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## CONVICTING THE INNOCENT: ABERRATION OR SYSTEMIC PROBLEM?

RODNEY UPHOFF\*

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## INTRODUCTION

No one in this country wants to see a person wrongly accused of a crime actually convicted of that crime. The United States Constitution provides criminal defendants a host of important rights, including the right to counsel, largely to ensure that the innocent are not wrongly convicted.<sup>1</sup> Further, we presume those accused of a crime to be innocent and insist that no defendant should be found guilty unless the prosecution can show beyond a reasonable doubt that the defendant is, in fact, guilty.<sup>2</sup> Our system imposes this high burden on the prosecution and provides the defendant with so many rights because we believe that it is better to let the guilty go free than to convict the innocent.<sup>3</sup> Indeed, the premise of our adversarial system is that the clash between partisan advocates produces reliable, accurate results.<sup>4</sup> In theory, then, if the adversary system is working properly, innocent persons will not be convicted.

Consequently, defense counsel plays a critical role in our adversary system because counsel aids the defendant in exercising most of his or her other rights.<sup>5</sup> In fact, without counsel's assistance, few accused persons would be capable of mounting any meaningful challenge to the prosecution's case. A one-sided, untested presentation

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1. U.S. CONST. amend VI.

2. *See, e.g.,* *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting); *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

3. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

4. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975))).

5. As Justice Stewart observed, “[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.” *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

of the facts compromises reliability and increases the likelihood of error. Accordingly, if the adversarial system is to function properly, a defendant must be provided the effective assistance of counsel.<sup>6</sup>

Moreover, once we acknowledge that a lawyer's assistance is essential to securing accurate results, then equal justice demands that all defendants be provided counsel. We cannot proclaim a commitment to equal justice and deny indigent defendants the assistance needed to obtain justice.<sup>7</sup> Thus, the right to counsel promotes equal access to justice by promising that every defendant, regardless of wealth, status, or race, has an advocate who will fight to see that the defendant is afforded the rights enshrined in the Constitution. Many look proudly to the American adversarial system as the "premiere legal system in the world today" because, at least in part, "[o]ur constitution provides to the lowest of persons the guarantees not even possessed by the affluent in most countries."<sup>8</sup>

In practice, however, the right to adequate counsel in the United States is disturbingly unequal. Only some American criminal defendants actually receive the effective assistance of counsel. Although some indigent defendants are afforded zealous, effective representation, many indigent defendants and almost all of the working poor are not.<sup>9</sup> The quality of representation a defendant receives generally is a product of fortuity, of economic status, and of the jurisdiction in which he or she is charged.<sup>10</sup> For many defendants, the

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6. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

7. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

8. *Torres v. State*, 2005 OK CR 17, ¶ 4, 120 P.3d 1184, 1191-92 (Lumpkin, P.J., concurring in part, dissenting in part).

9. See *infra* notes 46-155, 290-303 and accompanying text. My observations about the performance of criminal defense lawyers and of the operation of the criminal justice system are also a product of almost thirty years of working in and writing about the system. I was a public defender in Milwaukee, Wisconsin for six years, ran criminal defense clinics in Wisconsin and Oklahoma for almost fifteen years, and was a member of the Terry Nichols defense team in the Oklahoma City bombing state trial. I also served as Vice Chair of the ABA's Criminal Justice Section Defense Services Committee that included leaders of many public defender programs from around the country. Appointed by Oklahoma Governor Frank Keating, I served for three years on the Oklahoma Indigent Defense System Board. Finally, I have lectured frequently at seminars and conferences on criminal practice and have spoken with hundreds of lawyers and criminal defense experts about the delivery of defense services.

10. See ABA COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE 9* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (noting that disparities in indigent defense funding mean "the measure of justice received by an indigent defendant may depend more upon location than the actual merits of a case") [hereinafter *GIDEON'S BROKEN PROMISE*]. For an extensive look at the relationship between quality of counsel in capital cases and the defendant's economic situation, see Stephen B. Bright, *Counsel*

assistance of counsel means little more than counsel's help in facilitating a guilty plea. With luck, money, and location primarily determining whether a defendant has meaningful access to justice in this country, the promise of equal justice remains illusory.<sup>11</sup>

Providing defendants access to competent counsel with the time and resources to meaningfully test the prosecution's case is a badly needed step that would enhance the fairness and reliability of our criminal justice system. It is, however, just one step in fixing a "broken system."<sup>12</sup> For even the presence of a capable defense lawyer does not necessarily ensure that the innocent will, in fact, go free. Contrary to popular wisdom, our system of justice does not overprotect criminal defendants, thereby minimizing the conviction of the innocent.<sup>13</sup> Rather, our state criminal justice systems, as they currently operate, inadequately protect those wrongfully accused of crimes.<sup>14</sup>

Part I of this Article begins by examining the uneven right to counsel in this country. Wealthy defendants—and surprisingly, indigent defendants in some better funded jurisdictions—generally

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*for the Poor: The Death Sentence Not for the Worst Crimes But for the Worst Lawyer*, 103 YALE L. J. 1835 (1994).

11. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 1 (stating that a detailed study of indigent defense services in this country "has led to the inescapable conclusion that, forty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country"); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 906 (2004) ("[T]here is overwhelming evidence that defense representation in the United States often is egregiously inadequate."). For a powerful indictment of the criminal justice system, arguing that there are really two systems: one for the privileged and another for the less privileged, who also happen to be disproportionately black, see DAVID COLE, *NO EQUAL JUSTICE* (1998).

12. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), available at <http://ccjr.policy.net/cjedfund/jreport/finrep.PDF> [hereinafter LIEBMAN ET AL., *A BROKEN SYSTEM*] (describing the death penalty system as broken because roughly two-thirds of death penalty convictions between 1973 and 1995 were reversed due to serious error); JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> [hereinafter LIEBMAN ET AL., *A BROKEN SYSTEM, PART II*] (discussing reasons for high error rates and suggesting systemic reforms).

13. See *infra* notes 413-51 and accompanying text.

14. This Article focuses on the state criminal justice systems and not the federal system. The federal criminal justice system handles far fewer cases and generally provides indigent defendants with counsel who are better paid, have more manageable case loads, and have greater access to investigative services and experts. CAROLINE WOLF HARLOW, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 4* (2000) (reporting that 95 percent of criminal defendants are charged in state court). For a very positive assessment of the better-resourced federal defender system, see Igna L. Parsons, *Making It a Federal Case: A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837.

receive representation that is substantially better than that accorded most other defendants. For many indigent defendants and most of the working poor, however, the lawyers who represent them do not have the time or resources to effectively challenge the prosecution's case.<sup>15</sup> Ultimately, overworked or inept lawyers increase the likelihood that innocent defendants will plead or be found guilty.

It is not just bad lawyering, however, that produces wrongful convictions. Rather, other systemic practices and pressures contribute to such convictions. To illustrate this, Part II of the Article focuses on *Arizona v. Youngblood*,<sup>16</sup> a case in which Larry Youngblood, despite the assistance of competent counsel, was convicted and imprisoned for seven years for a rape he did not commit.<sup>17</sup>

Yet for many Americans, the lessons of the *Youngblood* case and other DNA exonerations are not easily grasped. Quite simply, many Americans harbor myths about the actual workings of the criminal justice system that in turn create or influence attitudes about the system. Part III of the Article explores some of these common myths and corresponding attitudes and exposes systemic shortcomings and practices that need to be addressed if we are to minimize the number of innocent persons who will be wrongfully convicted.

Fixing the system, however, will not be easy. Self interest and deeply held views about the criminal justice system create barriers to learning the lessons of the DNA exonerations and other cases of wrongful convictions. Indeed, some even refuse to acknowledge the existence of any significant systemic problems, arguing that the number of innocent persons wrongfully convicted has been grossly exaggerated.<sup>18</sup> Others contend that the costs of improving the system outweigh the marginal benefits gained by freeing a few more innocent persons.<sup>19</sup> Part IV of the Article responds to those critics and discusses the extent to which entrenched attitudes and narrow perspectives create barriers that impede meaningful systemic reforms. Finally, the Article concludes by identifying steps that can and should be taken to improve the criminal justice system and thereby minimize convicting the innocent.

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15. See *infra* notes 68-87, 110-55, 290-303 and accompanying text.

16. 488 U.S. 51 (1988).

17. See *infra* notes 170-289 and accompanying text.

18. See Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A1. But see *infra* notes 437-51 and accompanying text.

19. See *infra* notes 523-24 and accompanying text.

## I. THE UNEVEN RIGHT TO COUNSEL

A. *O.J. Simpson: The Rich Can Buy a Better Defense*

According to Justice Hugo Black, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>20</sup> It is commonly proclaimed, especially on Law Day, that our system of criminal justice guarantees equal justice under the law.<sup>21</sup> Anyone accused of a crime in this country has the virtually unfettered right to choose whomever he or she wants to serve as defense counsel and spend whatever resources the person deems appropriate to defend the charges that person faces.<sup>22</sup> The catch, of course, is that in most felony cases, it is expensive to hire a private criminal defense lawyer. Not only is the cost of an attorney often prohibitively high, but generally, the bulk of the money must be paid up-front or shortly after counsel is retained. Additionally, the cost of an investigator and defense experts must be borne by the defendant. As a result, it is often only a wealthy person or one who has family or friends with considerable assets who can afford to hire a lawyer and to pay counsel what it takes to mount a vigorous defense in a serious criminal case.<sup>23</sup>

A small percentage of defendants can and do hire defense lawyers who aggressively challenge the government’s case before, during, and, if necessary, after trial. These defendants do, in fact, receive zealous representation. O.J. Simpson is an obvious example of a defendant who could afford to pay for a vigorous defense. Simpson spent close to \$10 million to retain his “dream team” of lawyers, investigators, and

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20. Griffin v. Illinois, 351 U.S. 12 (1956).

21. Presidential Proclamation of Law Day, U.S.A., 2002 (Apr. 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/05/20020501.html>. In the proclamation, President George W. Bush stated,

One of our Nation’s greatest strengths is its commitment to a just, fair legal system and the protection it affords to the rights and freedoms we cherish. On May 1, we observe Law Day to draw attention to the principles of justice and the practice of law. The theme of this year’s Law Day, “Celebrate Your Freedom: Assuring Equal Justice for All,” acknowledges the essential task of protecting the rights of every American.

*Id.*

22. A defendant’s freedom of choice of counsel may be limited because of conflict of interest issues or other ethical concerns. See, e.g., Wheat v. United States, 486 U.S. 153, 159-63 (1988).

23. See Glenna Whitley, *Oklahoma Railroad*, DALLAS OBSERVER, July 21, 2005, available at [http://www.dallasobserver.com/issues/2005-07-21/news/feature\\_print.html](http://www.dallasobserver.com/issues/2005-07-21/news/feature_print.html) (reporting that Charlie and Nancy Jackson spent more than \$140,000 to pay for the defense of their daughter, who was charged with vehicular manslaughter).

experts to defend him.<sup>24</sup> Although commentators and the public disagree dramatically as to the reasons for Simpson's acquittal, few would disagree with the proposition that the money Simpson spent on his defense made a significant difference in the verdict handed down in that case.<sup>25</sup>

Money does not necessarily guarantee, however, that a defendant will receive quality representation. Given the difficulty of selecting truly skilled counsel,<sup>26</sup> some defendants or their families simply make poor choices when hiring defense counsel. Certainly, some clients spend considerable sums of money only to find out later that the lawyer they retained was inept,<sup>27</sup> overrated,<sup>28</sup> or unscrupulous.<sup>29</sup>

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24. Deborah L. Rhodes, *Simpson Sound Bites: What Is and Isn't News About Domestic Violence*, in POSTMORTEM: THE O.J. SIMPSON CASE 83, 84 (Jeffrey Abramson ed., 1996).

25. Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1234-35 (1996); Cheryl Fiandaca, *Both Sides Helped to Raise Doubts*, NAT'L L.J., Oct. 16, 1995, at A21.

26. Charged with a rape he did not commit, Mark Bravo did what many people do when selecting a lawyer—he went to the phone book. J. Michael Kennedy, *DNA Test Clears Man Convicted of Rape*, L.A. TIMES, Jan. 16, 1994, at B1. He picked Steve Nieto from the Yellow Pages because his name had a nice ring to it. *Id.* Partly as a result of Nieto's questionable representation, but also because the police withheld exculpatory evidence, Bravo was convicted of rape. *See id.*; *infra* notes 313, 519, 549, 574. Bravo's conviction was sustained despite significant inconsistencies in the victim's identification and the alibi testimony of Bravo and other witnesses. *People v. Bravo*, 23 Cal. Rptr. 2d 48 (Ct. App. 1993). It took three years for Bravo to secure the DNA testing that cleared him. Innocence Project, Case Profiles: Mark Diaz Bravo, [http://www.innocenceproject.org/case/display\\_profile.php?id=03](http://www.innocenceproject.org/case/display_profile.php?id=03) (last visited Feb. 28, 2006).

27. *See, e.g.*, *Bellamy v. Cogdell*, 974 F.2d 302, 303, 306-09 (2d Cir. 1992) (finding that, despite being mentally incapable of defending himself in a pending disciplinary hearing and being incompetent to practice law, the seventy-one-year-old lawyer with health problems retained by a mother to represent her son in a murder case did not provide ineffective assistance of counsel because of an inadequate showing of prejudice).

28. For example, Gary Gauger's well-paid lawyers failed to conduct a serious investigation and effectively challenge the prosecution's highly circumstantial case. Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 66, 80. Gauger was released after serving almost three years in prison when the Second District Appellate Court of Illinois threw out his confession. *People v. Gauger*, 698 N.E.2d 724 (Ill. App. Ct. 1996). Ultimately, two members of a motorcycle gang who actually murdered his parents were convicted and Gauger was pardoned by Governor George Ryan. Center for Wrongful Convictions, Northwestern Univ. Sch. of Law, *The Illinois Exonerated: Gary Gauger*, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/gauger.htm> (last visited Feb. 28, 2006).

29. For a detailed investigative series recounting the unscrupulous representation provided by John Pyle and other private lawyers, see Fredrick N. Tulsy, *The High Cost of a Bad Defense*, SAN JOSE MERCURY NEWS, Jan. 24, 2006, at 1A; *see also* Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB.,



Take for example, Richard Glossip, the manager of the Best Budget Inn in Oklahoma City, who faced the death penalty for allegedly convincing a maintenance man who worked at his motel to commit a murder.<sup>30</sup> Glossip asked his family to hire a lawyer and they paid a substantial sum of money to Wayne Fournerat to conduct Glossip's defense.<sup>31</sup> That substantial sum of money, however, purchased representation that was "so ineffective that [the court had] no confidence that a reliable adversarial proceeding took place."<sup>32</sup>

The case against Glossip rested almost entirely on a codefendant, Justin Sneed who admitted murdering Barry Van Treese, but claimed he did so at Glossip's behest.<sup>33</sup> Sneed agreed to testify against Glossip in exchange for a sentence of life without parole.<sup>34</sup> Mr. Fournerat was amazingly inept. The court noted that Fournerat's most glaring deficiency was his failure to impeach Sneed, the State's star witness, with a videotape of Sneed's prior statement to the police that contained numerous material inconsistencies and omissions when compared with his trial testimony.<sup>35</sup> In fact, Fournerat was so incompetent that he could not lay a proper foundation to get the videotape into evidence and ultimately never used the tape at all.<sup>36</sup> Additionally, Fournerat presented an incomprehensible theory of defense that reflected his lack of legal research and preparation.<sup>37</sup> In the end, the court reversed Glossip's conviction finding that "trial counsel was not prepared for trial, had not formulated any reasonable defense theory, fully expected Appellant to enter a plea, and never expected to get to the second

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Nov. 15, 1999, § 1, at 1 (reporting the shoddy performance of Earl Washington, a veteran Chicago lawyer who was paid \$8,000 to defend Bernon Howerly in a death penalty case, and other examples of inept and unethical lawyers).

30. Glossip v. State, 2001 OK CR 21, ¶ 5, 29 P.3d 597, 599.

31. Glossip's brother and his girlfriend chose Fournerat because he represented her in a civil suit. Email from Janet Chesley, Attorney, Oklahoma Indigent Defense System, to author (Jan. 13, 2006) (on file with author) (relating her experiences representing Glossip in a habeas corpus petition following his conviction when his murder case was retried). They paid Fournerat as much as \$50,000, including some of the proceeds of that civil suit. *Id.*

32. *Glossip*, 2001 OK CR 21, ¶ 8, 29 P.3d at 599.

33. *Id.* ¶ 5, 29 P.3d at 599.

34. *Id.*

35. *Id.* ¶¶ 16-17, 29 P.3d at 601.

36. *Id.* ¶ 24, 29 P.3d at 603.

37. The court cited numerous examples of Fournerat's lack of preparedness including his last minute requests for discovery that had already been provided; his claim to the jury that a particular witness was fictitious when his identity was obvious; his failure to lay proper foundations for evidence; his calling of only one witness other than the defendant during the mitigation phase; and his failure to object to improper victim impact evidence. *Id.* ¶¶ 21-25, 29 P.3d at 602-03.

stage” and concluding, therefore, that “[Glossip] was prejudiced by his trial counsel’s performance.”<sup>38</sup>

Other defendants are more fortunate than Mr. Glossip. Some simply stumble upon a good lawyer. Others benefit from a diligent search and, based on reputation or a referral, hire—or have hired for them—a zealous, conscientious advocate.

The size of one’s wallet does not guarantee a favorable result. Numerous well-heeled defendants have spent large amounts of money only to be convicted at trial.<sup>39</sup> Money does, however, enhance the wealthy defendant’s ability to challenge the prosecution’s case.<sup>40</sup> Not only does defense counsel have more time to prepare, but counsel also has the time to research, brief, and aggressively pursue pretrial motions.<sup>41</sup> More importantly, counsel can enlist the aid of investigators and forensic experts who can help marshal the facts and enable counsel to present defense evidence persuasively.<sup>42</sup> Frequently, it is through the efforts of investigators or defense experts that defense counsel uncovers the weaknesses of the prosecution’s case or finds the proof that reveals the defendant’s innocence. Thus, money improves the defendant’s chances for success at trial. Indeed, in rare instances, a rich defendant

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38. *Id.* ¶ 25, 29 P.3d at 603.

39. The two top Westar Energy, Inc. executives, David Wittig and Douglas Lake, recently were convicted of multiple charges despite spending \$4.36 million and over \$8.5 million, respectively, in attorneys’ fees and costs. See Dan Margolies, *Wittig, Lake Sued Over Defense Fees*, KAN. CITY STAR, Oct. 7, 2005, at C1.

40. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 28-31 (1997). As Stuntz explains, one of the consequences of the fact that only wealthy defendants can fully exploit the intricacies of criminal procedure is that prosecutors tend to focus more on easy-to-convict poor defendants rather than litigious rich ones. *Id.* at 28. Thus, the prospects of going up against a defendant with the resources to litigate affects prosecutorial charging decisions. *Id.*

41. Many commentators have discussed the importance of good motion practice for the criminal defense practitioner. 2 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 221-253A (1989); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 370.

42. As the Court noted in *Ake v. Oklahoma*, defense counsel must have the “basic tools” or “raw materials integral to the building of an effective defense.” 470 U.S. 68, 77 (1985). National standards also recognize the critical importance of investigators and experts in properly preparing and defending a criminal case. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. at 22 (3d ed. 1992) (stressing the importance of support services including investigators and experts and concluding that “[t]he quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are available”).

may be able to take advantage of a significant edge in expert assistance to raise reasonable doubt in a seemingly unassailable prosecution case.<sup>43</sup>

In addition, money buys wealthier defendants more leverage in the plea-bargaining process. Admittedly, in some instances the defendant's status may generate press coverage that reduces the defendant's ability to obtain a favorable plea bargain. More often, however, well-paid defense counsel can push more aggressively in the bargaining process because both counsel and the prosecutor know that counsel has the ability, time, and incentive to push forward to trial if a favorable bargain is not struck. Ultimately, both counsel and the prosecutor know that wealthier defendants generally have the power to reject any deal and insist on a trial.<sup>44</sup> Unlike an indigent defendant, a wealthier defendant is better able to resist counsel's pressure to plead guilty because, if dissatisfied with defense counsel, the wealthier defendant may simply choose to hire someone else.<sup>45</sup>

### B. *Larry Wade McVay: The Working Poor Get Stuffed*

The vast majority of defendants in this country cannot afford to hire private counsel. Nationally, over 80 percent of those accused of a felony are deemed indigent and qualify for counsel provided to them at public expense.<sup>46</sup> Jurisdictions vary markedly in how those indigency determinations are made and who qualifies for indigent defense representation.<sup>47</sup> A person in one state may qualify for such representation, while in a neighboring state another person in an identical financial situation facing the exact same charges will not.

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43. See June D. Bell, *Using Your Most Valuable Asset: The Client*, NAT'L L.J., June 21, 2004, at 56 (describing how attorney Dick DeGuerin utilized his client's wealth to hire experts and do investigation that led to Robert Durst's acquittal). For a discussion of the importance of the experts and investigators in the O.J. Simpson case, see Arenella, *supra* note 25, at 1234-35.

44. Although all defendants have this authority in theory, many defendants, in fact, are unable to wield such power. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2004). It is usually fruitless for a defendant to insist upon trial and risk a far greater sentence when counsel is not prepared to mount a vigorous defense. See *infra* notes 128-46 and accompanying text. Certainly some defendants do go to trial against counsel's wishes and pay the price for doing so. Most defendants, however, will succumb to the pressure to plead. See *infra* notes 69, 112-27, 373-412 and accompanying text.

45. A defendant's right to fire defense counsel is not absolute, of course, but subject to court approval. See MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2004).

46. HARLOW, *supra* note 14, at 1, 5.

47. RANGITA DE SILVA-DE ALWIS, *THE SPANGENBERG GROUP, DETERMINATIONS OF ELIGIBILITY FOR PUBLIC DEFENSE* (2002), available at <http://abanet.org/legalservices/downloads/sclaid/mdigentdefense/determinationofeligibility.pdf>.

Perhaps even more problematic is the fact that similarly situated defendants within the same state, or even in the same courthouse, may be treated differently when that indigency determination is made.<sup>48</sup> Although many poor people receive an indigent defender, a significant number of working people are deemed ineligible for indigent representation.<sup>49</sup> In the end, therefore, the indigency decision is critical because it generally determines whether a low-income defendant has any realistic hope of contesting the charges lodged against him or her.

A criminal defendant deemed ineligible for indigent representation faces a daunting challenge. Some struggle in vain to raise enough money to retain any lawyer. Take, for example, Larry Wade McVay who was charged with robbery in South Carolina in 1996.<sup>50</sup> McVay submitted an affidavit of indigency to the court showing a gross weekly income of \$182 and no savings or other sources of income.<sup>51</sup> After subtracting basic living expenses, he had virtually no disposable income.<sup>52</sup> Because South Carolina law created a presumption of non-indigency if the accused's gross income exceeded \$125 per week, the court required McVay to overcome the presumption.<sup>53</sup> Finding that

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48. See, e.g., Lola Velázquez-Aguilú, Comment, *Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense Is Failing*, 2006 WIS. L. REV. 193, 207-10 (describing the judge-to-judge and county-to-county disparity in indigency determinations made once a defendant is deemed ineligible for public defender representation). Catherine Greene Burnett, Michael K. Moore & Allen K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 425 S. TEX. L. REV. 595, 615-618 (2001) (stating that results of a state bar survey reflect widespread variation in indigency determinations in Texas). For a look at the variation within states regarding the appointment of counsel at bail hearings, see Douglas Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 9-13.

49. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 7, 12, 26 (reporting that thousands of accused poor persons who cannot afford counsel are denied representation each year); see also *infra* notes 58-67, 159-60 and accompanying text.

50. See *United States v. McVay*, 32 Fed. Appx. 661 (4th Cir. 2002). McVay's case is discussed in detail in Adam Gershowitz's excellent article, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 590-692 (2005) (highlighting the Supreme Court's failure to establish any minimal definition of indigency and discussing the extent to which that failure undermines the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

51. *McVay*, 32 Fed. Appx. at 664.

52. McVay was employed as a part-time picture framer with take-home pay of about \$160 per week. *Id.* at 668 (King, J., dissenting). According to his affidavit, McVay had monthly rent of \$275, paid \$80 to \$100 in utility costs a month, and spent \$60 to \$65 a week in food. *Id.* As the dissent noted, "[a]llowing for basic living expenses, McVay was left with disposable income of virtually nothing." *Id.*

53. *Id.* at 664 (majority opinion).

McVay failed to do so on the information provided, the trial court ruled he was not entitled to appointed counsel.<sup>54</sup>

McVay subsequently attempted to retain counsel but was quoted fees of \$8,000 and \$10,000 by the two lawyers he approached. Both insisted on at least half of that sum up-front. McVay did not have anything remotely close to that amount of money, nor any way of raising such a sum.<sup>55</sup> Not surprisingly, between the date of his indictment in February and his trial date in July, McVay was unable to save enough to retain counsel.<sup>56</sup> When he appeared for his July trial without counsel, the prosecutor offered a plea to common law robbery, which McVay accepted.<sup>57</sup>

It is difficult to ascertain exactly how many defendants find themselves in McVay's predicament. Nevertheless, estimates provided by many commentators over the last forty years indicate that the number is significant.<sup>58</sup> My observations and discussions with Oklahoma judges and defendants regarding indigency determinations,

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54. *Id.* at 665-66.

55. As the dissent observed, no bank or lender will give a defendant who is facing a serious felony, with a criminal record and working for a minimal wage, a loan to pay for a lawyer. *Id.* at 668 (King, J., dissenting).

56. *Id.* at 665 (majority opinion).

57. *Id.* In his appeal, McVay collaterally challenged the validity of his 1996 robbery conviction claiming he was denied his right to court-appointed counsel. *Id.* The Fourth Circuit rejected McVay's challenge, holding that he failed to carry his burden of showing that he was financially unable to retain counsel to defend himself in the robbery case. *Id.* at 667. As the dissent pointed out, however, the uncontradicted evidence showed he plainly lacked the \$4,000 to \$5,000 he needed to hire a lawyer. *Id.* at 668 (King, J., dissenting).

58. See, e.g., Laura Parker, *8 Years in a Louisiana Jail, But He Never Went to Trial*, USA TODAY, Aug. 29, 2005, at A1 (noting that tens of thousands of poor people go to jail every year without ever talking to a lawyer); Press Release, National Legal Aid and Defender Association [NLADA], *Forty Years After Landmark Supreme Court Ruling, Right to Counsel Still Denied to People Who Can't Afford an Attorney* (Mar. 12, 2003), available at [http://www.nlada.org/Defender/Defender\\_Public/Defender/Defender\\_Gideon/Defender\\_Gideon\\_Press](http://www.nlada.org/Defender/Defender_Public/Defender/Defender_Gideon/Defender_Gideon_Press) (noting that in one California county alone, 1200 people pled guilty to misdemeanors without counsel; and declaring "the dirty little secret of the criminal justice system is how many people accused of a crime get no lawyer at all"); NORMAN LEFSTEIN, ABA COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *CRIMINAL DEFENSE SERVICES FOR THE POOR, METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 2* (1982) (finding that millions of people are denied effective assistance of counsel or provided no representation at all); Mary Zahn & Jessica McBride, *Unequal Justice (Part 1): Poor Often Left Defenseless in Courtroom, \$250 a Month Too Much to Qualify for a Public Defender*, MILWAUKEE J. SENTINEL, Dec. 7, 2002, at A1 (reporting that thousands of people who would qualify for a public defender in other states do not get a lawyer in Wisconsin). For a thorough look at how the indigency standards and practices in Wisconsin operate to deprive economically strapped defendants of their right to counsel, see generally Velázquez-Aguilú, *supra* note 48.

coupled with frequent conversations with lawyers, court personnel, and clinic students about the handling of indigency questions led me to conclude in 1993 that a sizeable number of indigent defendants in Oklahoma were being forced to retain counsel in lieu of receiving counsel at public expense.<sup>59</sup> Then—and now—most Oklahoma defendants who are not in custody are denied counsel paid for by the State of Oklahoma.<sup>60</sup>

The reason is simple. The decision to post a bond, even if that bond is as small as fifty dollars, or posted by a friend, raises a statutory presumption of non-indigency.<sup>61</sup> Admittedly, the defendant does have a choice, albeit an unhappy one. The defendant can choose not to post bond and wait in jail until counsel is appointed. Once bond is posted, however, the statutory presumption is raised and it is extremely difficult for an unrepresented defendant to overcome that presumption. Indeed, some judges and court personnel make it perfectly clear that a person out on bail or bond will not receive an appointed lawyer unless he or she is prepared to return to custody.<sup>62</sup> Not surprisingly, defendants under such a threat either find some way to raise a minimal amount of money to hire counsel or, more frequently, just plead guilty, as Larry McVay did.<sup>63</sup>

This problem is not unique to Oklahoma. Other states have statutory presumptions or practices that frustrate or block access to indigent defense representation.<sup>64</sup> In Wisconsin, for example, the

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59. See Rodney J. Uphoff, *The Right to Appointed Counsel: Why Defendants in Oklahoma Still Are Unrepresented*, 64 OKLA. B. J. 918 (1993).

60. Telephone Interview with Terry Hull, Clinical Professor, Univ. of Okla. Coll. of Law, in Norman, Okla. (Dec. 16, 2005).

61. See OKLA. STAT. ANN. tit. 22, § 1355A (2003). *But see* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-7.1 cmt. at 89 (3d ed. 1992) (stating that counsel should not be denied because bond has been or can be posted).

62. See Burnett et al., *supra* note 48, at 616-18 (reporting that many Texas judges follow similar practices).

63. See Zahn & McBride, *supra* note 58 (reporting that in over 400 cases examined in which the defendant was ruled ineligible for a public defender, the judge referred the defendant to the prosecutor and a guilty plea was entered).

64. In Missouri, for example, the Public Defender Commission has created, by administrative regulation, a presumption that anyone released on bail of \$5,000 or more is ineligible for a public defender. For a look at the practices in Missouri, including the policies of the public defender program, that restrict persons too poor to hire private counsel from gaining access to indigent defense counsel, see THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, FINAL REPORT 18-21 (2005) [hereinafter SPANGENBERG GROUP, MISSOURI]; see also THE SPANGENBERG GROUP, COMPARATIVE ANALYSIS OF INDIGENT DEFENSE EXPENDITURES AND CASELOADS IN STATES WITH MIXED STATE AND COUNTY FUNDING 16 (1998), available at <http://www.abanet.org/legalservices/downloads/slclaid/>

Office of the State Public Defender (SPD) is charged by statute with the responsibility for making the initial determination of indigency.<sup>65</sup> In making that determination, the SPD utilizes a formula that compares the defendant's available income and assets with the estimated cost of counsel. Unfortunately, the SPD's formula currently relies on cost of living figures that are hopelessly outdated and estimated costs of counsel projections set far below the actual costs of retaining counsel.<sup>66</sup> Thus, thousands of defendants in Wisconsin living substantially below the federal poverty guidelines do not qualify for a public defender and many go unrepresented.<sup>67</sup>

The low-income defendant who cannot afford any lawyer or who can only muster a modest retainer undoubtedly can be found in every jurisdiction in this country. In some instances, defendants in such economic circumstances can and will find lawyers who are willing to sacrifice their own personal well-being to provide competent representation even if that means spending hours at a trial without any expectation of additional compensation.<sup>68</sup> For an innocent defendant facing a serious felony charge, however, it is exceedingly difficult to find a lawyer willing to devote the hours necessary to prepare for and try a complicated criminal case on the lawyer's own time and money. Most of the time, therefore, the couple of hundred dollars given to defense counsel buys only a plea bargain. Even a defendant who professes innocence will usually be forced into a guilty plea by the threat of a much harsher sentence, should the defendant go to trial and be found guilty.<sup>69</sup> It is very risky to go to trial facing a significant

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indigentdefense/comparativeexpenditurescaseloads.pdf [hereinafter SPANGENBERG GROUP, COMPARATIVE ANALYSIS] (noting that systemic problems in the Georgia criminal justice system prevented indigent defendants from obtaining appointed counsel in a majority of misdemeanor cases).

65. WIS. STAT. § 977.07(1)(b) (2003-2004).

66. See Velázquez-Aguilú, *supra* note 48, at 201-03.

67. *Id.* at 194 (noting that Wisconsin's indigency threshold is set at 33 percent of the federal poverty guidelines so that anyone with an annual income of \$3,000 is deemed able to afford counsel); see Press Release, NLADA, *supra* note 58, at 1 (estimating that over eleven thousand people annually in Wisconsin go unrepresented because they have an annual income of more than \$3,000).

68. One such conscientious lawyer was Steven Benjamin, a court-appointed lawyer in Virginia who was paid \$840 to handle a death penalty case. See Alan Berlow, *Requiem for a Public Defender*, AM. PROSPECT ONLINE, June 5, 2000, <http://www.prospect.org/print-friendly/print/V11/14/berlow-a.html>. Despite the judge's refusal to lift the cap, Benjamin spent countless hours preparing for a trial that culminated in an acquittal for his client. *Id.*

69. See *infra* notes 382-412 and accompanying text. For an extended look at the pressure to plead guilty faced by those defendants who have retained counsel, see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179-1206 (1975).

sentence knowing that defense counsel will not be prepared to conduct that trial. Regardless of guilt or innocence, most defendants are unwilling to take that risk and the vast majority plead guilty.

Nonetheless, some defendants insist on going to trial. Numerous stories have been written about horrific representation provided by counsel retained by defendants ineligible for a public defender or court-appointed lawyer, but too poor to pay anything other than a modest retainer.<sup>70</sup> Consider the plight of Bernon Howery, a Kankakee County Board member with no criminal record, who faced the death penalty for allegedly setting a fire that killed four children, including three of his own.<sup>71</sup> Howery hired Earl Washington, a veteran Chicago lawyer, for a flat fee of \$8,000.<sup>72</sup> Unbeknownst to Howery, Washington was facing disciplinary charges at the time he defended Howery.<sup>73</sup>

Washington did little investigation. Indeed, he failed to follow leads pointing to other suspects, claiming later that he trusted the police to do that investigation.<sup>74</sup> According to Howery, Washington never even talked to him about the facts of the case.<sup>75</sup> Washington regularly showed up late or missed court appearances, irritating the trial judge to the point that he threatened Washington with contempt and eventually complained to disciplinary authorities.<sup>76</sup> Ultimately, Washington persuaded Howery to waive his right to a jury and opt for a bench trial to save time and money.<sup>77</sup>

After the judge found Howery guilty, he set the sentencing hearing for a week later. Washington appeared late at the sentencing hearing and offered only brief testimony from three witnesses.<sup>78</sup> The trial judge, Patrick Burns, stated on the record that he was “totally amazed” at the minimal evidence Washington offered even after the court had “almost begged” Washington to give him some mitigating evidence.<sup>79</sup> Burns concluded that because the defense offered no mitigating

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70. See, e.g., Tulskey, *supra* note 29; Alschuler, *supra* note 69, at 1181-98, 1248; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1005 (1983); ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 411 (1982); Armstrong & Mills, *supra* note 29.

71. Armstrong & Mills, *supra* note 29.

72. *Id.*

73. A year later, Washington was suspended for three months. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*



evidence, he had no choice but to impose the death penalty.<sup>80</sup> Given Washington's feeble performance, however, the Illinois Supreme Court vacated Howery's death sentence and remanded the case for a new sentencing hearing.<sup>81</sup>

*C. Jimmy Ray Bromgard and Leonard Peart: Indigent Defendants in Underfunded Systems Get Underrepresented*

Indigent defendants represented by overworked public defenders<sup>82</sup> or poorly compensated appointed counsel often experience the same dismal representation provided to the working poor who have scraped up a minimal retainer to hire counsel.<sup>83</sup> Since *Gideon*,<sup>84</sup> numerous reports have been released highlighting the crisis in indigent defense funding in many jurisdictions and decrying the often abysmal representation afforded to many criminal defendants.<sup>85</sup> That is not to say that all indigent defendants receive substandard representation. Even in underfunded jurisdictions, some indigent defendants are well-served. Moreover, as the next section of this Article discusses, some

80. *People v. Howery*, 687 N.E.2d 836, 864 (Ill. 1997).

81. *Id.* at 865.

82. *See, e.g.*, Lefstein, *supra* note 11, at 838-58; *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 17-19; Trisha Renaud & Ann Woolner, *Meet 'em and Plead 'em*, FULTON COUNTY DAILY REP. (Atlanta, Ga.), Oct. 8, 1990, at 1; Christopher Johns, *'Slaughterhouse Justice': Crushing Workloads, Underfunded Public Defenders Shortchange Indigent Clients*, ARIZ. REPUBLIC, May 23, 1993, at C1.

83. *See, e.g.*, Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783; Burnett et al., *supra* note 48, at 612-45; Berlow, *supra* note 68; Bruce A. Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1179-85 (2003).

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

85. *See, e.g.*, *GIDEON'S BROKEN PROMISE*, *supra* note 10; SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, ABA SECTION OF CRIMINAL JUSTICE, CRIMINAL JUSTICE IN CRISIS (1988); LEFSTEIN, *supra* note 58, at 56-57; ABA & NAT'L LEGAL AID AND DEFENDER ASS'N, *GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING* (1982); RICHARD KLEIN & ROBERT SPANGENBERG, ABA SECTION OF CRIMINAL JUSTICE, *INDIGENT DEFENSE CRISIS* (1993); LAURENCE A. BENNER, NAT'L LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* (1973). In addition, the Spangenberg Group has studied the delivery of indigent defense services in virtually every jurisdiction in the United States. Many of the group's reports document severe funding problems in the jurisdiction being evaluated. *See, e.g.*, THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> [hereinafter SPANGENBERG GROUP, VIRGINIA] (finding that Virginia's indigent system is "deeply flawed" and fails to provide many indigent defendants with effective assistance of counsel, and documenting scores of other reports with similar findings).

jurisdictions, for the most part, offer indigent defendants very good representation.<sup>86</sup> Indeed, in some jurisdictions, indigent defendants not only receive better representation than the working poor, but receive representation that compares favorably to that provided to all but the very rich.<sup>87</sup> In underfunded jurisdictions, however, poor defendants, regardless of whether they are indigent or among the working poor, generally receive representation that is markedly inferior to that provided to defendants with means. In such jurisdictions, too many defendants get an inept or overworked lawyer with little time to do more than just plea bargain.

Unquestionably, the amount of money spent on indigent defense services varies dramatically across this country. Some jurisdictions spend less than five dollars per capita while others spend over twenty dollars per capita.<sup>88</sup> It is difficult, however, to get a clear picture of exactly how much money is being spent in each state on indigent defense services. Not since 1986 has the Department of Justice attempted to gather nationwide figures comparing indigent defense expenditures.<sup>89</sup> Since then, the Spangenberg Group, a nationally recognized consulting firm under contract with the American Bar Association's Bar Information Program, has collected the most comprehensive data relating to the delivery of indigent defense services across the United States.<sup>90</sup> Yet, as the Spangenberg Group acknowledges, a number of variables make gathering and comparing

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86. Oregon, Minnesota, Colorado, and Massachusetts all have statewide public defender programs that are widely regarded as quality programs. Parker, *supra* note 58.

87. For an excellent example of outstanding defense work done by some energetic public defenders, see the case of Brenton Butler, *infra* notes 161-69, 314-15, 434 and accompanying text. The Washington, D.C. Public Defender Service has long been recognized for providing its clients quality representation. See U.S. DEP'T OF JUSTICE, AN EXEMPLARY PROJECT: THE D.C. PUBLIC DEFENDER SERVICE (1975); Charles J. Olgetree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1263-67 (1993).

88. Jim Neuhard, Mich. State Appellate Defender Office, Per Capita Public Defense Expenditure; All States for 2002, [http://www.sado.org/publicdefense/2002\\_all\\_expense.pdf](http://www.sado.org/publicdefense/2002_all_expense.pdf).

89. *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 28; see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 22-33 (1986). In 1999, the Bureau of Justice Statistics gathered data of the spending on indigent defense services in the nation's one hundred most populous counties. CAROL J. DEFRANCES & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 (2000).

90. See SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 2-3 (noting that the Spangenberg Group has been under contract with the ABA for eighteen years and has done research on indigent defense delivery systems in all fifty states).

expenditures challenging.<sup>91</sup> Part of the problem is that data from some jurisdictions is so sketchy that the Spangenberg Group can only estimate expenditures in those states.<sup>92</sup>

Additionally, comparing state expenditures is complicated because states vary markedly in how they fund indigent representation, as is demonstrated in Appendix I.<sup>93</sup> Although most states fund indigent defense representation primarily at the state level,<sup>94</sup> several states rely entirely or very heavily on county funding.<sup>95</sup> In Indiana, for example, each county determines the method that will be used to provide indigent defense representation in that county.<sup>96</sup> A defendant in Indiana may have a contract lawyer, public defender, or court-appointed counsel, depending on the county in which he or she is charged.<sup>97</sup> In those states that rely primarily on counties to fund indigent defendant services, there may well be considerable variation in the quality of representation provided.<sup>98</sup> Thus, indigent defendants prosecuted in a poor county within a state are less likely to gain access to competent counsel than those prosecuted in a richer county.<sup>99</sup>

Just as states vary in the amount and manner of funding defense services, states rely on different systems for delivering those services. In some states, most indigent defendants are represented by salaried public defenders.<sup>100</sup> Other states primarily use a contract system

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91. See SPANGENBERG GROUP, COMPARATIVE ANALYSIS, *supra* note 64, at 4. In addition to different funding mechanisms, those variables include: population differences; lack of complete, reliable data; lack of statewide data collection or oversight; different ways to count cases; percentage and types of cases handled; and rate of pay for court-appointed counsel. See GIDEON'S BROKEN PROMISE, *supra* note 10, at 28 (noting that the lack of reliable data is a barrier to reform).

92. THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> [hereinafter SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES].

93. *Id.*

94. *Id.* (noting that twenty-three states provided 100 percent of indigent defense funding with another five contributing at least 80 percent of such funding).

95. *Id.* (noting that as of 2002, Utah and Pennsylvania were entirely county-funded while California, Nebraska, Nevada, Washington and Texas had state contributions ranging only from 2.6 percent to 6.6 percent).

96. See GIDEON'S BROKEN PROMISE, *supra* note 10, at 8.

97. *Id.* at 5.

98. *Id.* at 8-9.

99. *Id.*; see also Bright, *supra* note 10, at 1851-52; State v. Smith, 681 P.2d 1374, 1375-83 (Ariz. 1984) (describing the patchwork system of indigent defense representation that existed in Arizona).

100. See CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 2 (2001) (reporting that sixteen of the nineteen states with public defender programs had statewide programs).

whereby a private attorney or group of private attorneys handle some or all of the cases in a particular jurisdiction.<sup>101</sup> Additionally, one state and a number of counties across the United States use the assigned counsel model in which private lawyers provide indigent representation on a case-by-case or systemic basis.<sup>102</sup>

A significant number of states use a mixture of systems for delivering defense services to indigent defendants.<sup>103</sup> Take Oklahoma for example. Indigent defendants in Tulsa or Oklahoma City generally are represented by public defenders.<sup>104</sup> In most other counties in Oklahoma, a contract lawyer—or group of contract lawyers—provides representation to all indigent defendants, except those charged with capital murder.<sup>105</sup> Contract lawyers are paid markedly different amounts in different parts of the state.

Not surprisingly, defendants often receive markedly different representation depending on the county in which they are charged. For example, in Woods, Cherokee, and Payne County, contract lawyers were paid a per case average in fiscal year 2005 of \$79.41, \$93.46, and \$115.43, respectively.<sup>106</sup> In Jefferson, Caddo, and Grady County, contract lawyers in fiscal year 2005 received a per case average of \$380.43, \$333.33, and \$329.64, respectively.<sup>107</sup> Outside of Tulsa and Oklahoma City, almost all defendants facing the death penalty are represented by full-time staff lawyers from the Oklahoma Indigent

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101. See STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SELECTED FINDINGS, INDIGENT DEFENSE 2 (1996) (reporting that in 1992, 25 percent of counties used contract systems with 8 percent relying exclusively on such systems).

102. See THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 1-2 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratesnoncapital2003.pdf> [hereinafter SPANGENBERG GROUP, RATES OF COMPENSATION] (noting that Maine is the only state to rely exclusively on assigned counsel).

103. *Id.* at 2.

104. *Id.* at 13. The public defender offices in these two counties also handle all capital cases and appeals. See *id.* Conflict cases, however, are handled by private lawyers. See *id.*

105. I was a member of the board of the Oklahoma Indigent Defense System from 1995 to 1998. The board is responsible for overseeing the operation of the entire program including awarding contracts to private practitioners to provide indigent defense services. See OKLA. STAT. ANN. tit. 22, § 1355 (West 2003).

106. For fiscal year 2005, the statewide average cost per case in Oklahoma was \$197.22. E-mail from Terry Hervey, Non-Capital Trial Div., Okla. Indigent Def. Sys., to author (Dec. 28, 2005, 10:50 CST) (on file with author).

107. E-mail from Terry Hervey, Non-Capital Trial Div., Okla. Indigent Def. Sys., to author (Nov. 9, 2005, 14:58 CST) (on file with author).

Defense System.<sup>108</sup> Similarly, almost all appellate cases are handled by these salaried staff lawyers. Finally, conflict cases across the state are assigned to private lawyers paid on an hourly basis.<sup>109</sup>

While the salaried lawyers handling death penalty cases and the appellate lawyers who work for the Oklahoma Indigent Defense System generally provide competent representation, the quality of representation provided by the contract lawyers varies from adequate to abysmal. Quite simply, a lawyer being paid less than \$100 a case cannot realistically be expected to—nor generally will—provide clients effective representation.<sup>110</sup>

Representation provided to indigent defendants in Oklahoma mirrors that of many underfunded jurisdictions. As Nancy Gist, formerly the Director of the United States Department of Justice's Bureau of Justice Assistance, observed, "[I]t would be fair to say that the level of quality representation provided indigent defendants is uneven and frequently abysmal."<sup>111</sup>

The quality of defense services in a jurisdiction is not primarily a product of the delivery system used in that jurisdiction. Rather, quality is largely a function of the adequacy of the time and resources at defense counsel's disposal.<sup>112</sup> In Virginia, for example, indigent

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108. SPANGENBERG GROUP, RATES OF COMPENSATION, *supra* note 102, at 13.

109. *Id.*

110. Justice Brennan suggested that "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). In many respects, the defendant with an ineffective lawyer who has done no investigation may be in worse shape than an unrepresented defendant because many of the former simply plead guilty and it is extremely difficult for a defendant who had counsel to get relief following a guilty plea. For a further discussion of this point, see Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1821-22 (2000).

111. Berlow, *supra* note 68; see also *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 7-9, 21-22 (reporting that a number of jurisdictions were inadequately funded and had a fragmented, uneven delivery system that failed to provide competent representation to the majority of indigent defendants). For an unflattering assessment of the quality of representation in Oklahoma, see The SPANGENBERG GROUP, CAPITAL POST-CONVICTION REPRESENTATION IN OKLAHOMA: A STATUS REPORT 3 (1996), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ok-postconvictnarrative.pdf> ("The per capita and per case funding for representation in non-capital trial representation ranks as one of the worst in the nation.").

112. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 9, 17-18. Defense counsel's training, level of experience, and talent also affect the quality of representation provided. See *id.* at 17. Unfortunately, studies show that underfunded jurisdictions with heavy caseloads often provide little or no training and tend to have high turnover. See *id.* at 11. Thus, lawyers coping with these very heavy caseloads are often inexperienced and poorly trained. See, e.g., SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 27-33. But see SPANGENBERG GROUP, MISSOURI, *supra* note 64, at 7

defendants in some counties are represented by salaried public defenders while, in others, court-appointed counsel provide representation to indigent defendants.<sup>113</sup> Unfortunately, the local public defenders' offices are so woefully underfunded that staff lawyers handle caseloads that are far above national standards.<sup>114</sup> For example in Winchester County, each lawyer handled an average of 674 cases in 2002.<sup>115</sup> Given such a workload, jail visits to interview or counsel clients occur in only the most serious cases.<sup>116</sup> In Fairfax County, each lawyer averaged 160 to 170 open files.<sup>117</sup> With such a caseload, lawyers concede that "we let things slide. We cannot help it. We don't have time for investigation or research."<sup>118</sup> This refrain is echoed by public defenders across the state. Excessive caseloads translate into case processing because there is no time for performing legal research, filing motions, interviewing the client, or locating witnesses. Moreover, the young, inexperienced lawyers who take these low-paying jobs are inadequately supervised and receive little or no training.<sup>119</sup>

Indigent defendants represented by court-appointed lawyers in Virginia fare no better. As of 2004, court-appointed lawyers in Virginia were entitled to a maximum of \$112 for handling a misdemeanor or juvenile case, \$1,096 for a felony charge with a possible sentence of more than twenty years in prison, and \$395 for all other non-capital felony matters.<sup>120</sup> These non-waivable caps are the lowest in the nation.<sup>121</sup> Needless to say, with caps this low, defense counsel cannot afford to devote much time to investigate or prepare the defendant's case. Rather, defense counsel has an economic incentive to process the case as quickly as possible. As a result, many court-

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(noting that despite the excessive caseloads, low pay, and retention problems, the public defender training program is excellent).

113. See SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 20.

114. See *id.* at 20, 27-32.

115. *Id.* at 28.

116. *Id.*

117. *Id.*

118. *Id.* at 28-29.

119. *Id.* at 32-33; see also SPANGENBERG GROUP, MISSOURI, *supra* note 64, at 5-6 (decrying the extremely high turnover of staff lawyers that leaves inexperienced attorneys to carry very heavy caseloads without enough supervision).

120. SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 46-47.

121. *Id.* at 45-46.

appointed lawyers only meet their clients moments before their court appearance and enter guilty pleas on their behalf that same day.<sup>122</sup>

Case processing also tends to occur in jurisdictions in which indigent defendants are represented by a lawyer or group of lawyers who contract with the county or state to provide representation to some or all indigent defendants in that jurisdiction, especially when the contract is for a fixed amount and awarded to the lowest bidder.<sup>123</sup> Low-bid or fixed contracts have been widely condemned because they encourage defense counsel to minimize time spent in representing clients in order to maximize counsel's own economic gains.<sup>124</sup> Similarly, in this delivery system, defense counsel is discouraged from using investigators or experts because their cost is usually borne by counsel.<sup>125</sup> Even in jurisdictions in which defense counsel ostensibly can apply to the court for appointment of an expert or investigator, contract lawyers rarely do so.<sup>126</sup> Although this system is favored by cost-cutting politicians, defendants generally do not fare well under a low-bid contract system.<sup>127</sup>

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122. *Id.* at 44, 57-58. Given counsels' economic incentives, it is not surprising that jury trials accounted for less than 2 percent of the dispositions in Virginia in fiscal year 2002. *Id.* at 73.

123. *See, e.g.*, Bright, *supra* note 83, at 788-89 (citing the example of attorney Bill Wheeler in McDuffie County, Georgia who routinely pleads defendants guilty after meeting them for the first time in open court); THE SPANGENBERG GROUP, REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA 13-14 (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/northdakotareport.pdf> (detailing the extremely low rate of jury trials—ranging from 0.2 to 1.6 percent of all cases cleared—as demonstrative of the lack of incentive for contract lawyers to take cases to trial) [hereinafter SPANGENBERG GROUP, NORTH DAKOTA]. For a case study of the pitiful representation provided by another Georgia contract lawyer, Jason Shwiller, that highlights the deficiencies of this type of system, see Green, *supra* note 83, at 1169, 1171-73.

124. *See, e.g.*, State v. Smith, 681 P.2d 1374, 1381-82 (Ariz. 1984); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-3.1 cmt. 43-48 (3d ed. 1992); LEFSTEIN, *supra* note 58, at 49-55; RICHARD WILSON, NLADA, CONTRACT BID PROGRAMS: A THREAT TO QUALITY OF INDIGENT DEFENSE SERVICES (1982); Meredith Anne Nelson, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147 (1988).

125. *See Smith*, 681 P.2d at 1382.

126. SPANGENBERG GROUP, NORTH DAKOTA, *supra* note 123, at 15-16 (reporting that contract lawyers rarely request investigators or experts and that in twelve years, the court administrator in Bismark had seen only one expert request); *see also infra* notes 195-96 and accompanying text.

127. *See, e.g.*, Leinos, *supra* note 110, at 1808-09, 1822-42 (describing inadequate representation provided by a low-bid contract lawyer in McDuffie County, Georgia and detailing structural problems with the use of low-bid contracts); Berlow, *supra* note 68 (describing the popularity of low-bid contracts among politicians in spite of the poor quality of the representation provided to indigent defendants); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal*

The case of Jimmy Ray Bromgard illustrates an all too common example of the quality of representation provided by defense counsel in a low-bid system.<sup>128</sup> When he was eighteen years old, Bromgard was accused of the rape of an eight-year-old girl.<sup>129</sup> In addition to the uncertain testimony of the victim, the only other evidence connecting Bromgard to the crime was the questionable—but unchallenged—claim that the scalp and pubic hairs found at the scene were likely his.<sup>130</sup> Not only did defense counsel not object to the dubious testimony offered by the State's expert, he failed to undertake any investigation, challenge the victim's identification, do an opening statement, prepare a closing argument, or file a timely appeal.<sup>131</sup> Not surprisingly, Bromgard was convicted and sentenced to forty years in prison.<sup>132</sup> Fifteen years later, Bromgard was exonerated based on DNA evidence.<sup>133</sup>

Like defendants who can afford only to pay counsel a small retainer, defendants in those jurisdictions that poorly fund defense services often are provided counsel with only limited time to spend on their cases.<sup>134</sup> Realistically, defense counsel carrying a huge caseload can only allocate limited time to most clients. As the Supreme Court of Louisiana observed in *State v. Peart*,<sup>135</sup> a case challenging the indigent delivery system in Orleans Parish, a poorly funded system that produced crushing caseloads:

We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial

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*Defense Services*, 63 U. PITT. L. REV. 293, 307 (2002) (attributing the greatest problems of inadequate defense counsel to low-bid, fixed-price contract systems).

128. Bromgard's case is described in Barry C. Scheck & Sarah L. Tofte, *Gideon's Promise and the Innocent Defendant*, CHAMPION, Jan.-Feb. 2003, at 38, 39-40; see also Innocence Project, Case Profiles: Jimmy Ray Bromgard, [http://www.innocenceproject.org/case/display\\_profile.php?id=111](http://www.innocenceproject.org/case/display_profile.php?id=111) (last visited Mar. 1, 2006).

129. Scheck & Tofte, *supra* note 128, at 39.

130. *Id.* at 40.

131. *Id.*

132. *Id.*

133. *Id.*

134. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 19 (noting that witnesses from a number of states said that "in many cases, indigent defense attorneys fail to fully conduct investigations, prepare their cases, or advocate vigorously for their clients at trial and sentencing"); see, e.g., *State v. Bell*, 2004-1183, p. 5-6 (La. App. 3 Cir. 3/2/05); 896 So. 2d 1236, 1240-41 (holding that a lawyer who spent only eleven minutes with the defendant before trial and testified that she was unprepared for trial did not render ineffective assistance of counsel absent a factual showing of what she would have done given more time).

135. 621 So. 2d 780 (La. 1993).



judge put it, “[n]ot even a lawyer with an S on his chest could effectively handle this docket.” We agree. Many indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified.<sup>136</sup>

Undeniably, defendants like Jimmy Ray Bromgard or Leonard Peart have only limited access to the rights provided to the wealthy or to an indigent defendant in a jurisdiction that adequately funds indigent defense services. In an underfunded system, defense counsel has far too many cases to conduct legal research, vigorously pursue constitutional issues, interview witnesses, conduct factual investigation, hire experts, file briefs, or perform the other activities that are required if counsel is to provide a competent defense.<sup>137</sup> Too often, a harried defense counsel only has time to interview the defendant briefly, read the police reports, and then to try to facilitate a guilty plea through plea bargaining. For some defendants, particularly those who are clearly guilty, a plea bargain may be exactly what they want.<sup>138</sup> Unquestionably, some defendants benefit from an under-resourced, plea-bargain-driven system of justice.<sup>139</sup> Indeed, some guilty

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136. *Id.* at 789. The record showed that at the time Peart’s public defender, Rick Teissier, was assigned to his first-degree murder case, Teissier already was handling seventy active felony cases and that his clients were routinely in jail for thirty to seventy days before he first met with them. *Id.* at 784. The court went on to find that:

In the period between January 1 and August 1, 1991, Tessier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period. OI DP has only enough funds to hire three investigators. They are responsible for rendering assistance in more than 7,000 cases per year . . . . In a routine case Teissier receives no investigative support at all. There are no funds for expert witnesses. OI DP’s library is inadequate.

*Id.*

137. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) (setting forth the tasks defense counsel must perform in order to render competent assistance to a client charged with a crime). Yet the reality in many jurisdictions is that “[r]esources for indigent criminal defense are also capped at such ludicrous levels that adequate trial preparation is a statistical rarity and a sure route to financial ruin.” Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 463-64 (2001).

138. Alschuler, *supra* note 70, at 933.

139. *See id.* at 932-35.

defendants may reap undeserved benefits from such a system and will not suffer at all from the limited representation they receive.<sup>140</sup>

Yet other defendants, especially those who are innocent, are likely to suffer significantly at the hands of a lawyer without the time or resources to provide an adequate defense. Too often these defendants, like the working poor, are left with a very restricted right to counsel. The defendant is presented with only one viable option: accept the proffered plea bargain that counsel has negotiated. In theory, of course, the defendant has an alternative: risk a more severe sentence—and sometimes the threat of more charges<sup>141</sup>—by going to trial with a lawyer who is reluctant to do so.<sup>142</sup> Realistically, however, this option is of little utility when counsel's lack of preparation renders him or her unable to really subject the government's case to the searching adversarial testing our system purports to demand.

Ronald Williamson was one indigent defendant who had no choice but to go to trial with an attorney who was woefully unprepared to do so.<sup>143</sup> His attorney, W.B. Ward, was a sole practitioner appointed to defend Williamson in a capital murder case.<sup>144</sup> His appointed co-counsel withdrew shortly before trial so Ward tried the case alone.<sup>145</sup> He did not receive any investigative or expert services and was paid a total of \$3,200 for his efforts.<sup>146</sup> Ward explained to the trial judge that he had to make a living and could not spend any more time than was

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140. See RALPH ADAM FINE, *ESCAPE OF THE GUILTY* 42, 48-50 (1986) (discussing examples of cases in which defendants received arguably unwarranted leniency).

141. See *Bordenkircher v. Hayes*, 434 U.S. 357, 359, 364 (1978) (stating that the prosecutor could threaten to prosecute the defendant as a habitual offender despite the fact that the threat was being used to attempt to coerce the defendant to plead guilty to the charged felony).

142. At times, defense counsel is more than just reluctant. Sometimes counsel will threaten to withdraw if the defendant insists on going to trial. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 cmt. at 201-02 (3d ed. 1993). Although counsel is permitted to use fair persuasion to counsel a defendant to accept a plea bargain, undue pressure is not appropriate. *Id.* Standard 4-5.2 cmt. at 201. Most commentators agree that counsel's threatening to withdraw to coerce a guilty plea is improper. See AMSTERDAM, *supra* note 41, § 201; Alschuler, *supra* note 69, at 1310. *But see Uresti v. Lynaugh*, 821 F.2d 1099, 1102 (5th Cir. 1987) (stating that counsel has the right to request permission to withdraw if the client refuses to plead guilty and insists on going to trial when counsel sees the choice as "foolhardy").

143. *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997).

144. *Id.* at 1510, 1512.

145. *Id.* at 1512.

146. *Id.* at 1522.

necessary on this case.<sup>147</sup> Unfortunately, the time Ward spent investigating Williamson's case was far from adequate. Despite being aware of some of Williamson's psychiatric history, Ward failed to investigate his mental condition.<sup>148</sup> Had he done so, he would have discovered that Williamson had a long history of mental illness that left him delusional with a distorted perception of reality.<sup>149</sup> Although Williamson's dream confession to the police was a major part of the prosecution's case, Ward failed to challenge it and the jury never learned of Williamson's mental condition.<sup>150</sup> Nor did the jury learn that another man, Ricky Simmons, confessed to the crime.<sup>151</sup> Based on his dream confession, the testimony of a jailhouse informant, and some questionable hair comparison testimony, the jury convicted Williamson at trial and sentenced him to death.<sup>152</sup>

Five days before Williamson was to be executed, the federal district court issued a stay and subsequently overturned his conviction.<sup>153</sup> Based on counsel's inept performance, the Tenth Circuit Court of Appeals agreed that Williamson's conviction should be reversed and ordered a new trial.<sup>154</sup> While he was awaiting retrial, Williamson's DNA was tested and he was cleared of any involvement in the murder.<sup>155</sup>

*D. Brenton Butler: The Indigent Defendant Represented by Zealous Counsel*

Unquestionably, there are jurisdictions where indigent defendants are represented by defense lawyers with the skill, time, and resources to mount an effective defense. Commentators have identified systems and offices that do provide representation similar to that available to wealthier defendants and consistent with the kind of representation encouraged by the American Bar Association Standards for Criminal

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147. *Id.* at 1512. The record revealed that he spent 21.5 hours preparing for the preliminary hearing, thirty-two hours at the hearing, fourteen hours on trial motions, 43.5 hours preparing for trial, and forty-five hours at trial. *Id.*

148. *Id.* at 1513.

149. *Id.* at 1514-16, 1519.

150. *Id.* at 1512, 1520.

151. *Id.* at 1520-21.

152. *Id.* at 1510.

153. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 188 (2003); see *Williamson v. Reynolds*, 904 F. Supp. 1529, 1576 (E.D. Okla. 1995).

154. *Ward*, 110 F.3d at 1523.

155. Williamson's case and that of another man, Dennis Fritz, who also was wrongly convicted of the murder of Debra Carter, are discussed at length in SCHECK, NEUFELD & DWYER, *supra* note 153, at 163-203.

Justice.<sup>156</sup> Many defendants in these adequately funded jurisdictions, therefore, receive the benefits of the constitutional rights accorded all citizens.

Yet, even in these more adequately funded jurisdictions, not all defendants reap the benefits of a competent lawyer. Wisconsin, for example, is one of the states that spends a relatively high amount on the defense of indigent persons accused of crimes.<sup>157</sup> It has a highly regarded state public defender system with good training for its lawyers and relatively good access to investigators and expert witnesses.<sup>158</sup> Nevertheless, because the financial eligibility threshold in Wisconsin is set at only 33 percent of the federal poverty guidelines, thousands of people living well below the poverty level each year are deemed ineligible for indigent defense services by the State.<sup>159</sup> Some of these defendants have defense counsel appointed for them at the county's expense. Others will either represent themselves and plead guilty or pay a modest amount to hire a lawyer to provide limited representation.<sup>160</sup>

Nonetheless, in Wisconsin and in a number of jurisdictions across the United States, a significant number of indigent defendants will, in fact, be provided a zealous advocate with the time and resources to raise an effective defense.<sup>161</sup> Fifteen-year-old Brenton Butler certainly

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156. See *infra* note 161. For the most comprehensive set of standards for counsel defending a criminal case, see ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). In *Strickland v. Washington*, the Court recognized that the ABA Standards reflect the prevailing norms of practice and are guides to what can be reasonably expected of effective counsel. 466 U.S. 668, 688 (1984).

157. In 2004, Wisconsin spent \$83,839,372 on indigent defense services, which represented the fourth highest amount of the twenty states with a fully state-funded defense system. Of the twenty, Wisconsin ranked fifth in cost-per-capita spending. See SPANGENBERG GROUP, MISSOURI, *supra* note 64, app. B.

158. See THE SPANGENBERG GROUP, CASELOAD/WORKLOAD STUDY FOR THE STATE PUBLIC DEFENDER OF WISCONSIN, FINAL REPORT (1990).

159. See Zahn & McBride, *supra* note 58 (observing that a person earning \$248 a month would be ineligible for public defender representation and finding that thousands of such defendants are denied any lawyer); see also Velázquez-Aguilú, *supra* note 48, at 196 (relating stories of defendants in Wisconsin who were denied public-defender services even when earning as little as \$200 a week).

160. Zahn & McBride, *supra* note 58 (describing the significant inconsistencies in obtaining county-funded counsel and observing that many defendants denied a public defender simply plead guilty).

161. For examples of model programs, see Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, 17 CRIM. JUST. 51 (2002) (discussing the Bronx Defenders, Georgia Justice Project, and the Neighborhood Defender Services of Harlem); *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 37 (identifying the Defender Association of Seattle-King County as an office that provides meaningful defense representation); Parker, *supra* note 58 (listing Colorado, Massachusetts, Minnesota, and

benefited from the zealous representation provided him by two assistant public defenders, Pat McGuinness and Ann Finnell.<sup>162</sup> Butler was charged with first degree murder for the shooting of a tourist, Mary Ann Stephens, that occurred on May 7, 2000 at a motel in Jacksonville, Florida.<sup>163</sup> Stephens was shot in front of her husband, James, who positively identified Butler when the police brought the youth to the scene and asked Stephens if he was the shooter.<sup>164</sup> After his arrest, Butler signed a confession admitting he shot the woman.<sup>165</sup>

Butler subsequently testified that he was beaten by several officers who threatened that they would continue to beat him unless he signed a confession.<sup>166</sup> Three officers testified at trial that Butler was not beaten or threatened, but freely confessed.<sup>167</sup> Nevertheless, Butler's defense lawyers were ultimately able to persuade the jury that his signed confession was coerced and that the facts did not support the conclusion that Butler was the killer.<sup>168</sup> Absent the tireless investigation of McGuinness and Finnell, aided by their investigator Michelle Smith, it is highly unlikely that they would have been able to effectively challenge James Stephens' eyewitness testimony and overcome Butler's alleged confession.<sup>169</sup>

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Oregon as states having quality programs). In states such as Wisconsin and Colorado, which provide better funding for indigent defense, public defenders have more manageable caseloads. They also are more likely to have the assistance of an investigator and access to expert assistance if it is needed. Nonetheless, even in these states, mounting budget pressures mean even higher caseloads requiring defense lawyers to do more with less.

162. Florida has twenty elected public defenders for the state's twenty judicial districts. Salaried public defenders, funded by the State, staff the offices in each district, although counties are responsible for funding overhead expenses. See SPANGENBERG GROUP, *COMPARATIVE ANALYSIS*, *supra* note 64, at 7.

163. Butler's case was the subject of an award-winning documentary, *Murder on a Sunday Morning*, directed by Jean-Xavier De Lestrade. MURDER ON A SUNDAY MORNING (Centre Nationale de la Cinematographie 2001).

164. Paul Pinkham, *Butler Case Spotlights Interrogations*, FLA. TIMES-UNION (Jacksonville), Feb. 23, 2001, at A1. The Supreme Court and many commentators have condemned one-on-one show-ups as unduly suggestive. See, e.g., *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (stating that "the practice of showing suspects singly to persons for the purpose of identification, and not part of a lineup, has been widely condemned," but finding no due process violation under the totality of the circumstances); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 630-31 (1998) (expressing "grave concerns" about the use of show-ups).

165. See Pinkham, *supra* note 164.

166. *Id.*

167. *See id.*

168. *See id.*

169. Following Butler's acquittal, his attorney Pat McGuinness learned that another man, Juan Curtis, was talking about the killing. See Paul Pinkham, *Police*

Like Brenton Butler, there are many defendants in more adequately funded jurisdictions who receive the benefits of the protections afforded by the Constitution. Many of these defendants will eventually decide to waive most of their rights and plead guilty. On the other hand, if one of these defendants chooses to go to trial, that defendant does so with counsel who is ready, willing, and able to challenge the prosecution's case. Thus, it is well-represented, innocent defendants who should be least afraid of going to trial. In theory, if the adversarial system works as it should, the innocent defendant will be acquitted. As the next section demonstrates, however, even a good lawyer may not be enough to prevent a wrongful conviction.

## II. THE LARRY YOUNGBLOOD SAGA—DELAYED JUSTICE

### A. *The Arrest and Prosecution of Larry Youngblood*

On December 9, 1983, Larry Youngblood, a thirty-year-old black man, was arrested by the Tucson police for the abduction and rape of a ten-year-old boy, David Leon.<sup>170</sup> Youngblood was a chronic paranoid schizophrenic who previously had been convicted of aggravated assault and armed robbery.<sup>171</sup> At the time of his arrest, Youngblood had been receiving psychiatric counseling for several years.<sup>172</sup> Unable to afford counsel, Youngblood was found indigent and appointed a public defender, Carol Wittels.<sup>173</sup> Wittels had worked for the Pima County Public Defender's Office since 1979.<sup>174</sup> At the time, Arizona did not have a statewide public defender office but, instead, a patchwork indigent defense system with county-funded public defender offices in only Pima and Maricopa Counties.<sup>175</sup> Indigent defendants in the rest of

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*Charge 2 in May Tourist Slaying*, FLA. TIMES-UNION (Jacksonville), Mar. 13, 2001, at A1. McGuinness relayed this information to the police who subsequently arrested Curtis for the murder of Mary Ann Stephens. *See id.* Curtis' fingerprint was found on a document in the victim's purse. *Id.* He and an accomplice, Jermel Williams, were convicted of Stephens' murder. *See Rich Tucker, Last Sentence in Slaying, Butler Debacle*, FLA. TIMES-UNION (Jacksonville), Feb. 1, 2003, at B3.

170. *See Arizona v. Youngblood*, 488 U.S. 51, 53 (1988); *State v. Youngblood*, 790 P.2d 759, 761 (Ariz. Ct. App. 1989).

171. *Youngblood*, 790 P.2d at 765 n.2.

172. *Id.*

173. *See Thomas Stauffer, DNA Test Clears Tucsonan Convicted in Molestation*, ARIZ. DAILY STAR (Tucson, Ariz.), Aug. 9, 2000, at 1.

174. E-mail from Shelley Kroska, Admin. Servs. Manager, Pima County Public Defender Office, to author (Feb. 13, 2006, 12:21 CST) (on file with author).

175. For a more detailed look at the uneven nature of Arizona's indigent defense system in 1984, see *State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that

the state were represented either by contract lawyers or a lawyer assigned on a rotating basis.<sup>176</sup> Thus, Youngblood was fortunate in that he was arrested in Tucson. He also was fortunate to have Wittels, an experienced public defender with a large but not unmanageable caseload assigned to his case.

David Leon was kidnapped from a carnival on October 29, 1983, and then brutally assaulted and sodomized repeatedly by an unknown middle-aged black man.<sup>177</sup> David's ordeal lasted about an hour-and-a-half before his assailant returned him to the carnival.<sup>178</sup> Despite the man's threats to kill him if he talked about the attack, David told his mother about the assault and she promptly took him to the hospital.<sup>179</sup> At the hospital, a physician treated David for rectal injuries and collected evidence using a sexual assault kit.<sup>180</sup> The physician took rectal and throat swabs and samples of David's saliva, blood, and hair.<sup>181</sup> The physician did not examine the samples but rather gave the samples to the police who stored them in a secure refrigerator at the police station.<sup>182</sup> Additionally, the police took David's underwear and t-shirt, but they were not frozen or refrigerated.<sup>183</sup>

David, who would later be described as "a very observant youngster,"<sup>184</sup> provided a description both of his attacker and of the attacker's car. According to David, the assailant's car was a two-door, medium-sized white sedan, with a trashy interior and a noisy muffler.<sup>185</sup> He would later testify that the car started with an ordinary ignition key and that country music was playing on the car radio.<sup>186</sup> According to

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the low-bid contract system in place in Mohave County created an excessive caseload that raised an inference of inadequate representation of counsel).

176. *See id.*

177. *Arizona v. Youngblood*, 488 U.S. 51, 52 (1988).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 53.

182. *Id.*

183. The police did not follow their standard procedure. Instead, a reserve officer placed the underwear in a storage locker at room temperature. *See* Jim Erickson, *DNA Test Can Work with Little Evidence*, ARIZ. DAILY STAR, Aug. 10, 2000, at 1. Because of the failure to refrigerate the clothing, the semen on the clothing was beyond forensic usefulness by the time Youngblood was arrested. Brief for Respondent at 5-6, *Arizona v. Youngblood*, 488 U.S. 51 (1988) (No. 86-1904). That reserve officer, John Leavitt, is now an Assistant Chief of Police for the Tucson Police Department. Tucson Police Dep't, Organization, <http://www.ci.tucson.az.us/police/Organization/organization.html> (last visited Apr. 4, 2006).

184. *State v. Youngblood*, 734 P.2d 592, 592 (Ariz. Ct. App. 1986).

185. *Id.* at 593.

186. Brief for Respondent at 2, *Arizona v. Youngblood*, 488 U.S. 51 (1988) (No. 86-1904).

the Arizona Court of Appeals, David described his assailant as a middle-aged black man of medium height and weight.<sup>187</sup>

Nine days after the assault, a detective came to David's school and falsely told David that they had arrested the man who raped him.<sup>188</sup> The detective then asked him to pick his attacker out of a photographic lineup.<sup>189</sup> The Arizona Court of Appeals described the lineup identification process in this fashion:

Three of the photographs had the left eye whited out, and three had the right eye whited out. David's optometrist testified at trial that David had an astigmatism and "was instructed to wear glasses whenever he was in school [or] doing close work, [or watching] T.V." He was not wearing glasses the night of the incident nor when he first viewed the photographic lineup. After looking at the pictures by holding them very close to his face, David picked Youngblood as his assailant, saying he was "pretty sure." Later, David identified another man in the lineup as the possible assailant.<sup>190</sup>

On November 8, 1983, the day after David made his identification, a police criminologist examined the sexual assault kit and

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187. *Youngblood*, 734 P.2d at 592. Other sources indicate that David's initial description may have been more detailed. See Brief for Petitioners at 8-9, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904) (stating that David's description led to a composite sketch that described the assailant as a black male, twenty-five to thirty, approximately five foot eleven, 170 pounds, with black hair, dark eyes, a medium build, medium complexion, and one eyeball that was almost white); Stauffer, *supra* note 173 (reporting that David's attacker was identified as black, five foot seven, 150 pounds, with one eye displaying an impairment such as a cataract).

188. The Arizona Court of Appeals stated that a police detective came to the victim's school and "told him they had arrested the man who raped him, and asked him to pick the assailant out of a photographic lineup." *State v. Youngblood*, 790 P.2d 759, 762 (Ariz. Ct. App. 1989). In the petitioner's brief to the Supreme Court, the prosecution never disputed the false statement about the arrest but emphasized that Detective Lingle testified at trial that, when conducting the photographic lineup, he told David that "the person who assaulted him may or may not be in the pictures." Brief for Petitioners at 10, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904) (citing testimony of Detective Lingle).

189. *Youngblood*, 790 P.2d at 762.

190. *Youngblood*, 734 P.2d at 594. In the petitioner's brief to the Supreme Court, however, the prosecution claimed that David never identified anyone but Larry Youngblood as his attacker. Brief for Petitioners at 11, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904). The trial record supports the Court of Appeal's finding that David did pick another photo out as possibly that of the attacker. Telephone Interview with Dan Davis, Attorney for Youngblood on Appeal, in Tucson, Ariz. (Jan. 4, 2006).



found semen on the rectal smear.<sup>191</sup> After concluding that sexual contact had occurred, the criminologist declined to perform any other tests and placed the kit back in the refrigerator.<sup>192</sup> At this point, he did not test to identify any blood group substance or test David's clothing.<sup>193</sup>

Based on David's identification, Youngblood was arrested about four weeks later.<sup>194</sup> He was charged with child molestation, sexual assault, and kidnapping.<sup>195</sup> Youngblood was held in jail, unable to make bail, until December 13, 1984 when he went to trial for the first time.<sup>196</sup> The first trial ended in a hung jury.<sup>197</sup> The second trial began on February 5, 1985 and the State's case again rested almost exclusively on David's testimony.<sup>198</sup> At trial, David identified Youngblood as his attacker.<sup>199</sup> He described his assailant as "a black man named Damian or Carl who had greasy grey hair, facial hair, no facial scars, and whose right eye, to David's best recollection, was almost completely white."<sup>200</sup> He also testified that his assailant wore brown leather or plastic loafers.<sup>201</sup> The evidence produced at trial, however, showed that Youngblood was thirty years old with dry black hair, a scar on his forehead and a bad left eye.<sup>202</sup> Moreover, because of a foot injury suffered as a child, Youngblood wore cloth-laced shoes

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191. Brief for Petitioners at 4, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904).

192. *Arizona v. Youngblood*, 488 U.S. 51, 53 (1988).

193. *Id.* The State did not explain why David's clothing was not tested or why the police criminologist did not perform an ABO blood group test at this time. The criminologist did an ABO blood group test in October 1984 and did a P-30 protein test in January 1985. Brief for Petitioners at 3, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904). The State explained that it failed to conduct the P-30 test earlier because the Tucson police lab only started using that test in January 1985. *Id.* at 6.

194. *Youngblood*, 488 U.S. at 53.

195. *Id.* at 51.

196. During that time, Youngblood's competency was challenged and it was not until August 1984 that the court determined he was competent to stand trial. Brief for Petitioners at 5, *Arizona v. Youngblood*, 488 U.S. 51 (1998) (No. 86-1904).

197. *State v. Youngblood*, 790 P.2d 759, 764 (Ariz. Ct. App. 1989). The jury ultimately deadlocked at six to six. SCHECK, NEUFELD & DWYER, *supra* note 153, at 334.

198. See Brief for Petitioners at 4-7, *Arizona v. Youngblood*, 488 U.S. 51, (1998) (No. 86-1904).

199. Patty Machelor, *DNA Clears Man in Sex Case After 15 Years*, TUCSON CITIZEN, Aug. 9, 2000, at 1A.

200. *Youngblood*, 790 P.2d at 761.

201. *Id.*

202. *Id.*

and walked with a noticeable limp.<sup>203</sup> Youngblood also always wore glasses in public.<sup>204</sup>

On the evening of the crime, a police artist drew a composite sketch of the assailant based on David's description.<sup>205</sup> Although David initially was satisfied with the accuracy of the sketch,<sup>206</sup> he admitted at trial that it did not resemble Youngblood.<sup>207</sup> The sketch showed the assailant with a straight hairline, while Youngblood had a widow's peak.<sup>208</sup> Moreover, the sketch failed to depict sunglasses or a scar on the assailant's forehead, when Youngblood had such a scar and always wore sunglasses.<sup>209</sup>

Youngblood and others also testified about significant discrepancies between his car and the car David described to the police.<sup>210</sup> Youngblood owned a 1964 Chrysler Imperial that the police seized from his girlfriend's house six weeks after the assault.<sup>211</sup> The car had four doors, not two, and more importantly, because of electrical problems, Youngblood and his witnesses claimed the car was not driveable on October 29, 1983, the day of the assault.<sup>212</sup> The car ran quietly when last driven and the radio had not worked since Youngblood purchased the car.<sup>213</sup> Moreover, it did not start with a key, but had to be started with a screwdriver.<sup>214</sup>

When the police seized Youngblood's car, they dusted for fingerprints and looked for hair fibers.<sup>215</sup> Despite David's testimony that the assailant had held him by the hair and continually was pushing his head down, no hair fibers, fingerprints—except for Youngblood's—or any other evidence was found in the car.<sup>216</sup> Unfortunately, the police disposed of the vehicle without notice to Youngblood or his defense

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203. *Id.*

204. *Id.*

205. Brief for Respondent at 3, *Arizona v. Youngblood*, 488 U.S. 51 (1988) (No. 86-1904).

206. *Id.* (citing the testimony of Officer Cody).

207. *Id.* (citing the testimony of David Leon).

208. *Id.*

209. Although the Arizona Court of Appeals noted that Youngblood always wore glasses, the actual trial testimony referred to sunglasses. *Id.* at 3-4.

210. *State v. Youngblood*, 734 P.2d 592, 593-94 (Ariz. Ct. App. 1986).

211. *Id.* at 593.

212. *Id.* at 593-94.

213. *Id.*

214. *Id.*

215. *Id.* at 593.

216. *Id.* at 594.

counsel.<sup>217</sup> Prior to doing so, the police did not determine if the radio worked, if the muffler was noisy, or if the ignition switch worked with a key.<sup>218</sup> Nor was a determination made that the car was even driveable at that point.<sup>219</sup>

Youngblood testified at trial and denied that he was the attacker.<sup>220</sup> Youngblood insisted he was asleep at his girlfriend's house, where he was living at the time, when the attack occurred.<sup>221</sup> Youngblood's girlfriend corroborated his story, claiming she arrived at her home when the ten o'clock news was coming on the television.<sup>222</sup> The defense contended that Youngblood was the victim of a mistaken identification.<sup>223</sup> The State countered by questioning Youngblood's credibility in light of his prior convictions and that of the defense witnesses because of their friendship to Youngblood.<sup>224</sup> In the end, the jury took only forty minutes to reach a guilty verdict on all three charges.<sup>225</sup> Youngblood was subsequently sentenced to a ten-and-one-half-year prison term.<sup>226</sup>

### B. *The Appellate Process*

Youngblood appealed, arguing that his conviction should be reversed and the case against him dismissed because the State failed to properly preserve critical evidence that might have exonerated him.<sup>227</sup>

217. Youngblood was not the registered owner of the car, so after it was impounded, only the actual owner received notice. *State v. Youngblood*, 790 P.2d 759, 764 (Ariz. Ct. App. 1989). When that owner failed to claim the car, the towing company dismantled it. *Id.*

218. *Youngblood*, 734 P.2d at 593.

219. Admittedly, the condition of the car six weeks after the crime would not clearly establish the car's condition on the night of October 29, 1983. Nonetheless, given the information David supplied the police about the car, the officers' failure to carefully examine the car is inexcusable. In light of limited investigative resources, it is not surprising that the defense did not immediately check out Youngblood's vehicle. Unquestionably, however, a defendant with adequate financial resources would have had the car promptly examined, which would have greatly aided the defense.

220. *Youngblood*, 734 P.2d at 592.

221. *Id.* at 594.

222. *Youngblood*, 790 P.2d at 762.

223. *Youngblood*, 734 P.2d at 592.

224. Alice Whigham, the woman Youngblood lived with, testified that he was with her on October 29, 1983, but she was impeached because of her initial statement to the police. *See id.* at 594.

225. Tim O'Brien, *Reasonable Doubt and DNA*, WASH. POST, Sept. 7, 2000, at A25.

226. *See* Stauffer, *supra* note 173.

227. *Youngblood*, 734 P.2d at 592.

The Arizona Court of Appeals agreed.<sup>228</sup> The court noted that both criminalists who testified at trial agreed that, if the semen samples had been preserved and additional tests run, Youngblood may have been excluded as the attacker.<sup>229</sup> Thus, by failing to refrigerate or freeze David's clothes, to promptly test the clothing, or to perform a timely quantitative test on the rectal swab, the State permitted the destruction of material evidence that prejudiced Youngblood.<sup>230</sup> According to the Arizona Court of Appeals, there was "no doubt" that Youngblood was prejudiced as a result of the State's inaction.<sup>231</sup>

In deciding on the appropriate remedy, the Arizona court looked to another recent Arizona case, *State v. Escalante*,<sup>232</sup> stressing that in cases in which identification is at issue and evidence has been lost or destroyed that could eliminate the defendant as the perpetrator, dismissal is warranted unless "the evidence against the defendant is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating."<sup>233</sup> The *Youngblood* court also quoted approvingly from a decision by the California Supreme Court, *People v. Nation*,<sup>234</sup> a sexual assault case in which identification was at issue and where the police failed to properly preserve a semen sample. The California Supreme Court found that requiring the police to take reasonable measures to preserve evidence that might wholly exonerate the defendant not only protects the defendant's due process rights, but it "enhances the reliability of the trial process: if an accused is convicted of rape when available evidence would have exonerated him, not only is he unjustly incarcerated but the actual rapist remains at large."<sup>235</sup>

In reaching the conclusion that dismissal was appropriate, the Arizona Court of Appeals discussed other cases in which the destruction of evidence did not warrant such a drastic remedy.<sup>236</sup> The court emphasized, however, that the defense in *Youngblood* was not to blame for the defendant's predicament nor did the defense have an effective way to combat the loss of the potentially exculpatory

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228. *Id.* at 596.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 596 (citing *State v. Escalante*, 734 P.2d 597 (Ariz. Ct. App. 1986)).

233. *Escalante*, 734 P.2d at 603.

234. *Youngblood*, 734 P.2d at 596-97 (citing *People v. Nation*, 604 P.2d 1051, 1052-53 (Cal. 1980)).

235. *Nation*, 604 P.2d at 1055.

236. *Youngblood*, 734 P.2d at 594-95 (citing, among other cases, *State v. Mitchell*, 683 P.2d 750 (Ariz. Ct. App. 1984); *State v. Fierson*, 705 P.2d 1338 (Ariz. Ct. App. 1985)).

evidence.<sup>237</sup> The court insisted that, in dismissing the case against Youngblood, it was not implying any bad faith on the State's part in failing to preserve the evidence.<sup>238</sup> The court was not seeking to punish the State but rather ensuring that the defendant received a fair trial.<sup>239</sup> Indeed, the court's description of the incident, the car, the identification, and the alibi indicated that the Arizona Court of Appeals was not convinced that the evidence against Youngblood was so strong that it could safely conclude that the lost evidence would not have exonerated him.<sup>240</sup>

The Supreme Court of Arizona denied the State's petition for review<sup>241</sup> and the State then filed a petition for a writ of certiorari with the United States Supreme Court. The Supreme Court granted certiorari and ultimately reversed the Arizona Court of Appeals.<sup>242</sup> In doing so, Chief Justice Rehnquist, writing for the majority, expressed an unwillingness to impose on the police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."<sup>243</sup> The Court held instead that a failure to preserve potentially useful evidence constitutes a denial of due process only if the defendant can show bad faith on the part of the police.<sup>244</sup> Such a bad faith requirement limits the extent of the police's obligation to "reasonable bounds" and "that class of cases where the interests of justice most clearly require it."<sup>245</sup> For the Rehnquist majority, that class of cases was restricted only to those where the bad faith conduct on the part of the police indicated that evidence could form a basis for exonerating the defendant.<sup>246</sup>

Applying the test in this case, the Court noted that there was no suggestion that the police acted in bad faith.<sup>247</sup> In failing to refrigerate the clothing or to perform tests on the semen samples, the police were

237. 734 P.2d at 596 ("This is not a case where the samples were available for defendant's examination . . .").

238. *Id.*

239. *Id.*

240. *Id.*

241. See *Arizona v. Youngblood*, 790 P.2d 759, 762 (Ariz. Ct. App. 1989). Review was denied on March 27, 1987. *See id.*

242. *Arizona v. Youngblood*, 485 U.S. 903 (1988); *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988).

243. *Youngblood*, 488 U.S. at 58.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

at worst “negligent.”<sup>248</sup> In reaching this result, it is obvious that the majority did not share the Arizona court’s concern—or that of Justice Blackmun and his fellow dissenters—that in the context of this case, the destruction of this potentially exculpatory evidence was prejudicial.<sup>249</sup> Remarkably, the only evidence connecting Youngblood with the crime was the testimony of a ten-year-old victim of a different race.<sup>250</sup> Yet, no mention was made in the majority’s opinion of the significant inconsistencies between the victim’s description of the assailant and his car with that of Youngblood and his car. Nor did the majority note that Youngblood had an alibi. Moreover, in contrast to the Arizona Court of Appeals’ discussion of the problems with the identification procedures employed, Rehnquist stated only that “the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant.”<sup>251</sup> Indeed, the majority’s summary treatment of the facts of the case strongly suggests that the majority harbored no doubt that the Youngblood was guilty. It is hardly surprising, then, that the majority refused to let a person they considered guilty escape justice simply because the constable blundered, particularly when they viewed the lost evidence as so speculative.

More surprising, perhaps, is Justice Stevens’ concurring opinion.<sup>252</sup> Stevens did not join in the majority’s opinion because he concluded that the bad-faith test demanded too much of a defendant.<sup>253</sup> Rather, he opined, there may be cases in which the defendant could not show bad faith but where the loss or destruction of evidence was so critical as to make the trial fundamentally unfair.<sup>254</sup> Stevens confidently proclaimed, “[t]his, however, is not such a case.”<sup>255</sup>

For Justice Stevens, three factors persuaded him that the loss of the evidence did not render Youngblood’s trial fundamentally unfair. First, at the time the police failed to refrigerate the clothing, they were still investigating the case.<sup>256</sup> Thus, the police still had a strong incentive to preserve the evidence because it was more likely to be

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248. *Id.*

249. *Id.* at 61 (Blackmun, J., dissenting).

250. As Justice Blackmun’s dissent noted, children are more likely to make mistaken identifications than adults, and cross-racial identifications are less likely to be accurate than those involving a victim and perpetrator of the same race. *Id.* at 72 n.8.

251. *Id.* at 53 (majority opinion).

252. *Id.* at 59 (Stevens, J., concurring).

253. *Id.* at 61.

254. *Id.*

255. *Id.*

256. *Id.* at 59.

useful to the State than to the defendant.<sup>257</sup> Second, after noting it was impossible to know what the lost evidence would have revealed, Stevens opined that it was unlikely that Youngblood was prejudiced by the State's omission.<sup>258</sup> He reached this conclusion by first noting that the defense counsel stressed in her examinations and closing argument the significance of the lost evidence.<sup>259</sup> Because the jury was provided an instruction regarding the lost evidence that allowed the jurors to infer the true fact against the State, then to Justice Stevens, Youngblood actually had an advantage.<sup>260</sup> The fact that no juror decided to draw that inference proved to Justice Stevens that the lost evidence was "immaterial."<sup>261</sup> Indeed, in rejecting counsel's argument and the permissive instruction, the jurors indicated that the evidence "was so overwhelming that it was highly improbable that the lost evidence was exculpatory."<sup>262</sup> For Justice Stevens, if the case presented "a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory."<sup>263</sup>

On remand, the Arizona Court of Appeals issued a second opinion, including the identical factual summary set forth in its first opinion.<sup>264</sup> Disagreeing with the Supreme Court's bad faith requirement, the Arizona court concluded that the Due Process Clause of the Arizona Constitution provided greater protection than its federal counterpart.<sup>265</sup> Looking again to *State v. Mitchell*,<sup>266</sup> the court observed that law enforcement officers had a clear duty under state law to preserve and refrigerate the semen samples and the failure to do so violated Youngblood's right to a fair trial.<sup>267</sup> Agreeing with the thrust of Justice Blackmun's dissent, the court stressed that a reasonable police officer should have known of the obvious potential exculpatory value of the lost evidence.<sup>268</sup> The evidence that was not preserved was very relevant, not only because it might have exculpated the defendant, but because there was no other comparable evidence available to the

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257. *Id.* But see *infra* notes 307-13 and accompanying text.

258. *Youngblood*, 488 U.S. at 59 (Stevens, J., concurring).

259. *Id.*

260. *Id.* at 59.

261. *Id.*

262. *Id.* at 60. But see *infra* notes 335-39 and accompanying text.

263. *Youngblood*, 488 U.S. at 60. Justice Stevens also ignored the fact that at the first trial the jury was deadlocked, suggesting that the evidence was far from overwhelming. SCHECK, NEUFELD & DWYER, *supra* note 153, at 334.

264. *State v. Youngblood*, 790 P.2d 759 (Ariz. Ct. App. 1989).

265. *Id.* at 762.

266. 683 P.2d 750 (Ariz. Ct. App. 1984).

267. *Youngblood*, 790 P.2d at 763.

268. *Id.* at 764.

defense.<sup>269</sup> Thus, the State's destruction of this evidence mandated a dismissal because the defendant could no longer receive a fair trial.<sup>270</sup> Unlike the Rehnquist majority and Justice Stevens, the Arizona court clearly did not view this as a case where the evidence against Youngblood was overwhelming.<sup>271</sup>

Unfortunately for Youngblood, the State appealed and, this time, the Arizona Supreme Court granted the petition for review.<sup>272</sup> The court emphasized that under the circumstances of this case, the unpreserved evidence might have been either exculpatory or inculpatory.<sup>273</sup> The court concluded, therefore, that there was no showing of prejudice, but only speculation that the defendant might have been prejudiced.<sup>274</sup> Citing *State v. Willits*,<sup>275</sup> the court was satisfied that in a situation where evidence that only might have been exculpatory was lost or destroyed—and where there was no bad faith conduct—Arizona law only required a jury instruction.<sup>276</sup> Given the absence of bad faith, and because Youngblood asked for and received a jury instruction regarding the State's failure to preserve potentially exculpatory evidence, the court held that he had received due process under Arizona law.<sup>277</sup> Accordingly, the judgment of the court of appeals was reversed and Youngblood's conviction was reinstated.<sup>278</sup>

### C. *Youngblood's Exoneration*

This is not, however, the end of the story. After being released from prison in 1987, Youngblood went back to prison in 1993 and was released again in 1998.<sup>279</sup> In November 1999, he was arrested and

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269. *Id.*

270. *See id.*

271. The Arizona court also considered Youngblood's claim that the destruction of his car without notice violated his due process rights. *Id.* at 764. The court rejected this claim finding that the defendant was able to adequately argue the car's exculpatory value despite its destruction. *Id.* The court did note, however, that the defendant may have a colorable claim of ineffective assistance of counsel because of defense counsel's puzzling failure to call a number of important defense witnesses at trial. *Id.* at 764-65. The court did not need to reach the issue because of its ruling on the destruction of evidence issue. *Id.* at 765.

272. *State v. Youngblood*, 844 P.2d 1152, 1154 (Ariz. 1993).

273. *Id.* at 1156.

274. *Id.*

275. 393 P.2d 274 (Ariz. 1964).

276. *Youngblood*, 844 P.2d at 1157.

277. *Id.* at 1158.

278. *Id.*

279. When Youngblood's conviction was reinstated by the Arizona Supreme Court in January 1993, he was awaiting trial on an unrelated aggravated assault charge.



jailed for failing to register as a sex offender.<sup>280</sup> Once again, Carol Wittels was assigned to defend him.<sup>281</sup> Aware of technological advances in DNA testing since his trial in 1985, she asked the Tucson Police Department crime lab to perform DNA testing on the rectal swab from the Leon case.<sup>282</sup> The testing demonstrated unequivocally that the semen could not have been Youngblood's.<sup>283</sup> Contrary to the "overwhelming evidence," Youngblood was, in fact, innocent. In custody since November because he was unable to post bail, Youngblood's conviction was vacated and he was finally released on August 9, 2000.<sup>284</sup>

Not only did the DNA test exonerate Youngblood, but it also led the police to the actual attacker. The police identified Walter Cruise as the man who sexually assaulted David Leon because his DNA matched that found on the cotton swab.<sup>285</sup> Cruise, who was twenty-six at the time he assaulted David, had a bad eye, just as David had described.<sup>286</sup> Unfortunately, because of the system's overreliance on eyewitness identification evidence and the police department's negligent handling of physical evidence, it took the criminal justice system nineteen years to get it right.

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He received a five-year sentence on that charge, and also was ordered to serve the balance of the sentence for his three convictions arising out of the Leon incident. Stauffer, *supra* note 173.

280. Joyesha Chesnick, *Man Cleared by DNA Test Faces New Charges*, TUCSON CITIZEN, Oct. 17, 2000, at 1A.

281. Patty Machelor, *DNA Clears Man in Sex Case After 15 Years*, TUCSON CITIZEN, Aug. 9, 2000, at 1A.

282. In February 1999, Wittels asked the Tucson police to test the remaining swab. Inger Sandal, *Freed Man Plans to Sue; Had Signed Waiver Not To*, ARIZ. DAILY STAR, Aug. 10, 2000, at 13. When the police indicated that there might only be enough DNA for one test, she and her client faced a dilemma: whether to have the Tucson Police Department do the testing or have an independent lab do the testing. *Id.* Wittels advised Youngblood to have the Tucson crime lab perform the test because she feared that the sole remaining sample might get lost or destroyed when it was sent to the lab in California, or that the Arizona authorities might not accept the results and there would be nothing left to retest. *Id.* Youngblood had to sign a release, however, agreeing not to sue various police agencies before the Tucson lab would agree to do the testing. *Id.* Although Youngblood contemplated filing a lawsuit against the Tucson police, no lawsuit was ever filed. E-mail from Dan Davis, Attorney for Youngblood on Appeal, to author (May 9, 2006, 17:40 CST) (on file with author).

283. Erickson, *supra* note 183.

284. See Sandal, *supra* note 282, at 13.

285. Joseph Barrios, *24-Year Term Imposed for '83 Sex Crime*, ARIZ. DAILY STAR, Aug. 20, 2002, at 1.

286. *Id.*; see Innocence Project, Case Profiles: Larry Youngblood, [http://www.innocenceproject.org/case/display\\_profile.php?id=66](http://www.innocenceproject.org/case/display_profile.php?id=66) (last visited Apr. 20, 2006).

Ironically, even though he was the victim of a misidentification and of the State's failure to preserve and properly test all of the evidence in his case, Larry Youngblood was still fortunate. He was fortunate in that some DNA evidence was actually collected and that a sample was still available for testing years later.<sup>287</sup> For many DNA exonerees, they were simply lucky that evidence or samples still existed that allowed for subsequent testing that, in turn, led to their exonerations.<sup>288</sup> For many other defendants, however, there is no DNA or forensic evidence that can prove unequivocally whether or not they committed a particular offense.<sup>289</sup> Most of these defendants will have to rely on the skill and preparation of defense counsel to demonstrate their innocence. Given the sorry state of defense representation in many jurisdictions, an innocent defendant will often find it extremely difficult to prove his or her innocence.

### III. THE DISCONNECT BETWEEN RHETORIC AND REALITY: UNPACKING SYSTEMIC MYTHS

#### A. *Myth: Every Defendant Receives the Effective Assistance of Counsel*

What lessons can be learned from the cases of Leonard Peart, Larry McVay, Jimmy Ray Bromgard, Ronald Williamson, and Larry

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287. The victim's briefs and one of two cotton swabs were tested in 1983, but produced unreadable results. Erickson, *supra* note 183. Fortunately for Youngblood, there was still a single cotton swab left to be tested in July 2000. *Id.* Police forensic experts feared, however, that there was only enough DNA left for one test. *Id.* Had the remaining cotton swab been tested in 1983 or not preserved after Youngblood's conviction was affirmed, his innocence would never have been established.

288. See Kristin Gelineau, *Lab Worker Paved Way to Freedom for Innocent Man*, KANSAS CITY STAR, Oct. 9, 2005, at A3 (discussing Mary Jane Burton, a forensic scientist in the Virginia State crime lab, whose practice of saving a snippet of every lab test she ran resulted in DNA material being available many years later for testing, leading to the exoneration of three men imprisoned for over twenty years); Peter J. Boyer, *DNA on Trial; The Test Is Irrefutable, So Why Doesn't It Always Work?*, NEW YORKER, Jan. 17, 2000, at 42 (reporting that it was only happenstance that the evidence that later exonerated a wrongfully convicted man was not thrown away).

289. See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587, 602 (2004) (stating that DNA evidence can only help settle questions of guilt or innocence in a fraction of cases). According to Steve Hinsely, Director of the Missouri Highway Patrol State Crime Lab, the patrol investigated eighteen thousand cases in 2004, and DNA evidence was involved in only 5 to 7 percent of those cases. *Hearing on H.B. 558 and S.B. 397 Before the Subcomm. on DNA Issues*, 92d Leg., Reg. Sess. 9-10 (Mo. 2005) (Statement of Steven Hinsely, Director, Mo. Highway Patrol State Crime Lab).

Youngblood? First, no one can seriously claim that all indigent defendants in this country are provided the assistance of competent counsel.<sup>290</sup> Indeed, the right to counsel for poor defendants too often means little more than the right to have a lawyer stand next to them while they plead guilty or sit next to them at trial, unprepared to meaningfully challenge the prosecution's case.<sup>291</sup> Although in principle every criminal defendant stands equal before the law, in practice, defendants stand on very uneven footing given the tremendous variation in the quality and resources of the lawyers standing next to them. For Leonard Peart, Jimmy Ray Broingard, and countless other defendants, the right to compulsory process or to call defense witnesses, for example, is of little value without the assistance of counsel with the time to locate, interview, and subpoena those witnesses.<sup>292</sup> Simply put, the denial of the effective right to counsel renders many of a defendant's other constitutional rights virtually meaningless.<sup>293</sup> Thus, if equal access to competent counsel is a myth, then so too is the notion that there is equal justice under the law.

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290. Despite the guarantee of effective assistance of counsel, courts have frequently found subpar representation to be constitutionally adequate, usually because the defendant did not demonstrate that he or she was prejudiced by counsel's deficient performance. See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *infra* notes 342-44, 355 and accompanying text. Indeed, given the holding in *Strickland v. Washington*, a criminal defendant is not constitutionally entitled to competent counsel. 466 U.S. 668 (1984). As Judge Alvin Rubin noted:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.

*Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

291. For the clients of Eduardo Falla, the chief contract lawyer in Flathead County, Montana, the right to counsel meant little more than his assistance in pleading guilty. See Berlow, *supra* note 68. From 1994 to 1997, Falla did not take a single case to a jury, file any suppression motions, or get any cases dismissed. *Id.*; see also *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 16 (recounting examples of jurisdictions where defendants routinely plead guilty the first time they meet defense counsel). For other defendants, counsel may have been present at trial but did little to earn the meager amount he was being paid. See, e.g., *Tippens v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (affirming the lower court finding that a court-appointed lawyer who slept through a substantial portion of trial was ineffective); *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (holding that an appointed counsel who slept through a substantial part of the trial provided ineffective assistance of counsel).

292. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

293. See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("Without counsel the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his other rights." (citations omitted)).

Second, the reality for many indigent defendants and the working poor who have retained counsel is that they will have little or no investigation done on their cases.<sup>294</sup> These clients cannot afford to pay for an investigator and counsel generally fail to secure the appointment of one.<sup>295</sup> Any investigation will have to be conducted by the overburdened lawyer.<sup>296</sup> Even in adequately funded public defender offices, investigative services are rationed to the most promising cases and to the most serious ones.<sup>297</sup> A defendant like Youngblood was fortunate, therefore, that his lawyer even had access to investigative assistance.<sup>298</sup>

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294. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 10-11, 19. In Virginia, “investigators are reserved for only the most serious cases, thus the vast majority of cases receive no investigative work.” SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 38. Similarly, in Lake Charles, Louisiana, “the public defender office has only two investigators for the 2550 new felony cases and 4000 new misdemeanor cases assigned to the office each year.” Press Release, NLADA, *supra* note 58, at 2. Not surprisingly, appellate decisions routinely recount cases in which attorneys have done little or no investigation even in capital cases. See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000).

295. *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 19.

296. Not only does an overburdened attorney have little time to try to track down and interview witnesses, but it is also problematic for counsel to interview a hostile witness without the assistance of a third person. “Unless defense counsel is prepared to forgo impeachment of a witness by counsel’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-4.3(e) (3d ed. 1993). Thus, a defense counsel who acts as his or her own investigator risks compromising the effective impeachment of witnesses and ultimately the successful defense of a client’s case. See *id.* Standard 4-4.3 cmt. at 187-88.

297. As John Mitchell observes, all lawyers have to ration, but the representation of indigent clients involves practicing triage that ultimately demands a more focused rationing. John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1243-48 (1994). Given the limited funding available for indigent defense services, Darryl Brown argues that indigent defenders must adopt default rules that enable them to allocate scarce resources in a manner that maximizes protection of the innocent. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004). As Brown recognizes, however, some jurisdictions are so underfunded that no meaningful rationing can occur. *Id.* at 815. Although I agree with Brown that more discussion of intelligent rationing is warranted, I am skeptical that we can craft useful default rules that will, in fact, enable defenders to efficiently concentrate on those defendants who are innocent and still preserve the value of client confidentiality. A full exploration of the merits and problems with Brown’s proposed approach is, however, beyond the scope of this Article.

298. I worked at the public defender office in Milwaukee, Wisconsin in the early 1980s. We had six investigators for about forty lawyers. That meant each lawyer could use an investigator only on selected cases—those that were most serious and most

Similarly, few indigent defendants actually get access to expert assistance. In *Ake v. Oklahoma*,<sup>299</sup> the Supreme Court recognized that “a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”<sup>300</sup> Thus, to ensure that indigent defendants can present their claims fairly within the adversary system, the Court held that the “basic tools” of an adequate defense be provided at state expense for defendants who cannot afford them.<sup>301</sup> Despite the promise of *Ake*, however, access to critical expert assistance is very uneven and largely illusory.<sup>302</sup> A few indigent defendants, like Youngblood, do receive the assistance of an expert. But most do not.<sup>303</sup> In short, for many defendants—without investigative or expert assistance and with a lawyer too busy to work on their case—the claim of equal justice rings hollow.

*B. Myth: The Police Properly Collect, Handle, Preserve, and Analyze Forensic Evidence*

Although Larry Youngblood did have access to an expert, that expert assistance came too late. Indeed, one of the lessons of *Youngblood* is that good police work is necessary to ensure that the

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likely to be tried. In underfunded jurisdictions, access to investigators is even more restricted. See *infra* notes 125-26, 136.

299. 470 U.S. 68 (1985).

300. *Id.* at 77.

301. *Id.*

302. See, e.g., *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 10-11 (citing reports from observers in a number of states attesting to very restricted access to expert witnesses); Burnett et al., *supra* note 48, at 630-40 (reporting a lack of access to necessary experts and investigators for many Texas indigents).

303. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 19 (reporting that in a study of 1867 felony cases from four Alabama judicial circuits, no motion to appoint an expert or investigator was filed in 99.4 percent of the cases); SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 2, 59-66 (reporting that a lack of access to experts for indigent defendants is “pervasive and long-standing” in Virginia, and that expenditures for experts were made in less than 1 percent of all cases); JUDICIAL BRANCH OF GA., REPORT OF CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE PART 1 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc> (reporting the lack of funding for experts and investigators). Similarly, many defendants who scrape up enough money to retain counsel cannot afford to retain an expert. For example, Brian Piszczek managed to hire an attorney but could not afford DNA testing before his trial. James F. McCarty, *Wrongly Convicted, Now Free: DNA Testing Clears Man Jailed for 4 Years in Rape Case*, PLAIN DEALER (Cleveland, Ohio), Oct. 7, 1994, at 1-B. Based on the victim’s positive identification, Piszczek was convicted and sentenced to fifteen to twenty-five years in prison. *Id.* Four years after his rape conviction, his mother was able to raise \$5,000 for DNA testing that exonerated him. *Id.*

innocent are not wrongly convicted and that the guilty are promptly apprehended. Good crime scene investigation is the first step in a process whereby critical evidence is properly collected, preserved, and then analyzed. If evidence is never recovered, or if it is lost or destroyed, it may be impossible to overcome the damage. The tragedy is two-fold. Not only does an innocent defendant spend needless years in custody if forensic evidence is never found or mishandled, but the person who actually committed the crime may never be brought to justice.

Unfortunately, partly as a result of *CSI: Crime Scene Investigation*<sup>304</sup> and similar television shows, many people misunderstand the difficulty of obtaining reliable forensic evidence. In real life, rarely are the police or the crime labs as good as they are on television.<sup>305</sup> Sometimes errors in the collection or handling of physical evidence result from inadequate training or limited police resources.<sup>306</sup> Sometimes inept police work is to blame. Other times, crime scenes are contaminated, regardless of the care exercised by the police. Whatever the causes, there are a host of criminal cases in which potentially valuable physical evidence is never recovered or lost. Ultimately, the reliability of our criminal justice system is compromised by our inability to gather and analyze such critical evidence. Yet misperceptions about forensic science abound and those misperceptions, together with the other myths described in this Article, obscure the need for reform in this area.

Contrary to Justice Stevens' conclusion in *Youngblood*,<sup>307</sup> the police do not always have a strong incentive to collect, preserve, and test potentially critical evidence. Perhaps in theory they do, but in

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304. *CSI: Crime Scene Investigation* (CBS television broadcast). Prosecutors worry that the "CSI effect" places a heightened burden on them to produce forensic evidence. See *Litigators Offer Trial Practice Tips for Defending White Collar Clients*, 78 Crim. L. Rep. (BNA) 68, 68-69 (Oct. 12, 2005) (describing the "CSI effect" among jurors). Consequently, some prosecutors use voir dire to attempt to blunt the impact of their lack of forensic evidence. See *id.* Recently, I was called to jury duty in a murder case in Columbia, Missouri and heard jurors questioned about *CSI: Crime Scene Investigation* and their familiarity with the gap between television and the reality of forensic evidence.

305. See Paul C. Giannelli, *The "Science" of Wrongful Convictions*, CRIM. JUST., Spring 2003, at 55 (2003); SCHECK, NEUFELD & DWYER, *supra* note 153, at 206-07, 221; GREG W. STEADMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF DNA CRIME LABORATORIES, 2001 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sdnacl01.pdf>.

306. See Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 474-76 (1997).

307. *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988) (Stevens, J., concurring).

practice, police officers respond to a host of conflicting pressures and incentives. Surely, any reasonably competent police officer would have recognized the importance of refrigerating the clothing in the *Youngblood* case, especially right after the crime, when police had no suspect. Despite the obvious importance of the evidence in catching the perpetrator, however, the police failed to preserve this evidence. Although the *Youngblood* majority cavalierly characterized the inexplicable failure to refrigerate the clothing after semen had been detected on it as, at worst, “negligent,”<sup>308</sup> this failure directly led to an innocent man going to prison for a crime he did not commit. Moreover, the police bungling allowed the man who actually assaulted David Leon to go freely about his sordid business. Understandably, the *Youngblood* court did not want to micro-manage police investigations or mandate how all evidence should be handled. Nevertheless, the *Youngblood* test fails to adequately protect the due process rights of innocent citizens who may later face criminal charges.<sup>309</sup> As Justice Blackmun observed in dissent:

[D]ue process requires something more. Rather than allow a State’s ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process.<sup>310</sup>

In addition, Justice Stevens failed to acknowledge that the incentives for the Tucson police changed over time. It was significant that the police criminologist was not asked to test the rectal swab until the day after *Youngblood* was picked out in a lineup.<sup>311</sup> Although he examined a smear from the rectal swab under a microscope and determined that sexual contact had occurred, the criminologist did not perform any other tests.<sup>312</sup> That decision is not surprising. At that point the Tucson police already had their man—a convicted felon who

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308. *Id.* at 58 (majority opinion).

309. Dr. Edward Blake, one of the nation’s foremost forensic scientists specializing in DNA, criticized the *Youngblood* ruling for undermining the mandate to the law enforcement community to collect, maintain, and properly preserve evidence and generally lowering the standards of evidence collection. See Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12.

310. *Youngblood*, 488 U.S. at 69 (Blackmun, J., dissenting).

311. *Id.* at 53 (majority opinion).

312. *Id.*

had been positively identified by the victim. Additional testing might have produced more conclusive proof. Given the positive identification, however, the overworked police criminologist with a backlog of pressing cases had an incentive to move on to the next case.<sup>313</sup> Similarly, in the Brenton Butler case, the police failed to process a fingerprint found on a document in the victim's purse.<sup>314</sup> The police had an eyewitness and the defendant's confession. Consequently, they had little incentive to waste precious resources processing a fingerprint. Ultimately, that fingerprint led to the conviction of the real murderer.<sup>315</sup> Absent the zealous representation of Butler's attorneys, however, the lack of thoroughness by the police may well have led to the conviction of an innocent man.

Contrary to the image created by *CSI: Crime Scene Investigation* and related shows, the crime labs in this country are not well-oiled, infallible operations.<sup>316</sup> Rather, the vast majority of crime labs are staggering under a crush of cases and are unable to keep up with the demands for their services.<sup>317</sup> The lack of resources and manpower creates backlogs and encourages shortcuts. Additionally, some criminologists lack adequate training or supervision.<sup>318</sup> As a result, quality control in many labs is questionable.

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313. See *People v. Bravo*, 23 Cal. Rptr. 2d 48 (1993). In *Bravo*, a serology test placed the defendant within the 1.5 percent of the population who could have been the source of the sperm. *Id.* at 51. Given the victim's positive identification, the prosecution did not utilize DNA testing. See Innocence Project, Case Profiles: Mark Diaz Bravo, [http://www.innocenceproject.org/case/display\\_profile.php?id=03](http://www.innocenceproject.org/case/display_profile.php?id=03) (last visited Apr. 4, 2006). Three years later, DNA exonerated the defendant. See *id.*

314. See Tucker, *supra* note 169.

315. See *id.*

316. See *Reasonable Doubt: Can Crime Labs Be Trusted* (CNN television broadcast Nov. 5, 2005) (highlighting cases of forensic error and misconduct in wrongful convictions). The *Houston Chronicle* ran a series of articles in the fall of 2003 detailing the incompetence, mismanagement, and scandalous performance of the Houston Police Department crime lab. See Lise Olsen & Roma Khanna, *DNA Lab Analysts Unqualified, Review Finds Education, Training Lacking*, HOUS. CHRON., Sept. 7, 2003, at A1. For a further look at the "biggest forensic science scandal in U.S. history," see Innocence Project, Houston, We Have a Problem, <http://www.innocenceproject.org/dnaews/index.php> (last visited Apr. 4, 2006).

317. In Missouri, the State Highway Patrol crime lab is "inundated" with such a large backlog of samples that it might take three to five years to catch up. Bill Bryan, *A Real Life "Cold Case,"* ST. LOUIS DISPATCH, Nov. 24, 2005, at C1. The huge backlog in DNA cases across the country is only part of the problem facing under-resourced crime labs. See STEADMAN, *supra* note 305.

318. See, e.g., Olsen & Khanna, *supra* note 316 (documenting problems with the Houston Police crime lab DNA unit in which none of the scientists were qualified by education or training to do the job properly).



Sloppy labs not only generate mistakes, but they lose, fail to preserve, and destroy evidence.<sup>319</sup> Sometimes, of course, the loss of evidence is not the fault of the police or the criminologists.<sup>320</sup> At other times, however, forensic error is a function of more than just ineptitude. Occasionally, criminal defendants are victimized by criminologists who knowingly submit false results.<sup>321</sup>

One of the significant systemic costs of the failure to provide defendants with effective defense counsel with access to expert assistance is the extent to which most forensic evidence goes unchallenged. Pressed for time and without an expert to carefully review or test the findings of the State's expert, many criminal defense lawyers have no meaningful ability to controvert the State's forensic evidence. This, in part, explains how a rogue criminologist like Fred Zain was able to escape detection for years before his misconduct was uncovered.<sup>322</sup> Additionally, overly zealous prosecutors have exploited questionable scientific evidence to pressure defendants into guilty pleas because most defendants are unwilling to risk trial in the face of such

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319. It is not only state or local crime labs that have problems. An eighteen-month investigation of the FBI forensic laboratory revealed significant deficiencies. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES* (1997), available at <http://www.usdoj.gov/oig/reports/FBI/index.htm> (select "Table of Contents" hyperlink for the report listed under the "1997" heading).

320. For some of the many stories regarding the contamination or destruction of evidence in the aftermath of Hurricane Katrina and the attendant problems for the criminal justice system, see Jennifer Latson, *New Orleans After the Storm: City's Criminal Trials Are on Hold; Jail Fills; Prosecutors Fear Evidence Is Lost*, DETROIT FREE PRESS, Oct. 18, 2005; Susan Finch, *Orleans Judge Holds Court in Gonzales: Prosecutors Work in Borrowed Space*, TIMES-PICAYUNE (New Orleans), Sept. 26, 2005, at A2.

321. In recent years, numerous cases of forensic misconduct by state and federal crime lab employees have surfaced. The most infamous case is that of Fred Zain, the former head serologist of the West Virginia State Police crime laboratory, who falsified test results in scores of criminal cases between 1979 and 1989. See *In re Investigation of W. Va. State Police Crime Lab.*, 438 S.E.2d 501 (1993). For an extensive discussion of Zain's misconduct and other crime lab fraud, see George Castelle & Elizabeth F. Loftus, *Misinformation and Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 17, 27-28 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Giannelli, *supra* note 306, at 442-49. For an equally troubling account of the Oklahoma crime lab scandal involving Joyce Gilchrist and the extent to which Oklahoma County prosecutors condoned her misconduct, see MARK FUHRMAN, *DEATH AND JUSTICE* (2003); *Mitchell v. Gibson*, 262 F.3d 1036, 1064 (10th Cir. 2001) (reversing a death sentence in a case in which Gilchrist provided testimony that "she knew was rendered false and misleading by evidence withheld from the defense"); see also Roma Khanna & Steve McVicker, *Crime Lab Faked Results in 4 Cases, Probe Finds*, HOUS. CHRON., June 1, 2005, at A1.

322. See Giannelli, *supra* note 306, at 445-47.

evidence.<sup>323</sup> Similarly, some prosecutors have taken advantage of defense counsel's lack of preparation or familiarity with scientific evidence and have distorted or exaggerated the significance of certain scientific evidence thereby obtaining questionable convictions.<sup>324</sup>

### C. *Myth: Cross-Examination Produces the Truth*

It is a common myth that cross-examination is the greatest engine for truth.<sup>325</sup> Undoubtedly, cross-examination is a powerful weapon when wielded by a well-prepared, skilled practitioner. Without proper preparation, however, even a good lawyer may be unable to effectively undermine the testimony of a prosecution witness. Moreover, an unskilled advocate will find it exceedingly difficult to conduct an effective cross-examination. In practice, given the time pressures that confront many defense lawyers, inadequate preparation is common. Consequently, cross-examination often is done poorly and without meaningfully testing the accuracy or veracity of the prosecution's witness.<sup>326</sup> It is foolish, therefore, to place much confidence in the power of cross-examination to ensure the reliability of most criminal trials.

In addition, cross-examination can, in some instances, be used to defeat the truth. It is perfectly appropriate for defense counsel to cross-

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323. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 326-28, 330-33 (3d ed. 2004). For a look at one type of the so-called scientific evidence that has now been discredited, see Michael J. Sniffen, *FBI Drops Controversial Bullet Tests*, ASSOCIATED PRESS, Sept. 1, 2005, [http://www.whistleblowers.org/FBI\\_Drops\\_Controversial\\_Bullet\\_Tests.htm](http://www.whistleblowers.org/FBI_Drops_Controversial_Bullet_Tests.htm) (reporting an FBI announcement that it would no longer perform tests that matched bullets by lead content given criticism of the accuracy of such tests by the National Academy of Sciences); Charles Piller, *FBI Abandons Controversial Bullet-Matching Technique*, L.A. TIMES, Sept. 2, 2005, at A38 (criticizing the FBI's use of this inaccurate test for the past twenty-five years and its unreliable testimony based on such testing).

324. See *supra* notes 128-33 and accompanying text (reporting the case of Jimmy Ray Broingard); Ken Armstrong & Steve Mills, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, § 1, at 1 (recounting a number of cases of prosecutorial misuse of junk science to secure convictions); FUHRMAN, *supra* note 321. For a compelling account of the prosecution's use of a pubic hair comparison and defense counsel's failure to effectively attack the State's impeachable scientific evidence in the case of Roger Coleman, a man executed despite considerable doubt about his guilt, see JOHN C. TUCKER, *MAY GOD HAVE MERCY* (1997).

325. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn ed., Little, Brown & Co. 1974) (1940).

326. See, e.g., *Scarpa v. Dubois*, 38 F.3d 1, 9-12 (1st Cir. 1994) (noting that inept cross-examination actually played into the prosecutor's hands and bolstered the prosecution's theory of the case); TUCKER, *supra* note 324, at 64-80 (describing generally ineffective cross-examination by two inexperienced and underprepared defense lawyers that contributed to the controversial conviction of Roger Coleman).

examine a witness counsel knows is telling the truth in an effort to undermine the witness's credibility.<sup>327</sup> Unquestionably, some guilty defendants have benefited from counsel's skilled cross-examination and been acquitted.<sup>328</sup> Although ethically and strategically appropriate, it is hard to square such a result with the claimed role of cross-examination as the greatest engine for truth.

Perhaps even more importantly, Larry Youngblood's case and those of numerous other defendants victimized by a mistaken identification speak to the limits of cross-examination in guaranteeing that truth will be achieved at trial.<sup>329</sup> Admittedly, effective impeachment based on a thorough examination of the crime scene and of the circumstances surrounding the identification of the defendant, can make a tremendous difference in some cases. In other cases, however, cross-examination may do little to shake the confidence of the mistaken but very credible witness.<sup>330</sup> It is not surprising that mistaken

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327. In describing defense counsel's role in our adversarial system, Justice White emphasized that:

If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly, there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying.

United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part, concurring in part) (citations omitted); see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-7.6(b) (3d ed. 1993) ("[D]efense counsel's belief or knowledge that the witness is telling the truth does not preclude cross examination."). But see Harry I. Subin, *The Criminal Defense Lawyers' "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987).

328. Some commentators have suggested that O.J. Simpson's acquittal, in no small measure, was a result of skilled cross-examinations conducted by Johnnie Cochran, Barry Scheck, and other members of the defense team. See Boyer, *supra* note 286, at 45; Fiandaca, *supra* note 25.

329. Indeed, nearly 90 percent of the first seventy DNA exonerations involved misidentifications. Karin Brulliard, *Va. Urges Police Lineup Changes to Curb Mistakes*, WASH. POST, Mar. 6, 2005, at C7. Over two-thirds of the first 130 postconviction DNA exonerations involved a mistaken eyewitness identification. See Innocence Project, *Causes and Remedies of Wrongful Convictions*, <http://www.innocenceproject.org/causes/> (last visited Apr. 4, 2006).

330. See, e.g., Amy Bradfield & Dawn E. McQuiston, *When Does Evidence of Eyewitness Confidence Inflation Affect Judgments in a Criminal Trial?*, 28 LAW & HUM. BEHAV. 369 (2004); Brian L. Cutler, Steven D. Penrod & Thomas E. Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41 (1988); James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness*

identifications are the major cause of wrongful convictions and a common feature of DNA exonerations.<sup>331</sup> In the end, even a skilled cross-examiner may find it impossible to convince a jury to disregard the powerful impact of a positive identification of the defendant.

Moreover, as the *Youngblood* case demonstrates, the more horrific a crime, the harder it becomes for a jury to give the defendant the benefit of a reasonable doubt in the face of a victim's positive identification. In *Youngblood*, the defense not only was able to show significant inconsistencies in David's description of the assailant compared to the defendant, but also major inconsistencies in David's description of the attacker's car with that of Youngblood's car.<sup>332</sup> In addition, the defense had the "advantage" of the jury instruction regarding the unpreserved evidence and the testimony of Youngblood's friends that he was with them at the time of the attack.<sup>333</sup> Nevertheless, the jury found no reasonable doubt about Youngblood's guilt.<sup>334</sup>

To Justice Stevens, the jury's verdict, especially in light of the instruction regarding the unpreserved evidence, demonstrated that the evidence against Youngblood was overwhelming.<sup>335</sup> To the contrary, the jury's erroneous finding of guilt illustrates once again the fallibility of eyewitness identification testimony. It is a lesson that the Supreme Court should have learned years ago when Justice Brennan warned "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."<sup>336</sup> Seemingly oblivious to the power of identification testimony to mislead a jury, Justice Stevens and the Rehnquist majority ignored the discrepancies in the victim's testimony and leapt to the unwarranted conclusion that Youngblood was not really harmed by the State's negligence.<sup>337</sup> The assumption underlying Justice Rehnquist's opinion,

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*Trials*, CHAMPION, Jan.-Feb. 1998, at 12, 12-17, 73; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817 (1995); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360 (1998); Gary L. Wells, R.C.L. Lindsay & Tamara J. Ferguson, *Accuracy, Confidence and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979).

331. Wells & Bradfield, *supra* note 330, at 360 ("The identification of innocent persons from lineups and photo spreads is the primary cause of wrongful conviction, accounting for more convictions of innocent persons than all other causes combined.").

332. See *supra* notes 170-226 and accompanying text.

333. See *Arizona v. Youngblood*, 488 U.S. 51, 54 (1988).

334. See *id.*

335. See *id.* at 59-61 (Stevens, J., concurring).

336. *United States v. Wade*, 388 U.S. 218, 228 (1967).

337. Compare *Youngblood*, 488 U.S. at 56-59, with *id.* at 71 & nn. 8-9 (Blackmun, J., dissenting).

and that of Justice Stevens' concurrence, was that the lost evidence would only have confirmed what the jury ultimately found—that Youngblood was guilty.<sup>338</sup> Youngblood and other DNA exoneration cases, however, represent a powerful rebuttal to the unwarranted confidence that too many judges and others have in the ability of our criminal justice system to screen out the innocent.<sup>339</sup>

#### D. *Myth: Jury Instructions Cure Trial Error*

The *Youngblood* case also exposes the limited effects of curative jury instructions. The Arizona Supreme Court found that due process was satisfied by an instruction that permitted the jury to infer that the lost evidence would have been unfavorable to the State.<sup>340</sup> Yet what value did that curative instruction really have? Clearly, the jurors did not draw any negative inference from the State's inexcusable failure to preserve the evidence. Certainly they did not infer that testing would have exonerated Youngblood. In the end, despite the inconsistencies in David's testimony, the alibi evidence proffered by the defense, and the jury instruction, the victim's identification carried the day. Thus, it is difficult to believe that the jurors gave any weight whatsoever to the State's negligent handling of this potentially exculpatory evidence in reaching the guilty verdict.

Such a result is not surprising to scholars and psychologists who have studied jury behavior. Research demonstrates that most jurors fail to understand most of the jury instructions they receive.<sup>341</sup> Additionally, research indicates that jurors often find it extremely hard to disregard powerful evidence, despite instructions to the contrary.<sup>342</sup>

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338. Federal Judge David L. Bazelon acknowledged that federal judges had "the belief—rarely articulated, but . . . widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account." David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973). For an insightful discussion of the widespread presumption of guilt that applies to all defendants brought to trial, see Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997).

339. See *infra* notes 437-51, 525-42 and accompanying text.

340. *State v. Youngblood*, 844 P.2d 1152, 1156-58 (1993).

341. See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997).

342. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1958); Thomas R. Carretta & Richard Moreland, *The Direct and*

Consequently, jurors use evidence of a prior conviction on the issue of guilt despite an instruction against doing so<sup>343</sup> and use impeachment evidence to decide liability in the face of limiting jury instructions.<sup>344</sup> Similarly, research shows that curative instructions do not effectively counter the prejudicial effects of negative pretrial publicity.<sup>345</sup> Because jurors have a tendency to accord greater weight to eyewitness testimony than is often warranted, especially when a witness exudes confidence in an identification,<sup>346</sup> judicial reliance on a jury instruction to balance the detrimental effect of the loss of potentially exculpatory evidence is unfounded.

*E. Myth: Innocent People Don't Confess to Crimes They Didn't Commit*

Yet another myth that warrants reexamination in view of the DNA exonerations is the belief that people do not confess to crimes that they did not commit. Most people find it hard to fathom that anyone would confess to a serious crime—like murdering a parent—unless the person actually committed the act.<sup>347</sup> The reality, however, as the case of David Vasquez dramatically illustrates, is that the pressure placed on suspects during custodial interrogations can, and does, produce false confessions.<sup>348</sup>

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*Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 305-08 (1983).

343. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985).

344. Sarah Tanford & Michele Cox, *Decision Processes in Civil Cases: The Impact of Impeachment Evidence on Liability and Credibility Judgments*, 2 SOC. BEHAV. 165, 177-81 (1987).

345. Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 442-43 (1997).

346. See Wells & Bradfield, *supra* note 330, at 374; Wells et al., *supra* note 164, at 620-21.

347. John B. Wefing, *Wishful Thinking by Ronald J. Tabak: Why DNA Evidence Will Not Lead to an Abolition of the Death Penalty*, 33 CONN. L. REV. 861, 884 (2001). For a compelling account of Derrick Prillman's false confession to his father's murder, see Tom Schoenberg, *Family Tragedy*, LEGAL TIMES, Oct. 2, 2000, at 1; Tom Schoenberg, *When the Innocent Confess*, LEGAL TIMES, Oct. 9, 2000, at 1.

348. The Vasquez case is one of twenty-six cases highlighted in the Department of Justice report of persons convicted of crimes but later exonerated by science. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

While investigating the rape and murder of Carolyn Hamm in Arlington, Virginia, the police learned that a man named David Vasquez was seen walking by Hamm's house on the evening of the murder and then again two days later.<sup>349</sup> Vasquez had lived in Hamm's neighborhood but had moved to Manassas, Virginia about eight months earlier.<sup>350</sup> Two Arlington detectives picked up Vasquez in Manassas for questioning and, when he denied being in Arlington on the day of the murder, concluded he had something to hide.<sup>351</sup> Within thirty minutes of questioning, the detectives were able to convince Vasquez to change his story by falsely telling him that he was seen climbing through Hamm's window and that his fingerprints were found in her house.<sup>352</sup> For Vasquez, a thirty-seven-year-old with a GED, who was described as having "borderline retarded/low normal" intelligence," it was unfathomable that his fingerprints were there.<sup>353</sup>

The detectives pressed the distraught and crying Vasquez by insisting that the only real question was why he was at Hamm's house.<sup>354</sup> Vasquez suggested he might have helped Hamm move something. From there, the police fed Vasquez details of the crime and encouraged him to confirm those details. When his answers did not fit the facts of the case, the detectives yelled at him.<sup>355</sup> Although during this first interrogation Vasquez admitted to hanging Hamm, by the end of this first session, he denied even being at her home. He stated that he was admitting all this "because you tell me my fingerprints were there."<sup>356</sup> At the end of a second interrogation, Vasquez began to recount a "horrible dream."<sup>357</sup> In that dream, he admitted to the facts that he learned during his first interrogation.<sup>358</sup> The following day, Vasquez gave a shorter version of this dream confession.<sup>359</sup> Based largely on his three confessions, Vasquez was charged with capital

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349. Dana Priest, *At Each Step, Justice Faltered for Va. Man*, WASH. POST, July 16, 1989, at A1.

350. *Id.*

351. *Id.*

352. *Id.* Priest's newspaper account is based on a review of the tapes and transcripts of the three interrogations of Vasquez. *Id.*

353. *Id.* Friends also said Vasquez was easily flustered under pressure and reacted to things as a young child would. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. Years later Vasquez would say that the police "put words into my mouth . . . . I was repeating everything they were saying." Brooke A. Masters, *Lucky Release from a Life Behind Bars*, WASH. POST, Apr. 28, 2000, at A23.

murder, rape, and burglary. To avoid the death penalty, Vasquez ultimately entered an *Alford* plea to second-degree murder and was sentenced to twenty years on that charge, along with fifteen years for the burglary.<sup>360</sup> Five years later, Vasquez was pardoned when Hamm's real killer was caught following a killing spree.<sup>361</sup>

Few laypeople appreciate the coerciveness of the interrogation process.<sup>362</sup> Many mistakenly believe that the *Miranda* warnings, including the right to the presence of counsel, offer suspects considerable protection from police overreaching. In practice, however, few defendants request counsel and those that do are rarely allowed to see counsel, at least not until the police have had an opportunity to secure a confession.<sup>363</sup> Police are permitted to lie about incriminating evidence<sup>364</sup> and to bring a variety of psychological

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360. See Priest, *supra* note 349 (describing Vasquez's decision to enter an *Alford* plea). Recognized first in *North Carolina v. Alford*, an *Alford* plea enables a defendant to enter a guilty plea despite continuing to maintain his or her innocence. 400 U.S. 25 (1970).

361. Masters, *supra* note 359.

362. As Chief Justice Warren observed after detailing examples of police interrogation techniques: "[W]ithout proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). For an extended look at common interrogation techniques, see FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, *CRIMINAL INTERROGATIONS AND CONFESSIONS* (3d ed. 1986). Some prosecutors are quite skeptical, however, that a suspect can be induced to falsely confess. "Innocent people do confess sometimes . . . . But the idea that somebody can be induced to falsely confess is ludicrous. It's the Twinkie defense of the 1990s. It's junk science at its worst." Mark Hansen, *Untrue Confessions*, A.B.A. J., July 1999, at 50, 52 (quoting Joshua Marquis, Clatsop County, Oregon, District Attorney). Research and the DNA exoneration cases demonstrate, however, that the use of certain techniques can cause even an innocent person to falsely confess. See, e.g., Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, in 16 *STUDIES IN LAW, POLITICS, AND SOCIETY* 189 (1997); Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED*, *supra* note 321.

363. See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1246 (2001); see also *infra* notes 291-95 and accompanying text.

364. Police misrepresentations regarding evidence do not automatically invalidate a confession but will be considered in determining whether a defendant's statement is voluntary. See *Frazier v. Cupp*, 394 U.S. 731 (1969) (holding that, under the totality of the circumstances, the fact that police falsely stated that an accomplice had already confessed did not render the defendant's statement involuntary); *Beasley v. United States*, 512 A.2d 1007 (D.C. 1986) (finding that misleading statements regarding witnesses and the presence of the defendant's fingerprints in the decedent's car did not make the defendant's confession involuntary). *But see State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (finding that the police stepped over the line



pressures to bear to get at the truth.<sup>365</sup> The problem, unfortunately, is that in their zeal to get the truth, law enforcement agents may only get the defendant to acquiesce to the officer's version of events.<sup>366</sup>

Once law enforcement officers are satisfied that the defendant has confessed, a defendant's fate is usually sealed. It is exceedingly difficult for a defendant to successfully refute an officer's claim that he or she confessed. Few jurisdictions mandate that interrogations be electronically recorded.<sup>367</sup> Moreover, some police departments that do

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of permitted deception by falsely fabricating two scientific reports tying the defendant to the crime). In Great Britain, on the other hand, concerns that police deception leads to false confessions have prompted courts to rule inadmissible confessions secured after the police made false statements about evidence or witnesses. See Ian K. McKenzie, *Forensic Investigative Interviewing*, in HANDBOOK OF INTERVIEWING RESEARCH: CONTEXT AND METHOD 431, 443-45 (Jaber F. Gubrium & James A. Holstein eds., 2002).

365. It is difficult to know how common it is for the police to use physical force to secure a confession, as in the *Butler* case. See *supra* notes 162-69, 314-15 and accompanying text, *infra* note 434 and accompanying text. Certainly there are police officers—particularly in some departments—who use physical force to obtain statements from suspects. See, e.g., Ken Armstrong & Steve Mills, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, § 1, at 1 (detailing the physical abuse and torture used by members of the Chicago Police Department to extract confessions); M.L. Elrick & Ben Schmidt, *U.S. Plans to Oversee Detroit Cops*, DETROIT FREE PRESS, June 11, 2003, at 1A (discussing the prospective oversight of the Detroit Police Department because of the abuse of suspects during interrogations). Usually, however, the suspect's claims of abuse fall on deaf ears because there is no other evidence to rebut the officer's denial of any such abuse. It is revealing that about 27 percent of the DNA exonerations studied by the Innocence Project involved so-called confessions and in many of these cases, the defendants reported either that they had confessed as the result of beatings or never made the statement attributed to them. See SCHECK, NEUFELD & DWYER, *supra* note 153, at 120-21. Even if no physical force is employed, police will make threats or promises that may induce a suspect to say what the police want, even if it is not true. See Ofshe & Leo, *supra* note 362, at 212.

366. As in the *Vasquez* case, the police in *Williamson v. Ward* secured several dream confessions from a mentally ill defendant. 110 F.3d 1508, 1512 (10th Cir. 1997). Finding that these dream confessions “were likely given great weight by the jury, which was unaware that Mr. Williamson was mentally ill with a disorder that distorted reality and produced delusions,” the court reversed Williamson's conviction. *Id.* at 1520; see also *supra* notes 143-55 and accompanying text. It is not only mentally limited defendants who falsely confess. See, e.g., Bryan, *supra* note 317 (reporting that police said that the drifter who falsely confessed to a rape he did not commit could offer no explanation for his confession).

367. Two state courts have imposed a videotaping requirement. See *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); *Stephan v. State*, 711 P.2d 1156 (Alaska 1985). The Wisconsin Supreme Court recently imposed a videotaping requirement in all custodial interrogations of juveniles. *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110; see also *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 518 (Mass. 2004) (expressing a preference for taping but holding that in any case in which a confession is not recorded, cautionary jury instruction will be given). *But see State v. Cook*, 847 A.2d 530 (N.J. 2004) (rejecting the argument that due process requires

videotape confessions do not record all of the interrogation.<sup>368</sup> Thus, it is generally the defendant's word against that of a law enforcement officer or officers as to what happened and what was said during the interrogation.

For the defendant represented by an incompetent lawyer or overworked or underpaid counsel, it is almost impossible to rebut a claim that he or she confessed. If counsel is severely strapped for time, defendants who have confessed are least likely to receive counsel's limited time or energy. It is unlikely that a suppression motion will be filed, much less litigated. It also is unlikely that the scene will be visited or fact-witnesses interviewed. Indeed, defense counsel may well be skeptical of the defendant's claim that he or she never confessed and is actually innocent. Not surprisingly, a defendant represented by a skeptical defense lawyer who does not have the time to adequately prepare is unlikely to risk trial.

Moreover, even if the defendant is represented by able counsel who disbelieves the confession, counsel is still very likely to encourage the defendant to accept a plea bargain.<sup>369</sup> Defense lawyers recognize that a defendant faces long odds of beating a charge to which the defendant allegedly has confessed. For most jurors, a defendant's confession constitutes a powerful piece of evidence that is very difficult to ignore.<sup>370</sup> Not only does it take an exceptionally good lawyer to

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electronic recording but setting up a committee to make recommendations regarding such recording of custodial interrogations). Three states and the District of Columbia have mandated electronic recording by legislation. See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West Supp. 2005) (providing for taping all custodial interrogations of suspects in homicide cases); ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (Supp. 2005) (requiring taping of all suspects in serious cases); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005) (mandating taping in all custodial interrogations); D.C. CODE ANN. § 5-116.01 (LexisNexis 2005) (requiring taping of all custodial interrogations of persons suspected of committing a crime of violence).

368. In Manhattan, for example, after the police secure a confession, the District Attorney's Office attempts to get the suspect to repeat that confession on videotape. As the infamous case of the Central Park Jogger demonstrates, the practice of only taping the final confession and not the entire interrogation process does little to prevent false confessions or police coercion. 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, 645-46 n.157 (2004); see also Bryan, *supra* note 317 (reporting that a suspect's videotaped confession to a brutal rape turned out to be false when DNA exonerated him and two years later led police to the actual perpetrator).

369. In the *Vasquez* case, for example, faced with the dream confession and a possible death sentence, Vasquez' lawyers persuaded him to enter an *Alford* plea. See Masters, *supra* note 359.

370. Drizin & Reich, *supra* note 368, at 637-39. Indeed, an examination of wrongful conviction cases reveals that defendants who falsely confessed, recanted, and then went to trial, were convicted in about four of every five cases. See Steven A.

effectively neutralize a claim that the defendant admitted his or her guilt,<sup>371</sup> even the best lawyers will usually be unable to do so. As a result, innocent people can be convicted largely based on their own purported confessions.<sup>372</sup>

### F. *Myth: Innocent People Don't Plead Guilty*

The difficulty of overcoming so-called confessions and of successfully attacking a positive eyewitness identification are just two of a host of factors that may push a defendant into a guilty plea regardless of his or her actual innocence.<sup>373</sup> Nonetheless, the myth persists that innocent defendants simply do not plead guilty.<sup>374</sup> Surprisingly, even Supreme Court Justices labor under the misperception that our system only allows the guilty to enter guilty

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Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 960 (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, 482 (1998).

371. An expert can help. Hansen, *supra* note 362, at 53 (describing the role that the expert witness, Richard Ofshe, played in a high-profile murder case in San Diego). Very few defendants, however, will have access to such an expert. Thus, it will be the rare case in which the defense counsel will be able to persuade a jury that the defendant gave a false confession to stop the police from beating or psychologically abusing him. The case of Brenton Butler represents that rare case. *See supra* notes 162-69, 314-15, *infra* note 434 and accompanying text.

372. For example, Gary Gauger was convicted of the double murder of his parents based on statements Gauger allegedly made to the police, even though no physical evidence linked him to the crime. Gauger's conviction was reversed and he was not retried after members of a motorcycle gang were convicted of his parents' murders. *See* STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 8 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report). For a look at some of the many articles documenting proven cases involving purported confessions of persons who subsequently were exonerated, see Leo & Ofshe, *supra* note 370; Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58; Leo, *supra* note 362, at 36-37; Drizin & Reich, *supra* note 368, at 634-36; Associated Press, *\$2.25 Million Awarded for Policeman's Fakery*, KAN. CITY STAR, May 6, 2006 at A5.

373. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLIN. L. REV. 73, 77-78 (1995).

374. As the prosecutor in the HBO movie *Criminal Justice* insisted, "innocent people don't take upstate time." CRIMINAL JUSTICE (HBO Films 1990). In 2002, St. Louis City Prosecutor Jennifer Joyce set up a program in her office to review cases from St. Louis prior to 1994 of all inmates still incarcerated to determine if any of those inmates were appropriate for DNA testing. At the Access to Equal Justice Conference held at Washington University in February 2002, Ms. Joyce advised me that only defendants who had consistently maintained their innocence would be appropriate for testing and that persons who pled guilty would not be.

pleas. During oral arguments in *United States v. Ruiz*,<sup>375</sup> Justice Scalia reacted vehemently to defense counsel's argument that our plea-bargain-driven system provided incentives for innocent people to plead guilty by claiming:

No. I – I object to that. I – I don't think our system ever encourages or, indeed, even permits an innocent person to plead guilty. Our rules require the judge to – to interrogate the person pleading guilty to make sure that, indeed, the person is guilty. There is nothing in our system that encourages or even allows an innocent person to – to plead guilty. And I would be horrified if – if there were something like that.<sup>376</sup>

Contrary to Justice Scalia's protestation, however, the Court itself has recognized the right of a defendant who continues to profess his innocence to enter a guilty plea.<sup>377</sup> Every day in this country, defendants enter *Alford* pleas or no contest pleas because they decide, for a variety of reasons, that the costs of going to trial in pursuit of an acquittal are simply too high.<sup>378</sup> Astonishingly, Justice Scalia's comment suggests that he is totally unaware of this common phenomenon.

Justice Scalia apparently also failed to appreciate the pressure pretrial detention puts on defendants, including those who are innocent. Many states deny counsel to indigent defendants at bail hearings, resulting in lengthy detention for many defendants before counsel is

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375. Transcript of Oral Argument at 26, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595).

376. *Id.*

377. See *North Carolina v. Alford*, 400 U.S. 25 (1970) (holding that the trial judge can accept a guilty plea from a defendant despite the defendant's continued claim of innocence). Most state courts also permit a defendant to plead guilty while maintaining his or her innocence. See Curtis J. Shipley, Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1067-69 (1987). A few states, however, have specifically rejected *Alford*. See, e.g., *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983).

378. See HARLOW, *supra* note 14, at 8 (reporting that 17 percent of state inmates and 5 percent of federal inmates entered an *Alford* plea or no contest plea). The case of David Vasquez is illustrative. See *supra* notes 349-61 and accompanying text. Charged with murder and rape, Vasquez faced the death penalty. See Priest, *supra* note 349. He gave three confessions to the police, witnesses put him in the neighborhood, and hair evidence found at the scene was consistent with his hair. *Id.* To avoid the death penalty, Vasquez entered an *Alford* plea and was sentenced to thirty-five years. *Id.* He was pardoned five years later after the real killer was identified. See Masters, *supra* note 359.

finally appointed.<sup>379</sup> Moreover, the heavy caseloads of many indigent defenders mean that defendants languish in jail for extended periods without ever seeing defense counsel.<sup>380</sup> Because the consequences of pretrial incarceration are often very significant and, for some defendants, far outweigh the ultimate punishment for the crime charged, even innocent defendants choose to plead guilty simply to get out of jail.<sup>381</sup> Simply put, pleading guilty to time served is often much more attractive than the unlikely prospect of a not guilty verdict at some unknown point in the future.

Equally remarkable, Justice Scalia's comment suggests a stunning lack of recognition of the coercive power of a plea bargain. Virtually all defendants are told that if they go to trial and lose they will likely receive a harsher sentence.<sup>382</sup> Indeed, sometimes the threat is quite explicit, at times including a threatened sentence of life in prison or even death.<sup>383</sup> Moreover, the prosecutor's ability to threaten additional charges with even more enhanced penalties only intensifies the pressure on a defendant to plead guilty.<sup>384</sup>

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379. Colbert, *supra* note 48, at 1; *see also* Press Release; NLADA, *supra* note 58, at 2 (reporting that indigent defendants in Lake Charles, Louisiana typically meet their public defender for the first time 281 days after their arrest).

380. *See, e.g.*, Parker, *supra* note 58 (reporting cases from various jurisdictions where defendants represented by overworked public defenders spent lengthy periods in jail before trial, including James Thomas who was jailed eight-and-a-half years waiting for trial); *see also* Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1729 (2002).

381. *See* Colbert, *supra* note 48, at 6; MALCOLM M. FEELEY, *THE PROCESS IS PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); *see also infra* notes 540-41 and accompanying text. After languishing for almost six months in jail without seeing a lawyer, Ramiro Games pleaded guilty to simple possession of cocaine, a misdemeanor, despite having no attorney and no understanding that he was even pleading guilty. Ruben Castaneda, *Without English, Inmate was Trapped*, WASH. POST, Apr. 10, 2006, at A1. Circuit Court Judge Vincent Femia, who accepted Games' plea, admitted: "My object in this case was not criminal justice. My object was to get him the hell out of jail." *Id.* For an excellent overview of the serious consequences of pretrial detention, *see generally* Colbert et al., *supra* note 380.

382. Indeed, "[t]he threat of differential punishment, whether phrased in terms of rewarding a plea of guilty or of penalizing the exercise of the right to trial, is the essence of the plea bargaining process." Alschuler, *supra* note 70, at 952.

383. Not only did Christopher Ochoa falsely confess to assisting his roommate Richard Danziger in a murder that neither were involved in, but he pleaded guilty to avoid the death penalty, even though it also meant testifying against his roommate. Innocence Project, Case Profiles: Christopher Ochoa, [http://www.innocenceproject.org/case/display\\_profile.php?id=84](http://www.innocenceproject.org/case/display_profile.php?id=84) (last visited Feb. 28, 2006). After another person later confessed, DNA evidence inculpated that person and exonerated Ochoa and Danziger. *Id.* Both men were released after serving twelve years. *Id.*

384. A recent high-profile case involving a Kansas University basketball player highlights the pressure that can be brought to bear upon a defendant. Jeremiah

Thus, even with competent counsel, going to trial can be incredibly risky business. Take, for example, a high school teacher and basketball coach accused by one of his female players of fondling her. Charged with sexual assault and suspended from school, the defendant, if convicted, faces not only serious prison time but also the loss of his teaching license. Although the teacher insists that he is innocent, defense counsel can find nothing to discredit the testimony of the complaining witness. Thus, the trial ultimately will turn on the jury's assessment of the credibility of the two parties. If the defendant is offered probation—albeit resulting in the loss of his teaching license—should he turn down the plea bargain because he trusts the jury will reach the correct result and vindicate him? Or should the defendant cut his potential losses and plead guilty rather than risk a jury verdict that could result in a prison sentence of up to twenty years?<sup>385</sup> Realistically, many innocent defendants caught in this dilemma choose to plead guilty.

Some innocent defendants learn the hard way that they will not necessarily be vindicated should they decide to go to trial. Consider,

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Croswell was beaten badly by a group of ten to twelve men in the parking lot of a Lawrence, Kansas nightclub after an altercation in that club. Jason King, *Croswell Placed on Probation*, KAN. CITY STAR, Nov. 2, 2005, at D5. One of Croswell's assailants was J.R. Giddens, a star player on the Kansas basketball team. *Id.* Facing a misdemeanor charge of battery for allegedly hitting Giddens inside the bar, Croswell claimed he acted in self-defense and was prepared to go to trial. *Id.* Prosecutors told Croswell that if he refused their plea agreement they would add felony charges and with his criminal background, he would face twenty-three to 230 months in prison if convicted. *Id.* As Croswell's attorney, Billy Rourke, observed,

It's unfortunate they put us in that position. I would have gone to trial in a heartbeat, because I truly believe he is innocent. But you don't want to put your life in the hands of 12 people (a jury) who weren't there. You never know what they'll do.

I would have put on a good defense, but there's no way to guarantee that Jeremiah wouldn't have been found guilty. And if he was found guilty, he would have paid a major price and been victimized even more. It wasn't worth the gamble.

*Id.* Accordingly, despite insisting he never hit Giddens, Croswell pleaded no contest and was placed on probation for twelve months. *Id.*

385. This example is taken from a case that I consulted on in Oklahoma. If convicted, the defendant faced up to twenty years in prison. OKLA. STAT. ANN. tit. 21, § 1123 (West Supp. 2006). Given jury sentencing in Oklahoma, it is very difficult for counsel to predict how many years a defendant would actually receive if found guilty. Oklahoma juries, however, are well-known for meting out harsh sentences in sexual assault cases, especially when the victim is a minor. Moreover, the defendant would serve at least 85 percent of the sentence imposed. OKLA. STAT. ANN. tit. 21, § 13.1 (West 2002).

for example, the decision Arthur Lee Whitfield faced.<sup>386</sup> Whitfield was accused of raping and robbing one woman and then, less than an hour later, raping a second woman.<sup>387</sup> Both women positively identified Whitfield.<sup>388</sup> Whitfield went to trial on the first case, claiming that the women had misidentified him.<sup>389</sup> Although both victims said the rapist had no facial hair, Whitfield and his family testified he had a beard the night of the attacks and was home that night.<sup>390</sup> Notwithstanding this testimony, Whitfield was convicted and sentenced to forty-five years in prison.<sup>391</sup>

Whitfield knew that the jury had gotten it wrong. Facing a second trial, Whitfield now had to decide whether to trust a second jury or to accept a guilty plea and limit his exposure to additional time in prison.<sup>392</sup> Although he knew he was innocent—and twenty-two years later DNA evidence proved him right<sup>393</sup>—Whitfield also was painfully aware of the long odds he faced in going to trial. It should not be surprising that Whitfield elected to plead guilty despite his innocence.<sup>394</sup> Whitfield received an eighteen-year sentence which was to run consecutively to the original forty-five-year sentence.<sup>395</sup>

Justice Scalia's misguided notion that nothing in our system encourages or allows an innocent person to plead guilty also ignores the plight of defendants like Larry McVay who appear for trial unrepresented and are offered the choice of accepting a proffered plea bargain or having their bail revoked and returning to jail until the next trial date.<sup>396</sup> Nicholas Souder faced a similar predicament when he appeared for trial unrepresented by counsel.<sup>397</sup> Souder was eighteen years old when he was charged with two counts of aggravated assault and one count of possession of a firearm during the commission of a

386. Whitfield's case is described at Innocence Project, Case Profiles: Arthur Lee Whitfield, [http://www.innocenceproject.org/case/display\\_profile.php?id=150](http://www.innocenceproject.org/case/display_profile.php?id=150) (last visited Feb. 28, 2006).

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *See* Brulliard, *supra* note 329.

394. *See id.*

395. *See* Innocence Project, Case Profiles: Arthur Lee Whitfield, *supra* note 386.

396. For a compelling look at the systemic deprivation of the right to counsel of many of the poor in Wisconsin and the corresponding pressure on unrepresented defendants to plead guilty, see Zahn & McBride, *supra* note 58.

397. E-mail from Mike Mears, Dir. of the Ga. Public Defender's Council, to author (Oct. 21, 2005, 15:58 CST) (on file with author).

crime.<sup>398</sup> Unable to make bond, Souder had been in jail for over six months before his trial date.<sup>399</sup> His appointed counsel died and no one was appointed to replace him.<sup>400</sup> After Souder entered a guilty plea to three charges, the trial judge asked Souder if he had been promised anything to get him to plead guilty.<sup>401</sup> Souder replied, "No. I ain't got a lawyer."<sup>402</sup> The judge then asked if anybody forced him to plead guilty and Souder responded, "Why not if I ain't got no lawyer to help represent me."<sup>403</sup> I can't fight this, I don't know nothing about this."<sup>404</sup> The judge then remarked, "Put him on trial, had to have somebody to try anyway."<sup>405</sup>

After this colloquy, Souder talked with the judge off the record.<sup>406</sup> At this time, the defendant was told that if he went to trial and was found guilty he would be sentenced to forty-five years in prison.<sup>407</sup> To an eighteen-year old with a sixth-grade education, the prospect of going to trial without a lawyer and without any witnesses in the face of the threat of forty-five years in prison was overwhelming.<sup>408</sup> Understandably, Souder pleaded guilty and received a ten-year prison sentence. It would take six years for Souder, aided by competent counsel, to undo that guilty plea and secure an acquittal at trial.<sup>409</sup>

Persistence and good lawyering ultimately paid off for Nicholas Souder. For a defendant who meets his lawyer for the first time on the night before trial, however, it is hard to resist the pressure to plead.<sup>410</sup> Few appreciate the frustration and sense of hopelessness that confronts the defendant who has had little to no contact with the state-paid lawyer

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398. Transcript of Guilty Plea Proceedings at 2, *State v. Souder*, No. 99R-705 (Spalding County, Ga. Super. Ct. Feb. 21, 2000).

399. E-mail from Mike Mears, *supra* note 397.

400. *Id.*

401. Transcript of Guilty Plea Proceedings at 4, *Souder*, No. 99R-705.

402. *Id.*

403. *Id.*

404. *Id.* at 4-5.

405. *Id.* at 5.

406. E-mail from Mike Mears, *supra* note 397.

407. *Id.*

408. *Id.*

409. *Id.*

410. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 12 (describing the case of an innocent defendant represented by a contract lawyer who met the client the night before trial and convinced him to plead guilty to save his co-defendant wife). Five years later the client was released after the post-conviction investigation established his innocence. *Id.* For other accounts of jurisdictions in which "meet 'em and plead 'em" representation is commonplace, see *id.* at 16; Geri L. Dreiling, "Meet-and-Greet Pleas" Not Good Enough, ABA J. EREPORT, June 24, 2005, available at <http://www.abanet.org/journal/ereport/jn24plead.html>.



assigned to represent him. For many innocent defendants, the option of going to trial with a virtual stranger, who is urging them to plead guilty, is far too risky. It is unrealistic to expect that all or most innocent defendants will resist the pressure applied by defense counsel, family members, the prosecutor, and the judge to plead guilty and instead go to trial.<sup>411</sup> Not surprisingly, many innocent defendants succumb to the pressure to plead guilty, especially when the defendant is aware that defense counsel has spent so little time preparing the defendant's case.<sup>412</sup>

*G. Myth: Guilty Defendants Escape on Technicalities Because They Are Protected by Too Many Rights*

Most importantly of all, a popular misperception persists that criminal defendants are blessed with too many rights.<sup>413</sup> Critics rail against the exclusionary rule and point to *Miranda*<sup>414</sup> and its progeny as proof that judges overprotect the rights of criminals to the detriment of the public.<sup>415</sup> Lambasting the majority in *Brewer v Williams*,<sup>416</sup> Chief Justice Burger echoed the sentiments of many Americans:

411. This is especially true in misdemeanor cases where the process costs are often more than the punishment. See Alschuler, *supra* note 70, at 952-56. For a look at how the system pressured an innocent man to plead guilty after spending six months in a Georgia jail without being charged or seeing a lawyer, see Monroe Freedman, *For the Poor, Criminal Defense a Matter of Third World Justice*, LEGAL TIMES, Feb. 11, 1991, at 34. For a more extended look at the various systemic pressures on a defendant to plead guilty, see Uphoff, *supra* note 373.

412. For a case that highlights the difficulty of establishing innocence even with favorable DNA evidence, see *State v. Hammond*, 604 A.2d 793 (Conn. 1992). Ricky C. Hammond's conviction was reversed because, in light of DNA evidence, the appellate court had doubts about his guilt in light of the DNA evidence. CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMB., OLR RESEARCH REPORT: EXONERATIONS (2005-R-0381) (2005), available at <http://www.cga.ct.gov/2005/rpt/2005-R-0381.htm>. He ultimately pled guilty to two misdemeanors for time served despite continuing to insist he was innocent because the prosecutor threatened to retry him and Hammond did not want to risk conviction and a harsh sentence. *Id.* Additional DNA testing confirmed Hammond's innocence. *Id.* For more about the case of Ricky C. Hammond, see the Center for Public Integrity, Harmful Error, Connecticut, <http://www.publicintegrity.org/pm/states.aspx?st=CT> (last visited Apr. 13, 2006).

413. See Diane Carroll, *Death Won't Be Sought for Appleby*, KAN. CITY STAR, Nov. 3, 2005, at A1 (reporting that the father of a murdered girl complained of the DA's decision not to seek the death penalty, protesting that defendants have too many rights).

414. *Miranda v. Arizona*, 384 U.S. 436 (1966).

415. STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE 4 (1977); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court—by the narrowest margin—on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

. . . .

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found. In so ruling, the Court regresses to playing a grisly game of "hide and seek," once more exalting the sporting theory of criminal justice which has been experiencing a decline in our jurisprudence.<sup>417</sup>

Yet, the reality of the impact of *Miranda* is a far cry from the claims of its detractors. Most observers agree that the police have not been unduly restricted in their ability to obtain confessions.<sup>418</sup> Despite the fears of *Miranda*'s critics, many defendants continue to give

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ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 125-27 (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 439 (1989).

416. 430 U.S. 387 (1977).

417. *Id.* at 415-17 (Burger, C.J., dissenting) (citations omitted).

418. Based on a survey of judges, prosecutors, and police officers, as well as a number of empirical studies, a special committee of the ABA's Criminal Justice Section concluded that *Miranda* posed no significant problems for law enforcement. ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC., CRIMINAL JUSTICE IN CRISIS 28 (1988). There have been a host of commentators who have concluded that the *Miranda* decision has not hampered the ability of the police to secure confessions. See, e.g., White, *supra* note 363, at 1246 (stating that an overwhelming majority of suspects waive *Miranda* rights and talk to the police); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 501-03 (1996) (finding that *Miranda* has virtually no adverse effect on law enforcement); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1011 (2001) (exploring *Miranda*'s impact and finding it "negligible"). But see Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (arguing that *Miranda* has had long-term negative effects on law enforcement effectiveness). For an excellent summary of a series of articles debating the impact of *Miranda* in practice, see YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 673-75 (11th ed. 2005).

statements to the police and only rarely are those statements suppressed.<sup>419</sup> Even in those instances when a statement is suppressed, the prosecution can often still go forward with its case and ultimately secure a conviction. In the famous “Christian Burial Speech” case, *Brewer v. Williams*,<sup>420</sup> for example, the decision to suppress the defendant’s confession because of the officer’s purposeful violation of the defendant’s rights did not prevent the prosecution from eventually convicting the defendant.<sup>421</sup>

Moreover, limitations on *Miranda*, together with exceptions to the exclusionary rule, substantially blunt *Miranda*’s impact.<sup>422</sup> Even if a judge rules that the police deliberately failed to warn a defendant as *Miranda* requires, evidence or witnesses discovered as a result of an unwarmed but voluntary statement can still be used against the accused.<sup>423</sup> Similarly, practical considerations severely limit the extent to which *Miranda* hampers the police or protects suspects from police overreaching. Generally, most jurisdictions do not have any mechanism in place to promptly honor a defendant’s request for counsel.<sup>424</sup> Thus, even if a person does request counsel after being

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419. See, e.g., George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1998-2000 (2004) (concluding that most suspects waive their rights and almost always lose suppression motions).

420. 430 U.S. 387, 392-93 (1977).

421. See *Nix v. Williams*, 467 U.S. 431 (1984) (recognizing an inevitable discovery exception to the exclusionary rule and reversing the court of appeals’ decision overturning Williams’ conviction).

422. For example, in *Harris v. New York*, 401 U.S. 222 (1971), the Court held that a defendant’s statement following inadequate *Miranda* warnings could still be used to impeach the defendant’s testimony at trial. See also *New York v. Quarles*, 467 U.S. 649 (1984) (carving out a public safety exception to *Miranda*). Numerous commentators have discussed the extent to which subsequent decisions have severely curtailed *Miranda*’s impact. See, e.g., William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975 (2001); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987).

423. See *United States v. Patane*, 542 U.S. 630, 642 (2004) (stating that the “fruit of the poison tree” doctrine does not apply to evidence obtained as a result of a statement made in violation of *Miranda* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963))).

424. In underfunded jurisdictions, especially those without a public defender office, where counsel is not assigned until after a court appearance, no counsel would be available to come to the police station even if a police officer actually wanted to provide one for the suspect. Even in states with statewide public defender offices, it would be rare to find an established system set up to provide counsel to an indigent suspect who asked for counsel at a preindictment interrogation. The public defender programs in Wisconsin and Missouri have mechanisms in place to make counsel available if a suspect requests counsel. Only in the rarest of instances has a public defender ever been called. E-mail from Cathy Kelly, Training Dir., Mo. State Pub. Defender Sys., to author (Sept. 27, 2005, 12:19 CST) (on file with author) (stating that

advised of the right to a lawyer,<sup>425</sup> the officer will rarely stop the interrogation and call an attorney. The officer is more likely to advise the suspect that an attorney will not be provided until the accused gets to court.<sup>426</sup> Even if some system is established to make counsel available, it is extremely unlikely that police would break off an interrogation and locate counsel to come to the defendant's aid. Rather, law enforcement officers either wait until the defendant initiates contact to resume questioning the suspect<sup>427</sup> or simply ignore the defendant's request and continue their interrogation.<sup>428</sup>

Indeed, despite continued public criticism of *Miranda*, the law enforcement community has found it quite easy to evade the protections *Miranda* supposedly provides.<sup>429</sup> Some police departments have trained their officers to ignore the defendant's request for counsel.<sup>430</sup> Other officers have been trained to delay giving *Miranda* warnings until they

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it is rare for a sheriff or police officer to call the public defender looking for counsel and that she has only been called once in twenty years); E-mail from Neil McGinn, Assistant Wis. State Pub. Defender, to author (Jan. 3, 2006, 15:15 CST) (on file with author) (stating that his office has been ready to respond with an answering service or beeper system, but that the police never call). McGinn reports that, in Milwaukee, not only are public defenders never called by the police to speak to a suspect, but the police make it impossible for public defenders to gain access to their clients in police custody until the clients are transferred to the county jail or released. E-mail from McGinn, *supra*. Despite calls from family members indicating that a spouse, child, or relative is in custody and wishes to speak to a lawyer from the public defender's office, public defenders are denied access to these persons. *Id.* According to McGinn, the police claim that they do not have a secure room in the main police department building for in-custody suspects to meet with an attorney. *Id.*

425. Assuming, that is, that the request is unambiguous. Officers are free to ignore an ambiguous request for counsel and continue interrogating the suspect. *Davis v. United States*, 512 U.S. 452, 459 (1994).

426. See *Duckworth v. Eagan*, 492 U.S. 195, 203-04 (1989) (holding that *Miranda* does not require that attorney be producible on call, and that a statement by an officer that an attorney would be appointed when the suspect went to court was sufficient).

427. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that a suspect who has invoked the right to counsel may not be subjected to further interrogation unless the suspect initiates further communication with the police).

428. *Missouri v. Siebert*, 542 U.S. 600, 610 n.2 (2004) (recognizing that police are trained to deliberately ignore a suspect's invocation of the right to counsel).

429. See, e.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999). For a look at how the Baltimore police manage to get so many suspects to incriminate themselves, see DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 193-207 (1991).

430. For a disturbing look at the manner in which police officers are trained to ignore requests for counsel and evade *Miranda*, see Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).

secure a confession.<sup>431</sup> Others have knowingly exploited the fact that, even if the confession is suppressed, evidence seized or witnesses discovered as a result of the illegally obtained confession may still be used against the defendant.<sup>432</sup> Not surprisingly, therefore, few in the law enforcement community were upset when *Miranda* was upheld in *Dickerson*.<sup>433</sup> Unlike the general public, the police fully recognize the limited protection *Miranda* really offers.

Nonetheless, people continue to mistakenly believe that, as a result of having so many rights, a sizeable number of guilty defendants are getting off scot-free, especially on legal technicalities. Certainly prosecutors and the police—and talk show pundits—can point to cases where defendants have gone free despite their fervent beliefs that the defendants were guilty.<sup>434</sup> Undoubtedly, there are cases in which the guilty have gone free, but rarely because of some technicality. In fact, only a limited number of cases are dismissed on procedural grounds or because of suppression motions based on constitutional violations.<sup>435</sup>

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431. *Siebert*, 542 U.S. at 609 (describing the training provided to Rolla, Missouri police officers to withhold giving *Miranda* warnings, and noting that national police training organizations provided similar training).

432. *See Michigan v. Tucker*, 417 U.S. 433 (1974) (holding that the *Wong Sun* fruits doctrine does not extend to a prosecution witness discovered as a result of a statement taken in violation of *Miranda*).

433. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). For a look at why the police generally support *Miranda* and do not wish it overruled, see Leo, *supra* note 418, at 1021-23.

434. *See Boyer*, *supra* note 288, at 42-43, 50-51 (describing the belief of prosecutors and police in two cases that men freed by DNA were actually guilty); John Gibbaut, *Murderer Freed—Because He Intended To Do It*, ABA J. REP., Dec. 9, 2005, <http://www.abanet.org/journal/ereport/d9murder.html> (reporting a “disturbing case” in which a convicted murderer walked free on appeal because the jury convicted him of one of two inconsistent theories that were submitted to the jury and the evidence did not fit that theory). *But see supra* notes 162-69, 314-15 and accompanying text (discussing the Brenton Butler acquittal). Prosecutors and the police continued to maintain after the *Butler* verdict that a guilty person had gotten off. *See Jim Schoettler & Paul Pinkham, Sheriff, State Attorney Want Their Agencies Probed*, FLA. TIMES-UNION (Jacksonville), Feb. 27, 2001, at A1. It was only after evidence led to two other men that the police and prosecutors apologized for arresting and prosecuting Butler. *Id.* The police continued to deny striking or threatening Butler and claimed to have no idea why Butler confessed to something he had not done. Jim Schoettler & Paul Pinkham, *2 Men Linked to Murder After Teen Acquitted*, FLA. TIMES-UNION (Jacksonville), Feb. 22, 2001, at A1. Similarly, in the case of Rolando Cruz, the lead prosecutor and police involved in the case continued to insist that Cruz was involved in the crime even after DNA evidence exculpated Cruz and inculpated another convicted murderer who had earlier confessed to killing the victim Cruz allegedly murdered. *See Berlow*, *supra* note 28, at 66-68. For a further look at the Cruz case, see NAT’L INST. OF JUSTICE, *supra* note 348, at 44-46; SCHECK, NEUFELD & DWYER, *supra* note 153, at 226-32.

435. *See, e.g.*, Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1406-09 (1986) (discussing the reasons for the rare success of suppression motions); *The Jury*

Generally, most cases are dismissed, or acquittals occur, because of an absence of physical evidence or credible witnesses, not as a result of some legal technicality. Although this is how the adversary system is supposed to work, it is often hard for victims and the general public to appreciate that justice has been done when a not-guilty verdict is returned. Yet in the end, despite the panoply of defendants' rights, the vast majority of defendants plead guilty or, if they go to trial, are convicted.<sup>436</sup>

To much of the public and many of the regular players in the criminal justice system, the fact that the overwhelming majority of defendants plead guilty or are found guilty at trial demonstrates that the system generally works as designed.<sup>437</sup> They presume that virtually all defendants are guilty, so if a defendant enters a guilty plea or goes to trial and loses, it is to be expected.<sup>438</sup> This presumption of guilt is based on the widely held, but unwarranted, assumption that police and prosecutors effectively screen out innocent people during the arrest and charging process.<sup>439</sup> They believe that, in the rare instances in which the State does go forward with charges against an innocent person, defense counsel will normally bring forward the appropriate evidence to correct the mistake.

Given this perspective, if a defendant's case is dismissed based on a suppression motion or the defendant is acquitted at trial, it is understandable why such outcomes are often met with skepticism or

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*and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 143 (1995) (statement of Thomas Y. Davies) (reporting that there is a "virtual consensus" that only a tiny number of all arrests are lost because of the inadmissibility of seized evidence); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the Costs of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 617 (finding that only about 1 percent of felony prosecutions were lost due to the suppression of physical evidence); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 20-22 (2001) (noting that studies consistently show that successful suppression motions are quite rare and mostly occur in minor cases).

436. See PATRICK A. LANGAN & HELEN A. GRAZIADEI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCING IN THE STATE COURTS, 1992, at 9 (1995) (reporting that about 92 percent of all felony state convictions are the result of guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 (reporting that 78 percent of defendants who exercised their right to trial were convicted).

437. Givelber, *supra* note 338, at 1326-34.

438. For an insightful discussion of the presumption of guilt and the corresponding assumption that the innocent are rarely convicted, see *id.* at 1317-34.

439. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11-12 (1964) (describing the presumption of guilt and the operation of screening mechanisms in the Crime Control Model).

even outrage. Despite the homage paid to the presumption of innocence, the public has been conditioned to believe that whenever charges are filed, the defendant is, in fact, guilty.<sup>440</sup> Consequently, a dismissal or a not-guilty verdict is often seen as a system failure.<sup>441</sup> Indeed, even judges tend to view an acquittal as a failure of proof and not an exoneration of an innocent person.<sup>442</sup>

Not only does this presumption of guilt fly in the face of our deeply rooted commitment to presuming all defendants innocent until proven guilty, but it rests on a flawed premise that police and prosecutors efficiently and effectively separate the guilty from the innocent during the arrest and charging processes. Although some police departments and prosecutor's offices are excellent, there are too many examples of police and prosecutorial incompetence and corruption to realistically assume that, in the overwhelming percentage of cases, only the guilty are charged.<sup>443</sup> Moreover, even the best police officers can be misled into arresting and initiating charges against a suspect identified by an honest, but wrong, eyewitness. Given the fact that many cases turn on eyewitness identification testimony, the potential for innocent persons to be caught up in the system is frighteningly real.

Contrary to this presumption-of-guilt perspective, it is often difficult to know whether a not-guilty verdict represents a failure by the

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440. See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 334 (1995) (citing to articles and cases discussing the pervasive presumption of guilt once a defendant is arrested).

441. Daniel Givelber makes a similar observation. See Givelber, *supra* note 338, at 1317, 1328-36.

442. This tendency to view not-guilty verdicts primarily as the system's failure to convict the guilty follows from the widely held judicial belief that most defendants are guilty. Bazelon, *supra* note 338, at 26; see also *supra* note 227 and accompanying text. Given this perspective, it is not surprising that courts permit conduct resulting in a not-guilty verdict to be used against a person in a subsequent case. *United States v. Watts*, 519 U.S. 148, 157 (1997) (allowing the sentencing court to take into consideration a defendant's past acquittal to enhance punishment as long as the charged conduct could be proved by a preponderance of the evidence). On the other hand, some judges are willing to instruct the jury that "[t]he government always wins when justice is done," regardless of whether the verdict is guilty or not. *City of Fayetteville v. Edmark*, 801 S.W.2d 275, 281 (1990) (quoting EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 15.01 (3d ed. 1977)); see also *MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL)* Instruction 2-5 cmt. (Matthew Bender & Co. Inc. 2005) (regarding "The Government as Party").

443. For a damning indictment of the justice system in Oklahoma County, see FUHRMAN, *supra* note 321. For a sampling of other reports and articles documenting police and prosecutorial misconduct, see Terry McDormott & Rafael Perez, *The Road to Rampart*, L.A. TIMES, Dec. 31, 2000, at A1; Corey Kilgannon, *Abuse by Prosecutors Is Alleged in Queens*, N.Y. TIMES, Feb. 16, 2006, at B1; Armstrong & Mills, *supra* note 365.

prosecutor to marshal enough evidence to convict the guilty or the vindication of an innocent person who was wrongly accused. A recent review of a sample of cases of inmates in Virginia revealed a 6 percent rate of wrongful convictions.<sup>444</sup> This review was of a small group of cases in which there was a DNA sample that had not been previously tested, but when tested showed that the defendant's conviction was erroneous.<sup>445</sup> In each of these cases, the police, prosecutors, and the jury were convinced—albeit erroneously—that the defendant was guilty.<sup>446</sup> Admittedly, this is a small sample. Nevertheless, in light of this review, of the realities of the criminal justice system, and of the growing number of DNA exonerations nationally, the assumption that not-guilty verdicts generally are failures of proof is simply not warranted.

Those who cling to the notion that our criminal justice system minimizes wrongful convictions by offering defendants too many rights also fail to appreciate the bleak reality of the right to counsel for many Americans. Many defendants have no meaningful right to counsel, thereby rendering many of their rights superfluous. Not only are police and prosecutors under-resourced and prone using shortcuts, but the overworked public defender or contract lawyer does not have the time to do the investigation needed to remove innocent defendants from the system. Ironically, too often it is counsel's lack of preparation—or blunders—that deprives a defendant of a meaningful opportunity to obtain justice.<sup>447</sup> With no meaningful way to challenge the prosecution's case, defendants like Richard Heath<sup>448</sup> and Nicholas

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444. Editorial, *Errors of Justice*, WASH. POST NAT'L WKLY. ED., Dec. 26, 2005-Jan. 8, 2005, at 24.

445. *Id.*

446. *See id.*

447. *See, e.g.,* *Coleman v. Thompson*, 501 U.S. 722 (1991) (stating that Coleman's lawyers filed a document three days late thereby causing a procedural default that blocked federal habeas review despite the claim of actual innocence); *Taylor v. Illinois*, 484 U.S. 400 (1988) (holding that the defendant was barred from calling witnesses because counsel failed to provide timely notice to the prosecution); *Heath v. State*, 601 S.E.2d 758, 762 (Ga. Ct. App. 2004) (allowing the defendant to withdraw a guilty plea because defense counsel's representation "did nothing to preserve a meaningful adversarial atmosphere" and his deficiencies prejudiced the defendant).

448. Richard Heath's contract lawyer conducted no factual or legal investigation into the charge that Heath caused serious injury by a vehicle. *See Heath v. State*, 601 S.E.2d 758, 759-60 (Ga. Ct. App. 2005). Heath was told he was a drunk and his only option was to plead guilty. *See id.* A year later, without any further meetings with his lawyer, Heath pled guilty and received fifteen years in prison. *Heath v. State*, 574 S.E.2d 852, 853 (Ga. Ct. App. 2002). Ultimately, as a result of counsel's woeful performance, Heath was permitted to withdraw his guilty plea. *Heath*, 601 S.E.2d at 762.



Souder<sup>449</sup> simply plead guilty. Alternatively, if they go to trial like Jimmy Ray Bromgard or Ronald Williamson, they are convicted.<sup>450</sup> Once convicted, procedural rules frequently bar defendants from litigating certain issues and may even prevent them from establishing their innocence.<sup>451</sup> In the end, given the realities of the criminal justice system, the peril of convicting the innocent looms much larger than the danger of letting the guilty go free.

#### IV. BARRIERS TO SYSTEMIC REFORMS

##### A. *Entrenched Attitudes*

Despite lofty rhetoric, the American criminal justice system does not ensure all criminal defendants the right to effective assistance of counsel. Rather, defendants across the country are afforded representation that varies dramatically from excellent to laughable. Laughable, that is, except for the sad reality that a defendant's liberty—and, in some instances—life, depends on the defense mounted by defense counsel.<sup>452</sup> The aspirational goal of equal justice rings hollow to the many defendants who are provided incompetent counsel or an overworked and underpaid lawyer who lacks the time and resources to prepare a defense.

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449. See *supra* notes 397-409 and accompanying text.

450. See *supra* notes 113-40 and accompanying text.

451. *In re Wilson*, 433 F.3d 451 (5th Cir. 2005) (acknowledging the harsh result in a death penalty case involving a prima facie showing of mental retardation but denying authorization to file a successive habeas petition because counsel missed the one-year deadline under the Antiterrorism and Effective Death Penalty Act [AEDPA]); see also *infra* note 468 and accompanying text. For an excellent discussion of the procedural hurdles a defendant must overcome to establish his or her innocence, see Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005).

452. As Stephen Bright has observed, the protracted judicial debate as to whether Joe Cannon, the lawyer who admittedly slept through substantial portions of a capital murder case, provided effective assistance of counsel would, to many people, be quite humorous were it not for the fact that Cannon's client was on trial for his life. Stephen Bright, Dir. of the S. Ctr. for Human Rights, Crime, Prison, and the Death Penalty: The Influence of Race & Poverty, Address at the Washington University School of Law (Nov. 2, 2005). For a look at the controversy over Cannon's representation of Calvin Burdine, see *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), cert. denied, 535 U.S. 1120 (2002). Cannon's inept representation drew attention to the problem of incompetent lawyering. See, e.g., *Alert: Snoozing Lawyer Ruling Mocks Assistance of Counsel Right*, HOUS. CHRON., Nov. 2, 2000, at A36 (observing that the panel decision in *Burdine* meant that "an attorney merely must have passed the bar and have a pulse to meet a defendant's constitutional right to counsel").

Yet for many Americans, particularly politicians, this observation, at least initially, is unlikely to generate any serious concern. The problem is that many Americans have deeply held attitudes about crime and the criminal justice system that are, at least in part, a function of misconceptions or misunderstandings about both the theory and actual workings of the system. Since *Gideon* and the Warren Court's expansion of defendants' rights, there has been a heated debate in this country about whether courts are coddling criminals and handcuffing the police or placing appropriate limits on governmental power.<sup>453</sup> Politicians and some critics have been quick to blame activist judges for overprotecting defendants and creating rights where none had previously existed.<sup>454</sup> Law enforcement and prosecutors frequently have joined in on the attack against "liberal," "soft-on-crime" judges.<sup>455</sup> The rhetoric at times has been quite shrill.<sup>456</sup> The fear of crime—and, in the case of politicians, of being labeled soft on crime—has for years adversely affected society's ability to rationally discuss crime and the criminal justice system.<sup>457</sup>

The American public's fascination with high profile criminal trials, a fascination fueled by the popular press, talk radio, and cable television "analysts," has contributed to the perpetuation of myths about the system and distorted the dialogue about needed reform. Moreover, cases like those of O.J. Simpson and Kobe Bryant<sup>458</sup> have

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453. Much of the disagreement has focused on the exclusionary rule and the merits of allowing the guilty to go free because the constable has blundered. For a helpful overview of the debate over the exclusionary rule, see Dripps, *supra* note 433, at 5-11.

454. See, e.g., *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 90th Cong. (1967); Abner J. Mikva, *Is Judicial Independence in Danger? Impeachment Talk Is Bound to Affect Judges' Decision-Making*, FULTON COUNTY DAILY REP. (Atlanta, Ga.), June 3, 1997 (commenting on attacks on the judiciary, including calls for impeachment, because judges took antimajoritarian positions including protecting defendants in criminal cases).

455. See, e.g., Paul English, *Bar Panels Seek Ban on DAs in Judicial Races*, DAILY OKLAHOMAN, Sept. 17, 1999 (reporting on district attorneys campaigning against soft-on-crime judges).

456. See, e.g., Editorial, *More Judicial Nitpicking*, OKLAHOMAN, Nov. 30, 1988, at 8 (criticizing Judge Parks for reversing another conviction and "siding with defendants").

457. For a look at a few of the many scholars who have discussed the politics of crime and the apparent need of virtually all American politicians to take "tough-on-crime" positions, see, for example, MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004). See also Gershowitz, *supra* note 50, at 595-98; Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

458. See *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

only served to reinforce in the minds of many people a number of commonly held myths: that criminal defendants are afforded too many rights; that criminal defense lawyers engage in unsavory practices to free guilty clients; that many guilty defendants get off on technicalities; and that prosecutors and police are outmatched by defense lawyers who trick naive jurors into acquitting their guilty clients. Lost in the endless discussions about these high-profile cases, and what they tell us about justice in America, is the fact that such cases offer little insight into the actual workings of the system. Such cases are outliers because only a tiny fraction of Americans can muster the resources to mount the type of defense that was available to O.J. Simpson. Such cases distort, rather than illuminate, because they do not accurately portray the circumstances that confront the overwhelming number of criminal defendants or the manner in which the vast majority of cases are handled in the system.

For much of the public, sensational decisions like *Brewer v. Williams*<sup>459</sup> foster an attitude of resentment toward federal judicial intervention in the operation of the state criminal justice systems. Few people respond favorably to a federal decision overturning a state court conviction that appears to allow a brutal child murderer to go free. Predictably, police, prosecutors, and even state court judges frequently complain about federal judicial meddling.<sup>460</sup> Once again, the popular tendency is to blame liberal judges for allowing the guilty to escape justice at the expense of victims and in the face of the valiant efforts of local law enforcement officials.<sup>461</sup>

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459. 430 U.S. 387 (1977).

460. For example, Alabama Supreme Court Associate Justice Tom Parker blasted his colleagues for missing an opportunity “to actively resist” the unconstitutional opinion of liberal activists on the United States Supreme Court when the Alabama court removed a man from death row who had been a minor at the time of his crime. Tom Parker, Letter to the Editor, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2006, at 4B.

461. See, e.g., Robert Boczkiewicz & Diana Baldwin, *Death Sentences Stricken; Chemist’s Testimony Cited in Appeals Court Ruling*, DAILY OKLAHOMAN, Aug. 14, 2001, at 1A (reporting that the father of a murder victim chastised appellate judges for reversing the conviction, calling them “pin-headed people”); Nolan Clay, *Faded Memories, Missing Witnesses May Hamper New Trial*, DAILY OKLAHOMAN, Feb. 3, 1986, at A1 (reporting that the jury foreman found the reversal of the murder conviction based on withholding of exculpatory evidence impossible to understand and a technicality that leaves jurors wondering why they wasted their time); FINE, *supra* note 140, at 15 (criticizing plea bargaining for allowing the guilty to escape appropriate punishment).

### B. Legislative and Judicial Indifference

Perception, of course, matters. Myths or popular misconceptions about the operation of the criminal justice system affect behavior, especially that of elected officials. The legislative and executive branches regularly react to popular opinion by seeking to roll back defendants' rights.<sup>462</sup> Complaints about lengthy appeals and the lag between conviction and execution led to the elimination of funding for death penalty resource centers and the passage of the Antiterrorism and Effective Death Penalty Act of 1996.<sup>463</sup> This legislation was passed despite the fact that 68 percent of all death penalty verdicts from 1973 to 1995 were reversed because of serious error.<sup>464</sup> To Congress, the politically expedient solution was to restrict the ability of defendants to effectively raise claims of error and the jurisdiction of the federal courts to do anything about such errors, rather than address the problem of widespread error in death penalty cases. Even now, in the face of numerous DNA exonerations, when it is obvious that overburdened, underfunded state criminal justice systems need to be fixed, not sped up or immunized from challenge, some continue to clamor for shortening the appeals process or further restricting habeas review.<sup>465</sup>

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462. For example, in the wake of sharp criticism of the *Miranda* decision, Congress enacted 18 U.S.C. § 3501. Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV 175, 194-96 (1999). Indeed, Senator McCellan, the primary sponsor of the measure that would become § 3501, called the bill "my petition for [a] rehearing" on *Miranda*. *Id.* at 195. The Senate Committee report that accompanied McCellan's bill proclaimed the need for such legislation because "crime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities." S. REP. NO. 90-1097, at 37 (1968). The report concluded that "the rigid and unflexible requirements of the majority opinion in the *Miranda* case [were] unreasonable, unrealistic, and extremely harmful to law enforcement." *Id.* at 46. Given *Miranda's* unpopularity, it is not surprising that politicians were eager to attack it. As Adam Gershowitz observed, "elected officials typically have little or no interest in protecting the rights of criminal defendants." Gershowitz, *supra* note 50, at 599.

463. See Bright, *supra* note 83, at 799-801 (discussing the politics of eliminating funds for the death penalty resource centers and passing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No 104-132, 110 Stat. 1214 (amending 28 U.S.C. § 2244 (d)(1) (2000)), despite the fact that the resource centers had established the innocence of at least three men sentenced to death).

464. See LIEBMAN ET AL., A BROKEN SYSTEM, *supra* note 12.

465. Senator Jon Kyl of Arizona and his supporters introduced S. 1088, the so-called Streamlined Procedures Act of 2005, which would strip federal courts of essentially all authority to review state convictions and sentences. Marcia Coyle, *More Fuel Added on Fire Over Federal Habeas Bill*, NAT'L L.J., Oct. 17, 2005, at 1. The Judicial Conference and the American Bar Association oppose the bill. Editorial, *Blinding Justice*, N.Y. TIMES, Nov. 17, 2005, at A30 (arguing that the Streamlined Procedures Act will take away important protections and make the system less fair and

Just as hard cases make bad law,<sup>466</sup> highly publicized criminal cases routinely lead to short-sighted, poorly crafted legislation or ill-advised judicial decisions.<sup>467</sup> As a result of the furor over O.J. Simpson's acquittal, for example, lawmakers introduced numerous pieces of legislation, not only in California, but around the country.<sup>468</sup> Although such corrective legislative measures are often very popular with their constituents, legislators tend to overreact when initiating systemic changes in response to a sensational case.<sup>469</sup> As a result, the rights of many may be restricted in an understandable, but often vain, attempt to prevent further tragedy.

In the end, state legislatures "consistently have failed to address defects in the criminal process, even when they rise to crisis-level proportions."<sup>470</sup> State legislatures have, for the most part, failed to adopt measures to improve the workings of the criminal justice system or fill the gaps left by Supreme Court decisions that specifically reserve regulation to the legislative branch.<sup>471</sup> Most importantly, by failing to adequately fund indigent defense services, legislators severely curtail

more likely to convict the innocent); Editorial, *No Airtight Case for Death*, BIRMINGHAM NEWS, Nov. 10, 2005, at 8A. (criticizing the death penalty system as costly, arbitrary, and a threat to innocent people, but noting that some prosecutors and politicians continue to blame lengthy delays for dampening the effectiveness of the death penalty).

466. *Ex parte Long* (1854) 3 W.L.R. 18 (Q.B.).

467. *See, e.g.*, *Nichols v. District Court*, No. PR-2001-446 (Okla. Crim. App. July 11, 2001) (affirming the trial court ruling denying Terry Nichols' motion to dismiss based on double jeopardy, and stating that the court will no longer permit interlocutory appeal of a double jeopardy motion).

468. *See, e.g.*, Eric C. Johnson, Public Law Research Inst., Proposed Reforms to the Criminal Justice System as a Reaction to the *Simpson* Verdict, <http://w3.uchastings.edu/plri/fal95tex/simpson.html> (last visited Apr. 4, 2006) (detailing a host of legislative initiatives); Maura Dolan, *Key State Panel to Consider Major Changes for Trials*, L.A. TIMES, Oct. 31, 1995, at A1 (discussing proposed legislation in light of the O.J. Simpson case); Stephen Labaton, *Lessons of Simpson Case Are Reshaping the Law*, N.Y. TIMES, Oct. 6, 1995, at A1 (discussing the extent to which the Simpson case generated calls across the country for overhauling various aspects of the criminal process).

469. *See* Associated Press, *Man Guilty in Car Wash Abduction and Killing*, USA TODAY, Nov. 18, 2005, at 3A (noting that the killing of Carlie Brucia, whose abduction was captured on videotape and shown on national television, "spurred the introduction of federal and state legislation to crack down on probation violators"); *see also* Marie Price, *Slain Teen's Mother Touts Bail Bill*, TULSA WORLD (Okla.), Dec. 9, 2005, at A13 (describing proposed legislation including "Caitlin's Law" and some restrictive bail provisions following the abduction and murder of a sixteen-year-old by a man free on bond).

470. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 45 (2001).

471. *See id.* at 45-46.

the extent to which most defendants can actually utilize the rights that have been given to them.<sup>472</sup> Legislative indifference to fixing the criminal justice system reflects political reality. Those persons most likely to be erroneously convicted or shortchanged by the criminal justice system have the least political clout—poor, young minority men.<sup>473</sup> Consequently, systemic reform, if it is to come at all, is more likely to come from the courts.<sup>474</sup>

Unfortunately, as cases such as *Illinois v Fisher*<sup>475</sup> and *United States v Ruiz*,<sup>476</sup> demonstrate, the U.S. Supreme Court has for some time been disinclined to use its supervisory powers or to invoke due process to regulate the police or to check prosecutorial power.<sup>477</sup> In part, the Court's reluctance to exercise more control over the police and prosecutors reflects a judicial philosophy far different from that of Justices Warren, Brennan, Marshall, and others who forged *Gideon*, *Miranda*, *Wade*, and similar decisions. Some on the current Supreme Court clearly believe that crafting measures to control the players within the criminal justice system is largely within the province of the legislative branch.<sup>478</sup> Yet, the failure on the part of at least some on the Court to appreciate the true workings of the system may also contribute to the current Supreme Court's unwillingness to act more decisively to addressing systemic problems.<sup>479</sup> Although some members of the Court

472. See Stuntz, *supra* note 40, at 9-11; Brown, *supra* note 297, at 806.

473. See Stuntz, *supra* note 40, at 28-29, 51 n.167.

474. Other commentators have made this observation. See, e.g., Dripps, *supra* note 468, at 46; Gershowitz, *supra* note 50, at 594-98.

475. 540 U.S. 544 (2004) (per curiam).

476. 536 U.S. 622 (2002).

477. See, e.g., *United States v. Hastings*, 461 U.S. 499 (1983) (holding that supervisory power could not be invoked to reverse a conviction in order to discipline offending prosecutors because the offending conduct was harmless in the case); *United States v. Payner*, 447 U.S. 727 (1980) (holding that the government's intentional exploitation of the standing doctrine did not justify exclusion of evidence because the defendant's own Fourth Amendment rights were not violated); see also Bennett L. Gershan, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 432 (1992) (“[S]upervisory power increasingly has been viewed as an unwarranted judicial intrusion into the exclusive domain of a coordinate branch of the government.”).

478. For a forceful presentation of this view, see *Dickerson v. United States*, 530 U.S. 428, 449-65 (2000) (Scalia, J., dissenting). See also Stuntz, *supra* note 40, at 76 (opining that the judicial reluctance to impose restraints on the criminal process “seems to have been motivated by a desire not to trench on the prerogatives of the politicians”).

479. See the discussion of *Ruiz*, *supra* notes 395-410 and accompanying text. It may also reflect, as Christopher Slobogin suggests, the Court's unfair prosecution bias. Christopher Slobogin, *Having It Both Ways: Proof That the U.S. Supreme Court Is “Unfairly” Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996).

acknowledge that too many defendants receive subpar representation,<sup>480</sup> the Court generally has applied *Strickland v. Washington's*<sup>481</sup> stringent standard to determine ineffectiveness of counsel claims narrowly.<sup>482</sup> Thus, despite widespread horrific lawyering, the Supreme Court and other federal appellate judges routinely invoke the prejudice prong of *Strickland*, harmless error, or the procedural default doctrine<sup>483</sup> to sustain convictions even though the State's proof may not have been subjected to meaningful challenge.

The Supreme Court's indifference to the plight of the many defendants, including the innocent, caught up in our under-resourced, plea-bargain-driven criminal justice system is distressing. It is particularly worrisome, for example, that the Supreme Court still does not recognize that the test it fashioned in *Youngblood* not only fails to protect the rights of many innocent citizens, but it in fact sanctioned the prolonged incarceration of an innocent man. In *Illinois v. Fisher*,<sup>484</sup> however, the Court reaffirmed the test created in *Youngblood*, holding that the State's destruction of potentially useful evidence does not violate due process absent a showing of bad faith by the police or the

480. See Justice John Paul Stevens, Assoc. Justice, Supreme Court of the United States, Address at the ABA Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html) (observing that a significant number of defendants in capital cases have not been provided with fully competent counsel and that there are "serious flaws in our administration of criminal justice"); Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty: Justice Rethinking the Law She Shaped*, CHI. TRIB., July 4, 2001, § 1, at 1 (reporting that Justice O'Connor acknowledges that criminal defendants often receive inadequate representation).

481. 466 U.S. 668 (1984).

482. As interpreted, the "ineffective assistance doctrine tolerates a very low activity level by defense attorneys." Stuntz, *supra* note 40, at 20; see, e.g., Mitchell v. Kemp, 483 U.S. 1026 (1987) (Marshall, J., dissenting) (criticizing the Court for refusing to grant certiorari and give life to the *Strickland* standard in a capital case in which court-appointed counsel failed to interview any potential mitigating witnesses or present any mitigating evidence despite the existence of extensive mitigating evidence). For an extended discussion of the extent to which the *Strickland* standard inadequately safeguards the constitutional guarantee of effective assistance of counsel, see William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 12-29; Bright, *supra* note 83, at 828-32; COLE, *supra* note 11, at 78-79.

483. See, e.g., LIEBMAN ET AL., *A BROKEN SYSTEM*, *supra* note 12 (finding that reviewing courts do not effectively keep serious error from recurring nor do courts catch all serious error in part because of stringent rules limiting reversals even in cases marred by error); see also Bright, *supra* note 83, at 796-832 (describing the difficult struggle facing indigent defendants trying to establish error in post-conviction proceedings).

484. 540 U.S. 544 (2004).

State.<sup>485</sup> The fact that Fisher specifically requested that particular physical evidence be produced did not eliminate his need to show bad faith on the part of the police.<sup>486</sup> Because the defense did not make any such showing, the Court reversed the decision of the Appellate Court of Illinois that had overturned Fisher's conviction.<sup>487</sup>

The *Fisher* court reiterated that the *Youngblood* bad faith requirement applied regardless of the centrality of the contested evidence to the prosecution or the defense.<sup>488</sup> Thus, even if the destroyed or lost evidence is a defendant's "only hope for exoneration" or "essential to and determinative of the outcome of the case," due process is violated only if bad faith can be shown.<sup>489</sup> This nearly insurmountable test virtually insulates the police from any judicial oversight with respect to the collection and handling of forensic evidence. It encourages, or at least tolerates, an unacceptable level of carelessness in the face of the growing number of DNA exonerations and other cases of wrongful convictions. Indeed, as *Youngblood's* own saga dramatically demonstrates, police mishandling of critical evidence compromises the pursuit of justice. The wrong person can be arrested, prosecuted, and convicted while the guilty person goes free. Given all of the other problems highlighted by this Article, the Court's continued reliance on a flawed, overly broad test is inexcusable. In the face of the growing awareness of the importance of forensic evidence in ensuring the reliability and accuracy in the criminal justice system, the Court should adopt the more nuanced test proposed by Justice Blackmun's dissent in *Youngblood*.<sup>490</sup>

Refreshingly, some state courts have rejected *Youngblood* and held the police in their states more accountable.<sup>491</sup> In spite of popular

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485. *Id.* at 549.

486. *Id.* at 545.

487. *Id.* at 548-49.

488. *Id.* at 549.

489. *Id.* at 548-49 (citations omitted).

490. *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988) (Blackmun, J., dissenting). Justice Stevens, in a concurring opinion in *Fisher*, continued to distance himself from the bad faith requirement, insisting that in some cases, even without a bad faith showing, the loss of critical evidence would render a trial fundamentally unfair. *See Fisher*, 540 U.S. at 549 (Stevens, J., concurring). Not surprisingly, Justice Stevens did not find that the destruction of the cocaine that Fisher wanted retested was critical because it had already been tested four times. *See id.* at 545 (majority opinion); *id.* at 549 (Stevens, J., concurring). What is surprising is that Stevens equated *Fisher's* case with that of *Youngblood*, implying that he still maintained that the loss of *Youngblood's* evidence was not critical. *See id.* Perhaps Justice Stevens remains unaware that *Youngblood* was, in fact, innocent.

491. Daniel R. Dinger, Note, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in Arizona v.*



opinion and negative editorials, some state courts have continued to render decisions affording defendants broader protection than provided by the United States Constitution.<sup>492</sup> Moreover, some state courts have required the police to institute measures—such as videotaping interrogations<sup>493</sup>—designed to improve the operation of the criminal justice system. In addition, some state courts have sought to address inadequate funding for indigent defendants by declaring certain systemic practices invalid and ordering that remedial action be taken by the State.<sup>494</sup> As a result of upholding the rights of criminal defendants, some elected state court judges have drawn considerable fire, including being voted out of office.<sup>495</sup>

On the other hand, many state courts have followed the lead of the United States Supreme Court and have refused to interpret their own constitutions to provide broader protection to the citizens of their states. These courts have marched in lockstep with the Supreme Court and have recognized doctrines like the good faith exception that limit the impact of the exclusionary rule.<sup>496</sup> So too, many state courts have adopted and strictly applied an ineffective assistance of counsel standard that, like *Strickland*, rarely offers a defendant relief despite counsel's inept performance.<sup>497</sup> Like the Supreme Court, too many state courts

Youngblood, 27 AM. J. CRIM. L. 329, 348 n.127 (2000) (noting that, as of January 1, 2000, thirteen states had ruled that a bad faith requirement was not a prerequisite to a successful challenge to the state's loss or destruction of evidence).

492. See, e.g., *Stringer v. State*, 491 So. 2d 837, 841 (Miss. 1986) (Robertson, J., concurring) (declining to adopt the good faith exception announced in *United States v. Leon*, 468 U.S. 897 (1984)). See generally CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 34.02(c) (4th ed. 2000).

493. *In re Jerrell*, C.J., 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (mandating videotaping of all custodial interrogations of juveniles).

494. See, e.g., *State v. Peart*, 621 So. 2d 780, 791 (La. 1993); *Arnold v. Kemp*, 813 S.W.2d 770, 771 (Ark. 1991); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1139 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987); *State v. Smith*, 681 F.2d 1374 (Ariz. 1984); *State v. Robinson*, 465 A.2d 1214, 1217 (N.H. 1983).

495. Abner J. Mikva, *Judicial Pest Control*, 148 N.J. L.J. 1059 (1997) (noting that Chief Justice Rose Bird of California was denied a second term by the voters because of negative publicity based on her decisions in several death penalty cases).

496. See, e.g., *McCary v. Commonwealth*, 321 S.E.2d 637, 644 (Va. 1984) (“We embrace the recently announced ‘good faith’ exception to the exclusionary rule.”).

497. Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Deinean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 81 (2002) (“The states have almost uniformly adopted the *Strickland* standard . . .”); COLE, *supra* note 11, at 76-81 (lamenting the extent to which *Strickland* and its state equivalents tolerate abysmal defense lawyering); Green, *supra* note 83, at 1189-90 (describing *Heath v. State*, 574 S.E.2d 852 (Ga. Ct.

tolerate systemic shortcomings that increase the likelihood of wrongful convictions.

*C. The Narrow Perspective of Some Stakeholders*

There are other stakeholders in the criminal justice system with interests and attitudes that may be incompatible with needed reform. Increasingly, victims' groups have an active voice in debates about the criminal justice system. Although victims have a strong interest in seeing the right person brought to justice, victims' groups, along with the public, have been conditioned to believe that the system's problems lie in overprotecting defendants and underprotecting crime victims. Given the myths and misperceptions discussed in this Article, it may be difficult to persuade victims that measures designed to increase procedural protections for defendants will actually increase the accuracy and reliability of the fact-finding process.

Other stakeholders may have narrower interests. For example, following a successful bail project operated by the University of Maryland Access to Justice Clinic, legislation was introduced in Maryland to provide representation at the initial hearing when bail was set.<sup>498</sup> This reform measure would have reduced jail overcrowding by increasing the number of defendants released on bail pending trial. Unnecessary pretrial incarceration works a hardship on many low-income defendants and their families. It is particularly problematic for innocent defendants whose cases are eventually dismissed. Yet, in spite of the merits of this bail reform measure, the bail bond industry in Maryland played a leading role in frustrating legislative action.<sup>499</sup>

Similarly, the growth of private prisons in America has introduced another voice in the debate on crime and criminal justice reform. Private prisons make more money when cells are full. Those who run and own stock in private prisons have an economic interest that may conflict with the best interests of society. Good sentencing policies and practices may be trumped in the process.

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App. 2002), *rev'd*, 588 S.E.2d 738 (Ga. 2003) as "the rare and welcome exception" to the usual judicial toleration of deficient defense representation). Although this decision was reversed and remanded by the Georgia Supreme Court, *State v. Heath*, 588 S.E.2d 738 (Ga. 2003), the Court of Appeals subsequently reinstated its decision allowing Richard Heath to withdraw his guilty plea because defense counsel's deficient representation prejudiced him. *Heath v. State*, 601 S.E.2d 758 (Ga. Ct. App. 2004).

498. See Colbert et al., *supra* note 380, at 1749-63.

499. *Id.* at 1741,1763-64, 1770.

*D. The Failure to Appreciate the Need for Change*

Given widespread concerns about crime and the attendant popularity of tough-on-crime positions, most policymakers are reluctant to promote systemic reform that might be criticized as pro-defendant. Moreover, those who call for systemic change must overcome the entrenched attitudes that most Americans have about crime and the criminal justice system. For most Americans, our system of justice is the best in the world and only rarely, if ever, convicts the innocent. If we err, it is in freeing the guilty because we are too protective of defendants' rights and too lenient on criminals. It is understandable, then, why the lessons of *Youngblood* and of other DNA exonerations are so difficult for many to absorb. In light of all of the protections built into our system, news accounts of innocent persons serving years in prison seem almost incomprehensible.

For some defenders of the system, the answer is to simply deny that there is a serious problem.<sup>500</sup> In their view, isolated cases of rogue cops or prosecutors are the explanation for these tragic mistakes, but there are no widespread problems or structural deficiencies. Many defenders of the status quo fail to admit or acknowledge the significance of the flaws in our system; they hope that, by minimizing the problems, attention is diverted elsewhere.<sup>501</sup>

For others, the response is to politicize the situation. For example, former Illinois Governor Ryan's decisions to impose a death penalty moratorium and then to issue a blanket commutation converting all death sentences to life without parole were criticized as merely political maneuvers designed to divert attention from his own misdeeds.<sup>502</sup> Similarly, the *Daily Oklahoman* criticized death penalty foes for improperly twisting Ryan's moratorium and then exploiting the

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500. See, e.g., Joshua Marquis, *We Shouldn't Believe Death Row Is Full of Innocents*, MILWAUKEE J. SENTINEL, Mar. 3, 2002, at 5J (insisting that number of wrongfully convicted is "tiny"); Berlow, *supra* note 28, at 70 (noting that John Justice, the former president of the National District Attorneys Association, and fellow supporters, claim that wrongful death sentences are aberrations); Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, § 1, at 1 (reporting Governor Ryan's observations that state prosecutors deny that the system is broken or say that the problem is small).

501. Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb 24, 2003, at A1 (reporting the claims of some prosecutors that the number of actual innocent persons being exonerated has been inflated).

502. See Possley & Mills, *supra* note 500 (interviewing family members and friends of murder victims); David E. Rovella, *Execution Ban Deemed Moot*, NAT'L L.J., Feb. 21, 2000, at A1; Eric Zorn, *Ryan's Sincerity Hard to Doubt If You Do the Math*, CHI. TRIB., Jan. 9, 2003, § 2, at 1 (citing a letter received from a local reader).

misdeeds of police chemist Joyce Gilchrist to promote their agenda of abolishing the death penalty.<sup>503</sup> Still others charge that incidents of wrongful convictions are overblown and represent nothing more than the continued meddling of liberal judges bent on helping criminal defendants.<sup>504</sup>

Much of the difficulty in securing agreement about the need for systemic change is the competitive, contentious nature of the adversarial system of criminal justice. The regular players in that system—the police, prosecutors, defense lawyers, correctional officials and judges—frequently are locked in bitter battles that do not inspire cooperation or communication.<sup>505</sup> Not surprisingly, the perspective of players in the system about the need for change is shaped by the extent to which they perceive that the likely change will adversely affect their ability to carry out their particular role. Constructive discussions about systemic reform are often hampered, therefore, because of excessively adversarial positions taken by systemic players who tend to look at suggested reform only from their own perspective. This is especially true of some prosecutors and the law enforcement community, who

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503. Editorial, *Debating Death; Halt to Executions a Troubling Idea*, DAILY OKLAHOMAN, Feb. 21, 2000; Editorial, *Innocent by Association; Groupthink Drives Death Row Debate*, DAILY OKLAHOMAN, May 2, 2001.

504. In practice, it is hard to identify these so-called liberal judges, especially elected ones, who will go out of their way to “help” guilty defendants. Most judges are reluctant to grant suppression motions, particularly in serious cases and especially when doing so will derail the prosecution’s case. Even federal judges draw unwanted criticism by granting suppression motions. For a highly publicized example of the ire that a judge may generate by granting a suppression motion, see *U.S. v. Bayless*, 201 F.3d 116 (2d Cir. 2000). Federal District Judge Harold Baer, Jr. granted a suppression motion that unleashed a firestorm of controversy, including a letter sent to President Clinton signed by over two hundred members of Congress asking him to join them in calling for Judge Baer to resign. *Id.* at 122-23. Presidential candidate Bob Dole joined in the controversy by stating that if Judge Baer did not resign, he should be impeached. *Id.* at 123. Judge Baer subsequently granted the government’s motion to reconsider and reversed his suppression ruling. *Id.* The Second Circuit affirmed his decision, holding that Judge Baer’s decision not to recuse himself in the face of the adverse publicity was not plain error. *Id.* at 120.

505. However, some commentators have noted that the criminal justice system is marked by a high degree of cooperative behavior among the regular players. See, e.g., Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession*, 1 LAW & SOC’Y REV. 15, 20-21 (1967). Plea bargaining does drive the system and requires certain cooperation that works to the benefits of the regular players. Nonetheless, jurisdictions vary markedly in how adversarial or cooperative the relations are between the regular players. Moreover, cooperating in plea bargaining does not translate into similar attitudes regarding needed reform. For a discussion of the tendency of the players in the criminal justice system to take sides and the difficulty of securing cooperation to improve the system, see Peter Loge, *How to Talk Crimey and Influence People: Language and the Politics of Criminal Justice Policy*, 53 DRAKE L. REV. 693, 704-09 (2005).

frequently see most reform as aiding the guilty at the expense of their power to successfully fight crime. Thus, some in the system are willing to go to great lengths to defend it and deny the need for any significant change for fear that acknowledging the need for change will benefit the other side.<sup>506</sup>

As already discussed, the police have vigorously resisted judicial efforts to rein them in. Similarly, prosecutors have reacted aggressively to claims of prosecutorial misconduct and have sought to insulate themselves from judicial or third-party control.<sup>507</sup> Some prosecutors willingly strike “foul blows” in order to secure the convictions of defendants they believe are guilty.<sup>508</sup> Renouncing the

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506. See Liptak, *supra* note 501 (discussing prosecutorial resistance to DNA testing and the Missouri Attorney General’s argument that it would be constitutionally proper to execute an innocent person). Similarly, Ohio prosecutors’ organizations have opposed making a postconviction DNA testing program permanent, arguing that two years was enough time for inmates to seek such testing and that the police should not have to save evidence “forever.” Editorial & Comment, *Hope for the Innocent*, COLUMBUS DISPATCH, Nov. 7, 2005, at 8A (criticizing prosecutors for their opposition and urging that the DNA testing program be continued); see also *infra* notes 496-501 and accompanying text. For an extensive look at the professional, psychological, and personal factors that explain prosecutorial resistance to post-conviction claims of innocence, see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-48 (2004).

507. For example, Attorney General Richard Thornburgh and his successor, Janet Reno, took the position that the U.S. Attorney General could, by rule, exempt federal prosecutors from state ethics provisions. See Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 473-77 (1996). Subsequently, the Department of Justice filed suit to challenge a disciplinary action lodged against an Assistant U.S. Attorney who acted in violation of the state version of Model Rule 4.2. State and federal courts have rejected the Department’s position. *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992); *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), *aff’d*, 54 F.3d 825 (D.C. Cir. 1995); *In re Howes*, 940 P.2d 159 (N.M. 1997) (per curiam). For a detailed look at this controversy, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT L. REV. 291 (1992).

508. “[The government lawyer] may prosecute with earnestness and vigor—indeed, he should do so. But, while he make strike hard blows, he is not at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Unfortunately, not all prosecutors heed this directive. See *infra* notes 567-73 and accompanying text. James S. Liebman found that prosecutorial misconduct was a recurring problem in his extensive study of death penalty cases. See LIEBMAN ET AL., A BROKEN SYSTEM, *supra* note 12, at 20. Indeed, Liebman and his fellow authors noted that 17 percent of the cases in their study that were reversed involved the suppression of exculpatory evidence. *Id.* at 5. For an extended look at the role of prosecutorial misconduct in wrongful convictions, see Steve Weinberg, The Center for Public Integrity, *Anatomy of Misconduct* (June 26, 2003), <http://www.publicintegrity.org/pm/report.aspx?aid=33>.

vision of prosecutor as a minister of justice,<sup>509</sup> some prosecutors believe that they are justified in doing whatever it takes to win because they are locked in a noble war against an enemy who will do anything to secure a dismissal or acquittal.<sup>510</sup> This warrior mindset inspires attacks against judges who rule against them<sup>511</sup> and the pursuit of a legislative agenda that maximizes sentences, increases prosecutorial discretion, and limits procedural protections for defendants.

The competitive nature of the system, however, does not just adversely affect prosecutors. Some defense lawyers purposefully engage in dilatory tactics that benefit their clients. Other defense lawyers, particularly those representing wealthier clients, file numerous motions or take advantage of little-used procedural measures to make life miserable for the prosecutor.<sup>512</sup> Indeed, some criminal defense

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509. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2 cmt. (3d ed. 1993); MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004).

510. See Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 Nw. U. L. REV. 1485, 1491-94 (1984) (reviewing DAVID M. NISSMAN & ED HAGEN, *THE PROSECUTION FUNCTION* (1982), which reflects the authors' view that prosecutors are engaged in a war against crime that demands they play a warrior role); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 376-91 (2001) (describing the pressure to win for prosecutors and the corrupting influences of that perspective). For a chilling account of Bob Macy, the legendary district attorney of Oklahoma County, who boasted that he had sent more defendants to death row than any other prosecutor in the country, see FUHRMAN, *supra* note 321. As Fuhrman's book documents, Bob Macy epitomized the warrior prosecutor, whose win-at-any-cost mentality led him to withhold exculpatory material, to knowingly misrepresent evidence, to condone and tolerate false testimony, and to routinely engage in improper arguments. *Id.* For a similar portrayal of Macy, see Ken Armstrong, *'Cowboy Bob' Ropes Wins—But at Considerable Cost*, CHI. TRIB., Jan. 10, 1999, § 1, at 13.

511. See, e.g., Paul English, *Prosecutors Urge Voters to Oust Appeals Judge*, DAILY OKLAHOMAN, Oct. 13, 1994 (reporting that the Oklahoma District Attorney Association led the fight to unseat Oklahoma Appellate Court Judge Charles Chapel). In Oklahoma County, District Attorney Bob Macy openly campaigned to defeat judges who drew his ire. See Ed Godfrey, *Two Ousted Judges Make No Apologies*, DAILY OKLAHOMAN, Nov. 5, 1998, at 12; Paul English, *Bar Panels Seek Ban on DAs in Judicial Races*, DAILY OKLAHOMAN, Sept. 17, 1999; FUHRMAN, *supra* note 321, at 30.

512. Attorney Dick DeGuerin's creative use of motions in his defense of Tom DeLay has included a successful motion to recuse the presiding judge, Bob Perkins, claiming that the judge's past contributions to national and local Democrats raised an appearance of impropriety. Sylvia Moreno, *Defense Wins New Judge in DeLay Case*, WASH. POST, Nov. 2, 2005, at A3. Moreno also reported that DeLay's legal defense costs were at least \$260,000 in the third quarter of the year alone. *Id.* As William Stuntz has observed, the constitutionalization of criminal procedure raises the cost of prosecuting wealthier defendants because their lawyers can litigate so many issues. See Stuntz, *supra* note 40, at 4, 27-31. Busy prosecutors are understandably reluctant to support any change that they fear may make it more difficult and costly to secure convictions.

lawyers resort to blatantly unethical tactics to help their clients win.<sup>513</sup> Just as prosecutors may be reluctant to support systemic changes, defense lawyers also may be cautious about supporting systemic change fearing that such change is likely to further dilute the rights of criminal defendants.

Nevertheless, win-at-any-cost prosecutors, together with those police officers who see judges as the gullible protectors of the guilty, are least likely to respond enthusiastically to calls for systemic reform. Indeed, the resistance to the reform measures called for by the Ryan Commission in Illinois has been led by prosecutors.<sup>514</sup> Amazingly, some prosecutors have aggressively blocked defendants' efforts to obtain DNA testing.<sup>515</sup> Additionally, in a number of cases, prosecutors have fought to uphold convictions despite DNA results that were clearly exculpatory.<sup>516</sup>

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513. See, e.g., *Att'y Grievances Comm'n v. Kent*, 653 A.2d 909 (Md. 1995). Kent was representing a defendant in a murder case and went to see a represented codefendant who had already cut a deal to testify against Kent's client. *Id.* at 912. Kent persuaded the codefendant to back out of the deal, fire his lawyer, and retain Kent in an effort to withdraw his guilty plea. *Id.* 912-13. That effort was unsuccessful and the codefendant received two life sentences instead of the thirty-year sentence he would have received. *Id.* at 913. Mr. Kent was disbarred. *Id.* at 922.

514. See, e.g., Christi Parsons & Ray Long, *Senate OKs Death Penalty Bill, Ryan Would Veto GOP's Package*, CHI. TRIB., Dec. 5, 2002, § 2, at 1; Possley & Mills, *supra* note 500; see also Bright, *supra* note 83, at 787 (describing the opposition of the Georgia district attorney's association to a bill creating a statewide public defender system, calling it "the greatest threat to the proper enforcement of the criminal laws of this state ever presented").

515. For example, in the case of Lonnie Erby, the St. Louis Circuit Attorney Office fought for six years to block Erby's access to DNA testing. The testing finally exonerated him and Erby was released after serving seventeen years in prison. Innocence Project, Case Profiles: Lonnie Erby, [http://www.innocenceproject.org/case/display\\_profile.php?id=136](http://www.innocenceproject.org/case/display_profile.php?id=136) (last visited Feb. 19, 2006). Similarly, in the case of Larry Johnson, the St. Louis Circuit Attorney Office fought to prevent him from obtaining DNA testing for six years. He was finally exonerated on 2002 after serving eighteen years in prison. Innocence Project, Case Profiles: Larry Johnson, [http://www.innocenceproject.org/case/display\\_profile.php?id=109](http://www.innocenceproject.org/case/display_profile.php?id=109) (last visited Feb. 19, 2006); see also William S. Sessions, *DNA Tests Can Free the Innocent, How Can We Ignore That?*, WASH. POST, Sept. 21, 2003, at B2 (criticizing prosecutors for opposing DNA testing and finding such opposition, from his perspective as former FBI director, inconsistent with their professional duty and moral responsibility to seek the truth).

516. See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 716-17 n.77 (2004) (discussing cases of prosecutorial resistance to DNA results). See generally Medwed, *supra* note 506. For a chilling look at the conduct of Oklahoma County prosecutors in fighting to uphold the conviction of Robert Miller despite DNA results that showed he had not raped the women he was accused of raping and murdering, see SCHECK, NEUFELD & DWYER, *supra* note 153, at 101-37.

The standard prosecutorial reaction to the phenomenon of wrongful convictions is to insist that only in rare circumstances are the innocent being convicted.<sup>517</sup> After all, no one really wants to believe that he or she played a role in sending an innocent person to prison. Certainly it is the rare prosecutor who would knowingly seek to convict an innocent person.<sup>518</sup> Understandably, then, most prosecutors are troubled to learn that a person they successfully prosecuted was, in fact, innocent. Not surprisingly, some prosecutors—and some victims—adamantly refuse to accept that a particular defendant was wrongfully convicted.<sup>519</sup>

Finally, like most prosecutors, many judges may be reluctant to acknowledge the fact that our system sends innocent people to prison.<sup>520</sup> That also is quite understandable. Judges do not want to believe that they are responsible for imposing harsh sentences on persons who are, in fact, innocent. Thus, it is not surprising, given their role and responsibilities in our system of justice, that judges would tend to have considerable faith in the system's ability to separate the guilty from the innocent. In light of the DNA exonerations, certainly some judges recognize the need to reexamine the system and make needed improvements.<sup>521</sup> Unfortunately, others are likely to cling to the belief

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517. See Liptak, *supra* note 501; Marquis, *supra* note 500. In the early 1990s, I appeared at a debate at the University of Oklahoma with Cleveland County District Attorney Tully McCoy who confidently assured the crowd that there were no innocent people in prison in Oklahoma. See Boyer, *supra* note 288, at 51-52 (describing the "white-hat syndrome," which makes coming to terms with having put an innocent person behind bars "a very, very difficult thing to grapple with").

518. See Smith, *supra* note 510, at 388-91 (arguing that the culture of winning in prosecutors' offices overrides everything else, including concerns about convicting the innocent). As Albert Alschuler observed, prosecutors "seem to exhibit a remarkable disregard for the danger of false conviction." Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 62 (1968). To Alschuler, this attitude derives from the fact that the decision to charge generally also includes a personal judgment that the defendant is guilty so that the trial is just "a technical obstacle standing between the defendant and the punishment he deserves." *Id.* at 63.

519. In Mark Bravo's case, *supra* notes 26, 313, *infra* notes 549, 574, the prosecuting attorney who tried the case remained unconvinced of Bravo's innocence despite his exclusion by DNA. See Kennedy, *supra* note 26. Four years after he was convicted of rape, Brian Piszczek was exonerated by DNA. McCarty, *supra* note 303. The victim remained unconvinced of his innocence saying, "I'm still 100% sure it was him. . . . I was there. I know. I don't care what those DNA tests say. There was nobody else." *Id.*; see also *supra* note 434 and accompanying text.

520. For a discussion of the system's reluctance to acknowledge that innocent defendants are being convicted, see Givelber, *supra* note 338, at 1334-36.

521. For example, Chief Justice I. Beverly Lake, Jr. of the North Carolina Supreme Court sponsored the round table discussion that led to the establishment of the North Carolina Actual Innocence Commission. See Christine C. Mumma, *The North*



that the number of innocent persons who plead or are found guilty at trial is too small to merit serious attention. As discussed below, in the face of a growing number of DNA exonerations, such an attitude is inconsistent with our stated commitment to equal justice or with the “maxim of the law . . . it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned.”<sup>522</sup>

*E. Our Flawed System Primarily Affects the Poor and the Powerless*

Finally, there are some who acknowledge that our system is flawed, but who argue, nevertheless, that innocent defendants who are wrongfully convicted are just the inevitable byproduct of our system of “rough justice.” As Judge Richard Posner wrote:

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 may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be 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 society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.<sup>523</sup>

Thus, in Posner’s view, innocent defendants like Larry Youngblood, Jimmy Ray Bromgard, or Ronald Williamson may pay a high cost, but society as a whole benefits from an inexpensive system that ensures that guilty defendants get what they deserve—incarceration. To Posner, providing better representation to the poor would not only cost a great deal more, but would lead to more guilty persons going free. That consequence, in turn, would actually cause more societal harm because when guilty persons go free, they would commit new crimes.<sup>524</sup>

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*Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 *DRAKE L. REV.* 647, 648-49 (2004).

522. *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (quoting THOMAS STARKIE, *EVIDENCE* 756 (1824)).

523. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163-64 (1999).

524. For a similar argument contending that the death penalty deters crime and the failure to use it is morally unacceptable because a regime with capital punishment produces fewer arbitrary deaths than a regime without the death penalty, see Cass

Contrary to Posner's argument—and popular opinion—the lesson of the DNA exonerations and other wrongful convictions is that the system is more flawed than its supporters acknowledge.<sup>525</sup> Posner grossly overestimates the ability and willingness of police and prosecutors to screen out the innocent. Additionally, Posner's faith in the system minimizes the reality of bureaucratic shortcutting, incompetence, and the pressure to solve cases. Moreover, he turns a blind eye to the reoccurring police scandals and incidents of prosecutorial misconduct that increase the danger that innocent defendants will be victimized.<sup>526</sup> Indeed, no one who reads Mark Fuhrman's damning indictment of the criminal justice system in Oklahoma County can confidently assert that the risk of convicting the innocent in that jurisdiction is minimal.<sup>527</sup>

Similarly, Posner's claim that indigent defense lawyers are "good enough" to ensure that the probability of convicting the innocent is very low is, at best, unduly optimistic.<sup>528</sup> His assessment may hold true in some adequately funded jurisdictions, but in most others, it is mere wishful thinking. Even though the vast majority of defendants in this country plead guilty, a claim that all or almost all of them are guilty defies the harsh realities of the plea-bargain-driven system that defendants like Arthur Lee Whitfield<sup>529</sup> and Nicholas Souder<sup>530</sup> experience. Given the widespread denial of effective assistance of counsel to many Americans, we have no way of definitely determining just how many innocent people have been—or will be—wrongfully convicted.<sup>531</sup>

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Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Trade-Offs* (AEI-Brookings Joint Center for Regulatory Studies, Research Paper No. 05-06, 2005), available at <http://ssrn.com/abstract=691447>.

525. See *GIDEON'S BROKEN PROMISE*, *supra* note 10, at v, 3-4 (stating that the indigent defense system is in a state of crisis by putting poor persons at constant risk of wrongful convictions, a phenomenon "much more common than once believed"); Brown, *supra* note 297, at 804 ("[D]ocumented wrongful convictions are likely only a small portion of the total number of wrongful convictions."); Editorial, *Errors of Justice*, *supra* note 442 (stating that if a 6 percent error rate in the sample reviewed is "anything close to representative, then wrongful convictions in major felony cases may be far more routine than believed").

526. See *supra* notes 321, 323-24, 365, 443, 508-10, 516; *infra* notes 567-74 and accompanying text.

527. FUHRMAN, *supra* note 321.

528. POSNER, *supra* note 523, at 164.

529. See *supra* notes 386-95 and accompanying text.

530. See *supra* notes 397-409 and accompanying text.

531. See Tulskey, *supra* note 29 (concluding that inept lawyers were pressuring arguably innocent defendants into guilty pleas and quoting Professor Laurie Levenson as saying that the phenomenon of innocent people pleading guilty to crimes "happens all of the time").

Nevertheless, the data generated by the FBI since it began forensic DNA testing in 1989 provides powerful support for the proposition that the number of innocent people in American prisons is significant. Between 1989 and 1996, the FBI tested DNA in sexual assault cases referred to their lab in roughly ten thousand cases.<sup>532</sup> These were cases in which identity was at issue and eyewitness identification had led to the arrest or indictment of the suspect.<sup>533</sup> In about six thousand of these cases, the DNA testing matched the suspect with the DNA sample while in about two thousand cases the testing was inconclusive—usually because of an insufficient amount of DNA to test.<sup>534</sup> In about two thousand, or roughly 20 percent of the cases referred to the FBI, the DNA testing excluded the suspect.<sup>535</sup> Even taking into consideration laboratory error and some other false exclusions, “it is still plain that forensic DNA testing is prospectively exonerating a substantial number of innocent individuals who would have otherwise stood trial, frequently facing the difficult task of refuting mistaken eyewitness identification by a truthful crime victim who would rightly deserve juror sympathy.”<sup>536</sup>

Absent DNA testing, therefore, it is highly likely that a significant number of those sexual assault exonerees would have been convicted. Sadly, in the vast majority of cases, there is no DNA evidence or other conclusive forensic evidence.<sup>537</sup> Yet, it is reasonable to expect that a comparable number of robbery suspects are also wrongly arrested based on faulty identifications. Indeed, the growing number of DNA exonerations—and the recent exonerations in Virginia<sup>538</sup>—represent conclusive evidence that, even in cases in which the evidence appeared to the jury and judge to prove the defendant’s guilt beyond any reasonable doubt, our system gets it wrong. Contrary to Posner’s assumption, the system’s flaws revealed by the DNA exonerations make it extremely likely that there are hundreds of other Larry

532. Peter Neufeld & Barry C. Scheck, *Commentary*, in NAT’L INST. OF JUSTICE, *supra* note 348, at xxviii.

533. *Id.* at xxix.

534. *Id.* at xxviii.

535. *Id.* If the inconclusive cases are omitted, the exclusion rate for the FBI tests rises to approximately 25 percent. See NAT’L INST. OF JUSTICE, *supra* note 348, at 20. This FBI data was included in a nationwide study of DNA testing that found that test results excluded suspects in about 23 percent of the cases. *Id.* Recent statistics indicate that the percentage of suspects excluded by DNA has remained fairly constant since 1996. See generally Innocence Project, DNA News, <http://www.innocenceproject.org/dnanews/index.php> (last visited Mar. 12, 2006).

536. Neufeld & Scheck, *supra* note 532, at xxix.

537. See Bedau et al., *supra* note 289, at 601-02.

538. See *supra* notes 444-46 and accompanying text.

Youngbloods and Arthur Lee Whitfields imprisoned across the United States.<sup>539</sup>

In addition, Posner's cost-benefit analysis also grossly underestimates the societal costs to the many defendants and their families who are victimized by a system that fails to afford them the right to an effective lawyer.<sup>540</sup> It fails to account for the unnecessary time spent in jail, the lost jobs and the disruption of family life endured by defendants held for weeks on minimal bail for offenses that may warrant only a fine or are ultimately dismissed.<sup>541</sup> His position overestimates the extent to which procedural rights in our system translate into freedom for guilty defendants and underappreciates the pressure on innocent defendants to plead guilty. Moreover, his argument fails to adequately consider the enormous losses suffered by innocent defendants and their families who are compelled to plead guilty or who are found guilty at a trial despite their innocence. Finally, Posner's argument underestimates the harm to society suffered at the hands of those perpetrators who escape justice because the wrong person was arrested, prosecuted, and convicted.

An indifferent attitude toward fixing our flawed criminal justice system frequently is a reflection of where one lives. Generally, a person's neighborhood reflects his or her economic status and, in turn, a person's experience with, and attitudes about, the criminal justice system. Not surprisingly, those with positive attitudes about the system tend to live in better neighborhoods, those in which judges and legislators also live. They tend to have little first-hand experience with the system, and if they or someone in their family has trouble with the police, they can afford counsel. Americans from these neighborhoods

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539. For various assessments of the scope of the problem of wrongful convictions, see SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (2004); C. RONALD HUFF ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTIONS AND PUBLIC POLICY* (1996); *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 3, 16; Lefstein, *supra* note 11, at 858-61; Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Givelber, *supra* note 338, at 1318-21; MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

540. After reporting examples of systemic deprivations of the right to counsel that resulted in guilty pleas entered by unrepresented defendants, the authors of *GIDEON'S BROKEN PROMISE* concluded that such stories "illustrate how innocent defendants without legal knowledge or the assistance of counsel easily can be coerced by judges or prosecutors into believing they will receive jail time unless they plead guilty." *GIDEON'S BROKEN PROMISE*, *supra* note 10, at 25.

541. See, e.g., *id.* at 23. There have been a number of articles recounting the devastating effects of detention on minimal bail for indigent defendants, many of whom ultimately plead guilty for time served or see the charges against them dismissed. For a sampling of such articles, see Colbert et al., *supra* note 380, at 1720-27, 1756-57; Alschuler, *supra* note 70, at 951-55.

rarely experience random police stops, police sweeps, or bus searches. They may not appreciate the potentially devastating effects of an erroneous municipal warrant because they do not know anyone who has had to stay for weeks in jail, unable to post a \$100 bond. It is harder for people from some neighborhoods to assimilate the lessons of the wrongful convictions because so rarely are their family members, friends, or neighbors victimized by our flawed system.

In the end, the question becomes whether state legislatures and Congress have the political will to face up to the shortcomings of our criminal justice system and implement changes that are needed to minimize wrongful convictions. Improving the criminal justice system, especially by funding indigent defense services to make the promise of effective assistance of counsel a reality, will take hundreds of millions of dollars nationally. Historically, legislators have been very reluctant to spend money that is earmarked for criminal defendants.<sup>542</sup> Perhaps the growing recognition that our justice system is broken and innocent persons are being convicted will spark a greater willingness to spend money to protect innocent citizens. Yet there are competing social needs—health care, education, roads—that also need fixing and require massive financial investments. Given these other needs, it is difficult to imagine that most state criminal justice systems will see a significant infusion of new resources.

## V. IMPROVING THE SYSTEM: SOME FIRST STEPS

### A. *Task Forces on Systemic Reform*

Despite the myths and barriers discussed in this Article, the growing number of DNA exonerations and wrongful convictions may produce a heightened awareness of the flaws of our state criminal justice systems. Increased public awareness, in turn, may generate some momentum to reform state criminal justice systems in order to minimize the conviction of the innocent. Ideally, to improve the operation of the criminal justice system, each state legislature would

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542. See SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 7 (discussing thirty-three studies over three decades documenting serious deficiencies in Virginia's indigent defense system, yet noting that calls for reforming that system "have been largely ignored by the legislative, executive and judicial branches of Virginia state government"); Jessica McBride & Mary Zahn, *Unequal Justice (Part 2): Without Legislative Action, More Poor Will Struggle Finding Attorneys*, MILWAUKEE J. SENTINEL, Dec. 8, 2002, at 1A (noting that the Wisconsin Legislature is aware of the problems with the public defender system, but reporting little legislative support for fixing the system).

begin by agreeing to increase resources for indigent defense services. For some states, the additional expenditures would be fairly small, while in others the amount needed to create an adequately funded system for providing indigent defense services would be substantial.<sup>543</sup> Before determining the level at which to fund defense services, each legislature might start by creating a task force or commission to determine the optimal system for delivering defense services in light of other needed improvements to that state's criminal justice system.<sup>544</sup>

Each task force should be non-partisan. In addition to a significant number of legislators, the task force should include criminal justice experts, system regulars, and representatives of important stakeholders. The task of each commission should be to recommend legislative changes that would improve the reliability and fairness of the criminal justice system without unduly compromising its efficient administration.

### *B. Improving the Utility of Forensic Evidence*

In addition to the money needed to improve the delivery of indigent defense representation, increased expenditures for police training in the collection, handling, and storage of forensic evidence are critically important. Money spent in ensuring that vital evidence is gathered may well be the most cost-effective means of preventing injustice. Hard forensic evidence represents the best vehicle for quickly freeing the wrong suspect and identifying the right one.<sup>545</sup> It lessens our reliance on eyewitness identification testimony and other less reliable forms of evidence. Not only does the existence of reliably collected forensic evidence help to safeguard against wrongful convictions, but it also encourages defendants who are, in fact, guilty to plead guilty thereby eliminating some needless litigation.

The value of forensic evidence does not depend only on it being collected and handled properly by the police. Such evidence must be

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543. Missouri, for example, currently ranks forty-seventh in the nation in per capita spending for indigent defense. See SPANGENBERG GROUP, MISSOURI, *supra* note 64, at 51. The Spangenberg Group stated that it would take \$16 million just to bring spending levels to the average of other southern states which, as a group, are the lowest in the nation. *Id.*

544. Such task forces or commissions have been created, or are in the planning stages, in Illinois, Connecticut, Florida, Massachusetts, Virginia, North Carolina, Texas, and Wisconsin. Ken Strutin, Wrongful Conviction and Innocence Resources on the Internet, <http://www.llrx.com/features/wrongfulconviction.htm> (last visited May 1, 2006).

545. See *supra* notes 532-36 and accompanying text.

properly preserved<sup>546</sup> and then appropriately tested and analyzed. States must improve the performance of crime labs so that they function efficiently and effectively. Adequate resources must be provided so that testing is performed in a timely manner. Huge backlogs and lengthy delays are inconsistent with a criminal justice system designed to promptly identify the right suspect and free the wrongly accused. Similarly, there ought to be no place for bias in the work performed by crime lab technicians and experts.<sup>547</sup> Crime labs need to be independent of the prosecution and immunized from pressure by the police or prosecutors to generate any particular results.<sup>548</sup> Such labs also need to be accessible to the defense. Just as the police and the prosecution should not lose the opportunity to develop potentially important evidence because of inadequate resources, defendants should not be deprived of their ability to use forensic evidence to establish their innocence.<sup>549</sup> To the extent that defense counsel can confidently utilize

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546. Certainly, in any homicide or sexual assault case, evidence should be preserved. In Illinois, all physical evidence in a murder prosecution now must be preserved permanently unless a law enforcement agency, with notice to the defendant, obtains a court order permitting its destruction. 725 ILL. COMP. STAT. ANN. 5/116-4 (West 2003). Such a law minimizes the instances in which defendants are left in the position of Robin Lovitt, who was deprived of the opportunity to test certain evidence that he claimed could exonerate him because it was destroyed by a court employee. See Michael D. Shear & Maria Glod, *Warner Commutes Death Sentence, Governor Cites Clerk's Destruction of DNA in Arlington Slaying*, WASH. POST, Nov. 30, 2005, at A1. It might be necessary to add a provision making the intentional destruction of evidence a crime to curb the kind of misconduct that occurred in the Oklahoma crime lab. FUHRMAN, *supra* note 321, at 102-03, 113-22, 181, 214-17, 229-30.

547. A common complaint in cases involving fraud or laboratory mistake is that laboratory employees or scientists succumb to pressure to reach the results sought by the police, prosecutors, or senior officials. See, e.g., Steve Mills, *Forensics Under the Microscope, Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, § 1, at 8 (reporting on Governor Warner's order to the Virginia State lab director to seek an outside audit, which in turn revealed botched DNA tests by a senior DNA analyst).

548. For an extensive look at the forensic misconduct of Joyce Gilchrist and her unholy working relationship with the Oklahoma County District Attorney's Office, see FUHRMAN, *supra* note 321; see also *Freedom Needed in Crime Lab Probe*, VIRGINIAN-PILOT (Norfolk), May 19, 2005, at B10 (calling for an independent investigation and oversight of the Virginia State Crime Lab in light of crime lab problems around the country).

549. In the Bravo case, defense counsel did not promptly request DNA testing because counsel thought the prosecution was having such testing done. *People v. Bravo*, 23 Cal. Rptr. 2d 48, 51-52 (Ct. App. 1993); see also *supra* notes 26, 313, 519, *infra* note 574 and accompanying text. Counsel did seek a continuance to have a DNA test run, but the trial court denied the motion. *Id.* at 52. The appellate court did not find trial counsel "ineffective" for failing to have the DNA test run or that the trial judge erred in denying the continuance motion. *Id.* at 51-52. Three years later, DNA testing finally exonerated the defendant. See *supra* notes 26, 313 and accompanying text.

these expanded state or local crime labs; this will limit the number of requests for experts by the defense.<sup>550</sup>

### C. Videotaping Interrogations

Each state task force or commission should also consider legislation requiring, at a minimum, that all custodial interrogations be videotaped.<sup>551</sup> Such a measure is likely to deter abusive tactics, and minimize police overreaching, without a significant expenditure of new funds. Although the FBI and some in the law enforcement community oppose such a measure,<sup>552</sup> several states and a significant number of local police departments around the country have already successfully implemented a similar policy.<sup>553</sup> Indeed, Great Britain has required the tape-recording of all police interviews since 1984.<sup>554</sup> It is critical, however, that videotaping include the entire interrogation. Videotaping only the actual confession significantly undercuts the value of taping.<sup>555</sup>

In Great Britain, and in the jurisdictions in the United States that have adopted this policy, the police have not been unduly hampered in conducting interrogations. Neither the number of confessions nor the

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550. Defense access to state crime labs will not, however, eliminate the need for the defense in some cases to retain defense experts. Unquestionably, there will be times when the defense will need access to an expert to test the findings of a prosecution expert, challenge conventional wisdom, or raise a debatable issue. *See, e.g.*, I.A. Pretty & D. Sweet, *The Scientific Basis for Human Bitemark Analyses—A Critical Review*, 41 *SCI. & JUST.* 85, 90-91 (2001) (opining that a lack of hard scientific evidence exists to support assumptions underlying bitemark analysis).

551. Several state commissions have already recommended the adoption of a taping requirement. *See* Drizin & Reich, *supra* note 368, at 639 (citing Illinois, Arizona, Connecticut, and North Carolina). Many commentators also have called for electronic recording of confessions. *See, e.g.*, Cassell, *supra* note 413, at 486, 492; Leo & Ofshe, *supra* note 370, at 495; Drizin & Reich, *supra* note 368, at 645-46 n.157. Additionally, the ABA passed a resolution urging all law enforcement agencies to videotape all interrogations of suspects and also urging courts and legislatures to enact laws making such recordings mandatory. *See* Susan Saulny, *National Law Group Endorses Videotaping of Interrogations*, *N.Y. TIMES*, Feb. 10, 2004, at B4.

552. *See* Drizin & Reich, *supra* note 368, at 645-46.

553. *See supra* note 250 and accompanying text; Drizin & Reich, *supra* note 368, at 641 n.131, 643 n.144 (pointing to a growing number of police departments that are videotaping and stating that at least 2400 departments already are doing so).

554. *See* David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 *DRAKE L. REV.* 657, 659 (2004). Great Britain generally requires that the entire interview with the suspect be recorded. McKenzie, *supra* note 364, at 443-45.

555. Drizin & Reich, *supra* note 368, at 644-45; *see also supra* note 368 and accompanying text.



rates of convictions have dropped significantly as a result of taping.<sup>556</sup> Taping does ensure a more accurate record of a defendant's statements and of the circumstances surrounding that statement. In turn, the defendant and defense counsel are in a better position to make an informed choice as to whether to challenge the statement in a pretrial motion or at trial. More importantly, the judge and jury are better positioned to make an accurate decision about the reliability of that statement should the defendant choose to challenge the statement in court. Thus, videotaping interrogations encourages transparency and enhances reliability at a minimal cost.

#### D. Improving Identification Procedures

Similarly, each state should adopt, at a minimum, the new identification procedures recommended by the Department of Justice.<sup>557</sup> These procedures, developed following a study conducted at the request of the Department of Justice, are designed to increase the reliability of any identification by eliminating suggestiveness.<sup>558</sup> Research indicates the use of these recommended procedures will lessen the odds that suspects will be identified based on bias introduced during the identification process.<sup>559</sup> Given the obvious fallibility of eyewitness

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556. Indeed, the "vast majority" of agencies report that "videotaping has led to improvements in police interrogation." William A. Geller, *Videotaping Interrogations and Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 303-07 (Richard A. Leo & George C. Thomas III eds., 1998); see also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1262 (2002) (indicating that a sizeable number of police departments have experimented with routine interrogation videotaping with the "overwhelming majority [finding] the costs negligible and the benefits considerable").

557. U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. New Jersey was the first state to adopt a set of procedures based on the recommendations of the Department of Justice. See DEP'T OF LAW & PUB. SAFETY, OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES* (2001), available at <http://www.stat.nj.us/lps/>. Similarly, Connecticut has mandated new eyewitness identification procedures for all police departments and the state police. See Lisa Stegel, *High Court Tackles ID Flaws*, CONN. L. TRIB., Sept. 26, 2005. But see Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 592-95 (2000) (criticizing certain aspects of the Department of Justice guidelines).

558. See U.S. DEP'T OF JUSTICE, *supra* note 557, at 1-2.

559. See, e.g., Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 766-67, 795-82 (1995).

testimony, any reasonable measures that can be taken that will decrease the possibility of false identifications should be taken.

The suggested procedures do not require significant or expensive changes. In some instances, the new procedures may lengthen the identification process. Moreover, there is the added cost of training the police to use the new procedures. Nevertheless, if the procedures improve the reliability of eyewitness identifications, then any modest costs are far outweighed by the benefits to the system and to society of accurately distinguishing the wrongfully accused from the real perpetrator.

### *E. Enhancing Discovery*

In the last twenty-five years, most states have adopted statutes that provide for various types of discovery in criminal cases. Discovery procedures, however, vary markedly from one jurisdiction to the next.<sup>560</sup> Although it is no longer accurate to characterize the criminal trial as trial by ambush,<sup>561</sup> defendants in criminal cases are afforded less access to information than civil defendants. Moreover, access to information in the hands of the prosecution is very uneven and turns not only on state law, but also upon the practices of local prosecutors.<sup>562</sup> In particular, defense counsel's relationship with the prosecutor often will determine whether and when counsel obtains copies of police reports and other materials. Admittedly, counsel's available time and energy ultimately determines whether information in the possession of the State will actually be obtained, read, and acted upon.<sup>563</sup> Making it difficult for defendants to gain timely access to relevant information, however, is inconsistent with the systemic goal of seeking the truth.

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560. See KAMISAR ET AL., *supra* note 418, at 1221-56. Missouri, for example, is one of the few states that gives defense lawyers the ability to conduct a discovery deposition of prosecution witnesses. MO. ANN. STAT. § 545.400 (West 2002).

561. As the commentary to the *ABA Standards for Criminal Justice* states, the premise behind pretrial discovery is that it promotes fairness and justice in criminal cases and "reduces the risk of trial by ambush." ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY Standard 11-1.1 cmt. (3d ed. 1996); see also RICHARD SINGER, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 75 (2005) ("While trial by ambush is no longer quite the order of the day, criminal discovery is still more limited than in the civil arena.").

562. See SPANGENBERG GROUP, VIRGINIA, *supra* note 85, at 68-71 (documenting uneven access to discovery in Virginia).

563. See Robert L. Doyle, *The National College-Mercer Criminal Defense Survey: Some Preliminary Observations About Interviewing, Counseling, and Plea Negotiations*, 37 MERCER L. REV. 1019, 1025-27 (1986) (reporting that a significant number of defense lawyers negotiate without doing more than briefly reviewing police reports).

State task forces should look to expand defense access to information in the possession of the police and prosecutors and should require that all information be provided as soon as feasible.<sup>564</sup> Certainly there are cases in which the State has a compelling reason to seek a protective order to avoid pretrial disclosure of a particular witness or information. Generally, however, there is no reason why police reports and other material in the State's possession ought not to be promptly disclosed to the defendant.<sup>565</sup> Doing so facilitates informed plea bargaining. Prompt disclosure also helps ameliorate the problem of limited access to defense investigators. No matter how many additional resources are provided to the indigent defense system, indigent defendants and those who retain private counsel at a modest fee will still lack the ability to thoroughly investigate all of their cases. For the innocent defendant with a busy lawyer, however, prompt disclosure may enable defense counsel to undertake a more targeted investigation that may uncover the information needed to exonerate the defendant.<sup>566</sup>

It is especially important that each task force address the question of how to deal with the reoccurring failure of police and prosecutors to turn over exculpatory material to the defense.<sup>567</sup> Despite a

564. See ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY Standard 11-2.1(a) cmt. at 14 (3d ed. 1996) (urging that the exchange of discovery should occur as early as possible to make it meaningful). As Bruce Green has observed, some prosecutors offer plea bargains with short deadlines and couple that practice with a demand that the defendant relinquish the right to receive exculpatory evidence, a practice approved in *United States v. Ruiz*, 536 U.S. 622 (2002). Green, *supra* note 83, at 1191-92. I agree with Green that "it is wrong for prosecutors to exploit systemic neglect by pressuring defendants to plead guilty quickly." *Id.* at 1192.

565. See ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY Standard 11-2.1(a) cmt. at 13 (3d ed. 1996) (stating that the rules retain the general system of "open file" discovery adopted in the second edition of the Standards).

566. I am not advocating for a system that is as reciprocal as the civil system. The defendant's right against self-incrimination and defense counsel's role in our system ultimately impose some limits on the extent to which the state can gain access to the defense case. A full exploration of the reasons why discovery procedures for the criminal defendant should not be identical to that for the prosecution are, however, beyond the scope of this Article.

567. For a sample of the numerous articles and news stories attesting to the wide scope of the problem of police and prosecutorial failure to disclose exculpatory material, see Editorial, *And Justice Undone in Virginia*, WASH. POST, Sept. 4, 2005, at B8; Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1254-55 (2001); Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993); Stephan A. Salzberg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537 (2000); see also *supra* note 506 and accompanying text.

constitutional mandate,<sup>568</sup> an ethical command,<sup>569</sup> and in many states, a statutory obligation,<sup>570</sup> some prosecutors choose to withhold exculpatory evidence.<sup>571</sup> Sometimes the decision to withhold exculpatory information stems from a prosecutor's decidedly narrow view of what constitutes exculpatory evidence.<sup>572</sup> At other times, a prosecutor's competitiveness or excessive zeal may blind the prosecutor to his or her responsibilities.<sup>573</sup>

On the other hand, sometimes the failure of the defense to learn about exculpatory material has little or nothing to do with the prosecutor. Sometimes the police choose to hide from the prosecutor the existence of witnesses or information that is favorable to the defense.<sup>574</sup> Prosecutors have the responsibility to set up policies and

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568. See *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

569. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004) (regarding the special responsibilities of a prosecutor).

570. See, e.g., OKLA. STAT. ANN. tit. 22, § 2002(2) (West 2003); WIS. STAT. § 971.23(1)(h) (2005-2006).

571. See Berlow, *supra* note 28, at 70-74 (discussing cases of the prosecution withholding exculpatory evidence and the reasons such misconduct is rarely punished); Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, § 1, at 1 (reporting that Illinois prosecutors routinely fail to disclose exculpatory evidence).

572. Many prosecutors are inclined to adopt a narrow view of exculpatory evidence because of a lack of information about the defense, a competitive incentive to win, and an awareness that appellate courts apply a demanding materiality standard. See, e.g., Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991).

573. See, e.g., *supra* notes 321-24, 443, 506, 508-10, 516 and accompanying text; Ken Armstrong & Maurice Possley, *How Prosecutors Sacrifice Justice to Win, The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1; Griffin, *supra* note 567, at 1265-66.

574. See Fisher, *supra* note 567, at 52-53. *Bravo* illustrates an all-too-common problem with an all-too-rare happy ending. See *supra* notes 26, 313, 519, 549. In *Bravo*, the police failed to disclose that the victim had identified several other individuals as her assailant, including a man named "Tony," who committed a sexual assault two weeks before the incident leading to Bravo's arrest. See Sharon Bernstein, *Man Wrongly Jailed Could Get Settlement*, L.A. TIMES, Jan. 24, 1998, at B3. Unlike many defendants who never discover that the police failed to disclose exculpatory evidence, Mark Bravo subsequently learned of the police misconduct, was able to establish his innocence, and eventually was able to recover damages. Monte Morin, *He's Got 7 Million Ways to Tell Her "I Love You,"* L.A. TIMES, Feb. 14, 2004, at B21. At other times, police departments have systematically set up procedures or followed practices that kept exculpatory material from prosecutors so that such information would not be provided to the defense. See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988) (stating that the Chicago police maintained "street files" that were withheld from prosecutors).

procedures that prompt the police to turn over exculpatory evidence.<sup>575</sup> If the prosecutor's office has set up appropriate procedures and it is discovered that the police are purposefully withholding information, then prosecutors should utilize obstruction of justice statutes to discipline offending officers.<sup>576</sup> In the end, if we as a society are truly committed to justice, we cannot continue to tolerate prosecutorial or police misconduct that is inconsistent with the criminal justice system's search for the truth. Requiring the prosecution to disclose all police reports and any information pertinent to the investigation of a particular crime at the earliest feasible time is an important step in the direction of minimizing the number of wrongful convictions.

#### CONCLUSION

The growing number of DNA exonerations and the attendant publicity surrounding these cases and other wrongful convictions sound an increasingly loud discordant note in the normal chorus of praise for the American criminal justice system. The work of the Ryan Commission in Illinois and of other task forces and commissions around the country<sup>577</sup> are increasing awareness of the structural deficiencies and recurring problems that plague our underfunded criminal justice systems. More Americans, including legislators, are raising questions about the reliability of state systems. Despite these positive signs, however, the persistence of myths or misconceptions about various aspects of the criminal justice system makes significant reform difficult. Nonetheless, if Americans are, in fact, committed to a just society, we must set aside those misconceptions and be willing to devote the requisite resources and to make those improvements that will ensure that our criminal justice system minimizes the conviction of innocent persons.

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

576. Alternatively, courts may use their contempt power to encourage the police to refrain from withholding exculpatory material. For a recent example of a court using the threat of contempt to determine how exculpatory material was withheld from the defense, see Joe Lambe, *Police Chief Told to Explain Video Edit*, KAN. CITY STAR, Oct. 28, 2005, at A1 (describing how the Kansas City police kept information from the defense by providing the prosecutor with an edited version of the tape of the defendant's arrest).

577. See *supra* note 544.

## APPENDIX I

State and County Expenditures for Indigent Defense Services:  
Fiscal Year 2002<sup>578</sup>

State <sup>579</sup>	FY	State Expenditure <sup>580</sup>	County Expenditure	Total Expenditure	Percent of State Funds
Alabama	2002	\$37,698,403	\$0	\$37,698,403	100%
Alaska	2002	\$23,493,700	\$0	\$23,493,700	100%
Arizona	2002	\$150,000	\$77,643,965	\$77,793,965	0.002%
Arkansas	2002	\$13,165,489	\$0	\$13,165,489	100%
California	2002	\$30,541,000	\$468,311,799	\$498,852,799	6%
Colorado	2002	\$40,629,765	\$0	\$40,629,765	100%
Connecticut	2002	\$34,897,045	\$0	\$34,897,045	100%
Delaware	2002	\$9,223,500	\$0	\$9,223,500	100%
District of Columbia	2002			\$55,140,000 <sup>581</sup>	0%
Florida	2002	\$144,800,000	\$35,875,000	\$180,675,000	80%
Georgia	2002	\$9,423,078	\$44,632,008	\$54,055,086	17%
Hawaii	2002	\$10,011,173	\$0	\$10,011,173	100%
Idaho	2002	\$1,217,700	\$7,352,599	\$8,570,299	14%
Illinois	2002	\$29,456,856	\$86,759,701	\$116,216,557	25%
Indiana	2002	\$14,168,000	\$16,687,264	\$30,855,264	46%
Iowa	2002	\$37,576,468	\$1,166,884	\$38,743,352	97%
Kansas	2002	\$15,615,850	\$4,498,419	\$20,114,269	78%
Kentucky	2002	\$26,739,314	\$1,464,776	\$28,204,090	95%
Louisiana	2001	\$7,800,000	\$23,930,000	\$31,730,000	25%
Maine	2002	\$9,624,000	\$0	\$9,624,000	100%
Maryland	2002	\$58,528,208	\$0	\$58,528,208	100%

578. The Spangenberg Group, 50 State & County Expenditures for Indigent Defense Services FY 2002, in STATE & COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2002 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpcnd2003.pdf>. © 2003 by the American Bar Association. Reprinted with permission.

579. According to the author's research, the following states generate additional state funding from increased fees or alternative sources: Alabama, Arizona, Georgia, Kentucky, Louisiana, Massachusetts, New Jersey, New York, North Dakota, Ohio, South Carolina, South Dakota, and Texas.

580. According to the author's research, the following states provide no funding at the trial level: California, Idaho, Michigan, Pennsylvania, Utah, and Washington.

581. The money appropriated by the federal government to the District of Columbia for indigent defense is neither a state nor a county expenditure, thus it is just listed in the total expenditure column.

State <sup>579</sup>	FY	State Expenditure <sup>580</sup>	County Expenditure	Total Expenditure	Percent of State Funds
Massachusetts	2002	\$94,427,468	\$0	\$94,427,468	100%
Michigan	2002	\$5,950,000	N/A	\$5,950,000	N/A
Minnesota	2002	\$54,000,000	\$0	\$54,000,000	100%
Mississippi	2002	\$1,157,825	\$9,216,692	\$10,374,517	11%
Missouri	2002	\$31,601,168	\$0	\$31,601,168	100%
Montana	2002	\$4,739,824	\$4,553,824	\$9,293,648	51%
Nebraska	2002	\$660,000	\$13,000,000	\$13,660,000	5%
Nevada	2002	\$627,300	\$23,156,124	\$23,783,424	3%
New Hampshire	2002	\$13,396,398	\$0	\$13,396,398	100%
New Jersey	2002	\$79,695,000	\$0	\$79,695,000	100%
New Mexico	2002	\$29,000,000	\$0	\$29,000,000	100%
New York	2002	\$47,261,644	\$217,000,000	\$264,261,644	18%
North Carolina	2002	\$73,859,355	\$0	\$73,859,355	100%
North Dakota	2002	\$1,900,000	\$0	\$1,900,000	100%
Ohio	2002	\$42,188,424	\$51,649,078	\$93,837,502	45%
Oklahoma	2002	\$16,102,393	\$8,215,748	\$24,318,141	66%
Oregon	2002	\$87,806,912	\$0	\$87,806,912	100%
Pennsylvania	2000	\$0	\$86,947,485	\$86,947,485	0%
Rhode Island	2002	\$7,315,800	\$0	\$7,315,800	100%
South Carolina	2001	\$14,836,835	\$7,172,276	\$22,009,111	67%
South Dakota	2002	\$2,060,785	\$4,293,282	\$6,354,067	32%
Tennessee	2002	\$42,024,312	\$6,101,405	\$48,125,717	87%
Texas	2002	\$7,540,649	\$106,296,379	\$113,837,028	7%
Utah	2002	\$0	\$6,527,506	\$6,527,506	0%
Vermont	2002	\$7,461,030	\$0	\$7,461,030	100%
Virginia	2001	\$76,338,842	\$0	\$76,338,842	100%
Washington	2002	\$3,525,123	\$60,000,000	\$63,525,123	6%
West Virginia	2002	\$24,730,658	\$0	\$24,730,658	100%
Wisconsin	2002	\$67,420,000	\$0	\$67,420,000	100%
Wyoming	2002	\$3,045,644	\$537,467	\$3,583,111	85%
State Total <sup>582</sup>	2002	\$1,395,432,938	\$1,372,989,681	\$2,823,562,619	50%

582. A number of states with state-funded public defender systems, such as Arkansas, Hawaii and Wyoming, require counties to provide office space for public defender offices. The "County Expenditure" figures in the table do not include these costs.

The "Total Expenditure" figure includes the \$55,140,000 allocated by the federal government for indigent defense representation in the District of Columbia, and because this amount is neither a state nor a county expenditure, the "State Expenditure" total plus "County Expenditure" total is less than this total expenditure figure.

The "Percent of State Funds" figure does not include the funds allocated to the District of Columbia. See *supra* note 581.

State <sup>579</sup>	PY	State Expenditure <sup>580</sup>	County Expenditure	Total Expenditure	Percent of State Funds
Federal Expenditure: Criminal Justice Act Funding	2002		\$485,900,000		
National Total	2002		\$3,309,462,619		

*Notes on Estimates:*

In a number of states it was necessary for The Spangenberg Group to estimate the indigent defense expenditure. This was due to a lack of reliable data, either at the state or county level. Below are the states in which the indigent defense expenditures were estimated and the methodology used to make these estimates.

In Illinois, Pennsylvania, Nevada and Mississippi there is no statewide agency that collects county indigent defense expenditure data. However, in recent years, a statewide study on indigent defense has been conducted in each of these states by The Spangenberg Group. In Illinois, Pennsylvania, and Nevada, these studies produced a statewide indigent defense expenditure figure for 1999, 2000, and 1999 respectively. The Spangenberg Group's estimate for the 2002 county indigent defense expenditures in Illinois and Pennsylvania were arrived at by increasing the reported expenditures by 5 percent for each year that has elapsed since the state-wide reports were published. The statewide study in Mississippi did not yield a statewide expenditure figure.

In Kansas and Montana The Spangenberg Group was provided with the state, but not the county, expenditure. To estimate the counties' expenditures in each of these states, The Spangenberg Group calculated the rate of increase in state funding since 1986. The 1986 figure was taken from the Bureau of Justice Statistics Bulletin: *Criminal Defense for the Poor, 1986*. The Spangenberg Group took the 1986 county expenditure, as found in the report, and increased it by the same percentage as the state funding increased over the same period (1986 to 2002). As of July 1, 2003, the state assumed 100 percent of the costs of indigent defense in Montana.

In Idaho and Utah The Spangenberg Group was unable to find reliable figures for the county indigent defense expenditure. Utah's indigent defense system is entirely county funded. Idaho's state-funded State Appellate Defense system is new since 1986. To estimate the indigent defense expenditure in 2002 for these states, The Spangenberg Group calculated the average percentage increase from 1986 to 2002 for all states that had reliable data. It then applied that rate of increase to the county expenditure for Idaho and Utah in 1986.



At the time of The Spangenberg Group's data collection, Michigan was unable to provide updated county expenditures.