

## PREFACE

### CRIMINAL LAW 2.0

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#### I

Although we pretend otherwise, much of what we do in the law is guesswork. For example, we like to boast that our criminal justice system is heavily tilted in favor of criminal defendants because we'd rather that ten guilty men go free than an innocent man be convicted.<sup>2</sup> There is reason to doubt it, because very few criminal defendants actually go free after trial.<sup>3</sup> Does this mean that many guilty men are never charged because the prosecution is daunted by its heavy burden of proof? Or is it because jurors almost always start with a strong presumption that someone wouldn't be charged with a crime unless the police and the prosecutor were firmly convinced of his guilt? We tell ourselves and the public that it's the former and not the latter, but we have no way of knowing. They say that any prosecutor worth his salt can get a grand jury to indict a ham sandwich. It may be that a decent prosecutor could get a petit jury to convict a eunuch of rape.

The "ten guilty men" aphorism is just one of many tropes we assimilate long before we become lawyers. How many of us, the author included, were inspired to go to law school after watching Juror #8 turn his colleagues around by sheer force of reason and careful dissection of the evidence?<sup>4</sup> "If that's what the law's about, then I want to be a lawyer!" I thought to myself. But is it? We know very little about this because very few judges, lawyers and law professors have spent significant time as jurors.<sup>5</sup> In fact, much of the so-called wisdom that has been handed down to us about the workings of the legal system, and the criminal process in particular, has been undermined by experience, legal scholarship and common sense. Here are just a few examples:

**1. Eyewitnesses are highly reliable.** This belief is so much part of our culture that one often hears talk of a "mere" circumstantial case as contrasted to a solid case based on eyewitness testimony. In fact, research shows that eyewitness identifications are highly unreliable,<sup>6</sup> especially where the witness and the perpetrator are of different races.<sup>7</sup> Eyewitness reliability is further compromised when the identification occurs under the stress of a violent crime, an accident or catastrophic event—which

1. The author is a judge on the Ninth Circuit. He wishes to acknowledge the extraordinary help provided by his law clerk, Joanna Zhang. © 2015, Alex Kozinski.

2. Actually, as Sasha Volokh points out, the number of guilty men we are willing to free to save an innocent one is somewhat indeterminate. See Alexander "Sasha" Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 187-92 (1997).

3. According to the most recent United States Attorneys' Annual Statistical Report, out of the 3424 federal criminal cases that went to trial in 2013, only 228, or about 6.7 percent, resulted in acquittals. See Dep't of Justice, *U.S. Attorneys' Annual Statistical Report: Fiscal Year 2013*, at 51-56, Tables 2 & 2A (Sept. 22, 2014), available at <http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf>.

4. 12 ANGRY MEN (United Artists 1956).

5. I've done it twice, and I can't say I know much more about the process. One case was so clear-cut that only one verdict was possible. The other one was closer and resulted in a hung jury, but doubtless would have resulted in a swift conviction but for my participation.

6. See Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1018-22 (1995).

7. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211-15 (2001).

pretty much covers all situations where identity is in dispute at trial.<sup>8</sup> In fact, mistaken eyewitness testimony was a factor in more than a third of wrongful conviction cases.<sup>9</sup> Yet, courts have been slow in allowing defendants to present expert evidence on the fallibility of eyewitnesses; many courts still don't allow it.<sup>10</sup> Few, if any, courts instruct juries on the pitfalls of eyewitness identification or caution them to be skeptical of eyewitness testimony.

**2. Fingerprint evidence is foolproof.** Not so. Identifying prints that are taken by police using fingerprinting equipment and proper technique may be a relatively simple process,<sup>11</sup> but latent prints left in the field are often smudged and incomplete, and the identification process becomes more art than science. When tested by rigorous scientific methods, fingerprint examiners turn out to have a significant error rate.<sup>12</sup> Perhaps the best-known example of such an error occurred in 2004 when the FBI announced that a latent print found on a plastic bag near a Madrid terrorist bombing was “a 100 percent match” to Oregon attorney Brandon Mayfield.<sup>13</sup> The FBI eventually conceded error when Spanish investigators linked the print to someone else.

**3. Other types of forensic evidence are scientifically proven and therefore infallible.** With the exception of DNA evidence (which has its own issues), what goes for fingerprints goes double and triple for other types of forensic evidence:

Spectrographic voice identification error rates are as high as 63%, depending on the type of voice sample tested. Handwriting error rates average around 40% and

8. See Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1063-64 (2001).

9. See The National Registry of Exonerations, *% Exonerations by Contributing Factor* (last visited Apr. 7, 2015), <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (mistaken eyewitness identifications were a contributing factor in 34 percent of all exonerations recorded in the database).

10. The Seventh and Eleventh Circuits have “consistently looked unfavorably upon such testimony,” *United States v. Smith*, 122 F.3d 1355, 1357 (11th Cir. 1997), with the Eleventh Circuit going as far as to hold that eyewitness expert testimony is per se inadmissible. See *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992); *United States v. Hall*, 165 F.3d 1095, 1104 (7th Cir. 1999) (noting a presumption against admission of eyewitness expert testimony). The Second Circuit takes a similarly skeptical approach, holding that eyewitness expert testimony likely usurps the jury’s role of determining witness credibility. See *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999). The Third and Sixth Circuits, by contrast, have welcomed the admission of eyewitness expert testimony. See *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984); *United States v. Stevens*, 935 F.2d 1380, 1397-98 (3d Cir. 1991); see also *United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) (“[w]hile jurors may well be confident that they can draw the appropriate inferences about eyewitness identification directly from their life experiences, their confidence may be misplaced, especially where cross-racial identification is concerned”). And don’t even get me started on the state courts—they’re all over the place.

11. Then, again, maybe not. When the FBI Special Agent came around to take fingerprints for my background check, he brought a fingerprint kit and 10 cards, all of which he insisted on filling—about 120 prints in all. “Why so many?” I asked. “Because sometimes they don’t come out so clear so we like to make backups.” He carefully rolled his ten dozen prints and left . . . then came back a week later with 10 more cards: None of the first set were any good. True story.

12. “[F]orensic fingerprint identification almost never deals in whole fingerprints. Rather, technicians use ‘latent’ fingerprints—invisible impressions that they ‘develop’ using a powder or a chemical developing agent. Latent prints are usually fragmentary, blurred, overlapping, and otherwise distorted. The challenge is to match the latent print to a pristine inked (or, these days, optically scanned) print taken under ideal conditions at the police station.” Simon Cole, *The Myth of Fingerprints: A Forensic Science Stands Trial*, 10 LINGUA FRANCA, no. 8, 2000; see Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 994-1029 (2005); Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892, 895 (2005); Andy Newman, *Fingerprinting’s Reliability Draws Growing Court Challenges*, N.Y. TIMES (Apr. 7, 2001), <http://www.nytimes.com/2001/04/07/us/fingerprinting-s-reliability-draws-growing-court-challenges.html>. In *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 564 (E.D. Pa. 2002), for example, Judge Louis Pollack rejected fingerprint identification expert testimony after concluding that the field of fingerprint identification has failed to systematically test its underlying assumptions and claims of expertise.

13. Saks & Koehler, *supra* n.12, at 894.

sometimes approach 100%. False-positive error rates for bite marks run as high as 64%. Those for microscopic hair comparisons are about 12% (using results of mitochondrial DNA testing as the criterion).<sup>14</sup>

Other fields of forensic expertise, long accepted by the courts as largely infallible, such as bloodstain pattern identification, foot and tire print identification and ballistics have been the subject of considerable doubt.<sup>15</sup> Judge Nancy Gertner, for example, has expressed skepticism about admitting expert testimony on handwriting,<sup>16</sup> canines,<sup>17</sup> ballistics<sup>18</sup> and arson.<sup>19</sup> She has lamented that while “the *Daubert-Kumho* standard [for admitting expert witness testimony] does not require the illusory perfection of a television show (*CSI*, this wasn’t), when liberty hangs in the balance—and, in the case of the defendants facing the death penalty, life itself—the standards should be higher . . . than [those that] have been imposed across the country.”<sup>20</sup>

Some fields of forensic expertise are built on nothing but guesswork and false common sense.<sup>21</sup> Many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors.<sup>22</sup> Cameron Todd Willingham may have lost his life over it.<sup>23</sup>

14. *Id.* at 895 (internal citations omitted); see *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995) (McKenna, J.) (“the testimony at the *Daubert* hearing firmly established that forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after *Daubert*, be regarded as scientific . . . knowledge”) (internal quotation marks omitted); see also Radley Balko, *How the Flawed “Science” of Bite Mark Analysis Has Sent Innocent People to Prison*, WASH. POST (Feb. 13, 2015), <http://www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail/> (4-part series criticizing the failure of courts to accept the consensus in the scientific community that “bite mark matching isn’t reliable and has no scientific foundation for its underlying premises, and that until and unless further testing indicates otherwise, it shouldn’t be used in the courtroom”).

15. See TERRY LABER ET AL., NATIONAL INSTITUTE OF JUSTICE, FINAL REPORT, RELIABILITY ASSESSMENT OF CURRENT METHODS IN BLOODSTAIN PATTERN ANALYSIS (2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/247180.pdf>; Yaron Shor & Sarena Weisner, *A Survey on the Conclusions Drawn on the Same Footwear Marks Obtained in Actual Cases by Several Experts Throughout the World*, 44 J. FORENSIC SCI. 380, 383 (1999); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, NATIONAL RESEARCH COUNCIL 154-55 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (noting the unknown, and yet to be sufficiently tested, reliability of ballistics analysis).

16. *Hines*, 55 F. Supp. 2d at 69-71 (ruling that a handwriting expert may not give an ultimate conclusion on the author of a robbery note, and remarking that “[t]here is no academic field known as handwriting analysis,” as “[t]his is a ‘field’ that has little efficacy outside of a courtroom”).

17. *United States v. Hebshie*, 754 F. Supp. 2d 89, 119 (D. Mass. 2010) (“There are no peer reviewed standardized methods of training detective dogs; their reliability is in fact highly variable”) (citing Michael E. Kurz et al., *Effect of Background Interference on Accelerant by Canines*, 41 J. FORENSIC SCI. 868 (1996)).

18. *United States v. Green*, 405 F. Supp. 2d 104, 107-08 (D. Mass. 2005) (finding “serious deficiencies” in the ballistics expert’s proffered testimony, including the expert’s failure to “cite any reliable report describing his error rates, that of his laboratory, or indeed, that of the field”).

19. *Hebshie*, 754 F. Supp. at 114-15 (summarizing recent “public and professional literature reflect[ing] increasing scrutiny of arson evidence by experts in both the scientific and legal fields as well as by the public at large,” and expressing concerns about arson expert testimony rooted in “bad science” and “unreliable methodologies”).

20. *Green*, 405 F. Supp. 2d at 109.

21. “[S]ubjective, pattern-based forensic techniques—like hair and bite-mark comparisons” leave much room for error. See Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST (Apr. 18, 2015), [http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](http://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html); Roger Kopp, *CSI for Real: How to Improve Forensic Science*, REASON FOUND., Dec. 2007, at 3-18 (detailing inadequacies in the practice of forensic science).

22. See Paul Bieber, *Anatomy of a Wrongful Arson Conviction*, THE ARSON PROJECT, [http://the arsonproject.org/charm/wp-content/uploads/2014/08/wrongful\\_convictions.pdf](http://the arsonproject.org/charm/wp-content/uploads/2014/08/wrongful_convictions.pdf) (since 1989, 29 exonerations have involved arson convictions).

23. See Robert Tanner, *Science Casts Doubt on Arson Convictions*, WASH. POST (Dec. 9, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/09/AR2006120900357.html>; David Grann,

**4. DNA evidence is infallible.** This is true to a point. DNA comparison, when properly conducted by an honest, trained professional will invariably reach the correct result. But the integrity of the result depends on a variety of factors that are, unfortunately, not nearly so foolproof: the evidence must be gathered and preserved so as to avoid contamination; the testing itself must be conducted so that the two samples being compared do not contaminate each other; the examiner must be competent and honest.<sup>24</sup> As numerous scandals involving DNA testing labs have shown,<sup>25</sup> these conditions cannot be taken for granted, and DNA evidence is only as good as the weakest link in the chain.

**5. Human memories are reliable.** Much of what we do in the courtroom relies on human memory. When a witness is asked to testify about past events, the accuracy of his account depends not only on his initial perception, but on the way the memories are recorded, stored and retrieved. For a very long time, it was believed that stored memories were much like video tape or film—an accurate copy of real-world experience that might fade with the passage of time or other factors, but could not be distorted or embellished.

Science now tells us that this view of human memory is fundamentally flawed. The mind not only distorts and embellishes memories, but a variety of external factors can affect how memories are retrieved and described. In an early study by cognitive psychologist Elizabeth Loftus, people were shown videos of car accidents and then questioned about what they saw.<sup>26</sup> The group asked how fast the cars were going when they “smashed” into each other estimated 6.5 mph faster than the group asked how fast the cars were going when they “hit” each other.<sup>27</sup> A week later, almost a third of those who were asked about the “smash” recalled seeing broken glass, even though there was none.<sup>28</sup>

*Trial by Fire*, NEW YORKER (Sept. 7, 2009), <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>.

24. The DNA scandals continue to this day. See Jaxon Van Derbeken, *DNA Lab Irregularities May Endanger Hundreds of SFPD Cases*, SF GATE (Mar. 28, 2015), <http://www.sfgate.com/crime/article/DNA-lab-irregularities-may-endanger-hundreds-of-6165643.php> (noting that the San Francisco Police Department is facing accusations that its DNA crime lab technicians have been “fill[ing] in the gaps of poor-quality, incomplete genetic evidence” and passing them off as “definitive test results to the state’s offender tracking database, something that would not have been allowed with the original, lower-quality DNA evidence”); see also Kimberly C. Boies, *Misuse of DNA Evidence is Not Always a “Harmless Error”*: *DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 414-16 (2011); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 172-95 (2007).

25. See Stuart Taylor Jr., *Opening Argument—Innocents in Prison*, NAT’L J. (Aug. 4, 2007), <http://www.nationaljournal.com/magazine/opening-argument-innocents-in-prison-20070804>; Mark Hansen, *Crime Labs Under the Microscope After a String of Shoddy, Suspect and Fraudulent Results*, ABA J. (Sep. 1, 2013), [http://www.abajournal.com/magazine/article/crime\\_labs\\_under\\_the\\_microscope\\_after\\_a\\_string\\_of\\_shoddy\\_suspect\\_and\\_fraud/](http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraud/); Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES (Aug. 5, 2004), <http://www.nytimes.com/2004/08/05/us/new-doubt-cast-on-testing-in-houston-police-crime-lab.html>; Belinda Luscombe, *When The Evidence Lies*, TIME MAG. (May 13, 2001), <http://content.time.com/time/magazine/article/0,9171,109625,00.html>.

26. See Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585-89 (1974), available at <https://webfiles.uci.edu/eloftus/LoftusPalmer74.pdf>.

27. *Id.* at 586, Table 1.

28. *Id.* at 587, Table 2. Professor Loftus has shown it is even possible to manufacture false memories. See, e.g., Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720-25 (1995), [https://webfiles.uci.edu/eloftus/Loftus\\_Pickrell\\_PA\\_95.pdf](https://webfiles.uci.edu/eloftus/Loftus_Pickrell_PA_95.pdf). For example, she gave students each a packet describing three real childhood memories and a false one, and told the students that all four memories were real and took place with a close family member. In follow-up interviews asking the students to describe their memories, 7 of 24 students remembered the false event in their packet and some added their own details to that false memory. *Id.* at 722. Loftus was also able to convince participants in another experiment that they’d experienced traumatic events that never hap-



This finding has troubling implications for criminal trials where witnesses are questioned long and hard by police and prosecutors before the defense gets to do so—if ever. There is thus plenty of opportunity to shape and augment a witness’s memory to bring it into line with the prosecutor’s theory of what happened. Yet with rare exceptions, courts do not permit expert testimony on human memory.<sup>29</sup> For example, the district judge in the Scooter Libby case denied a defense motion for a memory expert, even though the key issue at trial was whose recollection of a 4-year-old telephone conversation should be believed.<sup>30</sup> At least one member of the jury that convicted Libby lamented the lack of expert testimony on the subject.<sup>31</sup> And a key witness in that case recently suggested in her memoirs that her memory may have been distorted by the prosecutor’s crafty questioning.<sup>32</sup>

Given the malleability of human memory, it should come as no surprise that many wrongful convictions have been the result of faulty witness memories, often manipulated by the police or the prosecution.<sup>33</sup>

**6. Confessions are infallible because innocent people never confess.** We now know that this is not true. Innocent people do confess with surprising regularity. Harsh interrogation tactics, a variant of Stockholm syndrome, the desire to end the ordeal, emotional and financial exhaustion, family considerations and the youth or feeble-mindedness of the suspect can result in remarkably detailed confessions that are later shown to be utterly false.<sup>34</sup>

pened, such as witnessing drug busts and breaking windows with their hands. See Elizabeth F. Loftus, *Illusions of Memory*, 142 PROCEEDINGS OF THE AM. PHIL. SOC., 60-73 (1998). Judge Mark Bennett provides a comprehensive overview of the existing cognitive psychological research on memory. See Mark W. Bennett, *Unspringing The Witness Memory and Demeanor Trap: What Every Judge And Juror Needs to Know About Cognitive Psychology And Witness Credibility*, AM. U. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2581650](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581650).

29. See, e.g., United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (“Specialized testimony explaining memory . . . is improper. The average person is able to understand that people forget; thus, a faulty memory is a matter for cross-examination.”). Testimony on memory has been admitted in limited circumstances, such as in cases involving mistaken eyewitness identifications, see *supra* n.10, and repressed memory caused by stress or trauma, see *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1064, 1066 (E.D. Mich. 1995) (admitting expert testimony on “repressed memory, its validity and reliability, and whether or not [the plaintiff] has, in fact, experienced repressed memory and/or post-traumatic stress disorder”).

30. United States v. Libby, 461 F. Supp. 2d 3, 16 (D.D.C. 2006).

31. See Peter Berkowitz, *The False Evidence Against Scooter Libby*, WALL ST. J. (Apr. 6, 2015), <http://www.wsj.com/articles/the-false-evidence-against-scooter-libby-1428365673>.

32. See JUDITH MILLER, *THE STORY: A REPORTER’S JOURNEY* (2015); see *infra* n.113.

33. See *infra* nn.51-52 and accompanying text (discussing how a 12-year-old boy accused the wrong man of a murder after the police fed the boy details of the crime); The National Registry of Exonerations, *George Franklin*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3221> (George Franklin was convicted on the basis of his daughter’s testimony—20 years after the crime took place—that she had seen him commit the murder. He was released after it was revealed that the daughter had recalled the memory through hypnosis.); Jim Dwyer, *Witness Accounts in Midtown Hammer Attack Show the Power of False Memory*, N.Y. TIMES (May 14, 2015), [http://www.nytimes.com/2015/05/15/nyregion/witness-accounts-in-midtown-hammer-attack-show-the-power-of-false-memory.html?\\_r=0](http://www.nytimes.com/2015/05/15/nyregion/witness-accounts-in-midtown-hammer-attack-show-the-power-of-false-memory.html?_r=0).

34. One such instance took place in Lake County, Illinois, where local police interrogated Juan Rivera Jr. for 4 straight days until he suffered a psychological breakdown and confessed to sexually assaulting and killing a young girl. Rivera spent 20 years in prison until DNA evidence exonerated him in 2012. See Dan Hinkel, *Wrongful Convictions: Exonerated Inmate Wins Early Round In Suit Against Lake County Officials*, CHI. TRIB. (Oct. 14, 2013), [http://articles.chicagotribune.com/2013-10-14/news/ct-met-juan-rivera-lawsuit-win-20131013\\_1\\_wrongful-convictions-dna-evidence-dna-exonerations](http://articles.chicagotribune.com/2013-10-14/news/ct-met-juan-rivera-lawsuit-win-20131013_1_wrongful-convictions-dna-evidence-dna-exonerations); see also Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052-57 (2010); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> (citing criminologists’ estimation that between 2 and 8 percent of convicted felons are innocent people who pleaded guilty, and noting that “young, unintelligent, or risk-averse defendants will often provide false confessions just because they cannot ‘take the heat’ of an interrogation”); Adam Cohen, *Why Innocent Men Make False Confessions*, TIME MAG.

**7. Juries follow instructions.** This is a presumption—actually more of a guess—that we’ve elevated to a rule of law.<sup>35</sup> It is, of course, necessary that we do so because it links the jury’s fact-finding process to the law. In fact, however, we know very little about what juries actually do when they decide cases.<sup>36</sup> Do they consider the instructions at all? Do they consider all of the instructions or focus on only some? Do they understand the instructions or are they confused? We don’t really know. We get occasional glimpses into the operations of juries when they send out questions or someone discloses juror misconduct, and even then the information we get is limited. But we have no convincing reason to believe that jury instructions in fact constrain jury behavior in all or even most cases.<sup>37</sup> And, because the information we get from inside the jury room is so limited and sporadic, experience does little to improve our knowledge. Looking at 100 black boxes is no more informative than looking at one.

**8. Prosecutors play fair.** The Supreme Court has told us in no uncertain terms that a prosecutor’s duty is to do justice, not merely to obtain a conviction.<sup>38</sup> It has also laid down some specific rules about how prosecutors, and the people who work for them, must behave—principal among them that the prosecution turn over to the defense exculpatory evidence in the possession of the prosecution and the police.<sup>39</sup> There is reason to doubt that prosecutors comply with these obligations fully. The U.S. Justice Department, for example, takes the position that exculpatory evidence must be produced only if it is material.<sup>40</sup> This puts prosecutors in the position of deciding whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the *Brady/Giglio* line of cases and increases the risk that highly exculpatory evidence will be suppressed. Beyond that, we have what I have described elsewhere as an “epidemic of *Brady* violations abroad in the land,”<sup>41</sup> a phrase that has caused much controversy but brought about little change in the way prosecutors

(Feb. 11, 2013), <http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions/>; Shankar Vedantam, *Confessions Not Always Clad in Iron*, WASH. POST (Oct. 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001326.html>.

35. See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions.”); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

36. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407 (2013).

37. See *id.*; *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be unmitigated fiction.”).

38. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

39. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment”); *United States v. Giglio*, 405 U.S. 150, 154 (1972) (the *Brady* rule includes evidence that could be used to impeach a witness); see also *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (extending the state’s obligation under *Brady* to evidence in the possession of the police).

40. See, e.g., United States Attorneys’ Manual, Chapter 9-5.000, ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS, <http://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings>.

41. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc); see *People v. Velasco-Palacios*, F068833, 2015 WL 782632 (Cal. Ct. App. Feb. 24, 2015) (noting that a prosecutor inserted a false confession into the transcript of the defendant’s police interrogation); Denis Slattery, *Exclusive: Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 4, 2014), <http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238> (noting that a Bronx prosecutor failed to present evidence that would have freed a man held at Rikers Island on bogus rape charges).

operate in the United States.<sup>42</sup>

**9. The prosecution is at a substantial disadvantage because it must prove its case beyond a reasonable doubt.** Juries are routinely instructed that the defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt, but we don't really know whether either of these instructions has an effect on the average juror. Do jurors understand the concept of a presumption? If so, do they understand how a presumption is supposed to operate? Do they assume that the presumption remains in place until it is overcome by persuasive evidence or do they believe it disappears as soon as any actual evidence is presented? We don't really know.

Nor do we know whether juries really draw a distinction between proof by a preponderance, proof by clear and convincing evidence and proof beyond a reasonable doubt. These levels of proof, which lawyers and judges assume to be hermetically sealed categories, may mean nothing at all in the jury room. My own experience as a juror certainly did nothing to convince me that my fellow jurors understood and appreciated the difference. The issue, rather, seemed to be quite simply: Am I convinced that the defendant is guilty?

Even more troubling are doubts raised by psychological research showing that "whoever makes the first assertion about something has a large advantage over everyone who denies it later."<sup>43</sup> The tendency is more pronounced for older people than for younger ones, and increases the longer the time-lapse between assertion and denial. So is it better to stand mute rather than deny an accusation? Apparently not, because "when accusations or assertions are met with silence, they are more likely to feel true."<sup>44</sup>

To the extent this psychological research is applicable to trials, it tends to refute the notion that the prosecution pulls the heavy oar in criminal cases. We believe that it does because we assume juries go about deciding cases by accurately remembering all the testimony and weighing each piece of evidence in a linear fashion, selecting which to believe based on assessment of its credibility or plausibility. The reality may be quite different. It may be that jurors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses. Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it.<sup>45</sup> And the effect may be worse the longer the prosecution's case lasts and, thus, the longer it takes to bring the contrary evidence before the jury. Trials in general, and longer trials

42. See CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT, WHITE PAPER (Dec. 2013), available at <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutor-Misconduct.pdf>.

43. Shankar Vedantam, *Persistence of Myths Could Alter Public Policy Approach*, WASH. POST (Sept. 4, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090300933.html> (discussing the results of a 2007 study by psychologist Norbert Schwarz); see Norbert Schwarz et al., *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 127, 152 (2007) ("[o]nce a statement is accepted as true, people are likely to attribute it to a credible source—which, ironically, may often be the source that attempted to discredit it—lending the statement additional credibility when conveyed to others") (citation omitted).

44. Vedantam, *supra* n.43 (quoting the statement of Peter Kim, an organizational psychologist who published a study in the *Journal of Applied Psychology*); see Donald L. Ferrin et al., *Silence Speaks Volumes: The Effectiveness of Reticence in Comparison to Apology and Denial for Responding to Integrity- and Competence-Based Trust Violations*, 92(4) J. APPLIED PSYCHOL. 893-908 (2007).

45. See Norbert Schwarz et al., *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 127, 152 (2007); Eliot G. Disner, *Some Thoughts About Opening Statements: Another Opening, Another Show*, PRAC. LITIGATOR, Jan. 2004, at 61 ("there is substantial evidence that juries normally make up their minds long before closing argument").

in particular, may be heavily loaded in favor of whichever party gets to present its case first—the prosecution in a criminal case and the plaintiff in a civil case. If this is so, it substantially undermines the notion that we seldom convict an innocent man because guilt must be proven to a sufficient certainty. It may well be that, contrary to instructions, and contrary to their own best intentions, jurors are persuaded of whatever version of events is first presented to them and change their minds only if they are given very strong reasons to the contrary.

**10. Police are objective in their investigations.** In many ways, this is the bedrock assumption of our criminal justice process. Police investigators have vast discretion about what leads to pursue, which witnesses to interview, what forensic tests to conduct and countless other aspects of the investigation. Police also have a unique opportunity to manufacture or destroy evidence,<sup>46</sup> influence witnesses, extract confessions<sup>47</sup> and otherwise direct the investigation so as to stack the deck against people they believe should be convicted.<sup>48</sup> And not just small-town police in Podunk or Timbuktu. Just the other day, “[t]he Justice Department and FBI [] formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all [of the 268] trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.”<sup>49</sup> Do they offer a class at Quantico called “Fudging Your Results To Get A Conviction” or “Lying On The Stand 101”? How can you trust the professionalism and objectivity of police anywhere after an admission like that?

There are countless documented cases where innocent people have spent decades behind bars because the police manipulated or concealed evidence, but two examples will suffice:

46. One example is the case of Mark Prentice, who pleaded guilty to assault and robbery only after a New York State Police trooper, David Harding, reported that he had found fingerprints matching Prentice in the victim’s house. A subsequent investigation revealed that New York State Police troopers, including Harding, had falsified fingerprint evidence in at least 30 cases, and Harding admitted to planting evidence in Prentice’s case. Prentice was acquitted after spending six years in prison. Harding was then sentenced to 4.5 years in prison for fabricating evidence. See The National Registry of Exonerations, *Mark Prentice*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4540>. In addition to the cases recorded by the National Registry of Exonerations, researchers became aware of more than 1,100 cases in which convictions were overturned due to just 13 police corruption scandals, the majority of which involved planting drugs or guns on innocent individuals. See Chris Seward, *Researchers: More than 2,000 False Convictions in Past 23 Years*, NBC NEWS (May 21, 2012), [http://usnews.nbcnews.com/\\_news/2012/05/21/11756575-researchers-more-than-2000-false-convictions-in-past-23-years?lite](http://usnews.nbcnews.com/_news/2012/05/21/11756575-researchers-more-than-2000-false-convictions-in-past-23-years?lite); Sean Gardiner, *Brooklyn District Attorney Kenneth Thompson Takes on Wrongful Convictions*, WALL ST. J. (Aug. 8, 2014), <http://www.wsj.com/articles/brooklyn-district-attorney-kenneth-thompson-takes-on-wrongful-convictions-1407547937> (Brooklyn DA Kenneth Thompson’s conviction integrity unit has ordered the review of more than 100 prior convictions, 70 of which involved accusations that former Brooklyn Detective Louis Scarcella coerced confessions and tampered with witness statements).

47. See *supra* n.34 (discussing Rivera’s coerced confession at the hands of the Lake County police); Spencer Ackerman, “*I Sat In That Place for Three Days, Man*”: *Chicagoans Detail Abusive Confinement Inside Police “Black Site”*, THE GUARDIAN (Feb. 27, 2015), <http://www.theguardian.com/us-news/2015/feb/27/chicago-abusive-confinement-homan-square> (four African-Americans describe being detained for several days inside a police warehouse, where they were “shackled and interrogated,” denied access to counsel and forbidden from notifying anyone of their whereabouts); see also Miriam S. Gohara, *A Lie For a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 794-95 (2006); Laure Magid, *Deceptive Police Interrogation Techniques: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1168 (2001).

48. 92 percent of arrest warrants obtained by the Ferguson, Missouri Police Department were issued against African Americans, who as a group were 68 percent less likely than others to have their charges dismissed. See UNITED STATES DEPARTMENT OF JUSTICE-CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, (Mar. 4, 2015), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

49. See Hsu, *supra* n.21.



In 2013, Debra Milke was released after 23 years on Arizona's death row based entirely on a supposed oral confession she had made to one Detective Saldade who was much later shown to be a serial liar.<sup>50</sup> And then there is the case of Ricky Jackson, who spent 39 years behind bars based entirely on the eyewitness identification of a 12-year-old boy who saw the crime from a distance and failed to pick Jackson out of a lineup.<sup>51</sup> At that point, "the officers began to feed him information: the number of assailants, the weapon used, the make and model of the getaway car."<sup>52</sup> 39 years!

For some victims of police misconduct, exoneration comes too late: Mark Collin Sodersten died in prison while maintaining his innocence.<sup>53</sup> After his death, a California appellate court determined that Sodersten had been denied a fair trial because police had failed to turn over exculpatory witness tapes.<sup>54</sup> It posthumously set aside the conviction, which no doubt reduced Sodersten's time in purgatory.

**11. Guilty pleas are conclusive proof of guilt.** Many people, including judges, take comfort in knowing that an overwhelming number of criminal cases are resolved by guilty plea rather than trial.<sup>55</sup> Whatever imperfections there may be in the trial and criminal charging process, they believe, are washed away by the fact that the defendant ultimately consents to a conviction. But this fails to take into account the trend of bringing multiple counts for a single incident—thereby vastly increasing the risk of a life-shattering sentence in case of conviction<sup>56</sup>—as well as the creativity of prosecutors in hatching up criminal cases where no crime exists<sup>57</sup> and the overcriminalization of virtually every aspect of American life.<sup>58</sup> It also ignores that

50. Michael Keifer, *Debra Milke Murder Charges Dismissed*, AZ CENT. (Dec. 11, 2014), <http://www.azcentral.com/story/news/local/phoenix/2014/12/11/%20milke-double-jeopardy-appeals/20253845/>.

51. Radley Balko, *This Week in Innocence: Ricky Jackson to be Released Tomorrow After 39 Years in Prison*, WASH. POST (Nov. 20, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/11/20/this-week-in-innocence-ricky-jackson-to-be-released-tomorrow-after-39-years-in-prison/>. Jackson was exonerated thanks to the dedicated efforts of the Ohio Innocence Project. See Ohio Innocence Project, University of Cincinnati College of Law, <http://www.law.uc.edu/oip>.

52. *Exonerated Man Who Spent 39 Years in Prison Meets Accuser*, CBS NEWS VIDEO (Jan. 5, 2015), <http://www.cbsnews.com/videos/exonerated-man-who-spent-39-years-in-prison-meets-accuser/>.

53. Laura Ernde, *Accused Murderer Cleared Seven Months After Prison Death*, DAILY J. (Jan. 18, 2007).

54. *In re Sodersten*, 53 Cal. Rptr. 3d 572 (Ct. App. 2007).

55. Judge Morris Hoffman, for example, cites to the fact that "almost all criminal defendants plead guilty" as support for the proposition that "the actual rate of wrongful convictions in the United States is vanishingly small." See Morris B. Hoffman, *The "Innocence" Myth*, WALL ST. J., Apr. 26, 2007, at A19. But see Rakoff, *supra* n.34 (strongly objecting to the tendency to equate guilty pleas with actual guilt, noting that the current "prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed"). As to the meaning of a 1 percent error rate, see *infra* pp. xiv-xv.

56. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 72-74 (2011).

57. See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (reversing Arthur Andersen's conviction of obstruction of justice under 18 U.S.C. §§ 1512(b)(2)(A) and (B), where the jury instructions, consistent with the government's reading of the vaguely-worded statute, had all but erased a culpability requirement); *United States v. Newman*, 773 F.3d 438, 442, 448 (2d Cir. 2014) (pointing out "the doctrinal novelty of [the government's] recent insider trading prosecutions" and reversing with prejudice two hedge fund managers' convictions for securities fraud because the government "presented no evidence that [the managers] knew that they were trading on information obtained from insiders in violation of those insiders' fiduciary duties"); *United States v. Goyal*, 629 F.3d 912, 921 (2010) (reversing a chief financial officer's convictions of 15 counts of securities fraud and making false statements where "the government's case suffered from a total failure of proof") (internal quotation marks omitted); *id.* at 922 (Kozinski, C.J., concurring) ("[*Goyal*] is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds. This is not the way criminal law is supposed to work.") (citations omitted).

58. Justice Scalia criticized the overcriminalization of federal law in his dissent from denial of certiorari in *Sorich v. United States*, 555 U.S. 1204 (2009), a case in which the Seventh Circuit affirmed

many defendants cannot, as a practical matter, tell their side of the story at trial because they fear being impeached with prior convictions or other misconduct.<sup>59</sup> And, of course, if the trial process is perceived as highly uncertain, or even stacked in favor of the prosecution, the incentive to plead guilty to some charge that will allow the defendant to salvage a portion of his life, becomes immense.<sup>60</sup> If the prosecution offers a take-it-or-leave-it plea bargain before disclosing exculpatory evidence, the defendant may cave to the pressure, throwing away a good chance of an acquittal.

**12. Long sentences deter crime.** In the United States, we have over 2.2 million people behind bars.<sup>61</sup> Our rate of approximately 716 prisoners per 100,000 people is the highest in the world, over 5 times higher than that of other industrialized nations like Canada, England, Germany and Australia.<sup>62</sup> Sentences for individual crimes are also far longer than in other developed countries. For example, an individual convicted of burglary in the United States serves an average of 16 months in prison, compared with 5 months in Canada and 7 months in England.<sup>63</sup> And the average prison sentence for assault in the United States is 60 months, compared to under 20 months in England, Australia and Finland.<sup>64</sup>

Incarceration is an immensely expensive enterprise. It is expensive for the taxpayers, as the average cost of housing a single prisoner for one year is approximately \$30,000.<sup>65</sup> A 20-year sentence runs into something like \$600,000 in prison costs alone. Long sentences are also immensely hard on prisoners and cruel to their

Chicago city employees' convictions under the honest services mail fraud statute. The statute criminalizes the use of the mail or wire services to carry out a "scheme . . . to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. In urging the Court to construe the statute more narrowly, Justice Scalia pointed out that the mail fraud statute "has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries"—for example, the convictions of "a local housing official who failed to disclose a conflict of interest," "students who schemed with their professors to turn in plagiarized work" and "lawyers who made side-payments to insurance adjusters in exchange for the expedited processing of their clients' pending claims." *Sorich*, 555 U.S. at 1204 (Scalia, J., dissenting from denial of certiorari) (internal quotation marks omitted); see Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2009) (illustrating the shady practices prosecutors have used in order to convict individuals under vaguely worded federal statutes for conduct no rational person would view as criminal); Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43-56 (Timothy Lynch ed., Cato Institute 2009); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. Sidebar 102 (2013); George F. Will, *When Everything Is a Crime*, Wash. Post (Apr. 8, 2015), [http://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5\\_story.html](http://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5_story.html).

59. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 863 (1995).

60. See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 *CORNELL L. REV.* 157 (2014); Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 *LOY. U. CHI. L.J.* 327 (2014); see also *infra* n.73.

61. Roy Walmsley, *World Prison Populations List* (10th ed., Oct. 2013), INTERNATIONAL CENTRE FOR PRISON STUDIES 3, [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf) (estimating there are 2,239,751 individuals, including pre-trial detainees, in American penal institutions).

62. *Id.* (Canada's rate is 118 per 100,000; England's is 148 per 100,000; Germany's is 79 per 100,000; and Australia's is 130 per 100,000).

63. See Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, *N.Y. TIMES* (Apr. 23, 2008), [http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0).

64. FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS, *JUST. POL'Y INST.* 2 (Apr. 2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>.

65. See NATHAN JAMES, THE BUREAU OF PRISONS (BOP): OPERATIONS AND BUDGET, *CONG. RES. SERV.* 14 (Mar. 4, 2014), available at <http://fas.org/sgp/crs/misc/R42486.pdf>; Christian Henrichson & Ruth Delaney, *What Incarceration Costs Taxpayers*, *VERA INST. OF JUST. CENTER ON SENT'G AND CORRECTIONS* (Feb. 19, 2012), <http://www.vera.org/pubs/special/price-prisons-what-incarceration-costs-taxpayers> ("total per-inmate cost averaged \$31,286" in 2011).

families, as it's usually very difficult for a prisoner to re-integrate into his family and community after very long prison sentences.<sup>66</sup>

We are committed to a system of harsh sentencing because we believe that long sentences deter crime and, in any event, incapacitate criminals from victimizing the general population while they are in prison. And, indeed, the United States is enjoying an all-time low in violent crime rates, which would seem to support this intuition.<sup>67</sup> But crime rates have been dropping steadily since the 1990s, and not merely in the United States but throughout the industrialized world.<sup>68</sup> Our intuition about harsh sentences deterring crime may thus be misguided.<sup>69</sup> We may be spending scarce taxpayer dollars maintaining the largest prison population in the industrialized world, shattering countless lives and families, for no good reason. As with much else in the law, the connection between punishment and deterrence remains mysterious.<sup>70</sup> We make our decisions based on faith.

## II

What I have listed above are some of the reasons to doubt that our criminal justice system is fundamentally just.<sup>71</sup> This is not meant to be an exhaustive list, nor is it clear that all of these uncertainties would, on closer examination, be resolved against the current system. But there are enough doubts on a broad range of subjects touching intimately on the integrity of the system that we should be concerned. The National Registry of Exonerations has recorded 1576 exonerations in the United States since 1989.<sup>72</sup> The year 2014 alone saw a record high of 125 exonerations, up from 91 the

66. See generally Jalila Jefferson-Bullock, *The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73 (2014).

67. See *Uniform Crime Reports: Crime in the United States 2013*, FBI, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain\\_final](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final) (explaining that an estimated 1.16 million violent crimes occurred in the U.S., which is 12.3 percent below the 2009 level and 14.5 percent below the 2004 level).

68. See *Where Have All the Burglars Gone?*, THE ECONOMIST (July 20, 2013), <http://www.economist.com/news/briefing/21582041-rich-world-seeing-less-and-less-crime-even-face-high-unemployment-and-economic>; see also Nimai M. Chettiar, *The Many Causes of America's Decline in Crime*, THE ATLANTIC (Feb. 11, 2015), <http://www.theatlantic.com/features/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/>.

69. Nor does putting more people behind bars necessarily lead to less crime. A recent report by the Brennan Center reveals that “incarceration has been decreasing[ly effective] as a crime fighting tactic since at least 1980,” as increased incarceration has had “no observable effect” on the nationwide decline in violent crimes in the 1990s and 2000s. See DR. OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE?, BRENNAN CENTER FOR JUST., 22-23 (Feb. 12, 2015), available at <https://www.brennancenter.org/publication/what-caused-crime-decline>. A recent study points to “prosecutors—more than cops, judges, or legislators—as the principal drivers of the increase in the prison population,” explaining that “[t]he real change is in the chances that a felony arrest by the police turns into a felony case brought by prosecutors.” See Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About The Mass Incarceration of African-Americans?*, THE NEW YORKER (May 11, 2015), <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.

70. Compare VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VERSUS SEVERITY OF PUNISHMENT, THE SENT’G PROJECT 6-8 (2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf> (compiling several studies that conclude that longer sentences don’t lead to lower recidivism rates, and can even lead to higher rates), with FRANCESCO DRAGO ET AL., THE DETERRENT EFFECTS OF PRISON: EVIDENCE FROM A NATURAL EXPERIMENT, THE INST. FOR THE STUDY OF LAB. 2 (Jul. 2007), available at <http://ftp.iza.org/dp2912.pdf> (finding that in some cases, a longer sentence can reduce recidivism by 1.24 percent). According to Judge Rakoff, this uncertainty should not stop the judiciary from speaking out against the “evil” of mass incarceration. Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/archives/2015/may/21/mass-incarceration-silence-judges>.

71. There are similar reasons to doubt that our civil justice system is fundamentally just, but that’s a topic for another day.

72. The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/>

year before, and there is reason to believe the trend will continue.<sup>73</sup> Certainly the significant number of inmates freed in recent years as the result of various innocence projects and especially as a result of DNA testing in cases where the convictions were obtained in the pre-DNA era, should cause us to question whether the current system is performing as effectively as we've been led to believe. It's no answer to say that the exonerees make up only a minuscule portion of those convicted. For every exonerated convict, there may be dozens who are innocent but cannot prove it.

We can be reasonably confident that the system reaches the correct result in most cases, but that is not the test. Rather, we must start by asking how confident we are that every one of the 2.2 million people in prisons and jails across the country are in fact guilty. And if we can't be sure, then what is an acceptable error rate? How many innocent lives and families are we willing to sacrifice in order to have a workable criminal justice system? If we put the acceptable error rate at 5 percent, this would mean something like 110,000 innocent people incarcerated across the country. A 1 percent error rate would mean 22,000 innocent people—more or less the population of Nogales, Arizona—wrongly imprisoned. These numbers may seem tolerable unless, of course, you, your friend or loved one draws the short straw.

Do we know how these numbers compare to the actual error rate? We have no idea. What we have is faith that our system works very well and the errors, when they are revealed, are rare exceptions.<sup>74</sup> Much hinges on retaining this belief: our self image as Americans; the pride of countless judges and lawyers; the idea that we live in a just society; confidence in the power of reason and logic; the certainty that none of us or our loved ones will face the unimaginable nightmare of unjust imprisonment

detaillist.aspx (last visited Apr. 7, 2015). Of these exonerated individuals, 112 were sentenced to death, and 265 spent more than 20 years behind bars. The average time spent in prison was 9 years, with 40 percent imprisoned for more than 10 years. 80 percent were convicted by juries, 7 percent by judges and 12 percent pleaded guilty. 25 percent were exonerated at least in part by DNA evidence. The following factors contributed to their exonerations: mistaken witness identification (34% of exonerations); perjury or false accusation (55%); false confession (13%), defective or misleading forensic evidence (22%) and official misconduct (46%). Cases often involve more than one of these factors. See The National Registry of Exonerations, *% Exonerations by Contributing Factor* (last visited Apr. 7, 2015), <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

73. 47 of the 125 exonerations in 2014 involved defendants who had pleaded guilty. See University of Michigan, *The National Registry of Exonerations, Exonerations in 2014*, 3 (Jan. 27, 2015), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2014\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf). The exonerations were mostly concentrated in California, Texas, New York and Illinois. According to an in-depth study by SAN FRANCISCO magazine, between 1989 and 2004, more than 200 California inmates were freed after courts found they were wrongfully convicted. See Nina Martin, *Innocence Lost*, S.F. (Nov. 2004), <http://deathpenalty.org/downloads/SFMag.pdf>.

Their stories are the stuff of nightmares. Take, for example, Gloria Killian, a 30-something former law student who had signed up to do freelance detective work for a coin shop owner. One day, an elderly coin collector was robbed and killed, and someone called the Sacramento police accusing “a law student named Gloria” of being involved. Nothing came of this accusation until a year later, when a repeat felon named Gary Masse was convicted of the murder and sentenced to life without parole. He named Killian as his accomplice and claimed she masterminded the robbery. The accusation stuck, and Killian was convicted of conspiracy and murder, and sentenced to 32 years to life. Masse got his sentence reduced to 25 years. Over a decade later, a new investigation uncovered evidence that Masse had entered into an agreement with prosecutors to testify against Killian in exchange for leniency—a fact never disclosed to the defense. The investigation also turned up a letter Masse sent to the DA soon after Killian was sentenced, in which he wrote, “I lied my ass off for you people.” A panel of our court reversed Killian’s conviction in 2002, at which point she had already lost 16 years of her life to prison. See *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002). The prosecutor walked away with an admonishment from the California State Bar. See Martin, *supra*, at 10-11.

74. Judge Hoffman cautions against the assumption that “our criminal justice system [is] so dismal that a rightful conviction seems the exception and not the rule,” urging that we “look not only at the number of wrongfully convicted defendants, but also at the number of rightly convicted ones.” See Hoffman, *supra* n.55.



or execution; belief in the incomparable integrity and accuracy of our system of justice; faith that we have transcended medieval methods of conviction and punishment so that only those who are guilty are punished, and their punishment is humane and proportionate. There are, we are convinced, no Edmond Dantèses and no Château d’Ifs in America today.

But what do we really know? We must reject out of hand the idea that the number of actual exonerations represents all of those who have been wrongly convicted. Convicted prisoners wishing to gain release on grounds of innocence face formidable hurdles.<sup>75</sup> To begin with, they are in prison and thus unable to pursue leads the police might have missed; they have to rely on someone on the outside to do it, and that’s often difficult or impossible to accomplish. A prisoner’s access even to his counsel is severely restricted once he’s incarcerated. A loyal friend or relative might do it, but friends and even relatives often abandon defendants who are convicted, no matter how much they may protest their innocence. A few prisoners may obtain the help of an innocence project, but the work is labor-intensive, resources are scarce and manpower is limited, so innocence projects engage in triage, focusing on the most promising cases.<sup>76</sup> Of course, it’s often difficult to tell whether a case is promising until you look closely at it, so a promising case can easily be overlooked.

But the biggest problem is that new evidence is hard—and often impossible—to find. If it’s a physical crime, police secure the crime scene and seize anything that looks like it could be relevant. The chance of going back years later and picking up new clues is vanishingly small. The trick then is to get whatever evidence the police have, assuming they didn’t destroy it or release it once it was clear that it wouldn’t be used at trial. If the crime is non-physical, such as fraud, child pornography or computer hacking, the police seize all the relevant computers, hard drives and paper records (including any exculpatory evidence the suspect may have there) and may well discard them after the conviction becomes final. For a brief period, DNA evidence helped exculpate defendants who were convicted in the pre-DNA era,<sup>77</sup> but DNA often cannot help identify the true perpetrator because no sample of DNA was found or collected from the crime scene.<sup>78</sup> A prisoner has to be exceedingly lucky to

75. See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1670-84 (2008).

76. See Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 367-77 (2011) (the average innocence project receives about 600 requests per year, but only has the bandwidth to effectively investigate around 100 cases per year).

77. Often over the dogged opposition of prosecutors who have no wish to have a victory snatched away. Take, for example, Ken Anderson, the Texas district attorney who succeeded in putting Michael Morton in prison for murder. See *infra* nn.80-82 and accompanying text. Morton was released after twenty-five years based on DNA test results linking the crime to another man, as well as exculpatory evidence that Anderson had withheld during trial. For six years, Anderson’s successor, John Bradley, fought Morton’s repeated requests for DNA testing, explaining that “[o]nce a prosecutor has a case in which he or someone else has achieved a conviction where a body of people have been convinced beyond reasonable doubt someone is guilty and then sentenced them, the presumption becomes that that is a justified verdict that the prosecutor must defend.” See Brandi Grissom, *A Tough Prosecutor Finds His Certitude Shaken by a Prisoner’s Exoneration*, THE TEX. TRIB. (NOV. 18, 2011), <http://www.texastribune.org/library/multimedia/john-bradley-texas-prosecutor-asserts-change-of-heart/>.

The prosecutors in Anthony Ray Hinton’s case took the same approach as Bradley: “Despite pleas by Mr. Hinton’s lawyers, who cited conclusions by newly enlisted specialists, the state refused for years to reconsider the evidence” that eventually led to his release after 30 years on death row. See Alan Blinder, *Alabama Man Freed After Decades On Death Row*, N.Y. TIMES (APR. 3, 2015), [http://www.nytimes.com/2015/04/04/us/anthony-ray-hinton-alabama-prison-freed-murder.html?mwrsm=Email&\\_r=1](http://www.nytimes.com/2015/04/04/us/anthony-ray-hinton-alabama-prison-freed-murder.html?mwrsm=Email&_r=1); see *infra* n.167.

78. See Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 73 (2003) (“[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted of crimes on virtually identical evidence,” yet “[f]or these thousands of defendants . . . there was no physical evidence that could have been subjected to scientific scrutiny.”).

collect enough evidence to prove his innocence; most cannot hope to meet that standard. I think it's fair to assume—though there is no way of knowing—that the number of exculpations in recent years understates the actual number of innocent prisoners by an order, and probably two orders, of magnitude.<sup>79</sup>

Wrongful convictions are not merely unjust to the prisoner and his family, they often result in another injustice or series of injustices: When an innocent man is convicted, a guilty man is left free and emboldened to victimize others. The Michael Morton case provides a good example.<sup>80</sup> Morton was convicted in 1987 for the 1986 beating murder of his wife. Twenty-five years later he was exonerated when DNA evidence pointed to another man, Mark Norwood, who was eventually convicted of killing Mrs. Morton. However, Norwood has now been charged with the similar beating-death of another woman, Debra Baker; that murder was committed a year after Morton was convicted of his wife's murder.<sup>81</sup> Norwood is awaiting trial for the Baker murder.<sup>82</sup> Had police continued to investigate the Morton murder instead of shutting down the investigation once they decided that Michael Morton was the culprit, Debra Baker might still be alive.

There's another question the answer to which we must be reasonably confident: Of those that *are* guilty, can we be sure that substantial numbers are not spending far more time behind bars than is justified? The question of how much time prisoners spend behind bars is no less important than that of whether only the guilty are being locked up. The ability to pick up the threads of one's life after three to five years in prison is quite different than after fifteen, twenty or twenty-five years. Aside from the brutalizing and often dehumanizing effect of long-term imprisonment,<sup>83</sup> an inmate who is released after a lengthy prison term simply does not return to the same world he left behind: Children grow up; spouses find other partners; friends and acquaintances forget; job prospects disappear; life and work skills deteriorate.<sup>84</sup> Shorter sentences also reduce the consequences of wrongful convictions. While no time behind bars can be justified for someone who is innocent,<sup>85</sup> we must be especially careful before imposing life-altering sentences.

By any measure, the United States leads the world in incarceration. In absolute terms, it has more prisoners than any other country. With just 5 percent of the world's

79. See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7230 (2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4034186/> (acknowledging that "the great majority of innocent defendants remain undetected," and conservatively estimating that at least 4.1 percent of those on death row are innocent).

80. See *supra* n.77; Innocence Project, *Michael Morton*, <http://www.innocenceproject.org/cases-false-imprisonment/michael-morton>.

81. Morton was convicted and sentenced to life in prison in February 1987, and Baker was murdered in January 1988. See Brandi Grissom, *Mark Norwood Indicted in Second Austin Murder*, THE TEX. TRIB. (Nov. 9, 2012), <http://www.texastribune.org/2012/11/09/mark-norwood-faces-grand-jury-second-austin-murder/>.

82. See Claire Osborn & Jazmine Ulloa, *Mark Norwood, Sentenced to Life for Morton Murder, Pleads Not Guilty in Second Case*, STATESMAN (Jan. 9, 2014), <http://www.statesman.com/news/news/local/mark-norwood-sentenced-to-life-for-morton-murder-p/nchx2/>; Jazmine Ulloa, *Judge Delays Trial in the 1988 Killing of Debra Baker*, STATESMAN (Jan. 12, 2015), <http://www.statesman.com/news/news/crime-law/judge-delays-trial-in-the-1988-killing-of-debra-ba/njmTY/>.

83. See Jefferson-Bullock, *supra* n.66, at 100-05.

84. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED 46-48 (Jeremy Travis & Michelle Waul eds., The Urb. Inst. Press 2003).

85. Jails, which primarily house the legally innocent, treat their inmates no better than prisons do, and have their own share of horror stories. See Ryan Cooper, *How Your Local Jail Became Hell: An Investigation*, THE WEEK (Mar. 31, 2015), <http://theweek.com/articles/540725/how-local-jail-became-hell-investigation>.

population, we have almost a quarter of the world's prisoners.<sup>86</sup> China, with nearly 20 percent of the world's population, has 16 percent of the world's prisoners.<sup>87</sup> Incarceration rates were not always this high in the United States. For the first three-quarters of the twentieth century, the rate was well under 250 per 100,000.<sup>88</sup> Then, starting around 1980, incarceration rates started rising sharply with the advent of the war on drugs, mandatory minimum sentences and three-strikes laws.<sup>89</sup>

The difference in incarceration rates cannot be explained by higher crime rates in the United States. Crime rates here are roughly equivalent to Canada and in many categories lower than other countries.<sup>90</sup> And the crime rate has been dropping in the United States, as in many other industrialized nations.<sup>91</sup> Yet, U.S. sentences are vastly, shockingly longer than just about anywhere else in the world.<sup>92</sup>

There are reasons to doubt whether the length of prison sentences in this country is just. Although elected officials, regardless of party affiliation and political leaning, seem to favor Draconian sentences, and the public seems to support them in the abstract, it's unclear how much popular support they enjoy when applied to individual defendants. U.S. District Judge James Gwin of Ohio reported on an informal study he conducted involving 22 jury trials.<sup>93</sup> He asked the jurors who had convicted the defendant to write down what each thought was the appropriate sentence. Judge Gwin found that the jurors' recommended sentences were significantly lower than those recommended by the Sentencing Guidelines: "In several cases, the recommended median Guidelines range was more than 10 times greater than the median jurors' recommendation. Averaged over more than 20 cases, jurors recommended sentences that were 37% of the minimum Guidelines recommended sentences and 22% of the median Guidelines recommended sentences."<sup>94</sup>

Whether we are incarcerating the right people and for an appropriate length of time are important questions to which we do not have very good answers. We are taught early in our schooling that the criminal justice system is tilted heavily in favor of defendants, resolving all doubts in their favor. Movies and television reinforce this idea with countless stories of dedicated police and prosecutors bringing guilty people to justice,<sup>95</sup> or of acquittals of the innocent because of the efforts of a dedicated lawyer or investigator.<sup>96</sup> Our educational system spends little time pondering the fate

86. Liptak, *supra* n.63.

87. Walmsley, *supra* n.61.

88. See JUSTICE POLICY INSTITUTE, THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 4 (2000), available at [http://www.justicepolicy.org/images/upload/00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf) (charting incarceration rates from 1900 onwards).

89. *Id.* Some states, like Maine and Minnesota, have stayed at the pre-1980s levels. Others, like Texas and Louisiana, have around 1000 inmates per 100,000 of population—which means that one out of every 100 people in those states are prisoners. See Liptak, *supra* n.63. Are people in Texas and Louisiana really three times worse than those in Maine and Minnesota?

90. See Jan van Dijk, John van Kesteren & Paul Smit, CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE 43 (2007), [http://www.unicri.it/services/library\\_documentation/publications/icvs/publications/ICVS2004\\_05report.pdf](http://www.unicri.it/services/library_documentation/publications/icvs/publications/ICVS2004_05report.pdf) (ranking the top 15 countries by victimization rates, with Canada and the United States coming in 12th and 13th, respectively).

91. *The Curious Case of the Fall in Crime*, ECONOMIST (July 20, 2013), <http://www.economist.com/news/leaders/21582004-crime-plunging-rich-world-keep-it-down-governments-should-focus-prevention-not>.

92. FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS, *supra* n.64.

93. James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010).

94. *Id.* at 187-88.

95. See, e.g., JFK (Warner Bros. 1991); *Law & Order: Special Victims Unit* (NBCUniversal Television Distribution 1999-2015).

96. See, e.g., CONVICTION (Fox Searchlight Pictures 2010); JUST CAUSE (Warner Bros. 1995); MY COUSIN VINNY (Twentieth Century Fox 1992); TO KILL A MOCKINGBIRD (Universal Pictures 1962).

of those unjustly convicted or those wasting their lives behind bars because of a punishment that far outstrips whatever evil they were convicted of committing. No Dumas, Hugo or Zola has risen among us to foment public sympathy to the plight of the unjustly imprisoned.

### III

Lawyers and judges are inculcated with the notion that the system works well and there is nothing to worry about. And perhaps it's true. But there are far too many uncertainties for us to be complacent. Criminal trials as we know them were developed centuries ago at a time when life and technology were very different. The process has remained essentially unchanged since time out of mind. While we have much experience with the process, we know very little about how well it works. We tell ourselves that the system works, and we really believe it, but this is largely based on faith. When all is said and done, we have only a guess.

Below I offer some suggestions on how the system might be improved and validated. I do not suggest how these changes are to be implemented: Some may require legislation; others a change in judicial practices; still others constitutional amendments. Nor do I insist that all my suggestions be implemented immediately. Some may deserve closer attention, and some should be delayed while others are accelerated. There may well be good reasons that my suggestions are unworkable, and perhaps others will come up with better ones. If my proposals raise controversy and opposition, leading to a spirited debate, I will have achieved my purpose.<sup>97</sup>

#### A. *Juries*

Juries matter. They obviously matter in the relatively few cases that are actually tried to them, but they also matter in the multitude of cases that are pled or settled. To the extent the jury is viewed as an unpredictable, erratic force, it increases the uncertainty of the outcome and thus considerably raises the stakes for the parties, especially criminal defendants. If a prosecutor can make a credible case that a jury might return a verdict calling for life without parole, he is very likely to extract a plea deal involving a "mere" 15- or 20-year sentence.

Most judges, especially trial judges, express satisfaction with the operation of the jury system. I've heard judges say that they seldom or never think juries reach the wrong outcome. I am skeptical of such claims. To begin with, judges don't know any better than anyone else what is the correct verdict in a case. The most they can say is that they would have reached the same verdict as the jury.<sup>98</sup> But judges are not usually called upon to make findings when they are presiding over a jury trial; their function is to determine whether there is sufficient evidence to support a guilty verdict, a process which presupposes that the prosecution's witnesses are believed by the trier of fact. This is a very different and much less rigorous process than figuring out who's lying and who's telling the truth, and I doubt that judges routinely go through *that* process in parallel with the jury. I certainly don't.

Actual observation of behavior in the jury room is rare, but it does exist. As cameras have become smaller and less obtrusive over the last quarter century, we've

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<sup>97</sup> "When critics disagree, the artist is in accord with himself." Oscar Wilde, *THE PICTURE OF DORIAN GRAY*, Preface (1891).

<sup>98</sup> In fact, judges are far more likely to acquit than juries. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 151 (2005) ("Statistically, federal judges are significantly more likely to acquit than a jury is—over a recent 14 year period, for example, the jury trial conviction rate was 84%, while the bench conviction rate was a mere 55%.").



had several instances where we have been able to observe jury-room behavior.<sup>99</sup> The results are not particularly reassuring.

There is at least one case of documented jury nullification, with every juror expressing the belief that the defendant was guilty yet acquitting him nevertheless.<sup>100</sup> In another case, jurors misconstrued the judge's denial of their request for a certain transcript to mean that they were not entitled to *any* transcripts from the trial.<sup>101</sup> And in a high profile murder trial, one juror experienced aggressive pushback for expressing skepticism of the defendant's guilt because the medical examiner had switched her diagnosis from accidental drug overdose to homicide only after listening to a tape recording where the defendant said "I got away with it."<sup>102</sup> The juror asked the judge (unsuccessfully) to excuse her from the jury because she was uncomfortable with being pressured, and eventually voted with the majority to convict the defendant while protesting that she was doing so in a "bullied manner." Worse still, in deliberations after the penalty phase of the trial, a different juror expressed a complete change of heart from the jury's guilty verdict the day before, emphatically maintaining that she never believed the defendant committed one of the two murders of which he was convicted. In short, "[e]ven with the camera rolling, jurors compromised on verdicts, allowed personality conflicts to interfere with the deliberations, and oversimplified the judge's instructions."<sup>103</sup>

Anecdotal accounts tend to support this view. I always debrief my jurors after they return a verdict (I've never had a hung jury) and try to get them to talk about what happened in the jury room. Some of the comments seem entirely rational, but much of what jurors describe looks like a fun-house mirror reflection of *Twelve Angry Men*. There was one case I remember where the jury acquitted despite what I thought was an iron-clad prosecution case. I was a bit shocked and entirely puzzled about what had happened. When I debriefed the jury, I got somewhat muted responses from most of the jurors but one gentleman, who turned out to be the foreman, had very strong views. He thought the government was wasting taxpayer money in prosecuting this defendant who had been caught red-handed with a suitcase full of some 10,000 Ecstasy pills just imported from Europe. The foreman was a large man and quite vociferous—almost belligerent—about it. Of course, during voir dire I had asked the usual questions about whether any of the panel members had philosophical objections to our drug laws, and he had answered in the negative. The reality was different; he had strong objections to the war on drugs and managed to pull the jury with him.

That one strong personality can dominate the jury room is consistent with my own experience. I've sat on two (state) juries. One of the cases was not close by any

<sup>99</sup>. TV cameras have entered the jury room on at least three occasions. First, in 1986, PBS aired a broadcast showing footage of deliberations in a Wisconsin criminal trial. *Inside the Jury Room* (PBS Frontline television broadcast 1986). Then, in 1997, CBS aired a 2-hour documentary consisting of footage of jury deliberations in four Arizona trials. *Enter the Jury Room* (CBS Reports television broadcast 1997). Most recently, in 2004, ABC aired a 7-part TV series following six homicide cases from the pretrial stage to the jury deliberations and final verdict. *In the Jury Room* (ABC television broadcast 2004).

<sup>100</sup>. The jurors in the Wisconsin trial all acknowledged early in the deliberations that they believed the defendant was guilty, but concluded that the only way they could achieve a just result was to ignore the law. See *Inside the Jury Room* (PBS Frontline television broadcast 1986); Margaret E. Guthrie, *Film Takes an Inside Look at Deliberations of Jurors*, NAT'L L.J. (Apr. 14, 1986).

<sup>101</sup>. See *Enter the Jury Room* (CBS Reports television broadcast 1997); David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36 JUDGES' J. 23, 31, 53 (1997).

<sup>102</sup>. *In the Jury Room* (ABC television broadcast 2004) (following the deliberations in *State of Ohio v. Mark Ducic*). The foreman, for example, accused the juror of "fighting logic."

<sup>103</sup>. Diane E. Courselle, *Struggling With Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 229 (2005) (discussing the jury deliberations in the ABC *In the Jury Room* series).

measure, but the other one hinged on the testimony of a single witness, as there was no physical evidence whatsoever. The police had not even managed to recover a large bag of coins that the accusing witness claimed he had handed over to the defendant during a store holdup, even though the defendant was apprehended within 20 minutes of the robbery, just a couple of blocks away. Having been elected foreman, I spoke after every one of my fellow jurors had expressed the view that the defendant was guilty. I reminded my colleagues of the prosecution's heavy burden of proof and questioned whether the complaining witness's identification could be trusted given the missing coins. If the defendant was, in fact, the perpetrator, he couldn't have spent a bag of assorted coins in the time it took to apprehend him, and he couldn't easily have hidden it when he saw the police approaching. And wouldn't he have gotten much farther from the scene of the crime if he were carrying a bag of stolen coins? One by one, all but one of the other jurors switched their votes to acquit. The one exception proved impossible to budge so we eventually asked the judge to declare a mistrial, which he did.

The simple truth is that our confidence in juries rests largely on faith, and our processes are not designed to help us improve the functioning of the jury because there is no systematic feedback mechanism to help us figure out what works and what doesn't. I've recently suggested that we introduce cameras into the jury room,<sup>104</sup> and I will not rehash the arguments I've advanced in support. Suffice to say that viewing what juries do in actual cases will give us a much better understanding of jury behavior and provide valuable information for different techniques in presenting evidence, instructing juries and jury management. Seeing what juries do in actual cases can also ameliorate or eliminate the endless speculation about which trial errors are harmless and which are prejudicial. Why shoot in the dark when a man's liberty or life is at stake? The same is true where there is a claim of improper juror conduct. In such circumstances, the trial judge will hear conflicting accounts about what happened in the jury room. Wouldn't it be better to see and hear what actually transpired?

Videos of jury deliberations could be sealed and preserved for viewing by researchers only after the case is final. Or they could be made available to the trial judge and a reviewing court as needed to resolve questions involving the jury's conduct. Or they could be made available to the lawyers immediately after the verdict. Disclosure could be implemented incrementally over time and rolled back if the process is found to interfere with the jury's function. But we need to get a close look as to what's going on in the jury room before we can even begin the process of meaningful reform.

In the meantime—or in addition—I offer the following suggestions for reform:

**1. Give jurors a written copy of the jury instructions.** Jury instructions are often lengthy and difficult to follow. Jurors are expected to absorb them by listening, which is probably the worst way to learn new and complex subject matter.<sup>105</sup> Many judges try to ameliorate this problem by sending a copy of the instructions into the jury room when the panel retires to deliberate, but some judges refuse to do so. It should be reversible error for a judge to fail to send a full set of jury instructions with the jury when it retires to deliberate. Pre-instructing the jury on key concepts and giving them those instructions in writing is also a good idea.

**2. Allow jurors to take notes during trial and provide them with a full trial**

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<sup>104</sup>. See Alex Kozinski & John Major, *Why Putting Cameras in the Jury Room Is Not as Crazy as You Think*, DUKE JUDICATURE (forthcoming 2015).

<sup>105</sup>. See Michael A. Cohen et al., *Auditory Recognition Memory Is Inferior to Visual Recognition Memory*, 106 PROC. NAT'L ACAD. SCIS. 6008, 6008 (Apr. 7, 2009).

**transcript.** Most judges now allow note-taking and provide writing materials for the jury to use, but a minority refuse to do so. This should be reversible error. Consulting notes during deliberations is immensely useful when the jurors' memories differ as to what a witness has said. Forcing jurors to rely on their recollections alone exacerbates the distorting memory effects discussed above. In fact, I would go a step farther and give jurors transcripts of the proceedings to consult during deliberations. This was not possible when transcripts had to be transcribed laboriously by hand. But real-time transcripts are now pretty much standard and available for the judge and lawyers to consult while the trial is going on. I can see no justification for keeping jurors in the dark.

**3. Allow jurors to discuss the case while the trial is ongoing.** Most jury trials now start with a stern admonition that jurors not discuss the case until they are sent out to deliberate. It's unclear why we do this except that we've always done it that way.<sup>106</sup> When I served as a juror, this restriction seemed unnatural and counter-productive. My guess is that it exacerbates the distorting effects of memory. Allowing jurors to discuss what they've heard could give them a chance to express doubts and to remind each other of the need to keep an open mind.

**4. Allow jurors to ask questions during the trial.** I've been doing this for some years in civil cases and it seems to work well. I ask jurors to put any questions in writing and hand them up to me. I then share these questions with the lawyers and let one or both use them during their examinations. Other techniques are possible, including having jurors pose questions to the witnesses directly and letting the lawyers follow up in light of the answers.

**5. Tell jurors up-front what's at stake in the case.** In most jurisdictions, jurors in non-capital cases are not told what the likely punishment will be if the defendant is convicted. In fact, we tell jurors not to consider punishment in deciding guilt. I don't understand why this is appropriate. In making most life decisions, we consider the consequences in determining how much effort to put into deciding and the degree of confidence we must feel before we go forward. Whether to get married or have a risky operation obviously requires a greater psychological commitment than choosing between Starbucks and Peets. Jurors should be told the gravity of the decision they are making so they can take it into account in deciding whether to convict or acquit. As representatives of the community where the defendant committed his crime, the jury should be allowed to make the judgment of whether the punishment is too severe to permit a conviction. Having to confront the jury with the severity of the punishment they are seeking to extract may well deter prosecutors from using overcharging as a bargaining tool.

**6. Give jurors a say in sentencing.** Except for capital cases, we have turned our sentencing process over entirely to experts and professionals. We have mandatory minimums, sentencing guidelines, probation officers and judges at all levels involved in the decision, but we studiously ignore the views of the very people who heard the evidence and are given the responsibility to determine guilt or innocence while reflecting the values of the community in which the offense occurred. This is a system only a lawyer could love. Jurors should be instructed on the range of punishments authorized by law and, if they find the defendant guilty, entrusted to weigh in on the appropriate sentence within that range. And I would make that the absolute upper limit of what punishment the judges actually impose, overriding any sentencing guidelines, mandatory minimums or their own considered judgment.

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<sup>106</sup>. See David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92, 94-95, 121-24 (2002) (chronicling the history of the prohibition against pre-deliberation discussion and concluding that the rule doesn't make sense and should be abolished).

## B. Prosecutors

Prosecutors hold tremendous power, more than anyone other than jurors, and often much more than jurors because most cases don't go to trial. Prosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory, and while they are required to provide exculpatory evidence to the defense under *Brady*, *Giglio*, and *Kyles v. Whitley*, it is very difficult for the defense to find out whether the prosecution is complying with this obligation.

Prosecutors also have tremendous control over witnesses: They can offer incentives—often highly compelling incentives—for suspects to testify. This includes providing sweetheart plea deals to alleged co-conspirators and engineering jail-house encounters between the defendant and known informants. Sometimes they feed snitches non-public information about the crime so that the statements they attribute to the defendant will sound authentic.<sup>107</sup> And, of course, prosecutors can pile on charges so as to make it exceedingly risky for a defendant to go to trial. There are countless ways in which prosecutors can prejudice the fact-finding process and undermine a defendant's right to a fair trial.<sup>108</sup>

This, of course, is not their job. Rather, as the Supreme Court has held, “[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”<sup>109</sup> All prosecutors purport to operate just this way and I believe that most do. My direct experience is largely with federal prosecutors and, with a few exceptions, I have found them to be fair-minded, forthright and highly conscientious.<sup>110</sup> But there are disturbing indications that a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct that seriously undermines the fairness of criminal trials. The misconduct ranges from misleading the jury,<sup>111</sup> to outright lying in court<sup>112</sup> and tacitly

**107.** Recently, California Superior Court Judge Thomas Goethals removed the Orange County DA's office from a high profile murder case after the prosecutors had shown a “chronic failure” to comply with orders to turn over evidence with respect to how defendant Scott Dekraai was assigned a cell next to a prolific jailhouse informant as part of a larger scheme to extract false confessions. *People v. Dekraai*, Supplemental Ruling 12ZF0128 (Cal. Sup. Ct. Mar. 12, 2015), <http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf>; see Paloma Esquivel, *D.A. Ran Illegal Snitch Operation in O.C. Jail, Attorneys Say*, L.A. TIMES (Feb. 27, 2014), <http://articles.latimes.com/2014/feb/27/local/la-me-ln-jailhouse-informant-operation-20140227>.

Indeed, last year, it was revealed that “two of the most prolific jailhouse informants in Orange and Los Angeles counties, Raymond Cuevas and Jose Paredes[, had] befriended suspects in jail and collected information in more than 30 criminal cases” in exchange for over \$150,000 from local law enforcement authorities. See Tony Saavedra, *Money, Cable TV, Food Delivery: How Mexican Mafia Snitches Lived Like Kings Behind Bars*, O.C. REG. (Nov. 23, 2014), <http://www.ocregister.com/articles/cuevas-643108-paredes-informants.html>; see also REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 28, available at <http://perma.cc/S2MB-LTEV> (“Copies of arrest reports, case files, and photographs of victims are shown to informants.”); Tracey Kaplan, *Santa Clara County: Ex-Jailer Says Planting Informants Was Routine*, SANTA CRUZ SENTINEL (Mar. 1, 2015), <http://www.santacruzsentinel.com/general-news/20150301/santa-clara-county-ex-jailer-says-planting-informants-was-routine>.

**108.** See, e.g., Peder B. Hong, *Summation at the Border: Serious Misconduct in Final Argument in Criminal Trials*, 20 HAMLINE L. REV. 43, 45-55 (1996) (outlining 19 forms of serious misconduct).

**109.** *Berger v. United States*, 295 U.S. 78, 88 (1935).

**110.** I was less impressed with the prosecutor in one of the two cases where I participated as a juror. I thought he engaged in unfair tactics that I would not have allowed, had I been the judge.

**111.** See, e.g., *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir. 1993) (AUSA strongly implied that a participant in the crime had not entered into a cooperation agreement, knowing full well that he had).

**112.** See, e.g., Sidney Powell, *Federal Judge Blasts Yet Another Federal Prosecutor for Lying to the Court*, OBSERVER (Dec. 9, 2014), <http://observer.com/2014/12/federal-judge-blasts-yet-another-federal>



acquiescing or actively participating in the presentation of false evidence by police.<sup>113</sup>

Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it—and in most cases it will never be discovered.

There are distressingly many cases where such misconduct has been documented,<sup>114</sup> but I will mention just three to illustrate the point. The first is *United States v. Stevens*,<sup>115</sup> the prosecution of Ted Stevens, the longest serving Republican Senator in history. Senator Stevens was charged with corruption for accepting the services of a building contractor and paying him far below market price—essentially a bribe. The government’s case hinged on the testimony of the contractor, but the government failed to disclose the initial statement the contractor made to the FBI that he was probably overpaid for the services. The government also failed to disclose that the contractor was under investigation for unrelated crimes and thus had good reason to curry favor with the authorities.<sup>116</sup>

Stevens was convicted just a week before he stood for re-election and in the wake of the conviction, he was narrowly defeated, changing the balance of power in the Senate.<sup>117</sup> The government’s perfidy came to light when a brave FBI agent by the name of Chad Joy blew the whistle on the government’s knowing concealment of exculpatory evidence. Did the government react in horror at having been caught with

prosecutor-for-lying-to-the-court/ (AUSA in *United States v. Seggerman*, No. 10-cr-948 (S.D.N.Y.) was “lambasted” by Judge Kevin Duffy for being caught in “a flat out lie”—namely, by telling the court that press releases were not issued when they indeed had been).

**113.** See, e.g., *Gathers v. United States*, Nos. 09-CO-422, 11-CO-1676, 11-CO-1677, 12-CO-1411, 12-CO-1412, at 17-18 (D.C. Ct. App. Oct. 23, 2014), <http://www.dccourts.gov/internet/documents/09-CO-422.pdf> (granting a new trial because the government presented “plainly false evidence highly prejudicial to the outcome” and “knew or should have known of the falsity, however belatedly this falsity may have come to the forefront”).

**114.** See The Open File Blog, <http://www.prosecutorialaccountability.com/> (chronicling nationwide instances of prosecutorial misconduct); Registry Database, CENTER FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/registry/database/>. The former governor of Illinois just pardoned a prisoner who had served 22 years because the prosecution was tainted with numerous flaws, including prosecutorial misconduct. See Nicholas Schmidle, *Freedom for Tyrone Hood*, THE NEW YORKER (Jan. 13, 2015), <http://www.newyorker.com/news/news-desk/freedom-tyrone-hood>.

**115.** No. 08-cr-231 (EGS), 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

**116.** The whole sordid episode, as well as several others, are detailed in Sidney Powell’s powerful book, *Licensed to Lie*. See SIDNEY POWELL, LICENSED TO LIE 190-201 (2014).

**117.** This wasn’t the only prosecution that has had profound effects on American politics. “A revelation in journalist Judith Miller’s new memoir, ‘The Story: A Reporter’s Journey,’ exposes unscrupulous conduct by Special Counsel Patrick J. Fitzgerald in the 2007 trial of I. Lewis ‘Scooter’ Libby.” Berkowitz, *supra* n.31. According to Berkowitz, “It is painful to contemplate how many lives—American and Iraqi—might have been spared had Mr. Libby, the foremost champion within the White House in 2003 of stabilizing Iraq through counterinsurgency operations, not been sidelined and eventually forced to resign because of Mr. Fitzgerald’s multiyear investigation and relentless federal prosecution.” *Id.*

Overly aggressive prosecution also wrecked the political career of longtime Iowa state legislator Henry Rayhons. The Attorney General of Iowa charged 78-year-old Rayhons with rape for having sex with his own wife, who was afflicted with Alzheimer’s. By the time the jury acquitted Rayhons, he had withdrawn from the re-election race for a seat he had held for 18 years. See Eugene Volokh, *78-Year-Old Iowa Ex-Legislator Acquitted of Having Nonconsensual Sex with His Wife, Who was Suffering from Alzheimer’s*, WASH. POST (Apr. 23, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/23/78-year-old-iowa-ex-legislator-acquitted-of-having-nonconsensual-sex-with-his-wife-who-was-suffering-from-alzheimers>.

its hands in the cookie jar? Did Justice Department lawyers rend their garments and place ashes on their head to mourn this violation of their most fundamental duty of candor and fairness? No way, no how. Instead, the government argued strenuously that its ill-gotten conviction should stand because boys will be boys and the evidence wasn't material to the case anyway.<sup>118</sup>

It was only the extraordinary persistence and the courageous intervention of District Judge Emmet Sullivan, who made it clear that he was going to dismiss the *Stevens* case and then ordered an investigation of the government's misconduct<sup>119</sup> that forced the Justice Department to admit its malfeasance—what else could it do?—and move to vacate the former senator's conviction. Instead of contrition, what we have seen is Justice Department officials of the highest rank suffering torn glenoid labrums from furiously patting themselves on the back for having “done the right thing.”<sup>120</sup>

The second case comes from my own experience. The defendant was Debra Milke,

**118.** See POWELL, *supra* n.116, at 210 (Judge Emmet Sullivan observed: “Not only did the government seek to keep [Chad Joy’s] complaint a secret, but the government claimed that the allegations had nothing to do with the verdict and no relevancy to the defense; that the allegations could be addressed by the Office of Professional Responsibility’s investigation; and that any misconduct had already been addressed and remedied during the trial”). Lack of materiality is the Justice Department’s standard defense when it is caught committing a *Brady* violation. See *DOJ Defends FBI Deputy Director Andrew Weissmann Against Serious Ethics Charges Pending in NY*, SEEKING JUST. (Apr. 26, 2013), <http://seeking-justice.org/doj-defends-fbi-deputy-director-andrew-weissmann-against-serious-ethics-charges-pending-in-ny/> (the “entire . . . defense [was based on] the claim that the Rules of Professional Conduct require prosecutors to disclose to the defense team only information that is both favorable and material”) (emphasis and internal quotation marks omitted). Just as they did in *Stevens*, the prosecutors refused to acknowledge that they had a duty to turn over exculpatory evidence in *United States v. Brown*, C.R. No. H-03-363, 2010 WL 3359471 (S.D. Tex. Aug. 2010), *affirmed by* 650 F.3d 581 (5th Cir. 2011). In *Brown*, the government secured a paper-thin conviction against a Merrill Lynch executive for perjury and obstruction of justice for his grand jury testimony regarding the company’s involvement in a Nigerian barge transaction—all the while suppressing evidence showing that the executive had testified truthfully. See POWELL, *supra* n.116, at 376-77.

**119.** See Henry F. Schuelke III, Special Counsel, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court’s Order, dated Apr. 7, 2009, *In re* Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), *available at* [http://legaltimes.typepad.com/files/Stevens\\_report.pdf](http://legaltimes.typepad.com/files/Stevens_report.pdf).

**120.** It’s not clear that the Justice Department learned much from the *Stevens* debacle, as it refused to admit that the exculpatory evidence it suppressed in the *Stevens* case was material to two other prosecutions that stemmed from the same investigation and involved overlapping issues and witnesses. See *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2010); *United States v. Kott*, 423 Fed. App’x 736 (9th Cir. 2011); see also POWELL, *supra* n.116, at 231. Holding that the prosecution had yet again violated *Brady* by failing to disclose the very evidence deemed material in the *Stevens* case, a panel of my court vacated both defendants’ convictions and remanded for a new trial. Judge Betty Fletcher lambasted the prosecution’s “flagrant, willful bad-faith misbehavior” as “an affront to the integrity of our system of justice” and found “[t]he prosecution’s refusal to accept responsibility for its misconduct [] deeply troubling and indicat[ive] that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions.” *Kohring*, 637 F.3d at 914 (Fletcher, J., concurring in part and dissenting in part); see *Kott*, 423 Fed. App’x at 738 (Fletcher, J., concurring in part and dissenting in part) (“Despite their assurances that they take this matter seriously, the government attorneys have attempted to minimize the extent and seriousness of the prosecutorial misconduct and even assert that Kott received a fair trial . . . . The government’s stance on appeal leads me to conclude that it still has failed to fully grasp the egregiousness of its misconduct, as well as the importance of its constitutionally imposed discovery obligations.”).

A similar case was recently repeated from Cuyahoga County, Ohio. Cuyahoga Common Pleas Judge Nancy Russo ruled that three men who had spent almost 20 years in prison for a 1995 murder should be released pending a new trial, explaining: “A review of the evidence firmly supports the conclusion that [former Cuyahoga County prosecutor] Carmen Marino maliciously inserted himself into a criminal proceeding, and that he also sought to suppress evidence from the defendants, that he concealed public records from the citizenry, and that he subverted the process of justice, thereby violating each of the defendants’ individual rights to a fair trial.” See *OH: The Long Shadow of Misconduct in Cuyahoga County*, The Open File Blog (Apr. 17, 2015), <http://www.prosecutorialaccountability.com/oh-the-long-shadow-of-misconduct-in-cuyahoga-county/>. The current Cuyahoga County chief prosecutor responded that Marino had done nothing wrong. *Id.*

who spent 23 years on Arizona's death row after a conviction and sentence obtained in 1990 based on an oral confession she supposedly made to Phoenix police detective Armando Saldate Jr. as a result of a 20-minute interrogation.<sup>121</sup> No one was present in the room with Milke except Saldate, who refused to record the session, despite his supervisor's admonition that he do so.<sup>122</sup> When the session ended, Saldate came out with nothing in writing—not even a *Miranda* waiver—and claimed Milke had confessed; Milke immediately and steadfastly denied it. The jury believed Saldate, but what the prosecution failed to disclose is that Saldate had a long and documented history of lying in court; he also had a serious disciplinary infraction bearing on his credibility: He had sought to extort sex from a lone female motorist and then lied about it when she reported the incident.<sup>123</sup> It is not difficult to imagine that a jury may have been skeptical of Saldate's testimony that Milke confessed, had it known about his track record. But the Maricopa County District Attorney's office did not disclose this information, although it was party to many of the proceedings where Saldate had been found to be a liar.

The evidence remained hidden for two decades until an unusually dedicated team of lawyers and investigators<sup>124</sup> spent hundreds of hours digging through all of the criminal prosecutions in Maricopa County during the era when Saldate had been an investigator. It winnowed down those cases and focused on those where Saldate provided evidence.<sup>125</sup> And the state doggedly refused to turn over Saldate's disciplinary record until forced to disgorge it by an order of the district judge who considered Milke's federal habeas petition.

After we vacated the conviction and gave Arizona a chance to re-try Milke, the Arizona Court of Appeals barred any re-trial in an opinion so scathing it made the *New York Times*.<sup>126</sup> The Court of Appeals described the “long course of *Brady/Giglio* violations in this case” as a “flagrant denial of due process” and “a severe stain on the Arizona justice system”—one that it hoped would “remain unique in the history of Arizona law.”<sup>127</sup> The Arizona Supreme Court recently denied the state's petition for review,<sup>128</sup> so the Court of Appeals decision stands. Maricopa County Attorney Bill Montgomery lamented that “[t]he denial of [the] petition for review is a dark day for Arizona's criminal justice system.”<sup>129</sup>

121. See Michael Keifer, *supra* n.50.

122. See *Milke v. Ryan*, 711 F.3d 998, 1002 (9th Cir. 2013).

123. See *id.* at 1007.

124. This team included Milke's attorney Anders Rosenquist, investigator Kirk Fowler and a dozen Arizona State University law students. See Steve Krafft, *Debra Milke Case: Researchers Discovered Detective's History of Misconduct*, FOX 10 NEWS (Sept. 21, 2013), <http://www.fox10phoenix.com/story/23447616/2013/09/16/debra-milke-case-research-team-discovered-detectives-misconduct>.

125. This gargantuan effort is related in detail in our opinion. See *Milke*, 711 F.3d at 1018.

126. See *Arizona: No Retrial for Woman Freed from Death Row*, N.Y. TIMES (Dec. 11, 2014), [http://www.nytimes.com/2014/12/12/us/arizona-no-retrial-for-woman-freed-from-death-row.html?\\_r=1](http://www.nytimes.com/2014/12/12/us/arizona-no-retrial-for-woman-freed-from-death-row.html?_r=1).

127. *Milke v. Mroz*, 339 P.3d 659, 665-66, 668 (Ariz. App. Ct. 2014). See Jonathan Abel, *Buoying Brady's Burden*, DAILY J. (Mar. 19, 2015) (critiquing the prosecutorial misconduct in Milke's case as “a symptom of a much larger problem,” particularly with respect to prosecutors' reluctance to disclose *Brady* evidence concerning police misconduct).

128. *Milke v. Mroz*, CV-15-0016-PR (Mar. 17, 2015), available at <https://perma.cc/QJE7-3FTN?type=pdf>.

129. *News Release: County Attorney Comments on Arizona Supreme Court Ruling in State v. Milke* (Mar. 17, 2015), <http://www.maricopacountyattorney.org/newsroom/news-releases/2015/2015-03-17-County-Attorney-Comments-on-ASC-Ruling-in-State-v-Milke.html>. Montgomery also had unkind things to say about our opinion, but we can live with that; life tenure is a wonderful thing.

Less than a month later, Montgomery filed a motion to depublish the Court of Appeals' decision barring re-trial, which the Arizona Supreme Court denied. *Milke v. Mroz*, CV-15-0016-PR (Apr. 21, 2015), available at [http://www.azcourts.gov/Portals/21/MinutesCurrent/Mot\\_042115.pdf](http://www.azcourts.gov/Portals/21/MinutesCurrent/Mot_042115.pdf). Motions to depublish opinions that disclose prosecutorial misconduct, or at least to modify them to delete the name of the offending prosecutor, are common. See, e.g., *infra* n.193 (discussing the government's motion in *United*

The third case is unfolding as I write these words. It involves the prosecution in Orange County of Scott Dekraai, who was convicted of having shot several people at a hair salon and is facing a capital penalty-phase trial. The prosecution presented evidence from a jailhouse informant, Fernando Perez, whom Dekraai had purportedly confessed to. It turns out that Perez was a serial informant who had presented similar confessions.<sup>130</sup> Defense counsel challenged the informant, and Superior Court Judge Thomas Goethals ordered the prosecution to produce evidence bearing on this claim.<sup>131</sup> He eventually found that the Orange County District Attorney's office had engaged in a "chronic failure" to disclose exculpatory evidence pertaining to a scheme run in conjunction with jailers to place jailhouse snitches known to be liars near suspects they wished to incriminate, effectively manufacturing false confessions.<sup>132</sup> The judge then took the drastic step of disqualifying the Orange County District Attorney's office from further participation in the case.<sup>133</sup> But this result came only after public defender Scott Sanders "wasted two years uncovering government misconduct, time that he could have spent preparing Dekraai's defense against the death penalty."<sup>134</sup> Pulling an elephant's teeth is surely easier than extracting exculpatory evidence from an unwilling prosecution team.

These cases are hardly unique or isolated. But they illustrate that three ingredients must be present before we can be sure that the prosecution has met its *Brady* obligations under the law applicable in most jurisdictions. First, you must have a highly committed defense lawyer with significant resources at his disposal. Second, you must have a judge who cares and who has the gumption to hold the prosecutor's feet to the fire when a credible claim of misconduct has been presented. And, third, you need a great deal of luck, or the truth may never come out. The misconduct uncovered in the *Milke* and *Dekraai* cases seems to implicate many other cases where criminal defendants are spending decades in prison. We can only speculate how many others are wasting their lives behind bars because they lacked the right lawyer or the right judge or the luck needed to uncover prosecutorial misconduct.

While most prosecutors are fair and honest, a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same. Having strict rules that prosecutors must follow will thus not merely avoid the risk of letting a guilty man free to commit other crimes while an innocent one languishes his life away, it will also preserve the integrity of the prosecutorial process by shielding principled prosecutors from unfair competition from their less principled colleagues.

Here are some potential reforms that would help achieve these goals:

**1. Require open file discovery.** If the prosecution has evidence bearing on the crime with which a defendant is being charged, it must promptly turn it over to the

*States v. Kojayan*).

**130.** See Paloma Esquivel, *Seal Beach Shooting Case Casts Spotlight on Jailhouse Informants*, L.A. TIMES (Apr. 20, 2014), <http://www.latimes.com/local/la-me-oc-informant-20140421-story.html#page=1>.

**131.** This courage did not go unpunished. Since February 2014, around the time that Judge Goethals began looking into prosecutors' mishandling of informant-related evidence, the Orange County DA's office has asked to disqualify him from 57 other criminal cases. See Christopher Goffard, *O.C. Prosecutors Steering Cases Away from Judge Thomas Goethals*, L.A. TIMES (Mar. 13, 2015), <http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150314-story.html>.

**132.** *People v. Dekraai*, Supplemental Ruling 12ZF0128 (Cal. Sup. Ct. Mar. 12, 2015), available at <http://big.assets.huffingtonpost.com/SUPPLEMENTALRULINGDekraai03122015.pdf>.

**133.** See *supra* n.7; Christopher Goffard, *Orange County D.A. Is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015), <http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150313-story.html>. The California Attorney General's Office has since appealed Judge Goethals's ruling, and I, of course, express no view as to how the case should be decided.

**134.** Goffard, *supra* n.133.



defense. North Carolina adopted such a rule by statute after Alan Gell was convicted of murder and sentenced to death, even though the prosecution had statements of 17 witnesses who reported to have seen the victim alive after Gell was incarcerated—evidence that the prosecution failed to disclose until long after trial.<sup>135</sup> Three years after its passage, the law forced disclosure of evidence that eventually exonerated three Duke lacrosse players who were falsely accused of rape—and led to the defeat, disbarment and criminal contempt conviction of Durham District Attorney Mike Nifong.<sup>136</sup> Prosecutors were none too happy with the law and tried hard to roll it back in 2007 and again in 2012, but the result was an even stronger law that applies not only to prosecutors but to police and forensic experts, as well it should.<sup>137</sup>

A far weaker law was proposed by several U.S. Senators following the disgraceful prosecutorial conduct during the *Stevens* case. The law would require prosecutors to disclose all information “that may reasonably appear to be favorable to the defendant.”<sup>138</sup> Despite support from both Democrats and Republicans, the bill has made no progress toward passage because of steadfast opposition from the U.S. Department of Justice.<sup>139</sup> In his 2012 Preface to these pages,<sup>140</sup> Attorney General Eric Holder voiced a strong commitment to ensuring compliance with *Brady* and related discovery obligations, but all of the measures he mentions leave prosecutors in charge of deciding what evidence will be material to the defense—something they cannot possibly do, because they do not know all the potential avenues a defense lawyer may pursue, and because it’s not in their hearts to look for ways to help the other side. If the Department of Justice wants to show its commitment to justice, it should drop its opposition to the Fairness in Disclosure of Evidence Act and help get it passed into law.

**2. Adopt standardized, rigorous procedures for dealing with the government’s disclosure obligations.** For reasons already explained, enforcing the government’s obligations is critical to achieving a level playing field in criminal cases. But policing this conduct is exceedingly difficult for the simple reason that “*Brady* violations . . . almost always defy detection. The cops know it. The prosecutors know it. The defense and the defendant have no idea whether *Brady* material exists.”<sup>141</sup> Open file discovery would go a long way toward ameliorating the problem, but not far enough. The prosecutor’s file will generally contain what the police and investigators consider to be inculpatory evidence; a great deal might be left out that is unhelpful to the

<sup>135.</sup> See EVIDENCEPROFBLOG, *Open And Shut: North Carolina Strengthens Its Open Discovery Law* (June 3, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/06/back-in-2004-north-carolina-governor-mike-easley-signed-a-bill-into-law-that-required-prosecutors-to-share-their-files.html>.

<sup>136.</sup> See *Duke Lacrosse Prosecutor Disbarred*, CNN (June 17, 2007), <http://www.cnn.com/2007/LAW/06/16/duke.lacrosse/>; THE ASSOCIATED PRESS, *Day in Jail for Ex-Duke Prosecutor*, N.Y. Times (Sept. 1, 2007), [http://www.nytimes.com/2007/09/01/us/01nifong.html?\\_r=0&gwh=D729031CB5109A29647D63F43549BEA4&gwt=pay](http://www.nytimes.com/2007/09/01/us/01nifong.html?_r=0&gwh=D729031CB5109A29647D63F43549BEA4&gwt=pay).

<sup>137.</sup> See N.C. GEN. STAT. § 15A-903(a)(1) (2011), available at <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H408v2.pdf> (“Upon motion of the defendant, the court must order: The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”); EVIDENCEPROFBLOG, *supra* n.135.

<sup>138.</sup> Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012), available at <https://www.govtrack.us/congress/bills/112/s2197/text>.

<sup>139.</sup> See Video Recording: Ensuring that Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Judiciary Comm., 112th Cong. (2012) (on file with S. Judiciary Comm.) (statement of James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice opposing the bill: “[I]n reacting to the *Stevens* case, we must not let ourselves forget . . . true improvements to discovery practices will come from prosecutors and agents . . . [i]n other words, new rules are unnecessary.”).

<sup>140.</sup> Eric Holder Jr., Preface, *In the Digital Age, Ensuring that the Department Does Justice* iii, 41 GEO. L.J. ANN. REV. CRIM. PROC. (2012).

<sup>141.</sup> Scott H. Greenfield, *The Flood Gates Myth*, SIMPLE JUSTICE (Feb. 16, 2015), <http://blog.simplejustice.us/2015/02/16/the-flood-gates-myth/>.



prosecution. Yet the government's disclosure obligation extends to information that is in the hands of investigators and places an affirmative obligation on prosecutors to become aware of exculpatory evidence that is held by others acting on the government's behalf.<sup>142</sup> Ensuring that the government complies with this obligation can't be left up to individual prosecutors. Rather, prosecutorial offices must establish firm policies to ensure compliance.

This does happen from time to time. For example, in 1990, Chief Assistant United States Attorney Mary Jo White of the Eastern District of New York, Chief of the Criminal Division Bill Muller and Chief of the Narcotics Unit David Shapiro, among others, issued a detailed, thoughtful 27-page memorandum analyzing the government's disclosure obligation at the time and recommending procedures to be followed when dealing with informants and other government witnesses.<sup>143</sup> One of those recommendations was that the office maintain, and provide to the defense, "information about every case in which an informant has testified as an informant or a defendant, including the district or state in which the proceedings took place, the docket numbers and transcripts, where possible . . . and statements by a judge referring to a witness's truthfulness and any allegations of double dealing or other misconduct."<sup>144</sup>

The memo contained other similarly enlightened recommendations, disclosing a firm commitment to complying with the spirit, not merely the letter, of *Brady* and its progeny. Some years later, in 1999, a similar set of procedures was adopted by the United States Attorney's Office in the Northern District of California in a manual drafted by one of the authors of the EDNY memo who had moved there and served as head of the Criminal Division.<sup>145</sup> But, according to a lawyer who left the office in 2002, the manual was disregarded by the new U.S. Attorney.

Compliance with the government's disclosure obligations cannot be left to the political vagaries of 93 U.S. Attorneys' offices and the countless District Attorneys' offices across the country. Instead, the U.S. Justice Department and the justice department of every state must ensure compliance by setting standards and meaningfully disciplining prosecutors who willfully fail to comply. If they will not do it on their own, Congress and the state legislatures must prod them into it by adopting such standards by legislation.

**3. Adopt standardized, rigorous procedures for eyewitness identification.** North Carolina leads the way, once again, with the Eyewitness Identification Reform Act,<sup>146</sup> which does just that. It provides in relevant part that lineups "shall be conducted by an independent administrator"; "[i]ndividuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately"; the eyewitness must be instructed that he "should not feel compelled to make an identification"; "at least five fillers shall be included in a [photo or live] lineup, in addition to the suspect"; and live identification procedures must be recorded on video.<sup>147</sup> This law, too, came as a result of a huge miscarriage of justice when Jennifer Thompson-Cannino mistakenly identified Ronald Cotton as her rapist.<sup>148</sup> He

142. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

143. See MARY JO WHITE ET AL., *BRADY/GIGLIO DISCLOSURES* (Oct. 30, 1990) (unpublished internal memorandum, on file with author).

144. *Id.* at 2.

145. See AUSA Manual for the Northern District of California (unpublished internal manual, on file with author).

146. N.C. GEN. STAT. § 15A-284.52 (2012), <http://law.justia.com/codes/north-carolina/2012/chapter-15a/article-14a/section-15a-284.52>.

147. *Id.*

148. See Innocence Project, *Ronald Cotton*, <http://www.innocenceproject.org/cases-false-imprisonment/ronald-cotton>. The case and the reform that it triggered were featured on a 60 Minutes episode titled

spent 11 years in prison before he was exonerated by DNA evidence.<sup>149</sup> The cases involving mistaken eyewitness identification are legion.<sup>150</sup>

**4. Video record all suspect interrogations.**<sup>151</sup> The surprising frequency of false confessions should make us deeply skeptical of any interrogation we cannot view from beginning to end. Suspects are frequently isolated and pressured in obvious and subtle ways, and when the process ends we often have very different accounts of what happened inside the interrogation room.<sup>152</sup> In those circumstances, whom are we to believe? Most of the time, the judge and juries believe the police. There may have been a time when we had to rely on such second-hand reports, but technology has now made this unnecessary: Video recording equipment is dirt cheap, and storage space for the resulting files is endless. No court should ever admit a confession unless the prosecution presents a video of the entire interrogation process *from beginning to end*.<sup>153</sup>

It appears that change is underway. Just last year, the Justice Department reversed its century-old prohibition against recording interrogations and adopted a policy “establish[ing] a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody.”<sup>154</sup>

“Eyewitness: How Accurate is Visual Memory?” See EVIDENCEPROFBLOG, *Can I Get A(n Eye) Witness: 60 Minutes Story Exposes Problems with Eyewitness IDs* (Mar. 9, 2009), <http://lawprofessors.typepad.com/evidenceprof/2009/03/those-of-you-wh.html>.

**149.** See Innocence Project, *supra* n.148.

**150.** For example, in *Gantt v. Roe*, 389 F.3d 908, 914 n.8 (9th Cir. 2004), the police first showed an eyewitness a picture of a car owned by an initial suspect named Wilson, which the witness identified as the car he had seen the morning of the crime. The police then showed the witness a six-photo lineup including Wilson’s photo, and “sure enough, [the witness] selected Wilson as someone who ‘looked like the pedestrian he had seen,’” even though Wilson was eventually shown to have zero connection to the crime. *Id.*; see also *Newsome v. McCabe*, 256 F.3d 747, 749 (7th Cir. 2001) (there was ample evidence that police officers had “encouraged two witnesses to select [the defendant, who was exonerated after 15 years in prison,] from a lineup . . . yet withheld from the prosecutors information about their coaching of the witnesses and the fact that these witnesses earlier selected pictures from a book of mug shots that did not contain [the defendant]’s photo”).

**151.** In fact, why don’t police officers wear body cameras at all times? It would protect the suspect and the police officer. See Steve Tuttle, *Cambridge University Study Shows On-Officer Video Reduces Use-of-Force Incidents by 59 percent*, *TASER Int’l* (Apr. 8, 2013), <https://s3.amazonaws.com/uploads.hipchat.com/33/3817/rc4wgppgd39lrns/130408%20Rialto%20AXON%20Flex%20Cambridge%20Study.pdf> (the use of “officer worn cameras reduced the rate of use-of-force incidents by 59 percent” and “utilization of cameras led to an 87.5 percent reduction in complaints” by citizens against police officers); see also U.S. DEPARTMENT OF JUSTICE, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED* (2014), available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf).

**152.** See, e.g., *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) (the defendant claimed his confession was coerced, while the detectives argued otherwise); *Milke*, 711 F.3d at 1002 (Detective Saldade claimed that Milke confessed to the murder during her interrogation, while Milke maintained that Saldade ignored her request for a lawyer and “embellished and twisted [her] statements to make it sound like she had confessed”). In both these cases, we lacked access to a video or audio recording to ascertain what really happened.

**153.** This practice has been adopted in England, Ireland and Australia, where the general rule is that all interrogations—and not just confessions—must be recorded on audio or video. However, Australia is the only country that explicitly provides that the consequence for failing to record is inadmissibility of the contents of the interrogation. See TOM SULLIVAN, *COMPENDIUM: ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS*, National Association of Criminal Defense Lawyers, July 11, 2014, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33287&libID=33256>. In addition, a number of states, including Alaska, Arkansas, Minnesota, Montana and New Jersey, require all interrogations to be recorded and consider compliance with that requirement a factor in determining whether a statement made in an interrogation is admissible. See *id.*

**154.** See James M. Cole, Memorandum, *POLICY CONCERNING ELECTRONIC RECORDING OF STATEMENTS*, May 12, 2014, <https://s3.amazonaws.com/s3.documentcloud.org/documents/1165422/doj-interrogation->

**5. Impose strict limits on the use of jailhouse informants.** In response to a devastating report on jailhouse informants issued by the Los Angeles County grand jury in 1990, the county adopted procedures that required the approval of a committee before informants could be used.<sup>155</sup> The use of informants consequently plummeted.<sup>156</sup> Even still, the practice of using jailhouse informants as a means of detecting and perhaps manufacturing incriminatory evidence has continued in California.<sup>157</sup> Serial informants are exceedingly dangerous because they have strong incentives to lie or embellish, they have learned to be persuasive to juries and there is no way to verify whether what they say is true.<sup>158</sup> A man jailed on suspicion of a crime should not be subjected to the risk that someone with whom he is forced to share space will try for a get-out-of-jail-free card by manufacturing a confession.

**6. Adopt rigorous, uniform procedures for certifying expert witnesses and preserving the integrity of the testing process.** There is an effort underway to do this at the federal level. A 30-member commission headed by the Justice Department and comprised of forensic scientists, researchers, prosecutors, defense attorneys and judges was founded two years ago with the goal of “improv[ing] the overall reliability of forensic evidence after instances of shoddy scientific analysis by federal, state and local police labs helped convict suspects.”<sup>159</sup>

However, the Justice Department recently made the unilateral decision that “the subject of pre-trial forensic discovery—i.e., the extent to which information regarding forensic science experts and their data, opinions, methodologies, etc., should be disclosed before they testify in court—is beyond the ‘scope’ of the Commission’s business and therefore cannot properly be the subject of Commission reports or discussions in any respect.”<sup>160</sup> This prompted the resignation of commission member Judge Rakoff, who criticized the decision as “a major mistake that is likely to significantly erode the effectiveness of the Commission” and a reflection of “a determination by the Department of Justice to place strategic advantage over a search for the truth.”<sup>161</sup> He elaborated: “A primary way in which forensic science interacts with the courtroom is through discovery, for if an adversary does not know in advance sufficient information about the forensic expert and the methodological and evidentiary bases for that expert’s opinions, the testimony of the expert is nothing more than trial by ambush.”<sup>162</sup>

Judge Rakoff’s noisy resignation had its desired effect: Two days later, the Justice Department reversed its decision to bar the commission from considering issues

memo.txt; Michael S. Schmidt, *In Policy Change, Justice Dept. to Require Recording of Interrogations*, N.Y. TIMES (May 22, 2014), [http://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recording-interrogations.html?\\_r=0](http://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recording-interrogations.html?_r=0).

<sup>155.</sup> See Henry Weinstein, *Use of Jailhouse Testimony is Uneven in State*, L.A. TIMES (Sept. 21, 2006), <http://articles.latimes.com/2006/sep/21/local/me-jailhouse21>.

<sup>156.</sup> *Id.*

<sup>157.</sup> See *supra* n.107.

<sup>158.</sup> See Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1376-1409 (2014).

<sup>159.</sup> See Tim Cushing, *Judge Resigns from Forensic Science Committee, Calls Out DOJ’s “Trial By Ambush” Tactics*, TECHDIRT (Feb. 5, 2015), <https://www.techdirt.com/articles/20150202/11152629883/judge-resigns-forensic-science-committee-calls-out-doj-s-trial-ambush-tactics.shtml>; Spencer S. Hsu, *U.S. To Commit Scientists and New Commission To Fix Forensic Science*, WASH. POST (Feb. 15, 2013), [http://www.washingtonpost.com/local/crime/us-to-commit-scientists-and-new-commission-to-fix-forensic-science/2013/02/15/e11c31f8-77b3-11e2-8f84-3e4b513b1a13\\_story.html](http://www.washingtonpost.com/local/crime/us-to-commit-scientists-and-new-commission-to-fix-forensic-science/2013/02/15/e11c31f8-77b3-11e2-8f84-3e4b513b1a13_story.html).

<sup>160.</sup> See *Full Text: Judge’s Protest Resignation Letter*, WASH. POST (Jan. 29, 2015), [http://www.washingtonpost.com/local/full-text-judges-protest-resignation-letter/2015/01/29/41659da6-a7e1-11e4-a2b2-776095f393b2\\_story.html](http://www.washingtonpost.com/local/full-text-judges-protest-resignation-letter/2015/01/29/41659da6-a7e1-11e4-a2b2-776095f393b2_story.html).

<sup>161.</sup> *Id.*

<sup>162.</sup> *Id.*

related to pre-trial forensic discovery.<sup>163</sup> Judge Rakoff subsequently returned to the commission, which is now in the process of preparing recommendations for the Attorney General. But why should the Justice Department have to be buffaloed into doing the right thing?

**7. Keep adding conviction integrity units.** We know that there are innocent people languishing in prison, but figuring out who they are is very difficult—more so if the prosecution, which has control of whatever evidence there is, is fighting you tooth and nail. That turns out to be a common response from prosecutors confronted with evidence that they may have obtained a wrongful conviction. A separate unit within the prosecutor's office, with access to all the available evidence, and with no track record to defend, may be the best chance we have of identifying wrongfully convicted prisoners. More than a dozen such offices have been established across the country<sup>164</sup> and more are being added.<sup>165</sup> This trend needs to continue and escalate. Better yet, there might be a federal agency to investigate the problem of questionable state convictions. This would reduce the bias that one state agency might have in favor of another.

In addition, state and federal law ought to be revised to give convicted defendants full access to DNA and other evidence in the possession of the prosecution. We have repeatedly witnessed the appalling spectacle of innocent defendants spending many years fighting to obtain the evidence that would eventually exonerate them. Michael Morton spent six additional years in prison because District Attorney John Bradley worked very hard to block Morton's requests for DNA testing.<sup>166</sup> And Anthony Ray Hinton spent more than fifteen years in prison fighting for the right to test evidence that eventually set him free.<sup>167</sup> Bruce Godschalk lost seven years<sup>168</sup>; Frank Lee Smith died in prison waiting for DNA testing that eventually proved his innocence.<sup>169</sup>

<sup>163.</sup> See Spencer S. Hsu, *Judge Rakoff Returns to Forensic Panel After Justice Department Backs Off Decision*, WASH. POST (Jan. 30, 2015), [http://www.washingtonpost.com/local/crime/in-reversal-doj-lets-forensic-panel-suggest-trial-rule-changes-after-us-judge-protests/2015/01/30/2f031d9e-a89c-11e4-a2b2-776095f393b2\\_story.html](http://www.washingtonpost.com/local/crime/in-reversal-doj-lets-forensic-panel-suggest-trial-rule-changes-after-us-judge-protests/2015/01/30/2f031d9e-a89c-11e4-a2b2-776095f393b2_story.html).

<sup>164.</sup> Various District Attorneys' offices in 12 states, as well as the U.S. Attorney's Office in Washington, D.C., have established conviction integrity units for the purpose of identifying and investigating wrongful conviction claims, often in collaboration with local innocence projects. See Center for Prosecutor Integrity, CONVICTION INTEGRITY UNITS, <http://www.prosecutorintegrity.org/> (last visited Mar. 18, 2015); CENTER FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM 9 (Dec. 2014), available at <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf> (noting that these conviction integrity units have produced a total of 61 exonerations, with 33 attributed to the unit in Dallas, Texas); Gardiner, *supra* n.46 (Brooklyn DA Kenneth Thompson overhauled the office's conviction integrity unit and, in a mere 7 months, has ordered 7 murder convictions overturned).

<sup>165.</sup> See, e.g., Marisa Gerber, *L.A. County D.A. to Create Unit to Review Wrongful-Conviction Claims*, L.A. TIMES (Apr. 22, 2015), <http://www.latimes.com/local/lanow/la-me-ln-conviction-review-unit-20150422-story.html#page=1>; Jim Forsyth, *Bexar DA Establishes "Conviction Integrity Unit"*, WOAI LOCAL NEWS (Feb. 25, 2015), <http://www.woai.com/articles/woai-local-news-sponsored-by-five-119078/bexar-da-establishes-conviction-integrity-unit-13288998/>.

<sup>166.</sup> See Brandi Grissom, *supra* n.77. In the words of the Houston Chronicle, "The fall of John Bradley was swift and severe and justified." Lisa Falkenberg, *Tossed from Office, Ex-Williamson DA Lands Job in Sunny Palau*, HOUSTON CHRON. (July 1, 2014), <http://www.houstonchronicle.com/news/columnists/falkenberg/article/Falkenberg-5594473.php>. Bradley lost the Republican primary for Williamson County District Attorney in 2012, a post he had held for a decade.

<sup>167.</sup> Just recruiting the panel of experts, including a former F.B.I. official, to review the forensic evidence took Hinton and his lawyers almost a decade. See Alan Blinder, *supra* n.77; Anthony Ray Hinton *Is Free After 30 Years Wrongfully On Death Row*, EQUAL JUSTICE INITIATIVE (Apr. 3, 2015), <http://www.eji.org/node/1064>.

<sup>168.</sup> See Sara Rimer, *DNA Testing in Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES (Feb. 15, 2002), <http://www.nytimes.com/2002/02/15/us/dna-testing-in-rape-cases-frees-prisoner-after-15-years.html>.

<sup>169.</sup> See The National Registry of Exonerations, *Frank Lee Smith*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3644>. Smith was exonerated on the basis of DNA testing results 11 months after his death in 2000 and 14 years after his conviction. He had requested DNA testing

There is no justification for withholding evidence that might set an innocent man free from unjust imprisonment. Whatever impediments have been interposed to prevent access to such evidence to convicted defendants and those working on their behalf ought to be summarily removed by legislation giving them full and swift access to all evidence in possession of the government. Most states now have laws allowing post-conviction access to DNA testing, but many are restrictive in practice—for example, denying requests from inmates who originally confessed to the crime or imposing a deadline of one year after conviction to file a request.<sup>170</sup> Nebraska's statute, however, serves as a good example to emulate. It provides:

[A] person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgement requesting forensic DNA testing of any biological material that:

- (a) Is related to the investigation or prosecution that resulted in such judgment;
- (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
- (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.<sup>171</sup>

The statute further provides that DNA tests must be performed in a nationally accredited laboratory, that the county attorney must submit an inventory to the defense and to the court of all evidence secured by the state in connection with the case.<sup>172</sup>

**8. Establish independent Prosecutorial Integrity Units.** In my experience, the U.S. Justice Department's Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble. In *United States v. Kojayan*,<sup>173</sup> we found that Assistant United States Attorney Jeffrey Sinek had misled the district court and the jury. The district judge, who had trusted the AUSA, was so taken aback with the revelation that he barred further re-prosecution of the defendants as a sanction for the government's misconduct.<sup>174</sup> OPR investigated and gave the AUSA a clean bill of health. And no Justice Department lawyer has yet been sanctioned for the Stevens prosecution despite the clear evidence of willful misconduct.<sup>175</sup> Prosecutors need to know that someone is watching over their shoulders—someone who doesn't share their values and eat lunch in the same cafeteria. Move OPR to the Department of Agriculture, and institute similar independent offices in the 50 states.

to no avail for 2 years.

**170.** See Sue Russell, *The Right and Privilege of Post-Conviction DNA Testing*, PACIFIC STANDARD (Oct. 4, 2012), <http://www.psmag.com/politics-and-law/the-right-and-privilege-of-post-conviction-dna-testing-47781>; Innocence Project, ACCESS TO POST-CONVICTION DNA TESTING (Oct. 10, 2014), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/access-to-post-conviction-dna-testing>.

**171.** See Neb. Rev. Stat. § 29-4120.

**172.** *Id.*

**173.** 8 F.3d 1315, 1322 (9th Cir. 1993).

**174.** Order on Motion for Acquittal, No. 2:91-cr-00622-ER-2, Dkt. 111 (Mar. 9, 1994) (granting the motion to dismiss the indictment with prejudice).

**175.** The Justice Department did give two of its prosecutors, Joseph Bottini and James Goeke, slaps on the wrists, but the Merit Systems Protection Board recently overturned even these mild sanctions on the basis that the Justice Department violated its own procedures for investigating alleged misconduct. See Lisa Rein, *Review Board Clears U.S. Prosecutors Accused of Botching Sen. Ted Stevens's Corruption Trial*, WASH. POST (Jan. 14, 2015), <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/01/14/panel-clears-u-s-prosecutors-accused-of-botching-sen-ted-stevens-corruption-trial/>. A bungled attempt at sanctions strikes me as worse than no sanctions at all. What does that say about the sincerity and competence of the Justice Department's efforts? They can topple a senator and jail Martha Stewart, but they can't even spank their own misbehaving lawyers?



### C. Judges

Judges, especially trial judges, can do a great deal to ensure that prosecutors comply with their constitutional obligations, that only reliable evidence is presented to juries, that juries are properly instructed and that the trial is generally fair. There has been an avalanche of exonerations in recent years, many of them of people who spent half a lifetime or more behind bars,<sup>176</sup> and in every one of those cases there was some sort of proceeding—usually a trial, sometimes a plea—where a judge let an innocent man be convicted and sent him to prison or death row. When such cases are reported, the trial judge is always given a pass, as if he were merely a bystander who watched helplessly while an innocent man had his life ripped away from him. I don't buy it. Any judge that inexperienced or incompetent has no business presiding over anything more significant than small claims court. In criminal cases, judges have an affirmative duty to ensure fairness and justice, because they are the only ones who can force prosecutors and their investigators and experts to comply with due process.

Other than being vigilant, compassionate and even-handed, there are specific measures trial judges can take to ensure fairness in criminal proceedings and avoid the conviction of innocents.

**1. Enter *Brady* compliance orders in every criminal case.** The *Brady* rule is in many ways the ultimate guarantor of fairness in our criminal justice system. This is because police have unparalleled access to the evidence in criminal cases—both inculpatory and exculpatory. Once a crime is reported and police are on the scene, they can secure the area and prevent anyone from touching anything until they are done. They have control of what evidence is sent out for forensic testing; they talk to witnesses and get their impression before anyone else does. Police and prosecutors, working together, can lean on witnesses by threatening prosecution or offering leniency. If there is evidence helpful to the defense, it will generally wind up in the possession of the police; if witnesses have made helpful statements in their initial contact with investigators (as happened in the *Stevens* case) that information will be in the sole possession of the prosecution. A defense investigator or lawyer plowing over the same territory after the police have done their job will generally find the scene denuded of clues and witnesses who are skittish and laconic.

*Brady* and its progeny therefore impose important obligations on prosecutors, obligations that are too frequently ignored. In case after case where an innocent person is exonerated after many years in prison, it turns out that the prosecution failed to disclose or actively concealed exculpatory evidence. But *Brady* is not self-enforcing; failure to comply with *Brady* does not expose the prosecutor to any personal risk.<sup>177</sup> When Judge Sullivan discovered that the prosecutors in the *Stevens* case had obtained their conviction after failing to disclose exculpatory evidence, he appointed a special counsel, DC attorney Henry Schuelke III, to independently investigate the prosecutors' conduct.<sup>178</sup> Schuelke determined that the lawyers had committed willful *Brady* violations but that the court lacked the power to sanction the wrongdoers because they had not violated any court-imposed obligations.<sup>179</sup>

The solution to this problem is for judges to routinely enter *Brady* compliance orders, and many judges do so already. Such orders vary somewhat from judge to

176. See The National Registry of Exonerations, *supra* n.72 and accompanying.

177. See *Imbler v. Pachtman*, 424 U.S. 409, 430, 431 n.34 (1976) (prosecutors are absolutely immune for “activities [that are] intimately associated with the judicial phase of the criminal process,” including the willful suppression of exculpatory evidence).

178. See Henry F. Schuelke III, Special Counsel, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, *supra* n.119.

179. See *id.*

judge, but typically require the government to turn over, when received, documents and objects, reports of examinations and tests, expert witness opinions and all relevant material required by *Brady* and *Giglio*.<sup>180</sup> Entering such an order holds prosecutors personally responsible to the court and will doubtless result in far greater compliance.

**2. Engage in a *Brady* colloquy.** This procedure was proposed by Professor Jason Kregag in an article published last year in the *Stanford Law Review Online*,<sup>181</sup> and it strikes me as a good idea. The details are outlined in Professor Kregag's article but the general idea is that, during pretrial hearings and before a defendant enters a guilty plea, the trial judge would have a conversation with the prosecutor on the record, asking him such questions as, "Have you reviewed your file . . . to determine if [it] include[s] information that is favorable to the defense?" and "Have you identified information that is favorable to the defense, but nonetheless elected not to disclose [it] because you believe that the defense is already aware of the information or the information is not material?"<sup>182</sup> There is nothing like having to face a judge on the record to impress upon lawyers the need to scrupulously comply with their professional obligations. But the questions must be sufficiently specific and detailed to avoid the mantra, "We're aware of our *Brady* obligations and we've met them."

**3. Adopt local rules that require the government to comply with its discovery obligations without the need for motions by the defense.** The prosecution need not present *Brady* evidence unless the defense asks for it, usually by motion.<sup>183</sup> This seems sort of silly because the defense *obviously* wants whatever exculpatory evidence the prosecution might have. Surprisingly, few courts have rules that obviate the need for criminal discovery motions.<sup>184</sup> I'm aware of only a dozen or so federal courts that have local rules either stating that the defense doesn't need to make a formal discovery motion, or requiring the government to disclose *Brady/Giglio* material within a specific time frame, without mentioning a defense motion.<sup>185</sup>

An example of such a rule is Eastern District of Washington Local Criminal Rule 16(a), which was adopted just last year. The rule requires the government to make available within 14 days of arraignment: (1) all of the defendant's oral and written

**180.** These orders are routine among all the district judges in the Eastern District of Washington. *See, e.g.,* Judge Justin Quackenbush, Scheduling Order at 1, No. 2:15-CR-0025-JLQ (E.D. Wa. Mar. 23, 2015) ("the United States shall forthwith provide, when received, all relevant material required by *Brady* and by *Giglio*") (citations omitted); Judge Edward Shea, Case Management Order at 4, No. 4:14-CR-6053-EFS (E.D. Wa. Feb. 13, 2015) ("The Court further presumes a request for discovery and disclosure under Federal Rules of Evidence 404(b), 608(b), and 609, *Brady, Giglio, United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), and their progeny.") (citations omitted).

**181.** Jason Kregag, *The Brady Colloquy*, 67 *STAN. L. REV. ONLINE* 47 (2014).

**182.** *Id.* at 50.

**183.** *See* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 *CASE W. RES. L. REV.* 531, 534 (2007), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1535&context=lawfaculty> ("Prosecutorial disclosure of *Brady* evidence is not automatic. Prosecutors are typically required to provide *Brady* evidence only upon a request."); FED. JUDICIAL CTR., *TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES* 14 (2007), available at <https://bulk.resource.org/courts.gov/fjc/bradyma2.pdf>.

**184.** *See* LAURAL HOOPER ET AL., FED. JUDICIAL CTR., *A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES* (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Rule16Rep.pdf>.

**185.** Courts that require the government to provide criminal discovery without a motion include the District of Hawaii, District of Kansas, District of New Hampshire, District of New Mexico, Western District of Texas, Eastern District of Washington and Eastern District of Wisconsin. Courts that imply as much include the Middle District of Alabama, Southern District of Alabama, Northern District of California, District of Massachusetts, Northern District of New York and the District of Vermont. *See id.* at 18.

statements, the defendant's prior record, documents and objects and expert witness opinions that are in the government's "possession, custody or control or which may become known . . . through due diligence"; (2) information from an "electronic eavesdrop, wiretap or any other interception," as well as "the authorization for and information gathered from" a tracking device or video/audio recording used during investigations; (3) "search warrants and supporting affidavits"; (4) information regarding whether physical evidence intended to be offered in the government's case-in-chief was seized without a warrant; and (5) photographs used in any photo lineup, as well as information obtained from any other identification technique.<sup>186</sup> Rule 16(a)(6) is a catchall clause that requires the government to "[a]dvice the defendant's attorney of evidence favorable to the defendant and material to the defendant's guilt or punishment to which defendant is entitled pursuant to *Brady* and *United States v. Agurs*."<sup>187</sup> I have no idea why this isn't part of the Federal Rules of Criminal Procedure, but it should be.

**4. Condition the admission of expert evidence in criminal cases on the presentation of a proper *Daubert* showing.** As Judge Nancy Gertner has pointed out on numerous occasions,<sup>188</sup> courts in criminal cases routinely admit expert evidence lacking the proper foundations and sometimes amounting to little more than guesswork. Few defense lawyers challenge the reliability of expert evidence because few trial judges grant requests for *Daubert* hearings.<sup>189</sup> And appellate courts affirm such denials under a very generous abuse of discretion standard.<sup>190</sup> With the mounting number of wrongful convictions based on faulty expert evidence in such diverse areas as arson and shaken baby syndrome, courts must be far more rigorous in enforcing *Daubert* before allowing experts to testify in criminal trials. Failure to hold a *Daubert* hearing where the reliability of expert evidence has been credibly challenged should be considered an error of law, as should the refusal to allow a defense memory expert where the case turns on conflicting recollections of past events.<sup>191</sup>

**5. When prosecutors misbehave, don't keep it a secret.** Defense lawyers who are found to have been ineffective regularly find their names plastered into judicial opinions, yet judges seem strangely reluctant to name names when it comes to misbehaving prosecutors.<sup>192</sup> Indeed, judges seem reluctant to even suspect prosecutors of improper behavior, as if they were somehow beyond suspicion. For example, the district judge in the *Kojayan* case, discussed above, could have obviated the appeal and the entire sordid episode by forcing the Assistant U.S. Attorney to answer a simple question: "Did Nourian have a plea agreement with the government?" Defense counsel urged the judge to ask the question but to no avail. It was not until the oral argument before our court that the AUSA was compelled to disclose that fact:

<sup>186</sup> U.S. District Court for the Eastern District of Washington, Local Crim. R. 16(a), available at [http://www.waed.uscourts.gov/sites/default/files/Local\\_Criminal\\_Rules-20150303\\_0.pdf](http://www.waed.uscourts.gov/sites/default/files/Local_Criminal_Rules-20150303_0.pdf).

<sup>187</sup> *Id.* (citations omitted).

<sup>188</sup> See, e.g., Nancy Gertner, *Judges Need to Set a Higher Standard for Forensic Evidence*, N.Y. TIMES (Mar. 30, 2015), <http://www.nytimes.com/roomfordebate/2015/03/30/robert-durst-handwriting-and-judging-forensic-science/judges-need-to-set-a-higher-standard-for-forensic-evidence>; Nancy Gertner, *Commentary on the Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 789, 793 (2011).

<sup>189</sup> See David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 50-66 (2013). Moreover, "[s]tatistics substantiate the ubiquity of defense failure to initiate *Daubert* challenges, confirming the rarity in the trial courts of any defense challenge to a prosecutor's proffered expert testimony." See also Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH 107, 110 (2005).

<sup>190</sup> See, e.g., Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997).

<sup>191</sup> See *supra* pp. vi-vii and accompanying footnotes.

<sup>192</sup> See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1069-71 & n.21 (2009).

[Q]: Was there a cooperation agreement?

AUSA: Well, your honor, that is not something that's in the record.

[Q]: I understand. Was there a cooperation agreement?

AUSA: There was an agreement with the Southern District of New York and

[Nourian], yes.<sup>193</sup>

Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights. In *Baca v. Adams*,<sup>194</sup> a panel of our court dealt with a case where both the California trial court and the California Court of Appeal concluded that a prosecutor lied on the stand, but nonetheless deemed the error harmless. During our questioning, we asked the Deputy Attorney General arguing the case whether the lying prosecutor and another untruthful witness had been prosecuted for perjury or otherwise sanctioned. The answer, of course, was that they had not been. We then suggested that, in resolving the case, we would write an opinion naming those who had misbehaved and the failure of the state authorities to take any actions against them. The video of that oral argument made its way to the blogosphere and has been viewed over 24,000 times.<sup>195</sup>

Not surprisingly, three weeks afterwards, the California Attorney General wrote confessing error and requesting that we remand to the district court with instructions that it grant a conditional writ of habeas corpus.<sup>196</sup> The incident, by the way, illustrates the importance of providing video access to court proceedings. It is far easier to hide an injustice from public scrutiny if only the judge and a few lawyers know about it.

Judges who see bad behavior by those appearing before them, especially prosecutors who wield great power and have greater ethical responsibilities, must hold such misconduct up to the light of public scrutiny. Some of us regularly encourage prosecutors to speak to their supervisors, even the United States Attorney, to ensure that inappropriate conduct comes to their attention, with excellent results.<sup>197</sup> If judges have reason to believe that witnesses, especially police officers or government informants, testify falsely, they must refer the matter for prosecution. If they become aware of widespread misconduct in the investigation and prosecution of criminal cases, a referral to the U.S. Department of Justice for a civil rights violation might well be appropriate.<sup>198</sup>

**193.** *United States v. Kojayan*, 8 F.3d 1315, 1320 (9th Cir. 1993). The Justice Department reacted with typical insouciance: It filed a motion to depublish the opinion or, in the alternative, to amend the opinion to remove the AUSA's name. USA's Motion for Depublication, or in the Alternative, Modification of Opinion w/Declaration of AUSA Sinek, No. 95-50875, Dkt. 51 (Sept. 24, 1993); *see supra* n.129.

**194.** No. 13-56132, 2015 WL 412835, at \*1 (9th Cir. Jan. 30, 2015).

**195.** *See 13-56132 Johnny Baca v. Derral Adams*, YouTube (Jan. 8, 2015), <https://www.youtube.com/watch?v=2sCURhXjH4>.

**196.** Appellee's Unopposed Motion for Summary Reversal and Remand to the District Court to Conditionally Grant the Writ, *Baca v. Adams* (Jan. 29, 2015) (No. 13-56132, Dkt. 33).

**197.** A memorable example is *United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014) (en banc). The AUSA had sandbagged the defense at trial by making for the first time a factual assertion not in the record in his rebuttal during closing argument. At oral argument, I asked the AUSA to go back and show the video of the oral argument to the U.S. Attorney and "see whether this [conduct] is something [she] want[s] to be teaching [her] line attorneys." *11-50311 United States v. Maloney*, YouTube (Sept. 19, 2013), <https://www.youtube.com/watch?v=HgafGnA4Eow>, at 59:00. A little over two weeks later, we received a letter from Laura Duffy, the U.S. Attorney herself, admitting that the AUSA had acted improperly and promising to "use the video of the argument as a training tool to reinforce the principle that all Assistant U.S. Attorneys must be aware of the rules pertaining to closing argument and must make every effort to stay well within these rules." Motion to Summarily Reverse the Conviction, Vacate the Sentence and Remand to the District Court, *United States v. Maloney* (Oct. 7, 2013) (No. 11-50311, Dkt. 52-1). Bravo Ms. Duffy!

**198.** But not always successful. In our opinion vacating Milke's conviction, we made an express referral of the matter to the Justice Department based on what appeared to us to be knowing and repeated use of perjured

#### D. Miscellaneous

On March 8, 2015, A.M. “Marty” Stroud III, a Shreveport lawyer and former state prosecutor, published a remarkable piece in the Shreveport Times reflecting on the case of Glenn Ford, who spent 30 years on death row after being convicted of murder and sentenced to death in 1984.<sup>199</sup> Ford was released after the state disclosed evidence proving his innocence. Stroud offered a public apology for his conduct in the case. It is well worth reading in full, but here is the gist of it:

At the time this case was tried there was evidence that would have cleared Glenn Ford. The easy and convenient argument is that the prosecutors did not know of such evidence, thus they were absolved of any responsibility for the wrongful conviction.

I can take no comfort in such an argument . . . . Had I been more inquisitive, perhaps the evidence would have come to light years ago . . . . My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. And that omission is on me.

I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. It never concerned me that the defense had insufficient funds to hire experts . . . .

The jury was all white, Mr. Ford was African-American. Potential African-American jurors were struck with little thought about potential discrimination . . . . I also participated in placing before the jury dubious testimony from a forensic pathologist that the shooter had to be left handed . . . . All too late, I learned that the testimony was pure junk science at its evil worst.

In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. To borrow a phrase from Al Pacino in the movie “And Justice for All,” “Winning became everything.”<sup>200</sup>

What is remarkable about Stroud’s statement is not that he gained a conviction and death sentence for a man that turned out to be innocent. Or that that man spent three decades caged like an animal. That kind of thing is all too common. Nor is there anything unusual about the confluence of errors that led to the wrongful conviction—failure to uncover exculpatory evidence, inexperienced defense lawyers, race-based jury selection, junk science, and a judge who passively watched the parade and sat on his thumbs. The same goes for a prosecutorial attitude of God-like omniscience and unwillingness to entertain the possibility that the wrong man is being prosecuted. These things happen all the time in case, after case, after case.

What is unusual—unique really—is Stroud’s willingness to accept personal responsibility for the calamity he helped inflict on Glenn Ford and his family—his willing-

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testimony by Detective Saldade in a large number of criminal prosecutions. *Milke*, 711 F.3d at 1019-20. The Justice Department declined to investigate the matter, yet evidence that Milke’s case was not an isolated incident was readily available. For example, in a recent letter to the editor complaining about Milke’s release, a colleague of Saldade’s in the 1980s stated: “I am painfully aware that Detective Armando Saldade and his now deceased partner were notorious for bending the rules, especially when it came to suspect interviews. Other homicide detectives attempted to make supervisors aware of these serious issues. They were met with disdain and angrily told that if they couldn’t be a team player, they could find another place to work. Nothing else was said for fear of retaliation, and no corrective steps were taken.” See Antonio Morales Jr., Op-ed, *Milke Doesn’t Deserve Her Freedom*, AZ CENTRAL (Mar. 20, 2015), <http://www.azcentral.com/story/opinion/letters/2015/03/19/milke-deserve-freedom/25057361/>. If evidence of such widespread misconduct in the highest level of a metropolitan police department is unworthy of even an investigation by the U.S. Justice Department, one must wonder what is.

<sup>199</sup> A.M. “Marty” Stroud III, RE: “*State Should Give Ford Real Justice*”, SHREVEPORT TIMES, Mar. 8, 2015, at 6D, <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/>.

<sup>200</sup> *Id.*



ness to embrace this as his personal failure, not just an unfortunate failure of the system. Most prosecutorial attitudes run the gamut from “that’s why they put erasers on pencils” to “they must be guilty of something.” Everyone else in the system, starting with trial judges, absolves himself of personal responsibility when a heinous failure occurs. We could do with a lot less of that.

In a sense, however, the system *is* responsible because it places a great deal of power and responsibility in young, ambitious lawyers, like Stroud, who have every incentive to close their eyes to the possibility of innocence, to testifying by police, to bogus experts and to suggestive eyewitness identification procedures. A prosecutor certainly does not help advance his career by providing to the defense evidence that his star witness made a statement directly contrary to his testimony before the police started leaning on him—as happened in the shameful prosecution and wrongful conviction of Senator Stevens. Faced with a remote possibility of being found out, and the likelihood that nothing bad will happen even if they are, many prosecutors will turn a blind eye or worse. And that’s how miscarriages of justice happen.

Some of the suggestions above will help ameliorate the problem, but there are some other reforms that require either legislation, a ruling by the Supreme Court, action by parties not involved in the criminal justice process or a constitutional amendment. These may be more difficult to achieve, but here they are nonetheless:

**1. Abandon judicial elections.** Professor Monroe Freedman made the case for the unconstitutionality of elected state judges in his succinct monograph, *The Unconstitutionality of Electing State Judges*.<sup>201</sup> He relied on the separate opinions of Justices O’Connor and Ginsburg in *Republican Party of Minnesota v. White*,<sup>202</sup> citing Justice O’Connor’s opinion for “studies showing that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty.”<sup>203</sup> The difficulty confronting any judge who faces an election is compounded by the well-known practice of prosecutors enlisting one of their own to oppose a judge that they consider to be pro-defense.<sup>204</sup> And in at least 19 states, lawyers may also “paper” or “affidavit” a judge by filing a peremptory challenge to disqualify a judge they deem “prejudiced” against their interests, without having to submit any explanation or proof of prejudice.<sup>205</sup> This tactic can be used en masse to effectively preclude a judge from hearing any criminal cases, and is precisely what appears to be happening to the judge in Orange County who removed the District Attorney’s office from a high-profile case because of repeated instances of misconduct.<sup>206</sup> While many,

**201.** Monroe H. Freedman, *The Unconstitutionality of Electing State Judges*, 26 GEO. J. LEGAL ETHICS 217 (2013).

**202.** 536 U.S. 765 (2002).

**203.** Freedman, *supra* n.201, at 218.

**204.** See Jennifer Emily, *Dallas DA Accused of Pushing Prosecutors to Run Against Judges*, THE DALLAS MORNING NEWS (Oct. 7, 2013), <http://www.dallasnews.com/news/politics/local-politics/20131006-da-accused-of-pushing-prosecutors-to-run-against-incumbent-judges.ece> (six prosecutors from the Dallas County DA’s office were running for state district judge benches, five of whom were challenging incumbent Democratic judges).

**205.** See Michelle Quinn, *District Attorney’s Boycott of a Judge Raises Issues*, N.Y. TIMES (Mar. 20, 2010), [http://www.nytimes.com/2010/03/21/us/21sfcourt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/21/us/21sfcourt.html?pagewanted=all&_r=0) (Santa Clara County DA disqualified one judge from 100 cases as retaliation for the judge freeing a child molester after the deputy DA provided false testimony and withheld exculpatory evidence); Maureen Cavanaugh & Pat Finn, *San Diego’s Great Judge Boycott*, KPBS (Feb. 22, 2010) <http://www.kpbs.org/news/2010/feb/22/san-diegos-great-judge-boycott/> (discussing the boycott of certain judges by the San Diego County DA’s office after those judges had either made rulings against the prosecution or criticized prosecutors for failing to disclose exculpatory evidence).

**206.** Prosecutors from the Orange County DA’s office made blanket disqualification requests against Judge Thomas Goethals in his other criminal cases as soon as he began probing into the misuse of jailhouse informants in the Dekkrai murder trial. See *supra* n.131; Eric Hartley, *Prosecutors Avoiding*

perhaps, most judges resist the pressure and remain impartial, the fact that they may have to face the voters with the combined might of the prosecution and police groups aligned against them no doubt causes some judges to rule for the prosecution in cases where they would otherwise have ruled for the defense.<sup>207</sup>

**2. Abrogate absolute prosecutorial immunity.** In *Imbler v. Pachtman*,<sup>208</sup> a divided Supreme Court held that prosecutors are absolutely immune from damages liability for misconduct they commit when performing the traditional activities of a prosecutor. *Imbler* was not a constitutional ruling; the Court was interpreting 42 U.S.C. § 1983. And it was certainly not a result compelled by the language of the statute; section 1983 says nothing about immunity. Rather, *Imbler* reflected a pure policy judgment that prosecutors needed complete freedom from liability in order to properly discharge their functions. Writing for himself and two others, Justice White would have adopted a more limited immunity rule that would have held prosecutors liable for certain kinds of deliberate misconduct such as willfully failing to disclose *Brady* and *Giglio* evidence.<sup>209</sup>

Under *Imbler*, prosecutors cannot be held liable, no matter how badly they misbehave, for actions such as withholding exculpatory evidence, introducing fabricated evidence, knowingly presenting perjured testimony and bringing charges for which there is no credible evidence. All are immune from liability. A defense lawyer who did any such things (or their equivalents) would soon find himself disbarred and playing house with Bubba. The *Imbler* majority seemed reassured by the possibility that rogue prosecutors will be subject to other constraints:

We emphasize that the immunity of prosecutors from liability in suits under [§] 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law . . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.<sup>210</sup>

This argument was dubious in 1976 and is absurd today. Who exactly is going to prosecute prosecutors? Despite numerous cases where prosecutors have committed willful misconduct, costing innocent defendants decades of their lives, I am aware of only two who have been criminally prosecuted for it; they spent a total of six *days* behind bars.<sup>211</sup>

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*Judge They Say Is Biased*, O.C. REG. (June 13, 2014), <http://www.ocregister.com/articles/prosecutors-618207-goethals-judge.html?page=1>. The Orange County Bar Association took notice and passed Resolution 15R-01, titled “Independence of the Judiciary,” in which it stated that it “publicly disapproves of the use of tactics which are, or have the appearance of being, punitive and retaliatory towards any sitting judge,” and that “the excessive use of [the affidavit procedure] against a particular judge can be . . . inappropriate . . . and could be construed as an attempt to intimidate not just that judge, but the entire judiciary, who will and must remain independent.” See Orange Cnty. Bar Ass’n, Resolution 15R-01: Independence of the Judiciary (Mar. 27, 2015), [http://www.ocbar.org/Portals/0/pdf/press\\_releases/2015/2015\\_03\\_30\\_OCBA\\_ResolutionR15-01.pdf](http://www.ocbar.org/Portals/0/pdf/press_releases/2015/2015_03_30_OCBA_ResolutionR15-01.pdf).

<sup>207</sup>. See *supra* n.129 (again, life tenure is a wonderful thing).

<sup>208</sup>. 424 U.S. 409, 430, 431 n.34 (1976).

<sup>209</sup>. *Id.* at 438-45 (White, J., concurring). In fact, on May 1, 2015, the Supreme Court of Canada reversed course and embraced a similar rule. See *Henry v. British Columbia (Attorney General)*, [2015] S.C.C. 24 (Can.) (government may be sued when prosecutors intentionally withhold evidence favorable to the defense).

<sup>210</sup>. *Id.* at 428-29.

<sup>211</sup>. Texas district attorney Ken Anderson, see *supra* n.77, went to jail for five days (serving only half of his 10-day sentence) for hiding evidence that put Michael Morton in prison for a quarter of a century. And he got even that much because he was found in contempt of a *Brady* compliance order entered by the

There have been a few instances of professional discipline against prosecutors, though even that has been much less than against similarly-situated private lawyers.<sup>212</sup> By and large, however, professional organizations are exceedingly reluctant to impose sanctions on prosecutors for misconduct in carrying out their professional responsibilities.<sup>213</sup> Sidney Powell's book, *Licensed to Lie*, illustrates exhaustively the futility of getting bar disciplinary boards to impose professional discipline for misconduct committed in the course of criminal prosecutions.<sup>214</sup>

Despite this dismal track record refuting the bland assurances of the *Imbler* majority that prosecutors will be subject to other forms of control, even if damages lawsuits are not available, the Court has reaffirmed *Imbler* on numerous occasions. Most recently, in its unanimous opinion in *Van de Kamp v. Goldstein*,<sup>215</sup> the Court denied compensation to the petitioner, Thomas Goldstein, who had spent 24 years in prison based on the testimony of notorious jailhouse snitch Edward Fink. Prosecutors used Fink as a utility infielder in numerous cases, and he somehow always managed to testify that the defendant had confessed.<sup>216</sup> Unmoved, the Court held the prosecutors and their supervisors were all protected by absolute immunity and Mr. Goldstein can pound sand.<sup>217</sup>

What kind of signal does this send to young prosecutors who are out to make a name for themselves? I think it signals that they can be as reckless and self-serving as they want, and if they get caught, nothing bad will happen to them. *Imbler* and *Van de Kamp* should be overruled. It makes no sense to give police, who often have to act in high pressure situations where their lives may be in danger, only qualified immunity<sup>218</sup> while giving prosecutors absolute immunity. It is a disparity that can only be

trial judge in that case. *See Texas Prosecutor to Serve 10 Days for Innocent Man's 25-Year Imprisonment*, THE GUARDIAN (Nov. 8, 2013), <http://www.theguardian.com/world/2013/nov/08/texas-prosecutor-ken-anderson-michael-morton-trial>. None of the prosecutors who concealed evidence in the *Stevens* criminal case were prosecuted, and the two who were initially disciplined by the DOJ got their sanctions overturned by the Merit Systems Protection Board. *See supra* n.175. Mike Nifong, the district attorney who committed widespread misconduct when prosecuting the Duke Lacrosse players, was convicted of criminal contempt but sentenced to just one day in jail. *See supra* n.136. The list of prosecutors who have committed misconduct causing serious, lasting harm to innocent people and who have not themselves been criminally prosecuted is very long indeed. I am aware of no prosecutors, other than Ken Anderson and Mike Nifong, who have been convicted of prosecutorial misconduct.

**212.** For example, Trinidad County, Colorado District Attorney Frank Ruybalid pleaded guilty to over a dozen instances of professional misconduct and had his law license suspended for six months, but that suspension was immediately suspended, even though "private attorneys 'have received sanctions more severe than a six-month stayed suspension' for conduct similar to Ruybalid's." *See* Alan Prendergast, *Frank Ruybalid, Trinidad District Attorney, Cops a Plea, Admits Misconduct*, WESTWORD (Jan. 29, 2015), <http://www.westword.com/news/frank-ruybalid-trinidad-district-attorney-cops-a-plea-admits-misconduct-6282816> (quoting the settlement agreement).

**213.** Nor have courts been eager to uphold sanctions imposed by professional organizations. *See, e.g., In re Kline*, No. 13-BG-851, at 2-3 (D.C. Ct. App. Apr. 9, 2015), *available at* <http://www.dccourts.gov/internet/documents/13-BG-851.pdf> (despite finding that "Bar Counsel proved by clear and convincing evidence that [the prosecutor] intentionally failed to disclose information in violation of [a D.C. Rule of Professional Conduct prohibiting prosecutors from intentionally withholding exculpatory evidence from the defense in a criminal case], the panel concluded that "given the confusion regarding the correct interpretation of a prosecutor's obligations under the rule, sanctioning [the prosecutor] would be unwarranted"). One can hope that prosecutors in the District of Columbia will no longer be confused as to their disclosure obligations after *In re Kline*.

**214.** *See* POWELL, *supra* n.116, at 397-401.

**215.** 555 U.S. 335 (2009).

**216.** *Id.* at 339.

**217.** *Id.* at 349 ("[W]here a § 1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.").

**218.** *See, e.g., Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *see also* *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc) (police have only qualified immunity for allegedly fabricating

explained by the fact that prosecutors and judges are all part of the legal profession and it's natural enough to empathize with people who are just like you.<sup>219</sup> If the Supreme Court won't overrule *Imbler* and *Van de Kamp*, Congress is free to do it by amending 42 U.S.C. § 1983.

**3. Repeal AEDPA § 2254(d).** Prior to AEDPA taking effect in 1996, the federal courts provided a final safeguard for the relatively rare but compelling cases where the state courts had allowed a miscarriage of justice to occur. One of the better-known examples of this is the case of Ron Williamson, who in 1994 was just 5 days away from being executed for a murder of which he was eventually cleared by DNA evidence. He was saved when U.S. District Judge Frank Seay entered a stay of execution that began a process culminating in Williamson's exoneration. The case is described in depth in John Grisham's non-fiction book, *The Innocent Man*.<sup>220</sup>

The federal court safety-value was abruptly dismantled in 1996 when Congress passed and President Clinton signed the Antiterrorism and Effective Death Penalty Act. Hidden in its interstices was a provision that has pretty much shut out the federal courts from granting habeas relief in most cases, even when they believe that an egregious miscarriage of justice has occurred.<sup>221</sup>

We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted.<sup>222</sup> Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal.<sup>223</sup> There are countless examples of this, but

evidence in a criminal case); *Gantt v. City of Los Angeles*, 717 F.3d 702 (9th Cir. 2013) (same).

**219.** Though it raises other questions, it's also worth taking another look at absolute judicial immunity. See Timothy M. Stengel, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 TEMP. L. REV. 1071 (2012) (arguing that absolute judicial immunity should be removed in cases where malice or corruption is substantiated).

**220.** See JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006).

**221.** Namely, 28 U.S.C. § 2254(d) provides that a writ of habeas corpus shall not be granted unless the adjudication of the claim on the merits in state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

**222.** See, e.g., *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc) (Kozinski, J., dissenting) (the plurality applied AEDPA deference and denied habeas relief to a petitioner who had steadfastly maintained his innocence and had "strong proof" that he was in fact innocent). It's no surprise that courts have "performed miserably in ferreting out the innocent." See Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES (July 23, 2007), [http://www.nytimes.com/2007/07/23/us/23bar.html?\\_r=1&gwh=D810E36AF10FBA1A836653D78673C1C8&gwt=pay](http://www.nytimes.com/2007/07/23/us/23bar.html?_r=1&gwh=D810E36AF10FBA1A836653D78673C1C8&gwt=pay). Not only did the Supreme Court decline to hear the appeals of 30 of 31 prisoners who were later exonerated by DNA evidence, but it ruled against the prisoner in the one appeal it did hear. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 95 (2008).

**223.** Compare *Brown v. Payton*, 544 U.S. 133, 148-49 (2005) (Breyer, J., concurring) ("In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. See 28 U.S.C. § 2254(d)(1). Were I a California state judge, I would likely hold that Payton's penalty-phase proceedings violated the Eighth Amendment . . . . Nonetheless, in circumstances like the present, a federal judge must leave in place a state-court decision unless the federal judge believes it is 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' § 2254(d)(1) . . . . I cannot say that the California Supreme Court decision fails this deferential test."), and *Sessoms v. Grounds*, 776 F.3d 615, 631 (9th Cir. 2015) (Kozinski, C.J., reluctantly dissenting) ("But what we must decide is not what Sessoms meant or the officers understood, but whether it was unreasonable for the state courts to conclude that a reasonable officer would have been perplexed as to whether Sessoms was asking for an attorney . . . . I am dismayed that Sessoms's fate—whether he will spend his remaining days in prison, half a century or more caged like an animal—turns on such esoterica. But that's the standard we are bound to apply, even if we are convinced that the habeas petitioner's constitutional rights were violated."), with *Hinton v. Alabama*, 134 S. Ct. 1081, 1083 (2014) (per curiam) (vacating the state court's judgment on direct appeal upon concluding that Anthony Ray Hinton's trial attorney "rendered constitution-

perhaps the best illustration is *Cavazos v. Smith*,<sup>224</sup> the case involving a grandmother who had spent 10 years in prison for the alleged shaking death of her infant grandson—a conviction secured by since-discredited junk science. My court freed Smith, but the Supreme Court summarily reversed (over Justice Ginsburg’s impassioned dissent) based on AEDPA.<sup>225</sup>

AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.<sup>226</sup>

**4. Treat prosecutorial misconduct as a civil rights violation.** The U.S. Justice Department seems ready enough to pursue charges of civil rights violations in cases where police have engaged in physical violence,<sup>227</sup> but far more reluctant to pursue misbehaving prosecutors.<sup>228</sup> But prosecutors can wreck and take lives just like police, and their actions are often far more premeditated than those of officers who may over-react to a belligerent suspect. And when a prosecutorial office uses known liars as jailhouse snitches, or presents evidence from cops they know are prone to fabricate evidence or conduct suggestive lineups or eyewitness identifications, they *are* committing civil rights violations with dire consequences for their victims. It is precisely such alternative enforcement mechanisms that the Supreme Court hypothesized in *Imbler* in deciding to give prosecutors absolute immunity.<sup>229</sup> One can only hope that the U.S. Department of Justice will reconsider what appears to be its policy against investigating prosecutorial misconduct in criminal cases as potential civil rights violations.

**5. Give criminal defendants the choice of a jury or bench trial.** Under current law, either the defendant or the prosecution can insist on trying the case before a jury.<sup>230</sup> Conventional wisdom is that defendants prefer juries because it only takes one juror to hang, but experienced defense lawyers know that some kinds of cases can best be tried before a judge—particularly where a defendant wishes to testify but

ally deficient performance,” *see supra* n.77.

<sup>224.</sup> 132 S. Ct. 2 (2011).

<sup>225.</sup> Citing 2254(d), the Supreme Court explained: “Doubts about whether Smith is in fact guilty are understandable. But it is not the job of this Court, and was not that of the Ninth Circuit, to decide whether the State’s theory was correct. The jury decided that question, and its decision is supported by the record.” 132 S. Ct. at 7.

<sup>226.</sup> In last year’s Preface, Shon Hopwood details other ill effects of AEDPA’s heartless regime. Shon Hopwood, Preface, *Failing to Fix Sentencing Mistakes: How the System of Mass Incarceration May Have Hardened the Hearts of the Federal Judiciary*, 43 GEO. L.J. ANN. REV. CRIM. PROC. (2014).

<sup>227.</sup> For example, the Justice Department brought civil rights charges against the four LAPD officers involved in the brutal beating of Rodney King. *See* James H. Andrews, *US Justice is on Trial in Rodney King Case*, CHRISTIAN SCI. MONITOR (Mar. 15, 1993), <http://www.csmonitor.com/1993/0315/15121.html>. And while it ultimately decided not to prosecute police officer Darren Wilson for the shooting death of Michael Brown, the Justice Department conducted an extensive investigation which culminated in a 86-page report. *See* UNITED STATES DEPARTMENT OF JUSTICE-CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), *available at* <http://apps.washingtonpost.com/g/documents/national/department-of-justice-report-on-the-michael-brown-shooting/1436/>.

<sup>228.</sup> *See supra* n.198 (discussing the Justice Department’s decision not to investigate the prosecutors’ misconduct in *Milke*).

<sup>229.</sup> *See Imbler*, 424 U.S. at 428 (“This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights . . .”).

<sup>230.</sup> *See* Fed. R. Crim. P. 23(a) (“If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.”).



fears impeachment with prior misdeeds.<sup>231</sup> The prosecution has many institutional advantages, not the least being that they get to go first and thus have their theory of the case laid out before the defendant can present any evidence at all.<sup>232</sup> I would think it fair to let the defendant *get the* choice of judge or jury. Because the government has no constitutional right to a jury, but the defendant does, there should be no constitutional impediment to such a rule.<sup>233</sup>

And while I'm at it, I'd amend Federal Rule of Evidence 609(a) (and its state analogues) to preclude impeachment of a criminal defendant testifying on his own behalf with evidence of his past criminal convictions.<sup>234</sup> Too many defendants are put to the grim choice of either telling their side of the story and having the jury hear of their prior misdeeds, or standing mute and seeming to acquiesce in the prosecution's case.<sup>235</sup> If the defendant lies, a skilled prosecutor will trip him up on cross; there is no need to paint him as a monster before the jury.<sup>236</sup>

**6. Conduct in depth studies of exonerations.** The recent spate of exonerations, especially those obtained by DNA evidence, gives us a window as to what can go wrong in our criminal justice system. It is an important database that ought to make us doubt the supposed infallibility of our criminal justice process. But it can also be a rich source of useful information about why criminal prosecutions go wrong, why police focus on a single innocent suspect, why prosecutors pursue cases without asking hard questions about whether the defendant is truly guilty and why judges and juries are so badly misled in so many cases. This should not be a matter left to academia, although much good work is done there now. Far better, though, if the federal government devoted, say, the cost of one aircraft carrier to analyze and dissect these cases and try to figure out what went wrong and what we can do better in the future. Thus far, the government has only made such an inquiry into a handful of cases.<sup>237</sup> This effort needs to be expended on a much larger scale, because even a single wrongful conviction is one too many.

**231.** See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 482 (1992) (many defendants do not testify because “[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand”).

**232.** See *supra* n.43 and accompanying text (discussing the advantage of going first).

**233.** See Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309 (1993) (fleshing out the arguments in favor of giving the defendant a unilateral right to choose between a bench or jury trial).

**234.** See Fed. R. Evid. 609(a)(1)(B) (evidence of a criminal conviction for purposes of attacking a witness's character for truthfulness “must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant”).

**235.** See Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985) (“[T]he presentation of the defendant's criminal record [under Rule 609] does not affect the defendant's credibility, but does increase the likelihood of conviction, and the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it. From a legal policy viewpoint, the risk of prejudice to the defense is greater than the unrealized potential benefit to the prosecution.”).

**236.** Rape shield laws and Federal Rule of Evidence 412 are based on similar policy considerations. See 124 Cong. Rec. 36,256 (1978) (statement of Sen. Biden) (“The enactment of [the Privacy Protection for Rape Victims Act of 1978, of which Federal Rule of Evidence 412 was the centerpiece,] will eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant [and] end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experiences[, making] the trial almost as degrading as the rape itself.”).

**237.** The National Institute of Justice recently sponsored in-depth analyses on three high-profile legal mistakes in an effort to “tease out the sequence of factors that might have contributed to a mistake and, perhaps, lead to a more accident-proof legal system”; the study found that “[t]here was no single bad actor,” with most cases involving “a series of small slip-ups that cascaded into an important mistake.” See

**7. Repeal three felonies a day for three years.**<sup>238</sup> Professor Tim Wu of Columbia Law School recounted a “darkly humorous game” played by Assistant U.S. Attorneys in the Southern District of New York:

[S]omeone would name a random celebrity—say, Mother Theresa or John Lennon. It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you’d see on *Law & Order* but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like “false statements” (a felony, up to five years), “obstructing the mails” (five years), or “false pretenses on the high seas” (also five years). The trick and skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences.<sup>239</sup>

A big reason prosecutors have so much leverage in plea negotiations is that there are many laws written in vague and sweeping language, inviting prosecutorial adventurism.<sup>240</sup> It is thus difficult for individuals charged with a crime to know how to defend themselves and to gauge the likelihood of being acquitted.

Even if ultimately vindicated, the process of being charged itself takes a massive toll. Arthur Andersen, guilty of no crime according to the Supreme Court, nevertheless was put out of business, leaving its 85,000 employees world-wide without jobs.<sup>241</sup> Senator Stevens lost his Senate seat even though his prosecution was riddled with misconduct and the Justice Department eventually dismissed all charges. The list of lives and businesses ruined by baseless prosecutions is long.<sup>242</sup> And, in the words of George Will, “as the *mens rea* requirement withers when the quantity and complexity of laws increase, the doctrine of *ignorantia legis neminem excusat*—ignorance of the law does not excuse—becomes problematic. The regulatory state is rendering unrealistic the presumption that a responsible citizen should be presumed to have knowledge of the law.”<sup>243</sup> Repealing a thousand vague and over-reaching laws and replacing them with laws that are cast narrowly to punish morally reprehensible conduct and give fair notice as to what is criminal may not solve the problem altogether, but it would be a good start.

## CONCLUSION

‘Nuff said.

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Douglas Starr, *A New Way to Reform the Judicial System*, THE NEW YORKER (Mar. 31, 2015), <http://www.newyorker.com/news/news-desk/the-root-of-the-problem>.

**238.** Harvey Silverglate estimates that a typical American commits three felonies a day due to overbroad laws. *Silverglate*, *supra* n.58; see Kozinski & Tseytlin, *supra* n.58, at 44–45 (“[M]ost Americans are criminals and don’t know it, or suspect they are but believe they’ll never get prosecuted.”).

**239.** Tim Wu, *American Lawbreaking*, SLATE (Oct. 14, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2007/american\\_lawbreaking/introduction.html](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html).

**240.** See *supra* n.57 (discussing examples).

**241.** See *Andersen Died in Vain*, CHI. TRIB. (Mar. 14, 2012), [http://articles.chicagotribune.com/2012-03-14/opinion/ct-edit-andersen-20120314\\_1\\_andersen-s-professional-standards-group-andersen-case-founder-arthur-andersen](http://articles.chicagotribune.com/2012-03-14/opinion/ct-edit-andersen-20120314_1_andersen-s-professional-standards-group-andersen-case-founder-arthur-andersen).

**242.** See, e.g., *Goyal*, 629 F.3d at 922 (Kozinski, C.J., concurring) (“This case . . . has no doubt devastated the defendant’s personal and professional life.”); POWELL, *supra* n.116, at 52 (“Jim Brown[, see *supra* n.118.] was devastated. His entire life and that of his family had been turned upside down. Now he was facing prison time. He was in shock.”).

**243.** Will, *supra* n.58 (citing Michael Anthony Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137 (2014)).