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TRUTH AND INNOCENCE PROCEDURES TO FREE INNOCENT PERSONS: BEYOND THE ADVERSARIAL SYSTEM

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Through innocent pleas and innocence procedures, this Article urges a fundamental change to the adversarial system to minimize the risk that factually innocent persons will be convicted of crimes. The current system, based on determining whether the prosecution can prove guilt beyond a reasonable doubt, results in acquittals of guilty persons when evidence is sparse and convictions of innocent persons when evidence is abundant. It might be easier philosophically to accept that guilty persons will go free than to know that some innocent persons will be convicted and imprisoned, especially in the American justice system where erroneous jury verdicts based on factual determinations are virtually never reversed. Thus, where defendants claim to be factually innocent, the adversarial system should provide for a plea of innocent, as opposed to only a not guilty plea, as well as innocence procedures through which to search for the truth of the prosecution's allegations. Innocence procedures would require the defendant and the prosecution to engage in a truth-seeking function. The prosecution would have to investigate with a view toward finding exculpatory evidence, rather than expecting the defendant to produce it. The defendant would have to submit to interrogation, and his attorney would have to affirm that the defendant is innocent. Jury instructions at trial would ensure that the prosecution and defendant acted in good faith, and where a defendant pleaded innocent, submitted to interrogation, and then still faced trial the prosecution would be required to prove guilt to a standard higher than beyond a reasonable doubt. By introducing a truth-seeking function into the adversarial system prior to trial, innocent persons would have a more realistic opportunity to save themselves, when in the current system their fates are virtually irrevocably sealed when a jury returns a guilty verdict.

INTRODUCTION: BEYOND THE ADVERSARIAL SYSTEM

This Article proposes a fundamental change to the adversarial system and the American criminal justice process. Specifically, it urges the adoption of truth-seeking innocence procedures designed to minimize convictions of innocent defendants. The Article's main premise is that a search for truth is the most effective

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means through which to discover innocence.[1] Unfortunately, however, this premise does not currently underlie the adversarial system, where the cost of requiring the government to prove guilt beyond a reasonable doubt[2] instead of searching for truth is that guilty persons will go free when evidence is lacking and innocent persons will be convicted and imprisoned when evidence is abundant.[3] The absence of innocence procedures, or some better method through which to discover innocence, has in part resulted in the conviction and imprisonment of hundreds, or perhaps even thousands, of innocent persons in a recent fifteen-year time period.[4]

In the current adversarial system, the mechanisms available to discover innocence are few and often impossible for innocent persons to access. Academics and practitioners have proposed several reforms to address the crisis caused by the convictions of innocent persons. In essence, these proposals focus on improving current criminal procedures, such as making witness identifications more reliable, ensuring that confessions are not coerced, and sanctioning prosecutors and police officers for improper actions.[5] However,

1. In *Nix v. Whiteside*, 475 U.S. 157, 171 (1986), the Supreme Court examined defense attorneys' obligations to their clients and found that an attorney's refusal to cooperate with a defendant's perjury at trial is "consistent with the governance of trial conduct in what we have long called 'a search for truth.'" The Court's conclusion seems more of an aspiration than a real tenet of the adversarial system, where the focus is on whether the prosecution can prove guilt beyond a reasonable doubt. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364–65 (1970) (holding that Due Process requires the government to prove guilt beyond a reasonable doubt). In the adversarial system, there might be legal guilt in the absence of a correct verdict, such as where a factually innocent person is convicted.

2. *See, e.g.*, *Winship*, 397 U.S. at 364–65 (requiring that the prosecution prove charges beyond a reasonable doubt).

3. A long-standing debate over protecting the innocent has led to various proposed ratios between how many guilty should go free so that one innocent may avoid punishment. *See generally*, Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 174, 182–84 (1997) (citing Blackstone for the proposition that "ten guilty persons [should] escape . . . [to protect] one innocent [from] suffer[ing,]" and Fortescue for the proposition that the ratio should be set at twenty-to-one to avoid that one innocent execution.).

4. *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 532 (2005) (finding, between 1989 and 2003, 340 exonerations—"an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted"—and suggesting the possibility that over 29,000 persons should have been exonerated in the period studied). One organization, The Innocence Project, at the Benjamin Cardozo Law School, claims that 205 persons have been exonerated based on DNA evidence alone. Press Release, Innocence Project, Byron Halsey Is Fully Exonerated in New Jersey After DNA Proves His Innocence in 1985 Child Rapes and Murders (July 9, 2007), *available at* http://www.innocenceproject.org/Content/689.php.

5. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1128 (2005) (arguing that "a tolerance for error has become woven into the fabric of the legal rules," such as those concerning pretrial release, venue, pretrial delay, joinder and severance, government disclosure, and guilty pleas); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L.

while each proposal seeks to improve the adversarial system, no proposal suggests changing the structure of the system so that defendants asserting innocence can compel the government and courts to search for truth.

This Article details specific innocence procedures. First, defendants would be entitled to plead "innocent." As a result of an innocent plea, the prosecution would be required, absent a compelling justification, to faithfully investigate the truth of defendants' innocence claims, as opposed to focusing on determining whether guilt can be proven beyond a reasonable doubt. In return for the prosecution's innocence investigation, the defendant would agree to cooperate with the prosecution, thus revealing virtually his entire defense. Specifically, a defendant claiming innocence would agree to waive his Fifth Amendment right to remain silent[6] and Sixth Amendment right to some confidential communications with an attorney.

In some cases, even after interviewing defendants who plead innocent and examining their claims and evidence, the government may remain convinced of a defendant's guilt and choose to proceed to trial. Then, an innocent defendant would normally have little or no chance of an acquittal. That is, assuming good faith, the prosecution may not believe the defendant's claims and would then possess adequate evidence to prove the defendant guilty at trial. Moreover, by exposing his case to the prosecution, the defendant would have lost any competitive advantage typically gleaned from the adversarial system. To protect a defendant who, in part, entrusts the government with his innocence claim, new criminal procedures would mandate the following protections at trial:

1. The government would be required to prove guilt to a higher standard than beyond a reasonable doubt;
2. Jurors could infer innocence from an innocent plea;

REV. 1271, 1275, 1280 (2005) (arguing that mistaken eyewitness identification is the leading cause of wrongful convictions and that false confessions account for fifteen to twenty-five percent of wrongful convictions); The Center on Wrongful Convictions at Northwestern University Law School, http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/eyewitnessstudy01.htm.

6. The Fifth Amendment privilege against self-incrimination applies in virtually all civil and criminal proceedings in federal and state jurisdictions. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964); *see also* Dickerson v. United States, 530 U.S. 428, 431–32 (2000) (clarifying that the holding in *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966), requiring warnings before the statements of a defendant in custody may be used in court, was based on the Constitution's Fifth Amendment requirement and not a Court rule).

3. Jurors could draw inferences favorable to the defendant from the defendant's prompt claim of innocence;
4. Jurors could presume that evidence and leads presented by the defendant but not pursued by the government would have been favorable to the defendant; and
5. Jurors could acquit the defendant upon finding that the government acted in bad faith.

Thus, to minimize the number of convictions of innocent persons, this Article urges a fundamental restructuring of the adversarial system. Part I distinguishes between factually innocent persons, who should never be convicted, and factually guilty persons, who should always be convicted, absent an applicable legal or policy consideration. Part II describes how the adversarial process is extremely dangerous for innocent defendants. Currently, innocent defendants must plead with prosecutors informally to investigate their claims of innocence. As a result, they expose their defenses to the prosecution far in advance of trial. Innocent defendants' only other alternative is to vigorously resist conviction and challenge the prosecution to prove their guilt beyond a reasonable doubt. This strategy risks presenting a jury with conflicting and inconsistent defenses that might seem incredible, such as "I am innocent of the crime. But, if it appears from the evidence that I might have committed the crime, I urge you to find me not guilty because the prosecution did not present evidence sufficient to prove my guilt beyond a reasonable doubt."

Part III describes how a search for truth would help reform the adversarial system. Part IV details innocence procedures and the obligations of defendants and prosecutors that would be triggered by a defendant's plea of innocent. Part V contains considerations and arguments that might undermine the rationale for innocence procedures, as well as refutations of those arguments. In particular, Part V focuses on whether jurors' knowledge of formal pleas of innocent would lead jurors to perceive that a defendant who pleads "only" not guilty is more likely to be guilty than the defendant who pleads innocent.

The Article concludes with a discussion of how innocence procedures would re-orient the focus of actors within the justice system. In exchange for obtaining defendants' evidence, prosecutors would have to investigate defendants' innocence claims to avoid adverse jury instructions. In addition, depending on the parties' compliance with innocence procedures, judges would have to

determine what additional instructions would be necessary to submit to the jury. In essence, the justice system would be more focused on achieving a correct result in cases where a criminal defendant knows he is truly innocent and formally pleads innocent.

I. WRONGFUL CONVICTIONS: FREEING INNOCENT AND GUILTY PERSONS

The number of innocent persons released from prison[7] demonstrates the critical need for the creation of innocence procedures and the attendant plea of "innocent." Indeed, the revolutionary use of scientific evidence[8] to prove innocence conclusively[9] leads to questions regarding whether the adversarial system can effectively ensure that large numbers of innocent persons will not be convicted.[10] In light of the problem presented by convictions of innocent persons, academics and practitioners have proposed a series of reforms, arguing, for example, that the role of defense attorneys should evolve to encompass more effective fact-finding,[11]

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7. At least several hundred innocent persons have been exonerated since 1989. *See* Gross et al., *supra* note 4; Innocence Project, *supra* note 4.

8. *See generally* Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 422–24 (2001) (concluding that the exonerations arising from the use of DNA evidence and the standards for admissibility of evidence under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594–95 (1993), where the Court held that scientific validity is the key to admissibility, have brought into question the forensic science that has been used in courts for the past century).

9. In examining eighty-six cases where defendants were exonerated, The Center on Wrongful Convictions at Northwestern University Law School, found that faulty eyewitness testimony affected the convictions of forty-six (53.5%) of the eighty-six defendants. The Center on Wrongful Convictions at Northwestern University Law School, *supra* note 5. "The average (mean) time between the arrest of the defendant and his or her exoneration in the eyewitness cases was 95 months—just short of 8 years." *Id.* The Center indicated that other reasons for erroneous convictions were police and prosecutorial misconduct, the testimony of informants, unreliable science, and false or coerced confessions. *Id.*

10. *See, e.g.*, Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 59 (1995) (urging that "a basic inquisitorial control, the requirement of 'reasoned judgment,' be incorporated into all nonjury criminal cases"); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1307 (2001) (advocating for post-conviction challenges and the creation of "a meaningful forum for the receipt and investigation of new evidence," akin to Britain's Criminal Cases Review Commission, which has the authority to investigate and examine cases for error after the appeals process); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 451 (1994) (disapproving Britain's curtailment of suspects' right to remain silent, such as during police questioning, without suffering adverse consequences and the move toward inquisitorial processes, while favoring the adversarial system as a method to protect "many of the characteristics of an open and democratic society").

11. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1591 (2005) (discussing the justice system's evolution

and that prosecutors should be more amenable to defense claims of innocence.[12] Others maintain that identification processes should be more reliable,[13] interrogation methods should be more refined,[14] "unsafe" jury verdicts should be subjected to more rigorous post-trial scrutiny,[15] police officers should be more honest,[16] and judges should be better.[17] Moving beyond practical suggestions about criminal procedures, others argue that prosecutors should be more open-minded[18] and subject to more frequent or severe punishment.[19] It seems that few expect the current system to pro-

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from adversarial adjudication to a system more akin to administrative decision-making, including reforms aimed at supplementing weakened defense counsel and refocusing them on tasks such as scrutinizing government evidence).

12. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-conviction Claims of Innocence*, 84 B.U. L. REV. 125, 125–32 (2004) (noting recent moves by prosecutors to remedy the problem of wrongful convictions, but also noting that prosecutors can have negative impacts on post-conviction innocence claims, both with regard to DNA testing and a prosecutor's cooperation or lack thereof with defense counsel, and concluding that prosecutorial resistance to post-conviction claims remains a problem, but that some reform is possible).

13. *See, e.g.*, McMurtrie, *supra* note 5, at 1275 (finding that eyewitness identification is the leading cause of wrongful convictions); Saks, *supra* note 8, at 424.

14. *See, e.g.*, Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 622–24 (2004) (advocating recording police interrogations of suspects as the key method to prevent false confessions). *But see* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 524–26 (1999) (challenging the proposition that improper interrogations are leading to a relatively large number of convictions).

15. *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1331–33 (2004) (arguing that trial and appellate courts should "carry a special obligation when a conviction was undergirded primarily with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or 'jailhouse snitch' testimony."). Although I conceived the phase "innocence procedures" and the concepts associated with them independently and prior to knowing about or reading Professor Risinger's article, it should be noted that it was Professor Risinger who apparently was first to publish the term "innocence procedures." He wrote: "However, it does not seem appropriate to give the defendant the untrammeled right to trigger *special actual innocence procedures* unilaterally and without judicial evaluation of the propriety and sufficiency of the circumstances alleged to make out an actual binary exterior-fact claim." *Id.* 1312 (emphasis added).

16. *See, e.g.*, Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1284–85 (2005) (arguing for repeal of absolute immunity for law enforcement witnesses in an effort to remedy the problems stemming from perjured police testimony).

17. *See, e.g.*, Hans Sherrer, *The Complicity of Judges in the Generation of Wrongful Convictions*, 30 N. KY. L. REV. 539, 540 (2003) (offering a critique of the judiciary's role in wrongful convictions in an effort to move toward decreasing their frequency).

18. *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 How. L.J. 475, 493 (2006) (concluding that psychological, social, and moral factors result in premature prosecutorial decisions).

19. *See* Ellen Yaroshefsky, *Wrongful Convictions: It is time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 297–98 (2004) (arguing for a system that will hold more prosecutors accountable and proposing an independent commission to examine alleged prosecutorial misconduct).

mote truth. Certainly, no reform proposal has as its central premise the requirement that the government and courts search for truth as the primary means to free innocent persons.

In contrast, the innocence procedures advanced in this Article provide an additional mechanism within the adversarial system to allow innocent persons to distinguish themselves from guilty persons. That is, most would concede that innocent and guilty persons are different from a moral perspective. Additionally, most would agree that a factually guilty person should almost always be convicted. It is true that a factually guilty person might also be a wrongfully convicted person. For example, police actions that might justify the exclusion of evidence needed to convict,[20] perjured testimony,[21] a new rule of law,[22] or prosecutorial abuse[23] might require a new trial or even the dismissal of the charges against a guilty person. Still, a factually guilty, but wrongfully convicted, person is morally culpable. In contrast to a factually guilty person, a factually innocent person has no moral responsibility and should not be legally responsible, provided the facts are adduced accurately and the law applied properly. However, through some error in the justice process, the innocent person, like the guilty person, might nonetheless be wrongfully convicted.

There are at least two types of factual innocence, one of which is more amenable to the application of innocence procedures. The first type of factual innocence, to which innocence procedures are less applicable, involves a factual dispute to which the fact-finder must apply a legal rule. This occurs, for example, when a defendant claims that his homicidal act was justified by the law of self-defense. Unfortunately, for whatever reason, a jury might find this factually innocent person guilty of murder even though a proper application of the law of self-defense to the universally objective facts would show that the defendant's action was legally justified. However, at trial, those facts might not have been reported

20. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961) (holding the exclusionary rule applicable to the states).

21. *See* Brian Murray & Joseph C. Rosa, *He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 21–25 (2001) (discussing how convicted persons might challenge perjury by an adverse witness and obtain a new trial, and suggesting that the standard for judicial evaluation of perjury should be uniform, not different based on whether the defendant is making a motion for a new trial under FED. R. CRIM. P. 33 or attacking a conviction via habeas corpus).

22. *See* Teague v. Lane, 489 U.S. 288, 299–305 (1989) (detailing complicated principles to determine when to apply rules of law retroactively).

23. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (discussing the roots of prosecutorial misconduct and proposing measures to help curtail it).

accurately or completely, or the jury might not have perceived the facts accurately. In any event, the case required the jury to apply law to facts, and a universally objective evaluation of the case would have resulted in an acquittal.

When jurors err in such a case, that is, when they misapply the law to the facts presented and engage in faulty or inaccurate mental judgments, convicted defendants will find it virtually impossible to overturn the resulting guilty verdicts. This is because judgments about factual disputes are almost exclusively within the province of the designated fact-finder, either a trial judge or a jury.[24] In essence, the error that the convicted defendant alleges—even if the allegation is true and the jury's verdict is wrong—will not be a basis for reversing the conviction. The jury's error is therefore an acceptable cost of the adversarial system, if for no other reason than that the system has no means to correct the error.

The second kind of factual innocence does not implicate any question of law and is not dependent directly on the fact finder's application of law to facts. Every reasonable person viewing the universally objective facts in this type of case would always conclude that the defendant is innocent. To illustrate, this factually innocent person would be one who was in another country at the time the solitary robber committed a robbery in the United States. In other words, to correct the jury's error, one could merely look at the universally objective fact of the case (that the defendant was in another country) without ever having to probe the mental processes or capabilities of the jurors who issued the objectively wrong verdict. There would be no issue of whether the jury properly applied the law to the facts. In this instance, even within the adversarial system, the jury's erroneous guilty verdict is always unacceptable, although some might consider it a justifiable cost inherent in a utilitarian system premised on adversarial processes. This second type of factual innocence—where every reasonable person viewing the facts would conclude that the defendant is innocent—is the subject of this Article.

24. FED R. CRIM. P. 32(j) permits appeals of convictions. *But see infra* notes 32, 50, 51 and accompanying text (discussing why findings of fact will almost never be overturned on appeal or through habeas corpus).

II. THE EFFECTS OF THE ADVERSARIAL SYSTEM ON INNOCENT PERSONS

A. The Limitations of Proof Beyond a Reasonable Doubt

In moving beyond the adversarial model, the justice system should first modify its approach to the concept of reasonable doubt. The reasonable doubt standard implies a philosophical and practical acceptance that a certain number of innocent persons will be convicted when the evidence points, erroneously, toward guilt. Indeed, the current U. S. system is focused on whether the prosecution can meet its burden of proof.[25] The system has no method through which to examine how to extricate innocent defendants where the evidence erroneously establishes their guilt beyond a reasonable doubt.

Unsurprisingly, hundreds of innocent defendants have been exonerated and recently released from prison, when the real number of innocent convicted persons might be in the thousands.[26] This harsh reality seems to be embodied in the widespread premise that an acceptable cost of the current justice system is that some innocent persons will be convicted and never exonerated. Of course, the world is not fair, and only the naïve would believe that no innocent person will ever be convicted. However, the purpose of innocence procedures is to compel a more thorough search for accuracy and thereby reduce the number of convictions of innocent persons without reducing the number of convictions of guilty persons.

The need for reform is poignantly illustrated by an ironic disparity in procedural rights allocated to innocent and guilty defendants. For example, an innocent defendant who knows, of course, that he is innocent, has no procedural right to compel the government to search for any exculpatory evidence. In contrast, the government, in every case, is required to notify every defendant, whether guilty or innocent, about the existence of exculpatory evidence, even where the defendant knows he is guilty and the evidence could result in the guilty defendant's wrongful

25. The Constitution does not require a particular form in explaining to the jury the meaning of reasonable doubt, but the jury instructions must correctly convey the concept of a reasonable doubt. *See* Victor v. Nebraska 511 U.S. 1, 5 (1994) ("[T]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." (quoting Holland v. United States, 348 U.S. 121, 140 (1954)). The burden of proof requires the government to produce evidence that creates a prima facie appearance of guilt and persuade the jury (or judge) that the evidence produced establishes the government's proposition that the defendant is guilty beyond a reasonable doubt. *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970).

26. *See* Gross et al., *supra* note 4; Innocence Project, *supra* note 4.

acquittal.[27] In one sense, of course, innocent and guilty defendants have equal rights in that the government must reveal exculpatory evidence to both of them. However, such a process might not achieve a just result. In a just system, every innocent defendant should be able to acquire additional evidence that would rightfully exonerate him while no guilty defendant should be able to acquire additional evidence that would wrongfully exonerate him.

In addition, through the exclusionary rule,[28] guilty (and innocent) defendants have many opportunities to eliminate government evidence that indicates their guilt. In a perfect and just system, guilty defendants should not be able to escape conviction through the elimination of such probative, truth-revealing evidence. Furthermore, guilty persons may inhibit the collection of probative evidence by refusing to testify[29] and thus avoiding an admission of guilt (assuming, theoretically, that they would not commit perjury while testifying). Upon their refusal to testify and subsequent silence, guilty defendants may then compel the trial judge to direct jurors not to draw any adverse inference from their refusal to testify and subsequent silence.[30] In contrast, an innocent person who testifies exposes himself to cross-examination and is not entitled to a favorable jury instruction. In an odd twist, the innocent defendant who testifies will often be punished for doing so. That is, the prosecution may request that the judge instruct the jury that the defendant who testifies is an "interested witness," thus implying that the defendant, despite being innocent, is less likely to be truthful because he has a substantial interest in the outcome of the case.[31]

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27. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that Due Process requires the prosecution to reveal exculpatory evidence that affects guilt or punishment).

28. *See* Mapp v. Ohio, 367 U.S. 643, 646–50, 657 (1961) (holding that the exclusionary rule, which prevents the use of improperly collected evidence in a criminal trial, applies in state prosecutions).

29. U.S. CONST. amend. V; *see also* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States" in virtually all civil and criminal proceedings).

30. *See, e.g.*, Carter v. Kentucky, 450 U.S. 288, 305 (1981) (holding "that a state trial judge has the constitutional obligation, upon proper request [by the defendant], to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by instructing the jurors that they may draw no adverse inference from the defendant's silence).

31. See *Reagan v. United States*, 157 U.S. 301 (1895), where the Court approved the following jury instruction after the defendant had testified:

> You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the

B. The Difficulty of Obtaining Post-Conviction Relief in the Adversarial System

Although practical impediments and legal rules constrain every defendant, the adversarial system can be particularly difficult for innocent persons to navigate after conviction.[32] All actors in the post-conviction process—defense attorneys, prosecutors, and appellate judges—are limited in searching for truth by the rules and roles unique to their institutional positions within the adversarial system. For example, the most significant practical loss to the innocent person might be the right to a publicly funded attorney. While defendants are entitled to attorneys through trial[33] and through an appeal[34] if the state offers one,[35] the right is severely weakened by a

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result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

Id. at 304.

32. Under FED. R. CRIM. P. 33(a), a court "may vacate any judgment and grant a new trial if the interest of justice so requires." *Id.* However, Rule 33(b)(1) requires that newly discovered evidence be raised via motion "within 3 years after the verdict or finding of guilty." *Id.* 33(b)(1). Where newly discovered evidence is not at issue, a "motion . . . grounded on any other reason . . . must be filed within 7 days after the verdict or finding of guilty." *Id.* 33(b)(2). Rule 33(a) might not provide relief to many innocent persons because new evidence can arise at any time, including long after the verdict. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 393 (1993) (rejecting relief in a federal habeas proceeding where ten years after conviction the petitioner presented affidavits indicating his brother admitted to the murder for which the petitioner had been convicted).

For an overview of the difficulty of obtaining post-conviction relief see Griffin, *supra* note 10, at 1292 (noting that the federal and state court procedures for granting a new trial are highly restrictive and that, therefore, the courts rarely grant a new trial). *See also* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 658–60 (2005) (discussing the structural impediments in state post-conviction regimes to proving one's innocence through new evidence); *cf.* Herrera, 506 U.S. at 400 (declining to require a state court to hear new evidence given the relevant state rule and that the Court could provide no habeas relief because, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact").

A defendant who is barred by a state procedural rule from introducing newly discovered evidence is not completely without an opportunity to challenge his conviction under federal habeas corpus, but the defendant's evidentiary burden is very high, rising to the level of a "miscarriage-of-justice," such that "prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House v. Bell, 126 S. Ct. 2064, 2076–77 (2006) (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

33. Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (holding that the Sixth and Fourteenth Amendments mandate publicly-funded attorneys for indigent defendants through trial).

34. Douglas v. California, 372 U.S. 353, 355 (1963).

35. *See* Smith v. Robbins, 528 U.S. 259, 270 n.5 (2000) ("The Constitution does not . . . require states to create appellate review in the first place." (citing Ross v. Moffitt, 417 U. S. 600, 606 (1974))).

lack of defense resources for investigation and effective individual representation.[36] Unfortunately, defendants' need for effective representation becomes more critical after the first appeal or the exhaustion of all appeals. Years or decades after the conviction, old evidence might be subjected to new scientific tests. Witnesses might recant or admit mistakes, or their perjury at trial might be exposed.[37] An incarcerated defendant with no attorney, or an overwhelmed one, has little opportunity to vindicate his innocence in this post-conviction adversarial atmosphere.

After conviction, an innocent defendant might argue for the first time that he is innocent, a claim that while truthful may appear inconsistent and incredible to prosecutors. This is because, almost always, that same defendant argued at trial that the prosecution's evidence did not establish proof beyond a reasonable doubt, an unsurprising and natural argument. That is, if that defendant had instead claimed innocence at trial, he would have created in the jurors' minds a virtual presumption that he must prove who committed the crime, a burden few defendants would accept as part of their defense. Rather than trying to find and prove who really committed the crime, the defendant will assert a simpler and easier defense by arguing that the prosecution's evidence does not establish guilt beyond a reasonable doubt. Unfortunately, but naturally, the defendant's early argument that the prosecution's evidence is lacking stands in sharp contrast to his later, post-conviction argument that he is innocent.

The moral power of a defendant's tardy and incongruent innocence claim, while true, is lost. In turn, a prosecutor's willingness to question the evidence will diminish after every judicial proceeding where the innocent defendant's legal culpability has been confirmed. These proceedings include the trial judge's denial of a

36. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1332 (2006) (noting a defense funding crisis that prevents effective investigation and representation, where, for example, an appointed attorney's caseload consisted of 300 criminal cases in a year as well as a private practice consisting of paying clients).

37. A witness who committed perjury at trial and then dies can never recant and provide testimony to exculpate a convicted innocent person. As long as the convicted person cannot prove the perjury, the perjurer's false testimony (known only to the defendant and the perjurer to be false) from the first trial can be reintroduced by the prosecution through a reading of the trial transcript at any subsequent proceeding or trial. *See* Mancusi v. Stubbs, 408 U.S. 204, 213–14 (1972) (permitting the reading of the testimony of the key witness from the first trial where that witness was unavailable for the re-trial ten years later). Police officers whose memories fade might not be able to remember additional circumstances of an interrogation or identification if those circumstances are made relevant by a new court ruling.

motion for a judgment of acquittal after the government's case;[38] the jury's verdict;[39] the judge's denial of the defendant's motion for a new trial;[40] the innocent person's recent, post-conviction claim of innocence; appellate courts' affirmations of convictions;[41] and federal courts' denials of habeas corpus relief.[42]

The claims of factually innocent persons are diluted further by other innocent persons, whose claims of innocence depend not only on facts but also on the application of the law to those facts. Thus, innocent persons who suffered a jury's mistaken application of law to facts are unlikely ever to have their convictions reversed[43] because the justice system is not capable of examining and correcting the mental processes of the jurors that caused their mistake in judgment. Faced with several types of defendants' claims—factual innocence based on facts, factual innocence based on facts and law, and guilty but wrongly convicted because of a mistake of law—prosecutors, on whom innocent persons depend, might find late, but truthful, claims of innocence to be unbelievable.[44] Therefore, in confronting late innocence claims, except where physical evidence can objectively indicate factual innocence,[45] prosecutors will

38. *See* FED. R. CRIM. P. 29(a) ("After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.").

39. *See* FED. R. CRIM. P. 31 (requiring unanimous verdicts).

40. *See* FED. R. CRIM. P. 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.").

41. *See* 28 U.S.C. §§ 1253–54, 1291 (2000) (appeals to the U.S. Supreme Court and federal circuit courts).

42. *See* 28 U.S.C. §§ 2254–55 (2000) (state defendants' habeas and federal defendants' habeas); Herrera v. Collins, 506 U.S. 390, 400 (1993) (limiting federal courts' habeas review to constitutional, not factual, issues).

43. *See supra* note 32, *infra* notes 50, 51 and accompanying text (discussing why reversals of factual decisions are rare).

44. *See generally* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1614–24 (2006) (arguing that prosecutors suffer cognitive failures, which might be remedied through education on cognitive bias, reversing roles and taking the position of the defense, seeking second opinions, and becoming involved in innocence projects); Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1237 (2005) (urging that the innocence movement focus not only on creating more reliable science, lineups, and confessions but also on structural changes in the justice system, including, most importantly, an examination of how prosecutors control dockets); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 239 (2005) (advocating more prosecutor involvement in obtaining exculpatory and technical information and assisting defendants with their claims of innocence after being convicted, and urging that ethical rules more specifically cover prosecutors' post-conviction actions).

45. *See generally* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 410–12 (2002) (advocating making scientific-testing statutes more effective and proposing model,

resort almost exclusively to the adversarial process, which has already failed the innocent defendant.

Vindication of innocence is even more difficult to obtain where state ethical systems do not impose upon prosecutors a duty to inquire into claims of innocence. To be sure, prosecutors have a constitutional duty to reveal exculpatory information.[46] They also have ethical duties to "seek justice"[47] and to reveal evidence that tends to "mitigate the degree of the offense, or reduce the punishment."[48] However, in the cases of innocent persons who have been convicted and sentenced but who continue to, or for the first time, claim innocence, prosecutors have no ethical duty[49] to assist in investigating such claims.

All convicted defendants face significant limitations on introducing newly discovered evidence under rules of procedure,[50] and they have only limited access to federal habeas corpus.[51] To have any

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post-conviction ethical obligations for prosecutors, including requirements to seek truth, continue to reveal exculpatory evidence, and utilize the most accurate scientific methods); Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENG. L. REV. 663, 666–67 (2001) (advocating cooperation among prosecutors and defense attorneys, at least where evidence may be tested for DNA and the court has provided funding for the testing).

46. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's failure to reveal material, exculpatory information relating to guilt or punishment violates Due Process).

47. *See, e.g.*, N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 7-13 (N.Y. State Bar Ass'n 2007) ("The responsibility of a public prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict.").

48. *Id.*

49. *See* Goldberg & Siegel, *supra* note 45, at 410–12.

50. *See* FED. R. CRIM. P. 33(b)(1) ("Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.").

51. *See* 28 U.S.C. § 2241(c)(3) (2000) (limiting habeas corpus to a violation of the United States Constitution, laws, or treaties); *id.* § 2244(b) (limiting successive applications for the writ of habeas corpus); *id.* § 2244(d)(1) (mandating a "1-year period of limitation . . . to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"); *id.* § 2254(a) (limiting habeas for state prisoners to violations of "the Constitution or laws or treaties of the United States"); *id.* § 2255 (indicating the habeas access of federal prisoners and also imposing a requirement that habeas petitions be filed within one year from "the date on which the judgment of conviction becomes final" or from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence").

"As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error." House v. Bell, 126 S. Ct. 2064, 2076 (U.S. 2006) (citing Murray v. Carrier, 477 U.S. 478, 485 (1986). In *House*, the Supreme Court concluded that:

> A petitioner's burden at the gateway stage [to merit a hearing] is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find

new facts considered, defendants must meet the Supreme Court's extraordinarily high burden of finding and proving that new evidence is more likely than not to convince any reasonable juror to have reasonable doubt about guilt.[52] Furthermore, the Supreme Court requires that to prevail on a habeas corpus petition,[53] a petitioner must not only produce new evidence but must also "demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt."[54] Thus, after trial, the innocent, albeit convicted, defendant's vindication becomes almost impossible because appellate and habeas corpus decisions are almost always predicated on questions of law, not questions of fact. A jury's decision to find an innocent person guilty is always incorrect, but legal mechanisms make reversal of the erroneous verdict almost impossible to obtain.[55]

III. REFORMING THE ADVERSARIAL SYSTEM: TRUTH TO VINDICATE INNOCENCE

The purpose of innocence procedures is to discover whether a defendant's claim of innocence is truthful. The innocence procedures advanced here consist of, first, pre-trial investigations and inquiries and, second, protective jury instructions at trial. The procedures begin with the adoption of the "innocent" plea, while retaining the traditional pleas of guilty and not guilty. A defendant could invoke innocent procedures when he would normally plead guilty or not guilty, that is, at the arraignment on an indictment, complaint, or other final accusatory instrument.

The defendant's innocent plea would trigger pre-trial investigations that focus on determining the truth of the defendant's innocence claim rather than on collecting evidence sufficient to prove guilt beyond a reasonable doubt. The difference in the focus of government investigators, from proving guilt to investigating innocence, would be monumental. The justice process in a particular case would be converted from an adversarial contest to an

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him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

Id. at 2077.

52. *House*, 126 S. Ct. at 2076–77; *see also supra* text accompanying note 51.

53. *See* 28 U.S.C. §§ 2254, 2255.

54. *House*, 126 S. Ct. at 2077.

55. *See* Griffin, *supra* note 10, at 1292–94.

inquisitorial inquiry.[56] While the government's investigators would still work closely with prosecutors, they would look at evidence differently, trying to determine whether it pointed toward innocence instead of evaluating whether it would be sufficient to convince a jury of the defendant's guilt.

The change in focus would mean that investigators would scrutinize evidence more thoroughly and at a much earlier stage of the justice process. To some extent, if it proceeded to trial, the government would have to disprove the defendant's claim of innocence or, at a minimum, defend its investigation of innocence, a significant additional evidentiary burden. Thus, the government would be more circumspect about its own witnesses and more open to defense witnesses. In evaluating evidence and following defense leads, government investigators would communicate more freely and have more discussions with members of the defense team.

New jury instructions at trial would permit the jury to draw inferences favorable to the defendant upon finding an incomplete government investigation or an investigation conducted in bad faith. Government agents would thus have to testify at trial about the vigor with which they pursued the defendant's innocence claim. To avoid adverse jury instructions and the appearance of pre-judging the evidence and, thus, any resultant jury perception of government incompetence or animus toward the defendant, government investigators would have powerful and compelling incentives to investigate innocence claims completely and with the utmost integrity.

An important qualification is essential. Under innocence procedures, the government would not be required to conduct any investigation at the behest of a defendant. However, as noted below, the government would sustain adverse jury instructions for failing to conduct an investigation. Indeed, the government should not be at the mercy of a defendant intent on misleading its investigators or exhausting its resources. Thus, to the extent that a

56. The inquisitorial system is characterized by a judge who "plays the pivotal role in adducing the facts and deciding every case." Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 175–76 (2003) (concluding that the adversarial system is more rational than and superior to the inquisitorial system). *But see* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183–84 (2005) (arguing that a fully adversarial American system, at least in regard to civil law, arose as late as 1938, with the merger of law and equity, and that some inquisitorial devices survived. "[T]he truth is that inquisitorial procedure is neither alien to our traditions nor inherently unfair. As late as the nineteenth century, Anglo-American courts of equity (from which, in fact, masters originally emerged) employed a mode of procedure, which like that used in the courts of continental Europe, derived from the Roman-canon tradition and thus was significantly inquisitorial.").

jurisdiction might formulate innocence procedures to require an investigation, the government should always have the right to ask the court to issue an order preventing defendants from improperly invoking innocence procedures.

To counter the government's decision not to conduct an innocence investigation, and so long as he pleaded "innocent," the defendant would be entitled to several favorable jury instructions. Those instructions would: (1) mandate a higher burden of proof than reasonable doubt; (2) permit an inference of innocence from a plea of innocent; (3) allow a favorable inference from a prompt claim of innocence; (4) allow an inference that uninvestigated evidence is favorable to the defendant; and (5) permit acquittals where the government has acted in bad faith in failing to conduct an innocence investigation. In practice, the new jury instructions would increase significantly the likelihood of an acquittal if the government failed to conduct an innocence investigation or did not file a motion with the court to avoid a vexatious or improper innocent plea and the procedures invoked through such a plea. Absent such a result, prosecutors would have little motivation to assist defendants in their claims of innocence.

In return for a government investigation of innocence and highly favorable jury instructions, a defendant would have to waive two of all defendants' most sacrosanct constitutional protections—the right to remain silent[57] and the right to have confidential communications with one's attorney.[58] Indeed, when defendants claim innocence, they are in essence pleading for an inquisitorial process in which the prosecution, instead of perhaps a judge in an inquisitorial system, learns all the facts of the defense case. Unfortunately, the structure of the current adversarial system does not encourage or even allow innocent persons to invoke any process similar to innocence procedures. Simply, no innocence procedures or pleas exist. Except for insanity[59] and some defenses that offer

57. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (holding that the right to remain silent applies at almost every civil and criminal proceeding).

58. *See* Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (holding that the privilege exists even after a client's death); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (holding that the attorney-client privilege applies to corporations). The secrecy of communications embodied in the attorney-client privilege is apparently based largely on an assertion in a treatise by Professor Wigmore. Paul R. Rice, *Attorney Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853, 859 (1998).

59. *See* 18 U.S.C. § 17 (2000) (providing that the burden lies with the defendant to prove the affirmative defense of insanity); FED. R. CRIM. P. 12.2 (outlining the notice requirements of an insanity defense).

the hope of mitigating mental states,[60] pleas are limited to guilty, not guilty, or nolo contendere.[61]

In pleading not guilty, innocent as well as factually guilty persons make a cost-benefit analysis that the possible benefits of proceeding to trial outweigh the risks. Despite the possibility of high costs, such as a prison sentence, an innocent defendant might make a moral choice to persist with a plea of not guilty even if the risk of going to trial outweighs the benefit of pleading guilty. In contrast, when confronted with the same overwhelming evidence, a different innocent person might evaluate the costs and benefits differently and plead guilty.[62] Of course, the values inherent in a moral decision to persist in a not guilty plea are weighted components of the innocent person's cost-benefit calculus.

Through innocence procedures, innocent defendants can better retain their moral positions and argue honestly for innocence because, instead of hoping only for acquittal at trial—a tenuous prospect that might lead to a false guilty plea to avoid a harsh sentence—they would have the right to an innocence investigation prior to trial. The possibly harsh sentence upon an erroneous conviction might be outweighed by the innocence procedures' requirement that the government investigate the case more thoroughly and the possibility that the government's investigation would induce it to discontinue its prosecution. If a defendant fails to obtain a pretrial dismissal, the favorable jury instructions granted by innocence procedures would afford the defendant a better chance for acquittal at trial. Thus, at least during pre-trial procedures, innocent persons would be less likely to falsely plead guilty to avoid a harsh sentence upon conviction.

At the same time, the government could better foster an accurate outcome if, at an appropriate point in the adversarial process, defendants have the opportunity to assert innocence and receive material support from the government in the investigation of innocence claims. Even with a new focus on finding truth, innocence

60. Mitigating mental states can be numerous depending on how one categorizes them. They might include guilty but mentally ill (more a verdict than a plea or defense); heat of passion justifying conviction of manslaughter but not murder; and extreme emotional disturbance, a type of extreme recklessness that reduces murder to manslaughter. *See generally* MODEL PENAL CODE § 210 (1980).

61. *See* FED. R. CRIM. P. 11(a) (pleas available in the federal system include "not guilty, guilty, or (with the court's consent) nolo contendere").

62. An innocent person may plead guilty even while professing innocence before a court. In *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), the Supreme Court held that a guilty plea can be made voluntarily and intelligently, and does not constitute a compelled plea in violation of the Fifth Amendment, where the defendant indicated he was innocent but pleaded guilty only to avoid the death penalty.

procedures would be consistent with current law and rules that require the government to provide defendants with significant material assistance, such as attorneys,[63] discovery materials,[64] and expert witnesses.[65] The development of innocence procedures would not alter attorneys' ethical approaches, fact-finding, or legal work, but the procedures would instill a different motivation in investigators when a defendant asserts innocence. The focus of the justice process would be on finding evidence that showed what really happened rather than on trying to collect just enough evidence to prove guilt beyond a reasonable doubt.

In an adversarial system, innocent defendants—like guilty defendants—are entitled to resort to any legally acceptable strategy to secure freedom.[66] Defense attorneys who find witnesses that provide incriminating evidence are duty-bound not to reveal the witnesses to prosecutors.[67] In contrast, prosecutors are always

63. *See* Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (concluding that state-funded counsel is a constitutional right of indigent criminal defendants).

64. *See* FED. R. CRIM. P. 16(a) (directing release, upon the defendant's request, of statements, physical evidence, and reports and examinations, including those of experts).

65. *See* Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (holding that Due Process requires the government to provide an indigent defendant with a psychiatrist where the defendant showed that his sanity would be a significant issue at trial and where a psychiatrist would be needed to resolve relevant issues, such as future dangerousness).

66. *See, e.g.*, N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 7-4 (N.Y. State Bar Ass'n 2007) ("The advocate may urge any permissible construction of the law favorable to the client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail.").

67. The American Bar Association's *Model Rules of Professional Conduct*, Rule 1.6(a) (Confidentiality of Information), provide that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6(a) (2007). Of course, presumably no factually guilty client would ever permit his defense attorney to inform the prosecution of a witness who could inculpate the defendant. Rule 1.6(b)(1–6) of the *Model Rules* does permit attorneys, without having to obtain permission from a client, to reveal information related to the representation of a client in some instances, such as when death or a crime of fraud might occur if the information is not revealed. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6(b)(1–6). However, the permissible instances do not permit revealing the existence of an incriminating witness without the informed consent of the client. To illustrate a similar state rule, the NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (2007), provides that a lawyer shall not knowingly "[r]eveal a confidence or secret of a client," *id.* 4-101(B)(1) or "[u]se a confidence or secret of a client to the disadvantage of a client" *id.* 4-101(B)(2). The New York Code provides instances, similar to those in the American Bar Association's Model Rules, when a lawyer "may" reveal confidences or secrets, none of which permit revealing witnesses whose testimony might be adverse to the interests of the defendant. *Id.* 4-101(C)(1–5). The New York Code defines "confidence" and "secret" broadly and would seem always to prohibit a defense attorney from revealing the existence of an adverse witness. "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* 4-101(A).

bound to reveal exculpatory evidence[68] and seek justice.[69] However, in bringing charges, prosecutors indicate their determination to harm the interests of the defendant, whom the prosecutor presumably believes is guilty.[70] The adversarial system promotes this confrontational process and does not require, at any stage, a formal consideration of whether a defendant is innocent.

IV. INNOCENCE PROCEDURES WITHIN THE ADVERSARIAL SYSTEM

Prior to trial and without suffering adverse consequences, every defendant should have the right to plead innocent and invoke what I have termed "innocence procedures." If defendants did nothing, then no part of the current adversarial process would change. There would be no diminution in defendants' rights unless they waived them in exchange for the benefits of the innocence procedures. The procedures would be a benefit conferred by the states and federal government and would be consistent with the authority of the states to provide defendants, or citizens in other contexts for that matter, with rights beyond those provided by the federal Constitution.[71] Innocence procedures could be designed so that only innocent persons or the most reckless guilty persons would likely choose to plead innocent.[72]

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68. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (mandating the disclosure of exculpatory evidence that affects guilt or punishment).

69. *See, e.g.*, N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 7-13 (2007) ("The responsibility of a public prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict."). *See also* MODEL RULES OF PROF'L CONDUCT R. 3.8(a)–(b) (requiring prosecutors to have probable cause before bringing any charge and to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel").

70. *See generally* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 7-103(A) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.").

71. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (concluding that the Court will not review state court decisions resting on "adequate and independent state grounds").

72. That is, for rational, strategic reasons, few guilty defendants would try to compel innocence procedures if doing so required them to submit to questioning under oath. One can surmise that such a guilty defendant would always lie to prosecutors and deny involvement in the charged crime, which would open the defendant to a charge of perjury. At a minimum, the defendant's statement would fix the defense theory of the case at an early stage, thus preventing the defense from adapting to the prosecution's evidence and strategy. Invariably, guilty defendants who lie will offer some truthful information to try to convince investigators of their veracity and innocence, which can lead to witnesses and evidence that contradict the defendant's claims. More often, defendants might simply fabricate a story, which prosecutors can investigate and refute, thus showing jurors at trial that the defendant lied to protect his interests and allowing prosecutors to argue that he lied to hide his crime.

If jurisdictions did adopt innocence procedures, the three main components of the procedures would consist of (1) the government's obligation to investigate particularized claims of innocence, (2) the defendant's obligation to submit to questioning and to reveal some communications with his attorney, and (3) the court's obligation to provide jury instructions favorable to a defendant who has complied with his innocence obligations and to instruct the jury when the prosecution has not properly complied with its duty to investigate innocence claims faithfully. These procedures would be available prior to and during trial, but a separate procedural system could be devised for post-verdict and post-conviction innocence claims. In choosing to enter a formal plea of innocent, defendants would open themselves and their attorneys and witnesses to an inquiry by the government. However, in making an innocence claim, like pleading not guilty, defendants would also place an obligation on the government. In the current system, the prosecutor's obligation is to prove guilt beyond a reasonable doubt. Alternatively, in a system containing innocence procedures, the prosecutor would receive assistance from the defendant to discover the truth and would be motivated to do so by the imposition at trial of a higher standard than beyond a reasonable doubt.

A. Obligations of Defendants

To invoke innocence procedures, defendants would have to relinquish the more protective procedures used in criminal litigation in favor of procedures more common in civil litigation[73] and

73. *See generally* FED. R. CIV. P. 7 (pleading special matters), 9 (signing of pleading, motions, and papers), 11 (depositions), 27 (interrogatories), 33 (interrogatories to parties), 36 (requests for admission). Thus, the Federal Rules of Civil Procedure provide an existing basis for innocence procedures because they are more focused on arriving at truth than are the federal and state rules of criminal procedure, which revolve around the beyond-the-reasonable-doubt standard and where the defense attorney is obligated to work to free the defendant, even if the attorney knows the defendant is guilty and the attorney is hiding the truth. *See supra* note 67. Perhaps most significantly, through interrogatories and depositions, the Civil Rules permit adverse parties to question each other, a procedure not currently available to prosecutors but which would be authorized under innocence procedures (that is, prosecutors' interviews of defendants under oath). Moreover, the Federal Rules of Criminal Procedure, in essence, already require both the prosecution and defense to assist each other's investigation through the production, via subpoena, of "books, papers, documents, data, or other objects the subpoena designates." FED. RULE CRIM. P. 17(c)(1). Indeed, upon a defendant's request, Federal Rule of Criminal Procedure 16 (Discovery and Inspection) requires the prosecution to produce a wide variety of documents and objects, *id.* 16(E), as well as information about or statements obtained from the defendant, *id.* 16(a)(1)(A)–(D). Innocence procedures would require an additional step in that the prosecution would have to investigate defense leads based on available information or face unfavorable jury

inquisitorial processes.[74] Initially, to invoke innocence procedures, defense attorneys would have to file an affidavit or affirmation indicating that upon information, belief, and investigation their clients' claims of innocence are true. Of course, attorneys whose clients admitted guilt in a confidential communication could not file an affidavit or affirmation truthfully asserting innocence. Those clients could not invoke innocence procedures.

An illustration of how innocence procedures can be invoked exists in the federal civil system, where Rule 11(a) of the *Federal Rules of Civil Procedure* requires that every pleading, written motion, or other paper must be signed by the attorney of record.[75] Rule 11(b) directs that:

> By presenting a pleading, written motion or other paper to the court, whether by signing, filing, submitting, or later advocating, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.[76]

Similarly, in criminal cases, the defense attorney's affirmation would indicate the attorney's belief in his client's assertion of innocence and encompass the existence of a prior investigation leading to and supporting the attorney's affirmation of innocence. In the civil system, courts can sanction attorneys and their clients for vio-

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instructions at trial if failing to do so. However, innocence procedures would not require the prosecution to produce contact information of prosecution witnesses, such as those who might face threats.

74. Specifically, defendants would have to submit to questioning, as do persons under investigation in inquisitorial systems and parties in civil litigation. *See* Walpin, *supra* note 56, at 176; *see also* FED. R. CIV. P. 11 (depositions), 27 (interrogatories). Parties may take the oral, *id.* 30(a)(1), or written, *id.* 31(a)(1), depositions of any person and may serve an interrogatory on any party, *id.* 33(a).

75. *Id.* 11(a).

76. *Id.* 11(b).

lations of the rules, such as making statements or filing papers without a proper factual or legal basis.[77] Innocence procedures would provide for similar sanctions against criminal defense attorneys.[78]

It can be argued that an attorney affirmation requirement on innocence would inhibit communication between the attorney and the client. To an extent, this is true, but no more so than in civil litigation and only for factually guilty defendants in criminal litigation who wish to raise a false claim of innocence to obtain the benefits of innocence procedures. The factually innocent defendant would have discussed his case freely with his defense attorney. The attorney and the innocent defendant would have made a decision that it is more advantageous to invoke innocence procedures than to continue with the current, conventional adversarial process. However, in invoking innocent procedures, the attorney and defendant would indirectly reveal the fundamental component of their communications—the defendant's assertion of innocence to the attorney, which would be conveyed to the government through the attorney's affirmation that he has a good faith basis in believing that the defendant is innocent.[79]

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77. *See id.* 11(c).

78. A reverse exclusionary rule might develop in cases where defendants plead innocent and assist their attorneys in making false statements or engaging in improper conduct. Such an exclusionary rule would apply when defendants or defense attorneys engage in intentional, knowing, and, possibly, reckless misconduct.

79. A competent innocent client might refuse to communicate with his defense attorney. If the client did not communicate assent to a plea of innocent and the invocation of innocence procedures, the attorney could not submit an innocence affirmation. The case would proceed like every current case in which the client does or does not communicate with the defense attorney.

Further, in cases involving mentally incompetent defendants, the innocent defendant/client who is unable to communicate innocence to his defense attorney would be unable effectively to assist in his defense and, like all similar defendants, would not be competent to stand trial. *See* 18 U.S.C. § 4241 (2000) (a defendant is incompetent if there is reasonable cause to believe he "may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"); *see also* Dusky v. United States, 362 U.S. 402, 402 (1960) (concluding that the "test [for competency] must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him"). Often detained in a mental institution until found competent to be tried, the incompetent innocent defendant would suffer more harm than would the incompetent guilty defendant. Innocence procedures might allow for defense attorneys, without the client's assent—because he is incapable of assenting—and with a court's approval, to provide normally confidential or privileged information to prosecutors in an effort to aid the innocent incompetent defendant who is being held in a mental institution awaiting a trial. The information provided by the defense attorney might vindicate the client, but be inaccessible to the client simply because of his mental or emotional deficiency (which requires institutionalization until competent). Innocence procedures

For whatever reason, some innocent defendants might refuse to communicate exculpatory information to their attorneys, or some guilty defendants might lie to their attorneys. In both instances, attorneys would lack the foundation to make and file an affirmation of innocence, assuming they perceived the guilty client's lie. Where the competent defendant did not communicate, the defense attorney either could not faithfully affirm that the client was innocent or, even where independent evidence indicated innocence, the attorney could not make the affirmation without the client's permission. However, the competent defendant who does not discuss his culpability but, nonetheless, consents to his attorney's affirmation of innocence would be presumed to have asserted his innocence. This presumption would be necessary to prevent guilty defendants from acquiring the benefits of innocence procedures, such as an enhanced government investigation, and then claiming they need not submit to questioning because, given their silence, they never, in fact, asserted their innocence.

Some incompetent defendants might not know that they are factually innocent. Even without knowing, they should be entitled to have their attorneys affirm innocence on their behalf so long as the attorneys conduct a good faith investigation that, in the attorney's belief, indicates innocence. As in any civil or criminal case, attorneys could be sanctioned for making frivolous innocence claims.[80]

The process for the defense attorney in asserting a good faith basis of innocence would be similar to what attorneys must do to file and litigate civil cases[81] or to make pre-trial motions in criminal cases.[82] Civil attorneys must file only cases they believe to have

might provide that such privileged and confidential information could not be used in the prosecution's case-in-chief at trial, assuming the defendant becomes competent to stand trial, unless the defendant, when competent, ratifies his attorney's decision. In almost all other instances, innocence procedures would allow the prosecution to introduce the privileged and confidential information (submitted voluntarily by the defense) in its case-in-chief. Even if the information were not allowed in the prosecution's case-in-chief, it could be allowed to impeach any defendant who testifies at trial. *See* Harris v. New York, 401 U.S. 222, 226 (1971) (allowing the prosecution to impeach a testifying defendant with prior inconsistent statements that the government obtained illegally and could not introduce against the defendant in the prosecution's case-in-chief).

80. *See* FED. R. CIV. P. 11(c) (authorizing the imposition of "an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) [Representations to Court] or are responsible for the violation"); *see also* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 7-102(A)–(B) (N.Y. State Bar Ass'n 2007) (prohibiting false statements and furthering a client's fraud).

81. *See supra* notes 73–76 and accompanying text.

82. *See* FED. R. CRIM. P. 12 (pleadings and pretrial motions); FED. R. CRIM. P. 47 (motions and supporting affidavits). That is, given the structure of the Federal Rules, which already focus on pre-trial matters, innocence procedures could be encompassed within addi-

merit.[83] Similarly, given innocence procedures, criminal defense attorneys who learn of their clients' factual guilt through confidential conversations or independent investigations would be unable to assert innocence claims. In a system incorporating innocence procedures, defense attorneys would have to submit any recorded communications with their clients to the prosecution. This would be similar to the requirement in current criminal cases that prosecutors and defense attorneys must reveal the prior statements of witnesses they call at trial (except for the defendant's prior statements),[84] a requirement that itself is similar to the deposition and discovery process in civil cases, where the parties must disclose virtually all relevant requested information.[85]

Factually guilty defendants could almost never avail themselves of innocence procedures because, assuming some minimal level of attorney-client communication, their attorneys could not affirm a good faith belief in innocence. Even if a defense attorney was not certain of a client's innocence, the attorney would be unlikely to proceed with an innocence claim because it could provide prosecutors with the opportunity to acquire potentially incriminating or devastating evidence from the questioning of the client. Factually guilty defendants might claim that they could not communicate freely with their attorneys because doing so would mean that their attorneys could not affirm their clients' innocence and, thus, without an affirmation, factually guilty defendants could not plead innocent and receive the benefits of innocence procedures. Of course, the goal of innocence procedures would be to adduce precisely this result, leaving the procedures available only to defendants who know they are factually innocent.

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tional rules, although the process leading to a separate statutory authorization might promote a wider discussion of innocence procedures.

83. *See* FED. R. CIV. P. 11(b)–(b)(2) ("By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .").

84. FED. R. CRIM. P. 26.2 (requiring the prosecution and defense to turn over the prior statements of their witnesses after the witnesses testify on direct examination, except that the defense is not required to turn over the defendant's prior statements).

85. *See* FED. R. CIV. P. 30 (deposition upon oral examination); FED. R. CIV. P. 31 (depositions upon written questions); FED. R. CIV. P. 33 (interrogatories to parties). The disclosure of additional information in criminal cases, like the broader disclosure in civil cases, would help place a focus on discovering truth rather than maintaining a strict focus on determining whether the available evidence establishes guilt beyond a reasonable doubt.

A defense attorney's affirmation of innocence would entitle the defendant to innocence procedures, namely an enhanced prosecutorial investigation and favorable jury instructions, so long as the defendant complied with additional discovery requirements. As in civil litigation, the defendant would have to submit to more extensive discovery and questioning under oath.[86] To prevent defendants from frivolously invoking innocence procedures and violating discovery obligations, the government would be entitled to use at trial any affirmation, pleading, or evidence it acquired in the course of its innocence investigation, while the violating defendant would not be entitled to any legal benefits under the innocence procedures, such as the favorable jury instructions. Similarly, the prosecutor who violated the innocence procedures would not be entitled to use any evidence acquired from the defendant, except perhaps in impeaching a defendant who testifies falsely,[87] while the defendant would acquire all of the benefits of the innocence procedures, mainly the highly favorable jury instructions.

B. Obligations of Prosecutors and the Government

A main purpose of innocence procedures is to induce the government to conduct an enhanced pre-trial investigation and not pursue cases that might normally proceed to trial without an enhanced investigation. Of course, even after an enhanced investigation, the government will proceed to trial in some cases. Defendants who have pleaded innocent and opened themselves to inquisitorial scrutiny should be entitled to rely on legal procedures to provide a counterbalance to the advantage that the government obtains through acquiring a defendant's statements, attorney-client communications, and evidence. These procedures would be necessary when the prosecution remained convinced of the defendant's guilt and refused to halt the prosecution or offer an acceptable plea agreement.[88]

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86. *See supra* notes 84–85 and accompanying text (discussing how oral and written depositions in a civil case could provide a basis for some innocence procedures in a criminal case).

87. *See* Harris v. New York, 401 U.S. 222, 226 (1971) (permitting the state to use illegally obtained statements from the defendant in its cross-examination of the defendant, where the defendant's trial testimony contradicted his prior, illegally obtained, statements).

88. An innocent defendant might choose to plead guilty after making a cost-benefit analysis. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (permitting a guilty plea by a defendant who claimed he was innocent but wished to plead guilty to avoid a possible death sentence).

Even if a defendant invoked innocence procedures, the prosecution might not faithfully initiate or complete an investigation. The trial judge would have little legal authority or practical ability to compel prosecutors to perform a more extensive investigation.[89] However, prosecutors would have strong motivations to conduct sufficient investigations because defendants who assert innocence will be entitled to highly favorable jury instructions at trial. The jury would be instructed, for example, that the absence of a government investigation to recover evidence reasonably available to the government indicates that the evidence does, indeed, indicate innocence, even in the absence of the introduction of the evidence at trial.[90] Therefore, the failure of the government to conduct an adequate innocence investigation would increase the likelihood of acquittal significantly.

Through the invocation of innocence procedures, the trust that defendants place in prosecutors need not be blind because the presumptions and jury instructions triggered by the procedures would provide defendants with the means to counter unscrupulous or unreasonable prosecutors. As for reasonable prosecutors, when presented with additional evidence, some of them would discontinue a prosecution, but others would find that the defendants' statements and evidence did not indicate innocence and would proceed to trial. If innocent defendants' only option was to simply

89. The Federal Rules of Criminal Procedure provide little or no authority to judges to review the discretionary decisions of prosecutors, except perhaps for approving guilty pleas. *See* FED. R. CRIM. P. 11(b). The government possesses broad discretion over whom to prosecute. *See* Wayte v. United States, 470 U.S. 598, 607–08 (1985) (concluding that the decisions of government prosecutors must be within constitutional bounds but that courts have little authority or competence to oversee prosecutors).

90. A jury instruction on missing evidence has precedent in the "missing witness" jury instruction, which creates an adverse inference toward a party that does not produce a material witness who is solely within the party's control or about whom only the party has knowledge. *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE FIRST CIRCUIT § 2.11, *available at* http://www.med.uscourts.gov/practices/crpji.97nov.pdf ("If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if the witness would be favorably disposed to the government, failure to call the witness may justify an inference that his/her testimony would be unfavorable to the government. No such inference is justified if the witness is equally available or favorably disposed to both parties or if the testimony would merely repeat other evidence."); *see also* United States v. Mahone, 537 F.2d 922, 926–27 (7th Cir. 1976) ("The first thing that must be shown before a party can raise to the jury the possibility of drawing an inference from the absence of a witness is that the absent witness was peculiarly within the other party's power to produce. This requirement is met both when a witness is physically available only to the opposing party and when the witness has a relationship with the opposing party 'that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability' . . . . The second thing that must be shown is that the testimony of the witness would elucidate issues in the case. 'No inference is permissible . . . where the unpresented evidence would be merely cumulative.'") (internal citations omitted).

trust the prosecutor, they would be unlikely ever to invoke innocence procedures, especially since the prosecution office entrusted with the innocence investigation was the very office that brought formal charges against them. Defendants should not be placed in a position worse than they would have occupied had they never invoked innocence procedures. They should be able to counter the government's advantages.

First, and most significantly, when the defendant invokes and submits to innocence procedures, the government will be required to prove guilt to a higher level of certainty.[91] After the government has acquired the defendant's statements and witnesses' statements, it will have a significant strategic advantage if it refuses to discontinue its prosecution and proceeds to trial. The prosecution will be aware of almost all of the defense evidence and have ample time to counter it and to prepare to cross-examine defense witnesses and offer and prepare rebuttal witnesses. To offset these advantages, the prosecution should have the burden of proving the defendant guilty to a level higher than the beyond-a-reasonable-doubt standard.[92] This standard might encompass guilt to a moral certainty,[93] or as proposed in the sentencing phase of capital cases, to an absolute certainty,[94] proof beyond all reasonable doubt,[95] or to a

91. Although the defendant's plea would be "innocent," the jury's verdict must not consist of a choice between innocent and not innocent. Such a choice would deprive the defendant of the presumption of innocence and place upon him the burden of proving innocence. The jury's choice in verdicts should be between whether the prosecution has proven guilt to the level of the higher standard or not proven guilt to that level.

92. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that beyond-a-reasonable-doubt is the standard that the prosecution must meet in all criminal cases).

93. *But see,* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty,* 40 HARV. C.R.-C.L. L. REV. 407, 450 (2005) (questioning a standard of moral certainty because "what seems morally certain will depend upon facts as we know them at a given time. . . . [and] facts sometimes turn out to be quite shaky").

94. *See generally* Erik Lillquist, *Absolute Certainty and the Death Penalty,* 42 AM. CRIM. L. REV. 45, 71 (2005) (acknowledging the need for more certainty in capital cases but questioning the usefulness of higher standards of proof and urging jury instructions that jurors will likely follow). Lillquist argues:

> A large number of theories for justifying the standard of proof exist. Perhaps surprisingly, on none of these theories is there an ineluctable conclusion that death penalty cases ought to involve a higher standard of proof than ordinary criminal cases. The best case can be made under a balance of the harms approach, while a good case can be made (depending upon the assumptions one is willing to accept) on a balance of the errors approach. Other theories, though, seem to have no criteria on which to justify the use of a higher standard for capital cases.

Id. at 71–72.

95. *See* Leonard B. Sand & Danielle L. Rose, *Proof Beyond all Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May be Death?,* 78 CHI.-KENT. L. REV. 1359,

similarly high standard. Regardless, the standard must be greater than beyond a reasonable doubt.[96]

Second, the defendant who claims innocence should be entitled to favorable legal inferences and presumptions. Judges should instruct jurors that they may draw inferences favorable to defendants who claim innocence, waive their right to remain silent, and reveal confidential communications, at least indirectly through defense attorney affirmations. Jurors could infer that such defendants believe they are innocent in the manner in which prosecutors ask jurors to infer that a defendant believes he is guilty based on actions or statements indicating his "consciousness of guilt."[97] Indeed, innocence procedures would permit the defendant to argue to the jury that his actions indicated a consciousness of innocence.

In addition, the defendant might point to additional actions that indicate innocence, such as a present or prompt outcry or a willingness immediately to speak to law enforcement personnel. Prosecutors regularly ask jurors to draw an inference that a complainant (often in sexual assault cases) is credible because the complaint was made promptly or within a reasonable time.[98] Using

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1368 (2003) (urging the adoption of a beyond-all-possible-doubt standard in capital cases). "The beyond all possible doubt standard asks the jury to be absolutely certain of its factual findings before it may proceed to the penalty phase; this means that the jury should consider any residual doubts—doubts that fall in the margin between reasonable doubt and absolute certainty." *Id.*

96. One rationale for the higher standard is that it compensates defendants for disclosing their evidence to the prosecution. However, a second and perhaps equally important reason is that the prosecution should be held to a higher standard in cases where the defendant has shown that there is a higher than normal risk of convicting an innocent person. This second rationale would recognize that some verdicts might be "unsafe." *See* Risinger, *supra* note 15, at 1315 ("[T]he 'against the weight of the evidence' decision [used to review jury verdicts] provides no functional protection of the reasonable doubt standard. And on appeal the protection is even more diluted because the court is called upon to defer to the trial court's decision and reverse only for abuse of discretion. By this time, the soup is too thin to contain much nourishment at all. In those rare cases in which a criminal verdict of guilt is found to be against the weight of the evidence, the decision does not trigger double jeopardy protection, and a new trial will generally follow, subject only to decisions within prosecutorial discretion.").

97. *See, e.g.*, N.Y. STATE UNIFIED COURT SYS., CRIMINAL JURY INSTRUCTIONS (SECOND) CHARGES OF GENERAL APPLICABILITY: CONSCIOUSNESS OF GUILT, *available at* http://www.nycourts.gov/cji/1-General/CJI2d.Consciousness_of_Guilt.pdf ("In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt."). Currently, there is no similar jury instruction on consciousness of innocence.

98. *See, e.g.*, N.Y. STATE UNIFIED COURT SYS., CRIMINAL JURY INSTRUCTIONS (SECOND) CHARGES OF GENERAL APPLICABILITY: PROMPT OUTCRY, *available at* http://www.nycourts.gov/cji/1-General/CJI2d.Prompt_Outcry.pdf ("If you find that the complaint was made promptly or within a reasonable time, you may consider to what extent, if any, that fact tends to support the believability of the witness's testimony.").

the same rationale—that the timing of a person's conduct or complaint indicates a state of mind—prosecutors regularly ask jurors to infer a defendant's guilty state of mind from the defendant's silence prior to arrest, a time when it might have been natural for an innocent person to deny an accusation.[99] Prosecutors argue that a defendant, by remaining silent when a demonstration of innocence would have been natural, makes an admission about his involvement in the crime that formed the basis of the accusation.[100]

The same reasoning applies to the conduct and state of mind of innocent defendants. Judges instruct juries that a prompt complaint may support a complainant's believability.[101] They also permit prosecutors to introduce the defendant's pre-arrest silence as an exception to the hearsay rule to prove adoption of a statement that implies the defendant is guilty of or involved in a crime.[102] Similarly, where defendants show that they issued a prompt statement of innocence, they should receive a jury instruction that the statement—so long as they also plead innocent and consent to innocence procedures—permits the jury to draw an inference of innocence.

Third, innocence procedures should provide defendants with the right to block evidence the government obtains in violation of its innocence obligations, as well as a favorable jury instruction when the government does not assist in investigating innocence. Initially, at trial, judges would prohibit prosecutors who did not conduct a sufficient investigation from using evidence obtained from the defendant during the innocence investigation, such as the defendant's statements. However, that prohibition would place

99. *See* FED. R. EVID. 801 (stating that a statement is not hearsay and may be admitted if a party manifests an adoption or belief in the statement's truth). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). A prosecutor would argue that whenever accused of or implicated in a crime a person would issue a denial. Therefore, the prosecution should be able to admit at trial evidence that the defendant remained silent when it would have been natural to deny an accusation, a proposition approved in *Jenkins v. Anderson*, 447 U.S. 231, 239–40 (1980), where the Court concluded that "[e]ach jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Id.* However, after arrest, Miranda warnings, *see Miranda v. Arizona*, 384 U.S. 436 (1966), and an invocation of the right to remain silent, the prosecution's comment on the defendant's silence is "an affront to the fundamental fairness that the Due Process Clause requires." Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (distinguishing between the prosecution's use of the defendant's silence before Miranda warnings and after Miranda warnings, which imply a promise that silence will not be used against the defendant).

100. *See generally* discussion *supra* note 99.

101. *See, e.g.*, N.Y. STATE UNIFIED COURT SYS., CRIMINAL JURY INSTRUCTIONS (SECOND) CHARGES OF GENERAL APPLICABILITY: PROMPT OUTCRY, *supra* note 98.

102. *See supra* note 99 and accompanying text.

the innocent defendant in no better a position than he would be in if innocence procedures did not exist—fighting to prevent the prosecutor from proving guilt beyond a reasonable doubt.

An additional sanction would be necessary to ensure that the government assisted in an innocence investigation. Innocence procedures would mandate a jury instruction on the prosecution's lack of investigation and would be similar to the common "missing-witness" jury instruction, which directs that "if a party has it particularly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."[103] A similar instruction would allow the jury to infer that evidence the prosecution might have uncovered would have been favorable to the defendant. Thus, jury instructions that reward the defendant for claiming innocence and punish the government for not properly pursuing evidence of innocence would induce the government to conduct a thorough investigation. The government's innocence investigation would be necessary to overcome the inferences favorable to the defendant resulting from jury instructions and the higher burden of proof placed on the prosecution.

V. QUESTIONING INNOCENCE PROCEDURES

One primary potential counterargument to the innocence procedure model is that a formal plea of innocent might lead jurors to believe that defendants who plead not guilty are more likely to be guilty than those who plead innocent. Stated differently, some might argue that jurors will wield an unrevealed or unconscious bias against defendants who plead "only" not guilty instead of innocent. This is a fair concern, yet one that is nonetheless muted for several reasons.[104]

In order to oppose innocent pleas based on the foregoing argument, one would have to presume that jurors would disregard the trial judge's direction to presume innocence from a plea of not guilty. To be sure, all jurors bring some preconceptions to the

103. United States v. Anders, 602 F.2d 823, 825 (8th Cir. 1979) (quoting Graves v. United States, 150 U.S. 118, 121 (1893)).

104. It is important to note that in assessing the possible relative effects of implementing innocence procedures, it is only necessary to ensure that jurors do not view defendants who plead not guilty differently than they view them now, in the absence of innocent pleas. The justice system should therefore ensure that the existence of innocent pleas and innocence procedures does not affect the presumption of innocence as it applies to defendants who plead not guilty.

courtroom. However, jurors' beliefs about the presumption of innocence are no different from jurors' other erroneous and biased beliefs, which trial judges and attorneys confront regularly at every stage of every trial, from jury selection to the choice of jury instructions.

Nonetheless, to counter fears or the reality of such juror bias surrounding defendants who plead not guilty in jurisdictions where formal pleas of innocent exist, a defendant who pleads not guilty should be entitled to a jury instruction that he has no obligation to plead innocent or to invoke any type of "special" innocence procedure. Indeed, the fear that a jury might infer guilt from a defendant's failure to exercise a right that might be widely known to the public has long been a concern of the justice system. Nonetheless, probably the most prominent of such fears was remedied long ago with a jury instruction that is now routine and unremarkable. That is, in *Bruno v. United States*, the Supreme Court recognized that defendants who choose not to testify have the right to a jury instruction indicating that their failure to testify does not create any presumption.[105] Similarly, a defendant who exercises his right not to plead innocent and instead pleads not guilty should be entitled to an instruction that the jury should draw no inferences from his plea.

Moreover, as an equitable matter, defendants who plead not guilty should not be able to prevent other defendants from plead-

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105. Bruno v. United States, 308 U.S. 287, 293 (1939). In *Bruno*, the Court concluded that a federal statute required the federal trial judge, at the defendant's request, to instruct the jury that it should draw no presumption from the defendant's failure to testify. *Id.* The Court approved the defendant's proposed instruction:

> The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

Id. at 292 (quoting the requested jury instruction). In *Carter v. Kentucky*, 450 U.S. 288 (1981), the Court held that the jury instruction on the defendant's failure to testify is a constitutional requirement when the defendant requests the instruction and that judges must instruct juries that they may draw no adverse inference from the defendant's silence "to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Id.* at 305. Moreover, the Court stated:

> Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege.

Id. (internal citations omitted).

ing innocent and distinguishing themselves at trial in a system where currently a large majority of all defendants, almost all of whom plead not guilty at some point, are eventually convicted. In sharp terms, a truly innocent person has no means of preventing himself from being "infected" in the eyes of the jurors by the pool of all defendants who plead not guilty, the large majority of whom are convicted. Thus, if anything, the absence of innocence procedures might create a presumption of guilt for the innocent person in a system where almost all defendants plead not guilty and where a large majority of them are later convicted.

In fact, jurors might have very real and accurate perceptions about defendants in the current justice system. Indeed, at least 90% of federal defendants are convicted via guilty pleas or after trials,[106] while at least 68% of state defendants are convicted via guilty pleas or after trials.[107] While 24% of state cases are terminated through dismissals, only 1% of state cases are terminated through acquittals.[108] It would be the greatest injustice imaginable if those guilty defendants could deprive innocent persons of procedures that they could use to vindicate their innocence and escape prison. The problem with the current system is not that too many guilty persons are being convicted, or acquitted for that matter, but rather that too many innocent persons are being convicted. Innocence procedures would provide an avenue of hope for innocent persons who are currently indistinguishable from most guilty persons to the majority of jurors at trial.

In further opposition to innocence procedures, some might argue that a defendant who testifies and receives a favorable jury instruction under innocence procedures would be doing so at the expense of defendants, some of them innocent, who choose not to testify. However, the Constitution provides only that a defendant shall not be punished for not speaking or testifying.[109] It does not prevent the federal and state governments from providing additional benefits, especially when states base their decisions on state

106. In the federal system, in 2004, "[c]ases were terminated against 83,391 defendants." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS: SUMMARY FINDINGS, http://www.ojp.usdoj.gov/bjs/fed.htm (last visited Nov. 1, 2007). Ninety percent of the "defendants were convicted. Of the 74,782 defendants convicted, 72,152 (or 96%) pleaded guilty or no-contest." *Id.*

107. *See* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 24 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf.

108. *See id.*

109. *See Carter*, 450 U.S. at 305 (holding that upon the defendant's request, a judge must instruct the jury that no inference may be drawn from a defendant's decision not to testify).

law.[110] A favorable jury instruction for testifying is logically no different from a favorable jury instruction for not testifying. Morally, if one hypothesizes that innocent defendants are more likely than guilty defendants to testify, then a favorable jury instruction for testifying is more reasonable than a favorable jury instruction for not testifying.

Innocence procedures would not affect trials for defendants who plead not guilty nor would innocence procedures change the philosophy surrounding the nature of the adversarial system, which is presumably designed to convict the guilty and free the innocent. Instead, innocence procedures would move the focus of the system from accepting some convictions of innocent persons to attempting to prevent all convictions of innocent persons. Significantly, when resources are discussed, innocence procedures would affect only a very small number of cases. In fact, given one estimate, the conviction rate for felonies that are not dismissed might be over ninety-eight percent in the federal system.[111] Assuming that the vast majority of defendants in those cases are guilty, innocence procedures might be invoked in relatively few of those cases and perhaps also in the two percent of cases that do not result in convictions.

Innocence procedures might not even affect conviction rates because the procedures are designed to dispose of cases with dismissals when innocent persons convince prosecutors that they are, indeed, innocent. Thus, prior to trial, dismissals should occur more frequently, which would reduce the expenditure of governmental resources on trials, appeals, and imprisonment of innocent persons. In the current system, with its high conviction rates and what some consider the remote chance of obtaining post-conviction relief,[112] proving innocence at any time is especially difficult. Innocence procedures offer a method to reduce the number of convictions of innocent persons by disposing of cases prior to trial, without reducing the number of convictions of guilty persons.

110. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding that federal courts will not review state court decisions based clearly on adequate and independent state grounds).

111. *See* Christopher W. Behan, *Don't Tug on Superman's Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 303 n.573 (2003) (finding that, for the year 2001, conviction rates in military general courts martial and federal criminal trials were 95% and 98.37% respectively).

112. *See supra* notes 32, 50–55 and accompanying text (discussing the small likelihood of reversals on appeal and via habeas corpus where factual disputes are at issue).

CONCLUSION

A quest for truth might be the best means through which to free innocent persons facing conviction within the adversarial system. When faced with formal charges, innocent persons are at an extreme disadvantage. Believing the innocent person is guilty, the government has marshaled its resources and is ready to proceed to trial should the innocent person not accept an offered plea agreement. In contrast, possessing relatively few resources, innocent persons must rely on the high-risk defense of arguing to the jury that the prosecution has failed to meet its burden of proving the defendant guilty beyond a reasonable doubt. The innocent defendant has only two options. First, he can plead guilty or no contest[113] to lesser but ultimately false charges and suffer a criminal conviction and probable imprisonment. Second, he can risk the all-or-nothing outcome of proceeding to trial. In doing so, he will be acquitted and freed or convicted and imprisoned for a longer period than if he had falsely pleaded guilty. Without a third alternative, an innocent person faces a high risk of conviction and imprisonment.[114]

The adversarial process should better protect innocent persons by permitting them to choose or compel procedures that would help them prove their innocence. Defendants would have to relinquish what some would consider their most important rights in an adversarial system: the Fifth Amendment right to remain silent[115] and, to some extent, the Sixth Amendment right to have confidential communications with their attorneys.[116] Defendants would also have to subject almost their entire case to the scrutiny of prosecutors, who would be obligated to examine and seek evidence that might indicate the defendant's innocence.

Importantly, however, defendants should not be at a disadvantage if they claim innocence, reveal their case to the prosecution, and then learn that the prosecution is proceeding to trial anyway. Thus, so as not to prevent innocent persons from claiming innocence (by suffering the disadvantages that would arise from revealing their evidence), the justice system should provide a

113. *See* FED. R. CRIM. P. 11(a) (permitting pleas of not guilty, guilty, and nolo contendere).

114. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 106 (reporting that at least ninety percent of defendants in the federal system who made it to adjudication of their case were convicted in 2004); *see also* Behan, *supra* note 111, at 303 n.573 (suggesting that 98.37% of federal defendants whose cases are not dismissed are convicted).

115. *See* U.S. CONST. amend. V; *see also supra* note 6 and accompanying text.

116. *See* U.S. CONST. amend. VI.

mechanism for defendants to counter the prosecution's advantage. At trial, for a defendant who has pleaded innocent, the court should instruct the jury that:

1. Guilt is based on a standard higher than beyond a reasonable doubt;
2. Jurors may infer innocence (and a consciousness of innocence) from the defendant's early claim of innocence, plea of innocent, and waiver of Fifth and Sixth Amendment rights after being formally charged;
3. Jurors may presume that evidence or avenues not reasonably pursued by the government would have indicated the defendant's innocence; and
4. Jurors may acquit the defendant if the prosecution acted in bad faith during the course of the innocence investigation.

In addition, the prosecution should not be permitted to block innocence procedures unless it can prove to a judge beyond a reasonable doubt why the procedures are inappropriate. This rule is necessary because prosecutors would benefit from blocking virtually every defendant's request for innocence procedures. That is, in bringing formal charges, prosecutors have almost always acquired what they believe is enough evidence to convict the defendant. Without compulsory innocence procedures, prosecutors would have no motive or incentive to investigate further.

The current adversarial system cannot reverse the convictions of most innocent persons because those convictions result from investigators', witnesses', prosecutors', judges', and jurors' errors and mistaken judgments about the facts of a case. Such human error is not amenable to correction because, practically, the justice system cannot correct mistaken thinking and, formally, because legal rules prevent courts from second-guessing jury verdicts.[117] In addition, factual errors are difficult to correct because they require the acquisition of additional evidence, which is often impossible for an incarcerated person to obtain. What the justice system can do, however, is try to prevent innocent persons from being convicted, an all too common and tragic occurrence in today's criminal justice system.[118] While some innocent persons might always be

117. *See supra* notes 32, 50, 51 and accompanying text (discussing why reversals of jury decisions are rare).

118. *See* Gross et al., *supra* note 4 at 523–24 (indicating that hundreds of convictions of factually innocent persons occurred within a recent fifteen-year period).

convicted and incarcerated despite their innocence, the justice system can do more to avoid that result. Innocence procedures will help.