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Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures

ABOUT THE AUTHOR: Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah. I appreciate the helpful comments of participants in the New York Law School symposium *Exonerating the Innocent: Pre-Trial Innocence Procedures* as well participants in a faculty colloquium at the S.J. Quinney College of Law at the University of Utah (especially Dan Medwed and Cliff Rosky). Thomas Goodwin provided excellent research assistance.

FREING THE GUILTY WITHOUT PROTECTING THE INNOCENT

A recent thoughtful article by Tim Bakken discusses the plight of innocent defendants and proposes new procedures to prevent “factually” innocent defendants from being convicted at trial.¹ Bakken quite rightly draws attention to the important subject of preventing the conviction of innocent persons—a fundamental goal of the criminal justice system. In proposing his prescribed solutions, however, Bakken stands on shakier ground. His untested and unprecedented proposals seem quite likely to free countless guilty defendants without doing much to aid the truly innocent. Indeed, by overwhelming the criminal justice system with frivolous claims of innocence, Bakken’s proposal seems likely to swell the size of the criminal justice haystack of purportedly innocent defendants, thus making it more difficult to identify the needle of the truly innocent defendant enmeshed in the system. To truly help the innocent, we should be looking at other, more discriminating reforms that offer better prospects of separating guilty from innocent defendants.

Part I of this article raises questions about Bakken’s proposal. Bakken has provided inadequate safeguards to keep guilty suspects from taking advantage of the special procedures designed for those with reasonable claims of innocence, as a hypothetical case clearly illustrates. For example, the requirement of an affidavit from a defense attorney attesting to a plausible claim of innocence seems unlikely to prevent most guilty defendants from raising such an argument.

Once the floodgates are open to raising claims of innocence, the procedural changes Bakken proposes would become real obstacles to effective law enforcement. For example, Bakken’s requirement that prosecutors must conduct an “adequate” investigation will drain substantial resources from the courts to litigate such claims and from prosecutors who would be forced to protectively reinvestigate the cases of guilty defendants—resources not devoted to determining whether the defendant is actually guilty or innocent, but instead determining whether the prosecutor has investigated the question enough. This hijacking of judicial and investigative resources to evaluate what are likely to be countless frivolous cases of “innocence” pleas will surely mean that the other cases left in the system will receive less attention—including cases of truly innocent defendants.

Similarly problematic is Bakken’s plan to change the burden of proof for those who plead innocent from the current beyond-a-reasonable-doubt standard to that of “moral certainty” or “absolute certainty.” This change would make it essentially impossible for prosecutors to establish guilt in a criminal trial. As a result, innumerable guilty defendants would be freed simply because prosecutors could not satisfy the new and novel requirement. These and other changes suggested by Bakken accordingly pose extreme risks, particularly given the way the “criminal justice funnel”² currently operates with large numbers of criminals escaping conviction even under current procedures.

1. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008).

2. *See infra* pp. 1078–79.

Given that Bakken's proposals seem misguided, is there anything that can reasonably be done to reduce wrongful convictions? Part II of this article attempts to answer this important question, tentatively offering some reform proposals that attend more carefully to the trade-offs between preventing the conviction of the innocent while permitting conviction of the guilty.

Proceeding from the perspective of "innocentrism" (that is, the idea that exoneration of the "innocent" ought to be privileged over other values in the criminal justice system), I suggest eight proposals for reform: (1) researching the frequency and causes of wrongful conviction; (2) allowing waiver of rights for greater freedom to raise post-conviction innocence claims (Professor Gross's proposal in this symposium³); (3) improving the implementation of existing rules on disclosing exculpatory evidence; (4) increasing resources for defense counsel and prosecutors to focus on issues relating to actual innocence; (5) abolishing the Fourth Amendment exclusionary rule; (6) replacing the *Miranda* regime with a system of videotaping custodial interrogation; (7) barring prisoners from filing for habeas relief without a colorable claim of actual innocence; and (8) requiring defense attorneys to directly ask their clients if they are actually innocent. These discriminating proposals offer a far greater prospect of providing help to the innocent without blocking conviction of the guilty. A common theme underlying many of them is that they reorient the focus of the criminal justice system away from procedural issues and toward substantive issues of guilt or innocence. Sadly, Bakken's proposals seem to offer too much procedure and not enough substance, a recipe for helping the guilty. The truly innocent will benefit in a system that values substance over procedure.

I. PROTECTING THE INNOCENT BY MAKING IT HARDER TO CONVICT THE GUILTY

Can we come up with procedural reforms that offer greater protection to the innocent without hampering conviction of the guilty? That is the thorny challenge that Professor Bakken boldly tackles. Unfortunately, his suggested reforms myopically focus on preventing the conviction of the innocent, not fully appreciating the countervailing risk of blocking prosecution of the guilty.

A. Bakken's Proposed Innocence Procedures

It may be useful to briefly describe the new procedures that Professor Bakken would impose on the American criminal justice system. Starting from documented cases in which factually innocent persons have been wrongfully convicted, Professor Bakken proposes sweeping changes. Most strikingly, he would allow defendants at any time before trial to plead "innocent"—that is, to raise the claims that they were factually innocent of the charges against them.⁴ The triggering device for this plea would be an affidavit from defense counsel alleging a "good faith" basis for believing the defendant to be innocent. Once an innocence plea has been raised, the defendant

3. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009 (2011-12).

4. Bakken, *supra* note 1, at 566-71.

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would waive his or her constitutional right to remain silent and would have to agree to be interviewed by government investigators. Defense counsel would also be obligated to turn over any recorded statement by the defendant to the government.⁵

Once the defendant has satisfied these obligations, the government would then bear additional obligations. At trial, the government would be required to prove guilt to a higher level of certainty than proof beyond a reasonable doubt—namely by proof to a “moral” or “absolute” certainty. Jurors would also be instructed that they could presume innocence from the simple fact of such a plea of innocence. In addition, jurors would be told that they could presume that leads presented by the defendant but not “adequately” pursued by the government would have been favorable to the defendant. By creating the possibility of such an instruction for inadequately explored leads, Bakken hopes to “induce the government to conduct a thorough investigation.”⁶

B. Keeping the Guilty from Using Protections for the Innocent

Given all these hoops prosecutors would be forced to jump through to convict a defendant pleading innocent, wouldn’t every defendant simply raise that plea? Professor Bakken recognizes the clear problem that guilty defendants might be tempted to escape justice by imposing additional burdens on prosecutors. Accordingly, he would limit the innocence plea to those defendants who can find defense attorneys willing to file an affidavit indicating “that upon information, belief, and investigation their clients’ claims of innocence are true.”⁷ As a further safeguard against abusive claims, Bakken would require defendants to waive their Fifth Amendment right against self-incrimination, be questioned under oath, and produce information about the case from the defense files.⁸ The government would then be entitled to use all information that it collects from the defendant.

Bakken claims that the court rules barring attorneys from filing frivolous or false pleadings would mean that guilty defendants could “almost never” avail themselves of innocence procedures because their attorneys would not be able to file the triggering affidavit.⁹ Bakken also argues that the waiver of Fifth Amendment

5. *Id.* at 549, 569–71.

6. *Id.* at 572–77. Another distinguished participant in this symposium (Lewis M. Steel) has offered a similar idea—the creation of “innocence bureaus” within prosecutors’ offices that would investigate claims of innocence in felony cases. Steel suggests the appointment of a bureau chief of impeccable reputation, who would then have government resources to assess defendants’ innocence claims. Steel would apparently allow the innocence bureau to intervene and block prosecutions if convinced that a defendant was innocent. See Lewis M. Steel, Op-Ed., *Building a Justice System*, NEWS & OBSERVER (Raleigh), Jan. 10, 2003, at A17. Similarly, Professor Daniel Medwed has suggested that “screening committees” could be created in prosecutors’ offices to review charging decisions. See Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2201 (2010). Because Bakken’s proposal is more sweeping in its effects, I focus my attention on his proposal.

7. Bakken, *supra* note 1, at 568.

8. *Id.* at 549.

9. *Id.* at 571.

protections would be a strong deterrent against false claims of innocence. Bakken therefore concludes that the net effect of such screens would be that “only innocent persons or the most reckless guilty persons would likely choose to plead innocent.”¹⁰

My instinct is exactly the opposite. Given the overwhelming incentives to raise an innocence plea, my sense is that only naive defendants represented by incompetent defense counsel would choose *not* to plead innocent. In support of my intuition, I invite the reader to consider the following case, designed to present a typical, recurring situation in the American criminal justice system:

An officer in a small town police department in New York pulls Able and Baker over for speeding. After they give evasive answers about what they were doing, the officer asks for a consent search. Thinking that the officer won't look in the spare tire in the trunk, Able and Baker consent. Unfortunately for them, the clever officer discovers five kilos of methamphetamine hidden in the tire. Able and Baker both—falsely—deny knowing anything about the drugs and claim that somebody must have hidden them in the car. In fact, Able and Baker are guilty drug dealers.¹¹

Can these guilty defendants take advantage of Bakken's proposed innocence procedures?

C. Defense Attorney Knowledge of Guilt as an Inadequate Barrier to Raising Claims of Innocence

Obviously, my hypothetical example involves no innocent defendant, and so Bakken's procedures would need to deter Able and Baker from taking advantage of the new rules. Bakken's main obstacle to such frivolous claims is supposed to be the requirement that defendants' attorneys have to file a good faith, supporting affidavit of possible innocence. Thus, Professor Bakken alleges that “[f]actually 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.”¹²

Bakken seems to be assuming that guilty criminal defendants will typically tell their attorneys the truth, straightforwardly confessing they committed crimes. But this assumption does not match the reports of experienced criminal defense attorneys about what really happens during client interviews. A good example comes from a recent article by Professor Robert Mosteller, who worked in the D.C. Public Defender's Office for seven years before becoming a law professor. In questioning the ability of defense attorneys to identify innocent defendants, Mosteller reports:

10. *Id.* at 566.

11. I served as a federal district court judge for more than five years in the District of Utah, and I frequently presided over cases similar to this one. Illegal drug prosecutions, of course, form a major part of both the state and federal criminal dockets.

12. Bakken, *supra* note 1, at 571.

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[M]y experience with hundreds of clients is that . . . the vast majority . . . charged with serious offenses, did not admit guilt. I asked for, and they gave me, detailed accounts, some of which turned out to be truthful, some untruthful These factual statements were accompanied by the summary contention, explicit or implicit, that “I am innocent.”

. . . .

. . . I could not tell the innocent from the large percentage that were guilty.¹³

Mosteller’s description of the existing system raises serious questions about Bakken’s screen. If Mosteller’s experience in the D.C. Public Defender’s Office is typical, then many defense attorneys might end up routinely filing affidavits of innocence simply based on their client’s protestations. Indeed, defense attorneys will be incentivized to do so simply to avoid their clients raising an ineffective assistance of counsel claim down the road.¹⁴ But Mosteller is simply reporting his experience in interviewing clients under the current regime without Bakken’s new procedures in place. If the procedures were in place, it seems likely that even fewer defense attorneys would get information from defendants that would pinpoint them as guilty criminals. Defense attorneys would, of course, have a strong disincentive to acquire such knowledge: after all, if they know that their clients were guilty, they are precluded from obtaining all the favorable provisions of Bakken’s innocence proposal. Therefore, the attorneys might move to a different form of initial interview precisely to keep from learning the true facts of the crime.

The literature on defense counsel interviews describes competing approaches. In what has been called the “traditional model,” a defense attorney’s client is urged to disclose everything about the crime under a pledge of confidentiality.¹⁵ It appears that this is the kind of interview that Bakken assumes every defense attorney undertakes with her client. But a different approach to the interview involves less fulsome disclosures. Under the “selective ignorance” model, a defense attorney consciously avoids obtaining full knowledge of her client’s involvement in the crime.¹⁶ Instead, she will obtain information only about certain useful facts, while avoiding acquiring knowledge about the bedrock issue of the defendant’s guilt. An attorney might employ different devices to be selectively ignorant. In one commonly suggested approach, a defense attorney might never ask the defendant whether he committed

13. Robert Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 37, 41 (2010).

14. Defendants who are convicted can later argue that defense counsel was ineffective in investigating an avenue of possible exculpatory evidence. *See, e.g.,* Schulz v. Marshall, 528 F. Supp. 2d 77 (E.D.N.Y. 2007) (holding that for purposes of an ineffective assistance of counsel claim, in preparing for trial counsel has a duty to make reasonable investigations or to make a reasonable decision that renders particular investigations unnecessary). Under Bakken’s proposal, convicted defendants presumably could argue that their attorneys were ineffective in obtaining the higher burden of proof that would follow from an affidavit of possible innocence.

15. *See* MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* (3d ed. 2004).

16. *Id.* at 159–60.

the crime, asking the defendant instead to recount only what the prosecution's witnesses are likely to say.¹⁷

How often do criminal defense attorneys employ the selective ignorance model? Good data are hard to come by, but indications suggest this model is a fairly common approach. For instance, one study of white collar defense attorneys reported, "Of the attorneys I studied, most either said that they sometimes preferred not to get certain facts from a client or showed by their actions that they felt this way."¹⁸

It is not difficult to imagine defense attorneys making even great use of a selective ignorance approach in a criminal justice system that has adopted the Bakken procedures. A defense attorney might promptly and accurately advise her client of innocence procedures and the pre-requisites to their use—specifically including the fact that the procedures require the defense attorney to believe that the client is innocent. The defense attorney might then conduct the interview so as to be selectively ignorant about her client's guilt, i.e., only asking her client what the prosecution is likely to say about his involvement in the crime. Having then solicited a minimal amount of information, the defense attorney could then ask her client whether he was innocent and, if so, if he would like to take advantage of the innocence procedures. Presumably the desired affirmative answer would be forthcoming. The defense attorney could also ask her client whether there was anyone who was angry with him and who might have been responsible for "setting him up." No doubt a defendant with even a modicum of intelligence could quickly recount several other people who were mad at him and who might be the "real" criminals (e.g., ex-girlfriends, business rivals, school enemies, and so forth). The interview would then conclude and the defense attorney could prepare the requisite innocence affidavit.

On the hypothetical facts recounted above involving defendant Able, for example, the affidavit would presumably look something like the following:

I, Alice Attorney, Esq., do hereby attest to the following:

- My client Mr. Able was pulled over and methamphetamine was found in his car. He promptly denied knowing anything about the drugs.
- Mr. Able has told me he is innocent of the charge.
- I have investigated and learned that Mr. Baker, who was also in the car, also has stated he is innocent and that someone must have planted the drugs.
- Mr. Baker's attorney and I have provided a list of six leads of possible true perpetrators to the prosecution.¹⁹

17. See, e.g., *id.* at 193–94 (discussing suggestion by Professor Geoffrey C. Hazard, Jr. that defense attorneys can avoid the rules against knowingly presenting perjured testimony by proceeding in this fashion).

18. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 104 (1985).

19. The six leads are discussed *infra* Part I.D.

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- I have turned over my investigative file to the prosecution.
- Mr. Able stands ready to be deposed by the prosecution.
- Based on the foregoing, I have a good faith belief that my client is actually innocent of the charge of drug dealing.

Alice Attorney

Accordingly, if the Able and Baker example is any guide, then producing the “innocence” affidavit would not be difficult. And such an affidavit would trigger the full panoply of innocence protections that Bakken proposes—protections that would make effective prosecution of the defendant far more difficult. Accordingly, it is worth considering whether my Able and Baker hypothetical is some kind of outlier or typical of American criminal justice cases.

There are good reasons for thinking the hypothetical represents a common situation and that many (if not in fact most) criminal defendants would be able to get an affidavit of this type from their defense attorneys. At the outset, a significant percentage of defendants have already given an exculpatory version of the facts to the police. Bret Hayman and I published research that recounted what happened when criminal suspects were questioned by police in Salt Lake County, Utah, in 1994.²⁰ Police questioned roughly 79% of all suspects.²¹ Of those who were questioned, about 46% had some kind of exculpatory version—23% a denial with explanation, 20% a flat denial, and 3% some other sort of statement.²² Presumably most of the defendants who have already denied their involvement in the crime to the police would feel comfortable denying their involvement to their defense attorney. If so, then about 46% of all defendants who are questioned—or 36% of all criminal defendants (both those who are questioned and not questioned²³)—would be well positioned to file innocence claims.²⁴

Defendants charged with certain kinds of crimes may be particularly likely to argue they are innocent. One significant group would be defendants charged with possession crimes, such as possession of drugs with intent to distribute²⁵ or possession of a firearm by a felon.²⁶ In the Able and Baker hypothetical case, for example, the government will

20. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842, 869 (1996).

21. *Id.* at 854.

22. *Id.* at 869.

23. Multiplying 79% of suspects questioned by 46% who give an exculpatory version equals 36% of all defendants giving an exculpatory version.

24. Such an extrapolation also requires the assumption that the figures from Salt Lake County, Utah, are representative of other areas of the United States. There are good reasons for thinking that the Salt Lake data is representative. *See* Cassell & Hayman, *supra* note 20, at 850–51.

25. *See, e.g.*, 21 U.S.C. § 841(a)(1) (2006).

26. *See, e.g.*, 18 U.S.C. § 922(g)(1) (2006).

only have circumstantial evidence linking the defendants to the drugs.²⁷ The chances of finding witnesses to contradict a defendant's claim of innocence are remote. Police are often unable to locate those involved in distributing illegal drugs and, even if they can identify the distributor, cooperation with authorities is often difficult to arrange. Able and Baker thus have little to fear in raising such a claim.

Similar problems will arise for sexual assault cases involving a consent defense. Such cases are already difficult for prosecutors to prove, as the crimes often happen in private locations without witnesses. The ambiguities arising out of a "he said, she said" fact pattern continue to be a serious problem for effective rape prosecutions.²⁸ If Bakken's proposal were in place, it seems probable that virtually every guilty "date rape" defendant would interpose a claim of "innocence," secure in the knowledge that the government would have little with which to challenge him.

Bakken's proposal may also extend to misdemeanor prosecutions. If so, the proposal would apply to a host of challenging situations where bogus claims of innocence would threaten to bog down an already overburdened law enforcement apparatus. It is well known that domestic violence convictions are among the most difficult for prosecutors to achieve.²⁹ Among the main problems is that battered victims often feel unable to continue to provide testimony supporting the prosecution throughout the course of a case.³⁰ In addition, as with sexual assault crimes, many domestic violence victimizations involve assault in private places, without witnesses to provide any objective corroboration of abuse that a victim may have suffered.³¹ Here again, it is hard to imagine why a guilty domestic violence defendant would want to do anything other than plead innocent.

Another group of defendants who seem virtually certain to raise innocence claims are those planning on presenting an alibi defense. By definition, a defendant who contends that he has an alibi for the crime is raising a claim of factual innocence. After all, an alibi defense means that the defendant is arguing he was in a different

27. Of course, the prosecution might attempt to secure additional evidence, by (for example) sending the drugs to a crime lab for fingerprint analysis. If the lab found the defendant's fingerprints, this might make an innocence plea problematic. Nothing in Bakken's proposal, however, requires defendants to plead innocence at the outset of a criminal case. Defendants like Able and Baker will thus be able to assess the information collected by the prosecution before deciding whether they have a decent shot at getting away with a bogus innocence plea. If the fingerprint report came back negative, for example, the defendants could presumably plead innocent at that time—even citing the report as additional supporting evidence of their innocence.

28. See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1049 (2008).

29. See Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1 (2002). See generally DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 289–323 (3d ed. 2010).

30. See Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 870–71 (2009).

31. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1360–61 (2005).

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place when the crime was committed.³² Federal and many state rules require that a defendant provide, upon request from the prosecution, the specific place where he claims to have been when the crime was committed and the names of witnesses who will support his alibi.³³ But in a situation where even a guilty defendant is already turning over to the prosecution a clear outline of his defense, there is little reason not to tack on an innocence claim as well.

Bakken also does not tightly define the types of defenses that are eligible for an innocence claim. Like other authors in this field, Bakken seems to have in mind situations of “factual” innocence.³⁴ But when Bakken lays out his proposed procedures, he does not appear to preclude defendants from raising what might be called claims of “legal” innocence by taking advantage of his innocence procedures.³⁵ A claim of “factual” innocence is generally understood to involve a “wrong person” argument, i.e., an argument that proceeds from the premise that a crime has been committed but that someone else committed it.³⁶ A claim of “legal” innocence might include justification defenses (i.e., entrapment or self-defense) or excuse defenses (i.e., mental state mitigations such as insanity and diminished capacity).

Bakken does not attempt to limit his proposal to defendants who claim to be factually innocent. Even if he had, defining precisely what a claim of “factual” innocence is may be difficult. Without a tight definition, many defendants not commonly understood as having “innocence” claims would be able to avail themselves of Bakken’s new procedures. And even with a tight definition, it is not immediately clear how the jury would be instructed in situations where a defendant presents inconsistent defenses, one of which might be viewed as involving factual innocence and the other as involving legal innocence.

Defendants will have tremendous incentives to contrive ways to plead innocence under Bakken’s proposal. And defense counsel will have tremendous incentives to accommodate their clients by filing the necessary triggering affidavit. Bakken seems to almost naively assume that the world is composed exclusively of defense attorneys whose overriding focus is to determine the guilt or innocence of their clients and then proceed accordingly. In reality many defense attorneys will conceptualize their role quite differently. Many will view their job as forcing the government to satisfy

32. BLACK’S LAW DICTIONARY 84 (9th ed. 2009).

33. See, e.g., FED. R. CRIM. P. 12.1(b); COLO. R. CRIM. P. 16(II)(d); FLA. R. CRIM. P. 3.200; HAW. R. PENAL P. 12.1.

34. See, e.g., D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1298 (2004) (discussing “brute fact” innocence). *But cf.* Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2011) (discussing different ways of defining “innocence” and their implications); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011) (arguing that a “modified” conception of innocence dilutes the constitutional core that protects innocent and guilty alike).

35. See Bakken, *supra* note 1, at 553–54.

36. 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, 535–36 (1999) (discussing “factual innocence” definition).

its burden of proof,³⁷ and others may focus simply on making money. In the real world, it is not hard to imagine a few defense attorneys who are particularly aggressive in signing affidavits of “actual innocence” in order to gain acquittals for their clients. These attorneys would quickly garner the lion’s share of the defense business (at least for those who can afford private counsel and therefore have a choice in the matter³⁸), further increasing the likelihood that guilty defendants will be able to put forward spurious pleas of innocence.

Bakken briefly acknowledges the possibility that defense counsel may file inadequately supported affidavits of innocence. But he believes that the sanctions currently provided in the rules against filing frivolous pleadings—exemplified by Federal Rule of Civil Procedure 11³⁹—create a sufficient safeguard.⁴⁰ If anything, experience with Rule 11 offers scant comfort, as the Rule does not seem to have been particularly effective at deterring frivolous claims.⁴¹ Moreover, all that a defense attorney would need to establish a good faith basis for an innocence affidavit is her client’s statement that he is innocent. No doubt many guilty defendants would be happy to provide such an avowal.

In sum, Bakken’s proposal seems to lack any meaningful safeguards against guilty defendants raising claims of innocence. This might not be cause for concern if the innocence plea did not impede convicting those who were truly guilty. It is therefore worth turning to the obstacles to conviction that would confront prosecutors facing such a plea.

D. The Impracticalities of Requiring Prosecutors to Conduct “Adequate” Investigations

Sadly, once a guilty defendant interposes an innocence plea, Bakken’s proposals would impose so many restrictions on the prosecution that a conviction would become virtually impossible. The first obstacle that a prosecutor would face is a requirement of enhanced investigation. Bakken proposes that, following an innocence plea, prosecutors must then complete a new and “adequate” innocence investigation into leads provided by the defense. Failing such an investigation, the jury would be instructed that it may

37. See, e.g., Mosteller, *supra* note 13.

38. Cf. Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 371–72 (2006) (discussing underfunding of public defender’s offices and the “creeping cynicism toward . . . innocence” that may afflict some public defenders).

39. FED. R. CIV. P. 11.

40. See Bakken, *supra* note 1, at 570–71.

41. See, e.g., Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1573–76 (2001) (discussing how Rule 11’s “safe harbor” provision ironically defeats the rule’s goal of deterring frivolous claims); Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1136 (1994) (criticizing Rule 11 and other sanctions schemes for deterring “too much licit litigation” while at the same time deterring “too little illicit litigation”).

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presume that leads not explored by the prosecution would have produced evidence favorable to the defense.⁴²

This requirement of “adequate” investigation seems unworkable. Consider, for example, the kinds of “leads” that Able and Baker might be able to provide in the hypothetical drug case outlined above:

- Able lead #1: He heard that Charlie on the north side of town runs a big meth ring that lately has been actively dealing methamphetamine.
- Able lead #2: Last week, he stole Doug’s girlfriend away and Doug was mad.
- Able lead #3: He borrowed the car from his new girlfriend Erica, who has a methamphetamine problem.
- Baker lead #1: He heard that Frank in a nearby town in Connecticut has been hiding drugs in spare tires.
- Baker lead #2: He got in a fight with some guy named Paul from Utah at a bar last week; Paul stomped out and vowed to get him.
- Baker lead #3: He saw a white guy, about six feet tall, lurking around his car shortly before he left on the drive that led to the police discovering the drugs.

All of these allegations appear to be “leads” that, were Bakken’s proposal adopted, law enforcement would have to “adequately” investigate. How the police would go about investigating, for example, an allegation that “Charlie” or a “white guy” of average height is dealing methamphetamine is not immediately clear. In addition, when the allegations span multiple jurisdictions—such as the suggestion by Baker (arrested in New York) that Frank (in Connecticut) or Paul (in Utah) is responsible—the complexities only grow. What if the Connecticut or Utah authorities don’t “adequately” follow up on the request of the New York police for assistance? How would the New York authorities force them to do so?⁴³ Or would the New York police be required to fly to Connecticut or Utah to run to ground this spurious suggestion?

Further fundamental difficulties exist with the very idea of defining an “adequate” investigation. Bakken appears to envision a judicially enforceable right to adequate investigation,⁴⁴ which presumably means that the government will be required to

42. Bakken, *supra* note 1, at 572–73.

43. Bakken proposes sanctioning the law enforcement agency that fails to adequately investigate the case, but he seems to assume that a single agency is involved in all cases. *See id.* at 573 (referring to “the government” as the one conducting the investigation). Of course, in the real world, many cases are investigated not by a monolithic government but rather by multiple agencies in multiple jurisdictions. Moreover, as Bakken recognizes, the sanction of unfavorable jury instructions falls on prosecutors, not police agencies. *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) (noting same problem with the Fourth Amendment exclusionary rule).

44. *See* Bakken, *supra* note 1, at 573 (discussing jury instructions to be given if court finds government investigation inadequate).

turn over all of its investigative materials to defendants so that they can assess whether to file a claim of “inadequacy” with the court. Such disclosures could create substantial issues. For example, the police might check with their informants around town (including very highly placed informants) to see if they have heard of “Charlie.” If the unvarying answer was no, that might well constitute adequate investigation. But then the police would presumably be required to turn over this sensitive information to defense counsel, who could then file an “adequacy” challenge to it. This disclosure of investigative avenues and resources seems particularly likely to pose a risk of compromising law enforcement sources and methods with little offsetting benefit in return.⁴⁵

Even assuming that police made a full investigation of the spurious leads and then made full disclosure to defense counsel, it is difficult to understand how courts would then litigate the question of “adequacy.” Courts have been reluctant to get into the business of second-guessing the allocation of police resources.⁴⁶ It is easy to understand why. Deciding what constitutes an adequate investigation inevitably involves assessing trade-offs: a detective working on one case is necessarily not working on another. If the local police department decides that its detectives have more pressing business to attend to than tracking down an unsubstantiated allegation from an accused drug dealer that “Charlie” is really behind planting drugs, how would a court determine which task the detective should focus on? The issue of the adequacy of a police investigation truly seems to be one lacking in “judicially manageable standards,”⁴⁷ which perhaps explains why Bakken does not even attempt to lay out evaluative criteria. At the very least, even assuming that the courts could ultimately develop standards for evaluating such claims, Bakken’s proposal seems sure to allow guilty defendants to generate substantial satellite litigation over the adequacy of police investigations, diverting both police and judicial resources into many wild-goose chases.

Defendants will have substantial incentives to raise questions about the adequacy of these investigations because the price prosecutors would have to pay for an adverse finding would be a high one. Bakken would instruct the jury 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.”⁴⁸ To continue with the illustration offered above, if the court determined that police efforts to find “Charlie” were insufficient, the jury would then be instructed that evidence about Charlie would have indicated

45. *See* *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (suggesting “serious questions of potential abuse” if accused persons can obtain access to government files by raising mere general allegations of inadequate prosecution efforts).

46. *See, e.g.,* *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (“[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen.”); *cf. Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) (adding that “there is a constitutional right, however, to have police services administered” without racial bias).

47. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

48. Bakken, *supra* note 1, at 573.

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that he was the real perpetrator—even if the defendant fails to introduce any evidence at trial about Charlie. Bakken states with satisfaction that such an instruction “would increase the likelihood of acquittal significantly”⁴⁹—with the idea of a truly innocent defendant in mind. But given the ease with which guilty defendants can take advantage of his proposal, raising the prospects of acquittal significantly in such cases is cause for alarm.

E. The Impossible Standard of Proving Guilt to an ‘Absolute Certainty’

Bakken would extend to the defendant even more protections than just the opportunity to litigate the adequacy of the government’s investigation. Merely by virtue of a defendant’s plea of innocence, Bakken would dramatically raise the ultimate burden of proof that a prosecutor would have to satisfy—from proof beyond a reasonable doubt to proof “to a moral certainty” or “to an absolute certainty.”⁵⁰ Here again, Bakken has in mind the plight of an innocent defendant wrongly ensnared in the criminal justice system. For any guilty defendant, however, requiring proof to an *absolute* certainty would seem to effectively bar any prosecution.⁵¹

To see how this change would be reflected in real world jury instructions, consider the standard New York instruction on proof beyond a reasonable doubt:

Proof Beyond a Reasonable Doubt

The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty A reasonable doubt is an honest doubt of the defendant’s guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt. It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.⁵²

If the instruction is changed to reflect Bakken’s proposed higher standard of proof to an absolute certainty, it would need to read something like this:

49. *Id.*

50. *Id.* at 574–75.

51. It is not clear what proof to a *moral* certainty means, and Bakken makes no attempt to define it precisely. Cf. Barbara J. Shapiro, ‘*To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600–1850*, 38 HASTINGS L.J. 153 (1986). Indeed, at odds with Bakken’s intentions, it is possible that proof to a moral certainty might actually amount to a *lower* standard of proof than proof beyond a reasonable doubt. The U.S. Supreme Court discussed the phrase at length in *Victor v. Nebraska*, 511 U.S. 1 (1994). The Court noted that “moral certainty” was apparently first used in *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850), where it was essentially a synonym for proof beyond a reasonable doubt. Over time, however, the Court observed that the phrase has come to mean a mere probabilistic assessment of guilt. *Victor*, 511 U.S. at 14. The Court ultimately concluded that use of the phrase standing alone might now conflict with due process requirements. *Id.* at 16–17. Because of the uncertainties of what proof to a “moral certainty” might actually mean, I focus on Bakken’s alternative proposal of proof to an “absolute certainty.”

52. N.Y. CRIM. JURY INSTRUCTIONS, REASONABLE DOUBT (2d ed. 2001), http://www.nycourts.gov/cji/1-General/CJI2d.Presumption.Burden.Reasonable_Doubt.pdf.

Proof to an Absolute Certainty

The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Proof to an absolute certainty requires that you be absolutely—that is completely—certain of the defendant's guilt based on your own inner feelings that the defendant is without a doubt guilty. Any doubt you may have requires you to acquit the defendant. The doubt need *not* be a reasonable one based on the nature or quality of the evidence.

It is hard to understand how a jury could *ever* end up rendering a guilty verdict if advised that “any” doubt is sufficient to acquit, and that this doubt need not even be a reasonable one based on the evidence. Such an instruction really seems tantamount to an instruction for a directed verdict, i.e., a verdict of not guilty.⁵³ As one commentator has noted in trying to raise the standard of proof for death penalty cases above the beyond-a-reasonable-doubt standard: “If true absolute certainty were required in death penalty cases, then it would appear that no defendant would ever be sentenced to death, for no juror would ever be able to truly say she had ‘absolute certainty.’”⁵⁴

A not guilty verdict is desirable, of course, when innocent defendants are on trial. But this only reinforces the compelling need to make certain that only truly innocent defendants can take advantage of Bakken's proposal. Such safeguards against abuse are lacking.

But Bakken is not finished with imposing burdens on prosecutors. As one last protective measure, Bakken would allow the jury to infer from the defendant's plea of innocence alone that the defendant is in fact innocent.⁵⁵ This instruction promises to be particularly pernicious, both for the incentives it would create and the consequences it would spawn. Because this jury instruction would allow juries to return a not guilty verdict based solely on the plea of innocence alone, guilty defendants will press mightily to have their attorneys raise a claim of innocence for them. Once a defense attorney raises such a claim—and obtains the instruction allowing juries to infer innocence from that claim alone—the trial would essentially turn into a crapshoot. Nothing the prosecution could say in response would really rebut the inference, as the jury is told that they can infer innocence from the fact of the innocence plea “alone.”

53. See generally Barbara J. Shapiro, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 41 (1991) (recounting historical development of the idea of proof beyond a reasonable doubt because of the impossibility of absolute proof in the empirical realm of events). Cf. Ronald J. Allen, *Standards of Proof and the Limits of Legal Analysis*, (Nw. Univ. Law Sch., Research Paper No. 11-47, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1830344## (questioning the extent to which articulation of standards of proof rules make a real world difference).

54. Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 74 (2005).

55. Bakken, *supra* note 1, at 575.

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F. The Trade-offs Inhering in Protecting the Innocent by Burdening Prosecution of the Guilty

For all these reasons, significant problems lurk in Bakken's proposals. They would protect innocent defendants, but at the significant cost of blocking conviction of many guilty defendants. It is worth trying to generally assess some of these trade-offs. Even a quick look at some of the numbers involved suggests that the American prosecuting and police agencies (already generally regarded as underfunded) could well collapse under the weight of new burdens that Bakken would assign to them.

As I have tried to articulate, it appears likely that a significant number of guilty defendants would try—and succeed—in raising pleas of innocence if Bakken's proposal were the law of this country. Precisely how many would be able to do so is a matter of conjecture, but it seems likely that the hundreds of thousands of innocence pleas would have to be processed by the system. One ballpark figure can be derived by assuming that defendants who have already given an exculpatory version of events to the police will happily persist in that position through the early stages of a criminal case.⁵⁶ As noted earlier, it is reasonable to estimate that roughly 36% of all criminal defendants in this country deny to the police their involvement in the crime or give some exculpatory version of the facts.⁵⁷ If even half of these defendants persist in a plea of innocence, more than 700,000 innocence pleas would be raised annually in the courts for violent, property, and drug offenses alone.⁵⁸ For these hundreds of thousands of innocence pleas, the government would then be required to conduct a new and "adequate" investigation—the adequacy of which prosecutors would then presumably have to frequently litigate in court. Such a massive burden on the system would be a recipe for disaster.

Bakken might respond by pointing to the clear and obvious importance of preventing the conviction of innocent persons. He could point out—and I would agree—that it is more important to prevent the wrongful conviction of an innocent person than to allow

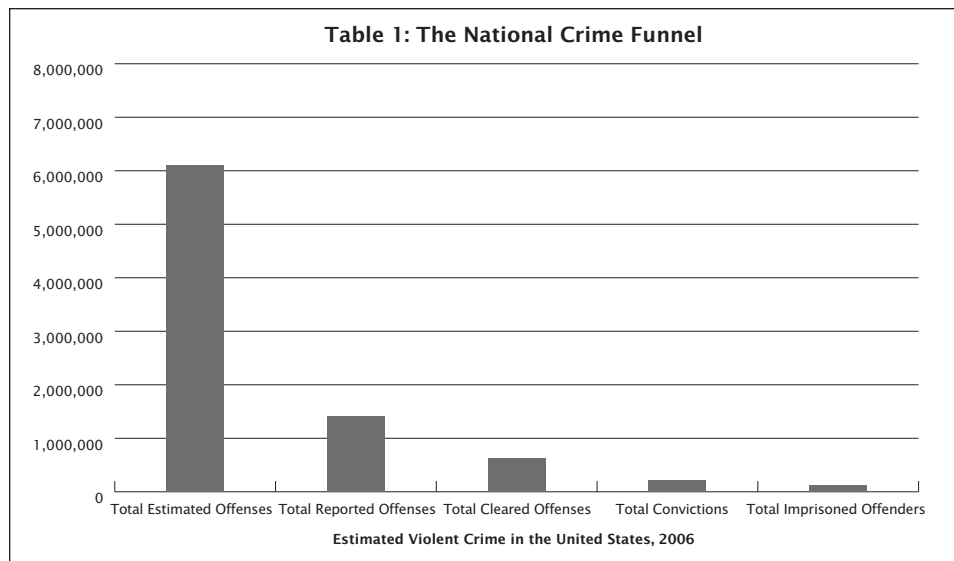
56. One odd feature of Bakken's proposal is that it does not seem to bar defendants who press pleas of innocence in the early stages of a case from later pleading guilty to reduced charges on the eve of trial. To the contrary, Bakken specifically envisions defendants using an innocence plea to force prosecutors to "offer an acceptable plea agreement," Bakken, *supra* note 1, at 572, and notes that an innocent defendant might choose to plead guilty. *Id.* at 572 n.8 (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)). But given the grave risk of abuses that inhere in Bakken's proposal, it seems more sensible to flatly block a defendant who presents a sworn innocence affidavit to the Court from thereafter negotiating a plea to any reduced charges. Given the realities of modern-day plea bargaining, such a restriction might begin to create a real disincentive to submit frivolous innocence pleas—something which Bakken's proposal lacks.

57. See *supra* notes 20–24 and accompanying text.

58. See *2009 Uniform Crime Reports: Estimated Number of Arrests by Offense*, FED. BUREAU OF INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_29.html. The figure recounted in the text is obtained by adding together the number of arrests for violent crimes, property crimes, and drug abuse violations and then multiplying the sum by 18%. If one simply uses the number of arrests for all crimes, the figure in the text would be about four times larger.

a guilty criminal to escape.⁵⁹ But the trade-offs here are not unlimited.⁶⁰ Surely Bakken would agree that the goal of preventing the conviction of the innocent should not be pursued to the point where vast numbers of guilty criminals are set free.

How well the criminal justice system is functioning today may shed light on the nature of the trade-offs involved. It is well known that the criminal justice system today does not send every criminal to prison—not even every violent or murderous criminal. Instead, because of what criminologists refer to as the “criminal justice funnel,” only a small percentage of crimes ever lead to even a clearly guilty criminal going to prison. A rough approximation of the national criminal justice funnel is found in the chart below. As can be seen using data from a recent year for violent crimes, the American criminal justice system goes from more than six million violent crimes committed to approximately 113,000 prison sentences a year.⁶¹ The vast majority of these defendants has pled guilty and are, by any measure, guilty of the crimes that have sent them to prison.⁶²



59. For a good explication of the reasons underlying this conclusion, see D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

60. For a humorous review of the trade-offs, see Alexander Volokh, *Aside, n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (recounting differing ratios that have historically been offered).

61. The methodology underlying the chart is contained in the Appendix to this article.

62. The highest empirically based figure of innocents convicted appears to be a rate of 3.3% to 5% for a subset of capital homicide trials, reported in Risinger, *supra* note 59, at 763. This implies at least a 95% guilt rate. Moreover, it should be noted that this error rate involves defendants convicted at trial. Since roughly 98% of defendants plead guilty, Risinger's figure (assuming it is correct) would not apply to most criminal justice convictions. Other figures are far lower. See Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 507–24 (1998). See generally ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982) (proposing “Rule I” of the “justice game” as “[a]lmost all criminal defendants are, in fact, guilty”).

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My project here is not to discourage efforts to protect the innocent from wrongful conviction. Instead, my point is to suggest that the goal of innocence protection must proceed against a backdrop of a few needles—innocents wrongfully convicted—in a comparatively big hay stack—the vast pool of guilty defendants.⁶³ Reform proposals designed without an awareness of these trade-offs can end up presenting far more problems than they would solve. Bakken’s proposals suffer from the flaw of protecting the innocent at the great cost of making it difficult (or impossible) to convict countless guilty criminals.

II. PROTECTING THE INNOCENT WHILE SIMULTANEOUSLY CONVICTING THE GUILTY

Although Bakken’s proposals appear to be a cure worse than the disease, that is not to say that we should make no effort to address the problem of innocents who might be wrongfully convicted in the criminal justice system. Ideally reform proposals would avoid such trade-offs, i.e., they would help protect the innocent from wrongful conviction without making it more difficult to convict the guilty. It has been suggested elsewhere that we can enact reforms that both offer greater protection for the innocent without freeing the guilty.⁶⁴ It is in that spirit that I offer the following proposals. Of course, as a practical matter, enacting reforms that do not compromise public safety will be considerably easier than those that do. Therefore, the proposals below would appear to stand a far greater chance of actually being implemented than do proposals like Bakken’s.

At the same time, these proposals proceed from the perspective of “innocentrism,” a useful term coined by my colleague Daniel Medwed. Innocentrism privileges the exoneration of the factually innocent as a criminal justice value over other competing values.⁶⁵ In this article, I present these ideas as a basis for starting discussion, rather than as fully formulated policy proposals. But I believe merit exists in considering the following ideas.

A. More Research on the Frequency and Causes of Wrongful Convictions

At the top of my list of measures to address the problem of wrongful convictions of the innocent is further research on the extent and causes of the problem. In particular, we need further research on the frequency in which defendants are wrongfully

63. Cf. Medwed, *supra* note 6, at 2210 (noting the difficulty in attempting to review every prosecutorial charging decision because “[m]any routine cases in our burgeoning, unrelenting criminal justice system may not merit extensive outside evaluation”).

64. See, e.g., Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 134 (2008) (arguing that the goals of convicting the guilty and protecting the innocent are not mutually exclusive).

65. Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549. See generally DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (forthcoming Mar. 2012).

convicted and the most important causes of these wrongful convictions.⁶⁶ To be sure, there has been considerable research about the wrongful convictions in the past, including some collections of wrongful conviction cases. But even disregarding the questions about how “innocence” is determined in some of this research,⁶⁷ a more fundamental problem is the fact that a collection of alleged miscarriages may not be representative of the processing of cases in the American criminal justice system.⁶⁸

One way of addressing the issue of the error rate is to survey knowledgeable persons in the criminal justice system. In 1995, Professors Huff, Rattner, and Sagarin concluded that the error rate in Ohio was 0.5% based on such a survey.⁶⁹ But this estimate was badly flawed. The estimate was based on a survey in which most respondents checked a box indicating that the number of wrongful convictions in the United States was “less than one percent.” From these responses, Huff and his colleagues argued that “most responses [were] hovering near the 1% mark.”⁷⁰ They then simply chose the “midpoint” between 0% and 1% and used it to estimate the number of wrongful convictions.

But it is hard to understand how the answers were “hovering” near any particular point. The respondents received a survey instrument with the categories of “never,” “less than 1%,” “1–5%,” etc.⁷¹ There was no “hovering” to do. Of course, the range covered by the response “less than 1%” extends as low as 0.0001% (or one in a million) and even lower. There is little reason for supposing that the respondents were estimating the value to be 0.5% rather than, say, 0.0001%.⁷² Surprisingly, despite the obvious flaws in this study, it continues to be cited today, even by participants in this

66. Others have proposed creating a commission to study cases of proven wrongful convictions. See, e.g., Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002). My proposal is slightly different because I propose to conduct research to expand our knowledge about a random sample of wrongful convictions, rather than simply study the nonrandom sample of wrongful convictions that have already come to light.

67. Compare Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72–75 (1987) (presenting cases of alleged execution of the innocent), with Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (questioning the accuracy of the determinations of “innocence”); compare also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (presenting cases of alleged wrongful convictions from false confessions), with Cassell, *supra* note 36 (also questioning the accuracy of the determinations of “innocence”).

68. For an interesting discussion of these (and other) problems, see Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008).

69. C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 57–62 (1996).

70. *Id.* at 61.

71. Arye Rattner, *Convicting the Innocent: When Justice Goes Wrong* 204 (1983) (unpublished Ph.D. dissertation, Ohio State University).

72. See Cassell, *supra* note 62, at 517.

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symposium.⁷³ Even if the survey instrument were not flawed, it is not obvious how participants in the system would have a good basis for estimating the frequency of such low probability events.

Rather than a survey approach, an empirically-based estimate of miscarriages is needed—specifically a random sample of cases that could be reviewed for miscarriages within it.⁷⁴ Along these lines, recent research by Professor D. Michael Risinger is worth mentioning.⁷⁵ Rather than despair at the impossibility of the task of conducting such research, Risinger made efforts to find data that would permit an empirical assessment. He combined data on capital exonerations in rape-murder cases from the Innocence Project with an estimate of the relevant number of similar cases that were processed in the system at the same time. He produced an error rate of somewhere between 3.3% to 5%—much higher than previously produced estimates.

Risinger is to be commended for the zeal with which he has pursued a fundamental issue in the innocence field. But even accepting his error rate as correct within the sample of cases he relied upon, reason exists for doubting whether Risinger's error rate generally reflects routine processing of cases in the American criminal justice system. For example, in my own research in Salt Lake County, I did not detect even a single wrongful conviction in a sample of 173 filed criminal cases.⁷⁶ Under Risinger's error rate, my sample should have included between five and nine innocent-yet-wrongfully convicted defendants. This suggests that Risinger's sample may not have been a "random audit" of American criminal case processing⁷⁷ but rather a reflection of something unique about the particular capital cases he was reviewing.⁷⁸

What I propose is that researchers take a random sample of a large number of filed felony criminal cases (1000 seems like a good number) and then track those cases through the system to see what happens. While it might not be possible to follow all 1000 cases carefully, it would seem likely that the cases where a defendant might plausibly be innocent would shrink the numbers down fairly rapidly. Researchers could focus on those cases and try to come up with an initial, plausible

73. See Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented*, 56 N.Y.L. SCH. L. REV. 1053, 1056 (2011–12).

74. I pursue this subject at greater length. See Cassell, *supra* note 62, at 507–13.

75. See Risinger, *supra* note 59.

76. See Cassell, *supra* note 62, at 509. To be clear, I previously reviewed my sample for indications of a wrongful conviction from false confessions. But in the course of that review, I did not see any indication of a wrongful conviction for any reason. Nor am I aware that any such claim has been made about these cases in subsequent years. I readily admit that my methodology is not perfect, and thus propose additional research in this area.

77. Risinger, *supra* note 59, at 785 (citing Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 69–70 (2003)).

78. Cf. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996) (arguing that certain capital cases pose a unique risk of convicting the innocent); Friedman, *supra* note 73, at 1057 (arguing that "[t]he more serious the crime, the more pressure there is to solve it"). *But cf.* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597 (2012) (arguing that the higher the penalty, the higher the standard of proof factfinders will apply).

number of cases in which a wrongful conviction was even a possibility, and then perhaps press even further to try and get to the bedrock truth in this subset of cases.⁷⁹ Research of this type might be very valuable for revealing both the scope of any wrongful conviction problem and particular areas where wrongful convictions might be prevalent. This would permit a targeted response to wrongful convictions issues,⁸⁰ rather than a blunderbuss approach exemplified by Bakken's proposal.

B. Allowing Waiver of Rights in Exchange for Greater Freedom to Raise Post-Conviction Innocence Claims

In this symposium, Professor Samuel Gross presents an intriguing idea for using pretrial procedures to sort between guilty and innocent defendants.⁸¹ He notes that currently defendants are given only two choices: plead guilty or go to trial. He proposes placing a third option on the table, specifically an option for an "investigative trial." In such a trial, the defendant would be able to argue his innocence provided he waived important rights, including the right against self-incrimination, the right to exclude illegally seized evidence, and the right to a jury trial. In exchange, a defendant (if convicted) would be given greater freedom to raise post-convictions claims of innocence.⁸²

Gross's intriguing proposal builds on the insight that we need to try and offer a set of options that create different incentives for guilty and innocent defendants. Unlike the Bakken proposal, however, which seems to single-mindedly focus on defendants who are innocent, Gross recognizes that most defendants in the system are in fact guilty. Any sorting scheme must accordingly create the right incentives for both groups.

Gross's tentative proposal gets the big picture right, by aligning incentives the right way. But for the incentives to work properly, the devil may be in the details. He is maddeningly vague on the most critical incentive: what kind of sentence should a defendant receive if he is found guilty after an investigative trial. As Gross acknowledges, for his scheme to succeed, a defendant convicted after electing the investigative trial option must receive a longer sentence than those who elect a guilty plea—otherwise every defendant would simply opt for the investigative trial.⁸³ But

79. In some previous studies, when researchers eager to find wrongfully convicted defendants have made the judgments about "innocence," many of their ultimate conclusions have been erroneous. See Cassell, *supra* note 36, at 535–37. Accordingly, it would be ideal if multiple researchers with diverse perspectives on wrongful convictions were involved in making the final judgments about innocence, including (for example) former prosecutors and others who may be skeptical of "innocence" claims.

80. For example, I have previously proposed that we should pay particular attention to issues involving alleged false confessions by the mentally retarded, rather than overgeneralizing the problem and proceeding on the assumption that false confessions are a routine product of police interrogation of those with normal mental faculties. See *id.* at 580–87.

81. See Gross, *supra* note 3.

82. See *id.* at 1023.

83. See *id.* at 1023–25.

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the sentence can't be so much longer that any incentive to use the investigative trial disappears. The trick, of course, is to find the happy median.

Let me offer two tentative suggestions for how the Gross proposal might be implemented. The first is that the proposal could be tested in a small set of cases to see how it operates, with possible modifications and expansions later on. One possible subset of cases might be homicide cases, where there is some suggestion that wrongful convictions may be a particular problem.⁸⁴

The second is that implementation of the proposal might be simplest in a jurisdiction where sentencing guidelines already in place give defendants a specific incentive to plead guilty. Without such guidelines, putting Gross's proposal in place might require judges to come perilously close to simply stating that they are imposing a "trial tax" on defendants who exercise their rights,⁸⁵ with the tax reduced for those who insist on a less burdensome trial compared to a full-fledged jury trial. On the other hand, in jurisdictions with sentencing guidelines, it should be possible to craft an arrangement with some precision that avoids these difficulties. For instance, in the federal system, a defendant involved in serious crimes receives a three-level reduction from the otherwise applicable sentencing guidelines for "acceptance of responsibility," which is based in part on the fact that the defendant's prompt notice of an intent to plead guilty "permit[s] the government and the court to allocate their resources effectively."⁸⁶ It might be possible to add a separate guideline that would allow for a reduction of, say, one level for a defendant who opted for an investigative trial. The guideline might award the reduction only if the defendant had taken steps to make the trial as efficient as possible, such as by stipulating to uncontested facts and otherwise focusing the trial on guilt/innocence issues.⁸⁷

Gross's thoughtful proposal deserves serious consideration. If carefully constructed, it might provide the long-sought, yet elusive, mechanism for sorting between guilty and (plausibly) innocent suspects, thereby allowing the system to focus resources on precisely those cases where concern about miscarriages should be greatest.

C. Implementing Existing Rules on Disclosing Exculpatory Evidence

It is well-settled law that prosecutors must disclose to criminal defendants exculpatory evidence—so-called "*Brady* material."⁸⁸ Yet in a few cases, it is clear that prosecutors have failed to discharge that obligation and, in some smaller subset of these cases, persons have been wrongfully convicted as a result. How often such

84. See Gross, *supra* note 78.

85. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 14 (2010) (discussing the concept of "trial tax").

86. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010).

87. Cf. Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 *U.C. DAVIS L. REV.* 1437, 1476 (2007) (noting that one of the glaring difficulties in current innocence procedures is their undue complexity).

88. See *Brady v. Maryland*, 373 U.S. 83 (1963).

problems occur is uncertain. In this symposium, it has been asserted that “we know that the nondisclosure of exculpatory information is a major cause of wrongful convictions.”⁸⁹ Other research seems to suggest that withholding exculpatory evidence is a comparatively minor cause of wrongful convictions.⁹⁰

Regardless of the frequency with which a failure to produce *Brady* material causes miscarriages, it still makes sense to do what can reasonably be done to correct any problems. How to ensure timely production of *Brady* material has been the subject of recent, active investigation, both by academics⁹¹ and the U.S. Department of Justice.⁹² Rather than assess all of the various proposals that have been made, I simply add one note about where efforts can most profitably be directed.

I have personal experience with a case involving (inadvertently) withheld *Brady* material. When I was a federal district court judge, I ordered a new trial where I had questions about the guilt of the defendant. During retrial, significant exculpatory evidence emerged, which the prosecution had (inadvertently) failed to produce during the earlier trial. When that material surfaced, the prosecution immediately dropped the case.⁹³

The problem that arose in my case stemmed from various local police agencies who handled different parts of the investigation, which the U.S. Attorney’s Office then prosecuted. The varying agencies simply lacked an effective way to pool all the evidence that they had gathered—the classic difficulty of the government’s left hand not being aware of what its right hand is doing. Other scholars have raised this

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89. Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 971 (2011–12). The source for this assertion is apparently JIM DWYER, BARRY SCHECK & PETER NEUFELD, *ACTUAL INNOCENCE* 225 (1st ed. 2001), which reported that 64% of the first seventy-four DNA-based exonerations involved suppression of exculpatory evidence.
90. See, e.g., HUFF ET AL., *supra* note 69, at 64 tbl.3.3 (listing causes of wrongful convictions; suppression of exculpatory evidence is not on the list); Bedau & Radelet, *supra* note 67, at 56 tbl.6 (among 534 cases counted as having an error, thirty-five (6.5%) were attributable to “suppression of exculpatory evidence”). *But cf.* Markman & Cassell, *supra* note 67 (criticizing the study’s methodology).
91. Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089 (2010); Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010).
92. In January 2010, the Justice Department issued additional guidelines to prosecutors for the purpose of reducing the chance of error during criminal discovery. Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf. In 2006, the Justice Department amended the U.S. Attorney’s Manual provisions on disclosures by requiring prosecutors to take a broad view of disclosure requirements. See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group* (Jan. 4, 2010), available at <http://www.justice.gov/dag/dag-memo.pdf>. The provision was last updated in June 2010. See U.S. ATTORNEY’S MANUAL 9-5.001(c) (2010).
93. The defendant in that case later sued the prosecutors, unsuccessfully, for violating his civil rights by failing to produce the materials. See *Oetinger v. Embley*, No. 1:08-CV-165-CW, 2010 WL 4973324 (D. Utah Nov. 10, 2010); *cf.* *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (finding no § 1983 cause of action for *Brady* violation).

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concern,⁹⁴ with the suggestion that new information-sharing technologies could solve the problem.⁹⁵ Such solutions should be aggressively pursued because they promise a win-win approach that gets defendants the information to which they are entitled—without interfering with crime control efforts by imposing undue burdens on police or prosecuting agencies.

Similarly worth considering is the idea of moving the culture of “trial by ambush” toward one of full disclosure—by both the prosecution *and* the defense. Professors D. Michael Risinger and Lesley C. Risinger make such a proposal in this symposium,⁹⁶ noting that innocent defendants would much prefer a system of reciprocal discovery to the current regime. The Risingers also report that “reciprocal waivers are the key to making such discovery schemes work in those jurisdictions, such as New Jersey, that have successfully adopted so-called ‘open file’ discovery practices.”⁹⁷ Here again is another opportunity for adopting a reform that will assist innocent defendants in the system without any compromising the ability of the prosecution to convict the guilty.

D. Increasing Resources for Indigent Defense Counsel and Prosecutors to Focus on Issues Relating to Actual Innocence

The proposals discussed so far might be viewed by some as nibbling around the edges of the problem. But the root cause of wrongful convictions is probably lack of resources devoted to the criminal justice system. Whatever individual causes might be pinpointed in particular cases, more resources would often have enabled defense counsel (or police and prosecuting agencies) to locate persuasive evidence of innocence. If this diagnosis is correct, then the true solution to the wrongful conviction problem is devoting additional resources to the criminal justice system.

Given the fiscal realities of the world we live in, however, it would truly be an academic proposal to call for significant new funding for defense attorneys, for example.⁹⁸ At a macro level, the funds devoted to the criminal justice system are probably roughly fixed and not much is likely to change in the near term.⁹⁹ What is needed, then, is to prioritize innocence over other criminal justice expenditures. Fortunately, for those who truly believe innocentism, there are ways to do this.

94. See, e.g., *New Perspectives on Brady*, *supra* note 91, at 1980.

95. *Id.*

96. D. Michael Risinger & Lesley C. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 886–90 (2011–12).

97. *Id.* at 887.

98. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1059 (2006).

99. See Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897 (2007) (noting a common assumption that there are fixed resources devoted to criminal justice).

E. Abolishing the Fourth Amendment Exclusionary Rule, and Consequently Shifting Defense Resources Away from Litigating Purely Procedural Claims

If we want the criminal justice system to prioritize the issue of innocence and devote more resources to it, then a good start would be to consider abolishing the Fourth Amendment exclusionary rule. Abolition of the rule and replacing it with a system of civil damage remedies has been advocated by such distinguished legal figures as Chief Justice Warren Burger,¹⁰⁰ Dallin Oaks,¹⁰¹ Akhil Amar,¹⁰² Bill Pizzi,¹⁰³ and symposium participant Paul Robinson.¹⁰⁴ The classic argument for abolishing the exclusionary rule is that the rule sets criminals free because the constable has blundered.¹⁰⁵ But there is a more subtle, and in many ways more pernicious, defect to the exclusionary rule. Under a regime that allows the “deliberate exclusion of truth from the fact-finding process,”¹⁰⁶ defense efforts will move toward issues involving the validity of evidence collection rather than toward assessing the quality of the evidence itself. Professor William Stuntz perhaps most famously made this point in his writings, explaining how a system with limited resources that emphasizes procedure over substance will give short shrift to factual claims of innocence.¹⁰⁷ Stuntz is cautious in his argument. As he explains, the current system does not simply involve a direct trade-off, but rather “places substantial pressure on [defense] counsel to opt for the procedural claim rather than the (potential) substantive one.”¹⁰⁸ But Stuntz’s bottom-line conclusion seems unassailable: there is some trade-off in the current regime favoring procedural claims over substantive ones.¹⁰⁹

100. See *Stone v. Powell*, 428 U.S. 465, 500–01 (1976) (Burger, C.J., concurring).

101. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 739–40 (1970).

102. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 40–45 (1997).

103. See WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* (1999).

104. PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* (2006).

105. *People v. Defore*, 242 N.Y. 13, 21 (1926).

106. *Stone v. Powell*, 428 U.S. 465, 496 (Burger, C.J., concurring).

107. William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 37–40 (1997).

108. *Id.* at 40.

109. Professor Mosteller responded to Stuntz’s argument by reporting his own experience that motions to suppress “posed only a minimal drain on defense resources.” Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 955–56 (2010). But Mosteller concedes that his experience comes from a system in which motions to suppress were set on the eve of trial, thereby preventing most such motions from being litigated. *Id.* at 956. Such a system seems atypical to me. For example, in both the state and federal systems in Utah, motions to suppress are typically litigated well in advance of trial and thus often produce contested suppression hearings.

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Given this trade-off, those with an innocent view of the world should be the first to jump on the replace-the-exclusionary-rule-with-civil-damages bandwagon. Surely the experience of the rest of the world suggests that the exclusionary rule is not the only way to restrain police abuses.¹¹⁰ There is good reason to think that we can craft a damages regime for protecting Fourth Amendment rights that will fully preserve them, just as we rely on a damages regime to protect other civil liberties, such as our First Amendment rights.¹¹¹

Once procedural issues regarding the legality of searches are diverted to the civil justice system, the criminal justice system would gain substantial new resources to devote to innocence issues. While the percentage of cases in which the exclusionary rule results in guilty criminals going free is disputed,¹¹² it does not appear to be disputed that the exclusionary rule results in “tens of thousands of contested suppression motions each year.”¹¹³ Instead of filing and litigating these motions that have nothing to do with innocence, defense counsel could turn their attention to substantive issues about who committed the crime. Prioritizing substantive issues of guilt and innocence over procedural issues of the reasonableness of searches is exactly the way the system should be structured.

F. Replacing the Miranda Regime with the Videotaping of Custodial Interrogations

The problem of procedure over substance is not confined solely to Fourth Amendment jurisprudence. The same flaw has developed in confession law. Here again, those who are most concerned about innocence should be skeptical of the law’s current structure, which relies largely on *Miranda* warnings and waivers to protect against coercive interrogations. As a practical matter, this approach does little to help the innocent and prioritizes litigation about *Miranda* compliance over litigation about the accuracy of confessions. The result has been a regime that is not particularly well suited to address “false confession” issues¹¹⁴—i.e., not well suited to protecting the innocent.

The problem starts with the fact the innocent defendants are most likely to waive their *Miranda* protections. Innocent persons have nothing to hide from the police,

110. See *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (noting that when adopted, the exclusionary rule was “unique to American jurisprudence” and that “a categorical exclusionary rule has been ‘universally rejected’ by other countries”).

111. See AMAR, *supra* note 102, at 27–29 (explaining why the exclusionary rule is a bad way to deter police misconduct compared to a civil damages regime); cf. Yale Kamisar, *Mapp v. Ohio 50 Years Later*, NAT’L L.J., June 13, 2011, at 50 (arguing that critics of the exclusionary rule may not really want an effective alternative remedy because it would be just as burdensome on law enforcement).

112. Compare *United States v. Leon*, 468 U.S. 897, 907 (1984) (arguing that the small percentage researchers deal with masks the large number of felons released from prison based in part on illegal searches and seizures), with *id.* at 950 (Brennan, J., dissenting) (arguing that only a very small percentage of all felony arrests are declined for prosecution on grounds of potential exclusionary rule problems).

113. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (quoting William Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 444 (1997)).

114. See generally Cassell, *supra* note 62.

and so they almost invariably waive their *Miranda* rights.¹¹⁵ Once they waive their rights, the *Miranda* procedures do little (if anything) to restrain police questioning techniques, a point that seems to be generally accepted.¹¹⁶

Miranda's procedural requirements, like those of the Fourth Amendment exclusionary rule, also shift defense attorney time and attention away from claims of innocence. The *Miranda* procedures have spawned considerable litigation about whether a suspect was in "custody," whether a suspect "waived" his rights, or whether a suspect "invoked" his right to counsel.¹¹⁷ These issues generally have little to do with the reliability of any confession that police might obtain through questioning. Thus, like the Fourth Amendment exclusionary rule, these issues tend to draw defense attorney attention toward raising claims about process rather than about substance.¹¹⁸

Miranda has also turned the attention of trial judges away from questions of the reliability of confessions and toward questions about police compliance with the *Miranda* rules. As Professor White has observed, before *Miranda* reliability "played an important role in our constitutional jurisprudence . . . [Since *Miranda*], however, courts and legal commentators have largely ignored issues relating to untrustworthy confessions."¹¹⁹ To be sure, as a matter of black letter law, the *Miranda* procedural requirements were piled on top of traditional voluntariness requirements. But as a practical matter, judicial attention is a scarce resource. *Miranda* has created a triumph of formalism.¹²⁰ Prioritizing one set of claims (*Miranda* compliance) has inevitably reduced scrutiny of the others—to the disadvantage of innocent defendants.

One last injury to the innocent defendants is worth noting. Good reasons exist for believing that *Miranda* has significantly hampered the ability of police officers to obtain confessions from guilty criminals.¹²¹ This has not only harmed law enforcement's ability to convict guilty criminals but also the opportunity of innocent individuals to use those confessions to exonerate themselves.¹²² For example, Professor

115. *See id.* at 539–40.

116. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION 97–98 (1986), reprinted in 22 U. MICH. J.L. REFORM 437 (1989).

117. *See* 39 GEO. L.J. ANN. REV. CRIM. PRO. 1, 179–99 (2010) (collecting approximately 400 recent federal court of appeals cases on *Miranda* issues).

118. *See* Stuntz, *supra* note 107, at 44 (advancing the argument that *Miranda* doctrine causes shift of attention away from defendants with factual issues to raise and toward defendants with procedure claims to raise).

119. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 156 (1997).

120. JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 206–16 (1996).

121. *See, e.g.*, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Cassell & Hayman, *supra* note 20. These conclusions are not universally accepted. Compare John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (critiquing the validity of the data used to correlate *Miranda* with diminished clearance), with Paul G. Cassell, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (responding to these criticisms).

122. *See* Cassell, *supra* note 62, at 550–52.

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Gross has noted that the number of exonerations when the actual criminal confessed declined sometime between the mid-1950s and the early 1970s.¹²³ Gross cites among the possible causes the *Miranda* decision, which “may result in some reduction in the number of confessions.”¹²⁴ Thus, by impairing the system’s ability to get to the truth in cases, *Miranda* has caused the innocent to suffer.

A system that respects the constitutional right against self-incrimination while at the same time providing greater protection for innocent suspects could be easily designed. There appears to be wide agreement that videorecording interrogations would offer far greater protection for innocent suspects than does the current *Miranda* regime.¹²⁵ I made a proposal long ago for substituting videorecording of police questioning as a substitute for *Miranda*.¹²⁶ Others have proposed that recording should supplement *Miranda*.¹²⁷ A fair number of jurisdictions are moving forward with requiring videorecording of at least some interrogations,¹²⁸ although recording is often left to the discretion of police officers or mandated only for very serious crimes. The innocence movement could speed the adoption of this important reform if they would highlight the extent to which *Miranda* does not offer effective protection to the innocent and suggest that, instead, we should use videorecording.

G. Barring Prisoners from Filing a Petition for Federal (or State) Habeas Corpus Review Unless They Present a Colorable Claim of Factual Innocence

As noted above, one of the great problems for the innocence movement is trying to find the needles in a large haystack—that is, trying to identify innocent persons in a criminal justice system that processes mostly guilty defendants.¹²⁹ Some commentators have made a frontal assault on this problem by directly proposing that we limit access to some forms of judicial review to those who are making claims of actual innocence. For example, two distinguished legal scholars—Joseph L. Hoffmann and Nancy J. King—recently proposed that federal habeas corpus review of noncapital state court convictions and sentences should, with narrow exceptions, be abolished except for those who couple a constitutional claim with “clear and

123. Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 430–31 (1987).

124. *Id.* at 431. For reasons to think that *Miranda* is the most likely cause of this drop in confessions, see Cassell & Fowles, *supra* note 121, at 1107–20.

125. See Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO. ST. J. CRIM. L. 163, 189–90 (2007).

126. See Cassell, *Miranda’s Social Costs*, *supra* note 121, at 486–92.

127. See, e.g., Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199 (2007); Lisa C. Oliver, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code*, 39 SUFFOLK U. L. REV. 263 (2005).

128. Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9 (2010).

129. See *supra* notes 7–11 and accompanying text.

convincing proof of actual innocence.”¹³⁰ Relying on a comprehensive study of federal habeas corpus filings,¹³¹ they found that only seven of the 2384 noncapital habeas filings in the study (0.29%) resulted in a grant of habeas relief, and one of those seven was later reversed on appeal.¹³² Hoffman and King argued that habeas review of such claims “currently squanders resources while failing to remedy defense attorney deficiencies. Those resources should be redeployed where they have a more meaningful chance of preventing the deficiencies in the first place.”¹³³ They propose moving resources to indigent defense representation instead of largely pointless habeas litigation.

Hoffmann and King’s proposal is similar to others that have tried to focus habeas corpus on protecting the innocent. Most famously, Judge Henry Friendly argued that federal habeas relief for most constitutional errors should be conditioned on a showing of innocence.¹³⁴ Interestingly, he also proposed that a sufficient demonstration of innocence should itself be a basis for habeas relief,¹³⁵ an issue that has bedeviled the Supreme Court in recent years.¹³⁶ Similarly, Professors John C. Jeffries, Jr. and William J. Stuntz have suggested allowing defaulted federal claims to be raised in federal habeas where those claims raise a reasonable probability that the defaulted claims resulted in an erroneous conviction.¹³⁷ All of these ideas have the benefit of focusing an important part of the criminal justice system—federal habeas corpus review—on the central issue of innocence.

Hoffmann and King’s proposal to restrict habeas corpus has been attacked, perhaps most extensively, by Professor John Blume and his colleagues.¹³⁸ But interestingly enough, their critique relies heavily on the case of an allegedly innocent

130. Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 820 (2009).

131. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

132. *Id.* at 52, 58, 115–16.

133. Hoffman & King, *supra* note 130, at 823.

134. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI L. REV. 143 (1970).

135. *Id.* at 167.

136. See Joshua M. Lott, Note, *The End of Innocence? Federal Habeas Corpus Law After In re Davis*, 27 GA. ST. U. L. REV. 443 (2011). The Supreme Court has stated that “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)). Nonetheless, there has been enough uncertainty about that statement that at least 173 freestanding innocence claims have since been filed in federal habeas courts. See Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 131 (2005).

137. John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).

138. See, e.g., John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435 (2011).

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habeas petitioner¹³⁹—the very kind of petitioner that Hoffmann and King would try to protect. Blume and his colleagues go on to argue that federal habeas plays an important role in correcting errors at trial. Given the miniscule number of cases in which relief is granted, it is difficult to credit that view. But the larger point that is worth thinking about for those who believe innocence is the most important value in our criminal justice system is whether we can focus our legal institutions (such as federal habeas) on the interests of the innocent.¹⁴⁰ At the end of the day, it does seem more likely that the innocent will benefit from a system concentrating on them—that is, that we can find needles more effectively in smaller haystacks.

H. Requiring All Defense Attorneys to Directly Ask Their Clients, “Did You Commit the Crime?” and Aggressively Investigate Claims of Actual Innocence

It is finally worth considering what additional role defense attorneys might be able to play in preventing convictions of the innocent. Like the great bulk of the innocence literature, Bakken’s proposals aim to focus prosecutors on the plight of innocent defendants. But prosecutors are not the only actors in the criminal justice system who may occasionally need such reorientation. It appears that defense attorneys, too, may bear some of the responsibility for miscarriages of justice.

The mindset of the defense bar toward the question of whether their clients are in fact guilty has been described as one of “staggering indifference.”¹⁴¹ Defense attorneys simply cannot pay any attention to whether their clients are guilty, it is argued, because doing so would impair the quality of the representation they provide.¹⁴² I am not convinced. Particularly if we want to structure an innocent criminal justice system that gives top priority to preventing the conviction of the innocent, defense attorneys must be involved. Indeed, defense attorneys, who have direct access to defendants, may be uniquely positioned to identify a miscarriage of justice before it happens and take steps to prevent it.

Here is one example of how we might think about reorienting defense attorneys toward innocence issues. Earlier in this article, I noted that many defense attorneys do not directly ask their clients whether they are guilty of the crime charged. This ignorance may permit defense attorneys to perhaps raise defenses that might otherwise be barred by rules of legal ethics.¹⁴³ But why should we give defense counsel

139. *Id.* at 436–40 (discussing the rape conviction of Clarence Moore, which was overturned in *Moore v. Morton*, 255 F.3d 95, 102 (3d Cir. 2001)). It is not clear whether Blume and his colleagues believe that Moore was actually innocent or simply convicted on inadequate evidence.

140. For an interesting effort along these lines in the area of direct appeals, see Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391 (2011).

141. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 180 (1983).

142. *See* Mosteller, *supra* note 13.

143. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3). *But cf.* Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) (suggesting that there are few limits on the defense and criticizing this view). *See generally* discussion *supra* Part I.C.

such freedom if we are trying to structure a criminal justice system that focuses on innocence? It is hard to see what larger societal interest is served by allowing counsel to move forward in ignorance of this important fact. It may be true, as Professor Mosteller argues, that defense attorneys can never be sure whether their client is telling the truth when a defendant claims to be innocent.¹⁴⁴ But at least requiring defense attorneys to ask the question might serve the valuable function of putting this issue squarely out in the open and helping them to play their role in sorting the guilty from the innocent.

Simply requiring the defense attorney to ask a perfunctory question probably would not make much of a change in the current system. Part of the current criminal justice game seems to be for defendants to deny their involvement in a crime—at least at the start of a case. For example, Professor Mosteller reports that, when he was a defense attorney, virtually all of his clients claimed to be innocent until he recited the advantages of a specific plea offer; at that point, they conceded their guilt.¹⁴⁵ In light of this fact, maybe defense attorneys should be required not only to ask their clients if they committed the crime but to also explore more thoroughly whether a defendant is truly guilty or innocent. This requirement must be enforced by a rule that only if a defendant admits he is guilty would a defense attorney be permitted to explore a standard plea bargain.¹⁴⁶ Such a requirement might promote more frank and open discussion between defense attorneys and their clients about whether they were involved in the crime.

Forcing defense attorneys to truly attempt to learn whether their clients are guilty or innocent would create a real advantage: it would give the criminal justice system one more opportunity to begin sorting innocent defendants from guilty ones through the one person who has the best access to important information—the defendant. Professor Mosteller may complain about how defense attorneys have difficulties obtaining access to witnesses and other forms of evidence,¹⁴⁷ but the barriers to information are not all one-sided. Prosecutors are usually precluded from talking to defendants once legal counsel enters the scene. But defendants are in a unique position to provide information that can sort the guilty from the innocent. If defendants can be induced to provide more thorough information to their attorneys about whether they are innocent or guilty, then the system can more effectively protect against wrongful conviction.

With the innocence issue directly on the table for discussion, how should defense counsel proceed when her client reports that he is innocent? Professor Mosteller rightly bristles at the suggestion that there should be some sort of “second-class

144. See Mosteller, *supra* note 13, at 41.

145. See Mosteller, *supra* note 109, at 954.

146. A defense attorney could still explore an *Alford* plea for an “innocent” defendant. See *North Carolina v. Alford*, 400 U.S. 25 (1970). But typically the sort of concessions that prosecutors are willing to offer for such a plea are less than that offered for a full-blown guilty plea.

147. See Mosteller, *supra* note 109, at 941–43 (discussing “limited defense access to witnesses and evidence”).

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treatment” of defendants who state clearly that they are guilty.¹⁴⁸ He explains quite nicely that defense counsel have important duties to perform in the criminal justice system, even when performing the far more common duty of defending those who have in fact committed the crimes charged against them. But he interestingly goes on to discuss the idea that perhaps individual defense attorneys—or even perhaps the criminal justice system in general—should try to devote additional resources to cases in which a defendant has a good claim of actual innocence.¹⁴⁹ Of course, defense attorneys—and the system—are not well positioned to do this if the defendant is not even asked whether he is in fact innocent. Posing the question is at least a start to identifying those who may be wrongfully ensnared in the criminal justice system.

If a defendant claims to be innocent, as a first step defense counsel obviously ought to adequately investigate the claim. Presumably adequate defense investigation happens in most cases, regardless of whether a defendant claims to be innocent or guilty. But if some defense attorneys are not squarely raising the innocence issue because they think ignorance is tactically useful, they may end up missing a chance to discover exculpatory evidence that could set a defendant free.¹⁵⁰

Following such an investigation, defense counsel should obviously rely on the procedures available in our criminal justice system for presenting a defense. For reasons discussed earlier in this article, I am skeptical of proposals (like Bakken’s) for tinkering with the traditional structure of a criminal trial. Within that traditional structure, defense attorneys have many tools that they can employ in the defense of innocent clients.

But in reviewing cases of wrongful conviction over the years, one omission from the defense repertoire has always puzzled me. I have always wondered why, in a rare case where a defense attorney believes she is representing a truly innocent client, she almost invariably fails to bring the prosecutor into the discussion. The wrongful conviction literature contains suggests it is almost unheard of for a defense attorney to communicate her specific concerns directly to a prosecutor. Perhaps this is part of a larger culture of distrust between prosecutors and defense attorneys that appears to afflict at least some jurisdictions. But direct communication on this issue needs to be strongly encouraged.

It would, of course, be naive to think that defense counsel reports to prosecutors could prevent every wrongful conviction of an innocent defendant. But I am surprised to discover that defense counsel so rarely employ this approach. Perhaps an unfortunate reason is that defense attorneys behave in the way that Mosteller suggests: they simply do not view their job as having much to do with guilt or innocence.¹⁵¹ If defense attorneys proceed in this way, they never learn whether they

148. Mosteller, *supra* note 13, at 7.

149. *Id.* at 68–69.

150. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 510 (2000) (reporting an example of a seemingly delusional defendant blaming thefts on a “chicken man”; defense investigation discovers that man in a chicken suit perpetrated the crimes).

151. Mosteller, *supra* note 13, at 60–64; accord Babcock, *supra* note 141, at 180.

have an innocent defendant for a client as opposed to a guilty one. This agnostic approach may help to avoid burnout on the job or allow for an increased feeling of self-worth, as some have argued in justification.¹⁵² But at the end of the day, this is a cop-out, leading the innocence movement to point fingers exclusively at errant prosecutors and rogue police officers while ignoring the role of ignorant defense attorneys. If we wish to leave no stone unturned in our efforts to prevent conviction of the innocent, it is time to broaden our perspective on those who may be responsible.¹⁵³

III. CONCLUSION

This article has proceeded from the assumption that preventing wrongful conviction of the innocent is the top priority of our criminal justice system. But it is obviously not the only goal of the system. Reform proposals to protect the innocent must accordingly be assessed for their effect on all of the goals of the system, including most obviously any interference they will cause to prosecutors' efforts to convict guilty criminals.

Professor Bakken's reform proposals suffer from a myopic focus on preventing the conviction of innocent persons. The upshot is that if his scheme was implemented in this country, it would likely block the convictions of at least tens of thousands of dangerous criminals every year, causing grave harm to public safety. The main problem lurking in the proposals is that they offer no real safeguard against guilty criminals taking advantage of them. Without a check on such abuse, reform proposals like the ones Bakken offers will likely be cures worse than the disease.

But there are other proposals for making innocence a greater priority in our criminal justice system that do not suffer from these trade-offs. I have tried to sketch out a few such possibilities in this article, including replacing the exclusionary rule with a civil damage remedy, moving confession law away from *Miranda* procedures and toward videorecording of interrogations, confining habeas relief to those with claims of factual innocence, and requiring defense attorneys to explore their clients' guilt or innocence. Ideas such as these can help prevent the conviction of innocent persons without interfering with the conviction of the guilty. I hope that the innocence movement will be true to its professed claim that innocence should be an overriding concern of our criminal justice system and add its support to proposals such as these.

152. See generally Barbara A. Babcock, Book Review, 53 GEO. WASH. L. REV. 310, 315 (1985).

153. One way to hold defense attorneys accountable for wrongful convictions would be through civil suits against them. Recent cases seem to be broadening defense liability in this area. See, e.g., *Dombrowski v. Bulson*, 915 N.Y.S.2d 778 (4th Dep't 2010) (nonpecuniary loss damages are available for criminal defendant's loss of liberty due to attorney malpractice); cf. Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341 (2007) (proposing that defendants should not be required to prove that they are innocent to proceed with criminal malpractice claims).

APPENDIX – DATA SOURCES FOR THE NATIONAL CRIME FUNNEL

The “crime funnel” presented in Table 1 of the article rests on the following sources.

Source for Total Estimated Offenses:

MICHAEL RAND & SHANNAN CATALANO, PH.D., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2006, at 3, tbl.2, NCJ 219413 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv06.pdf>. This figure excludes murder, but the proportion of murder within all violent crimes is extremely small and therefore not enough to meaningfully distort the crime funnel picture.

Source for Total Reported Offenses:

U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2006: VIOLENT CRIME (2007), <http://www2.fbi.gov/ucr/cius2006/documents/violentcrimemain.pdf>. While this figure includes murder, the proportion of murder within all violent crimes is extremely small and therefore not enough to meaningfully distort the crime funnel picture.

Source for Total Cleared Offenses:

The figure for Total Cleared Offenses was compiled by multiplying total reported violent crimes by the percent of offenses cleared. *See* U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2006: CLEARANCES (2007), <http://www2.fbi.gov/ucr/cius2006/documents/clearancemain.pdf> (showing that in 2006, 44.3% of violent crimes were cleared by arrest or exceptional means).

Source for Total Convictions:

For a compilation of state and federal violent crime convictions, see SEAN ROSENMERKEL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006: STATISTICAL TABLES, at 9, tbl.1.6, NCJ 226846 (2009) (*revised on* Nov. 22, 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

Source for Total Imprisoned Offenders:

See SEAN ROSENMERKEL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006: STATISTICAL TABLES 5, tbl.1.2.1, 9, tbl.1.6 (2009) (*revised on* Nov. 22, 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>. This figure is compiled by multiplying the total amount of federal violent crime convictions by the percent of federal felons sentenced to prison (Table 1.6), and then adding that figure to the total amount of state violent crime felons sentenced to prison (Table 1.2.1).