Subcomm. On Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 226 (1967) (statement of Aaron Koota, quoting Nicholas deB. Katzenbach)).

Wholly apart from any effect on crime control, victims suffer in various and real ways when crimes are not successfully solved and punished. But the experience is not uniform, or always as clear and dramatic as when an innocent person is sent to prison or death row. Victimization studies reveal that most crimes are never even reported, let alone prosecuted.¹⁶ And with the rise of the victims' rights movement, criticism has been leveled against the single-minded focus on criminal prosecution and incarceration "for taking disputes out of the hands of offenders, victims and the larger community."¹⁷ Focusing solely on criminal sanction risks neglecting the needs of some victims for other mechanisms to resolve wrongs and disputes, including "family conferencing, restorative justice, and victim-offender reconciliation" and other forms of "re-integrative shaming through informal, non-punitive and non-adversarial interventions which shame offenders for their crimes, but offer support and re-integration through families and communities."¹⁸

Thus, failure to convict the guilty is a serious problem, but such failures are not inherently the equivalent of wrongly convicting the innocent, either as a matter of constitutional priority or sound policy judgment.

But there is a limit to this value preference. Given that we can never achieve perfect knowledge, mistakes are inevitable no matter how many precautions we take; the only way to prevent all risk of wrongful convictions is to prosecute no one.¹⁹ Of course, such paralysis is not a serious alternative. So the proper balance must lie somewhere between these poles.

I do not propose to resolve the debate about precisely where that balance should lie. It is enough for my purposes to note that, when pondering whether we can reduce the number of wrongful convictions without sacrificing too many convictions of the guilty, the appropriate trade-off point is not one-to-one. Because wrongful convictions of the innocent are a greater evil

¹⁶ Kent Roach, *Four Models of the Criminal Process*, 89 J. OF CRIM. L. AND CRIMINOLOGY 671, 677, 693 (1999). Roach cites data from a 1993 Canadian victimization survey that found that victims never reported to police 90% of sexual assaults, 68% of assaults, 53% of robberies, 54% of vandalism, 48% of motor vehicle theft or attempted theft, and 32% of break and enters or attempted break and enters. *Id.* at 696 n.134 (citing Rosemary Gartner & Anthony Doob, *Trends in Criminal Victimization 1988-93*, 14 JURISTAT 4 (1994)).

¹⁷ Roach, *supra* note 16, at 693.

¹⁸ *Id.* (citing JOHN BRAITHWAITE, SHAME AND REINTEGRATION 180-81 (1989)).

¹⁹ Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 62-63 (2005).

than failure to convict the guilty, we should be willing to accept some loss of true convictions, even a disproportionate number, if required to reduce the number of false ones.

CRIME CONTROL AND DUE PROCESS:
COMPETING CRIMINAL JUSTICE MODELS?

Fortunately for our purposes, we need not determine a level of lost true convictions that would be acceptable as a tradeoff for preventing wrongful convictions because most of the reforms designed to reduce the wrongful conviction of the innocent cost little or nothing in terms of accurate convictions. Those proposed reforms instead increase the reliability of the truth-finding functions of the criminal justice system, simultaneously enhancing our ability to convict the guilty and prevent convictions of the innocent. They represent not a tradeoff between mistaken convictions and mistaken acquittals, but rather best practices that improve the reliability of the criminal justice system in the aggregate.

The premise of the inquiry into whether we can reduce wrongful convictions without risking too many wrongful acquittals is that those two goals are inherently in tension. That perspective permeates scholarly and popular discussions about criminal justice.²⁰ Simply put, we have become accustomed to thinking in terms of a conflict between crime control objectives and defendants' rights.

That paradigm has its scholarly foundation in models such as Packer's competing Crime Control and Due Process Models.²¹ Packer created his two models not to advocate either

²⁰ See, e.g., Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973) ("Unfortunately there is a conflict between these two desires: the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty.... [T]his inner tension is part and parcel of the dialectics of *any* criminal process.") (emphasis in original); Aranella, *supra*, note 13, at 187 (discussing the "tensions between the protection of individual rights and the state's need to detect and punish criminal activity quickly and efficiently").

²¹ Others have revised or proposed alternatives to Packer's two models, but none has been as influential or enduring as Packer's two models. See, e.g., Roach, *supra* note 16; Aranella, *supra*, note 13; Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974); Damaska, *supra*, note 20, at 575-76; Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407 (1973); John Griffiths,

one in its pure form, but to clarify the value preferences that underlie different systemic choices, and to help describe the competing forces that shape our criminal justice system.

According to Packer, the Crime Control Model is based on a value system that preferences repression of crime as the most important function of the criminal justice system.²² To achieve maximum crime suppression in a world of scarce resources, the Crime Control Model emphasizes “the efficiency with which the criminal process operates to secure appropriate dispositions of persons convicted of crime.”²³ By efficiency, Packer meant that the system must be capable of apprehending, trying, convicting, and sanctioning a high proportion of criminal offenders with maximum speed and finality.²⁴ To achieve such speed and finality, the system depends on quick resolution of questions of factual guilt by police through informal investigation processes and interrogations, with minimal review or oversight by formal adversarial adjudication. As Packer put it, “The model that will operate successfully on these presuppositions must be an administrative, almost a managerial model. The image that comes to mind is an assembly line or a conveyor belt”²⁵

Accordingly, the Crime Control Model places great faith and confidence in the administrative screening process conducted by police and prosecutors to reach an accurate assessment of guilt, leading to a “presumption of guilt” that permits resolution of most cases by guilty pleas.²⁶ Packer explained that, “if there is confidence in the reliability of informal administrative factfinding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency.”²⁷ Accordingly, under this model it is important to place few restrictions on the administrative factfinding process, except those “that enhance reliability, excluding those designed for other purposes.”²⁸

The Due Process Model, by contrast, is much more skeptical of the administrative investigative process and its

Ideology in Criminal Procedure or A Third “Model” of the Criminal Process, 79 YALE L.J. 359 (1970).

²² Packer, *Two Models*, *supra* note 1, at 9.

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *Id.* at 11.

²⁶ *Id.* at 12-13; Packer, THE LIMITS OF THE CRIMINAL SANCTION, *supra* note 1, at 162.

²⁷ Packer, *Two Models*, *supra* note 1, at 12.

²⁸ *Id.* at 13.

capacity to make accurate assessments of guilt without judicial oversight. And the Due Process Model values individual rights and dignity in the face of state power, rather than just crime suppression.²⁹ Accordingly, the Due Process Model rejects informal, administrative factfinding, and preferences instead formal adversarial adjudication. Under the Due Process Model, there is no legitimate factfinding until the case is publicly heard and evaluated by an impartial tribunal, and the accused has had a full opportunity to discredit the case against her.³⁰ As its premise, the Due Process Model relies upon a presumption of legal innocence.³¹ Hence, as Packer put it, “If the Crime Control model resembles an assembly line, the Due Process Model looks very much like an obstacle course.”³²

INNOCENCE REFORMS AND BEST PRACTICES:
MERGING CRIME CONTROL AND DUE PROCESS

As we consider whether we can safely reduce the number of wrongful convictions that have been revealed in the last two decades,³³ it becomes clear that these two competing models do not capture the interplay of values that underlie the Innocence Movement. The Innocence Movement and its proposed reforms have shown that the two value preferences—crime control and defendants’ due process rights—can co-exist quite nicely, that they are indeed in many ways two sides of the same coin.

Thus, while the Innocence Movement is largely perceived as a defense-oriented movement, its rhetoric includes respect for fundamental crime control values. At its most basic level, this is

²⁹ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 165.

³⁰ Packer, *Two Models*, *supra*, note 1, at 14. In this sense, “[t]he criminal trial is concerned not with factual guilt, but with whether the prosecutor can establish legal guilt beyond a reasonable doubt on the basis of legally obtained evidence.” Roach, *supra* note 16, at 682.

³¹ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 167-68.

³² Packer, *Two Models*, *supra*, note 1, at 14.

³³ Most notably, the Innocence Movement has been launched by the more-than-200 postconviction DNA exonerations that have been exposed since 1989. See The Innocence Project, www.innocenceproject.org (listing DNA exonerations) (last visited April 24, 2008); Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (analyzing the first 200 DNA exonerations). But the exonerations have not been limited to the DNA cases; during the last two decades many more exonerations have emerged in cases with no DNA, although the total is unknown. See Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Samuel R. Gross, *Convicting the Innocent*, ___ ANN. REV. OF L. & SOC. SCI. ___ (2008) (forthcoming), currently available at <http://ssrn.com/abstract=1100011>.

reflected in the Movement's focus on ascertaining factual truth, and in the interest in apprehending the *true* perpetrator. The Innocence literature is replete with references to the fact that every wrongful conviction also represents a failure to convict the guilty—that is, a failure of crime control.³⁴ Indeed, the literature notes that in thirty-seven percent of the DNA exoneration cases, the DNA not only freed the innocent but also identified the true perpetrator.³⁵ And many of the inquiries into wrongful convictions posit as their objectives the need to learn about errors in the criminal justice system so that we can better protect the innocent *and* convict the guilty.³⁶

At the same time, it is becoming apparent that core values of the Crime Control Model also now require greater attention to innocence protection—that is, to defendants' rights. Packer's Crime Control Model accepts the probability of mistakes only “up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law.”³⁷ The exposure of an alarmingly high rate of wrongful convictions threatens crime control in both of these ways.³⁸ It is becoming increasingly clear that convicting

³⁴ See, e.g., BARRY SCHECK, PETER NEUFELD, & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* __ (2000); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 287-88; Keith A. Findley, *Learning from our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. WESTERN L. REV. 333, 337-39 (2003).

³⁵ Garrett, *supra* note 33, at 119.

³⁶ See 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”); Findley, *supra* note 34, at 337 (noting that the opportunity to learn from the DNA exoneration cases “poses a double imperative—a justice imperative and a public safety imperative”); Charter Statement, Wisconsin Criminal Justice Study Commission, available at www.wcjsc.org (last visited April 24, 2008) (creating State Commission to explore the causes of wrongful convictions and propose reforms to enhance the system's ability to convict the guilty and acquit the innocent).

³⁷ Packer, *Two Models*, *supra* note 1, at 15.

³⁸ In addition to the more-than-200 DNA exonerations counted by the Innocence Project, Samuel Gross and his colleagues have counted 340 wrongful convictions that they could identify from public media sources between 1989 and 2003 (a total that surely grossly undercounts the full number of wrongful convictions during that time). Gross et al., *supra* note 33. Others have attempted to calculate a wrongful conviction *rate*. The most empirically sound attempt thus far, by Michael Risinger, estimates a

the innocent means the guilty are escaping punishment for some of the most serious crimes. And the exonerations have created a general awareness of the unreliability of the process that might indeed be threatening the efficacy of the criminal law. As one example, prosecutors complain now that DNA testing (and the exonerations it produces) has contributed to what they claim is a “CSI effect”—an expectation by juries that the prosecution will produce conclusive scientific evidence of guilt, and a reluctance to convict without it.³⁹

Some procedural rules, of course, serve values other than truth-finding, and many of these are important aspects of the Due Process Model. Some testimonial privileges and rules that exclude reliable but illegally obtained evidence, for example, “deliberately reduce[] factfinding precision for the sake of other values.”⁴⁰ But the Innocence cases demonstrate that not all

wrongful conviction rate in one particular type of case—capital rape murders—of between 3.3 and five percent. Rising, *supra* note 3, at 780. In 2008, more than 2.3 million people were held in America’s prisons and jails. Pew Report Finds More than One in 100 Adults are Behind Bars, Pew Center on the States, http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912 (last visited April 24, 2008). If the wrongful conviction rate of 3.3 to five percent rate were to hold for all crimes and all sentences—and we don’t know that it would—that would mean that somewhere between almost 76,000 and 115,000 innocent people are presently behind bars in the United States.

³⁹ The CSI effect refers to *Crime Scene Investigation*, the shared title and premise of several popular television programs in which crimes are routinely solved with nearly magical and always infallible scientific analyses. There is considerable debate about whether the CSI effect really exists, or, if so, in which direction it tilts the system. See Craig M. Cooley, *The CSI Effect: Its Impact and Potential Concerns*, 41 NEW ENG. L. REV. 471 (2007); Kimberlianne Podlas, “*The CSI Effect*”: *Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 465 (2006); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1063-76 (2006). There is some evidence that DNA might also be creating what might be called a Reverse-CSI effect—a reluctance on the part of some prosecutors or courts to accept evidence of innocence, particularly in postconviction proceedings, unless it is as conclusive as the most dispositive DNA evidence. See generally Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) (describing the difficulties that defendants with non-DNA-based innocence claims have in obtaining relief).

⁴⁰ Damaska, *supra* note 20, at 579. Damaska notes, however, with some skepticism, that even some evidentiary privileges are sometimes defended on the basis that they avoid evidence of dubious value, and exclusion of some illegally obtained evidence is sometimes defended on the ground that such exclusionary rules enhance evidentiary factfinding in the long run. *Id.* at n.196. Cf., Arnold H. Loewy, *The Fourth Amendment as a Device for*

defendants' rights are incompatible with crime control, and that instead many enhance the system's truth-finding functions. Indeed, even after the Warren Court established new due process rights in criminal cases in the 1960s, including some that do not purport to serve truth-enhancement, those rights have not seriously impeded crime control, at least as measured by imprisonment rates. The last fifty years have witnessed unprecedented increases in prosecutions, convictions, and imprisonment rates.⁴¹ Moreover, research suggests that offenders may be more law abiding if they perceive that they have been treated fairly by the system.⁴² In sum, the past fifty years have demonstrated that fair(er) proceedings are not incompatible with crime control.

Yet another trend is also blurring the distinction between the Crime Control and Due Process Models. The Crime Control Model is premised on a preference for administrative fact-finding centered in police investigations, while the Due Process Model preferences formal adversarial adjudication in open court. But even after the Warren Court's due process revolution the criminal justice system has continued to take on an increasingly

Protecting the Innocent, 81 MICH. L. REV. 1229 (1983) (arguing that the primary purpose of the Fourth Amendment is to protect the innocent from insufficiently justified searches and seizures); Dripps, *supra* note 13, at 620 (the Fourth Amendment is designed to protect "innocent victims of official detention and home invasion").

⁴¹ The total number of people in American prisons or jails has skyrocketed from fewer than 213,000 in 1960 to nearly 2.6 million in 2005. U.S. Department of Justice, Bureau of Justice Statistics, 1960 data summarized at <http://www.soci.niu.edu/~critcrim/prisons/pris.pop> (last visited April 24, 2008); U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <http://www.ojp.gov/bjs/prisons.htm> (2005) (last visited April 24, 2008). And the incarceration rate has soared from just over 100 per 100,000 residents in 1960 to more than 1,000 per 100,000 residents in 2008. Michael Tonry, *Crime Does Not Cause Punishment: The Impact of Sentencing Police on Levels of Crime*, 20 SA CRIME QUARTERLY 13, 14 (2007), available at http://www.iss.co.za/index.php?link_id=3&slink_id=5238&link_type=12&slink_type=12&tmpl_id=3 (last visited April 24, 2008); *Pew Report Finds More than One in 100 Adults are Behind Bars*, Pew Center on the States, http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912 (last visited April 24, 2008)

⁴² Roach, *supra*, note 16, at 675 (citing TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990); John J. Braithwaite, *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory* (October 1997) (University of Toronto, Faculty of Law, Intensive Course Materials)). As Roach notes, Packer's Crime Control Model "assumes that punishment is necessary to control crime whereas it may achieve little in the way of general deterrence and may make things worse by stigmatizing offenders and producing defiance." *Id.* at 674-75.

administrative quality. Packer's Due Process Model assumes that fair treatment can only be achieved through an adversarial criminal trial in which the accused is represented by a defense lawyer. But we now know that defense lawyers rarely invoke due process rights.⁴³ They rarely conduct independent investigations, file motions to suppress evidence, challenge prosecution-proffered expert testimony, or seek experts of their own.⁴⁴ And they rarely invoke the right to trial itself; increasingly, criminal cases are resolved by the most administrative of judicial proceedings, the plea of guilty or no contest.⁴⁵ The rise of due process rights has not translated into extensive exercise of those rights.

Under the Due Process Model, the right to counsel is the focal point, because counsel is expected to protect and assert the defendant's due process rights.⁴⁶ But defense counsel have

⁴³ Indeed, Roach questions whether fair treatment necessarily requires counsel at all in all cases, noting that "circle-based alternatives such as restorative justice, family conferences, and Aboriginal justice can be run without lawyers and in a procedurally fair manner that encourages participation." Roach, *supra* note 15, at 674-75 (footnotes omitted).

⁴⁴ See Findley, *supra* note 4, at 901-02, 934-49; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 135 (2000); Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S107-S110 (2005); Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 46, 49, 52 (1990).

⁴⁵ More than ninety-five percent of all convictions are obtained by plea, rather than trial, and the percentage of cases taken to trial has diminished over time. In 1962, fifteen percent of federal criminal cases were resolved by trial; by 2002, the number had fallen to less than five percent. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUDIES 459, 493 (2004). And while the total number of federal criminal case filings (measured by number of defendants) more than doubled during that forty-year span, from 33,110 in 1962 to 76,827 in 2002, the absolute number of criminal trials diminished from 5,097 in 1962 to 3,574 in 2002, a drop of thirty percent. *Id.* at 492, 493. The numbers in state courts mirror the patterns in federal court. From 1976 to 2002, the overall rate of criminal trials in the twenty-two states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent. Although total case dispositions grew by 127 percent in these state courts, the absolute number of jury trials fell by fifteen percent and the number of bench trials fell by ten percent. *Id.* at 510.

⁴⁶ Packer explained the centrality of counsel in this way:

At every stage in the criminal process, as we have seen, our two models divide on the role to be played by counsel for the accused. In the Crime Control Model, with its administrative and managerial bias, he is a mere luxury; at no stage is he indispensable, and only in the very small proportion of cases

proved unable or unwilling to aggressively assert those rights, in part because underfunding has left them incapable of taking on the State, and in part because defense counsel have learned that they tend to get the best outcomes for their clients by cooperating with the prosecution, not by acting as an adversary. “Prosecutors and judges alike . . . indoctrinate defense attorneys into the plea bargain process by communicating to attorneys that time-consuming motions should be forsaken in favor of plea negotiation.”⁴⁷ And it is not just defense lawyers who fail to reflect the adversarial ideal. “Many empirical studies have illustrated that police, prosecutors, judges, and defense counsel share common organizational interests that defy the contrasting ideologies of crime control and due process. These professionals are bureaucrats who habitually co-operate to maximize their own organizational interests, not warriors for crime control or due process.”⁴⁸

Noting these trends, Darryl Brown has observed that the role of defense counsel is declining, and in its place the system is beginning to rely on other, more administrative mechanisms that have greater promise for protecting innocent defendants.⁴⁹ Brown echoes Judge Gerard Lynch’s contention that most contemporary adjudication reflects an “administrative system of criminal justice.”⁵⁰ Brown contends that these new administrative mechanisms for ensuring reliability—from improved eyewitness identification procedures and forensic laboratory systems to increased checks and balances within the investigative and prosecutorial processes (such as separating more clearly the roles of investigation and prosecution) to more expansive criminal discovery—have greater potential for protecting the rights of innocent defendants than the politically

that go to trial and the even smaller proportion that are reviewed on appeal is he to be regarded as more than merely tolerable. The Due Process Model, with its adversary and judicial bias, makes counsel for the accused a crucial figure throughout the process; on his presence depends the viability of this Model’s prescriptions.

Packer, *Two Models*, *supra* note 1, at 59-60.

⁴⁷ F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B.Y.U.J. PUB. L. 189, 213 (2002). See also MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 277 (1979).

⁴⁸ Roach, *supra* note 16, at 687.

⁴⁹ Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585 (2005).

⁵⁰ *Id.* at 1589; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

unrealistic hope of adequately funding defense counsel to fight prosecutors in adversary litigation.⁵¹

So, especially with the emergence of the Innocence Movement, it is becoming increasingly clear that crime control and due process are not as dichotomous as commonly perceived. Rather, the Reliability Model, with its reliance on “best practices,” incorporates the primary underlying values and objectives of both the Crime Control and the Due Process Models. Like the Crime Control Model, the Reliability Model emphasizes the need for efficient (and accurate) ability to sort the guilty and the innocent, relying more on administrative procedures than adversarial adjudication. And the Reliability Model incorporates features of the Due Process Model—including strengthening defense counsel and the rules of evidence and admissibility—to force the administrative practices to improve, and to respect the interests of the accused.

Indeed, the Innocence Movement is revealing that the dichotomy between Crime Control and Due Process concerns was never as stark as sometimes assumed. Scholars have long noticed that the two models actually share many values and features. While the Due Process Model reflects greater concern about protecting individuals from overbearing government power, it also, just like the Crime Control Model, is designed first and foremost to sanction and suppress crime. As Mirjan Damaska put it, “it is conceptually impossible to imagine a criminal process whose dominant concern is a desire to protect the individual from public officials. In its pure form[, concerned *only* about protecting individuals from the government, the Due Process Model] would lead not to an obstacle course, but rather

⁵¹ Brown summarizes his argument as follows:

[T]he strategy of pursuing accuracy through adversarial processes—through well-equipped defense counsel in particular—has reached a political limit. Broadly speaking, legislatures are interested in accurate criminal adjudication, but they do not view zealous defense attorneys as the best way to achieve that goal. Accordingly, adversarial process will not be a politically sustainable means for assuring the accuracy of fact-gathering. Partisan challenges brought by defense counsel against the state’s evidence must become—and are becoming—less dominant tools for serving a renewed popular commitment to accuracy. Other actors and institutions, with different mixes of motives and weaknesses, are equipped to take on—and are starting to take on—more of that task.

Brown, *supra* note 49, at 1645.

to mere obstacles and no course on which to place the former.”⁵² And the “defendants’ rights” that form the core of the innocence reform agenda are equally important to crime control. As Jon Gould wrote recently, “The most promising venue for criminal justice reform is in the local police departments, sheriff’s offices, and district attorneys’ office that from the front line of America’s criminal justice system. This initially may seem odd, . . . [b]ut the same reforms that may be envisioned as prodefendant can also be advanced under the aegis of greater professionalism and best practices for criminal justicians.”⁵³

It is for these reasons, indeed, that police and prosecutors, along with victims’ advocates and judges, are joining defense lawyers in reform efforts to improve the reliability of the criminal justice system—to better protect the innocent and convict the guilty. Most visibly, these efforts are apparent in the work of Innocence Commissions, Criminal Justice Study Commissions, or other such bodies, that are being formed in a number of states, including North Carolina, Virginia, Wisconsin, Illinois, Connecticut, California, and others.⁵⁴ These organizations, typically comprised of representatives of all perspectives in the criminal justice system, are finding remarkable common ground in efforts to improve the functioning of the criminal justice system, replacing any distinction between the Crime Control and Due Process Models with an implicit model that emphasizes reliability and “best practices.”⁵⁵

THE RELIABILITY MODEL: FOCUSING ON BEST PRACTICES TO PROTECT THE INNOCENT WITHOUT SACRIFICING PUBLIC SAFETY

⁵² Damaska, *supra* note 20, at 575. See also JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 239 (2008) (“The reform and law and order communities have more in common than they sometimes acknowledge. We all seek protection from crime. We all want wise and efficient stewardship of public monies.”).

⁵³ GOULD, *supra* note 52, at 240.

⁵⁴ See *id.* at 72 (“One of our tenets in starting the commission was a collective belief that people of goodwill from across the political spectrum share an interest in convicting the guilty and freeing the innocent.”); Findley, *supra* note 34.

⁵⁵ For a detailed description of the work of one such body that led to significant reforms in one jurisdiction, see Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645. For a recent in-depth description of the work of the Innocence Commission for Virginia, see GOULD, *supra* note 52.

The reforms advocated by the Innocence community to reduce the number of wrongful convictions all draw on those shared values of the Crime Control and Due Process Models that serve truth-seeking. Study of the DNA exonerations has consistently identified the same cluster of features that contribute to mistaken convictions. That list includes eyewitness error, false confessions, jailhouse snitch or informer testimony (and other types of perjury), police and prosecutorial misconduct, flawed or fraudulent forensic science, inadequate defense counsel, and tunnel vision.⁵⁶ Reforms to redress each of these problems are aimed at enhancing reliability of the process; they simultaneously serve the needs of both crime control and due process by enhancing the system's ability to convict the guilty and exonerate the innocent. Discussion of a few of these reforms will illustrate the point, and demonstrate that indeed we can reduce the number of convictions of the innocent without losing too many convictions of the guilty.

A. Improving Eyewitness Identification Evidence

Because eyewitness error is the leading contributor to wrongful conviction of the innocent—present in seventy-nine percent of the first 200 DNA exonerations⁵⁷—most discussions of innocence reforms begin with an analysis of ways to improve the reliability of eyewitness evidence. Probably no other factor related to wrongful convictions has received as much legal or scientific attention as eyewitness identification. Many of the causes of the problems and most, although not all, of the proposed remedies are by now well known and not disputed. The reforms represent a classic example of the merger of crime control and due process: almost all of the proposed reforms will improve the reliability of the process, reducing wrongful convictions of the innocent without loss of—and probably even an increase in—convictions of the guilty. Indeed, most of the reforms are virtually costless, both in financial terms and in the ability to identify and convict the guilty.

The reforms break down generally into two categories: those designed to prevent mistakes during the pre-trial identification process, and those designed to permit factfinders

⁵⁶ SCHECK, NEUFELD, & DWYER, *supra* note 34, at 246; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292; Garrett, *supra* note 33, at 76; Gross et al., *supra* note 33, at 542-44.

⁵⁷ Garrett, *supra* note 33, at 76.

to more effectively evaluate the reliability of eyewitness evidence offered at trial. Because preventing erroneous identifications in the first place is always preferable, the most important reforms relate to the process of obtaining identifications—the administrative investigation (that lies at the heart of the Due Process Model), more than the formal adjudication that follows (which is more central to the Due Process Model).

1. Reforming Eyewitness Identification Procedures

The proposed reforms in eyewitness identification procedures generally include those outlined below.⁵⁸ All of these proposals are consistent with both the Crime Control and Due Process Models in that they protect the wrongly accused while they enhance overall accuracy (and thus efficiency) of administrative practices.

First, in every case, no matter how many suspects there might be, each lineup procedure (whether live or photographic) should contain only one suspect.⁵⁹ The rationale for this reform is that a lineup is a test of an eyewitness's ability to accurately use recognition memory, and not just guesswork, to select a suspect. A lineup with more than one suspect (or worse, a lineup consisting entirely of suspects, like the now infamous Duke lacrosse team photo lineup⁶⁰) means the witness is given a test with more than one right answer (or even no wrong answers, as in the Duke case). Such a test is obviously less probative (or barely probative at all). Creating a more probative test does not cost anything in terms of proper identifications; it only increases the reliability and value of the evidence.

⁵⁸ This list is not exhaustive, but illustrates the point that we can significantly reduce the risk of convicting the innocent without jeopardizing convictions of the guilty. Many, but not all, of these reforms have been adopted as recommendations by a technical working group created by the federal government. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at www.ncjrs.org/pdffiles1/nij/178240.pdf.

⁵⁹ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 623; Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 PSYCHOL. BULL. 320, 321, 328 (1986) (explaining research demonstrating that having more than one suspect in a lineup dramatically increases the chances of a mistaken identification).

⁶⁰ See STUART TAYLOR JR. AND K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 38-39 (2007).

Second, in any lineup the suspect should not “stand out.”⁶¹ That means, generally, that the perpetrator or his photograph should not exhibit any unique features that draw attention to him, and that all innocent fillers generally should, like the suspect, fit the description of the perpetrator.⁶² Although this principle may seem obvious, it is violated routinely. Again, constructing a non-suggestive lineup has no costs in terms of developing legitimate identification evidence.

Third, witnesses should be instructed prior to viewing a lineup that the offender might not be in the lineup.⁶³ Research shows that instructing eyewitnesses that the perpetrator might or might not be in the lineup lowers rates of mistaken identifications in offender-absent lineups, but has little effect on reducing identifications when the offender is present in the lineup.⁶⁴

Fourth, one of the most important reforms, which is only now beginning to be employed in a limited number of jurisdictions, is that identification procedures should always use a double-blind testing protocol.⁶⁵ Double-blind simply refers to the practice—understood as essential to validity in any type of scientific testing—whereby neither the subject of the test (in an eyewitness case, the witness) nor the test administrator (the detective or other police investigator), knows who the suspect is. The purpose is to prevent the tester from *unintentionally*

⁶¹ Wells, *supra* note 59, at 624. See also Roy S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. OF APPLIED PSYCH. 482 (1981); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997); Steven E. Clark, *A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395 (2005); R.C.L. Lindsay and Gary L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 LAW & HUM. BEHAV. 303, 313 (1980).

⁶² There are exceptions to this principle, for example, when the suspect himself does not fit the description of the perpetrator; in that case, the fillers should all deviate from the description of the perpetrator in the same way as the suspect so that the suspect does not stand out. *Id.*

⁶³ Wells, *supra* note 59, at 625.

⁶⁴ Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 486-87 (1997).

⁶⁵ Wells, *supra* note 59, at 629; Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223, 236 (David Frank Ross et al. eds. 1994).

influencing the outcome of the procedure,⁶⁶ or *unintentionally* influencing the certainty of the eyewitness.⁶⁷ The recommendation is not based upon any doubts about police integrity, but rather on well-accepted understandings that all human beings are influenced by their own beliefs and unknowingly “leak” this information in ways that can influence the person being tested, or that can influence the investigator’s own interpretation of the results of the test procedure.⁶⁸ While there can be some minimal cost to requiring a “blind” administrator, those problems can be minimized or virtually eliminated.⁶⁹ And there can be no possible cost in terms of lost

⁶⁶ *Id.* The risk of influence in eyewitness identification procedures is real. Studies in which lineup administrators are led to believe, incorrectly, that a particular member of a lineup is the perpetrator show that witnesses are influenced by the administrator’s false belief and are more likely to pick the suspect. R.M. Haw & R.P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. OF APPLIED PSYCH. 1106 (2004); M.R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCH. 940 (1999); M.B. Russano et al., “*Why Don’t You Take Another Look at Number Three?*” *Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL. & ETHICS J. 355 (2006). The confidence of an eyewitness can be influenced and strengthened by information that the witness receives during, or after, the identification process. Eyewitnesses who are given confirming feedback about their identifications express more confidence in their identification and the details of their identification. In a recent study, researchers obtained 352 false identifications in an experiment and randomly assigned these eyewitnesses to receive feedback about their identification decisions. Some received confirming feedback (“good, you identified the suspect”), some received disconfirming feedback (“actually the suspect is number 4”) and some received no feedback. Later, the eyewitnesses were asked how certain they were at the time of the identification that they had identified the actual culprit. The eyewitnesses who received confirming feedback were much more confident than the witnesses with no feedback and the witnesses with disconfirming feedback. In addition, the confirming feedback witnesses distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit and how much attention they paid to the culprit’s face while observing the event.

⁶⁷ Wells, *supra* note 59, at 630.

⁶⁸ *Id.* at 629.

⁶⁹ Some smaller jurisdictions can find it difficult to find or assign an independent lineup administrator who knows nothing about the case. But that problem can be overcome. For photo arrays (which comprise the vast majority of identification procedures today), for example, the administrator can be functionally “blinded” by using a laptop computer which she cannot see while the witness looks at photos on the computer, or by putting each photograph in a separate file folder and shuffling the order of the photographs before presenting them to the witness, so the investigator does not know and cannot see which folder contains the suspect. These approaches have been adopted by a number of police departments and the

valid identifications of the guilty. The only information that is removed by the blind procedure is potentially suggestive cuing by lineup administrators that might lead eyewitnesses to pick out a suspect. But that is not legitimate identification evidence, any more than if police just declared an identification without conducting any procedure at all.⁷⁰

Fifth, police should take a verbatim confidence statement from the witness immediately after any identification.⁷¹ Significant scientific research has demonstrated that eyewitness confidence has little relation to accuracy, and what limited correlation there is can be undermined by post-identification feedback, because eyewitness confidence is highly malleable.⁷² To ensure that the eyewitness's expression of confidence in an identification is based solely on the eyewitness's independent recollection, and not on any after-acquired information or feedback, police should record the witness's confidence assessment before there is any opportunity for the witness to receive any type of feedback. Again, there can be no loss of

Wisconsin Department of Justice, among others. See Training & Standards Bureau, Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (Sept. 12, 2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>.

⁷⁰ Michael Risinger argues that a blind testing protocol for eyewitness identification procedures (as well as for the forensic sciences) is one of the best examples of "cost-free proposals" for reform. Risinger, *supra* note 3, at 796-97. He observes:

There appear to be no tenable substantive counter-arguments on theoretical grounds. . . . In sum, this lack of counter-argument is because the claims being made for the informational result of the process (forensic science or eyewitness identification) are that the information is derived from the special knowledge of the witness acting upon the stimulus (bitemark, fingerprint, human appearance). To the extent the results differ because of the impact of extraneous influences, what is claimed for the information is no longer true.

Id. at 798 n.74.

⁷¹ Wells, *supra* note 58, at 631.

⁷² *Id.* at 620; Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 117 (2002); Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 342-43 (2004); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 372-73 (1998).

legitimate evidence by employing this procedure; accurately and promptly assessing confidence only enhances reliability of the factfinding process.⁷³

Sixth, police should be instructed to limit the use of show-ups only to those circumstances in which they have no alternative. A show-up is a procedure in which a single suspect is presented to a witness for identification, typically within a short time after and in close proximity to the scene of a crime. The rationale for using such an inherently suggestive procedure is to try to obtain an identification while the witness's memory is still fresh. "Research indicates, however, that show-ups produce higher rates of mistaken identification than do simultaneous lineups or sequential lineups, even when the witness is tested soon after the witnessed event."⁷⁴ For this reason, most courts generally view show-ups with disfavor—but tend to permit them nonetheless.⁷⁵ However, one state supreme court recently held under its state constitution that show-ups are so inherently suggestive, and hence unreliable, that show-up identifications are not admissible unless police had no reasonable alternative.⁷⁶ The court elaborated that a show-up will not be necessary whenever police have the time and ability to construct a proper, non-suggestive live or photo lineup. Typically, therefore, show-ups will be impermissible unless police lack probable cause to detain the suspect for a proper lineup procedure, and therefore

⁷³ To the extent that some in law enforcement may be concerned that merely asking the witness how confident she is will send some sort of suggestive message, perhaps indicating doubt about the identification, that concern can easily be addressed by informing the eyewitness at the outset of the procedure that no matter what identification she makes, if any, the lineup administrator will be required by the procedure to assess and record her confidence level.

⁷⁴ Wells, *supra* note 59, at 628; Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1, 10 (1996); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUMAN BEHAV. 391, 402 (1997); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUMAN BEHAV. 459, 475 (1996).

⁷⁵ See, e.g., *Ford v. State*, 658 S.E.2d 428, 430 (Ga. App. 2008) (admitting show-up identification despite acknowledging that "one-on-one showups have been sharply criticized as inherently suggestive"); *State v. Wilson*, 827 A.2d 1143, 1147-48 (N.J. 2006) (acknowledging the suggestiveness of a show-up, but concluding that it was nonetheless sufficiently reliable to be admissible); *United States v. McGrath*, 89 F.Supp.2d 569 (E.D. Pa. 2000) (same); *State v. Santos*, 935 A.2d 212, 225 (Conn. App. 2007) (same).

⁷⁶ *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

are faced with a choice of conducting a show-up or releasing the suspect without any identification procedure at all.⁷⁷

While suppression of unnecessary show-up identifications might result in excluding some accurate identifications, and hence the loss of some convictions of the guilty, on balance even such an exclusionary rule will improve the quality of identification evidence, and thus both protect the innocent and help convict the guilty. Unlike other exclusionary rules that tend to be associated with the Due Process Model, which exclude reliable evidence in service of other values,⁷⁸ this exclusionary rule is designed solely to serve the value of accurate truth-finding. Again, such a rule merges due process and crime control values.

Seventh, each suspect should be exhibited to any given witness only once. Currently, police frequently utilize multiple identification procedures with a single suspect in order to confirm an initial identification, to make sure the witness made an accurate pick, or to bolster the persuasiveness of the identification. Police might, for example, first present the suspect to a witness in a show-up and then follow that up with a photo array, or initially display the suspect in a photo array, and then follow it up with a corporeal lineup. But research shows that multiple viewings of the same suspect are risky. Each viewing of a suspect alters the memory of the witness and makes subsequent identification of that suspect more likely, not because the witness accurately remembers the person from the crime, but rather from the prior identification procedure.⁷⁹ Psychologists have taught that eyewitness memory has to be understood as a type of trace evidence, like fingerprints, blood, semen or fibers, and that it too can be easily contaminated and altered by processing.⁸⁰ Each viewing of a suspect's image introduces a type of contamination that alters the "trace"

⁷⁷ *Id.* at 584-85.

⁷⁸ Suppressing evidence for Fourth Amendment violations in particular results in excluding otherwise reliable and relevant evidence based on concern for other values, such as protecting privacy interests.

⁷⁹ J.C. Brigham & D.L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. OF APPLIED SOC. PSYCHOL. 1394 (1988); G.W. Gorenstein & P.C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. OF APPLIED PSYCHOL. 616 (1980); T. Hinz & K. Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 LAW & HUM. BEHAV. 185 (2001); K.A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 2887 (2006).

⁸⁰ Wells, *supra* note 59, at 622-23.

evidence in the witness's brain. Police, therefore, must understand that they get one opportunity to conduct a valid identification procedure with each suspect and witness, so they had better use the best, most reliable procedure possible the first time, and then accept whatever the results of that procedure might be.⁸¹

Eighth, and somewhat more controversially, reformers recommend presenting suspects and fillers to witnesses one at a time—sequentially—rather than simultaneously, as is done in the traditional photo array or lineup.⁸² The theory behind this recommendation—which is supported by extensive laboratory research—is that eyewitnesses have a natural tendency to engage in what is known as the relative judgment process. When making selections, people prefer naturally to compare one item to the next, selecting the one that, compared to the others, best fits their selection criteria. In an eyewitness identification context, that can be problematic if the true perpetrator is not included among the suspects and fillers in a lineup. The relative judgment process will lead the witness to compare all of the faces presented and pick the one that best matches his memory of the perpetrator. Because, by definition, *someone* in every lineup will *best* match the perpetrator, when compared to the others in the lineup, the relative judgment process tends to induce people to pick out that best-match, even if the true perpetrator is not present and the best-match is an innocent person. Presenting images sequentially, rather than simultaneously, makes it more difficult for witnesses to engage in such comparison-shopping, requiring them instead to make absolute judgments based upon memory.

Laboratory research confirms that the sequential method produces fewer mistaken identifications.⁸³ There is some

⁸¹ See Training & Standards Bureau, Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (Sept. 12, 2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>.

⁸² Wells, *supra*, note 59, at 625-28; Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001); R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 559 (1985).

⁸³ Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281, 288 (1988); Lindsay & Wells, *supra* note 60, at 562; R.C.L. Lindsay et al., *Biased Lineups, Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796, 800 (1991); R.C.L. Lindsay et al.,

evidence, however, that in some circumstances it might also reduce the rate of accurate identifications.⁸⁴ A meta-analysis of the research suggests that, in laboratory studies, accurate identifications might be reduced from about fifty percent to about thirty-five percent.⁸⁵ But, significantly, mistaken identifications of innocent suspects are reduced even more dramatically, from twenty-seven percent to nine percent.⁸⁶ Thus, the *ratio* of accurate to mistaken identifications, that is, the diagnosticity ratio, is superior in the sequential compared to the simultaneous procedure.⁸⁷ Although the sequential

Simultaneous Lineup Presentation: Technique Matters, 76 J. APPLIED PSYCHOL. 741, 744 (1991); Wells, *supra* note 59, at 626.

⁸⁴ See Steblay et al., *supra* note 82, at 471. There is also some debate about whether the laboratory studies accurately reflect what happens in the real world. Most of this debate arises from a report on a field study in three Illinois police jurisdictions conducted primarily under the direction of the Chicago Police Department pursuant to a statutory mandate to compare double-blind sequential and non-blind simultaneous procedures. That report purports to indicate that the non-blind simultaneous procedure produced more suspect picks and fewer mistaken filler picks than the double-blind sequential procedure. SHERI H. MECKLENBERG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006). However, that study's methodology was so flawed, and its results so inconsistent in some respects with what is known from other laboratory and field studies, that most experts have concluded that it is essentially meaningless. See Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2007); NANCY STEBLAY, OBSERVATIONS ON THE ILLINOIS FIELD STUDY DATA, *available at* <http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf> (last visited March 6, 2008); Timothy P. O'Toole, *What's the Matter With Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*, CHAMPION, Aug. 2006, at 18; Gary L. Wells, *Comments on the Mecklenburg Report* (2006), http://www.psychology.iastate.edu/faculty/gwells/Illinois_Project_Wells_comments.pdf (last visited March 6, 2008). Some law enforcement agencies, which had adopted the double-blind sequential reform package, also rejected the Mecklenburg Report as methodologically flawed. See STATE OF WISCONSIN, OFFICE OF THE ATTORNEY GENERAL, RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES, *available at* <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf> (last visited Mar. 6, 2008).

⁸⁵ *Id.* Meta-analysis is a method of compiling and analyzing the data from multiple independent studies that purport to test the same phenomenon, to obtain essentially aggregate data from those multiple studies. _____.

⁸⁶ Steblay et al., *supra* note 82, at 463.

⁸⁷ Gary Wells explains the computation of the diagnosticity ratio as follows:

Using the data from the meta-analysis by Professor Nancy Steblay and her colleagues there are two ways to calculate this ratio. The first way is to divide the accurate

procedure thus produces fewer picks overall, it improves the odds that any picks will be accurate. As Dr. Gary Wells concludes, “The sequential lineup procedure appears to be one that good eyewitnesses have no trouble with, but gives eyewitnesses whose memories are weaker some difficulty.”⁸⁸

Thus, it appears that the sequential reform is one that might indeed have some costs in terms of lost accurate evidence of guilt. But it might not be anything more than lost accurate but fortuitous guesses by eyewitnesses who really don't have good recall. More significantly, while the procedure might cost some accurate identifications, it appears that it will improve the overall accuracy of identification evidence, and lead to an even greater reduction in mistaken identifications of the innocent. For this reason, a number of law enforcement agencies, including some entire states, that have studied the sequential procedure have chosen to adopt it.⁸⁹

identification rate for culprit-present lineups by the average identification rate of any given person in the culprit-absent condition. Using that method, the simultaneous procedure yields an accurate-identification ratio of $.50/.085 = 5.88$ and the sequential procedure yields an accurate identification ratio of $.35/.0467 = 7.49$. The other method of calculating the ratio of accurate to mistaken identifications is to use the rate of identifying the known-innocent suspect in the culprit-absent condition as the denominator. Using this method, the simultaneous procedure yields an accurate-identification ratio of $.50/.27 = 1.85$ and the sequential procedure yields an accurate-identification ratio of $.35/.09 = 3.89$. In other words, in spite of some reduction in accurate identifications, the sequential appears to improve the *odds* that a suspect, if identified, is the actual culprit.

Wells, *supra* note 59, at 626-27.

⁸⁸ Wells, *supra* note 59, at 628.

⁸⁹ The New Jersey Attorney General, who uniquely among state attorneys general has direct supervisory authority over all law enforcement in the state, in 2001 directed that all police agencies in the state adopt the sequential method (among other reforms), making New Jersey the first state to adopt the procedure statewide. See Gina Kalata & Iver Peterson, *New Way to Insure Eyewitnesses Can Identify the Right Bad Guy*, N.Y. TIMES, July 21, 2001, at A1. Wisconsin's Attorney General has similarly adopted the procedure. Although the Wisconsin Attorney General does not have the authority to mandate compliance, the Attorney General has incorporated the procedure into its training curriculum and policies, and most local jurisdictions are complying. See Training & Standards Bureau, Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (Sept. 12, 2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>. Other states have adopted the sequential procedure by statute. See N.C. Gen. Stat. §§ 15A-284.50-53. Other notable local law enforcement agencies have adopted the procedure on their own, including Hennepin County,

Finally, one additional reform is worth mention, because it is relatively new and has not yet received much attention. Dr. Gary Wells has recently proposed what he calls a “reasonable-suspicion criterion.”⁹⁰ Under that proposal, police generally would avoid conducting any eyewitness identification procedure as a first line of investigation. Instead, they would hold off on attempting an identification until other evidence had created “a reasonable belief that the individual is in fact the culprit.”⁹¹ This recommendation is premised upon the understanding that any lineup procedure puts innocent suspects in inherent jeopardy.⁹² The amount of risk turns on the base rate in which lineups contain the actual culprit rather than innocent suspects, and this depends on how much evidence a particular investigator requires before putting a suspect in a lineup.⁹³ The less evidence required before constructing a lineup, the lower the base rate of actual perpetrators in the lineups, and the greater the likelihood that an innocent suspect (not just a filler) will be misidentified.⁹⁴ When possible, therefore, investigators should try to raise the base rate of actual perpetrators in their lineups by conducting lineups only after good reason has developed to suspect their target. This reform should not cause any loss of convictions of true perpetrators, but rather should improve the accuracy of the process.

These reforms would advance justice by protecting the innocent and by simultaneously helping to “keep the focus of investigations on guilty persons.”⁹⁵ They also would help decisionmakers who are responsible for “evaluating the identification testimony (such as prosecutors, judges, and jurors).”⁹⁶ And they would enhance efficiency—an explicit objective of the Crime Control Model—by minimizing the ability of the defense to impeach identification evidence (thereby inducing more pleas) and by reducing the need to present expensive and time-consuming expert testimony (which is

Minnesota, and the Minneapolis Police Department, Northampton, Massachusetts, and several jurisdictions in Virginia and California. Wells, *supra* note 59, at 642-43.

⁹⁰ Wells, *supra* note 59, at 635-40.

⁹¹ Wells, *supra* note 59, at 635.

⁹² *Id.*

⁹³ *Id.* at 636-37.

⁹⁴ *Id.*

⁹⁵ *Id.* at 631.

⁹⁶ *Id.* at 632.

usually presented to focus on the inadequacies of the lineup procedures used in the case).⁹⁷

Moreover, such reforms will help produce more convictions because they will prevent “spoiling” eyewitnesses. The “reasonable suspicion criterion,” for example, serves law enforcement objectives by protecting witnesses from situations in which they are more likely to make a mistake. Wells explains: “It is also based on the proposition that conducting lineups that do not contain the actual culprit has the probabilistic risk of ruining the eyewitness for later possible identifications if the actual culprit later becomes a focus of the investigation.”⁹⁸ Wells further explains:

Suppose that an eyewitness were shown a lineup in the absence of reasonable suspicion [or utilizing a flawed procedure], the suspect is innocent, and the eyewitness selected a filler instead. Suppose now that additional investigation (or a tip) uncovers a new suspect, someone for whom there is a very strong reason to believe is the culprit. The eyewitness, having already picked a filler, is now considered “spent” or “spoiled” for purposes of conducting a lineup because that eyewitness has already misidentified a filler. . . . [T]he potential for credible identification evidence against the new suspect is forever lost.⁹⁹

2. Reforming the Way Eyewitness Evidence is Received and Considered

Even the most pristine eyewitness identification procedures, however, are bound to produce mistakes sometimes. And not all jurisdictions (indeed, not even most, yet) have adopted the best practices recommendations outlined above. Another set of reforms therefore is required to minimize the harmful effects of eyewitness error at trial. Those recommendations center on revised standards for admissibility of eyewitness evidence,¹⁰⁰ freer admissibility of expert testimony

⁹⁷ *Id.*

⁹⁸ *Id.* at 636.

⁹⁹ *Id.* at 640.

¹⁰⁰ See Timothy P. O’Toole and Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. L. REV. 109 (2006); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, ___ L. & HUM. BEHAV. ___ (2008) (in press), available at <http://www.psychology.iastate.edu/FACULTY/gwells/homepage.htm>; *State v. Hunt*, 69 P.3d 571 (Kansas 2003); *State v. Ramirez*, 817 P.2d 774 (Utah 1991); *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v.*

about eyewitness evidence,¹⁰¹ and modified jury instructions that educate jurors about the fallibility of eyewitness evidence and the factors that can make an identification more or less reliable.¹⁰² These kinds of reforms look more like the adjudication-focused process rights that are typically associated with the Due Process Model. But even they are designed solely to improve the process's truth-finding accuracy; they do not serve values inconsistent with truth-finding.

A few may threaten some accurate convictions, but most would not, and most would balance that by doing even more to protect against wrongful convictions. Revised admissibility standards, for example, which more faithfully reflect scientific knowledge about human perception and memory and more rigorously demand scientifically sound procedures, might result in more identifications being suppressed, at least initially until police adapt by improving their practices.¹⁰³ That might cost a

Adams, 423 N.E.379 (N.Y. 1981); and *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005).

¹⁰¹ See Michael R. Leippe, *The Case for Expert Testimony about Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995); Saul Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AMER. PSYCHOLOGIST 405 (May 2001); Steven D. Penrod & Brian L. Cutler, *Preventing Mistaken Convictions in Eyewitness Identification Trials: The Case Against Traditional Safeguards*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 89 (1999).

¹⁰² *E.g.*, *Brodes v. State*, 614 S.E.2d 766, 771 & n.8 (Ga. 2005) (advising trial courts "to refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of [an] identification"); *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (mandating a jury instruction if police fail to advise witnesses that the culprit "might or might not be present"); *State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (finding reversible error where trial court refused to give the jury an instruction about cross-racial identifications).

¹⁰³ Under current constitutional doctrine, identifications are inadmissible if (1) police engaged in an "impermissibly suggestive" identification procedure, and (2) the state cannot prove that, despite the suggestiveness, the identification is nonetheless sufficiently reliable under the totality of the circumstances. See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). The criteria that the Supreme Court has established for evaluating reliability, however, are not scientifically sound, and make it very difficult for courts to conclude anything except that all but the most egregiously suggestive procedures are nonetheless sufficiently reliable. See O'Toole and Shay, *supra*, note 100; Wells & Quinlivan, *supra* note 100; Findley, *supra* note 4, at 917. Some of the revised admissibility standards modify *Brathwaite* and *Biggers* by adding some reliability factors that are based on the scientific research. *E.g.* *State v. Hunt*, 69 P.3d 571 (Kans. 2003); *State v. Ramirez*, 817 P.2d 774 (Utah 1991). Others jettison the reliability assessment altogether, and simply exclude any eyewitness evidence produced by unnecessarily suggestive procedures. *E.g.*,

few convictions, but it likely also would protect a significant group of innocent people who were misidentified. And in the long run, by applying pressure on police to avoid suggestive and unreliable procedures—that is, to adopt “best practices” for identification procedures—more scientifically sound and rigorous admissibility standards ought to improve accuracy in the aggregate.

Jury instructions could conceivably cost a few otherwise valid convictions at the margins, but not likely very many, if any. Jury instructions would be designed to *improve* the jury’s ability to understand and evaluate eyewitness testimony. The goal of such instructions would be to educate jurors and thereby enhance decisional reliability, not undermine it. Some courts have mandated instructions on matters such as the fallibility of eyewitness testimony,¹⁰⁴ the relative weakness of cross-racial identifications,¹⁰⁵ and the risk caused by failure to advise witnesses that the perpetrator might or might not be present.¹⁰⁶ Even to the extent that any particular jury instruction might increase juror skepticism about some eyewitness testimony, it is unlikely that it would have much impact, given that eyewitness evidence is so powerful and jury instructions are a very weak tool. Research suggests that jury instructions, while not valueless, do relatively little to overcome mistaken eyewitness testimony.¹⁰⁷

Expert testimony is a somewhat more effective corrective for misunderstandings about eyewitness identifications.¹⁰⁸ Yet

Commonwealth v. Johnson, 650 N.E.2d 1257 (1995); People v. Adams, 423 N.E.2d 379 (N.Y. 1981); State v. Dubose, 699 N.W.2d 582 (Wis. 2005).

¹⁰⁴ *Hunt*, 69 P.3d at 576.

¹⁰⁵ *Cromedy*, 727 A.2d at 467.

¹⁰⁶ *Ledbetter*, 881 A.2d at 318-19.

¹⁰⁷ Penrod & Cutler, *supra* note 101, at 111; BRIAN L. CUTLER AND STEVE D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 263 (1995).

¹⁰⁸ In *State v. Copeland*, 226 S.W.3d 287, 299-300 (Tenn. 2007), the court recognized the importance of allowing expert testimony on eyewitness identification and the changing trend in allowing such testimony. The court held that it was error in a capital murder trial to prohibit expert testimony on the issue of the reliability of eyewitness identification. The court noted:

“[S]tudies of DNA exonerations . . . have validated the research of social scientists, particularly in the areas of mistaken eyewitness identification . . . Courts traditionally tended to exclude scientific evidence from expert witnesses in these disciplines, primarily on the basis that the testimony addressed matters within the common understanding of jurors, was confusing, or that it invaded the province of the jury to make credibility determinations. However, with the

expert testimony likewise is unlikely to cost many, if any, accurate convictions. Expert testimony simply enhances the factfinder's ability to knowledgeably evaluate eyewitness testimony; it increases the jurors' accuracy-assessment tools. Research indicates that it does not overwhelm jurors or lead them to reject eyewitness identifications too readily.¹⁰⁹ Rather, it increases their sensitivity to factors affecting the reliability of eyewitness testimony, helping them to rely less on poor indicators of accuracy like confidence, and more on those factors that are good predictors of reliability.¹¹⁰

B. Improving Police Interrogation Practices and Guarding Against False Confessions

One of the reforms that most clearly would simultaneously protect the innocent and enhance the ability to convict the guilty relates to police interrogations and false confessions. The notion that a person would confess to a serious crime she did not commit is so counter-intuitive that until relatively recently it was hard for most people to imagine that it was any kind of a real problem. Indeed, as recently as twenty years ago even thoughtful and informed scholars shared the view that there was little risk of coercing a confession from an innocent person. In 1990, Donald Dripps reflected the view that any confession, no matter how obtain, must be truthful. He wrote, "Of course, excluding a confession always damages the search for truth at trial, but if truth at trial were our primary goal we would not hesitate to coerce confessions without limit. . . . Coercion advances substantially the search for truth at trial."¹¹¹ Since then, the DNA exonerations, and a good body of new research, have established that people do confess to crimes they did not commit,

increased awareness of the role that mistaken identification . . . play[s] in convicting the innocent, a new trend is developing regarding the admissibility of expert testimony." Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1273 (2005) (footnotes omitted). McMurtrie observes that "[r]esearch over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors." *Id.* at 1276.

Copeland, 226 S.W.3d at 299-300.

¹⁰⁹ Penrod & Cutler, *supra* note 101, at 111; CUTLER & PENROD, *supra* note 107, at 263.

¹¹⁰ Penrod & Cutler, *supra* note 101, at 113.

¹¹¹ Dripps, *supra* note 13, at 631.

with alarming regularity, and for a variety of reasons.¹¹² Indeed, of the first 200 DNA exonerations, sixteen percent involved false confessions.¹¹³

The most widely recommended reform to guard against such false confessions is to require electronic recording of interrogations, from start to finish.¹¹⁴ Electronic recording protects the innocent by deterring overbearing and unlawful police coercion, and makes a record for factfinders when police push too hard or supply the details of a purported confession. At the same time, electronic recording aids factfinders by providing a clear record to resolve otherwise insoluble swearing contests between interrogators and the interrogated about what happened in the interrogation room and what the suspect said and meant by her responses. And it serves the needs of law enforcement in multiple ways. It protects police from spurious claims of abuse or misconduct during interrogations. It also advances crime control objectives by increasing the efficiency with which the system convicts the guilty. When a person is captured on tape, voluntarily and without coercion confessing to a crime, suppression motions and trials disappear. With an unassailable confession on tape, there is usually little for the defendant to do but plead guilty. And when cases do go to trial, electronic recording gives prosecutors the most powerful evidence they could hope for.

It is for these reasons that police across the country are beginning to adopt electronic recording voluntarily.¹¹⁵ And it is

¹¹² 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 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

¹¹³ Garrett, *supra* note 33, at 88.

¹¹⁴ See Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZAGA L. REV. 199 (2007); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997); 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 (2004); Thomas P. Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, 31 CHAMPION 8 (April 2007).

¹¹⁵ Thomas Sullivan has identified more than 300 local police and sheriff's departments in 43 states (in addition to the entire states of Minnesota and Alaska) that, as of early 2005, had adopted a policy of electronic recording. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations:*

why eight states and the District of Columbia now require electronic recording of at least some interrogations by statute, a ninth (Maryland) is poised to adopt such a law, and the supreme courts in five more states have mandated or encouraged recording.¹¹⁶ It is also why even crime control critics of *Miranda*¹¹⁷ like Paul Cassell advocate electronic recording as a better alternative to *Miranda*.¹¹⁸ After considering the

Everybody Wins, 95 J. CRIM. LAW & CRIMINOLOGY 1127, 1128 (2005). Since then several more states have mandated or established statewide policies of electronic recording. See *infra* note 116. Virtually without exception, law enforcement officers in those jurisdictions have become strong advocates of the practice. Thomas P. Sullivan, *Recording Custodial Interrogations: The Police Experience*, 52 FED. LAWYER 20, 20 (Jan. 2005) (surveying 260 law enforcement agencies in 41 states where they electronically record interrogations, and reporting that “[a]lmost without exception officers who have had experience with custodial recordings enthusiastically favor the practice”).

¹¹⁶ See Van Smith, *Roll the Tape*, Citypaperonline (April 16, 2008), at <http://www.citypaper.com/news/story.asp?id=15588> (reporting that electronic recording legislation is on the Maryland governor’s desk for his signature, and that the governor was considering it and had supported it while it was in the legislature); D.C. Code Ann. § 5-116.01 (LexisNexis Supp. 2007) (requiring police to record all custodial investigations); 725 Ill. Comp. Stat. Ann. 5/103-2.1 (West 2006) (same); Me. Rev. Stat. Ann. tit. 25, § 2803-B (2007) (mandating policy of recording “interviews of suspects in serious crimes”); N.M. Stat. § 29-1-16 (Supp. 2006) (requiring police to record all custodial investigations); Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (Vernon Supp. 2007) (rendering unrecorded oral statements inadmissible); N.C. Gen. Stat. § 15A-211 (requiring complete electronic recording of custodial interrogations in homicide cases); Wis. Stat. §§ 968.073 and 938.195 (declaring it to be state policy that police must electronically record all custodial interrogations in felony cases and in all juvenile cases whenever feasible); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (mandating electronic recording); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (same); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out state’s failure to record interrogation and calling unrecorded admissions “less reliable”); *State v. Cook*, 847 A.2d 530, 547 (N.J. 2004) (establishing a committee to study and make recommendations on the use of electronic recording); *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005) (mandating electronic recording of all custodial interrogations of juveniles).

¹¹⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁸ See Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 990 Nw. U. L. Rev. 387, 391 (1996) (arguing for a reassessment of *Miranda* “in light of [its] costs” and concluding that those costs “are unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing *Miranda*’s harms to society”). See also Ronald J. Allen, *The Misguided Defenses of Miranda v. Arizona*, 5 OHIO ST. J. OF CRIM. LAW 205, 213 (2007) (criticizing *Miranda*, but contrasting it to electronic recording, stating, “There is surely nothing inappropriate about prophylactic court rulings on evidentiary grounds

experience in jurisdictions that record, Cassell concludes “that such a requirement would not significantly harm police efforts to obtain confessions,” and that “tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike.”¹¹⁹ A clearer merger of crime control and due process values is hard to imagine.¹²⁰ This is an area where the Innocence Movement has shown that reforming an administrative investigative process can have the best potential for serving defendants’ due process interests while also advancing crime control goals.

Other reforms to prevent false confessions are less clear, but also promising. Standard police interrogation training teaches police a very aggressive, guilt-presuming approach whose goal is to obtain a confession, not elicit information.¹²¹ The most common variant of this approach, known as the Reid Technique, teaches police to isolate and break down a suspect, making him feel hopeless by convincing him that he will be convicted (by, for example, cutting off all denials of guilt and telling him about overwhelming evidence against him, whether real or fabricated).¹²² The technique then teaches a strategy of minimization, designed to minimize the suspect’s sense of culpability for the crime, or to make him believe that a confession is the only way to reduce the negative consequences

reducing the incentive for untapped interrogation. A court can typically decide the facts accurately only if it has reliable evidence.”).

¹¹⁹ Cassell, *supra* note 118, at 490 (quoting Royal Comm’n on Criminal Justice, Report 26 (1993)).

¹²⁰ Under Packer’s Due Process Model, “[t]he rationale of exclusion [of confessions] is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to cooperate in the process.” Packer, *Two Models*, *supra* note 1, at 35. Under the Innocence Movement, the due process concern now melds with the crime control concern, focusing first on concern about the reliability of the confession. Indeed, at least one state supreme court has declared that failure to record violates its state constitution’s due process clause. *Stephan v. State*, 711 P.2d 1156, 1159-60 (Alaska 1985).

¹²¹ For summaries and critiques of the standard nine-step interrogation process, see AMINA MEMON, ALDERT VRIJ & RAY BULL, *PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY* 58-65 (2d ed. 2003); Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT* 37, 72-73 (G. Daniel Lassiter ed., 2004); GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 10-21 (2003).

¹²² The essential textbook for the Reid Technique is FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (2001).

of the crime.¹²³ Confession is made to look like a rational, cost-reducing choice. Unfortunately, one consequence of these heavy-handed tactics is that they can and do induce innocent people to confess as well.¹²⁴

Recently, especially in the era of electronic recording, new methods of interrogating suspects have emerged that challenge the confrontational approach of the Reid Technique. The transparency imposed by electronic recording is causing police to re-evaluate some of their methods, because police sense that aggressive, confrontational Reid methods do not look good to juries. St. Paul, Minnesota, Commander Neil Nelson, a leading detective with many years of experience recording interrogations, has noted in his training materials that “[e]xisting strategies don’t work well on tape.”¹²⁵ He teaches that, when recorded, the officer is better served not by cutting off denials or engaging in hostile confrontations, but instead by being “disarming,” trying to “‘see, hear, and feel’ from the interviewee’s point of view,” treating the interviewee “like a fellow human being,” maintaining a “friendly atmosphere,” keeping “an open mind,” asking “objective questions,” and asking “difficult, delicate, or distressing questions in a firm, gentle, considerate (yet persistent) manner.”¹²⁶ Instead of cutting off denials and pressuring suspects to confess, the new approach encourages the suspect keep talking and responding to cordial but challenging questions until the suspect’s own statements either convince the observer of innocence, or trap the suspect in a web of lies. Nelson reminds police that, while other interrogation techniques “[w]ere created with the goal of getting a suspect to confess,” the real objective is to gather information

¹²³ See Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188 (2003).

¹²⁴ For a discussion of how these interrogation techniques contribute to the problem of tunnel vision that can lead to convicting the innocent, see Findley & Scott, *supra* note 56, at 333-40. See also Kassin, Goldstein & Savitsky, *supra*, note 123, at 188; Saul M. Kassin, *On the Psychology of False Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215 (2005).

¹²⁵ NEIL NELSON, MAXIMIZING THE OPORTUNITY: INTERVIEW AND INTERROGATION C2 (2005) (on file with the author). Neil Nelson is a commander with the St. Paul, Minnesota, Police Department, who has been recording interrogations for over a decade. *Id.* He provides interviewing and interrogation training through Neil Nelson & Associates. *Id.*

¹²⁶ *Id.* at B5.

and “to keep[] the suspect talking (even if only to tell lies).”¹²⁷ By changing interrogation tactics in this way, Dr. Richard Leo has noted, “the presence of a camera, and the scrutiny it implies, may help to increase the diagnostic value of interviews and interrogations and protect the innocent from false confessions.”¹²⁸

The new techniques raise questions about whether police should continue to engage in deceit during interrogations,¹²⁹ whether extended, multi-hour interrogation sessions that wear suspects down should be permitted, and whether police should continue to employ various other forms of confrontational psychological pressure to obtain confessions. Under the old Due Process Model, rejecting those approaches might have been advocated on grounds that they disrespect individual human dignity and basic fairness. Today, while those values are still important, the debate focuses on whether these interrogation techniques are really effective at obtaining truthful or useful information.¹³⁰ The due process and crime control interests coalesce. Although that debate has not yet been resolved in most jurisdictions, it is at least now no longer an insoluble debate over value preferences, but a debate centered on shared values that asks a more empirical question: which method produces the most reliable information?¹³¹

¹²⁷ *Id.* at E1-E2. Such new methods of interrogation are similar to the new “investigative interviews” that have emerged in England (which were also developed after police began recording their interrogations). See John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRITISH J. OF CRIMINOLOGY 325, 331 (1993); Tom Williamson, *Toward Greater Professionalism: Minimizing Miscarriages of Justice*, in INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION (Tom Williamson ed. 2006).

¹²⁸ Leo, *supra* note 121, at 99.

¹²⁹ British courts, for example, have prohibited false evidence ploys. See *R. v. Madon* [1987] 3 All E.R. 481; *R. v. Kirk* [2000] 1 WLR 567. For discussions of these issues, see Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEXAS TECH L. REV. 1239 (2007); Christopher Slobogin, *Lying and Confessing*, 39 TEXAS TECH L. REV. 1275 (2007).

¹³⁰ See Findley & Scott, *supra* note 56, at 391-93.

¹³¹ Detective John Tedeschini of the Edmonton Police Service, for example, has recently reviewed the debates on these issues and argued that, from the police perspective, “what is really required is a change of ‘ethos of interviewers from seeking a confession to a search for information—from a blinkered, closed minded, oppressive and suggestive interviewing style to one involving open-mindedness, flexibility, and the obtaining of reliable evidence.” John Tedeschini, *Moving Behond the Conventional Wisdom: A Progressive Approach to Police Interview and Interrogation Training*, paper presented at the 3rd International Conference on Investigative Interviewing,

C. Improving Forensic Sciences

Much has been written about the flaws with forensic sciences. I will not repeat that critique here, other than to note that faulty forensic sciences played a role in fifty-seven percent of the first 200 DNA exonerations,¹³² and that many of the forensic sciences were developed in law enforcement settings, not academic scientific settings, where their scientific validity has never been firmly established. In a previous article, I have explored this issue in greater depth.¹³³

The important point for purposes of this symposium is the nature of the reforms that have been proposed to remedy this problem. Certainly, one proffered solution is exclusion of many of the forensic sciences for want of a scientific foundation. Wholesale exclusion of categories of forensic science evidence is a solution that might serve due process concerns, but would likely impede crime control objectives. While the claims of fingerprint examiners, for example, are based on surprisingly little scientific foundation and at bottom reflect subjective judgments rather than careful statistical analysis based upon known databases of fingerprint characteristics, they no doubt are correct the vast majority of the time.¹³⁴ Excluding

June 15-18, 2008, Nicolet, Quebec, Canada, at 10 (quoting Ray Bull & Becky Milne, *Attempts to Improve the Police Interviewing of Suspects*, in INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 181, 186 (D. Lassiter ed. 2004)). For a discussion about many of these issues that has been conducted by a state study commission comprised of prosecutors, judges, defense lawyers, and victims' advocates, see Wisconsin Criminal Justice Study Commission, Position Paper on False Confessions, available at <http://www.wcjsc.org/> (last visited April 29, 2008); Wisconsin Criminal Justice Study Commission, *Study Suggests Causes of and Ways to Prevent False Confessions*, 80 WIS. LAWYER __ (May 2007) available at http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/cm/htmldisplay.cfm&contentid=65422 (last visited April 29, 2008).

¹³² Garrett, *supra* note 33, at 81.

¹³³ See Findley, *supra* note 4, at 929-50.

¹³⁴ For critiques of fingerprint analysis and a discussion of some of the known errors of fingerprint evidence in criminal cases, see Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping*, 44 ABA JUDGES' J. 16, 18 (2005); Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed*, 75 S. CAL. L. REV. 605, 609-13 (2002); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 991 (2005). Among the mistaken fingerprint matches, one of the most notorious in recent years is that of Brandon Mayfield. FBI analysts investigating the Madrid terrorist bombing in 2004 matched Mayfield's fingerprints to a crime scene print, claiming the match was "a

fingerprint evidence would indeed come at a significant loss of convictions of the guilty. For other “sciences,” such as bite mark analysis and microscopic hair analysis, the scientific foundation is even weaker and the error rates much higher, so exclusion in those areas might on balance enhance truth-finding.¹³⁵

But simple exclusion is not the only possible innocence-based reform. Rather, mechanisms to improve the reliability of forensic sciences are at the core of the innocence reforms. Much of the problem with relying on traditional due process approaches to handling forensic sciences is that the adversarial adjudicative system has not been up to the task of screening and evaluating scientific evidence.¹³⁶ In part, that is because lawyers, judges, and juries lack the competence to evaluate scientific and expert evidence.¹³⁷ In part, it is because defense lawyers have inadequate access to the resources needed to

100% identification.” Cole, *supra*, at 985–86. Subsequent analysis by Spanish authorities linked the print to Ouhnane Daoud, an Algerian national living in Spain, and the FBI eventually conceded that its analysts had erred. *Id.* at 986; see also OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT OF JUSTICE, A REVIEW OF THE FBI’S HANDLING OF THE BRANDON MAYFIELD CASE (2006); Neufeld, *supra* note 44, at S108; Paul C. Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 SETON HALL L. REV. 1071, 1072, 1096–97 & n.152 (citing cases) (2003) [hereinafter Giannelli, *Daubert Cases*]; Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 203–05 (2008).

¹³⁵ See Clive A. Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil*, 27 COLUM. HUM. RTS. L. REV. 227, 22–31 (1996) (discussing the questionable scientific foundation of microscopic hair analysis); Paul C. Giannelli & Emmie West, *Forensic Science: Hair Comparison Evidence*, 37 CRIM. L. BULL. 514, 514 (2001) (same); Giannelli, *Daubert Cases*, *supra* note 134, at 1074–76, 1096–98 (citing high error rates in hair microscopy cases, cases in which examiner error was exposed through postconviction DNA testing, and cases in which the scientific basis for the technique has been challenged; also noting that lack of scientific validity of bite mark evidence); Garrett, *supra* note 33, at 83 (noting that, of the first 200 DNA exoneration cases, forty-three (twenty-two percent) involved false hair or fiber comparisons); I.A. Pretty & D. Sweet, *The Scientific Basis for Human Bitemark Analyses—A Critical Review*, 41 SCI. & JUST. 85 (2001); Flynn McRoberts & Steve Mills, *From the Start, A Faulty Science: Testimony on Bite Marks Prone to Error*, CHI. TRIB., Oct. 19, 2004, at 1; Flynn McRoberts, *Bite-Mark Verdict Faces New Scrutiny*, CHI. TRIB., Nov. 29, 2004, at 1.

¹³⁶ See Findley, *supra* note 4, at 929-50.

¹³⁷ *Id.* at 931-32, 945-49; Bradley D. McAuliff et al., *Juror Decision-Making in the 21st Century: Confronting Science and Technology in Court*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (D. Carson & R. Bull eds., 2d ed., 2003); Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313, 319, 326 (1999).

mount vigorous challenges to scientific evidence.¹³⁸ Whatever the reason, the empirical record is quite clear: the adversary process has done very little to regulate forensic science evidence. Few challenges to forensic science evidence are litigated, and even fewer are successful, even regarding the most unreliable of the forensic “sciences.”¹³⁹ Unfortunately, as a consequence, *both* due process and crime control interests are jeopardized; erroneous or misleading forensic science undermines the search for the truth, putting innocents at risk and jeopardizing the quest to identify and prosecute the real perpetrator.

As a consequence, a set of reforms that again draws on both crime control and due process values has been suggested. As a general matter, the most interesting of those proposals involve increasing the *administrative* performance and scrutiny of the forensic sciences, upstream from adjudication. Certainly, some of this improvement is happening already, especially with the increased use of scientifically sound and reliable methods such as DNA profiling. In addition, a number of states have created forensic science commissions to oversee and improve the reliability of the work in the crime laboratories.¹⁴⁰ Scholars have also stressed the importance of blinding crime laboratory analysts from case evidence that is unnecessary to their scientific analyses, so as to avoid influencing or tainting their judgments about the results of their analyses.¹⁴¹ Many observers have called for mandatory accreditation of laboratories, including standardized testing protocols and

¹³⁸ Findley, *supra* note 4, at 929-32; Giannelli, *Daubert Cases*, *supra* note 134, at 1072 & 1095; Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 46, 50 (1990); Paul C. Giannelli, *Forensic Science*, 33 J.L. MED. & ETHICS 535, 539 (2005).

¹³⁹ D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 135-36 (2000); Michael J. Saks & Jonathan Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892, 892-94 (2005); Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 342, 345-46 (2002); Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S110 (2005); Neufeld & Colman, *supra* note 138, at 49, 52.

¹⁴⁰ See Findley, *supra* note 4, at 952-53.

¹⁴¹ Michael Risinger calls this, like the recommendation for double-blind eyewitness identification protocols, one of the most obvious of the “cost-free” proposals. Risinger, *supra* note 3, at 97. For an important and thorough explanation of the problem that extraneous information can present to forensic science analyses, see D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002).

rigorous blind proficiency testing.¹⁴² And I, among others, have argued for forensic science oversight panels, comprised of scientists and other experts, to study, assess the validity of, encourage research in, and make recommendations for uses and limitations of specific forensic sciences.¹⁴³ The notion behind all of these reforms is that the science is too complicated, and adversary adjudication is too ill-equipped and random, to resolve forensic science reliability questions adequately through case-level litigation in criminal cases. Neither due process nor crime control reliability interests are served by the current emphasis on case-by-case litigation. More administrative efforts to improve the quality, scientific validity, and understanding about appropriate uses of forensic science evidence would serve both to protect the innocent and help convict the guilty. It is again a question about adopting best practices.

D. Neutralizing False Jailhouse Informant Testimony

One of the most notoriously unreliable forms of evidence used in criminal cases is the testimony of jailhouse informants, or snitches. Such witnesses are typically called by the prosecution to claim that the defendant confessed to them while they shared a jail or prison cell. Informants are notoriously unreliable because they have tremendous incentive to fabricate evidence they know will be of value to the state in return for promised, or even unilaterally hoped-for, lenience in their own cases.¹⁴⁴ Despite its dubious source, jailhouse snitch testimony sounds like confession testimony, and therefore tends to be very convincing.¹⁴⁵ Not surprisingly, perjured snitch testimony was a factor in eighteen percent of the first 200 DNA exonerations.¹⁴⁶

¹⁴² See Giannelli, *Daubert Cases*, *supra* note 134; Findley, *supra* note 4, at 951-54.

¹⁴³ Findley, *supra* note 4, at 955-72.

¹⁴⁴ See ROB WARDEN, *THE SNITCH SYSTEM: HOW INCENTIVISED WITNESSES PUT 38 INNOCENT AMERICANS ON DEATH ROW* (2002); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413, 1419 (2007); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *U. CIN. L. REV.* 645, 660-63 (2004); Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 578 (1999) (“Under the current sentencing regime, cooperation is the only option that significantly alters the most important set of considerations for most defendants—those that relate to the ultimate sentence to be imposed.”).

¹⁴⁵ See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 *LAW & HUM. BEHAV.* 137, 146 (2007) (empirical study finding that informant testimony influences

No other witness (with the exception of experts, who ostensibly sell their expertise, not their testimony) may be similarly offered anything of value in return for favorable testimony. We don't permit such testimony-purchasing because it so obviously invites corruption and fabrication. Indeed, were anyone other than the government to attempt to offer anything of value to a fact witness in return for testimony, not only would the testimony be inadmissible, but the testimony-for-gain scheme would be criminal.¹⁴⁷

This problem therefore might be addressed by treating informant testimony like any other purchased testimony—by excluding it, or at least excluding it in its most overt forms, by prohibiting the government, like any other party, from expressly or impliedly offering anything of value in return for testimony.¹⁴⁸ Such a reform would surely sacrifice some convictions of the guilty, as not all informant testimony is false. But it is not at all clear that it would result in more lost convictions of the guilty than it would gain in avoided wrongful convictions of the innocent.¹⁴⁹ It would only cost more accurate

jurors to convict, and knowledge that the informant was given incentives to testify does not affect their verdict decisions). The Canadian inquiry into the wrongful conviction of Thomas Sophonow concluded that jailhouse informants are “polished and convincing liars,” that jurors give great weight to “confessions,” and that jurors give “the same weight to ‘confessions’ made to jailhouse informants as they [do] to ‘confessions’ made to a police officer.” Manitoba Justice, *The Inquiry regarding Thomas Sophonow, Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them*, available at <http://www.gov.mb.ca/justice/publications/sophonow/jailhouse/what.html> (last visited Apr. 2, 2008).

¹⁴⁶ Garrett, *supra* note 33, at 86.

¹⁴⁷ See 18 U.S.C. § 201(c)(2) (2000) (“Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.”).

¹⁴⁸ The Tenth Circuit started down this path when a panel of the court held initially, in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), that a prosecutor’s offer of benefits in return for cooperation and testimony from a witness would be illegal under 18 U.S.C. § 201(c)(2). See *supra* note 145. The court quickly reheard the case en banc, however, and reversed the panel, holding that the statute does not apply to the government’s traditional authority to offer inducements to witnesses as a law enforcement tool. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 427 U.S. 1024 (1999).

¹⁴⁹ *But see* Lillquist, *supra* note 2, at 920 (positing that “the number of erroneous convictions that would be averted [by excluding jailhouse

convictions than it would prevent wrongful ones if we assume that informant testimony is truthful more often than it is false. But no data I am aware of supports that assumption, and it is entirely possible, if not probable, that the opposite is true, that snitch testimony is more often false than true. If my sense about this is accurate, or even if the rate of true to false testimony is remotely close to even, then our constitutional preference for protecting the innocent ought to lead us to exclude such dangerous testimony.

But regardless of whether snitch testimony is more often true or false—and we don't know the answer to that—other reforms are also possible. Alexandra Natapoff has proposed a model statute requiring pretrial evaluations of informant testimony.¹⁵⁰ Illinois has adopted legislation requiring pretrial reliability hearings for informant testimony.¹⁵¹ The Oklahoma courts have adopted a procedure for jailhouse informant testimony that ensures “complete disclosure” of all information about the informant needed to evaluate her credibility.¹⁵² Even better, a state could require that all encounters and discussions between a potential informant and the state be electronically recorded, so that factfinders can evaluate as fully as possible the incentives and credibility of the informant. Some commentators have recommended a corroboration requirement.¹⁵³ Other jurisdictions require cautionary instructions to attend the testimony of informant testimony.¹⁵⁴ The bottom line is, reforms are possible that can protect the innocent without risking too many, if any, convictions of the guilty.

E. Improved Defense Counsel

informant testimony] is vastly outweighed by the number of erroneous acquittals that would result”).

¹⁵⁰ Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 112-15 (2006).

¹⁵¹ 725 ILL. COMP. STAT. . 5/115-21(e) (2003)

¹⁵² *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000)

¹⁵³ *E.g.*, Lillquist, *supra* note 2, at 923 (“requiring at least some minimal corroboration of the informant’s testimony, disclosing any previous occasions in which the informant testified, and divulging the terms, if any, that have been agreed to for the witness’s testimony are all welcome changes”).

¹⁵⁴ *See* Cal. Penal Code § 1127a(b) (West 2004) (requiring courts to instruct jury on in-custody informant testimony); *United States v. Villafranca*, 260 F.3d 374, 381 (5th Cir. 2001) (“The testimony of a plea-bargaining defendant is admissible if the jury is properly instructed.”).

Ineffective assistance of counsel is a recurring theme in wrongful convictions.¹⁵⁵ Under the Crime Control Model, as Packer described it, defense counsel was considered a luxury, or worse, an impediment to efficient processing of the guilty.¹⁵⁶ By contrast, under the Due Process Model, as we have seen, defense counsel was the key to asserting and protecting the defendant's rights.¹⁵⁷

Here again, the Innocence cases have demonstrated that cutting corners on the provision of services to the defense undermines reliability of the system, and thus in fact threatens both due process and crime control values. Without a vigorous defense (which must include expanded discovery rights¹⁵⁸), erroneous focus on the wrong suspect goes unchecked.¹⁵⁹ Indeed, prosecutors and judges today generally see competent counsel as an important part of the system, which actually facilitates processing the convictions of guilty defendants, as well as protection of the innocent. As Jon Gould has written, "Prosecutors, too, believe that their jobs are often easier when defendants are well represented; in these cases, state's attorneys need not perform both their responsibilities and those of the defense in order to stave off a later claim of ineffective assistance of counsel."¹⁶⁰ Gould notes, additionally, that "[e]ven

¹⁵⁵ See The Innocence Project, Bad Lawyering, at <http://www.innocenceproject.org/understand/Bad-Lawyering.php>.

¹⁵⁶ Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has suggested such a view of counsel:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this is not entirely a bad thing. The lawyers who represent indigent criminal defendants are good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or the state would have to devote much greater resources to the prosecution of criminal cases.

Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1, 14-15 (1996).

¹⁵⁷ See Packer, *Two Models*, *supra* note 1, at 59-60.

¹⁵⁸ See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 5006 WIS. L. REV. 541; Findley & Scott, *supra* note 55, at 389-93 (arguing that greater transparency in criminal cases is needed to help offset natural tendencies that produce tunnel vision and can lead to convicting the innocent); Lillquist, *supra* note 2, at 914 ("If it is true that the government presently has access to more pretrial investigative resources than the defendant, then perhaps the effect of liberalized discovery is just to 'even-up' a presently imbalanced system.").

¹⁵⁹ See generally, Findley & Scott, *supra* note 56, at 331-33.

¹⁶⁰ GOULD, *supra* note 52, at 240.

measures generally associated with ‘defendants’ rights’—like adequately compensated trial counsel—can save taxpayers money because appeals will be shorter and retrials less likely.”¹⁶¹ Judge Richard Posner has also acknowledged this possibility: “If the law entitles a defendant to effective assistance of counsel, then paying lawyers too little to attract competent lawyers to the defense of indigent defendants may cost the system more in the long run by leading to retrials following a determination that the defendant’s lawyer at his first trial was incompetent.”¹⁶² Thus, vigorous defense counsel, it turns out, is important to protect both due process and crime control values, because good defense counsel enhances reliability and efficiency.

CONCLUSION

The Innocence Movement and its Reliability Model do indeed show that due process and crime control are compatible with one another. Of course, the new model’s fit with the old Due Process and Crime Control Models is not perfect. The Due Process Model, for example, is about a lot more than just accurate factfinding; it also is concerned in important and significant ways about fair process that has nothing or little to do with truth-finding *per se*. Indeed, an overemphasis on innocence-protection, to the detriment of other fair process concerns (especially the rights to fair treatment by guilty defendants or attention to appropriate dispositions, especially in capital cases¹⁶³) is one of the most salient criticisms of the Innocence Movement.¹⁶⁴ But fairer, more accurate truth-finding mechanisms are an important part of due process, both for the innocent and the guilty (because, for example, they help establish true culpability levels more reliably for sentencing purposes). And at least to some extent, the new due process is showing that, instead of resisting the transfer of the factfinding locus from formal adjudication to pretrial administrative processes, defendants’ rights are served by accepting that transfer and enhancing the efficacy and reliability of the administrative process. Adversarial adjudication in an imbalanced and inadequately funded system simply has not

¹⁶¹ *Id.* at 238.

¹⁶² Posner, *supra* note 156, at 15.

¹⁶³ See David R. Dow, *Death by Good Intentions*, WASH. POST, Oct. 15, 2006, at B7.

¹⁶⁴ For a response to those criticisms, see Daniel S. Medwed, *Innocentrism*, 2007 U. ILL. L. REV. (forthcoming 2008).

been up to the task of effectively sorting out the guilty from the innocent. By shifting more emphasis to improved investigative procedures, the new due process better protects the rights of all defendants, and enhances the ability of the adversary adjudicative process to address those issues that remain in dispute after the fair administrative process has concluded.

At the same time, by improving the reliability and efficiency of the administrative and adjudicative systems, the Reliability Model satisfies the most fundamental demands of the Crime Control Model. With “best practices” reforms like those outlined in this essay, the new Reliability Model can indeed reduce the number of convictions of the guilty without losing too many convictions of the guilty.