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Exonerating the Innocent: Pretrial Innocence Procedures

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Exonerating the Innocent: Pretrial Innocence Procedures

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Separately, the authors of this introductory article recommended similar changes to the adversarial system in response to data showing that significant numbers of innocent persons have been convicted and imprisoned.[1] In essence, we proposed formal innocence bureaus and innocence procedures, which would require the government to conduct enhanced investigations so long as defendants agreed to a formal interview with the prosecution. The symposium[2] that resulted from the ideas behind our recommended changes was titled *Exonerating the Innocent: Pre-Trial Innocence Procedures* and is the basis for the articles in this issue of the *New York Law School Law Review*.[3]

In 2003, one of us, Lewis Steel, proposed "innocence bureaus"[4] and in 2008 the other, Tim Bakken, proposed "innocence procedures."[5] Both of us started from the proposition that the more fully and impartially the government investigates the facts and suspects surrounding a crime, the less likely it is that innocent persons will be convicted. Both of us proposed that defendants in criminal cases should receive more thorough and impartial investigations if they agree to cooperate fully with a government agency empowered to conduct enhanced investigations. If, however, a defendant does not seek an enhanced investigation, then the case would proceed to trial under the regular criminal justice procedures.

Both of us proposed that the adversarial system remain essentially as it is for the great majority of criminal cases because we believe that few defendants would seek an impartial post-arrest reinvestigation. If a defendant is guilty, as statistics reveal

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1. *See, e.g.*, *Know the Cases: Innocence Project Case Profiles*, Innocence Project, http://www.innocenceproject.org/know/ (based on DNA evidence, finding 275 convictions of innocent persons) (last visited on Nov. 6, 2011).

2. *See* Symposium, *Exonerating the Innocent: Pre-Trial Innocence Procedures*, 56 N.Y.L. Sch. L. Rev. 855 (2011–12), http://www.nylslawreview.com/innocence. Support and funding for the symposium was provided by New York Law School and the West Point Center for the Rule of Law. The symposium brought leading scholars and practitioners to New York Law School on November 5, 2010.

3. The symposium's keynote speaker was the Honorable Theodore J. Jones, associate judge of the New York Court of Appeals and co-chair of New York's Justice Task Force. The panelists included: Steven Banks, The Legal Aid Society of New York City; John H. Blume, Cornell Law School; Paul Cassell, S.J. Quinney College of Law at the University of Utah; Keith A. Findley, University of Wisconsin Law School; Leon Friedman, Hofstra University School of Law; Lissa Griffin, Pace University School of Law; Samuel R. Gross, University of Michigan Law School; James S. Liebman, Columbia Law School; D. Michael Risinger, Seton Hall University School of Law; Lesley C. Risinger, Seton Hall University School of Law; Paul Robinson, University of Pennsylvania Law School; Theodore M. Shaw, Columbia Law School; and Mike Ware, Dallas County, Texas, District Attorney's Office. The moderators were: Eugene Cerruti, New York Law School; Peter Neufeld, Neufeld Scheck & Brustin, LLP and co-founder and co-director of the Innocence Project at the Benjamin N. Cardozo Law School; and Maritza Ryan, U.S. Military Academy at West Point. For a brief video overview of the symposium featuring interviews with the participants, see *Exonerating the Innocent*, N.Y.L. Sch. L. Rev. (Aug. 1, 2011), http://www.nylslawreview.com/innocence.

4. *See* Lewis M. Steel, Op-Ed, *Building a Justice System,* News & Observer (Raleigh), Jan. 10, 2003 at A17.

5. *See* Tim Bakken, *Truth and Innocent Procedures to Free Innocent Persons: Beyond the Adversarial System,* 41 U. Mich. J.L. Reform 547 (2008).

most defendants are,[6] lawyers would advise their clients that an additional investigation would only solidify the prosecution's case against them and, in all likelihood, greatly reduce the defendant's ability to plea bargain. That is, where a defendant committed a crime but requested innocence procedures, the prosecution's collection of additional evidence would usually indicate the defendant's guilt. Both of us proposed that a defendant would have to waive the privilege against self-incrimination in order to obtain an enhanced investigation.[7] Bakken proposed, in addition, pleas of innocence, defense-attorney affirmations of innocence, and innocence procedures at trial.[8] Steel believes that whoever conducts the investigation should be independent of the initial investigative/prosecutorial authorities to ensure impartial development and consideration of the facts. Although Bakken agrees on the need for an impartial investigation, he believes that it could occur within prosecution offices and would explore that avenue first. Whatever the variations, however, the central concept in both proposals was that full pretrial investigations will lead to a significant number of additional exonerations of innocent persons.

Primarily because of many defendants' lack of resources and their underfunded, and sometimes overwhelmed, defense attorneys, we focused on the need to develop a full factual record prior to trial so that an early decision could be made as to whether the charges against a defendant should be dismissed or prosecuted. The reasons for both of our proposals were identical: a robust early investigation is important because the chances of exoneration are minimal after a defendant has been convicted. Introducing new evidence after trial is extraordinarily unlikely and, even when such evidence can be discovered or developed, courts typically reject the evidence because usually there is little reason to believe that later-discovered evidence is more valuable or reliable than evidence introduced at trial.[9] Even when key prosecution witnesses

6. "From October 1, 2007 through September 30, 2008 . . . 91,835 defendants in criminal cases commenced in federal court. . . . [and] 82,823 offenders were convicted in federal court," a conviction rate of 90%. *Federal: Summary Findings*, Bureau Just. Stat. (Nov. 2, 2011), http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=6 (last visited Nov. 8, 2011); *see also* Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190, 303 n.573 (2003) (concluding that in 2001 conviction rates in military general courts martial and federal criminal trials were 95% and 98.37% respectively).

7. *See* Steel, *supra* note 4; Bakken, *supra* note 5, at 549–50.

8. *See* Bakken, *supra* note 5, at 549–50. Under innocence procedures, defendants would be permitted to plead "innocent," a new plea, thereby requiring the prosecution to engage in an enhanced investigation. To be entitled to the enhanced investigation, defendants would have to consent to an interview by the prosecution and their attorneys would have to affirm their clients' (the defendant's) innocence, as attorneys do in civil cases. If the case proceeded to trial, defendants would be entitled to favorable jury instructions to compensate for revealing their defense to the prosecution during their interviews. *See id.* at 563. If defendants did not plead innocent, their cases would proceed as they do currently, with pleas of guilty and not guilty.

9. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009). The Court, after rejecting a due process claim, stated,

> [a]s a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of "actual innocence." Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming,

recant their testimony and explain why their original testimony was erroneous, courts virtually always reject their recantations.[10]

While many scholars acknowledge the superb and tireless work of advocates in the innocence movement, which has made the procedures in the adversarial system better,[11] new pretrial procedures are necessary to ensure that cases are more thoroughly

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> *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.

Id.; *see also* House v. Bell, 547 U.S. 518, 536 (2006) (requiring a petitioner who wants to introduce newly discovered evidence after conviction to show a "miscarriage-of-justice exception"); Herrera v. Collins, 506 U.S. 390, 393 (1993) (concluding that habeas corpus is not a basis on which a convicted petitioner can introduce newly discovered evidence (affidavits) that indicated innocence); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 Ariz. L. Rev. 655, 658–60 (2005) ("This inherent difficulty in litigating innocence claims predicated on newly discovered non-DNA evidence is exacerbated by the structural design of most state post-conviction regimes: in effect, the path to proving one's innocence through new evidence has become virtually impassable due to procedural roadblocks."). In the absence of DNA evidence, the evidentiary mountain is obviously much higher. *But see* Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011) (finding that convicted persons may use a civil rights statute, 42 U.S.C. § 1983, to obtain DNA testing of evidence).

10. *See, e.g.*, Dobbert v. Wainwright, 468 U.S. 1231, 1238–41 (1985) (Brennan, J., dissenting) (objecting to the denial of a stay of execution where the main witness, the son of the convicted petitioner, recanted, in an affidavit, his key trial testimony).

> Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction. For these reasons, a witness' recantation of trial testimony typically will justify a new trial only where the reviewing judge after analyzing the recantation is satisfied that it is true and that it will "render probable a different verdict."

Id. at 1233–34 (quoting Brown v. State, 381 So. 2d 690, 692–93 (Fla. 1980)); *see also* Haouari v. United States, 510 F.3d 350, 353 (2007) (denying a motion for a successive habeas corpus petition because the recantation, a letter from a co-conspirator to the U.S. Attorney, was "general, unsworn, and conclusory").

> Haouari has not brought to our attention any case in which an unsworn letter of a co-conspirator recanting sworn trial testimony was found to satisfy AEDPA's [Anti-Terrorism and Effective Death Penalty Act of 1996] prima facie standard. And we have been unable to find such a case. On the other hand, cases involving different stages of habeas review and cases outside the habeas context amply support the view that a general, unsworn recantation of the sort presented here is insufficient to contradict sworn trial testimony.

Id. at 353–54.

11. *See, e.g.*, Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 Sw. L. Rev. 965 (2008):

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

Id. at 969–70 (footnotes omitted).

and neutrally investigated. A primary reason for the new procedures we propose is to compensate for defendants' inability to investigate their own cases. The resources that indigent persons are given to defend themselves are sparse and insufficient with perhaps as little as $490 expended by public defenders per case in 1999.[12] Yet, the plight of innocent persons is dire. One of the symposium's panelists, Samuel Gross, estimated that the number of innocent persons convicted between 1989 and 2003 might be as high as 29,000.[13] Another panelist, Michael Risinger, while urging additional research, found a "3.3% minimum factual wrongful conviction rate for capital rape-murders in the 1980s."[14]

Despite these estimates, the actual number of innocent people who fall between the cracks of the criminal justice system is large by any measure. And there are many discrete causes for innocent-person convictions, including mistaken identifications, improper interrogations, and errors or misconduct by police officers, government agents, prosecutors, defense attorneys, and judges. But the origin of the errors and misconduct is not mysterious. Put simply, the system is overloaded. Prosecutors, judges, and defense counsel, and their staffs, are inundated with cases, but have too few personnel to investigate and process each case with the attention necessary to achieve correct results. As a result, police personnel might conduct hasty or suggestive identification procedures or interrogations and may not investigate further once they have what they think is adequate evidence to identify and arrest a suspect. Due to the tremendous number of cases, the great majority are resolved by plea bargains. But for persons who are innocent, the plea bargaining system itself is a form of extreme anguish where defendants whose cases were inadequately investigated often have to give up their right to a trial in order to save themselves from long prison time or even a death sentence. We do not claim here that police officers, prosecutors, or sentencing judges want to send innocent persons to prison. But, as the New York Bar Association stated in 2009, the reality is that the majority of wrongful convictions are the result of law enforcement mistakes or misidentifications.[15]

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12. Carol J. DeFrances, *State-funded Indigent Defense Services, 1999*, Bureau Just. Stat. Special Rep. 7 (Sept. 2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf ("In the 16 States reporting public defender expenditures and criminal caseload, the estimated cost per criminal case was $490."). Although the report cited refers to this as the "cost" per case, it is probably better understood as the amount *expended* by the public defenders' offices (as explained in the report). This figure is only the "cost" insofar as it is the amount the public defenders spend on a case. The report's use of "cost" is therefore a bit of a misnomer—if it only costs $490 per case, then the problem of a defendant's financial resources does not seem all that significant. But this is the amount expended, which is more clearly problematic because a criminal trial would surely warrant or require more resources. *See also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings L.J. 1031, 1332 (2006) (finding that one attorney represented 300 defendants in one year).

13. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 532 (2003).

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

15. John Eligon, *New Efforts Focus on Exonerating Prisoners in Cases Without DNA Evidence*, N.Y. Times, Feb. 8, 2009, at A26.

To illustrate the large number of cases in the system, the Bureau of Justice Statistics reported that "[i]n 2006, state courts sentenced an estimated 1,132,290 persons for a felony conviction."[16] If just 1% of these convictions were of innocent persons, then the number of wrongful convictions would be about 11,323 in just one year. The Bureau of Justice Statistics reported that "[c]orrectional authorities supervised 7,225,800 offenders at year end 2009"[17] (in prison or jail or on probation or parole), amounting to about 3.1% of the U.S. population,[18] of whom 1,613,740 were in prison.[19] Using the same 1% presumption, this would mean that 72,258 innocent persons had been convicted and were under supervision, with 16,137 of them in state or federal prisons. Of course, those on parole would have served time in prison previously.

The mind-bending, assembly-line processing of cases does not allow for careful investigation of each case. Prosecutors do not generally direct additional investigation of cases once police officers have arrested a suspect. Defense attorneys usually have few resources with which to investigate a case. Judges have no authority to conduct or order an investigation. The prosecutors, defense attorneys, and judges handle the cases that are presented to them. Unlike industrial assembly lines turning out standardized products, the assembly line of criminal cases is composed of widely divergent events and fact patterns. Without standardization, there is no meaningful quality control. Moreover, when accused of serious crimes, naturally, few defendants, most of whom are probably guilty of some offense, are willing to admit what they have done. As a result, everyone who works in the system has heard every possible reason why "I am innocent."

Cynicism becomes natural. Although perhaps charging the real offender 90% of the time,[20] government agents may focus on only one suspect and thus unintentionally influence witnesses or miss relevant evidence. Where the police have made a mistake, however, the very nature of the overtaxed, police-controlled investigation makes unraveling the error difficult. Clues are buried; actual perpetrators cover their tracks; and crime scenes are compromised. Officers and investigators develop emotional stakes and commitments in what they have accomplished. Moreover, the next case is always waiting. Even assuming good faith by everyone, crime never stops and the assembly line never stops.

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16. Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006–Statistical Tables*, Bureau Just. Stat. (Nov. 22, 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

17. Lauren E. Glaze, *Correctional Populations in the United States, 2009*, Bureau Just. Stat. Bull. (Dec. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf.

18. *Id.*

19. *Id.*

20. *See, e.g.*, Mark Motivans, *Federal Justice Statistics, 2005*, Bureau Just. Stat. Bull. (Sept. 2008), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs05.pdf ("In 2005, 9 in 10 (90%) defendants charged with a federal violation were convicted, up from 84% in 1995 and 79% of defendants convicted were sentenced to prison, up from 67% in 1995."); *see also Disposition of Criminal Cases Terminated, By Offense, During October 1, 2007–September 30, 2008*, Bureau Just. Stat. (Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf (reporting a conviction rate of 90.3% in federal cases).

So it is with the rest of the system. Prosecutors and police officers work as a team and may find it difficult or impossible to challenge one another's conclusions. They will need each other again, and the next case is already coming through the door. Defense attorneys, assigned by a public system or hired by a defendant's family for a small retainer, have heard innumerable guilty clients claim innocence. With few investigative resources, defense attorneys have little ability to investigate or examine evidence or witnesses that the government agents have found. Many, perhaps most, defense attorneys have learned that clients are less than truthful and so the attorneys work from the beginning under the presumption that their clients, even those who may be innocent, are guilty.

Obviously, an investigation is most effective when it occurs soon after the commission of the crime, when witnesses are relatively plentiful and evidence is fresh. But this is also a time when only the government has access to the witnesses and evidence. Later, the defense attorney, of course, may ask the prosecutor for help. But the prosecutor has heard such pleas many times before. Perhaps the prosecutor will examine the case file again or initiate a further investigation. But, in the end, the prosecutor, having heard many informal pleas of innocence previously, almost always simply says, "Go tell it to the judge or jury." Especially when an accused person is poor, uneducated, frightened, youthful, or mentally or intellectually challenged—characteristics of most defendants—police officers, prosecutors, and defense attorneys may not adequately question identification and interrogation procedures or the reliability of other evidence because the accused cannot sufficiently articulate what should be further investigated.

We believe that if the resources possessed by the government and the suspect-defendant were equal, social scientists could probably determine whether a purely adversarial system is the best method for convicting guilty persons and exonerating the innocent. But we also believe that the government will always have far greater resources and access to evidence. Thus, the system should be modified to account for this inevitable resource disparity in the service of exonerating the innocent, as well as convicting the guilty.

The *Exonerating the Innocent* symposium at New York Law School asked scholars and practitioners to evaluate our ideas and, regardless of whether they agreed or disagreed, propose how to proceed or suggest other systemic changes to the adversarial system. We and the *Law Review* made clear there should be no limits on the ideas the symposium participants could present. They could agree or disagree with our approaches or suggest adopting, rejecting, or modifying our approaches. We also invited participants to propose other avenues of redress.

In considering the symposium presentations, we found that the participants offered wide-ranging responses that fell generally into three categories: (1) fundamental changes in the pretrial process; (2) modifications to current procedures (such as greater discovery); and (3) no change (with one participant urging what appears to be fewer rights for defendants). In the first category, Michael Risinger and Lesley Risinger, in their article, and Keith Findley, in his article, suggest that our proposals are too limited and recommend changes in the pretrial investigation and

charging processes that are more expansive than our pretrial proposals. Risinger and Risinger propose that a neutral, inquisitorial-type magistrate investigate each case and issue charges, after which the current adversarial process would resume. Findley proposes a new institution, an Office of Public Advocacy, in which lawyers would alternate between serving as a prosecutor and defense attorney, and where each would have equal opportunity, in a kind of joint investigation, to work with investigators and experts.

In the second category, other authors proposed some changes to procedures in the current system. John Blume, Sheri Johnson, and Susan Millor focused on the needs of mentally retarded[21] defendants and, for such defendants, would require taped interrogations, defense attorneys with special expertise representing such clients, and rules that require corroboration of informant testimony. For all defendants, Lissa Griffin urges new, broader discovery obligations for prosecutors. Finding that the *Brady* rule, requiring prosecution disclosure of exculpatory evidence,[22] is too narrowly focused on only material exculpatory evidence, Griffin would require prosecutors to complete a checklist to indicate whether other (nonexculpatory) information were available. Samuel Gross focuses on the importance of acquiring and introducing newly discovered evidence after conviction. He would offer defendants the opportunity to choose to have fewer rights prior to conviction in exchange for additional rights following conviction. Mike Ware found few differences between the trials of guilty and innocent persons. He discusses several innocent-person convictions and concludes that questionable identification procedures and mistaken identifications were the key components of each case. He concludes that identification procedures should be treated like DNA analysis in examining their reliability and that all interrogations should be videotaped.

In the third category, Leon Friedman favors retaining current criminal procedures. Paul Cassell seems generally satisfied with the current adversarial system, but he suggests two significant changes that would limit the rights of defendants. Cassell would eliminate the *Miranda* rule and the exclusionary rule. Friedman advocates for better discovery for the defense, and he points with favor to rules established by the Attorney General to foster earlier and additional discovery. Of all the authors, Cassell was the most critical of any pretrial procedures that result in independent investigations. He believes that current criminal procedures are better for society than the innocence procedures discussed at the symposium because, he argues, the proposed new procedures would result in the exoneration of too many guilty persons.

21. In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Court used the term "mentally retarded" in holding that the execution of such persons is unconstitutional. The American Association on Intellectual and Developmental Disabilities (formerly The American Association on Mental Retardation) defines intellectual disability (sometimes termed "mental retardation") as: "a disability characterized by significant limitations both in *intellectual functioning* (reasoning, learning, problem solving) and in *adaptive behavior*, which covers a range of everyday social and practical skills. This disability originates before the age of 18." *FAQ on Intellectual Disability*, Am. Ass'n on Intell. & Developmental Disabilities, http://www.aaidd.org/content_104.cfm (last visited Nov. 10, 2011).

22. *See* Brady v. Maryland, 373 U.S. 83 (1963) (requiring the prosecution to reveal exculpatory information to the defense).

In order to lessen the chances that a guilty person will escape responsibility, Cassell urges eliminating the constitutional requirement that statements be excluded for a *Miranda* violation[23] and the court rule[24] that exclusion is required when police obtain physical evidence in violation of the U.S. Constitution.

Defense attorneys seem to have an interest in their clients' refusal to waive their right to remain silent. Under our proposals, the waiver of the right to silence would be exchanged for enhanced investigations. Similarly, Risinger and Risinger and Gross propose systems wherein defendants could waive their right to remain silent. Defense attorneys should consider the value of a complete investigation, at government expense, when their clients claim innocence and their attorneys believe them. No matter how accomplished, a defense attorney's cross-examination of witnesses at trial is a poor substitute for a full investigation. Beyond our proposals, we believe that attorneys and legislators must be more open to changes in the adversarial system if we are to achieve significant reductions in the number of innocent-person convictions. Resources should be reallocated from the end of the criminal justice process (trials, appeals, and incarceration) to the beginning of the process (investigation).

The well-publicized Dominique Strauss-Kahn case in New York City illustrates what a "let-the-chips-fall-where-they-may, no-holds-barred" investigation conducted by the district attorney's office can do to shed an entirely different light on what looked like a very strong attempted-rape indictment. Using its investigators to gather evidence, as well as its ability to interrogate the complaining witness, in a matter of days, the District Attorney's Office in New York County so weakened its own case that it asked the court to release the defendant from house arrest while it considered how to proceed.[25] No doubt, the District Attorney was motivated to use his investigators to impartially investigate the complainant's credibility, as well as what happened, because Strauss-Kahn was an international figure, wealthy, and well armed with top lawyers who probably would have developed much of the evidence on their own. But this investigation showed what investigators, armed with subpoena power and the authority of the state, can do to fulfill a district attorney's responsibility to protect the innocent as well as convict the guilty. If an independent unit were

23. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (generally requiring police officers to inform defendants of their right to remain silent, right to an attorney, and the possible consequences if they speak); *see also* Dickerson v. United States, 530 U.S. 428 (2000) (finding that the *Miranda* rule is a constitutional requirement).

24. *See* Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (concluding that the exclusionary rule is a "judicially created remedy" (citing United States v. Calandra, 414 U.S. 338, 348 (1974))).

25. John Eligon, *Judge Orders House Arrest of Strauss-Kahn*, N.Y. Times, July 2, 2011, at A1; *see also* Recommendation for Dismissal at 3, People v. Strauss-Kahn, No. 2011NY35773 (N.Y. Sup. Ct. Aug. 22, 2011), *available at* http://www.nytimes.com/interactive/2011/08/22/nyregion/dsk-recommendation-to-dismiss-case.html. Recently, the New York County District Attorney's Office, under Cyrus R. Vance, Jr., instituted what it calls a Conviction Integrity Unit, which it reports has dismissed charges in two cases prior to trial and has other cases under investigation. If formalized, made publicly available to the criminal bar, and properly staffed to undertake independent investigations, especially for the indigent, this type of conviction integrity unit appears to be a step in the right direction. Such a development should be both applauded and carefully evaluated. *See* John Eligon, *Manhattan Prosecutors Are Asked to Undo a '99 Murder Conviction*, N.Y. Times, Oct. 6, 2011, at A26.

established in district attorneys' offices to investigate claims of innocence shortly after indictment in serious cases, particularly those involving indigent defendants willing to waive their rights—something that Strauss-Kahn did not have to do because of his wealth and power—then the American myth of equal justice for the poor, as well as the rich, would be a step closer to fruition.

Believing that independent investigations will free additional innocent persons from criminal charges, we have presented proposals to open up what is now a closed investigative system controlled by police officers and prosecutors. Throughout our work on the *Exonerating the Innocent* symposium and in this introductory article, we have recognized the difficulties inherent in establishing a mechanism or an agency through which to test our ideas. A proper test would include independent justice professionals, either within existing prosecutorial offices (Bakken's approach) or as separate entities (Steel's approach), who are willing to consider the value of systemic changes. Such a test would also include identifying the legal basis for changes and sources of funding for start-up demonstration projects within the various jurisdictions.

As we await improvements in the investigative process, each day additional innocent persons unnecessarily are sentenced to prison terms or, even worse, possibly to death. We call on everyone to consider meaningful systemic reform, whether based on the ideas we have presented or the ideas of the authors of the articles in this *Law Review* issue, or of those who have yet to be heard. Whether charged or convicted, innocent persons need investigative procedures to make good on the ethical mandate that prosecutors and the government—and the systems they employ—exonerate the innocent while convicting the guilty.