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TIM BAKKEN

Models of Justice to Protect Innocent Persons

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MODELS OF JUSTICE TO PROTECT INNOCENT PERSONS

I. INTRODUCTION: THE PROBLEM OF INNOCENT-PERSON CONVICTIONS

This article discusses various approaches to the problem of innocent-person convictions and concludes that systemic change in the adversarial system is necessary. The notion that there have been “approaches” to the problem may be a misnomer because, to date, there has been virtually only one approach to the problem¹—improve the procedures of the current adversarial system, but do not change the system.² Some suggested improvements are essential³ and have been implemented by various jurisdictions.⁴ Generally, changes have fallen within three categories: use social science research to make police interrogations and identification procedures better;⁵

1. “[S]ix evidentiary sources of wrongful convictions are actually well known: faulty eyewitness identifications; false confessions; jailhouse snitches; ‘junk’ science . . . bad lawyering . . . and general witness misconduct . . .” Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 Sw. L. Rev. 965, 968–69 (2008) (footnotes omitted).

2. [A] multiplicity of procedural protections have been proposed: improved eyewitness identification procedures and independent corroboration; protective jury instructions; videotaped interrogations and *Daubert*-like “reliability hearings”; strongly regulated forensic labs and examiners; independent case reviews; limiting “anecdotal” forensic testimony; better lawyer training, funding and oversight and stronger lawyer ethics rules. Indeed, the American Bar Association, a sometimes slow-moving but powerful representative force in American law, has adopted 11 different resolutions advocating a large number of reforms.

Id. at 969–70 (footnotes omitted). “[S]ince we know what types of evidence have led to most ‘actual innocence’ convictions, why not statutorily ban those evidentiary sources from capital prosecutions (except, perhaps, where other independent evidence strongly corroborates guilt)?” *Id.* at 984.

3. See, e.g., Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1222 (2005).

While readily accessible post-conviction DNA testing, innocence commissions, double-blind lineups, and videotaped confessions are all worthy reforms that would no doubt improve the operation of the South Carolina criminal justice system, none of these reforms would have nearly the impact on the quality of justice—including the prospect for wrongful convictions—as the simple alteration of a single procedural rule [i.e., docket control by prosecutors].

Id. at 1237.

4. See, e.g., *Conviction Integrity Unit*, DALLAS COUNTY DISTRICT ATTORNEY’S OFFICE, <http://www.dallasda.com/conviction-integrity.html> (last visited Nov. 5, 2011) (“[T]he Conviction Integrity Unit oversees post-conviction review of more than 400 DNA cases in conjunction with the Innocence Project of Texas”); *Wrongful Conviction: Conviction Integrity Program*, NEW YORK COUNTY DISTRICT ATTORNEY’S OFFICE, <http://manhattanda.org/wrongful-convictions> (last visited Nov. 5, 2011) (addressing “claims of actual innocence” prior to and following conviction).

5. See, e.g., Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1278 (2005) (“In a double-blind procedure, neither the eyewitness nor the officer conducting the identification procedure are aware of who the suspect is within the photo array or lineup. This straightforward procedure protects against witnesses looking towards the administrator of the photo array or lineup for cues as to which person to choose, or for confirmation of their selection. It also prevents against the administrator giving unintended or express reinforcement of the witnesses’ selection.”); see also Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENG. L. REV. 663, 666–67 (2001) (urging DNA testing); Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 422–23 (2001) (discussing forensic evidence).

hold police officers, prosecutors, defense lawyers, and judges to higher standards;⁶ and provide more resources to defendants.⁷ In contrast, rather than focusing on improving current procedures, this article considers systemic changes to the current adversarial system. The article examines proposals that range from expanding discovery in criminal cases to replacing police investigators with a neutral magistrate, as in inquisitorial systems.

Innocent persons need procedures to separate themselves from the large majority of guilty persons in the justice system. One prosecutor, in charge of a “conviction integrity unit” in a district attorney’s office, found that “[i]n short, the trials of the innocent, which resulted in wrongful convictions, in many instances, look similar, if not identical, to the trials of the (presumably) guilty, which result in convictions.”⁸ While contemporary trials may be unable to distinguish the guilty from the innocent, the movement to exonerate innocent persons, not having focused on systemic changes, may have reached a stalemate. It might not be possible to change current procedures to ensure a significant reduction in the number of innocent-person convictions.

Many significant changes in the current system have been made, but new changes may occur very slowly and not produce appreciable results. One commentator concluded that

the scholarly work on false confessions, faulty eyewitness identifications, and other predictable problems of proof is largely complete. As a result, the academic allies of the wrongful convictions movement are, to some extent, adrift without an agenda. . . . [W]rongful convictions scholars should shift their focus from post-conviction strategies and evidence-related flaws in our system of criminal justice to broader questions about the structure and administration of the justice system, both because of the intrinsic importance of the knowledge they will create and in preparation for future litigation and law reform campaigns.⁹

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6. See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *How. L.J.* 475, 493–94 (2006); 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, 620 (2004); Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 *NOTRE DAME L. REV.* 1259, 1284–85 (2005); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 *WIS. L. REV.* 399, 427–28; Brian Murray & Joseph C. Rosa, *He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness*, 27 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 1, 21–25 (2001); Hans Sherrer, *The Complicity of Judges in the Generation of Wrongful Convictions*, 30 *N. KY. L. REV.* 539, 583 (2003); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 *D.C. L. REV.* 275, 298 (2004).
 7. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *HASTINGS L.J.* 1031, 1032 (2006) (finding a defense-attorney caseload of 300 defendants in one year).
 8. See Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 *N.Y.L. SCH. L. REV.* 1033, 1038 (2011–12) (describing the work of the Conviction Integrity Unit in the Dallas County, Texas, District Attorney’s Office, with a focus on cases of exoneration through post-conviction DNA testing).
 9. See Siegel, *supra* note 3, at 1222 (footnote omitted).

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Exonerating innocent persons in individual cases has energized the innocence movement. But the movement has been simultaneously frozen because it lacks both a means to identify how many more convicted innocent persons languish, usually in prison, and a new method to prevent innocent persons from being convicted in the first place.¹⁰

To illustrate, the authors of an important and comprehensive recent article¹¹ on the issues surrounding innocent-person convictions, in reviewing two decades of research and examining recommendations of a task force in New York State, provide a basis for practical changes in the current justice system. But, in the end, they do not consider fundamental change in the adversarial system, even while characterizing the issues the article addresses as “systemic.”¹² The authors endorse the recommendations of the state task force regarding, in essence, correcting human error surrounding the practices of government agents and judges, identification procedures, mishandling of forensic evidence, false confessions, jailhouse informants, and the practices of defense lawyers.¹³ The authors urge additional changes, such as better data collection and analysis; a commission to examine post-conviction claims of innocence; and enhanced education and training for prosecutors, defense attorneys, and judges.¹⁴ They raise additional issues concerning a DNA databank; guilty pleas; newly discovered evidence following conviction; and executive clemency.¹⁵

Yet, in their expansive and illuminating review of the current system and their many recommendations, the authors do not identify any fundamental change that could or should be made in the adversarial system. Indeed, it seems that the recommendations of today are identical to those made eighty years ago by a leading scholar.

History might also suggest some skepticism about the power of such information [i.e., proof of wrongful conviction], standing alone, to bring about far-reaching systemic change. In 1932, Prof. Edwin Borchard published *Convicting the Innocent*,^[16] a book in which he set out 65 cases of wrongful conviction and

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10. See generally Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1572 (examining four chief criticisms of the innocence movement, such as overstating the problem of innocent-person convictions, but concluding that “innocentrism is a positive feature of the contemporary criminal law discourse that should be cherished and nurtured as a complement to other criminal law values”).
 11. See James R. Acker & Catherine L. Bonventre, Perspective, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1249 (2010) (examining “miscarriages of justice” in New York criminal cases and the State’s response to them).
 12. *Id.* at 1344.
 13. *Id.* at 1271–325.
 14. *Id.* at 1331–43.
 15. *Id.* at 1344–50.
 16. See generally EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* vi (1932) (considering a “somewhat at random” number of cases of actual innocence. “The causes of the error are, in the main, mistaken identification, circumstantial evidence (from which erroneous inferences are drawn), or perjury, or some combination of these factors.”). “Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine [of sixty-five] of these convictions.” *Id.* at 367.

offered proposals for reform. The causes he identified for the wrongful convictions—mistaken identifications, inadequate lawyering, police or prosecutorial misconduct, false or coerced confessions, and perjury—are strikingly similar to those offered today by advocates for the wrongfully convicted. He also advocated the same kinds of relief as today's advocates. Yet we find ourselves, seventy years later [in 2001], addressing the same problems and the same causes. The lesson is clear: we do not solve this problem merely by identifying it.¹⁷

Amidst relative agreement on what changes should be made in the current system, the main task remaining for the innocence movement, if it does not adopt new ideas, seems more political than legal or social: convince legislatures, courts, and prosecutors to adopt the methods, as confirmed by social science research, that lead to better procedures and professionals.¹⁸ Yet, such methods were proposed in 1932 when Professor Borchard advocated for improvements in the prosecution and police; eyewitness identifications, especially where victims of violent crimes make identifications; expert-witness testimony; and resources for poor defendants and defense attorneys.¹⁹ Still, while the problem of innocent-person convictions has been identified, the recommended remedies have not addressed the systemic failures in the adversarial system that continue to cause wrongful convictions.

A. The Number of Convicted Innocent Persons

The innocent-person conviction problem remains monumental. It probably amounts to a “staggering total of wrongful convictions.”²⁰ One study suggested that the number of innocent-person convictions in a fifteen-year period (1989–2003) might be 29,000.²¹ Another study concluded: “If defendants who were sentenced to prison had been exonerated at the same rate as those who were sentenced to death, there would have been nearly 87,000 non-death-row exonerations in the United States from 1989 through 2003, rather than the 266 that were actually reported.”²²

17. Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 463 (2001) (questioning the effectiveness of the innocence movement).

Focusing as it does on factual innocence, the wrongful convictions movement places a premium on it. It creates, in effect, a supercategory of innocence, elevating factual innocence over the other categories. My concern is that our jurors, thoroughly schooled in the importance of factual innocence, may conclude that anything short of factual innocence is simply not good enough to justify an acquittal.

Id. at 457 (footnote omitted).

18. For a compilation of sources that make recommendations on how to improve current procedures, see *supra* notes 5–6.

19. See BORCHARD, *supra* note 16, at 367–78; see also Raymond, *supra* note 17, at 463; *supra* notes 5–6.

20. Acker & Bonventre, *supra* note 11, at 1246.

21. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 532 (2005) (examining exonerations during a fifteen-year period).

22. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 958–59 (2008) (estimating that the “frequency of wrongful death sentences in the United States is at least 2.3 percent”).

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One author of the previous two studies found that “if the false conviction rate for prison sentences were 2.3%, about 185,000 innocent American defendants were sent to prison for a year or more from 1977 through 2004.”²³ Still another study found a “3.3% minimum factual wrongful conviction rate for capital rape-murders in the 1980s.”²⁴ Assuming that 99.5% of guilty verdicts are correct, although the percentage of incorrect guilty verdicts has been estimated to be 1%–3%,²⁵ an analysis of New York State and federal statistics “would still mean that nearly one thousand innocent New Yorkers a year are convicted of crimes and in excess of eleven thousand of the nation’s incarcerated population . . . are in prison or jail for crimes they did not commit.”²⁶

B. DNA Exonerations of Innocent Persons

To date, the Innocence Project has identified 275 wrongful convictions of innocent persons based on DNA evidence.²⁷ However, in using DNA exonerations to estimate the number of innocent-person convictions, one must be circumspect. A recent study cautions about extrapolating from DNA exonerations:

Deriving reliable estimates of the number of innocent people erroneously convicted from DNA exonerations is challenging, in part because of the skewed distribution of those cases compared to the universe of criminal convictions. For example, all but three of the two hundred DNA exonerations between 1989 and April 2007 involved individuals convicted of rape and/or murder, crimes that account for less than 2% of all felony convictions and less than 25% of the incarcerated population. Moreover, roughly 96% of the wrongful convictions resulted from trial verdicts, an almost exact inversion of the norm for criminal cases, where approximately 95% of convictions are based on guilty pleas. Wrongful convictions occasionally stem from guilty pleas—on the order of 5% of DNA exonerations have surfaced in cases in which defendants pled guilty, often in exchange for leniency in charging or sentencing decisions—and unreliable guilty pleas may be especially prevalent in high volume, lower level cases.²⁸

Indeed, the study confirmed that innocent-person convictions are skewed toward serious crimes. But that probably means that the number of innocent-person convictions is larger than it appears. In serious cases, innocent defendants are less likely to plead guilty to avoid social condemnation, stigma, and long prison terms,

23. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 179 (2008) (expanding the analysis of innocent-person convictions beyond rape and murder cases).

24. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 799 (2007).

25. See Acker & Bonventre, *supra* note 11, at 1246 n.5, and the discussion therein.

26. *Id.* at 1246 (footnote omitted).

27. *Know the Cases: Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited on Nov. 5, 2011).

28. Acker & Bonventre, *supra* note 11, at 1258–59 (footnotes omitted).

and are thus certain to appeal if convicted after trial. Less serious charges are treated less seriously and may have a lower likelihood of resulting in exonerations of innocent persons. For instance, innocent defendants who plead guilty to misdemeanors might not be incarcerated, as convicted felons often are. Misdemeanor defendants will probably not lose any civil rights (such as the right to vote), they will encounter fewer impediments to employment, and they may not have the resources or emotional disposition to pursue innocence, either through a trial on the charge or a motion to withdraw a false plea of guilty.

For all cases, the Bureau of Justice Statistics reports (as of 2009) that about 7.2 million persons in the United States are currently under correctional supervision (convicted and either on probation or parole, or in jail or prison)²⁹ and that, probably, less than 1% of all crimes involve DNA analysis.³⁰ Given the reliability of DNA analysis and the greater likelihood that DNA cases will result in relatively accurate dispositions, the 99% of the cases not involving DNA evidence and analysis almost certainly have a higher error rate. But even an error rate in all cases of only 1% still translates to 72,000 innocent persons convicted and under correctional supervision, not to mention those who have been convicted but who are no longer under correctional supervision. The real number might be much higher because the primary cause of innocent-person convictions is human error (e.g., government agents' practices, identification procedures, mishandling of forensic evidence, false confessions, jailhouse informants, and defense attorney practices),³¹ which is not amenable to correction through scientific analysis.³²

29. *Total Correctional Population*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last visited Nov. 10, 2011) ("In 2009, over 7.2 million people were on probation, in jail or prison, or on parole at year-end—3.1% of all U.S. adult residents or 1 in every 32 adults. The total correctional population declined (down 0.7% or 48,800 offenders) during 2009, the first decline observed in the population since the Bureau of Justice Statistics began reporting this population in 1980. At year-end 2009 a total of 4,203,967 adult men and women were on probation and 819,308 were on parole or mandatory conditional release following a prison term. State and federal prison authorities had jurisdiction over 1,613,740 prisoners at year-end 2009: 1,405,622 under state jurisdiction and 208,118 under federal jurisdiction. Local jails held 760,400 adults awaiting trial or serving a sentence at midyear 2009.").

30. Matthew R. Durose, *Census of Publicly Funded Forensic Crime Laboratories, 2005*, BUREAU OF JUST. STAT. BULL. 4 (July 2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl05.pdf> ("In 2005, 86 laboratories reported completing about 14,000 DNA requests for cases where no suspect had been identified. Ninety laboratories reported analyzing about 25,000 requests from cases that year where a suspect had been identified."); *id.* at 1 ("In 2005 the nation's [389] forensic crime laboratories received evidence from an estimated 2.7 million criminal investigations."). According to the FBI, 1,390,695 violent crimes and 10,166,159 property crimes were reported in 2005.

31. Acker & Bonventre, *supra* note 11, at 1271.

32. *Id.* at 1257–58 ("Still, the biological evidence required for DNA analysis—such as semen, blood, saliva, or hair—is available in a distinct minority of crimes (less than twenty percent), is not always secured or preserved properly to allow testing, and may not negate an individual's participation in a crime even when he or she is ruled out as the source of the tested substance. Mindful of such limitations, some researchers have used DNA exonerations as a basis to help estimate the true incidence of wrongful convictions." (footnotes omitted)).

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This article, in Section II, surveys prior responses to the problem of innocent-person convictions. In essence, most responses have focused on improving current procedures. Section III outlines several new approaches advocated by participants at a symposium at New York Law School on November 5, 2010. The articles of those participants appear in this issue of the *Law Review* and are summarized in this article. While some commentators focus on expanding current procedures, such as through more liberal discovery for all defendants or special procedures for particular defendants, other commentators contemplate significant changes in the adversarial system. Some argue for no change or suggest that recommended changes, such as innocence procedures, would result in too many guilty-person acquittals. Section IV discusses how some of the recommendations would create structural changes to the adversarial system, in that some commentators seem willing to scrap components of the current system in favor of inquisitorial-type procedures.

II. THE ABSENCE OF SYSTEMIC CHANGE IN THE ADVERSARIAL SYSTEM

The innocence movement has not recommended systemic change, but still, some commentators, although not necessarily focused on innocence issues, have lamented the current adversarial system and urged that it be modified. In spite of that, they have not indicated how to do so, even while questioning the basis of the system. They have found that the adversarial system has failed “to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth”;³³ that adversarial ideology may not be “correct or even useful”³⁴ because of its fact-finding and truth-seeking³⁵ deficiencies; and that the system should be more neutral because “[a]dversariness harmfully distorts all the relevant relationships at a trial.”³⁶

To date, recommendations for change have been general in nature. They include (1) a “[modest] prescriptive claim . . . that we should stop treating differentiation of [the adversarial and inquisitorial systems] . . . as a paramount constitutional value”;³⁷

33. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 343 (2003) (providing a history of the adversarial system).

34. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 302, 355 (1989) (finding that “[a]dversarial ideology has failed”).

35. Franklin Strier, *Making Jury Trials More Truthful*, 30 *U.C. DAVIS L. REV.* 95, 182 (1996) (finding that “[t]he substantial truth-seeking deficiencies of current trial procedure represent a failure of the essential purpose of the trial”).

36. Lloyd L. Weinreb, *Legal Ethics: The Adversary Process is Not an End in Itself*, 2 *J. INST. STUD. LEG. ETH.* 59, 61 (1999). “We should not regard it [the adversarial system] as in the nature of things and not to be altered. Nor should we suppose that the Constitution requires the extreme, destructive manifestations of adversariness that are now common.” *Id.* at 63.

37. David Alan Sklansky, *Anti-Inquisitorialism*, 122 *HARV. L. REV.* 1634, 1641–42 (2009). “[T]he broad and continuing legal tradition with which it [inquisitorialism] is identified is not so self-evidently bad.” *Id.* at 1704.

(2) a claim that the morality of the presumption of innocence should be questioned;³⁸ (3) a claim that “the two strongest candidates for formal recognition [for change] involve greater discovery rights, and the formalization of the opportunity to be heard before prosecutorial decisions are made”;³⁹ and (4) a claim that “a short, *mandatory*, non-jury trial in the continental mode, with few of the evidentiary restrictions that inhere in the usual jury trial, is a sensible alternative” to adversary trials,⁴⁰ along with the opportunity for jurors to ask questions about the evidence.⁴¹ In sum, commentators’ criticism of the adversarial system has been so broad that it is difficult to know precisely what adversarial procedures (outside those specifically within the innocence movement) should be changed. The recommendations for change are equally broad, with the most specific being a recommendation for greater discovery.⁴²

This article arose from a symposium at New York Law School, titled *Exonerating the Innocent: Pre-Trial Innocence Procedures*.⁴³ The symposium was based on two articles urging specific changes (including one by this author), which, if implemented, would result in inquisitorial procedures within the adversarial system. One article advocated creating “innocence bureaus”⁴⁴ and the other article (by this author) proposed “innocence procedures.”⁴⁵ Under both authors’ models, defendants could

38. Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 560 (1994).

[T]he rules of evidence in an adversarial system of justice are a perfect tool for keeping facts out of sight and out of the courtroom so that the jury is not fully acquainted with all the facts in the case. For these reasons, it would be a marvel, indeed, if the adversarial system produced a better form of justice than a more inquisitorial one.”

Id. at 594.

39. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2147 (1998). “[T]he [current] process cannot be dismissed as arbitrary. It is not, however, an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and ad hoc flexibility of procedure.” *Id.* at 2129.

40. Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 483 (1996) (footnotes omitted) (reviewing CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Phil Fennell et al. eds., 1995)). “In both the United States and England and Wales, the jury trial continues to be much revered, even as it is actually used less and less (about 5 percent of criminal cases in both jurisdictions).” *Id.* at 482.

41. Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 97 (2002) (“[T]he collateral possibility that widespread adoption of jury reforms such as question asking and trial discussions may bring the U.S. adversary system more in line with Europe’s inquisitorial approach.”).

42. See Lynch, *supra* note 39, at 2147.

43. Symposium, *Exonerating the Innocent: Pre-Trial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825 (2011–12).

44. See Lewis M. Steel, Op-Ed., *Building a Justice System*, NEWS & OBSERVER (Raleigh), Jan. 10, 2003, at A17 (concluding that more facts need to be obtained to protect innocent persons and advocating “innocence bureaus”).

45. See Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008) (advocating a new plea of innocent and “innocence procedures”).

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compel enhanced investigations by waiving the right to remain silent and agreeing to an interview. In recommending “innocence bureaus,” one author explained:

The mild pretrial reforms considered fail to address the deeply entrenched problems of our criminal justice system that often lead to false convictions—especially the pressure police feel to cut corners in order to ‘solve’ heinous crimes and the disadvantages faced by indigent defendants who almost always have to rely on grossly underfunded public defenders with limited access to investigators, crime laboratories and even the witnesses against them.⁴⁶

“Innocence procedures” would extend to the trial if the prosecution did not move to dismiss charges after an enhanced pretrial investigation. Defendants would be entitled to plead innocent and compel the prosecution to conduct an enhanced investigation. In return, the prosecution could require the defendant to submit to an interview, thus waiving the right to remain silent. To protect defendants who expose their case to prosecutors, defendants would be entitled to a higher standard of proof than beyond a reasonable doubt; favorable inferences from a prompt claim and later a formal plea of innocence; presumptions against the government for not pursuing evidence favorable to the defendant; and the right to an acquittal upon a finding that the government acted in bad faith.⁴⁷

Both articles contain similar fundamental components, in that defendants could invoke a right to enhanced investigations if they agree to be interviewed by government agents. A defendant could decide not to invoke innocence bureaus or procedures (hereinafter “innocence procedures”) and cases would proceed as they do now. Nothing would change. But, obtaining more evidence is almost always advantageous to innocent persons, although there are exceptions. Innocence procedures could result in discovering evidence that is favorable to the government. For example, an innocent person might identify a possible alibi witness from a crowded party far from the crime scene, but the witness might not remember the defendant from the party. The inaccurate trial testimony of the forgetful or unaware witness could be a devastating blow to the defense, thus illustrating the need for the fullest possible investigation to ensure or at least increase the likelihood of finding additional, more accurate, and more credible witnesses from the party. Of course, the discovery of all evidence is always advantageous to innocent persons.

III. MODELS TO PROMOTE THE DISCOVERY OF INNOCENCE

The approaches that emanated from the symposium on innocence procedures fall generally within three categories. The first category includes commentators who believe that pretrial innocence procedures are unwise or implausible. They believe that the procedures may result in too many acquittals of guilty persons⁴⁸ or be

46. Steel, *supra* note 44.

47. Bakken, *supra* note 45, at 549–50.

48. Paul G. Cassell, *Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures*, 56 N.Y.L. SCH. L. REV. 1063, 1064–65 (2011–12) (disputing the need for additional procedures to protect innocent persons).

impossible politically or practically to adopt.⁴⁹ The second category includes commentators who argue for new rules or procedures within the current system. Prosecutors would have to disclose evidence beyond that which is exculpatory;⁵⁰ defendants with intellectual disabilities would be entitled to special considerations;⁵¹ and defendants who plead guilty would be entitled to expanded standards when introducing evidence following conviction.⁵² The third category includes commentators who propose structural change in the adversarial system. One proposal would result in the creation of a new “Office of Public Advocacy, in which lawyers alternate between acting as prosecutors and as defense attorneys, and in which both the adversarial prosecutor and defense attorney share in guiding the inquisitorial process of investigating the case and developing the evidence.”⁵³ A second proposal, leaning hard toward an inquisitorial process prior to trial, would see a judicial officer supervise the investigative process, from which the prosecutor would be more removed; and if a prosecution ensued, the current adversarial process would apply.⁵⁴

A. *Opposition to Innocence Procedures*

The broadest criticism of innocence procedures is from Professor Paul Cassell, who believes that the procedures “seem quite likely to free countless guilty defendants without doing much to aid the truly innocent.”⁵⁵ Professor Cassell believes that

49. See Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented?*, 56 N.Y.L. SCH. L. REV. 1053, 1056, 1058–59 (2011–12) (arguing against enhanced investigations even while estimating that 24,704 innocent persons were convicted in 2009). Professor Friedman writes with skepticism:

The problem is that all of these resources are being stretched very thin—particularly at this time—and the idea that the government is going to allocate even a small amount of money in order to make sure that the 0.5% that are innocent are cleared before trial, does not seem feasible. There are not many legislators in this country who say that it is better for a hundred people to go free than to have one innocent person found guilty.

Id. at 1059. Professor Friedman’s proposed remedy to the problem of innocent-person convictions is to expand the obligations of prosecutors to disclose to the defense information in case files, and he notes with approval a Justice Department policy to do the same. *Id.* at 1059–61.

50. See generally Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969 (2011–12). See also Friedman, *supra* note 49, at 1059–61 (arguing for greater pretrial discovery).

51. See generally John H. Blume, Sheri L. Johnson & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 943, 958–67 (2011–12) (proposing additional procedural protections for mentally retarded suspects or defendants).

52. See generally Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1021–29 (2011–12) (considering a pretrial option for defendants to waive major procedural rights at trial, in return for receiving procedural advantages on post-conviction review).

53. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 913 (2011–12).

54. See generally D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869 (2011–12).

55. See Cassell, *supra* note 48, at 1064.

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prosecutors could rarely prove guilt to a standard greater than beyond a reasonable doubt;⁵⁶ that guilty defendants would always claim at trial that prosecutors did not fulfill their investigatory obligations and would thus be entitled to acquittal;⁵⁷ and that there is no viable mechanism to prevent guilty persons from invoking the procedures. Professor Cassell's main objection, regarding false claims of innocence, is very broad. His more specific objections to innocence procedures, regarding the burden of persuasion and favorable jury instructions, would not be applicable unless, despite an enhanced investigation, both the prosecution and defense insisted on a trial.

The last thing any guilty person wants to promote is the collection of all evidence. Innocence procedures would require defendants who plead innocent to identify evidence through submitting to an interview with the prosecution. In addition, defense attorneys would have to affirm their clients' innocence by submitting an innocence affirmation. Only then is the government required to conduct an enhanced investigation based on the evidence identified by the defendant. It is difficult to find a system where more evidence would be produced in a criminal case.⁵⁸ Where the focus is on truth rather than on the burden of proof—whether the prosecution can prove guilt beyond a reasonable doubt—both the prosecution and defense have enormous incentives to produce dispositive evidence. Under innocence procedures, the defense will have little ability to exclude evidence or the defendant's statements, and thus must be very certain that the volunteered statements are truthful and accurate and will lead only to evidence helpful to the defense. The prosecution must conduct a thorough investigation or suffer adverse jury instructions at trial, a potentially fatal blow to its case.

As alternatives to innocence procedures, Professor Cassell suggests a number of reforms,⁵⁹ including elimination of the exclusionary rule and the requirements of the *Miranda* rule.⁶⁰ Ironically, under innocence procedures, Professor Cassell's reforms would be realized through a defendant's waiver of rights, without the necessity of constitutional change. Defendants who plead innocent would have to submit to questioning by the government. Defendants' attorneys would be present and *Miranda* would not apply, except perhaps in a pro forma fashion. If defendants made earlier statements that should be excluded, the government could ask the defendant about

56. See Bakken, *supra* note 45, at 549 (noting possible burdens of persuasion: "The government would be required to prove guilt to a higher standard than beyond a reasonable doubt.").

57. *Id.* at 550 ("Jurors could acquit the defendant upon finding that the government acted in bad faith.").

58. See *id.* at 549, 561 ("The procedures begin with the adoption of the 'innocent' plea, while retaining the traditional pleas of guilty and not guilty. A defendant could invoke innocent procedures when he would normally plead guilty or not guilty, that is, at the arraignment on an indictment, complaint, or other final accusatory instrument. The defendant's innocent plea would trigger pre-trial investigations that focus on determining the truth of the defendant's innocence claim rather than on collecting evidence sufficient to prove guilt beyond a reasonable doubt.").

59. See Cassell, *supra* note 48, at 1087–90 (arguing for the abolition of the exclusionary and *Miranda* rules).

60. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court held that the *Miranda* rule is a constitutional requirement. In *Davis v. United States*, 512 U.S. 452, 461 (1994), the Court found that the exclusionary rule for physical evidence is a court rule.

the prior statements during the innocence interview. If a trial ensued and the defendant testified, the prosecution could use statements from the interview and even the earlier statements, which would otherwise be excluded, to impeach the defendant.⁶¹

Similarly, even if the police had illegally obtained physical evidence that should be excluded at trial, the government could simply ask the defendant during the innocence interview whether he had possession or knowledge of the evidence or knowledge about the circumstances of its recovery. The defendant's concessions about the illegally obtained evidence should result in the admission of the evidence at trial through the defendant's consent or waiver of its exclusion. The defendant's denials concerning the evidence would allow the prosecution to try to show at trial that the defendant was lying by introducing the evidence (otherwise inadmissible), such as guns or drugs, which impeaches the defendant's statements made during the innocence interview.⁶² The evidence could be used not only for impeachment but also to prove the charged crime.

This circumstance is slightly different from that in *Walder v. United States*, where an officer from a previous case (the case was dismissed after the trial court excluded the heroin evidence at issue) testified in a later case that the defendant told him (in the previous case) "should they find any narcotic drugs they were his property and not his wife's, and that after they arrived at the residence appellant delivered to him one capsule of heroin containing 1.1 grains."⁶³ In the later case, at trial, the defendant denied ever possessing illegal drugs. The prosecution used the defendant's statement about heroin, from the previous case, to impeach his testimony in the case on trial. In *Walder*, the impeachment occurred across two different cases against the same defendant, while under innocence procedures the impeachment and/or introduction of evidence would occur within one case against the same defendant. Nonetheless, the reason to allow impeachment or the introduction of normally inadmissible evidence in both circumstances is to prevent a defendant from lying in current or later proceedings.

61. *See Harris v. New York*, 401 U.S. 222, 225 (1971) (permitting the prosecution, on cross-examination of the defendant, to use inadmissible statements by the defendant to impeach the defendant's trial testimony).

62. *See Walder v. United States*, 347 U.S. 62, 65 (1954) (permitting the prosecution to introduce inadmissible evidence from a previous (dismissed) case against the defendant to impeach the defendant's trial testimony that he had never sold narcotics previously and to refute the defense implication that the defendant did not sell or possess the narcotics at issue in the instant case).

63. *Walder v. United States*, 201 F.2d 715, 717 (8th Cir. 1953), *aff'd*, 347 U.S. 62, 65 (1954). The previous case against the defendant was dismissed when the heroin, the subject of the indictment, was excluded from evidence. In the previous case, the appellant was indicted for the offense which he committed in 1950, and that when that case came on for trial the evidence discovered by the narcotic agents by their going to appellant's apartment to make a search for narcotics without a search warrant was rejected by the court on the ground that it was obtained by an illegal search, and the indictment was dismissed and the appellant was discharged.

Id. at 716–17.

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In *Walder*, the defendant's second statement occurred at trial. Under innocence procedures, the second statement would occur prior to trial, during the innocence interview. But in both instances, at or prior to trial, the defendant's statements would be attended by defense counsel. Also, defendants would be making both statements (under oath, depending on the jurisdiction) with the purpose of influencing the criminal cases against them. Defendants who invoke innocence procedures would have to speak with government agents and explain their previous statements, which would have been made prior to arrest and would normally be inadmissible.⁶⁴ Thus, two of Professor Cassell's reforms—eliminating the exclusionary rule and the *Miranda* rule—would be addressed without the need for fundamental or constitutional change because defendants who submit to interviews would reveal the excluded physical evidence and ratify the excluded statement.

But still, Professor Cassell argues that innocence procedures would “free countless guilty defendants.” In analyzing innocence procedures, Professor Cassell gives little or no consideration to the various advantages the government would acquire from defendants who plead innocent and submit to an interview. In lamenting that guilty persons might plead innocent, Professor Cassell fails to note that in the current system, which he believes is sound (absent, of course, the exclusionary rule and the Fifth Amendment's *Miranda* rule⁶⁵), most defendants' “not-guilty” pleas are, indeed, false statements when construed literally. Professor Cassell believes that under innocence procedures the “main obstacle to such frivolous claims [of innocence by guilty persons] is supposed to be the requirement that defendants' attorneys have to file a good faith, supporting affidavit of possible innocence.”⁶⁶ Professor Cassell also notes that “[Bakken] believes that the sanctions currently provided in the rules against filing frivolous pleadings—exemplified by Federal Rule of Civil Procedure 11—create a sufficient safeguard.”⁶⁷

In his dismissal of the defense-attorney affirmation as one method through which to ensure truthful innocence pleas, Professor Cassell questions whether Rule 11 is effective. “If anything,” he writes, “experience with Rule 11 offers scant comfort, as the Rule does not seem to have been particularly effective at deterring frivolous claims.”⁶⁸ In dismissing defense-attorney affirmations under innocence procedures, Professor Cassell is also questioning a foundation of civil procedure, the requirement under Rule 11 that attorneys act in good faith when “presenting to the court a pleading, written

64. *Walder*, 347 U.S. at 65 (“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the *Fourth Amendment*.”).

65. See Cassell, *supra* note 48, at 1064, 1088.

66. *Id.* at 1067.

67. *Id.* at 1073 (footnote omitted).

68. *Id.*

motion, or other paper.”⁶⁹ He bears a heavy burden in demonstrating either why attorney affirmations are not appropriate in criminal innocence cases as a method to foster truth but are appropriate in civil litigation or why attorney affirmations are inappropriate in all criminal and civil litigation.

Rule 11 can be effective if judges apply it. Rule 11 allows adversaries to file a motion for sanctions and allows judges, *sua sponte*, to invoke the rule.⁷⁰ Also, the majority of federal circuit courts apply to attorneys an objective, as opposed to subjective, standard when examining a possible violation of Rule 11.⁷¹ Sanctions, available when an attorney files a frivolous claim, may also be available when an attorney files a non-frivolous claim with an improper purpose.⁷²

The first iteration of Rule 11, in effect from 1938 through 1983, produced only nineteen reported cases in which parties filed Rule 11 motions during a thirty-eight year period. Of these cases, courts found violations in eleven and sanctioned lawyers in only three. If the pre-1983 form of Rule 11 was little used to control lawyers’ conduct and nothing more than a blinking yellow traffic light on the litigation road, the amended form of Rule 11, in effect from 1983 through 1993, was a full-fledged speed trap resulting in nearly 7000 published Rule 11 opinions in less than ten years.⁷³

Despite Professor Cassell’s intuition, because Rule 11 was too severe it was amended in 1993.⁷⁴ The cost to any defendant, guilty or innocent, in pleading innocent and

69. FED. R. CIV. P. 11(b).

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Id.

70. Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 *LOY. L.A. L. REV.* 727, 748 (2004) (concluding, because sanctions are “akin to contempt,” that “courts agree that a district court should use particular care in deciding whether conduct is sufficiently egregious to warrant the imposition of sanctions on the court’s own initiative”).

71. *See id.* at 763.

72. *See id.* at 736–40.

73. Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation Of Lawyers*, 37 *LOY. L.A. L. REV.* 765, 765–66, 814 (2004) (footnotes omitted) (“[T]he lack of correlation between Rule 11 sanctions and subsequent lawyer discipline for the Rule 11 conduct suggests that enforcing norms against bringing or maintaining frivolous positions in federal courts is almost exclusively the province of judges.”).

74. *See id.* at 766–67.

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invoking innocence procedures is high. Implicit and explicit in a defense attorney's affirmation is that the defendant has not admitted guilt to the attorney because the attorney must affirm that the attorney believes the client is innocent.⁷⁵ This component of the affirmation requirement, alone, represents an immense change from the current system, where the entire defense case is secret, including the defendant's communications with counsel.⁷⁶ In fact, a defense attorney could file an innocence affirmation in only the rare case. The vast majority of all cases result in guilty pleas, including 95% of the cases in state courts.⁷⁷ In U.S. district courts, where only 2607 trials occurred in 2009,⁷⁸ 97% of cases result in guilty pleas where cases are not first dismissed; with dismissals included, 88% of cases result in guilty pleas. This is not to say that innocent persons do not plead guilty.⁷⁹ But, under any estimate or interpretation, defense attorneys can only rarely affirm their clients' innocence. Professor Cassell's objections to innocence procedures can pertain to only 3%–5% of all criminal cases.

If learning of or discovering evidence of guilt, a defense attorney would have to withdraw the affirmation, and the defendant would not be entitled to any favorable inferences or jury instructions. It is difficult to imagine a real case where, when possessing almost all available defense and prosecution information and evidence, along with a minimal working relationship with a client, a competent defense attorney could be fooled into making or sustaining a false innocence affirmation. On one level, every defense attorney has an ethical⁸⁰ and professional⁸¹ interest, and thus a personal stake, in ensuring that an affirmation is accurate. On another level, even where, as Professor Cassell believes,⁸² defendants would search for less-than-scrupulous defense attorneys who would file "light" affirmations of innocence (a problem not to be discounted), defense attorneys would never want to expose clients they know to be

75. Under FED. R. CIV. P. 11(b) a "pleading, written motion, or other paper" must be "warranted."

76. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1–18 ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.").

77. See *Felony Convictions in State Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.46.2004 (2004), <http://www.albany.edu/sourcebook/pdf/t5462004.pdf> (indicating the percentage of guilty pleas is highest in drug and larceny cases, from 96%–97% and lowest in homicide cases, at 69%).

78. See *Criminal Defendants Disposed of in U.S. District Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.24.2009 (2009), <http://www.albany.edu/sourcebook/pdf/t5242009.pdf> (indicating that 83,707 defendants pleaded guilty and 8408 defendants had their charges dismissed (out of 95,206 defendants)).

79. See Acker & Bonventre, *supra* note 11, at 1258–59. "Wrongful convictions occasionally stem from guilty pleas—on the order of 5% of DNA exonerations have surfaced in cases in which defendants pled guilty, often in exchange for leniency in charging or sentencing decisions—and unreliable guilty pleas may be especially prevalent in high volume, lower level cases." *Id.* at 1259 (footnote omitted).

80. See MODEL RULES OF PROF'L CONDUCT R. 3.3. "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Id.* at 3.3(a)(1).

81. See FED. R. CIV. P. 11(b).

82. See Cassell, *supra* note 48, at 1068.

lying to interrogation by the government. Almost nothing could be more advantageous to a prosecutor than a defendant making false statements long before trial.

Given his criticism of defense-attorney affirmations, Professor Cassell's final reform proposal is curious. To promote exonerations for innocent defendants, he suggests that all defense attorneys should ask their clients whether they committed the crime alleged.⁸³ Presumably, if this question (and answer) was a requirement of defense attorneys, then prosecutors would know that defense-attorney claims of their clients' innocence were reliable. Prosecutors would then be more likely to conduct a reinvestigation at the behest of the defense. However, Professor Cassell's suggestion or requirement that defense attorneys ask about their clients' guilt *is* innocence-procedure "light," but without the formal structural components that would make defense claims of innocence even more reliable.

Professor Cassell is rightly concerned with situations where, with winks and nods, defense attorneys acquire enough evidence from their clients to mount a defense, but work assiduously to prevent their clients from saying to their attorneys, "I killed the victim intentionally and have no defense." The absence of a literal confession is enough under the ethical interpretations of many defense attorneys to tell the court that their defense tactics, if questioned by the prosecution, are being conducted in good faith because they do not "know" whether their client committed the alleged crime. Under some metaphysical argument, the defense attorneys might not "know," but in reality they may be convinced of their clients' guilt to the highest level of proof possible. Required to ask whether their clients committed the crime, the defense attorneys, having received a negative response, would inform prosecutors that they believed their clients to be innocent. But, if there were unscrupulous defense attorneys, a key concern of Professor Cassell's, these attorneys would be much more likely to deceive prosecutors if they have no requirement to make an affirmation of innocence.

Professor Cassell notes that he has "always wondered why, in a rare case where a defense attorney believes she is representing a truly innocent client, she almost invariably fails to bring the prosecutor into the discussion."⁸⁴ There are eminently practical reasons why. In an adversarial system, prosecutors may not trust the word of defense attorneys or, at least, the claims of innocence that emanate from defendants. Prosecutors have no incentive and no duty to reinvestigate a case upon the assertion of a defense attorney. Moreover, prosecutors have no systematic method through which to test defense attorneys' claims about their clients' innocence. Practically, prosecutors will find it institutionally difficult to ask detectives, who have already closed a case with an arrest, to perform a do-over. Rather, prosecutors will believe that the proper forum to test innocence claims is the trial, not the pretrial process, especially where the defense offers little or no evidence in return for a reinvestigation by the government. The only way to convince prosecutors to investigate anew is to require them to do so, via a statute or rule. But, compulsion is not a sufficient rationale for a reinvestigation. Through innocence procedures, after defendants have

83. *See id.* at 1092.

84. *Id.* at 1094.

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invested in a reinvestigation—through their defense attorneys’ affirmations and their own interviews with the prosecution—then prosecutors will understand that a defendant is making a serious claim of innocence.

Professor Cassell believes that a defense attorney’s affirmation and a defendant’s waiver of the right to remain silent will not prevent guilty defendants from pleading innocent.⁸⁵ But this seems more like an argument for not changing the current system than it is an argument against the secondary or tertiary effects of innocent procedures. That is, it is unclear what other additional significant rights any defendant could waive. Through a waiver of silence and a subsequent interview of the defendant, the prosecution would obtain an immense advantage. Also, a jurisdiction could require that a defendant’s statement be under oath, subjecting the defendant to virtually unlimited counts of perjury.⁸⁶ Any statement would effectively limit the defendant to one defense, which the prosecution could investigate fully, far in advance of trial. A variance at trial would undermine the entire defense case. A defendant who refused to answer relevant questions during the innocence interview would not be entitled to either favorable inferences or a higher burden of persuasion at trial, and the statements he had already made could be used against him.

From the defendant’s statement, the prosecution could follow every lead and prepare for any defense. All defense witnesses would be known. The defendant’s errors during the interview, which could be videotaped and shown to the jury, could be made to appear to be lies. Of course, the prosecution would not have to introduce the innocence statement at trial, and, under the hearsay rule, the defendant could not introduce the videotape.⁸⁷ The defendant would have to testify and be cross-examined. Then, the prior taped statement could be used to impeach the defendant’s trial testimony.⁸⁸ Indeed, if not for innocence procedures, the defendant’s prior (sworn) statement on videotape would never exist. Guilty defendants could not easily plant a false defense through some defense attorneys, who, because of the affirmation requirement, would be personally responsible for offering a good faith claim of innocence.⁸⁹ Surprise at trial would be less likely because the enhanced investigation would reveal each party’s evidence,⁹⁰ especially that of the defendant.

Still, Professor Cassell believes that a higher burden of persuasion and favorable inferences, if necessary because the prosecution proceeded to trial, would lead to

85. *Id.* at 1083–84.

86. *See, e.g.*, 18 U.S.C. § 1621 (2006) (“Whoever . . . having taken an oath . . . and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . or . . . willfully subscribes as true any material matter which he does not believe to be true . . . is guilty of perjury . . .”).

87. *See* FED. R. EVID. 801(c) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

88. *See* *Harris v. New York*, 401 U.S. 222, 225 (1971).

89. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3.

90. In some cases, probably not an insignificant number, measures would have to be taken to ensure the protection of prosecution witnesses, which might include not revealing their identity or providing access to them until they testify at trial.

more acquittals of guilty persons than those that occur in the current system. However, a conviction of a guilty person seems more, not less, likely under innocence procedures. In the current system, from the time of “adversary judicial proceedings”⁹¹ (such as a “formal charge, preliminary hearing, indictment, information, or arraignment”⁹²), when the right to an attorney attaches,⁹³ through the trial, guilty defendants will always reveal nothing unless they testify. At that late moment, the time of testimony, full investigation of any statement is impossible. And, indeed, most defendants will testify at trial.

From data collected in the 1950s, Harry Kalven and Hans Zeisel⁹⁴ found that defendants with no criminal record testified in 91% of cases⁹⁵ and defendants with a criminal record testified in 74% of cases.⁹⁶ Defendants testified in 82% of all cases.⁹⁷ Data collected in the 2000s indicate that 62% of defendants with no record and 45% of defendants with a record will testify.⁹⁸ Presumably, defendants with a record are less likely to testify to avoid revealing their criminal convictions to jurors. Thus, the majority of defendants will testify, and prosecutors will have a significant advantage if they obtain statements from defendants prior to trial to use against defendants who testify at trial, a circumstance that will always occur under innocence procedures.

Kalven and Zeisel found that the prosecution introduces alleged confessions in only 19% of cases.⁹⁹ In stark contrast, with innocence procedures, prosecutors would have available pretrial statements of guilty defendants who invoke innocence procedures in 100% of all cases. Contrary to Professor Cassell’s belief that guilty defendants would abuse innocence procedures, if guilty defendants invoked the procedures they would be much more likely to be convicted because the prosecution would have much more evidence to use against them. Evidence leads more closely to truth, and guilty defendants want to avoid truth. They will always want to conceal evidence rather than promote its acquisition. Guilty defendants would fear and avoid innocence procedures.

91. See *United States v. Gouveia*, 467 U.S. 180, 187 (1984) (concluding that the right to counsel attaches when adversarial judicial proceedings begin).

92. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (finding no right to an attorney at an identification procedure that occurs prior to formal charges).

93. *Id.* at 688.

94. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). The trials that were the focus of the study occurred in “1954-1955 for Sample I and mainly in 1958 for Sample II.” *Id.* at 33 n.1.

95. *Id.* at 146.

96. *Id.* at 148.

97. *Id.* at 138.

98. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1371 (2009). (“The enhanced conviction probability that prior record evidence supplies in close cases may well contribute to erroneous convictions.”).

99. KALVEN & ZEISEL, *supra* note 94, at 137–38.

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B. New Rules or Procedures Within the Current System

Several symposium participants proposed modifying current procedures or rules so that the defense may discover more evidence prior to or after conviction. The proposals favored expanding discovery rules; permitting defendants to exchange some pre-conviction rights for post-conviction rights; and providing mentally retarded defendants with additional rights.

1. Expanding Discovery

Professor Lissa Griffin recommends changes in discovery rules. She proposes that “the prosecution’s obligation to disclose exculpatory information to the defense be formalized by statute, court rule, or internal protocol in ways that would reflect the current state of our knowledge of and experience with both *Brady* and wrongful convictions.”¹⁰⁰ While finding Bakken’s and Steel’s proposals “troubling,”¹⁰¹ although not indicating why, Professor Griffin finds that the *Brady* rule,¹⁰² requiring the prosecution to produce exculpatory information if it is material,¹⁰³ to be inadequate because prosecutors cannot be both advocates for the Government and responsible for assisting the defendant. Professor Griffin finds that “*Brady* necessarily rests on a remarkable—and perhaps blind—faith in the capacity of prosecutors, who are advocates, to subordinate their values, cognitive biases, and competitive instincts to undertake the role of ‘minister of justice.’”¹⁰⁴

Professor Griffin identifies the materiality requirement of *Brady*—limiting mandatory prosecution disclosure to evidence that is “favorable and material”—as the rule’s main shortcoming.¹⁰⁵ To replace the *Brady* rule, she proposes a statute that “would broaden the prosecutor’s obligation to disclose from the current ‘material

100. Griffin, *supra* note 50, at 972.

101. *Id.* at 970. Professor Griffin errs in concluding that “[t]he organizers [Bakken and Steel] of the symposium have proposed that the current adjudication process be scrapped for a defendant who certifies his innocence and waives *all constitutional rights.*” *Id.* (emphasis added). However, Bakken proposed only that defendants would have to waive the right to remain silent and, in a sense, the right to some attorney-client secrets, in that the defense attorney would have to affirm a belief in the defendant’s innocence for the defendant to be entitled to innocence procedures. *See* Bakken, *supra* notes 45, 47 and accompanying text. Steel proposed only that defendants would have to waive the right to remain silent to be entitled to innocence bureaus. *See* Steel, *supra* note 44. Defendants who waive the right to remain silent lose the advantage of secrecy and surprise in litigation and make it easier for the prosecution to obtain evidence, which is a main goal of innocence procedures and bureaus because more evidence usually aids the innocent person. Nonetheless, defendants retain all other constitutional rights and, under Bakken’s innocence procedures, acquire additional statutory (or rule) rights at trial. *See* Bakken, *supra* note 47 and accompanying text.

102. *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires prosecutors to reveal exculpatory information).

103. *See* *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (“It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.”).

104. Griffin, *supra* note 50, at 976.

105. *See* *Ritchie*, 480 U.S. at 57.

favorable evidence' requirement to a disclosure of 'reasonably helpful information.'"¹⁰⁶ Professor Griffin would implement the new standard through a checklist that the prosecution would have to submit to the defense.

Professor Griffin's recommendation that "reasonably helpful information" be disclosed to the defense could result in the same kinds of interpretive problems surrounding materiality that she identifies in the *Brady* exculpatory rule. Also, because the "reasonably helpful" concept is broader than the exculpatory standard, more litigation would be required. Professor Griffin's recommendation that prosecutors, via a checklist, certify due diligence¹⁰⁷ regarding the disclosure of information could induce a more thorough investigation. It could also result in much litigation over what is proper due diligence. Due diligence depends on a multitude of different social and economic factors that exist in every community, police department, and prosecution office. Different diligence standards could be necessary for every county and state. It seems easier to identify and place on the Griffin checklist the kind of evidence that may be reasonably helpful and presume that its production manifests due diligence. This could eliminate the significant burden that the government and courts would have in trying to determine what evidence is reasonably helpful and what prosecution and police actions constitute due diligence.

The main result of the reasonably helpful standard would be to provide the defense with additional evidence. The additional evidence produced would not be exculpatory because, under *Brady*, such evidence already has to be disclosed. The additional evidence, like any information that was previously unknown but is now known to the recipient, would be a boon to innocent, but also to guilty, defendants. The Bakken and Steel proposals place an additional burden on prosecutors, but only if defendants agree to be interviewed. In contrast, Professor Griffin's proposed "statute does not expand the defense's [disclosure] obligation because defense disclosure has virtually no role to play in protecting the innocent and very little to do with *Brady*'s fundamental fairness concerns."¹⁰⁸ Professor Griffin's statement about the defense role is largely accurate, but it might not address how to equalize the significant redistribution of power, from prosecution to defense, that her reasonably helpful and due-diligence standards demand. Her standards burden only the prosecution, which might be fine, of course, if there should be a redistribution of power. While trying to create protections for innocent persons, however, new standards may also contain provisions that allow too many guilty persons to escape responsibility.

106. Griffin, *supra* note 50, at 997.

107. *Id.* at 997, 1005–06 (Appendix C).

108. *Id.* at 1000.

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2. *Exchanging Pre-conviction for Post-conviction Rights*

Noting that few defendants go to trial (up to 98% plead guilty, not including dismissals¹⁰⁹), Professor Samuel Gross considers a new pretrial option where “criminal defendant[s] would waive major procedural rights at trial, but *not* plead guilty, in return for [important] procedural advantages on post-conviction review.”¹¹⁰ Indeed, to obtain post-conviction relief, the Supreme Court, in *House v. Bell*, found that defendants have to show that new evidence would result in “no reasonable juror” finding them guilty in order to introduce the evidence.¹¹¹ Professor Gross suggests:

[A] pretrial procedure that changes the defendants’ options might reduce false convictions if it satisfies two criteria: (1) *Does it offer a choice that generates different incentives and different behavior for innocent and guilty defendants?* . . . [and] (2) *Does it reduce the probability of conviction of innocent defendants at trial?*

. . . .

. . . A defendant who chooses an investigative trial and is then convicted would have two new rights: (i) the right to reopen the question of his guilt if he presents substantial new evidence that casts doubt on his conviction, and (ii) the right to a retrial if, at that review proceeding, a de novo assessment of all the evidence leads to the conclusion that there is a substantial doubt that he is guilty. . . . [The defendant would waive] the Fifth Amendment privilege against self-incrimination and . . . the right to exclude evidence that was obtained in violation of the Fourth Amendment prohibition [And] [n]ext in line is . . . the right to a jury trial.¹¹²

Professor Gross believes that a more open pretrial procedure will benefit innocent defendants and disadvantage guilty defendants, who have an interest in suppressing truthful, accurate evidence.¹¹³

Professor Gross focuses on changes to the pretrial process and, like Bakken, Risinger and Risinger, and Steel, suggests a system where the defendant would have to waive his privilege against self-incrimination to obtain additional rights. Professor Gross’s additional focus on defendants’ obtaining post-conviction rights, as the benefit for waiving some pretrial or trial rights, is apparently novel, in that convicted defendants would have better opportunities to collect and introduce evidence more

109. *See supra* notes 72–74 and accompanying text.

110. *See* Gross, *supra* note 52, at 1023.

111. *See* *House v. Bell*, 547 U.S. 518, 536–37 (2006) (“In *Schlup*, the Court . . . held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))). *But see*, *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) (holding that convicted persons may use a civil rights statute (42 U.S.C. § 1983) to obtain DNA testing of evidence, which may be used to attack their convictions in habeas corpus proceedings, under 28 U.S.C. § 5544).

112. Gross, *supra* note 52, at 1021, 1023.

113. *Id.* at 1023.

easily, when they are presumably in prison. Assuming that defendants' rights are rationed in the criminal justice system, one might question why innocent defendants would favor additional post-conviction rights over additional rights at trial, so as to avoid conviction in the first place. An obvious answer is that exculpatory evidence might be revealed only through new events that occur over the passage of time, long after the trial. Indeed, one panelist, Mike Ware, a prosecutor in Dallas County, Texas, notes the importance of examining cases following conviction, through a conviction integrity unit in a district attorney's office.¹¹⁴ Of course, pretrial procedures could be fashioned to permit the discovery of some exculpatory evidence far sooner than the time following conviction.

3. *Protecting Mentally Retarded Persons*

Professor John Blume, Professor Sheri Johnson, and Susan Millor focus on the difficulties confronted by mentally retarded defendants, who compose 2% of the general population, but 10% of the prison population.¹¹⁵ Reasoning from *Atkins v. Virginia*,¹¹⁶ prohibiting execution of mentally retarded persons, they urge the adoption of special procedures for mentally retarded persons prior to and at trial.¹¹⁷ The procedures include: appointing for the defendant an advocate with experience in mental retardation; appointing counsel during interrogations (or requiring videotaping and corroboration of statements); requiring corroboration of informant testimony; limiting plea bargaining; instructing juries that persons with mental retardation (as

114. See Ware, *supra* note 8, at 1035–39.

115. Blume et al., *supra* note 51, at 948. See generally *FAQ on Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aaid.org/content_104.cfm (last visited Nov. 5, 2011) (The American Association on Intellectual and Developmental Disabilities (formerly The American Association on Mental Retardation) characterizes intellectual disability (sometimes termed “mental retardation”) as: “Intellectual disability is a disability characterized by significant limitations both in *intellectual functioning* (reasoning, learning, problem solving) and in *adaptive behavior*, which covers a range of everyday social and practical skills. This disability originates before the age of 18.”).

116. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of mentally retarded persons is excessive under the Eighth Amendment).

First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty [retribution and deterrence] applies to mentally retarded offenders.

....

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Id. at 318–19, 320–21 (citation omitted).

117. Blume et al., *supra* note 51, at 958–67.

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opposed to those without) confess at higher rates; and requiring the prosecution to bear the burden of proof for affirmative defenses.¹¹⁸

The authors identify a subset of defendants whose disability (mental retardation) is unique when compared with most defendants' social and economic disadvantages, which exist outside their personage. Where *Atkins* was limited to holding that the execution of mentally retarded persons violates the Eighth Amendment,¹¹⁹ additional special rules could generate a significant amount of additional litigation because the rules would apply to all mentally retarded defendants, not just those who are eligible for the death penalty. For example, usually it would be almost impossible for government agents to determine in advance of diagnostic testing what suspect is mentally retarded and thus know when to videotape an interview with the suspect. Of course, this might be an argument for videotaping all statements.¹²⁰ Also, while defense attorneys should have an understanding of how mental retardation affects such clients, diagnostic tests would be necessary to determine which defendant possesses that characteristic. The testing would result in delays. Litigation would ensue over issues of whether the defendant was correctly identified as mentally retarded.

Like mentally retarded defendants, mentally ill¹²¹ defendants have cognitive deficits and confront the same kinds of challenges in their dealings with and statements to government agents. Mentally ill defendants would seem to have the same need for experienced attorneys, videotaped interviews, and a burden of persuasion higher than beyond a reasonable doubt. Perhaps the authors (Blume, Johnson, and Millor) have concluded that mental retardation is a disability that results uniquely in the conviction of innocent persons. But, it is not readily apparent that mentally retarded defendants suffer more disadvantages than those who are mentally ill. Moreover, generally "[p]ersons charged with [a] crime are not infrequently of defective or inferior intelligence, and, even without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result."¹²² Even if mentally retarded persons do suffer unique disadvantages, perhaps more, or at least as much, should be done for mentally ill and other intellectually disadvantaged defendants if they outnumber those who are mentally retarded.

Not providing similar rights might raise equal protection claims by mentally ill defendants or defendants with other disabilities.¹²³ Still, in *Heller v. Doe*, the Supreme

118. *Id.*

119. *Atkins*, 536 U.S. at 321 ("[D]eath is not a suitable punishment for a mentally retarded criminal.").

120. *See, e.g.*, Drizin & Reich, *supra* note 6, at 620 (advocating taping all statements).

121. *Mental Illnesses*, NAT'L ALLIANCE ON MENTAL HEALTH, http://www.nami.org/Template.cfm?Section=By_Illness (last visited June 10, 2011) (identifying sixteen mental illnesses, including autism, bipolar disorder, major depression, panic disorder, and suicide).

122. BORCHARD, *supra* note 16, at 371–72.

123. *But see Heller v. Doe*, 509 U.S. 312, 322, 333 (1993) (rejecting an equal protection claim and upholding for civil commitment purposes a burden of persuasion (on the State) of clear and convincing for mentally

Court concluded that a state did not violate the equal protection clause where its civil commitment burden of persuasion was clear and convincing for mentally retarded persons and beyond a reasonable doubt for mentally ill persons.¹²⁴ In *Heller*, the plaintiffs were involuntarily committed mentally retarded persons who argued that the lower burden of persuasion for them, compared with the higher burden for mentally ill persons, violated equal protection. The Court found that the lower burden of persuasion was reasonable because mental retardation is easier to identify than mental illness.¹²⁵ However, the Court did not find that the challenges confronted by mentally retarded and mentally ill persons were different, only that it is easier to identify one disability over another. Thus, it might be questioned whether the Blume, Johnson, and Millor proposal would withstand constitutional inquiry if it did not contain similar (albeit not identical) protections for mentally retarded suspects/defendants and other suspects/defendants with different disabilities.

One may also question why the prosecution's burden of persuasion should be higher when mentally retarded persons are on trial. Under the Blume, Johnson, and Millor proposal, the pretrial process will have already been modified, through taped interviews and special attorneys, to compensate for mentally retarded persons' intellectual disability. In contrast, under innocence procedures, a defendant's waiver of silence and the defense attorney's affirmation help reveal evidence and strategies that the prosecution may exploit, thus justifying a higher burden of persuasion at trial. Moreover, it does not appear that the mentally retarded defendant has waived any right in return for the higher burden of persuasion. However, perhaps mental retardation is tantamount to a "waiver" of rights.

C. *Structural Change in the Adversarial System*

Relatively few commentators have suggested structural changes to the adversarial system. In contrast, Professor Keith Findley, in his article, and Professors Michael Risinger and Leslie Risinger, in their article, recommend fundamental changes to pre-arrest investigation processes. Professor Findley finds that the American adversarial system does not work because it "is marked by an adversary process so compromised by imbalance . . . that true adversary testing is virtually impossible."¹²⁶ Professor Findley envisions an Office of Public Advocacy, where

an accused person, whether claiming innocence or not, can choose whether to be prosecuted in the traditional adversarial system or under a system in which adversaries share in the inquisitorial search for the truth.

. . . .

retarded persons and beyond a reasonable doubt for mentally ill persons because the "difference between the two conditions justifies Kentucky's decision to assign a lower standard of proof in commitment proceedings involving the mentally retarded").

124. *See id.* at 333.

125. *Id.* at 322.

126. Findley, *supra* note 53, at 912.

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In this new institution, the prosecutor and defense attorney would then be tasked to work together, as joint inquisitors—adversarial inquisitors, in a sense—to search for the truth and develop the evidence in the case. Thus, these joint, adversarial inquisitors would share equally in the responsibility for and access to the tools for developing the evidence in the case. Police and forensic analysts would answer to both and would be available to undertake investigations and analyses at the joint request of both. Police and lab analysts would become acculturated to answering to both sides, knowing that everything they do would be reviewed fully by both, and that they would be required to search as aggressively for evidence of innocence or alternative perpetrators as for evidence of guilt.¹²⁷

In addition to addressing resource disparities, Professor Findley’s model provides a method to ameliorate the often intractable adversary relationship between the prosecution and defense. His model also provides a means for the defense to collect evidence and locate witnesses.

In the current adversarial system, conflicts between police and prosecution offices can be significant even though the two entities are presumably working cooperatively to obtain a correct and just outcome. Under the Findley model, it seems that additional conflicts could arise. Under this model, “[t]he defense lawyer—who would remain adversarial and duty-bound to zealously advocate for her client when assigned that role—would join with the prosecutor (also in an adversarial role) in jointly supervising the continuing investigation by police.”¹²⁸ In the Findley model, the obligation of the defense attorney to zealously defend the client, who is usually guilty, would usually or always be at odds with the goal of collecting all the evidence.

But Professor Findley believes that the structure of his model “would be designed to create a culture that mutes the polarizing forces of career adversaries.”¹²⁹ However, where the defense attorney is jointly responsible for an investigation, it is very difficult or impossible to envision that this process would not benefit the defendant, including every guilty defendant. The defense attorney would be ethically bound simply to veto, in this two-person decisionmaking process, any action that could lead to evidence unfavorable to the client. Even with a procedure to appeal disputes to a judge, the pretrial process could cause long delays in deciding even what charges to bring.

Professor Findley believes defense obstructionism would not occur because the “culture would be one of shared enterprise,” in that “lawyers would not want to alienate other lawyers, or law enforcement.”¹³⁰ However, one could just as easily urge that it is the primary responsibility of defense attorneys to do whatever is necessary to protect client-defendants, including obstructing law enforcement officers, regardless of who is alienated, and that the reluctance to avoid offending a government prosecutor is not a proper defense function. Further, Professor Findley concludes

127. *Id.* at 935–36.

128. *Id.* at 935.

129. *Id.*

130. *Id.* at 939.

that, “defense teams would know that every wild-goose chase that produces nothing exculpatory would instead produce ammunition for the prosecution.”¹³¹ However, this focus on defense attorneys initiating unmerited investigations may miss the point. Generally, guilty defendants want no investigation at all. The exclusion of evidence is their primary goal. Certainly, they would not want to uncover evidence. Providing the defense with joint responsibility for the investigation would encourage guilty defendants to select the Findley joint investigation model and then resist, impede, or veto the prosecution’s attempt to collect additional evidence.

Professors Michael Risinger and Lesley Risinger envision a system that begins with an inquisitorial investigation and becomes an adversarial process if charges are filed.¹³² Like Professor Findley, they conclude that innocence procedures are too limited, in that the procedures apply after a person has been arrested, when it is the initial investigation (prior to arrest) that should be more thorough and neutral. They urge the creation of a neutral investigating magistrate; however, Professor Findley believes this would be impractical because of “cognitive biases” and “public law-and-order pressures.”¹³³ Calling their model “back to the future,”¹³⁴ the Risingers believe that the concept of a supervising magistrate is essential. “The point here,” they write, “is that the practical elimination of judicial involvement in overseeing investigation, together with modern arrangements allowing for only severely restricted discovery, are products of the mid- to late-nineteenth century. They are not part of ‘our adversary system’ as it existed at the founding of the republic.”¹³⁵

Most significantly, then, the Risinger model calls for judicial oversight of the investigation. Detective divisions and forensic laboratories would be merged into an independent agency, which would be supervised by judicial officers responsible for considering the guilt and innocence of each suspect. The prosecution would retain its role as advocate but would see its investigatory role curtailed in an effort to make investigations more balanced. As the Risingers contend,

Our proposal differs from [that of] many others who have called for judicial control of the investigatory stage, in that it terminates exclusive judicial control at the charging stage. At that point the primary control over information gathering and structuring returns to the adversaries, with the judge remaining in the background and serving only to oversee any new investigation requested by the parties, and the required exchanges of information prior to trial which would of course be a feature of the new structure.

. . . The “factual innocence” track would require the defendant to make a limited waiver of the privilege against self-incrimination, in that the

131. *Id.*

132. *See* Risinger & Risinger, *supra* note 54.

133. *See* Findley, *supra* note 53, at 928.

134. *See* Risinger & Risinger, *supra* note 54, at 883.

135. *Id.* at 884.

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defendant would commit himself to testify at trial, and also make himself available for a formal pretrial deposition in front of, and to be conducted primarily by, the judge. In return, the defendant would be able to depose witnesses against him, would receive complete discovery, including any grand jury testimony that might have been given, and would be tried under a special rule¹³⁶

The more neutral judicial intervention would diminish the traditional role of the prosecutor “in criminal investigations before the charging decision.”¹³⁷

Under the Risinger model, the judicial officer would initiate the charging decision and then the adversarial system would begin with the prosecutor and defense attorney.¹³⁸ The Risinger proposal offers an important method through which to discover additional evidence and evaluate it neutrally. However, aside from political considerations, and given the significant change in the investigation process urged, one might wonder why the Risinger model would not go all the way, to a more complete conversion to an inquisitorial system, by having the neutral judicial investigator continue as the prosecutor or trial judge. Under the Risinger model, it appears that the judicial investigator would drop out of the process after the charging decision. While the investigator would certainly have to testify in some cases, the elimination of the investigator from an active role in the case seems like a loss. The defense, prosecution, and trial judge would have to learn about every case after the investigator/magistrate withdrew. Retaining the investigator as prosecutor or judge would conserve resources.

The Risinger and Findley models might promote too broad a solution. Their models, of a neutral investigator and joint defense/prosecution investigation, would apply to all defendants. But, although the absolute number may be large, only a small percentage of defendants are innocent, indeed only about 3.3% in capital-rape murders, according to Michael Risinger’s research,¹³⁹ and 1%–3% according to other

136. *Id.* at 893–94. That Professor Michael Risinger now supports a limited waiver of a defendant’s privilege against self-incrimination at trial is significant because in a previous article he had considered and rejected such a waiver. *See generally* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 *Hous. L. Rev.* 1281, 1283 (2004) (proposing “reforms intended to recognize the special moral position of innocence-in-fact claims”).

I considered obliging criminal defendants who elected ‘factual innocence’ procedures to testify, requiring that their examination be conducted by a judicial officer, not the partisan advocates, and severely limiting the extent of prior convictions that would be admissible purely on impeachment grounds. Although these or other such proposals might actually increase the system’s ‘resolving power’ in regard to claims of actual innocence, I ultimately concluded that they would only get in the way of a fair consideration of the need for some provision of special procedures for factual innocence claims.

Id. at 1312 n.157.

137. Risinger & Risinger, *supra* note 54, at 892.

138. *Id.* at 892–93.

139. *See* Risinger, *supra* note 24, at 799–80.

research.¹⁴⁰ If about 97% of all defendants are guilty of some crime, then the Findley joint investigation model and the Risinger magistrate model, designed to alleviate the innocent-person conviction problem, which affects only about 3% of defendants, at most, would consume tremendous resources for an exceedingly small return.

Moreover, a great problem for innocent suspects and defendants is that they have no method by which to distinguish themselves from guilty persons, such as a plea of innocence,¹⁴¹ and thereby alert authorities that their cases merit special scrutiny. Under the Findley and Risinger models, an accused person's firm claim of innocence, regardless of the stage of the criminal justice process, would be included with the assertions of all other accused persons, including the assertions of all guilty persons. The Findley model would permit accused persons to proceed under the current system or under the joint investigation model. But many guilty persons would be as likely as innocent persons to select the joint investigation model because their defense attorneys could better monitor and control the investigation. Under the Risinger model, a magistrate would control the investigation of all defendants. The Findley and Risinger models do foster the collection of evidence, and at an earlier point in the process, but in 97% of the cases the collection of additional evidence would benefit guilty defendants. In contrast, Steel's innocence bureaus¹⁴² and Bakken's innocence procedures,¹⁴³ both requiring a more neutral, comprehensive investigation, would be necessary only if a defendant or suspect invoked the bureaus or procedures.

Also, under the Risinger model, it might be questioned whether it is plausible to have one entity, the judicial investigator, initiate charges and then require another entity, the local district attorney or U.S. Attorney, to prosecute the case. Prosecutors have a responsibility to proceed only when they believe cases have merit. Thus, virtually all prosecutors would reinvestigate the case to be sure it was meritorious. The result could often be two overlapping or duplicative government investigations, one by a judicial officer (investigator/magistrate) and another by the prosecutor. Although with fewer resources, defense attorneys have ethical obligations to their clients and could be expected to initiate private investigations.

With the charging decision in the hands of the judicial investigator under the Risinger model, the system of elected district attorneys and appointed federal prosecutors would be diminished. The Risinger judicial charging decision might very well be fairer than having elected politicians or politically appointed U.S. Attorneys issue charges. Regardless, community involvement in the charging process would be lessened. The justice system could become more ministerial and less democratic. Still, even if this were the result, the Risinger model could be significant if the judicial investigator or charging agent served to temper the passions of the majority by issuing more well-considered charges. For instance, a Risinger magistrate might base charging decisions on the likelihood of convicting a suspect, thus saving

140. See Acker & Bonventre, *supra* note 11, at 1246 n.5.

141. See Bakken, *supra* note 45 and accompanying text.

142. See Steel, *supra* notes 44, 46 and accompanying text.

143. See Bakken, *supra* note 45 and accompanying text.

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resources and time by declining charges when, although evidence might be adequate to support a prima facie case, the evidence is inadequate to support a conviction. In contrast, elected district attorneys might be more likely to issue charges to satisfy public opinion, regardless of the likelihood of a conviction. Nonetheless, for many reasons, prosecutors would be very reluctant to proceed on cases where another governmental entity had issued the charges.

IV. CONCLUSION: THE POSSIBILITY OF SYSTEMIC CHANGE

The symposium on innocence procedures produced ideas for change in the adversarial system and recommendations for new procedures within the current system. Perhaps these approaches are responses to the innocent movement, which seems unwilling to recommend changes to the adversarial system,¹⁴⁴ and whose recommendations about improving procedures are similar to those made in 1932.¹⁴⁵ Regardless, others have concluded that the adversarial system must be changed because it is not capable of seeking truth¹⁴⁶ and it manifests destructiveness.¹⁴⁷ Moving beyond general criticism of the current system, the symposium on innocence procedures produced recommendations for practical changes. New approaches are necessary because various measures indicate that the number of innocent-person convictions may range from 1%–3% of all cases,¹⁴⁸ which, if accurate, would mean that between 73,000 and 222,000 innocent persons¹⁴⁹ stand wrongfully convicted at any one time in America. This number is far too high to accept and suggests that significant and even profound change in the adversarial system is necessary.

Michael Risinger and Lesley Risinger advocate direct judicial control of the investigation,¹⁵⁰ a central component of the inquisitorial system. Keith Findley envisions that prosecutors and defense attorneys will work together as “adversarial inquisitors.”¹⁵¹ Whether within a new system or in using new procedures, Risinger and Risinger,¹⁵² Samuel Gross,¹⁵³ Lewis Steel,¹⁵⁴ and Tim Bakken¹⁵⁵ recommend that defendants waive the privilege against self-incrimination in return for opportunities to discover more information and evidence. In 1932, Professor Borchard went so far

144. See Siegel, *supra* note 3, at 1222; Medwed *supra* note 10, at 552–58.

145. See BORCHARD, *supra* note 16, at 367–78; Raymond, *supra* note 17, at 463.

146. See LANGBEIN, *supra* note 33, at 343.

147. See Weinreb, *supra* note 36, at 63.

148. See *supra* notes 20–26 and accompanying discussion.

149. See *supra* notes 30–32 and accompanying discussion.

150. See Risinger & Risinger, *supra* note 54, at 893–94.

151. Findley, *supra* note 53, at 936.

152. See Risinger & Risinger, *supra* note 54, at 894.

153. See Gross, *supra* note 52, at 1025–26.

154. See Steel, *supra* note 44.

155. See Bakken, *supra* note 45, at 547–50.

as to consider “repeal”¹⁵⁶ of the privilege against self-incrimination because it did not serve the defendant or the justice system:

[I]t seems probable that the privilege [against self-incrimination] is not an essential condition of the impartial administration of justice and that it does not afford to the accused the protection assumed. On the contrary, it is probably responsible for many abuses, not least of all the ‘third degree,’ which subjects accused persons to far more brutal and intolerable ordeals than any obligation to tell the truth in open court. Refusal to take the stand—under circumstances where an explanation from the accused is naturally expected—even if it cannot be commented upon by judge or prosecutor, inevitably affects the jury unfavorably; but in addition, the accused’s known privilege of refusing to testify influences the police to exact ‘confessions’ which, whether true or not, stigmatize the system of obtaining them as a public disgrace.¹⁵⁷

In proposing an evidence checklist for prosecutors and expansion of the *Brady* doctrine, and special procedures and rules for mentally retarded defendants, Lissa Griffin¹⁵⁸ and John Blume, Sheri Johnson, and Susan Millor,¹⁵⁹ respectively, offer new methods of discovery or procedural protections that would be applicable within any system. In the end, the ideas emanating from the innocence symposium nicked and, in some instances, pierced the adversarial system.

156. BORCHARD, *supra* note 16, at xvi–xvii.

157. *Id.* at xvii. Presumably, *Miranda v. Arizona*, 384 U.S. 436, 445–48 (1966), decided thirty-four years after Professor Borchard wrote, tempered the “third degree” to which he referred in 1932. Still, at the time of *Miranda*, the Court discussed the third degree as a basis for requiring rights warnings, *id.* at 445–48, and noted Professor Borchard’s book with approval, *id.* at 455 n.24, for the proposition that “custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455.

158. Griffin, *supra* note 50, at 996–1001.

159. Blume et al., *supra* note 51, at 958–67.