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**Toward a New Paradigm of Criminal Justice:  
How the Innocence Movement  
Merges Crime Control and Due Process**

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# TOWARD A NEW PARADIGM OF CRIMINAL JUSTICE: HOW THE INNOCENCE MOVEMENT MERGES CRIME CONTROL AND DUE PROCESS

by Keith A. Findley\*

I.	THE PRIMACY OF INNOCENCE PROTECTION.....	
II.	CRIME CONTROL AND DUE PROCESS: COMPETING CRIMINAL JUSTICE MODELS?.....	
III.	INNOCENCE REFORMS AND THE RELIABILITY MODEL: MERGING CRIME CONTROL AND DUE PROCESS.....	
IV.	THE RELIABILITY MODEL: FOCUSING ON BEST PRACTICES TO PROTECT THE INNOCENT WITHOUT SACRIFICING PUBLIC SAFETY.....	
A.	<i>Improving Eyewitness Identification Evidence</i> .....	
1.	<i>Reforming Eyewitness Identification Procedures</i> .....	
2.	<i>Reforming the Way Eyewitness Evidence Is Received and Considered</i> .....	
B.	<i>Improving Police Interrogation Practices and Guarding Against False Confessions</i> .....	
C.	<i>Improving Forensic Sciences</i> .....	
D.	<i>Neutralizing False Jailhouse Informant Testimony</i> .....	
E.	<i>Improved Defense Counsel</i> .....	
V.	CONCLUSION.....	

At least since 1964 when Herbert Packer introduced two competing models of criminal justice, the Crime Control Model and the Due Process Model, we have become accustomed to thinking in terms of a conflict between society's interest in convicting the guilty and the rights of criminal defendants.<sup>1</sup> The question posed to this symposium panel, "Could we convict fewer innocents without acquitting too many guilty?" is premised on such a paradigm of competing goals. In this Article, I respond to that question in two ways. First, I suggest that the question, at least to a large degree, is the wrong question to ask under our constitutional system.<sup>2</sup> Our constitutional system chooses protecting the innocent as a highest-order

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1. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 150-73 (1968) [hereinafter PACKER, CRIMINAL SANCTION]; Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 2-68 (1964) [hereinafter Packer, *Two Models*].

2. See discussion *infra* Part I.

value, which preferences innocence protection over convicting wrongdoers.<sup>3</sup> Second, confronting the question on its own terms (because of course there is and must be a limit to our willingness to protect the innocent at the expense of public safety), the answer is yes: we can reduce the number of wrongful convictions without sacrificing too many convictions of the guilty.<sup>4</sup> Indeed, the Innocence Movement shows that those goals are not inherently contradictory; rather, they are quite complementary.<sup>5</sup> In this sense, the Innocence Movement alters our understanding of the criminal justice system by giving us a new paradigm—a Reliability Model based on best practices, which supplants and transcends the competing Crime Control and Due Process Models.<sup>6</sup>

### I. THE PRIMACY OF INNOCENCE PROTECTION

To ask if we could convict fewer innocents without acquitting too many guilty assumes an inherent tradeoff between those objectives. In this Article, I argue that the choice is false because the two goals are not mutually exclusive.

But even accepting the question under its implicit assumption that the two goals conflict begs another question: What is “too many” convictions of the innocent and “too many” acquittals of the guilty? Put another way, what is the proper balance between an acceptable number of wrongful convictions and an acceptable number of acquittals of the guilty?<sup>7</sup> The question might suggest a rough parity—perhaps we are no worse off if we lose one valid conviction so long as we prevent one conviction of an innocent.<sup>8</sup> Or perhaps to some, the fear of crime is so much more palpable than the fear of wrongful conviction that virtually *any* loss of valid

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3. See *infra* notes 14, 19 and accompanying text.

4. See discussion *infra* Part IV.

5. See discussion *infra* Part III.

6. See discussion *infra* Part III.

7. See Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 904 (2007) (noting the need to know “the proper error ratio” for the purpose of evaluating reform proposals).

8. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 796 (2007). Professor Risinger suggests what he calls the “Reform Ratio”:

Any wrongful conviction that can be corrected or avoided without allowing more than one or two perpetrators of similar crimes to escape ought to be corrected or avoided; in addition, system alterations (reforms, if you will) that there is good reason to believe will accomplish this ought to be embraced.

*Id.* Risinger notes that the Reform Ratio must be conservative because of the constitutional preference for protecting the innocent. *Id.* He proposes compensating for this conservative ratio, however, by placing “a rather low standard of proof concerning the effects of reform onto the proponents, and a correspondingly high standard of proof for those opposing such reform.” *Id.*

convictions is too great a price to pay.<sup>9</sup> But that cannot be the proper balance. If that were the case, there would be no stopping point; *any* measure to detain, convict, or otherwise incapacitate great numbers of people based on minimal or even no suspicion would be justified because surely some of those people, even by chance, would be guilty of a crime.<sup>10</sup> *Any* restriction on the government's ability to imprison or sanction people necessarily runs some risk of losing some convictions of guilty people.<sup>11</sup>

But any presumption of rough parity (or worse) between the value of avoiding false convictions and false acquittals is misguided. Wrongful conviction of the innocent and failure to convict the guilty are not equal evils, either as a matter of policy or as a normative constitutional principle.<sup>12</sup> Under our constitutional value scheme, wrongful conviction of the innocent is by far the greater evil.<sup>13</sup> As we ponder the question presented to this panel, this constitutional value scheme must be our starting point.

Our constitutional scheme recognizes that some error is inevitable, and therefore, we must decide how we want to apportion the risk of error in our system. Reflecting the judgment that wrongful conviction of an innocent is a greater evil than is failure to convict the guilty, our constitutional scheme purports to put most of the risk of error on the prosecution (even though in practice our system is not always true to that asserted value preference).<sup>14</sup> Accordingly, despite the powerful intuition to believe otherwise, we instruct our fact-finders that the defendant is presumed innocent, and we require the government to prove guilt beyond a reasonable doubt.<sup>15</sup> We extend to the defendant a panoply of procedural protections, most of which are not similarly enjoyed by the government, including rights against self-incrimination (even the right to withhold truthful information helpful to the prosecution's case), confrontation clause rights, compulsory process rights,

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9. See Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 633-36 (1988).

10. *Id.*

11. *Id.*

12. See *In re Winship*, 397 U.S. 358, 372 (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”); see also Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 198 (1997) (discussing the history of the constitutional value scheme, which embraces a presumption of innocence).

13. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring).

14. Elsewhere, I argue that, while we purport to put most risk of error on the government, in practice our system puts considerable, even most, risk of error on the accused. Nonetheless, while our system does not operate as we think or proclaim that it does, as a matter of constitutional doctrine, our system at least professes to preference innocence-protection as a highest-order value. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 895-96 (2008).

15. *In re Winship*, 397 U.S. at 363; see also Findley, *supra* note 14, at 895-96 (discussing the procedural protections our system gives to defendants in order to protect the innocent); Goldwasser, *supra* note 9, at 633-36 (discussing the purpose behind the reasonable doubt standard in criminal cases).

speedy trial rights, ex post facto protections, and the right to a jury trial.<sup>16</sup> We guarantee the right to assistance of counsel, even to defendants who cannot afford counsel.<sup>17</sup> And we guarantee criminal defendants a constitutional right to present a defense, which can overcome even legislative judgments about the scope of admissible evidence in ways that would not be applicable to prosecution evidence.<sup>18</sup> In sum, we embrace the value preference expressed by Blackstone's ratio, which proclaims that it is better that ten guilty go free than that one innocent be wrongly convicted.<sup>19</sup> While that ratio is not meant to create a rigid mathematical formula—indeed the acceptable ratio of wrongful convictions to failures to convict cannot be set with any mathematical precision—the maxim does at least express a value preference that has been incorporated into constitutional doctrine.<sup>20</sup> Wrongful conviction of the innocent is a greater constitutional wrong than is failure to convict the guilty.<sup>21</sup>

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16. See Goldwasser, *supra* note 9, at 636 (discussing the defendant's right to a trial by jury); Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1277, 1352 (discussing compulsory process rights). Hoeffel argues that "the purpose of the [Compulsory Process] Clause was to allow for the introduction of evidence by the accused through the adversarial process" and that "[t]he Clause aids in the search for truth across all cases by giving the defendant a procedure that allows his side of the case, and not just the prosecution's, to be heard by the jury." *Id.* at 1277.

17. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

18. See *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006); *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *Washington v. Texas*, 388 U.S. 14, 19 (1967). *But see Scheffer v. United States*, 523 U.S. 303, 308 (1998).

19. WILLIAM BLACKSTONE, 4 COMMENTARIES \*358; see also Michael S. Pardo, *On Misshapen Stones and Criminal Laws' Epistemology*, 86 TEX. L. REV. 347, 358 (2007); George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 978 (2007).

20. Risinger, *supra* note 8, at 791 ("In general, it is fair to say that the ratio image is meant as a general declaration that, for any given crime, the relative disvalue of a wrongful acquittal is less, perhaps significantly less, than the disvalue of a wrongful conviction. This ratio was not conceived of by statisticians, and it was never meant, nor should it be used, in my opinion, to announce the acceptability of a system of criminal justice so long as no more than ten percent of those convicted are innocent."). While Blackstone chose the ratio of 10-1, others over the centuries have expressed the same sentiment using ratios varying from 1-1 to 1000-1. Volokh, *supra* note 12, at 175.

21. See *supra* notes 12-14 and accompanying text. Some critics challenge the notion that this preference can be found in the Constitution. See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. (forthcoming 2008). The strict constructionists believe that the truth-finding function, not protection of the innocent, is the primary purpose of the criminal justice system. *Id.* But the primacy of truth-finding is not expressly mentioned in the Constitution or the legislative history. And the list of special rights expressly granted to defendants powerfully suggests a preference for protecting the wrongly accused. In any event the Supreme Court has interpreted the Constitution to recognize such a preference for protecting the innocent. See, e.g., *In re Winship*, 397 U.S. 358, 363-64 (1970) (holding that the Due Process Clause requires a reasonable doubt standard); *id.* at 372 (Harlan, J., concurring) (stressing the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"). Whether all agree with that interpretation or not, it is now settled constitutional doctrine. *Id.* at 363-64 (majority opinion). As Donald Dripps puts it, "in constitutional terms the relevant value is not finding the truth but preventing unjust punishment." Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 593 (1990). Accordingly, "Constitutional criminal procedure . . . should assume for its premises the preference for avoiding unjust

From a policy perspective as well, favoring innocence protection makes sense. *Every* wrongful conviction of an innocent person is an intolerable event.<sup>22</sup> The injustice and harm to the wrongly convicted innocent defendant is staggering.<sup>23</sup> Moreover, wrongful convictions are an injustice that undermines our respect for and faith in our criminal justice institutions and the rule of law because they are inflicted directly by the State.<sup>24</sup> Those injustices are compounded by an additional wrong: when we convict the innocent, the truly guilty avoids sanction and remains free to victimize the community again.<sup>25</sup>

Not every failure to convict the guilty, however, represents a similarly intolerable event. While this failure is also problematic, it simply is not as intolerable as the wrongful conviction of the innocent.<sup>26</sup> Our system—any system—inevitably lacks the capacity to apprehend, prosecute, and incarcerate every person, or even most people, guilty of serious crimes for which incarceration would be an appropriate sanction.<sup>27</sup> Selective incapacitation is the most we can hope for.<sup>28</sup> Moreover, not every guilty person will recidivate, so not every failure to convict translates into a loss of public safety. As Donald Dripps observes:

[F]alse acquittals may not cost anything in terms of unprevented crimes. Who can say that Willy Horton committed graver outrages than would have been committed by the felon confined in the prison space his furlough made available? As for deterrence, how many street criminals count on being arrested, bound over, indicted, and then freed on a “technicality”? Invisible lost convictions do not affect general deterrence. Given that freeing the guilty for constitutional reasons has become virtually exotic, the suggestion that crime will decrease if the Warren Court precedents are overruled is “inutterable nonsense.”<sup>29</sup>

Wholly apart from any effect on crime control, victims genuinely suffer in a variety of ways when crimes are not successfully solved and

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conviction . . .” *Id.*; see also Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 198 (1983) (“At least in theory, our system prefers erroneous acquittals over erroneous convictions.”); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) (“Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.” (footnote omitted)).

22. See Risinger, *supra* note 8, at 789.

23. See *id.*

24. *Id.*

25. *Id.*

26. See *id.* at 791.

27. See *infra* Part II.

28. See *infra* notes 45–46 and accompanying text.

29. Dripps, *supra* note 21, at 609. (footnotes omitted).

punished.<sup>30</sup> But the experience is not uniform or always as clear and dramatic as when an innocent person is sent to prison or death row.<sup>31</sup> Victimization studies show that most victims do not report crimes, and thus, most crimes are never prosecuted.<sup>32</sup> And with the rise of the victims' rights movement, criticism has been leveled against the single-minded focus on criminal prosecution and incarceration "for taking disputes out of the hands of offenders, victims and the larger community."<sup>33</sup> By focusing solely on criminal sanctions, we neglect the need of some victims for other methods to redress wrongs, including "family conferencing, restorative justice, and victim-offender reconciliation" and other forms of "re-integrative shaming through informal, non-punitive and non-adversarial interventions which shame offenders for their crimes, but offer support and re-integration through families and communities."<sup>34</sup>

Thus, failure to convict the guilty is a serious problem, but this failure is not inherently the equivalent of wrongly convicting the innocent, either as a matter of constitutional priority or sound policy judgment.<sup>35</sup>

But this value preference has limits.<sup>36</sup> Because we can never achieve perfect knowledge, mistakes are inevitable no matter how many precautions we take; the only way to prevent all risk of wrongful convictions is to prosecute no one.<sup>37</sup> Of course, such paralysis is not a serious alternative. Thus, the proper balance must lie somewhere between these poles.<sup>38</sup>

I do not propose to resolve the debate about precisely where that balance should lie. Instead, I merely note that the appropriate tradeoff point is not one-to-one. Because wrongful conviction of the innocent is a greater evil than failure to convict the guilty, we should be willing to accept some loss of true convictions, even a disproportionate number, to reduce the number of false ones.<sup>39</sup>

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30. Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 695-97 (1999).

31. See Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 64-65 (2005).

32. Roach, *supra* note 30, at 677. Roach cites data from a 1993 Canadian victimization survey that found that victims failed to report to police "90% of sexual assaults, 68% of assaults, 53% of robberies, 54% of vandalisms, 48% of motor vehicle thefts or attempted thefts and 32% of break and enters or attempted break and enters." *Id.* at 696 n.134 (citing Rosemary Gartner & Anthony Doob, *Trends in Criminal Victimization 1988-93*, 14 JURISTAT 4 (1994)).

33. *Id.* at 693.

34. *Id.*

35. See *supra* text accompanying notes 18-42.

36. Lillquist, *supra* note 31, at 62-63.

37. See *id.*

38. See *id.* at 64.

39. *Id.*

## II. CRIME CONTROL AND DUE PROCESS: COMPETING CRIMINAL JUSTICE MODELS?

Fortunately, we need not determine a level of lost true convictions that would be an acceptable tradeoff for preventing wrongful convictions because most of the reforms designed to reduce wrongful convictions cost little or nothing in terms of accurate convictions.<sup>40</sup> Instead, those proposed reforms increase the reliability of the truth-finding functions of the criminal justice system, which simultaneously enhances our ability to convict the guilty and prevent convictions of the innocent.<sup>41</sup> The proposed reforms do not represent a tradeoff between mistaken convictions and mistaken acquittals; rather, they represent best practices that improve the reliability of the criminal justice system in the aggregate.<sup>42</sup>

The premise for the inquiry into whether we can reduce wrongful convictions without risking too many wrongful acquittals is that those two goals are inherently in tension.<sup>43</sup> That perspective permeates scholarly and popular discussions about criminal justice.<sup>44</sup> Simply put, we have become accustomed to thinking in terms of a conflict between crime control objectives and defendants' rights.<sup>45</sup>

That paradigm has its scholarly foundation in models such as Packer's competing Crime Control and Due Process Models.<sup>46</sup> Packer created his two models not to advocate either one in its pure form but to clarify the value preferences that underlie different systemic choices and to help describe the competing forces that shape our criminal justice system.<sup>47</sup>

According to Packer, the Crime Control Model is based on a value system that preferences repression of crime as the most important function

40. See Arenella, *supra* note 21, at 187; Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973); Roach, *supra* note 30, at 677, 693.

41. See sources cited *supra* note 40.

42. See sources cited *supra* note 40.

43. See, e.g., Arenella, *supra* note 21, at 187 (discussing the "tensions between the protection of individual rights and the state's need to detect and punish criminal activity quickly and efficiently"); Damaska, *supra* note 40, at 576 ("Unfortunately there is a conflict between these two desires: the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty. . . . [T]his inner tension is part and parcel of the dialectics of any criminal process.").

44. See, e.g., Arenella, *supra* note 21, at 187; Damaska, *supra* note 40, at 576.

45. See Arenella, *supra* note 21, at 187; Damaska, *supra* note 40, at 576.

46. See Arenella, *supra* note 21, at 187; Damaska, *supra* note 40, at 576. Others have revised or proposed alternatives to Packer's two models, but none are as influential or enduring as Packer's models. See, e.g., Arenella, *supra* note 21, at 187; Damaska, *supra* note 40, at 575-77; Malcolm M. Feeley, *Two Models of The Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407, 407-09 (1973); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1009 (1974); John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 360 (1970).

47. See Packer, *Two Models*, *supra* note 1, at 6.



of the criminal justice system.<sup>48</sup> To achieve maximum crime suppression in a world of scarce resources, the Crime Control Model emphasizes “the efficiency with which the criminal process operates to . . . secure appropriate dispositions of persons convicted of crime.”<sup>49</sup> By efficiency, Packer means that the system must be capable of apprehending, trying, convicting, and sanctioning a high proportion of criminal offenders with maximum speed and finality.<sup>50</sup> To achieve such speed and finality, the system depends on quick resolution of questions of factual guilt by police through informal investigation processes and interrogations with minimal review or oversight by formal adversarial adjudication.<sup>51</sup> As Packer states, “The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly line or a conveyor belt . . . .”<sup>52</sup>

Necessarily, the Crime Control Model places great faith and confidence in the administrative screening process conducted by police and prosecutors to reach an accurate assessment of guilt, which leads to a “presumption of guilt” that permits resolution of most cases by guilty pleas.<sup>53</sup> Packer explains that, “if there is confidence in the reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency.”<sup>54</sup> Thus, this model places few restrictions on the administrative fact-finding process, except those restrictions “that enhance reliability, excluding those designed for other purposes.”<sup>55</sup>

The Due Process Model, by contrast, is much more skeptical of the administrative investigative process and its capacity to accurately assess guilt without judicial oversight.<sup>56</sup> In addition, this model values individual rights and dignity in the face of state power rather than merely crime suppression.<sup>57</sup> Accordingly, the Due Process Model rejects informal, administrative fact-finding and prefers formal adversarial adjudication.<sup>58</sup> Under this model, there is no legitimate fact-finding until the case is publicly heard and evaluated by an impartial tribunal, and the accused has

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48. *Id.* at 9.

49. *Id.* at 10.

50. *Id.*

51. *See id.*

52. *Id.* at 11.

53. *See* PACKER, CRIMINAL SANCTION, *supra* note 1, at 160-61; Packer, *Two Models*, *supra* note 1, at 11-12.

54. Packer, *Two Models*, *supra* note 1, at 12.

55. *Id.* at 13.

56. *See* PACKER, CRIMINAL SANCTION, *supra* note 1, at 163-64; Packer, *Two Models*, *supra* note 1, at 14.

57. *See* PACKER, CRIMINAL SANCTION, *supra* note 1, at 165.

58. *See id.* at 163-64.

had a full opportunity to challenge the prosecution's case.<sup>59</sup> As its premise, the Due Process Model relies upon a presumption of legal innocence.<sup>60</sup> Hence, as Packer states, "If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course."<sup>61</sup>

### III. INNOCENCE REFORMS AND THE RELIABILITY MODEL: MERGING CRIME CONTROL AND DUE PROCESS

When considering whether we can safely reduce the number of wrongful convictions, it becomes clear that the Due Process and Crime Control Models do not capture the interplay of values that underlie the Innocence Movement.<sup>62</sup> This movement and its proposed reforms have shown that the two value preferences, crime control and defendants' due process rights, can co-exist quite nicely—they are, in many ways, two sides of the same coin.<sup>63</sup>

Thus, while the Innocence Movement is largely perceived as a defense-oriented movement, its rhetoric includes respect for fundamental crime control values.<sup>64</sup> At its most basic level, these values are reflected in the movement's focus on ascertaining factual truth and apprehending the true perpetrator.<sup>65</sup> The innocence literature is replete with references to the fact that every wrongful conviction also represents a failure to convict the guilty—a failure of crime control.<sup>66</sup> Indeed, the literature notes that in 37% of the DNA exoneration cases, DNA evidence not only freed the innocent but also identified the true perpetrator.<sup>67</sup> Similarly, many inquiries into

59. See Packer, *Two Models*, *supra* note 1, at 14. In this sense, "The criminal trial is concerned not with factual guilt, but with whether the prosecutor can establish legal guilt beyond a reasonable doubt on the basis of legally obtained evidence." Roach, *supra* note 30, at 682.

60. PACKER, *CRIMINAL SANCTION*, *supra* note 1, at 167-68.

61. Packer, *Two Models*, *supra* note 1, at 14.

62. See *infra* notes 70-87 and accompanying text. Most notably, the Innocence Movement has been launched by the more than 200 post-conviction DNA exonerations exposed since 1989. See The Innocence Project, *Know the Cases*, [www.innocenceproject.org/know/](http://www.innocenceproject.org/know/) (last visited Oct. 18, 2008) (listing DNA exonerations); see also Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 130-32 (2008) (analyzing the first 200 DNA exonerations). But, the exonerations are not limited to DNA cases; during the last two decades, many more exonerations have emerged in cases with no DNA, although the total is unknown. See Samuel R. Gross, *Convicting the Innocent* (4 ANN. REV. OF L. & SOC. SCI., Working Paper No. 103, 2008) [hereinafter Gross, *Innocent*], available at <http://ssrn.com/abstract=1100011> (analyzing categories of false convictions beyond rape and murder); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 551-53 (2005) [hereinafter Gross, et. al, *Exonerations*].

63. See Garrett, *supra* note 62, at 130-31.

64. See Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission To Study Wrongful Convictions*, 38 CAL. W.L. REV. 333, 338 (2002).

65. See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 287-89.

66. See, e.g., Findley, *supra* note 64, at 337-39; Rosen, *supra* note 65, at 287-88.

67. Garrett, *supra* note 62, at 119.

wrongful convictions posit the need to learn about errors in the criminal justice system to better protect the innocent and convict the guilty.<sup>68</sup>

At the same time, we are beginning to understand that the core values of the Crime Control Model require greater attention to innocence protection—to defendants' rights.<sup>69</sup> Packer's Crime Control Model accepts the probability of mistakes only "up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law."<sup>70</sup>

The exposure of an alarmingly high rate of wrongful convictions threatens crime control in both of these ways.<sup>71</sup> The wrongful conviction cases remind us that by convicting the innocent, our system allows the guilty to escape punishment for serious crimes.<sup>72</sup> And the exonerations have created a general awareness of the unreliability of the process, which may threaten the efficacy of the criminal law.<sup>73</sup> For example, prosecutors now complain that DNA testing (and the exonerations it produces) has contributed to what they claim is a "CSI effect"—the jury's expectation that the prosecution will produce conclusive scientific evidence of guilt and its reluctance to convict without it.<sup>74</sup>

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68. See Findley, *supra* note 64, at 337 (noting that the opportunity to learn from the DNA exoneration cases "poses a double imperative—a justice imperative and a public safety imperative"); Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, CRIM. JUST., Winter 2005, at 18, 18 (discussing resolutions adopted by the ABA in 2004 that were "designed to improve the justice system's accuracy in convicting the guilty while acquitting the innocent"); Wisconsin Criminal Justice Study Commission, Charter Statement, [http://www.law.wisc.edu/webshare/02i0/commission\\_charter\\_statement.pdf](http://www.law.wisc.edu/webshare/02i0/commission_charter_statement.pdf) (last visited Oct. 18, 2008) (creating a State Commission to explore the causes of wrongful convictions and propose reforms to enhance the system's ability to convict the guilty and acquit the innocent).

69. See generally Packer, *Two Models*, *supra* note 1 (discussing the Crime Control and Due Process Models).

70. *Id.* at 15.

71. See, e.g., Gross, *Innocent*, *supra* note 62, at 524-26; Risinger, *supra* note 8, at 780-82. In addition to the more than 200 DNA exonerations counted by the Innocence Project, Samuel Gross and his colleagues have identified 340 wrongful convictions from public media sources between 1989 and 2003 (a total that surely grossly undercounts the full number of wrongful convictions during that time). Gross, *Innocent*, *supra* note 62, at 524. Others have attempted to calculate a wrongful conviction rate. Risinger, *supra* note 8, at 780. The most empirically sound attempt thus far, by Michael Risinger, estimates a wrongful conviction rate in one particular type of case—capital rape murders—of between 3.3% and 5%. *Id.* In 2008, more than 2.3 million people were held in America's prisons and jails. THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5 (2008), available at [http://www.pewcenteronthestates.org/uploaded\\_Files/8015P\\_CTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploaded_Files/8015P_CTS_Prison08_FINAL_2-1-1_FORWEB.pdf). If the wrongful conviction rate of 3.3% to 5% holds for all crimes and all sentences—and we don't know that it would—somewhere between almost 76,000 and 115,000 innocent people are presently behind bars in the United States.

72. See generally Gross, et. al., *Exonerations*, *supra* note 62 (discussing wrongful convictions).

73. See *infra* note 74 and accompanying text.

74. See Craig M. Cooley, *The CSI Effect: Its Impact and Potential Concerns*, 41 NEW ENG. L. REV. 471, 501 (2007). The CSI effect refers to Crime Scene Investigation, the shared title and premise of several popular television programs in which crimes are routinely solved with nearly magical and

Some procedural rules, of course, serve values other than truth-finding, and many of these values are important aspects of the Due Process Model.<sup>75</sup> For example, some testimonial privileges and rules that exclude reliable but illegally obtained evidence “deliberately reduce[] factfinding precision for the sake of other values.”<sup>76</sup> But the innocence cases demonstrate that not all defendants’ rights are incompatible with crime control; instead, many enhance the system’s truth-finding functions.<sup>77</sup> Indeed, even after the Warren Court established new due process rights for criminal cases in the 1960s, including some rights that do not purport to serve truth-enhancement, those rights have not seriously impeded crime control.<sup>78</sup> In fact, over the last fifty years, we have witnessed an unprecedented increase in prosecutions, convictions, and imprisonment rates.<sup>79</sup> Moreover, research suggests that offenders may be more law abiding if they perceive that they have been treated fairly by the system.<sup>80</sup> In sum, the past fifty years have

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always infallible scientific analyses. *See id.* at 471. Considerable debate exists about whether the CSI effect really exists, or if so, in which direction it tilts the system. *See id.*; Kimberlianne Podlas, “*The CSI Effect*”: *Exposing the Media Myth*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 429, 465 (2006); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050, 1063-76 (2006). Some evidence suggests that DNA might also be creating a reverse-CSI effect—a reluctance on the part of some prosecutors or courts to accept evidence of innocence, particularly in post-conviction proceedings, unless it is as conclusive as the most dispositive DNA evidence. *See generally* 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 (2005) (describing the difficulties that defendants with non-DNA-based innocence claims have in obtaining relief).

75. *See* Damaska, *supra* note 40, at 578-80.

76. *Id.* at 579. Damaska notes with some skepticism, however, that some evidentiary privileges are defended on the basis that they avoid evidence of dubious value and that exclusion of some illegally obtained evidence is defended on the ground that these exclusionary rules enhance evidentiary fact-finding in the long run. *Id.* at n.196; *cf.*, Dripps, *supra* note 21, at 620 (stating that the Fourth Amendment is designed to protect “innocent victims of official detention and home invasion”); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 *MICH. L. REV.* 1229, 1229 (1983) (arguing that the primary purpose of the Fourth Amendment is to protect the innocent from insufficiently justified searches and seizures).

77. *See* Dripps, *supra* note 21, at 634-40.

78. *See infra* note 79 and accompanying text.

79. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <http://www.albany.edu/sourcebook/pdf/t6282004.pdf> (last visited Aug. 29, 2008). The total number of people in American prisons or jails has skyrocketed from fewer than 213,000 in 1960 to nearly 2.2 million in 2005. *See id.*; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ONE IN EVERY 32 ADULTS WAS IN PRISON, JAIL, ON PROBATION, OR ON PAROLE AT THE END OF 2005, <http://www.ojp.gov/bjs/pub/press/priprop.htm> (last visited Oct. 18, 2008). And the incarceration rate has soared from just over 100 per 100,000 residents in 1960 to more than 1,000 per 100,000 residents in 2008. Michael Tonry, *Crime Does Not Cause Punishment: The Impact of Sentencing Police on Levels of Crime*, SA CRIME QUARTERLY, June 2007, 13, at 14, available at [http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/CQ20\\_TONRY.PDF?link\\_id=3&slink\\_id=4730&link\\_type=12&slink\\_type=23&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/CQ20_TONRY.PDF?link_id=3&slink_id=4730&link_type=12&slink_type=23&tmpl_id=3); Press Release, Pew Ctr. on the States, Pew Report Finds More than One in 100 Adults Are Behind Bars (Feb. 28, 2008), [http://www.pewcenteronthestates.org/news\\_room\\_detail.aspx?id=35912](http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912).

80. Roach, *supra*, note 30, at 675 (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)). As Roach notes, Packer’s Crime Control Model “assumes that punishment is necessary to control crime

demonstrated that fair(er) proceedings are not incompatible with crime control.<sup>81</sup>

Another trend is also blurring the distinction between the Crime Control and Due Process Models.<sup>82</sup> The Crime Control Model is premised on a preference for administrative fact-finding centered in police investigations, while the Due Process Model preferences formal adversarial adjudication in open court.<sup>83</sup> But even after the Warren Court's due process revolution, the criminal justice system has continued to take on an increasingly administrative quality.<sup>84</sup> Packer's Due Process Model assumes that fair treatment is only achieved by an adversarial criminal trial in which a defense lawyer represents the accused.<sup>85</sup> But evidence shows that defense lawyers routinely fail to invoke due process rights.<sup>86</sup> They rarely conduct independent investigations, file motions to suppress evidence, challenge prosecution-proffered expert testimony, or seek experts of their own.<sup>87</sup> And they rarely invoke the right to trial itself; increasingly, criminal cases are resolved by the most administrative of judicial proceedings—the plea of guilty or no contest.<sup>88</sup> The rise in due process rights has not translated into defendants extensively exercising those rights.<sup>89</sup>

Under the Due Process Model, the defendant's right to counsel is the focal point because counsel is expected to protect and assert the defendant's

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whereas it may achieve little in the way of general deterrence and may make things worse by stigmatizing offenders and producing defiance." *Id.* at 674-75.

81. *See supra* note 79 and accompanying text.

82. *See infra* note 88 and accompanying text.

83. *See* Damaska, *supra* note 40, at 574.

84. *See* Roach, *supra* note 30, at 684-85.

85. *Id.* at 674-75.

86. *See id.* at 675 (footnotes omitted). Indeed, Roach questions whether fair treatment necessarily requires counsel in all cases by noting that "circle-based alternatives such as restorative justice, family conferences, and Aboriginal justice can be run without lawyers and in a procedurally fair manner that encourages participation." *Id.* at 674-75 (footnotes omitted).

87. *See* Findley, *supra* note 14, at 901-02, 934-49; Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S107-S110 (2005); Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 46, 49, 52-53 (1990); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 135 (2000).

88. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 493 (2004). More than 95% of all convictions are obtained by plea, rather than trial, and the percentage of cases taken to trial has diminished over time. *Id.* at 493. In 1962, 15% of federal criminal cases were resolved by trial; by 2002, that number had fallen to less than 5%. *Id.* at 492-93. And while the total number of federal criminal case filings (measured by number of defendants) more than doubled during that forty-year span, from 33,110 in 1962 to 76,827 in 2002, the absolute number of criminal trials diminished from 5,097 in 1962 to 3,574 in 2002, a drop of 30%. *Id.* The numbers in state courts mirror the patterns in federal court. *See id.* at 506-13. From 1976 to 2002, the overall rate of criminal trials in the twenty-two states for which data is available dropped from 8.5 % of dispositions to 3.3 %. *Id.* at 512. Although total case dispositions grew by 127% in these state courts, the total number of jury trials were reduced by 15% and the number of bench trials fell by ten percent. *Id.* at 510.

89. *See* Roach, *supra* note 30, at 684-85.

due process rights.<sup>90</sup> But defense counsel have proved unable or unwilling to aggressively assert those rights because (1) underfunding leaves them incapable of taking on the State and (2) they have learned that cooperating with the prosecution tends to result in better outcomes for their clients.<sup>91</sup> “Prosecutors and judges alike . . . indoctrinate defense attorneys into the plea bargaining process by communicating to attorneys that time-consuming motions should be forsaken in favor of plea negotiation.”<sup>92</sup>

Defense lawyers are not the only group that fails to reflect the adversarial ideal.<sup>93</sup> “Many empirical studies have illustrated that police, prosecutors, judges, and defense counsel share common organizational interests that defy the contrasting ideologies of crime control and due process. These professionals are bureaucrats, who habitually co-operate to maximize their own organizational interests, not warriors for crime control or due process.”<sup>94</sup>

Noting these trends, Darryl Brown has observed that the role of defense counsel is declining and that the system is beginning to rely on other, more administrative mechanisms that have greater promise for protecting innocent defendants.<sup>95</sup> Brown echoes Judge Gerard Lynch’s contention that most contemporary adjudication reflects an “administrative system of criminal justice.”<sup>96</sup> Brown contends that these new administrative mechanisms for ensuring reliability have greater potential for protecting the rights of innocent defendants than the politically unrealistic hope of adequately funding defense counsel to fight prosecutors in adversary litigation.<sup>97</sup> These new mechanisms include improved eyewitness

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90. See Packer, *Two Models*, *supra* note 1, at 59-60. Packer explains the centrality of counsel in this way:

At every stage in the criminal process, as we have seen, our two models divide on the role to be played by counsel for the accused. In the Crime Control Model, with its administrative and managerial bias, he is a mere luxury; at no stage is he indispensable, and only in the very small proportion of cases that go to trial and the even smaller proportion that are reviewed on appeal is he to be regarded as more than merely tolerable. The Due Process Model, with its adversary and judicial bias, makes counsel for the accused a crucial figure throughout the process; on his presence depends the viability of this Model’s prescriptions.

*Id.*

91. F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. PUB. L.* 189, 209-13 (2002).

92. *Id.* at 213; see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 277 (1979) (discussing how defendants have little incentive to fully engage in the legal process because the cost of a trial is often greater than the potential criminal sentence).

93. See Roach, *supra* note 30, at 687-88.

94. *Id.* at 687.

95. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CAL. L. REV.* 1585, 1590-91 (2005).

96. *Id.* at 1589; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2117 (1998).

97. See Brown, *supra* note 95, at 1613-14. Brown summarizes his argument as follows:

[T]he strategy of pursuing accuracy through adversarial processes—through well-equipped

identification procedures and forensic laboratory systems, increased checks and balances within the investigative and prosecutorial process (such as separating more clearly the roles of investigation and prosecution), and more expansive criminal discovery.<sup>98</sup>

The emerging Innocence Movement is then showing that the Crime Control and Due Process Models are not as dichotomous as commonly perceived.<sup>99</sup> Rather, the Reliability Model, with its reliance on best practices, incorporates the underlying values of both the Crime Control and the Due Process Models.<sup>100</sup> Like the Crime Control Model, the Reliability Model emphasizes the need to efficiently and accurately sort the guilty and the innocent, and it relies more on administrative procedures than on adversarial adjudication.<sup>101</sup> And the Reliability Model incorporates features of the Due Process Model, including strengthening defense counsel and the rules of evidence to force the administrative practices to respect the interests of the accused and to improve the efficiency of sorting the guilty from the innocent.<sup>102</sup>

Indeed, the Innocence Movement reveals that the dichotomy between Crime Control and Due Process concerns was never as stark as sometimes assumed. While the Due Process Model reflects greater concern about protecting individuals from overbearing government power, it also, just like the Crime Control Model, is designed first and foremost to sanction and suppress crime.<sup>103</sup> As Mirjan Damaska explains:

[I]t is conceptually impossible to imagine a criminal process whose dominant concern is a desire to protect the individual from public officials. In its pure form[, the Due Process Model, which is concerned only about protecting individuals from the government,] would lead not to an obstacle

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defense counsel in particular—has reached a political limit. Broadly speaking, legislatures are interested in accurate criminal adjudication, but they do not view zealous defense attorneys as the best way to achieve that goal. Accordingly, adversarial process will not be a politically sustainable means for assuring the accuracy of fact-gathering. Partisan challenges brought by defense counsel against the state's evidence must become—and are becoming—less dominant tools for serving a renewed popular commitment to accuracy. Other actors and institutions, with different mixes of motives and weaknesses, are equipped to take on—and are starting to take on—more of that task.

*Id.* at 1645.

98. *See id.* at 1613-14.

99. *See, e.g.,* Packer, *Two Models*, *supra* note 1, at 6 (introducing the two models of the criminal process, their underlying values, and the important distinctions between them).

100. *See* discussion *infra* Part IV.

101. *See* discussion *infra* Part IV.A.1.

102. *See* discussion *infra* Part IV.A.2.

103. Packer, *Two Models*, *supra* note 1, at 13, 16.

course, but rather to mere obstacles and no course on which to place the former.<sup>104</sup>

And the defendants' rights, which form the core of the innocence reform agenda, are equally important to crime control. As Jon Gould recently observed:

The most promising venue for criminal justice reform is in the local police departments, sheriff's offices, and district attorneys' offices that form the front line of America's criminal justice system. This initially may seem odd . . . but the same reforms that may be envisioned as prodefendant can also be advanced under the aegis of greater professionalism and best practices for criminal justices.<sup>105</sup>

For these reasons, police and prosecutors, along with victims' advocates and judges, are joining defense lawyers in reform efforts to improve the reliability of the criminal justice system—to better protect the innocent and convict the guilty.<sup>106</sup> These efforts are most visible in the work of innocence commissions, criminal justice study commissions, or other similar bodies that are being formed in states such as North Carolina, Virginia, Wisconsin, Illinois, Connecticut, and California.<sup>107</sup> Typically comprised of representatives from all perspectives in the criminal justice system, these organizations are finding remarkable common ground in efforts to improve the functioning of the criminal justice system by replacing any distinction between the Crime Control and Due Process Models with an implicit model that emphasizes best practices.<sup>108</sup>

#### IV. THE RELIABILITY MODEL: FOCUSING ON BEST PRACTICES TO PROTECT THE INNOCENT WITHOUT SACRIFICING PUBLIC SAFETY

The reforms advocated by the innocence community to reduce the number of wrongful convictions draw on the truth-seeking values shared by the Crime Control and Due Process Models.<sup>109</sup> Studies of DNA

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104. Damaska, *supra* note 40, at 575; *see also* JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 239 (2008) (“The reform and law and order communities have more in common than they sometimes acknowledge. We all seek protection from crime. We all want wise and efficient stewardship of public monies.”).

105. GOULD, *supra* note 104.

106. *See id.*

107. *See, e.g.*, Findley, *supra* note 64, at 348-53; *see also* GOULD, *supra* note 104, at 72 (“One of our tenets in starting the commission was a collective belief that people of goodwill from across the political spectrum share an interest in convicting the guilty and freeing the innocent.”).

108. *See* Findley, *supra* note 64, at 348-53; Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 709-11 (2006) (giving a detailed description of the work of one such body that led to significant reforms in one jurisdiction); *see also* GOULD, *supra* note 104, at 42-73 (discussing work of the Innocence Commission for Virginia).

109. *See* Kruse, *supra* note 108, at 645-51.



exonerations have consistently identified the same cluster of features that contribute to mistaken convictions.<sup>110</sup> These include eyewitness error, false confessions, jailhouse snitch or informant testimony and other types of perjury, police and prosecutorial misconduct, flawed or fraudulent forensic science, inadequate defense counsel, and tunnel vision.<sup>111</sup> Reforms to redress each of these problems are aimed at enhancing the reliability of the process, which simultaneously serve the needs of both crime control and due process by enhancing the system's ability to convict the guilty and exonerate the innocent.<sup>112</sup> A discussion of a few of these reforms illustrates that, indeed, we can reduce the number of convictions of the innocent without losing too many convictions of the guilty.<sup>113</sup>

#### A. *Improving Eyewitness Identification Evidence*

Because eyewitness error is the leading contributor to wrongful convictions—present in 79% of the first 200 DNA exonerations—most discussions of innocence reforms begin with an analysis of ways to improve the reliability of eyewitness evidence.<sup>114</sup> Probably no other factor related to wrongful convictions has received as much legal or scientific attention as eyewitness identification.<sup>115</sup> Many causes of misidentification and most of the proposed remedies are well known and not disputed.<sup>116</sup> The reforms represent a classic example of the merger of crime control and due process: almost all of the proposed reforms will improve the reliability of the process by reducing wrongful convictions of the innocent without losing convictions of the guilty.<sup>117</sup> And most of the reforms are virtually costless—both in financial terms and in the ability to identify and convict the guilty.<sup>118</sup>

The reforms break down generally into two categories: those designed to prevent mistakes during the pre-trial identification process, and those

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110. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292; Garrett, *supra* note 62, at 76; Gross et al., *Exonerations*, *supra* note 62, at 543-44.

111. See sources cited *supra* note 110.

112. Rosen, *supra* note 65, at 289-90.

113. See *id.* at 288.

114. Garrett, *supra* note 62, at 76.

115. See e.g., Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 615-16 [hereinafter Wells, *Systemic Reforms*]; Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 PSYCHOL. BULL. 320, 320 (1986) [hereinafter Wells & Turtle, *Importance of Lineup Models*]; TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3 (1999) [hereinafter GUIDE FOR LAW ENFORCEMENT], available at [http://www.ncjrs.org/pdf\\_files1/nij/178240.pdf](http://www.ncjrs.org/pdf_files1/nij/178240.pdf).

116. See GUIDE FOR LAW ENFORCEMENT, *supra* note 115, at 8-9; Wells, *Systemic Reforms*, *supra* note 115, at 616, 641-45.

117. Wells, *Systemic Reforms*, *supra* note 115, at 631-32.

118. *Id.* at 632.

designed to permit fact-finders to more effectively evaluate the reliability of eyewitness evidence offered at trial.<sup>119</sup> Because preventing erroneous identifications in the first place is always preferable, the most important reforms relate to the process of obtaining identifications—the administrative investigation that lies at the heart of the Crime Control Model, rather than the formal adjudication that is central to the Due Process Model.<sup>120</sup>

### 1. Reforming Eyewitness Identification Procedures

The proposed reforms of eyewitness identification procedures generally include those outlined below.<sup>121</sup> All of these proposals are consistent with both the Crime Control and Due Process Models in that they protect the wrongly accused while enhancing the overall accuracy and efficiency of administrative practices.

First, in every case, no matter how many suspects there might be, each lineup procedure (whether live or photographic) should contain only one suspect.<sup>122</sup> The rationale for this reform is that a lineup is a test of an eyewitness's ability to accurately use recognition memory, not guesswork, to select a suspect.<sup>123</sup> A lineup with more than one suspect (or worse, a lineup consisting entirely of suspects, like the now infamous Duke lacrosse team photo lineup) means the witness is given a test with more than one right answer (or even no wrong answers, as in the Duke case).<sup>124</sup> Such a test is obviously less probative (or barely probative at all) than a test with only one suspect.<sup>125</sup> By creating a more probative test, we do not lose anything in terms of proper identifications; instead, we gain more reliable and valuable evidence.<sup>126</sup>

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119. Timothy P. O'Toole & Diovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitnesses Identification Procedures*, 4 VAL. L. REV. 109, 113-15 (2006); Wells, *Systemic Reforms*, *supra* note 115, at 616-17.

120. *Cf.* Garrett, *supra* note 62, at 122-25 (reporting a wave of eyewitness reform legislation in response to post-conviction DNA exonerations).

121. *See infra* notes 131-200 and accompanying text. This list is not exhaustive, but it illustrates the point that we can significantly reduce the risk of convicting the innocent without jeopardizing convictions of the guilty. Many, but not all, of these reforms have been adopted as recommendations by a technical working group created by the federal government. *See generally* GUIDE FOR LAW ENFORCEMENT, *supra* note 115 (discussing adopted reforms).

122. Wells, *Systemic Reforms*, *supra* note 115, at 623; Wells & Turtle, *Importance of Lineup Models*, *supra* note 115, at 320-21, 328 (explaining research demonstrating that having more than one suspect in a lineup dramatically increases the chances of a mistaken identification).

123. Wells, *Systemic Reforms*, *supra* note 115, at 618-19.

124. *See* STUART TAYLOR JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 38-39 (2007); Wells, *Systemic Reforms*, *supra* note 115, at 623.

125. *See* Wells, *Systemic Reforms*, *supra* note 115, at 623.

126. *See* O'Toole, *supra* note 119, at 140.

Second, in any lineup the suspect should not stand out.<sup>127</sup> Generally, this means the perpetrator or his photograph should not exhibit any unique features that draw attention to him, and all innocent fillers, like the suspect, should generally fit the description of the perpetrator.<sup>128</sup> Although this principle may seem obvious, police departments routinely violate it.<sup>129</sup> Again, constructing a nonsuggestive lineup has no costs in terms of developing legitimate identification evidence.<sup>130</sup>

Third, prior to showing the witness the lineup, the law enforcement officer should instruct the witness that the offender may not be present in the lineup.<sup>131</sup> Research shows that instructing eyewitnesses that the perpetrator may or may not be in the lineup lowers rates of mistaken identifications in offender-absent lineups but has little effect on reducing identifications when the offender is present in the lineup.<sup>132</sup>

Fourth, one of the most important reforms, which a limited number of jurisdictions are now employing, requires that identification procedures always use a double-blind testing protocol.<sup>133</sup> Essential to any type of scientific testing, double-blind testing refers to the practice in which neither the subject (the eyewitness) of the test nor the test administrator (the police investigator) knows who the suspect is.<sup>134</sup> The purpose is to prevent the tester from *unintentionally* influencing either the outcome of the procedure or the certainty of the eyewitness.<sup>135</sup> This recommendation is not based

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127. Wells, *Systemic Reforms*, *supra* note 115, at 624; see also Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395, 415 (2005) (noting that innocent suspect identification would be significantly reduced if the innocent suspect does not stand out); R.C.L. Lindsay & Gary L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 LAW & HUM. BEHAV. 303, 313 (1980) (noting that courts have more confidence in identifications from high-similarity lineups).

128. Wells, *Systemic Reforms*, *supra* note 115, at 624. There are exceptions to this principle, however, when the suspect himself does not fit the description of the perpetrator; in that case, the fillers should all deviate from the description of the perpetrator in the same way as the suspect so that the suspect does not stand out. *Id.*

129. *Id.* at 632.

130. *Id.*

131. *Id.* at 625.

132. Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 486-87 (1997).

133. Wells, *Systemic Reforms*, *supra* note 115, at 629; Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 223, 236 (David Frank Ross et al. eds., 1994).

134. Wells, *Systemic Reforms*, *supra* note 115, at 624.

135. See *id.* at 624, 630. The risk of influence in eyewitness identification procedures is real. See R.M. Haw & R.P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106-07 (2004); M.R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 941 (1999); M.B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL. & ETHICS J. 355, 358-59 (2006). Studies in which lineup administrators are incorrectly led to believe that a particular member of a lineup is the perpetrator show that witnesses are influenced by the administrator's false belief and are more likely to pick the suspect. Haw & Fisher, *supra*, at 1106-07;

upon any doubts about police integrity; rather, it is based on the well-accepted understanding that people are influenced by their own beliefs, and that they can unknowingly leak information, which can influence the subject and the administrator in interpreting the results.<sup>136</sup> While some minimal cost may result from requiring a “blind” administrator, those costs can be minimized or virtually eliminated.<sup>137</sup> And the double-blind procedure does not cost anything in terms of lost valid identifications of the guilty. Double-blind procedures lose no probative identification information at all; rather, they merely prevent lineup administrators from giving potentially suggestive cues that might lead eyewitnesses to pick out a suspect.<sup>138</sup> Identifications in lineups that are not double-blind are not legitimate identification evidence any more than if police just declared an identification without conducting any procedure at all.<sup>139</sup>

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Phillips et al., *supra*, at 941; Russano et al., *supra*, at 358-59. The confidence of an eyewitness can be influenced and strengthened by information that the witness receives during or after the identification process. *Id.* Eyewitnesses who are given confirming feedback about their identifications express more confidence in their identification and the details of their identification. *Id.* at 363-64. In a recent study, researchers who received 352 false identifications randomly assigned eyewitnesses to receive feedback about their identification decisions. Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED SCI. 360, 360 (1998). One group of participants received confirming feedback (“Good, you identified the suspect”), a second group received disconfirming feedback (“Actually the suspect is number \_\_\_\_”), and another group received no feedback at all. *Id.* Later, the eyewitnesses were asked how certain they were at the time of the identification that they had identified the actual culprit. *Id.* at 364-66. The eyewitnesses who received confirming feedback were much more confident than the witnesses who received either disconfirming feedback or no feedback. *Id.* at 366. Additionally, the witnesses who received confirming feedback distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit and how much attention they paid to the culprit’s face while observing the event. *Id.*

136. Wells, *Systemic Reforms*, *supra* note 115, at 629.

137. *Id.* at 632. Some smaller jurisdictions may find it difficult to find or assign an independent lineup administrator who knows nothing about the case. See TRAINING & STANDARDS BUREAU, WIS. DEP’T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 7-12 (2005) [hereinafter PROCEDURE FOR EYEWITNESS IDENTIFICATION], <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>. But that problem can be resolved. For example, when using photo arrays (which comprise the vast majority of identification procedures today), the administrator can be functionally blinded by having the witness look at the photos on a computer screen that is not visible to the administrator or by having the administrator put each photograph in separate file folders that are shuffled before being presented to the witness so that the investigator does not know and cannot see which folder contains the suspect. See *id.* These approaches have been adopted by a number of police departments and the Wisconsin Department of Justice, among others. See *id.*

138. See PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 137, at 2; Risinger, *supra* note 8, at 796-97.

139. See Risinger, *supra* note 8, at 798 n.74. Risinger argues that a blind testing protocol for eyewitness identification procedures (as well as for the forensic sciences) is one of the best examples of “cost-free proposals” for reform. *Id.* at 796-97. Risinger observes there are no counter-arguments to using a blind testing protocol:

There appear to be no tenable substantive counter-arguments on theoretical grounds. . . . In sum, this lack of counter-argument is because the claims being made for the informational result of the process (forensic science or eyewitness identification) are that the information is derived from the special knowledge of the witness acting upon the stimulus (bitemark, fingerprint, human appearance). To the extent the results differ because of the impact of

Fifth, police should take a verbatim confidence statement from the witness immediately after any identification.<sup>140</sup> Significant scientific research demonstrates that eyewitness confidence has little relation to accuracy and that post identification feedback can undermine any correlation between eyewitness confidence and accuracy because eyewitness confidence is highly malleable.<sup>141</sup> To ensure that the eyewitness's expression of confidence in an identification is based solely on the eyewitness's independent recollection, not on any after-acquired information or feedback, police should record the witness's confidence statement before he has an opportunity to receive any feedback.<sup>142</sup> Again, this procedure does not result in a loss of legitimate evidence; accurately and promptly assessing confidence only enhances the reliability of the fact-finding process.<sup>143</sup>

Sixth, police should be instructed to limit the use of show-ups to only those circumstances in which they have no alternative.<sup>144</sup> A show-up is a procedure in which a single suspect is presented for identification within a short time after and in close proximity to the scene of the crime.<sup>145</sup> The rationale for using this inherently suggestive procedure is that police want to obtain an identification of the offender while the witness's memory is fresh.<sup>146</sup> "Research indicates, however, that show-ups produce higher rates of mistaken identification than do simultaneous lineups or sequential lineups, even when the witness is tested soon after the witnessed event."<sup>147</sup>

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extraneous influences, what is claimed for the information is no longer true.  
*Id.* at 798 n.74 (citations omitted).

140. Wells, *Systemic Reforms*, *supra* note 115, at 631.

141. See Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 117 (2002); Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 342-43 (2004); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 324 (1995); Wells, *Systemic Reforms*, *supra* note 115, at 620-21; Wells & Bradfield, *supra* note 135, at 372-73.

142. See Bradfield et al., *supra* note 141, at 119.

143. See Wells, *Systemic Reforms*, *supra* note 115, at 631. To the extent that some in law enforcement personnel may be concerned that merely asking the witness how confident she is will send some sort of suggestive message, indicating doubt about the identification, that concern can easily be addressed by informing the eyewitness at the outset of the procedure that the lineup administrator will be required by procedure to assess and record the witness's confidence level regardless of any identification made. See Semmler et al., *supra* note 141, at 628.

144. See Wells, *Systemic Reforms*, *supra* note 115, at 628.

145. *Id.*

146. *Id.*

147. *Id.* at 628; see also Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1, 10 (1996) (discussing the risk of false positive identifications when show-up procedures are used with children); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUMAN BEHAV. 391, 402 (1997) (discussing the increased danger of false identifications with show-ups); A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in*

For this reason, most courts generally view show-ups with disfavor but tend to permit them nonetheless.<sup>148</sup> One state supreme court, however, recently held that under its state constitution show-ups are so inherently suggestive, and hence unreliable, that show-up identifications are not admissible unless police had no reasonable alternative.<sup>149</sup> The court elaborated that a show-up will not be necessary whenever police have the time and ability to construct a proper, nonsuggestive live or photo lineup.<sup>150</sup> Thus, in most cases show-ups will be impermissible, unless police lack probable cause to detain the suspect for a proper lineup procedure, and they are faced with a choice of conducting a show-up or releasing the suspect without any identification procedure at all.<sup>151</sup>

While suppression of unnecessary show-up identifications may result in excluding some accurate identifications and hence cause the loss of some convictions of guilty suspects, on balance, this exclusionary rule will improve the quality of identification evidence, and thereby both protect the innocent and help convict the guilty.<sup>152</sup> Unlike other exclusionary rules associated with the Due Process Model, which exclude reliable evidence in service of other values, this exclusionary rule is designed solely to serve the value of accurate truth-finding.<sup>153</sup> Again, such a rule merges due process and crime control values.<sup>154</sup>

Seventh, police should exhibit each suspect to any given witness only once.<sup>155</sup> Currently, police frequently utilize multiple identification procedures with a single suspect to confirm an initial identification, to ensure that the witness made an accurate pick, or to bolster the persuasiveness of the identification.<sup>156</sup> Police might, for example, first present the suspect to a witness in a show-up and then follow that with a

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*Showups and Lineups*, 20 LAW & HUMAN BEHAV. 459, 475 (1996) (discussing the inferiority of show-up procedures to successive lineups).

148. See, e.g., *Ford v. State*, 658 S.E.2d 428, 430 (Ga. App. 2008) (admitting show-up identification despite acknowledging that “one-on-one show-ups have been sharply criticized” as being inherently suggestive”); *State v. Wilson*, 827 A.2d 1143, 1147-48 (N.J. Super. Ct. App. Div. 2006) (acknowledging the suggestiveness of a show-up, but concluding that it was nonetheless sufficiently reliable to be admissible); see also *United States v. McGrath*, 89 F. Supp. 2d 569, 571 (E.D. Pa. 2000) (concluding that identifications made during a show-up were admissible); *State v. Santos*, 935 A.2d 212, 225 (Conn. App. 2007) (same).

149. See *State v. Dubose*, 699 N.W.2d 582, 594-95 (Wis. 2005).

150. See *id.* at 584-85.

151. See *id.*

152. See *id.* at 596.

153. See *id.* (holding this rule will discourage suggestive show-ups but still allow a properly conducted pretrial identification to be proven at trial). The Fourth Amendment is an example of a rule that excludes otherwise reliable and relevant evidence based on concerns for other values, such as protecting privacy interests. See U.S. CONST. amend IV (excluding evidence obtained during an unreasonable search); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (discussing evidence suppression for Fourth Amendment violations).

154. See Wells, *Systemic Reforms*, *supra* note 115, at 631-32.

155. See *Dubose*, 699 N.W.2d at 594.

156. See *id.* at 594-96.

photo array, or they might initially display the suspect in a photo array and then follow up with a corporeal lineup.<sup>157</sup> But research shows that multiple viewings of the same suspect are risky.<sup>158</sup> Each viewing of a suspect alters the memory of the witness and makes subsequent identification of that suspect more likely, not because the witness accurately remembers the person from the crime but rather from the prior identification procedure.<sup>159</sup> Psychologists believe that eyewitness memory should be treated as a type of trace evidence, like fingerprints, blood, semen, or fibers, because it can be easily contaminated and altered by processing.<sup>160</sup> Each viewing of a suspect's image introduces a type of contamination that alters the "trace" evidence in the witness's brain.<sup>161</sup> Thus, police must understand that they should use the best, most reliable identification procedures the first time because they will only have one opportunity to conduct a valid identification procedure with each suspect and witness.<sup>162</sup>

Eighth, and somewhat more controversially, reformers recommend presenting suspects and fillers to witnesses one at a time—sequentially—rather than simultaneously, as is done in the traditional photo array or lineup.<sup>163</sup> The theory behind this recommendation, which is supported by extensive laboratory research, is that eyewitnesses have a natural tendency to engage in what is known as the relative judgment process.<sup>164</sup> When making selections, people naturally prefer to compare one item to the next, selecting the one that, when compared to the others, best fits their selection criteria.<sup>165</sup> In an eyewitness identification context, that selection method can be problematic if the true perpetrator is not included among the suspects and fillers in a lineup.<sup>166</sup> The relative judgment process will lead the witness to compare all of the faces presented and pick the one that best

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157. See *id.* at 595-96.

158. See J.C. Brigham & D.L. Cairns, *The Effect of Mugshot Inspections on Eyewitness Identification Accuracy*, 18 J. OF APPLIED SOC. PSYCHOL. 1394, 1394-95 (1988); K.A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 287-88 (2006); G.W. Gorenstein & P.C. Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. OF APPLIED PSYCHOL. 616, 620-21 (1980); T. Hinz & K. Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 LAW & HUM. BEHAV. 185, 195-97 (2001).

159. See Brigham & Cairns, *supra* note 158, at 1394; Deffenbacher et al., *supra* note 158, at 288; Gorenstein & Ellsworth, *supra* note 158, at 620-21; Hinz & Pezdek, *supra* note 158, at 195-97.

160. Wells, *Systemic Reforms*, *supra* note 115, at 622-23.

161. See *id.* at 623.

162. See PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 137, at 2.

163. See R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 559 (1985); Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001); Wells, *Systemic Reforms*, *supra* note 115, at 625-28.

164. See Lindsay & Wells, *supra* note 163, at 558; Steblay et al., *supra* note 163, at 459-60.

165. Steblay et al., *supra* note 163, at 460.

166. Lindsay & Wells, *supra* note 163, at 558.

matches his memory of the perpetrator.<sup>167</sup> Because, by definition, someone in every lineup will best match the perpetrator when compared to the others in the lineup, the relative judgment process tends to induce people to pick out that best match, even if the true perpetrator is not present and the best match is an innocent person.<sup>168</sup> By presenting images sequentially rather than simultaneously, law enforcement officers make it more difficult for witnesses to engage in comparison shopping because the witnesses must make absolute judgments based upon memory.<sup>169</sup>

Laboratory research confirms that the sequential method produces fewer mistaken identifications.<sup>170</sup> Some evidence suggests, however, that in some circumstances the sequential method may reduce the rate of accurate identifications.<sup>171</sup> A meta-analysis of the research suggests that, in laboratory studies, accurate identifications might be reduced from about 50% to about 35%.<sup>172</sup> But mistaken identifications of innocent suspects are reduced even more dramatically, from 27% to 9%.<sup>173</sup> Thus, the *ratio* of accurate to mistaken identifications—the diagnosticity ratio—is superior in

167. Steblay et al., *supra* note 163, at 460.

168. See Lindsay & Wells, *supra* note 163, at 558.

169. See Wells, *Systemic Reforms*, *supra* note 115, at 625-28.

170. See Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281, 288 (1988); R.C.L. Lindsay et al., *Biased Lineups, Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796, 800 (1991); Lindsay & Wells, *supra* note 163, at 562; R.C.L. Lindsay et al., *Sequential Lineup Presentation: Technique Matters*, 76 J. APPLIED PSYCHOL. 741, 744 (1991); Wells, *Systemic Reforms*, *supra* note 115, at 626.

171. See Steblay et al., *supra* note 163, at 471. Whether the laboratory studies accurately reflect what happens in the real world is debated. See, e.g., Timothy P. O'Toole, *What's the Matter with Illinois? How an Opportunity Was Squandered To Conduct an Important Study on Eyewitness Identification Procedures*, 30 CHAMPION 18, Aug. 2006, at 19-21; Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2007); NANCY STEBLAY, OBSERVATIONS ON THE ILLINOIS LINEUP STUDY DATA (2006), <http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf>; Gary L. Wells, *Comments on the Mecklenburg Report* (2006), [http://www.psychology.iastate.edu/faculty/gwells/Illinois\\_Project\\_Wells\\_comments.pdf](http://www.psychology.iastate.edu/faculty/gwells/Illinois_Project_Wells_comments.pdf) (last visited Oct. 18, 2008). Most of this debate arises from a report on a field study in three Illinois police jurisdictions conducted primarily under the direction of the Chicago Police Department pursuant to a statutory mandate to compare double-blind sequential and non-blind simultaneous procedures. See SHERI H. MECKLENBERG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 2-76 (2006). That report purports to indicate that the non blind simultaneous procedure produced more suspect picks and fewer mistaken filler picks than the double-blind sequential procedure. See *id.* That study's methodology was so flawed, however, and its results were so inconsistent, in some respects, with what is known from other laboratory and field studies, that most experts have concluded that it is essentially meaningless. See O'Toole, *supra* at 128; Schacter et al., *supra*, at 4; STEBLAY, *supra*; Wells, *supra*. Some law enforcement agencies that adopted the double-blind sequential reform package also rejected the Mecklenberg Report as methodologically flawed. See BUREAU OF TRAINING & STANDARDS FOR CRIMINAL JUSTICE, WIS. DEP'T OF JUSTICE, RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES (2006), <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf>.

172. Steblay et al. *supra* note 163, at 463. Meta-analysis is a method of compiling and analyzing the data from multiple independent studies that purport to test the same phenomenon to obtain essentially aggregate data from those multiple studies. *Id.* at 460.

173. *Id.* at 463.



the sequential method compared to the simultaneous procedure.<sup>174</sup> Although the sequential procedure produces fewer picks overall, it improves the odds that any picks will be accurate.<sup>175</sup> As Dr. Gary Wells concludes, “The sequential lineup procedure appears to be one that good eyewitnesses have no trouble with, but [it] gives eyewitnesses whose memories are weaker some difficulty.”<sup>176</sup>

Thus, the sequential reform may indeed have some costs in terms of lost accurate evidence of guilt.<sup>177</sup> But the lost evidence may not be anything more than fortuitous guesses by eyewitnesses who really do not have good recall.<sup>178</sup> More significantly, while the procedure might cost some accurate identifications, the best available scientific evidence suggests that it will improve the overall accuracy of identification evidence and lead to an even greater reduction in mistaken identifications of the innocent.<sup>179</sup> For this reason, a number of law enforcement agencies and some states that have studied the sequential procedure have chosen to adopt it.<sup>180</sup>

Finally, one additional reform is worth mentioning, although it is relatively new and has not received much attention.<sup>181</sup> Dr. Gary Wells has

174. Wells, *Systemic Reforms*, *supra* note 115, at 626-27. Wells explains the computation of the diagnosticity ratio as follows:

Using the data from the meta-analysis by Professor Nancy Steblay and her colleagues there are two ways to calculate this ratio. The first way is to divide the accurate identification rate for culprit-present lineups by the average identification rate of any given person in the culprit-absent condition. Using that method, the simultaneous procedure yields an accurate-identification ratio of  $.50/.085 = 5.88$  and the sequential procedure yields an accurate identification ratio of  $.35/.0467 = 7.49$ . The other method of calculating the ratio of accurate to mistaken identifications is to use the rate of identifying the known-innocent suspect in the culprit-absent condition as the denominator. Using this method, the simultaneous procedure yields an accurate-identification ratio of  $.50/.27 = 1.85$  and the sequential procedure yields an accurate-identification ratio of  $.35/.09 = 3.89$ . In other words, in spite of some reduction in accurate identifications, the sequential appears to improve the odds that a suspect, if identified, is the actual culprit.

*Id.* at 626-27.

175. *Id.* at 627.

176. *Id.* at 628.

177. *See id.* at 626.

178. *See id.* at 628.

179. *See id.* at 627.

180. *See* PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 137, at 2; Gina Kalata & Iver Peterson, *New Jersey Trying New Way for Witnesses To Say, 'It's Him,'* N.Y. TIMES, July 21, 2001, at A1.

In 2001, the New Jersey Attorney General, who has direct supervisory authority over all law enforcement in the state, directed that all state police agencies adopt the sequential method (among other reforms); thus, New Jersey became the first state to adopt the procedure statewide. *See* Kalata & Peterson, *supra*. Wisconsin's Attorney General has similarly adopted the procedure by incorporating it into its training curriculum and policies, and most local jurisdictions are complying. *See* PROCEDURE FOR EYEWITNESS IDENTIFICATION, *supra* note 137, at 2. Other states have adopted the sequential procedure by statute. *See* N.C. GEN. STAT. §§ 15A-284.52(b)(2) (2007). Other notable local law enforcement agencies have adopted the procedure on their own, including Hennepin County, Minnesota, and the Minneapolis Police Department; Northampton, Massachusetts; and several jurisdictions in Virginia and California. Wells, *Systemic Reforms*, *supra* note 115, at 642-43.

181. *See* Wells, *Systemic Reforms*, *supra* note 115, at 635.

recently proposed what he calls a “reasonable-suspicion criterion.”<sup>182</sup> Under that proposal, police generally would avoid conducting any eyewitness identification procedure as a first line of investigation.<sup>183</sup> Instead, they would hold off on attempting an identification until other evidence creates “a reasonable belief that the individual is in fact the culprit.”<sup>184</sup> This recommendation is premised upon the understanding that any lineup procedure puts innocent suspects in inherent jeopardy.<sup>185</sup> The amount of risk turns on the base rate in which lineups contain the actual culprit rather than innocent suspects, and the base rate depends on how much evidence a particular investigator requires before putting a suspect in a lineup.<sup>186</sup> The less evidence required before constructing a lineup, the lower the base rate of actual perpetrators in the lineups and the greater the likelihood that an innocent suspect (not just a filler) will be misidentified.<sup>187</sup> When possible, therefore, investigators should try to raise the base rate of actual perpetrators in their lineups by conducting lineups only after developing good reason to suspect their targets.<sup>188</sup> This reform should not cause any loss of convictions of true perpetrators; rather, it should improve the accuracy of the process.<sup>189</sup>

These reforms would advance justice by protecting the innocent and by simultaneously helping to “keep the focus of investigations on guilty persons.”<sup>190</sup> Also, they would help decision makers who are responsible for “evaluating the identification testimony (such as prosecutors, judges, and jurors).”<sup>191</sup> And these reforms would enhance efficiency, an explicit objective of the Crime Control Model, by minimizing the defense’s ability to impeach identification evidence (thereby inducing more pleas) and by reducing the need to present expensive and time-consuming expert testimony, which is usually presented to show the inadequacies of the lineup procedures used in the case.<sup>192</sup>

Moreover, these reforms will help produce more convictions because they will prevent “spoiling” eyewitnesses.<sup>193</sup> For example, the “reasonable suspicion criterion” serves law enforcement objectives by protecting witnesses from situations in which they are more likely to make a mistake.<sup>194</sup> “It is . . . based on the proposition that conducting lineups that

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182. *Id.* at 635-40.

183. *See id.* at 635.

184. *Id.*

185. *Id.*

186. *Id.* at 636-37.

187. *Id.*

188. *See id.*

189. *See id.* at 638.

190. *Id.* at 631.

191. *Id.* at 632.

192. *Id.*

193. *Id.* at 640.

194. *See id.* at 635.

do not contain the actual culprit has the probabilistic risk of ruining the eyewitness for later possible identifications if the actual culprit later becomes a focus of the investigation.”<sup>195</sup> Wells elaborates on the concept of spoiling as follows:

Suppose that an eyewitness were shown a lineup in the absence of reasonable suspicion [or utilizing a flawed procedure], the suspect is innocent, and the eyewitness selected a filler instead. Suppose now that additional investigation (or a tip) uncovers a new suspect, someone for whom there is a very strong reason to believe is the culprit. The eyewitness, having already picked a filler, is now considered “spent” or “spoiled” for purposes of conducting a lineup because that eyewitness has already misidentified a filler. . . . [T]he potential for credible identification evidence against the new suspect is forever lost.<sup>196</sup>

## 2. *Reforming the Way Eyewitness Evidence Is Received and Considered*

Even the most pristine eyewitness identification procedures are bound to produce mistakes sometimes.<sup>197</sup> And most jurisdictions have not adopted the best practices recommendations outlined above.<sup>198</sup> Therefore, another set of reforms is required to minimize the harmful effects of eyewitness error at trial.<sup>199</sup> These recommendations center on revised standards for admissibility of eyewitness evidence,<sup>200</sup> freer admissibility of expert testimony about eyewitness evidence,<sup>201</sup> and modified jury instructions that educate jurors about the fallibility of eyewitness evidence and the factors that can make an identification more or less reliable.<sup>202</sup> These kinds of

195. *Id.* at 636.

196. *Id.* at 640.

197. *See id.* at 632.

198. *See id.* at 643.

199. *See* O’Toole & Shay, *supra* note 119, at 132-33.

200. *See* State v. Hunt, 69 P.3d 571, 576 (Kan. 2003); Commonwealth v. Johnson, 650 N.E.2d 1257, 1259-61 (Mass. 1995); People v. Adams, 423 N.E.2d 379, 383-84 (N.Y. 1981); State v. Ramirez, 817 P.2d 774, 778-80 (Utah 1991); State v. Dubose, 699 N.W.2d 582, 591-94 (Wis. 2005); O’Toole, *supra* note 119, at 116-17; Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, L. & HUM. BEHAV. (forthcoming 2008), available at [http://www.psychology.iastate.edu/FACULTY/gwells/In\\_Press\\_scientific\\_analysis\\_of\\_Manson.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/In_Press_scientific_analysis_of_Manson.pdf).

201. *See* Saul Kassir et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405 (May 2001); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL’Y & L. 909, 911 (1995); Steven D. Penrod & Brian Cutler, *Preventing Mistaken Convictions in Eyewitness Identification Trials: The Case Against Traditional Safeguards*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 89, 112-15 (Ronald Roesch et al. eds., 1999).

202. *E.g.*, State v. Ledbetter, 881 A.2d 290, 315 (Conn. 2005) (mandating a jury instruction if police fail to advise witnesses that the culprit “might or might not be present”); Brodes v. State, 614 S.E.2d 766, 771 n.8 (Ga. 2005) (advising trial courts “to refrain from informing jurors they may consider a witness’s level of certainty when instructing them on the factors that may be considered in deciding the

reforms look more like the typical adjudication focused process rights that are typically associated with the Due Process Model.<sup>203</sup> But even these reforms are designed solely to improve the process's truth-finding accuracy, and they do not serve values inconsistent with truth-finding.<sup>204</sup>

A few reforms may threaten some accurate convictions, but most would not because they would balance that threat by doing even more to protect against wrongful convictions.<sup>205</sup> For example, revised admissibility standards, which more faithfully reflect scientific knowledge about human perception and memory and more rigorously demand scientifically sound procedures, may initially result in more suppressed identifications until police adapt by improving their practices.<sup>206</sup> These suppression orders may cost a few convictions, but the standards will likely protect a significant group of innocent people who have been misidentified.<sup>207</sup> In the long run, revised admissibility standards that apply pressure on police to adopt best practices for identification procedures ought to improve accuracy in the aggregate.<sup>208</sup>

Jury instructions could conceivably cost a small number of otherwise valid convictions, but only at the margin.<sup>209</sup> Some courts have mandated instructions on matters such as the fallibility of eyewitness testimony, the relative weakness of cross-racial identifications, and the risk caused by failure to advise witnesses that the perpetrator may or may not be present.<sup>210</sup>

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reliability of [an] identification"); *State v. Cromedy*, 727 A.2d 457, 460 (N.J. 1999) (finding reversible error when trial court refused to give the jury an instruction about cross-racial identifications).

203. See PACKER, *CRIMINAL SANCTION*, *supra* note 1, at 165; *supra* note 202 and accompanying text.

204. See *supra* note 202 and accompanying text.

205. See, e.g., Wells, *Systemic Reforms*, *supra* note 115, at 627.

206. See, e.g., Steblay, et al., *supra* note 163, at 471. Under current constitutional doctrine, identifications are inadmissible if (1) police engage in an "impermissibly suggestive" identification procedure, and (2) the state cannot prove that, despite the suggestiveness, the identification is sufficiently reliable under the totality of the circumstances. See *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977); *Neil v. Biggers*, 409 U.S. 188, 196 (1972). The Supreme Court established scientifically unsound criteria for evaluating identification reliability that make it very difficult for courts to conclude anything except that all but the most egregiously suggestive procedures are nonetheless sufficiently reliable. See Findley, *supra* note 14, at 915-17; O'Toole & Shay, *supra* note 119, at 110; Wells & Quinlivan, *supra* note 200. Some of the revised admissibility standards modify *Brathwaite* and *Biggers* by adding some reliability factors that are based on the scientific research. E.g., *State v. Hunt*, 69 P.3d 571, 575-77 (Kan. 2003); *State v. Ramirez*, 817 P.2d 774, 779-81 (Utah 1991). Others jettison the reliability assessment altogether and simply exclude any eyewitness evidence produced by unnecessarily suggestive procedures. E.g., *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1263-66 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981); *State v. Dubose*, 699 N.W.2d 582, 596-97 (Wis. 2005).

207. See, e.g., Wells, *Systemic Reforms*, *supra* note 115, at 627.

208. See *id.* at 622.

209. See BRIAN L. CUTLER & STEVE D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 264 (1995).

210. *State v. Ledbetter*, 881 A.2d 290, 318-19 (Conn. 2005) (failure to advise witness); *Hunt*, 69 P.3d at 579 (eyewitness testimony); *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) (cross-racial identification).

To the extent that any particular jury instruction might increase juror skepticism about eyewitness testimony, the impact is slight because eyewitness evidence is so powerful and jury instructions are a very weak tool.<sup>211</sup> Research suggests, that such jury instructions, while not valueless, do relatively little to overcome mistaken eyewitness testimony.<sup>212</sup> Although in the aggregate jury instructions are thought to have little effect, they may have a positive effect on the guilt-assessment process by educating jurors on how to evaluate eyewitness testimony, thereby enhancing decisional reliability.<sup>213</sup>

Expert testimony is a slightly more effective corrective for misunderstandings about eyewitness identifications.<sup>214</sup> Yet, expert testimony is unlikely to cost many, if any, accurate convictions.<sup>215</sup> Expert testimony simply enhances the fact-finder's ability to knowledgeably evaluate eyewitness testimony; it increases the jurors' accuracy assessment tools.<sup>216</sup> Research indicates that expert testimony does not overwhelm jurors or lead them to reject eyewitness identifications too readily.<sup>217</sup> Rather, expert testimony increases jurors' sensitivity to factors affecting the reliability of eyewitness testimony by helping them focus on those factors that are good predictors of reliability rather than on poor indicators of accuracy, like confidence.<sup>218</sup>

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211. See CUTLER & PENROD, *supra* note 209, at 263-64.

212. *Id.* at 263; Penrod & Cutler, *supra* note 201, at 111.

213. See Lisa Dufrainmont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions*, 33 QUEEN'S L.J. 261, 304-08 (2008).

214. CUTLER & PENROD, *supra* note 209, at 264; see also *State v. Copeland*, 226 S.W.3d 287, 299-300 (Tenn. 2007) (recognizing the importance of allowing expert testimony on eyewitness identification and the changing trend towards allowing this testimony). In *Copeland*, the court held that it was error in a capital murder trial for the lower court to prohibit expert testimony on the issue of the reliability of the eyewitness identification. *Copeland*, 226 S.W.3d at 298-304. The court noted that:

'[S]tudies of DNA exonerations . . . have validated the research of social scientists, particularly in the area of mistaken eyewitness identification . . . Courts traditionally tended to exclude scientific evidence from expert witnesses in these disciplines, primarily on the bases that the testimony addressed matters within the common understanding of jurors, was confusing, or that it invaded the province of the jury to make credibility determinations. However, with the increased awareness of the role that mistaken identification . . . play[s] in convicting the innocent, a new trend is developing regarding the admissibility of experts.' McMurtie observes that '[r]esearch over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors.'

*Id.* at 299-300 (footnotes omitted) (citations omitted) (quoting Jacqueline McMurtie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1273, 1276 (2005)).

215. See CUTLER & PENROD, *supra* note 209, at 224.

216. See *id.* at 250.

217. *Id.* at 263.

218. Penrod & Cutler, *supra* note 201, at 113.

*B. Improving Police Interrogation Practices and Guarding Against False Confessions*

One of the reforms that would most clearly simultaneously protect the innocent and enhance the system's ability to convict the guilty relates to police interrogations and false confessions. The notion that a person would confess to a serious crime that she did not commit is so counterintuitive that, until relatively recently, people had difficulty imagining that these confessions pose a real problem.<sup>219</sup> Indeed, as recently as twenty years ago, even thoughtful and informed scholars shared the view that there was little risk of coercing a confession from an innocent person.<sup>220</sup> In 1990, Donald Dripps reflected the view that any confession, no matter how obtained, must be truthful. He wrote, "Of course, excluding a confession always damages the search for truth at trial, but if truth at trial were our primary goal we would not hesitate to coerce confessions without limit . . . . Coercion advances substantially the search for truth at trial."<sup>221</sup> Since then, DNA exonerations and substantial new research have established that people do confess to crimes they did not commit with alarming regularity and for a variety of reasons.<sup>222</sup> Indeed, 16% of the first 200 DNA exonerations involved false confessions.<sup>223</sup>

Electronic recording of interrogations is the most widely recommended reform for guarding against false confessions.<sup>224</sup> Electronic recording protects the innocent by deterring overbearing and unlawful police coercion and by making a record for fact-finders when police push too hard or supply the details of a purported confession.<sup>225</sup> At the same time, electronic recording aids fact-finders by providing a clear record to resolve otherwise insoluble swearing contests between interrogators and the

219. See Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005).

220. See, e.g., Dripps, *supra* note 21, at 631.

221. *Id.*

222. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901-03, 907-10 (2004); 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, 430 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997).

223. Garrett, *supra* note 62, at 88.

224. See Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations To Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 620 (2004); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735 (1997); Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 220-23 (2007); Thomas P. Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, CHAMPION, Apr. 2007, 8, at 8-9.

225. See Drizin & Reich, *supra* note 224, at 625, 628; Lewis, *supra* note 224, at 220; Sullivan, *supra* note 224, at 10.

interrogated about what happened in the interrogation room and what the suspect said and meant by the responses.<sup>226</sup>

Electronic recording also serves the needs of law enforcement in multiple ways.<sup>227</sup> It protects police from spurious claims of abuse or misconduct during interrogations.<sup>228</sup> It advances crime control objectives by increasing the efficiency with which the system convicts the guilty.<sup>229</sup> For example, when a person is captured on tape voluntarily and without coercion confessing to a crime, suppression motions and trials disappear.<sup>230</sup> With an unassailable confession on tape, the defendant can usually do little but plead guilty.<sup>231</sup> And when cases do go to trial, electronic recording gives prosecutors the most powerful evidence they could hope for.<sup>232</sup>

For these reasons, police across the country are beginning to adopt electronic recording voluntarily.<sup>233</sup> Eight states and the District of Columbia now require the electronic recording of at least some interrogations by statute, the State of Maryland is poised to adopt such a law, and the supreme courts in five more states have mandated or encouraged recording.<sup>234</sup> Even crime control critics of *Miranda*, like Paul

226. Drizin, *supra* note 224, at 626; Sullivan, *supra* note 224, at 10; *see* Lewis, *supra* note 224, at 221.

227. Lewis, *supra* note 224, at 221.

228. *Id.*

229. *See id.* at 222; Sullivan, *supra* note 224, at 10.

230. *See* Lewis, *supra* note 224, at 221; Sullivan, *supra* note 224, at 10.

231. *See* Lewis, *supra* note 224, at 221; Sullivan, *supra* note 224, at 10.

232. *See* Lewis, *supra* note 224, at 221; Sullivan, *supra* note 224, at 10.

233. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. LAW & CRIMINOLOGY 1127, 1128 (2005). According to Sullivan, “more than 300 local police and sheriff’s departments in forty-three states” and the entire states of Minnesota and Alaska have adopted a policy of electronic recording. *Id.* Since then several more states have mandated or established statewide policies of electronic recording. *See infra* note 234 and accompanying text. Virtually without exception, law enforcement officers in those jurisdictions have become strong advocates of the practice. Sullivan, *supra* note 224, at 20 (surveying 260 law enforcement agencies in forty-one states where interrogations are electronically recorded and reporting that “[a]lmost without exception officers who have had experience with custodial recordings enthusiastically favor the practice”).

234. *See* D.C. CODE ANN. § 5-116.01 (LexisNexis Supp. 2007) (requiring police to record all custodial investigations); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006) (same); ME. REV. STAT. ANN. tit. 25, § 2803-B (2007) (mandating policy of recording “interviews of suspects in serious crimes”); N.M. STAT. § 29-1-16 (Supp. 2006) (requiring police to record all custodial investigations); N.C. GEN. STAT. § 15A-211 (2007) (requiring complete electronic recording of custodial interrogations in homicide cases); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon Supp. 2007) (rendering unrecorded oral statements inadmissible); WIS. STAT. §§ 968.073, 938.195 (2005) (declaring it to be state policy that police must electronically record all custodial interrogations in felony cases and in all juvenile cases whenever feasible); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (mandating electronic recording); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 535 (Mass. 2004) (allowing defense to point out state’s failure to record interrogation and calling unrecorded admissions “less reliable”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (mandating electronic recording); *State v. Cook*, 847 A.2d 530, 547 (N.J. 2004) (establishing a committee to study and make recommendations on the use of electronic recording); *In re Jerrel C.J.*, 699 N.W.2d 110, 123 (Wis. 2005) (mandating electronic recording of all custodial interrogations of juveniles); Van Smith, *Roll the Tape*, Apr. 16, 2008, <http://www.citypaper.com/news/story.asp?id=15588> (reporting that electronic recording

Cassell, advocate electronic recording as a better alternative to *Miranda*.<sup>235</sup> After considering the experiences of jurisdictions that record, Cassell concludes “that such a requirement would not significantly harm police efforts to obtain confessions” and that “tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike.”<sup>236</sup> A clearer merger of crime control and due process values is hard to imagine.<sup>237</sup> Recording is an area where the Innocence Movement has shown that reforming an administrative investigative process can have the best potential for serving defendants’ due process interests while also advancing crime control goals.<sup>238</sup>

Other reforms aimed at preventing false confessions are less clear but promising.<sup>239</sup> Standard police interrogation training teaches police a very aggressive, guilt-presuming approach whose goal is to obtain a confession, not elicit information.<sup>240</sup> The most common variant of this approach, known as the Reid Technique, teaches police to isolate and break down suspects, making them feel hopeless by convincing them that they will be convicted. Police are taught methods such as cutting off all denials of guilt and telling the suspect that the police have overwhelming evidence against

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legislation is on the Maryland governor’s desk for his signature, and that the governor was considering it and had supported it while it was in the legislature).

235. See Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 391 (1996) (arguing for a reassessment of *Miranda* “in light of [its] costs” and concluding that those costs “are unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing *Miranda*’s harms to society”); see also Ronald J. Allen, *The Misguided Defenses of Miranda v. Arizona*, 5 OHIO ST. J. OF CRIM. LAW 205, 213 (2007) (criticizing *Miranda*, but contrasting it to electronic recording by stating that “[t]here is surely nothing inappropriate about prophylactic court rulings on evidentiary grounds reducing the incentive for untaped interrogation. A court can typically decide the facts accurately only if it has reliable evidence.”).

236. Cassell, *supra* note 235, at 490.

237. Under Packer’s Due Process Model,

“The rationale of exclusion [of confessions] is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against a defendant without forcing him to cooperate in the process.”

Packer, *Two Models*, *supra* note 1, at 35. Under the Innocence Movement, the due process concern now melds with the crime control concern by focusing first on concern about the reliability of the confession. See *supra* notes 230-43. Indeed, at least one state’s supreme court has declared that failure to record violates its state constitution’s due process clause. *Stephan v. State*, 711 P.2d 1156, 1159-60 (Alaska 1985).

238. See *supra* notes 234-38 and accompanying text.

239. See Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 98-102 (G. Daniel Lassiter ed., 2004).

240. See GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 10-21 (2003); AMINA MEMON, ALDERT VRIJ & RAY BULL, PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 58-65 (2d ed. 2003) (for summaries and critiques of the standard nine-step interrogation process); Leo, *supra* note 239, at 72-73.



him whether real or fabricated.<sup>241</sup> The Reid Technique then prescribes a strategy that is designed to minimize the suspect's sense of culpability for the crime and make him believe that a confession is the only way to reduce the negative consequences of the crime.<sup>242</sup> Interrogators attempt to make false confessions seem rational and cost-reducing.<sup>243</sup> Unfortunately, one consequence of these heavy-handed tactics is that they can and do induce innocent people to confess as well.<sup>244</sup>

Recently, especially in the era of electronic recording, new methods of interrogating suspects have emerged that challenge the confrontational approach of the Reid Technique.<sup>245</sup> Electronic recording's transparency is causing police to re-evaluate some of their methods because they sense that aggressive, confrontational Reid methods are disfavored by juries.<sup>246</sup> Commander Neil Nelson, a leading detective with many years of experience recording interrogations, notes in his training materials that "[e]xisting strategies don't work well on tape."<sup>247</sup> He teaches that officers being recorded are better served if they disarm the suspect by trying to "'see, hear, and feel' from the interviewee's point of view"; treating the interviewee "like a fellow human being"; maintaining a "friendly atmosphere"; keeping "an open mind"; asking "objective questions"; and asking "difficult, delicate, or distressing questions in a firm, gentle, considerate (yet persistent) manner rather than cutting off denials or engaging in hostile confrontations."<sup>248</sup> Instead of cutting off denials and pressuring suspects to confess, the new approach encourages the suspect to talk without interruption and to respond to cordial but challenging questions until the suspect's own statements either convince the observer of innocence or trap the suspect in a web of lies.<sup>249</sup> Nelson reminds police that, while other interrogation techniques "[w]ere created with the goal of getting a suspect

241. See generally FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 209-397 (4th ed. 2001) (discussing the Reid Technique).

242. See Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188 (2003).

243. *Id.*

244. See Findley & Scott, *supra* note 110, at 333-40 (discussing how guilt-presumptive interrogation techniques contribute to interrogators' closed-mindedness, leading to false convictions); see also Kassin, Goldstein & Savitsky, *supra* note 242, at 188 (explaining that police sometimes erroneously rely on verbal and nonverbal behavior to conclude the suspect is guilty); Saul M. Kassin, *On the Psychology of False Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 219-20 (2005) (suggesting that interrogators who utilize a guilt-presumptive approach are not merely blinded by their belief but seek to reinforce it).

245. See Kassin, *supra* note 244, at 225.

246. *Id.*

247. NEIL NELSON, MAXIMIZING THE OPPORTUNITY: INTERVIEW AND INTERROGATION C2 (2005) (on file with the author); Neil Nelson & Associates Homepage, <http://www.neilnelson.com/>. Neil Nelson, who is a veteran of the St. Paul, Minnesota, Police Department, has been recording interrogations for over a decade. Neil Nelson & Associates Homepage, *supra*. He provides interviewing and interrogation training through Neil Nelson & Associates. *Id.*

248. NELSON, *supra* note 247, at B5.

249. See *id.*

to confess,” the real objective is to gather information and to keep the suspect talking, even if only to tell lies.<sup>250</sup> By changing interrogation tactics in this way, Dr. Richard Leo notes, “[t]he presence of a camera, and the scrutiny that it implies, may help to increase the diagnostic value of interviews and interrogations and protect the innocent from false confessions.”<sup>251</sup>

The effectiveness of these new techniques raises questions about whether police should continue to engage in deceit during interrogations,<sup>252</sup> whether extended, multi-hour interrogation sessions that wear suspects down should be permitted, and whether police should continue to employ various other forms of confrontational psychological pressure to obtain confessions.<sup>253</sup> Under the old Due Process Model the values of individual human dignity and basic fairness would call for the rejection of the use of these questionable approaches.<sup>254</sup> While those values are still important today, the debate now focuses on whether these questionable interrogation techniques are really effective at obtaining truthful or useful information. Thus, the due process and crime control interests once again coalesce.<sup>255</sup> Although the debate has not yet been resolved in most jurisdictions, it is at least now no longer an insoluble dispute over value preferences, but a debate centered on shared values that asks a more empirical question; which method produces the most reliable information?<sup>256</sup>

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250. *Id.* at E1-E2. These new methods of interrogation are similar to the new “investigative interviews” that have emerged in England after England’s police began recording their interrogations. See John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 331 (1993); Tom Williamson, *Towards Greater Professionalism: Minimizing Miscarriages of Justice*, in INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION 124 (Tom Williamson ed., 2006).

251. Leo, *supra* note 239, at 99.

252. British courts, for example, have prohibited false evidence ploys. See *R. v. Madon* [1987] 1 W.L.R. 139; *R. v. Kirk* [2000] 1 W.L.R. 567. See generally Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239 (2007) (discussing police deception); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275 (2007) (discussing deceptive police practices).

253. See Christian A. Meissner & Saul M. Russin, “*You’re Guilty, So Just Confess!*” *Cognitive and Behavioral Confirmation in the Interrogation Room*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 239, at 37, 90.

254. See Packer, *Two Models*, *supra* note 1, at 16-18.

255. See Findley & Scott, *supra* note 110, at 391-93.

256. See *id.* Detective John Tedeschini of the Edmonton Police Service, for example, has recently reviewed the debates on these issues and argued that from the police perspective, “what is really required is a change of ‘ethos of interviewers from seeking a confession to a search for information—from blinkered, closed-minded, oppressive and suggestive interviewing style to one involving open-mindedness, flexibility, and the obtaining of reliable evidence.’” John Tedeschini, *Moving Beyond the Conventional Wisdom: A Progressive Approach to Police Interview and Interrogation Training*, Paper Presented at the Third International Conference on Investigative Interviewing in Nicolet, Quebec, Canada, June 15-18, 2008, at 10 (on file with the *Texas Tech Law Review*) (quoting Ray Bull & Becky Milne, *Attempts To Improve the Police Interviewing of Suspects*, in INTERROGATIONS, CONFESSIONS,

### C. Improving Forensic Sciences

Much has been written about flaws in the forensic sciences.<sup>257</sup> I will not repeat that critique here other than to note that faulty forensic sciences played a role in 57% of the first 200 DNA exonerations,<sup>258</sup> and that many of the forensic sciences were developed in law enforcement settings, not academic scientific settings, where their scientific validity has never been firmly established.<sup>259</sup> The important point for purposes of this symposium is the nature of the reforms that have been proposed to remedy this problem.

Certainly, one proffered solution is to exclude many of the forensic sciences that lack a scientific foundation.<sup>260</sup> Such wholesale exclusion might serve due process concerns but would likely impede crime control objectives.<sup>261</sup> Fingerprint evidence, for example, is based on surprisingly little scientific foundation, and ultimately rests on subjective judgments rather than careful statistical analyses based upon known databases of fingerprint characteristics. Nonetheless, fingerprint evidence is undoubtedly correct the vast majority of the time.<sup>262</sup> Excluding fingerprint evidence would indeed lead to a significant loss of convictions of the

AND ENTRAPMENT, *supra* note 239, at 181, 186. A discussion of these issues has been conducted by a state study commission comprised of prosecutors, judges, defense lawyers, and victims' advocates in Wisconsin. See WIS. CRIMINAL JUSTICE STUDY COMM'N, POSITION PAPER ON FALSE CONFESSIONS, [http://www.wcjsc.org/Position\\_Paper\\_on\\_False\\_Confessions.pdf](http://www.wcjsc.org/Position_Paper_on_False_Confessions.pdf) (last visited Oct. 18, 2008); Wis. Criminal Justice Study Comm'n, *Study Suggests Causes of and Ways to Prevent False Confessions*, 80 WIS. LAW., May 2007, at 6, available at [http://www.wisbar.org/AM/Template.cfm?Section=Search\\_Archive1&template=/cm/htmldisplay.cfm&contentid=65422](http://www.wisbar.org/AM/Template.cfm?Section=Search_Archive1&template=/cm/htmldisplay.cfm&contentid=65422).

257. See Garrett, *supra* note 62, at 81 n.95.

258. See *id.* at 81.

259. See *id.* See generally Findley, *supra* note 14, at 937-38 (explaining and critiquing the development and basis for the forensic sciences in greater depth).

260. See Garrett, *supra* note 62, at 122 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

261. See *id.*

262. See Findley, *supra* note 14, at 938-39. Discussions of some of the known errors of fingerprint evidence can be found in many sources. See Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 991 (2005); Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed*, 75 S. CAL. L. REV. 605, 609-13 (2002); Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping*, 44 ABA JUDGES' J. 16, 18 (2005). The FBI mistakenly identified a fingerprint from the 2004 Madrid terrorists bombing as belonging to Brandon Mayfield; the FBI analyst claimed there was a 100% match to Mayfield. See Findley, *supra* note 14, at 936 n.203 (quoting Cole, *supra*, at 985-86). Subsequent analysis by Spanish authorities linked the print to Ouhane Daoud, an Algerian national living in Spain, and the FBI eventually conceded that its analysts had erred. *Id.* at 986. See generally Paul C. Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 SETON HALL L. REV. 1071, 1072, 1096-97, 1097 n.152 (citing cases) (2003) [hereinafter Giannelli, *Daubert Cases*]; Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 203-05 (2008); Neufeld, *supra* note 87, at S108; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE (2006), [http://www.nlada.org/Defender/forensics/for\\_lib/Documents/1145382069.31/OIGfinal.pdf](http://www.nlada.org/Defender/forensics/for_lib/Documents/1145382069.31/OIGfinal.pdf).

guilty.<sup>263</sup> For other “sciences,” such as bite mark analysis and microscopic hair analysis, the scientific foundation is even weaker and the error rates much higher, so exclusion of evidence in those areas might enhance truth-finding.<sup>264</sup>

But simple exclusion is not the only innocence-based reform.<sup>265</sup> Rather, mechanisms to improve the reliability of forensic sciences are at the core of the innocence reforms.<sup>266</sup> Much of the problem with relying on traditional due process approaches to handling forensic sciences is that the adversarial adjudicative system is ill equipped for the task of screening and evaluating scientific evidence.<sup>267</sup> In part, that is because lawyers, judges, and juries lack the competence to evaluate scientific and expert evidence.<sup>268</sup> In part, it is because defense lawyers have inadequate access to the resources needed to mount vigorous challenges to scientific evidence.<sup>269</sup> Whatever the reason, the empirical record is quite clear: the adversary process has done very little to regulate forensic science evidence.<sup>270</sup> Few challenges to forensic science evidence are litigated and even fewer challenges are successful even when the most unreliable of the forensic sciences is involved.<sup>271</sup> As an unfortunate consequence, both due process and crime control interests are jeopardized; erroneous or misleading

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263. See Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 63-64 (2007).

264. See Garrett, *supra* note 62, at 83 (noting that forty-three of the first 200 (22%) DNA exoneration cases involved false hair or fiber comparisons); Paul C. Giannelli & Emmie West, *Forensic Science: Hair Comparison Evidence*, 37 CRIM. L. BULL. 514, 514 (2001) (same); Giannelli, *Daubert Cases*, *supra* note 262, at 1074-76, 1096-98 (citing high error rates in hair microscopy cases, cases in which examiner error was exposed through post-conviction DNA testing, and cases in which the scientific basis for the technique has been challenged; and noting the lack of scientific validity of bite mark evidence); I.A. Pretty & D. Sweet, *The Scientific Basis for Human Bitemark Analyses—A Critical Review*, 41 SCI. & JUST. 85, 87-91 (2001); Clive A. Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil*, 27 COLUM. HUM. RTS. L. REV. 227, 235-41 (1996) (discussing the questionable scientific foundation of microscopic hair analysis); Flynn McRoberts, *Bite-Mark Verdict Faces New Scrutiny*, CHI. TRIB., Nov. 29, 2004, at 1; Flynn McRoberts & Steve Mills, *From the Start, A Faulty Science: Testimony on Bite Marks Prone to Error*, CHI. TRIB., Oct. 19, 2004, at 1.

265. See Findley, *supra* note 14, at 927.

266. *Id.* at 945-71.

267. See *id.*

268. Bradley D. McAuliff et al., *Juror Decision-Making in the 21st Century: Confronting Science and Technology in Court*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 304, 305-06 (D. Carson & R. Bull eds., 2d ed. 2003); Findley, *supra* note 14, at 945-46; Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313, 319, 326 (1999).

269. Findley, *supra* note 14, at 896-97; Paul C. Giannelli, *Forensic Science*, 33 J.L. MED. & ETHICS 535, 539 (2005); Giannelli, *Daubert Cases*, *supra* note 262, at 1072, 1095; Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 SCI. AM. 46, 53 (1990).

270. Findley, *supra* note 14, at 945.

271. Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 342, 345-46 (2002); Neufeld, *supra* note 87, at S110; Neufeld & Colman, *supra* note 87, at 49, 52-53; Risinger, *supra* note 87 at 135-36; Michael J. Saks & Jonathan Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892, 892-94 (2005).

forensic science undermines the search for the truth, putting innocents at risk and jeopardizing the identification and prosecution of the real perpetrator.<sup>272</sup>

Consequently, reforms have been suggested that draw on both crime control and due process values.<sup>273</sup> The most interesting of those proposals involves increasing the administrative performance and scrutiny of the forensic sciences, upstream from adjudication.<sup>274</sup> With the increased use of scientifically sound and reliable methods, such as DNA profiling, some improvement is already happening.<sup>275</sup> In addition, a number of states have created forensic science commissions to oversee and improve the reliability of the work in crime laboratories.<sup>276</sup> Scholars also stress the importance of blinding crime laboratory analysts from case evidence that is unnecessary to their scientific analyses in order to prevent extraneous case information from influencing or tainting their judgments about the results of their analyses.<sup>277</sup> Many observers are calling for mandatory accreditation of laboratories, which would require the laboratories to use standardized testing protocols and rigorous blind proficiency testing.<sup>278</sup> And I, among others, have argued that forensic science oversight panels comprised of scientists and other experts should be formed to study, assess the validity of, encourage research in, and make recommendations for the use and limitations of specific forensic sciences.<sup>279</sup> The notion behind all of these reforms is that the science is too complicated, and that adversary adjudication is too ill-equipped and random, to resolve forensic science reliability questions adequately through case-level litigation in criminal cases.<sup>280</sup> Neither due process nor crime control reliability interests are served by the current emphasis on case-by-case litigation.<sup>281</sup> More administrative efforts to improve the quality, scientific validity, and understanding about appropriate uses of forensic science evidence will help protect the innocent and convict the guilty.<sup>282</sup> Again, the question revolves around adopting best practices.<sup>283</sup>

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272. See *supra* notes 266-72 and accompanying text.

273. See Findley, *supra* note 14, at 951-57.

274. See *id.* at 956-57.

275. See *id.* at 951-52.

276. See *id.* at 952.

277. Risinger, *supra* note 8, at 797. Risinger states that blinding analysts, like the recommendation for double-blind eyewitness identification protocols, is one of the most obvious of the “cost-free” proposals. See generally D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002) (giving an important and thorough explanation of the problem that extraneous information can present to forensic science analyses).

278. See Findley, *supra* note 14, at 951-54; Giannelli, *Daubert Cases*, *supra* note 262, at 1110-11.

279. Findley, *supra* note 14, at 955-72.

280. *Id.* at 949.

281. *Id.*

282. *Id.*

283. See *id.* at 971.

*D. Neutralizing False Jailhouse Informant Testimony*

One of the most notoriously unreliable forms of evidence used in criminal cases is the testimony of jailhouse informants or snitches.<sup>284</sup> The prosecution typically calls these witnesses to claim that the defendant confessed while they shared a jail or prison cell.<sup>285</sup> Informants, who are promised leniency or unilaterally hope that leniency will be granted in their own cases, are notoriously unreliable because they have tremendous incentive to fabricate evidence they believe will be valuable to the State.<sup>286</sup> Despite its dubious source, jailhouse snitch testimony sounds like confession testimony and therefore tends to be very convincing.<sup>287</sup> Not surprisingly, perjured snitch testimony was a factor in 18% of the first 200 DNA exonerations.<sup>288</sup>

No other witnesses, except for experts, who ostensibly sell their expertise and not their testimony, may be similarly offered anything of value in return for favorable testimony.<sup>289</sup> Testimony purchasing is not permitted because it obviously invites corruption and fabrication.<sup>290</sup> Indeed, if anyone other than the government were to offer anything of value to a fact witness in return for testimony, not only would the testimony be inadmissible, but the testimony-for-gain scheme would be criminal.<sup>291</sup>

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284. Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413, 1414 (2007).

285. *Id.* at 1419-20.

286. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *U. CIN. L. REV.* 645, 660-63 (2004); Raeder, *supra* note 284, at 1419; Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 578 (1999) (“Under the current sentencing regime, cooperation is the only option that significantly alters the most important set of considerations for most defendants—those that relate to the ultimate sentence to be imposed.”); ROB WARDEN, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH* ROW 3 (2004), <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf>.

287. See Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 *LAW & HUM. BEHAV.* 137, 146 (2007) (discussing an empirical study finding that informant testimony influences jurors to convict and that the jury’s verdict is unaffected by the jurors’ knowledge that the informant was given incentives to testify). The Canadian inquiry into the wrongful conviction of Thomas Sophonow concluded that jailhouse informants are “polished and convincing liars,” that jurors give great weight to “confessions,” and that jurors give “the same weight to ‘confessions’ made to jailhouse informants as they [do] to ‘confessions’ made to a police officer.” Manitoba Justice, *The Inquiry Regarding Thomas Sophonow: Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them*, <http://www.gov.mb.ca/justice/publications/sophonow/jailhouse/what.html> (last visited Oct. 18, 2008).

288. Garrett, *supra* note 62, at 86.

289. See 18 U.S.C. § 201(c)(2) (2000).

290. See WARDEN, *supra* note 286, at 2.

291. See § 201(c)(2) (“Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, . . . before any court, . . . shall be fined under this title or imprisoned for not more than two years, or both.”).

Therefore, this problem might be addressed by treating informant testimony like any other purchased testimony: by excluding it, or at least excluding it in its most overt forms, thus prohibiting the government, like any other party, from expressly or impliedly offering anything of value in return for testimony.<sup>292</sup> Such a reform would surely sacrifice some convictions of the guilty because not all informant testimony is false.<sup>293</sup> But it is not at all clear that it would result in more lost convictions of the guilty than it would gain in avoided wrongful convictions of the innocent. It would only cost more accurate convictions than it would prevent wrongful ones if we assume that informant testimony is truthful more often than it is false.<sup>294</sup> But no data I am aware of supports that assumption, and it is entirely possible, if not probable, that the opposite is true—that snitch testimony is more often false than true. If my sense about this is accurate, or even if the rate of true to false testimony is remotely close to even, then our constitutional preference for protecting the innocent ought to lead courts to exclude such dangerous testimony.

But regardless of whether snitch testimony is more often true or false—and we do not know the answer to that—other reforms are also possible, short of outright exclusion. Alexandra Natapoff has proposed a model statute requiring pretrial evaluations of informant testimony.<sup>295</sup> Similarly, Illinois has adopted legislation requiring pretrial reliability hearings for informant testimony.<sup>296</sup> The Oklahoma courts have adopted a procedure for jailhouse informant testimony that ensures “complete disclosure” of all information about the informant needed to evaluate her credibility.<sup>297</sup> Even better, a state could require that all encounters and discussions between a potential informant and the state be electronically recorded so that fact-finders can evaluate, as fully as possible, the incentives and credibility of the informant.<sup>298</sup> Some commentators have recommended a corroboration requirement.<sup>299</sup> Other jurisdictions require

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292. See *United States v. Singleton*, 144 F.3d 1343, 1355 (10th Cir. 1998). Initially, the Tenth Circuit held it to be illegal for a prosecutor to offer a witness benefits in exchange for cooperation and testimony. *Id.* at 1355. But, the court reversed the case and held that § 201(c)(2) does not apply to the government using benefit offers as a law enforcement tool. See *United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir. 1999) (en banc).

293. See sources cited *supra* note 286.

294. Lillquist, *supra* note 7, at 920.

295. See 725 ILL. COMP. STAT. ANN. 5/115-21(c) (West 2002); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 112-15 (2006).

296. 725 ILL. COMP. STAT. 5/115-21(c) (West Supp. 2008).

297. *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

298. See WARDEN, *supra* note 286, at 15.

299. *E.g.*, Lillquist, *supra* note 7, at 923 (“[R]equiring at least some minimal corroboration of the informant’s testimony, disclosing any previous occasions in which the informant testified, and divulging the terms, if any, that have been agreed to for the witness’s testimony are all welcome changes.”).

that cautionary instructions accompany the informant's testimony.<sup>300</sup> The bottom line is that some potential reforms can protect the innocent without risking too many, if any, convictions of the guilty.<sup>301</sup>

### *E. Improved Defense Counsel*

Ineffective assistance of counsel is a recurring theme in wrongful convictions.<sup>302</sup> The Crime Control Model, as Packer describes it, considers defense counsel a luxury, or worse, an impediment to efficient processing of the guilty.<sup>303</sup> By contrast, under the Due Process Model, defense counsel is the key to asserting and protecting the defendant's rights.<sup>304</sup>

Here again, the innocence cases demonstrate that cutting corners on the availability of services to the defense undermines reliability of the system, and thus threatens both due process and crime control values.<sup>305</sup> Without a vigorous defense, which must include expanded discovery rights, erroneous focus on the wrong suspect goes unchecked.<sup>306</sup> Indeed, prosecutors and judges today generally view competent defense counsel as an important part of the system because they actually facilitate convicting the guilty and protecting the innocent.<sup>307</sup> As Jon Gould has written, "Prosecutors, too, believe that their jobs are often easier when defendants are well represented; in these cases, state's attorneys need not perform both their responsibilities and those of the defense in order to stave off a later

300. See CAL. PENAL CODE § 1127a(b) (West 2004) (requiring courts to instruct jury on in-custody informant testimony); *United States v. Villafranca*, 260 F.3d 374, 381 (5th Cir. 2001) ("The testimony of a plea-bargaining defendant is admissible if the jury is properly instructed.").

301. See *supra* notes 296-300 and accompanying text.

302. See The Innocence Project, *Bad Lawyering*, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited Aug. 15, 2008).

303. See Packer, *Two Models*, *supra* note 1, at 59-60. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has suggested such a view of counsel:

I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hardheaded we must recognize that this is not entirely a bad thing. The lawyers who represent indigent criminal defendants are good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or the state would have to devote much greater resources to the prosecution of criminal cases.

Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1, 14-15 (1996).

304. See Packer, *Two Models*, *supra* note 1, at 59-60.

305. See *id.*; The Innocence Project, *supra* note 310.

306. See Findley & Scott, *supra* note 110, at 389-93 (arguing that greater transparency in criminal cases is needed to help offset natural tendencies that produce tunnel vision and can lead to convicting the innocent); Lillquist, *supra* note 7, at 914 ("If it is true that the government presently has access to more pretrial investigative resources than the defendant, then perhaps the effect of liberalized discovery is just to 'even-up' a presently imbalanced system."); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 572. See generally, Findley & Scott, *supra* note 110, at 331-33 (discussing defense counsel's failure to investigate as causing wrongful convictions of defendants).

307. See GOULD, *supra* note 104, at 240.



claim of ineffective assistance of counsel.”<sup>308</sup> Gould additionally notes that “[e]ven measures generally associated with ‘defendants’ rights’—like adequately compensated trial counsel—can save taxpayers money because appeals will be shorter and retrials less likely.”<sup>309</sup> Judge Richard Posner also acknowledges this possibility:

If the law entitles a defendant to *effective* assistance of counsel, then paying lawyers too little to attract competent lawyers to the defense of indigent defendants may cost the system more in the long run by leading to retrials following a determination that the defendant’s lawyer at his first trial was incompetent.<sup>310</sup>

Thus, vigorous defense counsel, it turns out, is important to protect both due process and crime control values because good defense counsel enhances reliability and efficiency.<sup>311</sup>

## V. CONCLUSION

The Innocence Movement and its Reliability Model show that due process and crime control values are compatible with one another.<sup>312</sup> Of course, the new model’s fit with the old Due Process and Crime Control Models is not perfect.<sup>313</sup> The Due Process Model, for example, is about more than just accurate fact-finding; it is also meaningfully concerned about fair process in ways that have little or nothing to do with truth-finding *per se*.<sup>314</sup> Indeed, an overemphasis on innocence protection to the neglect of other fair process concerns is one of the most salient criticisms of the Innocence Movement.<sup>315</sup> But fairer, more accurate truth-finding mechanisms are an important part of due process for both the innocent and the guilty because they help establish true culpability levels for sentencing purposes.<sup>316</sup> And the Reliability Model is showing that, instead of resisting the transfer of the fact-finding locus from formal adjudication to the pretrial administrative processes, defendants’ rights are served by accepting that transfer and enhancing the efficacy and reliability of the administrative

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308. *Id.*

309. *Id.* at 238.

310. Posner, *supra* note 303, at 15.

311. *See id.*

312. *See* discussion *supra* Part III.

313. *See* discussion *supra* Part III.

314. *See supra* Part II.

315. *See* David R. Dow, *Death by Good Intentions*, WASH. POST, Oct. 15, 2006, at B7. Fair processes of particular concern are the right to fair treatment of guilty defendants and the attention to appropriate dispositions, especially in capital cases. *Id.* *But see* Daniel S. Medwed, *Innocentrism*, 2007 U. ILL. L. REV. (forthcoming 2008) (responding to those criticisms).

316. *See supra* Part III.

process.<sup>317</sup> Adversarial adjudication in an imbalanced and inadequately funded system simply has not been effective in sorting out the guilty from the innocent.<sup>318</sup> By shifting more emphasis towards improved investigative procedures, this newly focused understanding of due process better protects the rights of all defendants and enhances the ability of the adversary adjudicative process to address those issues that remain in dispute after the fair administrative process has concluded.<sup>319</sup>

At the same time, by improving the reliability and efficiency of the administrative systems, the Reliability Model satisfies the most fundamental demands of the Crime Control Model. With best practices reforms like those outlined in this Article, the new Reliability Model can reduce the number of convictions of the innocent without losing too many convictions of the guilty.<sup>320</sup>

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317. *See supra* Part III.

318. *See supra* Part III.

319. *See supra* Part IV.A-E.

320. *See supra* Part IV.A-E.