

# **Reforming Criminal Justice**

**Volume 3: Pretrial and Trial Processes**

**Erik Luna**

*Editor and Project Director*



# Reforming Criminal Justice

## Volume 3: Pretrial and Trial Processes

**Erik Luna**

*Editor and Project Director*

*a report by*

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*with the support of*



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# **Reforming Criminal Justice**

## **Volume 3: Pretrial and Trial Processes**



## Editor's Note

The present volume of *Reforming Criminal Justice* examines some crucial issues in pretrial and trial processes, key aspects of which may occur outside of the courtroom and beyond trial proceedings. For the most part, the chapters are as advertised (so to speak)—their titles accurately and succinctly convey the topic at hand. The goal of each chapter is to increase both professional and public understanding of the subject matter, to facilitate an appreciation of the relevant scholarly literature and the need for reform, and to offer potential solutions to the problems raised by the underlying topic. This approach is taken in the report's other volumes, which address additional areas of criminal justice that are worthy of attention and even reconsideration.

For interested readers, Volume 1 contains a preface describing the background of this project and the reasons for writing the report, as well as offering a more elaborate introduction to the report's creation and contents. The preface also mentions several limitations, one of which bears repeating here: Each chapter carries the weight only of its author(s). The other participants in this project have not endorsed the arguments made in each chapter. Likewise, an author's references to other chapters in this report are provided for the convenience of the reader and do not indicate that the author necessarily approves of the arguments presented in the cited chapters.

Nonetheless, the authors were chosen to contribute to the report precisely because they are leaders in their respective fields and are known to be thoughtful and reasonable. Their chapters were reviewed in a process involving some of the best and brightest in the academic world. Moreover, this report is not intended as the end-all of debate about criminal justice reform. To the contrary, it hopes to rekindle the discussion with the input of those whose lifework is the study of criminal justice.

– *Erik Luna*



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# Grand Jury

Roger A. Fairfax, Jr.\*

*The grand jury has come under fire as an outmoded relic that provides little, if any, protection to the accused. Often criticized as the complete captive of the prosecutor, the grand jury has a proud history and uncertain modern practical role. This chapter explores the leading critiques of the grand jury and proposals for its reform. After considering the grand jury's history, constitutional purpose, operation, and perceived shortcomings, the chapter makes several policy recommendations for how we might enhance the grand jury's utility in our modern criminal justice system.*

## INTRODUCTION

A grand jury is a lay body, typically numbering between 12 and 23 persons, called upon to determine whether there is sufficient evidence supporting allegations against an accused. In many jurisdictions, the government is powerless to force a defendant to stand trial unless a grand jury first returns an indictment. The grand jury also has significant authority to compel sworn testimony and the production of tangible evidence. As such, the grand jury is a powerful tool used by law enforcement to investigate crime.

In theory, the grand jury's dual role of "sword" (as a potent investigative tool to combat crime) and "shield" (as an ostensible protector of defendants' rights) should make it a celebrated feature of our criminal justice system, particularly when one considers the grand jury's proud heritage as an organ of popular representation in the administration of criminal justice, and, more broadly, as a "bulwark of liberty."<sup>1</sup> However, today's grand jury is widely criticized as a vestige of a time before professional prosecutors and additional safeguards were available to filter meritless allegations. Also, many critics believe that the grand jury's "shield" role has all but receded

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1. United States v. Mandujano, 425 U.S. 564, 589 (1976) (Brennan, J., concurring); United States v. Dionisio, 410 U.S. 1, 17 (1973).

and has given rise to an era in which the grand juries rarely, if ever, refuse to consent to the prosecutor's proposed charges. What remains, many argue, is simply an investigative tool of the prosecutor masquerading as a protection for the defendant. Therefore, the argument goes, the grand jury needs to be significantly reformed, if not abolished altogether.

## I. THE GRAND JURY'S HISTORICAL AND CONSTITUTIONAL ROLES

### A. HISTORY OF THE GRAND JURY

Perceptions of the modern grand jury's value are bound up with its historical role. The grand jury, which is "rooted in long centuries of Anglo-American history,"<sup>2</sup> has a history stretching back to ancient Athens.<sup>3</sup> However, the roots of what we recognize today as the grand jury can be found in the 14th century when, during Edward III's reign, a 24-person accusing jury was established.<sup>4</sup> This development completed the evolution of the two-tier, grand and petit jury system with which we are familiar today.<sup>5</sup> However, this early grand jury, like the grand jury of today, was perceived as a mechanism for the Crown to ferret out wrongdoing among the subjects rather than as a safeguard for the people against the power of the monarchy.

The grand jury began to earn its reputation as a protection for the accused over the next few centuries, as grand-jury indictment became a prerequisite for criminal prosecution and after high-profile instances of English grand juries refusing attempts to prosecute religious rivals of the monarchy.<sup>6</sup> In the 18th century, American colonial grand juries followed suit, using their power to frustrate the Crown's prosecutions as a form of resistance to, and protest of,

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2. United States v. Williams, 504 U.S. 36, 47 (1992) (quoting *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

3. See GEORGE J. EDWARDS, *THE GRAND JURY: AN ESSAY* 1 (1906); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 408 (2006) [hereinafter Fairfax, *Jurisdictional Heritage*].

4. EDWARDS, *supra* note 3, at 2.

5. For more on the antecedents of the modern grand jury, see *id.* at 2-7; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 408-09 n.39 (noting antecedents of the grand jury found during the reign of Henry II); Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 4-5 (2002).

6. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 721-22 (2008) [hereinafter Fairfax, *Grand Jury Discretion*]; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 408-09; see also EDWARDS, *supra* note 3, at 28-30; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996).



monarchical rule.<sup>7</sup> The grand jury in the American colonies also became a feature of everyday civic life, “overseeing community infrastructure and public works projects, taxing and spending, and appointments of individuals to local office.”<sup>8</sup>

The level of respect accorded the grand jury by the Founding generation led to the inclusion of the right to grand-jury indictment in the Bill of Rights.<sup>9</sup> The Fifth Amendment to the Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>10</sup>

The grand jury continued to figure prominently into the political and legal development of the young republic, with charges to grand juries becoming a popular means of disseminating political messages and educating a growing population on principles of democratic government.<sup>11</sup> The grand jury also inserted itself into a number of the legal and political controversies of the day, with grand jurors using their discretion to frustrate (or facilitate) proposed prosecutions under the Alien and Sedition Acts, Fugitive Slave Act, and criminal laws passed during the Reconstruction era.<sup>12</sup>

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7. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 722; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 409-410.

8. Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 410 n.45; see also LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 221-23 (1999); Roger A. Fairfax, Jr., *Grand Jury: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL OF RIGHTS J. 339, 346 (2010) [hereinafter Fairfax, *Grand Jury Innovation*]; Simmons, *supra* note 5, at 4-5 & n.8.

9. See Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 410-12.

10. U.S. CONST. amend. V. Although the right to grand jury indictment was not included in the text of the original Constitution as was the right to jury trial, see U.S. CONST. art. III, § 2 (“In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury.”); there was a reference to grand jury indictment in the provision of Article I relating to impeachment. See U.S. CONST. art. I, § 3, cl. 7 (“Judgement in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement, and Punishment, according to Law.”). This further underscores the notion that the grand jury was ingrained in the fabric of American law at the time.

11. See, e.g., Michael Daly Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 119 (Roger A. Fairfax, Jr. ed., 2011); *Justice William Paterson’s Charge to the Lyon Grand Jury, U.S. Circuit Court for the District of Vermont, October 3, 1798*, in BRUCE A. RAGSDALE, THE SEDITION ACT TRIALS 52 (Fed. Jud. Ctr. 2005), <https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf>.

12. See RICHARD YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 49-52, 103-05, 118-33 (1963); Fairfax, *Grand Jury Discretion*, *supra* note 6, at 722.

However, in 1884, the U.S. Supreme Court held that the Grand Jury Clause of the Fifth Amendment did not restrain the states from dispensing with grand-jury indictment as the exclusive means of initiating criminal proceedings.<sup>13</sup> Therefore, by the time the Supreme Court's project of selective incorporation was completed nearly a century later, the grand jury stood as one of the only criminal procedural rights not incorporated to apply to the states.<sup>14</sup> Nevertheless, the American grand jury survived early 20th-century attempts to abolish it in the wake of the abolition of the grand jury in England during the interwar years.<sup>15</sup> It is still required as a matter of constitutional command in federal criminal cases, and, today, about half of the states require grand-jury indictment as a prerequisite to felony prosecution.<sup>16</sup>

### B. THE GRAND JURY'S CONSTITUTIONAL ROLE

Contrary to popular opinion, the grand jury is not merely an adjunct of the court or a tool of the prosecutor. Rather, the grand jury "is a constitutional fixture in its own right. In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as kind of a buffer or referee between the Government and the people."<sup>17</sup>

Perhaps the most significant constitutional role the grand jury plays is that of check on the government's power to bring criminal charges against a defendant. The Supreme Court "has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a

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13. See *Hurtado v. California*, 110 U.S. 516 (1884). The grand jury would also play a significant role in many of the political episodes and skirmishes throughout the twentieth century, including the fights against political corruption, the regulation of industry, Jim Crow entrenchment, and terrorism. See, e.g., Sara Sun Beale & James E. Felman, *Enlisting and Deploying Federal Grand Juries in the War on Terrorism*, in *GRAND JURY 2.0*, *supra* note 11, at 3-23.

14. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010); ROGER A. FAIRFAX, JR., *ADJUDICATORY CRIMINAL PROCEDURE: CASES, STATUTES, AND MATERIALS* 7 & n.2 (2017) (noting only the Sixth Amendment's right to jury verdict unanimity and the Eighth Amendment's Excessive Fines Clause).

15. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 346; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 428-30.

16. See SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 1:1 (2d ed. 2015).

17. *United States v. Williams*, 504 U.S. 36, 47 (1992). For more on how the grand jury serves as a check on the three branches of government, see Fairfax, *Grand Jury Discretion*, *supra* note 6, at 726-29.

serious crime.”<sup>18</sup> Indeed, the grand jury’s determination of probable cause has preclusive effect for purposes of weighing the evidence in the early stages of a criminal case.<sup>19</sup> The fact that federal prosecutions (and prosecutions in states that require grand-jury indictment) cannot proceed without the consent of the grand jury has prompted some to refer to the grand jury as a “shield” for would-be defendants.<sup>20</sup> On the other hand, the grand jury also has earned the nickname of “sword” because of its potent power to gather evidence and compel sworn testimony on behalf of the prosecutor’s investigation of crime.<sup>21</sup>

## II. THE OPERATION OF THE GRAND JURY

### A. SUBPOENA POWER

The aforementioned “sword” moniker derives primarily from the grand jury’s subpoena power. The authority of the grand jury to subpoena evidence is tremendously broad and has nearly unlimited reach. This extends to witness testimony and documentary and tangible evidence.<sup>22</sup> As the Supreme Court has noted, the grand jury has the right to “every man’s evidence.”<sup>23</sup> However, this right is subject to valid constitutional, common law, and statutory privileges.<sup>24</sup> In the case of the Fifth Amendment privilege against self-incrimination, prosecutors can provide immunity to the witness in order to compel testimony.<sup>25</sup>

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18. *Kaley v. United States*, 134 S. Ct. 1090 (2014). For a discussion of the evolution of the probable cause standard for grand jury indictments, see Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0, *supra* note 11, at 142-47; Fairfax, *Grand Jury Discretion*, *supra* note 6, at 720-21.

19. *See Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014) (“The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think a person committed a crime.”).

20. *See, e.g.*, Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263 (1995). However, as discussed below, many bemoan the fact that grand juries rarely refuse to return indictments. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195-96 (9th Cir. 2005) (Hawkins, J., dissenting).

21. *See, e.g.*, Leipold, *supra* note 20, at 263.

22. *See, e.g.*, BEALE ET AL., *supra* note 16, § 6:3.

23. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

24. Among these privileges are the common law privileges recognized by Federal Rule of Evidence 501, including the attorney-client privilege and the spousal privilege. *See* FED. R. EVID. 501.

25. *See, e.g.*, 18 U.S.C. § 6001 *et seq.*

However, there are some limits to the grand jury's subpoena power. First, although the government is given a wide berth with regard to the subject matter of grand-jury subpoenas, subpoenas can be challenged on the grounds that they are unreasonable or oppressive.<sup>26</sup> Also, the grand jury has no power to enforce its own subpoenas; it must rely on the court to do so.<sup>27</sup> Courts will use both civil contempt and criminal contempt to encourage compliance with subpoenas.<sup>28</sup> Furthermore, there are sometimes statutory or regulatory limitations placed on the purpose or subject-matter scope of grand-jury subpoenas.<sup>29</sup>

### B. SECRECY

Another salient feature of the grand jury's operation is its secrecy. Virtually everyone associated with the grand-jury process—typically except the witnesses themselves—is forbidden from disclosing any “matter occurring before the grand jury.”<sup>30</sup> Matters occurring before the grand jury include not only testimony, but also evidence presented and other information related to grand-jury proceedings.<sup>31</sup> The secrecy rule is enforced through the court's contempt power.<sup>32</sup>

Secrecy serves a number of important purposes. First, it protects witnesses who testify before the grand jury from intimidation or retaliation.<sup>33</sup> The secret nature of grand-jury proceedings also guards against external pressure on the grand jurors themselves, who might become subject to attempts to influence their deliberations.<sup>34</sup> In addition, grand-jury secrecy helps to protect the reputations of those who are investigated for criminal activity but ultimately exonerated, and to minimize the chances that a target of an investigation will be tipped off and attempt to flee justice.<sup>35</sup>

26. See *United States v. R. Enterprises*, 498 U.S. 292 (1991).

27. See FED. R. CIV. P. 17(g); U.S. ATTORNEYS' MANUAL § 9-11.140.

28. See 18 U.S.C. § 401; 18 U.S.C. § 1826; FED. R. CRIM. P. 42; U.S. ATTORNEYS' MANUAL § 9-11.140.

29. For example, federal grand jury subpoenas may not be used for the purpose of gathering evidence in a civil case, or for locating fugitives. See, e.g., *In re Archuleta*, 432 F. Supp. 583 (S.D.N.Y. 1977); U.S. ATTORNEYS' MANUAL § 9-11.120.

30. FED. R. CRIM. P. 6(e)(2); see also PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* § 10.01(B) (4th ed. 2001).

31. See, e.g., *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 600 (D.C. Cir. 1999).

32. See FED. R. CRIM. P. 6(e)(7).

33. See BEALE ET AL., *supra* note 16, § 5:1; Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352-53 (1999).

34. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201 (9th Cir. 2005).

35. See *Fairfax, Grand Jury Discretion*, *supra* note 6, at 748.

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### C. DELIBERATION AND VOTING

After completion of the presentation of evidence to the grand jury, the prosecutor, who serves as the legal adviser to the grand jury,<sup>36</sup> typically gives legal instructions to the grand jurors.<sup>37</sup> The grand jurors will then have the opportunity to deliberate and vote in private.<sup>38</sup> The standard governing grand-jury proceedings is whether there is probable cause to believe the accused committed the offense or offenses in the proposed indictment. If a majority of the grand jurors vote in favor, the grand jury returns what is often referred to as a “true bill.”<sup>39</sup> If the grand jury declines to vote in favor of indictment, the prosecutor is free to bring the charges before another grand jury, as the Double Jeopardy Clause does not apply to grand-jury indictments.<sup>40</sup>

### III. GRAND-JURY CRITIQUES

The grand jury is perhaps the most criticized of all the mechanisms of criminal adjudication. The critiques are many, but they generally fall into three categories: ineffectiveness as a probable-cause filter, redundancy as a check on prosecutorial discretion, and lack of fairness to defendants and witnesses.

#### A. INEFFECTIVENESS AS A PROBABLE-CAUSE FILTER

The most common indictment against the grand jury is the claim that it is merely a rubber stamp for prosecutorial decisions to charge a defendant with a crime.<sup>41</sup> Although much of the criticism is likely grounded more in anecdote than in empirical analysis, there are some who have made a convincing case that the grand jury rarely rejects charges lodged by the prosecutor.<sup>42</sup> Indeed, the statistics on the federal level bear out this notion; in a recent year, federal grand juries

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36. See, e.g., AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(a) [hereinafter ABA PROSECUTION FUNCTION]; BEALE ET AL., *supra* note 16, § 4:15; Kristin Henning, *Status, Race, and the Rule of Law in the Grand Jury*, 58 HOW. L.J. 833, 841 (2015).

37. See BEALE ET AL., *supra* note 16, § 4:15.

38. See FED. R. CRIM. P. 6(d)(2).

39. See, e.g., SUSAN BRENNER & LORI SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 5:20 (2d ed. 2016).

40. See *United States v. Williams*, 504 U.S. 36, 49 (1992). However, the U.S. Department of Justice has an internal policy requiring high-level approval before a line attorney may resubmit previously rejected charges to the grand jury. See U.S. ATTORNEYS' MANUAL § 9-11.120.

41. See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195-96 (9th Cir. 2005); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 926 (2006); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995).

42. See, e.g., Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0, *supra* note 11, at 195-222.

rejected indictments in only eleven of over 160,000 cases.<sup>43</sup> Assuming this pattern maintains in state grand-jury practice, it seems to paint a fairly bleak portrait of the grand jury's effectiveness as a probable-cause filter. Given the rarity of indictment declination, it is natural to question what value the grand jury adds.

However, there are reasonable explanations for the high rate of indictment. First, it must be remembered that the probable-cause standard employed by grand juries is a relatively modest threshold to meet compared to the proof-beyond-a-reasonable-doubt standard required at trial.<sup>44</sup> Furthermore, the prosecutor in the grand jury is unencumbered by evidentiary rules, fully free to use hearsay evidence and other evidence that would be inadmissible at trial.<sup>45</sup> In addition, prosecutors have the ability to poll the grand jury informally to obtain an indication of how the grand jurors perceive the strengths and weaknesses of the case before requesting that the grand jurors vote on an indictment. If there are issues that would jeopardize obtaining a probable-cause finding, the prosecutor could present additional evidence to fill any gaps, or could simply choose not to request a vote. Either way, the statistics would not reflect a declination by the grand jury.<sup>46</sup>

### B. REDUNDANCY AS A CHECK ON PROSECUTORIAL DISCRETION

Another set of criticisms relate to the changed context within which the grand jury operates. The American grand jury came of age during an era before the public prosecutor became a regular feature of our criminal justice

43. See, e.g., MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 (2013) (showing that grand juries refused indictments in only eleven of the more than 160,000 federal cases prosecuted in 2010); Ben Casselman, *It's Incredibly Rare for a Grand Jury to do what Ferguson's Just Did*, FIVE THIRTY EIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> (discussing same).

44. See, e.g., Kuckes, *supra* note 18; William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (2016).

45. See *Costello v. United States*, 350 U.S. 359 (1956).

46. See, e.g., Kevin Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2370 & n.179 (2008); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 5 & n.24 (1999). Many guilty pleas, of course, involve the waiver of indictment as part of the plea bargain. See Roger A. Fairfax, Jr., *Thinking Outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process*, 57 WM. & MARY L. REV. 1395 (2016) [hereinafter Fairfax, *Deploying the Grand Jury*]; see also Fairfax, *Grand Jury Innovation*, *supra* note 8, at 342-43 (noting that statistics also show that nearly all grand-jury indictments are followed by a conviction, either at trial or, more typically, as the result of a guilty plea); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

system.<sup>47</sup> As late as the mid-1800s, private citizens were permitted to lodge and prosecute criminal charges against others without a public prosecutor to determine whether those charges were supported by the evidence or were in the interests of justice.<sup>48</sup> The grand jury, which was responsible for screening those allegations, undoubtedly served as a safeguard against private manipulation of the criminal process for improper purposes.<sup>49</sup>

Today, however, the office of the public prosecutor is firmly established in the United States. Prosecutors are held accountable through either supervision by elected officials, or through election at the ballot box.<sup>50</sup> Furthermore, prosecutors have access to training and are expected to adhere to ethical and professional norms and standards.<sup>51</sup> In addition, there are other mechanisms available for the vetting of criminal allegations, such as the preliminary hearing in which a judge determines whether there is probable cause to support the charges the government seeks to bring.<sup>52</sup>

These are all valid observations, but they ignore that fact the grand jury represents a *community* perspective on whether charges are appropriate in a given case.<sup>53</sup> This is the same reason that, constitutional command aside, the jury trial is deemed to provide the popular perspective that enhances the administration of justice.<sup>54</sup> Indeed, the grand jury's finding of probable cause is conclusive in the criminal process; once a grand jury finds probable cause, no other judicial finding is necessary for any purpose.<sup>55</sup> The additional respect

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47. See, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 422-23 & n.33 (2009).

48. See, e.g., Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292-93 (1989).

49. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 64 (1989); Fairfax, *Grand Jury Innovation*, *supra* note 8, at 344-45.

50. Most prosecutors in the United States are elected. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009). For a discussion of the prosecutorial environment, see Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume.

51. See, e.g., AM. BAR ASS'N, *MODEL RULES OF PROFESSIONAL CONDUCT* 3.8; AM. BAR ASS'N, *MODEL CODE OF PROFESSIONAL RESPONSIBILITY*, DISCIPLINARY RULE 7-103. See generally ABA PROSECUTION FUNCTION, *supra* note 36.

52. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).

53. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 759-61.

54. See, e.g., Roger A. Fairfax, Jr., *Harmless Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027 (2008).

55. See, e.g., *Kaley v. United States*, 134 S. Ct. 1090 (2014).

the law affords the grand jury's probable-cause finding is at least some evidence of the importance of having community participation in the criminal process, particularly in a system where jury trials are rare.<sup>56</sup>

### C. LACK OF FAIRNESS TO TARGETS AND WITNESSES

Other criticisms relate to the notion that the grand-jury process treats targets and witnesses unfairly. Among the concerns raised on the part of witnesses are the lack of counsel in the grand-jury room and the inability of witnesses to obtain a transcript of their testimony.<sup>57</sup> As for targets of grand-jury investigations, critics have pointed toward the lack of the right to testify before the grand jury, the lack of a prohibition on the prosecutor's introduction to the grand jury of inadmissible evidence, and the lack of a requirement that the prosecutor present any exculpatory evidence before the grand jury.

#### 1. Witnesses

**(a) Counsel in the grand-jury room:** With regard to counsel in the grand-jury room, the central argument is that witnesses are better protected when counsel can be present during questioning. In the absence of such a right, the witness generally must recognize when he or she is in need of legal advice, ask the prosecutor to pause the proceeding, leave the grand-jury room to consult with counsel, and then return to either answer the question (or assert privilege). As one might imagine, this could be a difficult and disruptive process, even assuming a lay witness would know when legal advice should be sought before answering a question. However, an objection to having counsel accompany the witness is that it would transform the grand jury into something akin to an adversarial proceeding.<sup>58</sup> In addition, there is the concern that permitting defense counsel to be present would undermine the secrecy of the proceedings.<sup>59</sup>

**(b) Disclosure of witness transcripts:** Secrecy is also the concern at the heart of objections to releasing to witnesses their grand-jury transcripts. Although grand-jury witnesses are permitted to disclose the substance of their testimony,<sup>60</sup> the transcripts themselves are treated as confidential grand-jury

56. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) ("Our world is no longer one of trials, but of guilty pleas."); see also Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 IOWA L. REV. 1511, 1530 (2012).

57. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, FEDERAL GRAND JURY REFORM REPORT & BILL OF RIGHTS (2000) [hereinafter NACDL, GRAND JURY BILL OF RIGHTS]; AM. BAR ASS'N, GRAND JURY POLICY AND MODEL ACT (1982).

58. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57; N.Y. CRIM. PROC. L. §§ 190.25, 190.52.

59. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57.

60. See, e.g., FED. R. CRIM. P. 6(e)(2)(B).



material. Arguably, it would benefit witnesses to have those transcripts, in part, so that they may be better prepared for, and avoid perjury in, future testimony. However, there still exists the serious concern that witnesses could be coerced to disclose their transcripts to those against whom they testified. This would not only pose a problem of witness intimidation, but it also could undermine the integrity of the proceedings.

## 2. Targets

**(a) Defendant's right to testify before the grand jury:** Typically, a target of a grand-jury investigation has no right to testify before the grand jury.<sup>61</sup> The main concern with such a right is not that more defendants will testify before grand juries; indeed, most prosecutors would relish the opportunity to question the target in the grand jury. Rather, it is that, if the defendant has the right to testify, the prosecutor would need to notify the target that he or she is, in fact, a target. Such notification could lead to flight, destruction of evidence, or witness intimidation. However, this concern can be addressed by limiting the right to testify to cases in which the target already is aware of the grand-jury proceeding and makes a formal request to testify.<sup>62</sup>

**(b) Prohibition on the use of inadmissible evidence in the grand jury:** Some have criticized the fact that prosecutors are permitted to introduce inadmissible evidence before the grand jury.<sup>63</sup> In the grand jury, prosecutors are permitted to introduce hearsay evidence and evidence that would be suppressed at trial due to constitutional violations.<sup>64</sup> If prosecutors were required to refrain from introducing such evidence, there would undoubtedly be clear cases in which the prosecutor would know that a court would be almost certain to suppress a piece of evidence. (For example, a confession coerced by physical abuse.) However, query how closer admissibility calls would be resolved. Would the question be committed to a judge or magistrate, or would we simply rely on the good-faith prediction of the prosecutor? If the former, satellite litigation would be created, thus consuming resources and undermining the preliminary nature of grand-jury proceedings. If the latter, there would be a question of whether the rule would be enforceable in practice.

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61. New York State is a prominent exception. See N.Y. CRIM. PROC. L. § 190.50; William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES (Jun. 20, 2004).

62. For example, the target could become aware of the investigation either because a witness has disclosed the investigation, or because a criminal complaint already has been filed against the individual. See N.Y. CRIM. PROC. L. § 190.50; see also ABA PROSECUTION FUNCTION, *supra* note 36, § 3-4.6(g).

63. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57.

64. See *Costello v. United States*, 350 U.S. 359 (1956).

**(c) Requirement of disclosure of exculpatory evidence to the grand jury:**

Critics have bemoaned the lack of a rule requiring that the prosecutor disclose exonerating evidence to the grand jury before they return an indictment.<sup>65</sup> The U.S. Supreme Court has held that a prosecutor need not present such evidence to the grand jury.<sup>66</sup> Part of the Court's rationale was that the grand jury is not meant to be a trial-like proceeding.<sup>67</sup> The Court's ruling, however, does not preclude jurisdictions from adopting their own requirement that prosecutors disclose exonerating evidence to the grand jury. In fact, the U.S. Department of Justice adopted a rule requiring federal prosecutors to disclose such evidence to the grand jury.<sup>68</sup> Several states have provisions requiring disclosure of exonerating evidence under certain circumstances,<sup>69</sup> and professional prosecutorial standards also call for such disclosure.<sup>70</sup>

### RECOMMENDATIONS

In the wake of grand-jury decisions not to indict in recent high-profile cases involving police killings of unarmed African-Americans, the grand jury has been placed under a microscope.<sup>71</sup> One byproduct of this renewed scrutiny was a set of proposals for drastically altering the grand jury as we know it. Some advocated stripping the grand jury of its secrecy.<sup>72</sup> Others insisted that judges be installed in the grand jury to supervise the proceedings.<sup>73</sup> Many even

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65. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57.

66. See *United States v. Williams*, 504 U.S. 36 (1992).

67. See *id.*

68. See U.S. ATTORNEYS' MANUAL § 9-11.233.

69. See, e.g., Ali Lombardo, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?*, 48 CLEVELAND ST. L. REV. 829, 842-57 (2000).

70. See ABA PROSECUTION FUNCTION, *supra* note 36, § 3-4.6(e). For a discussion of disclosure standards, see Darryl K. Brown, "Discovery," in the present Volume.

71. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men, in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017); Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825 (2015).

72. See, e.g., JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY, THE STATE OF THE JUDICIARY 2015, at 3-4 (2015); Brad Schrade, *Grand Jury Privilege Curtailed for Ga. Officers in Shooting Cases*, ATLANTA JOURNAL-CONSTITUTION (Apr. 26, 2016); *Bill on Grand Jury Reform a Welcome Move Toward Transparency*, STATEN ISLAND ADVANCE (Dec. 8, 2014).

73. See, e.g., LIPPMAN, *supra* note 72, at 2-4; *A Judge's Idea for Grand Jury Reform*, N.Y. TIMES (Feb. 19, 2015).

called for the outright abolition of the grand jury.<sup>74</sup> These are understandable responses to the outrage generated by tragic events such as those that took place in Ferguson and Staten Island.<sup>75</sup> It is not surprising that the grand jury would receive the blame for the outcomes in those and other cases.<sup>76</sup> However, as a general matter, many of these reform or abolition proposals, though well meaning, are ultimately misguided.<sup>77</sup>

Nevertheless, there are opportunities to improve the grand jury and harness its untapped potential. Below are several policy recommendations worth considering for the improvement of the grand-jury process in the United States.

**1. Enhancing the grand jury's filter and community-voice functions.**

As discussed above, the grand jury's high rate of indictment may not be a sign of its complete incompetence as a probable-cause filter. In addition, the grand jury can offer a valuable community perspective on charging and enforcement practices. Therefore, jurisdictions should consider improvements to how grand jurors are educated regarding their role in evaluating the appropriateness of proposed charges.<sup>78</sup>

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74. See, e.g., Jason Hancock, *Missouri Lawmaker Wants to Abolish Grand Jury System*, KANSAS CITY STAR (Jan. 19, 2015); Rachel Van Cleave, *Time to Abolish the 'Inquisitorial' Grand Jury System*, THE RECORDER (Dec. 31, 2014); James C. Harrington, *Abolish Grand Jury System*, SAN ANTONIO EXPRESS-NEWS (Dec. 21, 2014); George E. Curry, *U.S. Should Abolish Grand Jury System*, PHILA. TRIBUNE (Dec. 10, 2014); LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014); Caleb Pilgrim, *Let's Abolish the Grand Jury System*, NEW HAVEN REGISTER (Dec. 9, 2014).

75. See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2015); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014). President Barack Obama established a task force on 21st-century policing in the wake of these cases. See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017); see also PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015).

76. See, e.g., Fairfax, *Should the American Grand Jury Survive Ferguson*, *supra* note 71.

77. See, e.g., Roger A. Fairfax, Jr., *Time for U.S. to Junk Grand Juries? Evidence Shows System Needs Mending, Not Ending*, ORLANDO SENTINEL (Dec. 26, 2014). Many of the very real obstacles that can frustrate grand jury indictments in cases against law enforcement can be addressed by mechanisms to ensure the independence of the prosecutor handling the case. It is this, rather than radical reform or abolition of the grand jury that may lead to more frequent indictments in these types of cases. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. CIV. RTS.-CIV. LIB. L. REV. 397 (2017) [hereinafter Fairfax, *Grand Jury Role*].

78. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 761.

2. **Affording the defendant the right to testify in the grand jury.** Although secrecy concerns may discourage the presence of counsel for witnesses in the grand-jury room and disclosure of witness transcripts,<sup>79</sup> jurisdictions should consider establishing the right of grand-jury targets to testify before the grand jury when the investigation is known to the target.<sup>80</sup> In addition, targets, like all grand-jury witnesses, should receive *Miranda*-like warnings before testifying.<sup>81</sup>
3. **Requiring the disclosure of exculpatory evidence to the grand jury.** Although there may be practical concerns with a prohibition on the introduction of inadmissible evidence in the grand jury, jurisdictions should adopt a clear policy requiring prosecutors to disclose exculpatory evidence to the grand jury.<sup>82</sup>
4. **Legal instructions to the grand jury should be made on the record and disclosed to the defendant.** When a prosecutor instructs a grand jury on the controlling legal standards in a case, these instructions should be made on the record and made available as a matter of course to the indicted defendant(s) upon request.<sup>83</sup>
5. **Making a legal adviser available to the grand jury.** Jurisdictions should consider establishing a dedicated legal adviser, independent of the prosecutor, available for consultation by the grand jury.<sup>84</sup>
6. **Enhance use of grand-jury reports.** Jurisdictions should establish or revive the ability of grand juries to investigate and issue reports on matters of general concern, including official corruption and misconduct.<sup>85</sup>

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79. See Part IV.C, *supra*.

80. See *id.*

81. See, e.g., NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57. For a discussion of questioning by law enforcement, see Richard A. Leo, "Interrogation and Confessions," in Volume 2 of the present Report.

82. See Part IV.C, *supra*.

83. See, e.g., NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57; Fairfax, *Grand Jury Role*, *supra* note 77; Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443 (2001).

84. See, e.g., Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171 (2008); see also Susan W. Brenner, *Grand Jurors Speak*, in GRAND JURY 2.0, *supra* note 11.

85. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 342-44; see also 18 U.S.C. § 3331; BEALE ET AL., *supra* note 16, § 2:2.

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7. **Utilize the grand jury beyond the accusing and screening functions.** More generally, jurisdictions should endeavor to utilize the grand jury for other functions related to the administration of criminal justice, including as a resource for community input in the guilty-plea process,<sup>86</sup> sentencing and deferred prosecution agreements,<sup>87</sup> and prosecutorial priorities and regulation.<sup>88</sup>

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86. See Fairfax, *Deploying the Grand Jury*, *supra* note 46; Fairfax, *Grand Jury Innovation*, *supra* note 8, at 354-57; *cf.* Laura I. Appelman, *The Plea Jury*, 85 IND. L.J. 731, 748 (2010).

87. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 357-60.

88. See *id.* at 364-68; see also Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in GRAND JURY 2.0, *supra* note 11, at 184-86.



# Pretrial Detention and Bail

Megan Stevenson\* and Sandra G. Mayson†

*Our current pretrial system imposes high costs on both the people who are detained pretrial and the taxpayers who foot the bill. These costs have prompted a surge of bail reform around the country. Reformers seek to reduce pretrial detention rates, as well as racial and socioeconomic disparities in the pretrial system, while simultaneously improving appearance rates and reducing pretrial crime. The current state of pretrial practice suggests that there is ample room for improvement. Bail hearings are often cursory, taking little time to evaluate a defendant's risks, needs, or ability to pay. Money-bail practices lead to high rates of detention even among misdemeanor defendants and those who pose no serious risk of crime or flight. Infrequent evaluation means that the judges and magistrates who set bail have little information about how their bail-setting practices affect detention, appearance, and crime rates. Practical and low-cost interventions, such as court reminder systems, are underutilized. To promote lasting reform, this chapter identifies pretrial strategies that are both within the state's authority and supported by empirical research. These interventions should be designed with input from stakeholders, and carefully evaluated to ensure that the desired improvements are achieved.*

## INTRODUCTION

The scope of pretrial detention in the United States is vast. Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last 20 years.<sup>1</sup> There are 11 million jail admissions annually; on any given day, local jails house almost half a million people who are awaiting trial.<sup>2</sup> The U.S. pretrial detention rate, compared to the total population, is higher than in any European or Asian country.<sup>3</sup>

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1. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014, at 1 (2015).

2. *Id.* at 3.

3. *See, e.g.*, ROY WALMSLEY, WORLD PRETRIAL/REMAND IMPRISONMENT LIST 2-6 (1st ed. 2013).

Pretrial detention has profound costs. In fiscal terms, the total annual cost of pretrial jail beds is estimated to be \$14 billion, or 17% of total spending on corrections.<sup>4</sup> At the individual level, pretrial detention can result in the loss of employment, housing or child custody, in addition to the loss of freedom. Pretrial detention also affects case outcomes. No fewer than five empirical studies published in the last year, deploying quasi-experimental design, have shown that pretrial detention causally increases a defendant's chance of conviction, as well as the likely sentence length.<sup>5</sup> The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself—especially if some of those convicted are innocent. Finally, two recent studies have found evidence that pretrial detention increases the likelihood that a person will commit future crime.<sup>6</sup> This may be because jail exposes defendants to negative peer influence,<sup>7</sup> or because it has a destabilizing effect on defendants' lives.

Given the costs of pretrial detention, one might expect that detention decisions would be made with care. This is not how the system currently operates. For the most part, whether a person is detained pretrial depends solely on whether he can afford the bail amount set in his case. Nationwide, 9 out of 10 felony defendants who were detained pretrial in 2009 (the last year for which the data is published) had bail set and would have been released if

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4. PRETRIAL JUSTICE INST., *PRETRIAL JUSTICE: HOW MUCH DOES IT COST?* 2 (2017); MELISSA S. KEARNEY ET AL., *THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES* 13 (2014).

5. See, e.g., WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, *THE EFFECTS OF PRETRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), [www.nber.org/papers/w22511](http://www.nber.org/papers/w22511); ARPIT GUPTA, CHRISTOPHER HANSMAN & ETHAN FRENCHMAN, *THE HEAVY COSTS OF HIGH BAIL: EVIDENCE FROM JUDGE RANDOMIZATION* 22 (Columbia Law & Econ. Working Paper No. 531, 2016), <http://ssrn.com/abstract=2774453>; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711 (2017); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* 34-35 (July 20, 2016) (unpublished manuscript), *available at* [http://home.uchicago.edu/~npope/pretrial\\_paper.pdf](http://home.uchicago.edu/~npope/pretrial_paper.pdf); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (January 12, 2016) (unpublished manuscript), *available at* <https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf>.

6. GUPTA ET AL., *supra* note 5; Heaton et al., *supra* note 5. *But see* Stevenson, *supra* note 5 (finding no future-crime effects); DOBBIE ET AL., *supra* note 5 (same).

7. Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, 124 *Q. J. ECON.* 105, 105 (2009); Megan Stevenson, *Breaking Bad: Social Influence and the Path to Criminality in Juvenile Jails* 1 (2015) (unpublished manuscript) (on file with author).



they had posted it.<sup>8</sup> Even at relatively low bail amounts, detention rates are high. In Philadelphia, between 2008 and 2013, 40% of defendants with bail set at \$500 remained jailed pretrial.<sup>9</sup> Over the same time period in Houston, more than half of all misdemeanor defendants were detained pending trial; their average bail amount was \$2,786.<sup>10</sup> Some pretrial detainees are facing very serious charges, but most are not: At least as of 2002, 65% of pretrial detainees were held on nonviolent charges only, and 20% were charged with minor public-order offenses.<sup>11</sup> The hearings at which bail is set—and which have such serious consequences—are typically rapid and informal.

In the last few years, the hefty costs of pretrial detention have generated growing interest in bail reform. Jurisdictions around the country are now rewriting their pretrial law and policy. They aspire to reduce pretrial detention rates, as well as racial and socioeconomic disparities in the pretrial system, without increasing rates of non-appearance or pretrial crime. The overarching reform vision is to shift from the “resource-based” system of money bail to a “risk-based” system, in which pretrial interventions are tied to risk rather than wealth.<sup>12</sup> To accomplish this, jurisdictions are implementing actuarial risk assessment and reducing the use of money bail as a mediator of release. The idea is that defendants who pose little statistical risk of flight (i.e., fleeing the jurisdiction) or committing pretrial crime can be released without money bail or onerous conditions. Riskier defendants can be released under supervision, and detention can be reserved for those so likely to flee or commit serious harm that the risk cannot be managed in any less intrusive way. (In practice, however, risk-assessment tools do not actually measure flight- and crime-risk; rather, they measure nonappearance- and arrest-risk, a point discussed at greater length below.)

This chapter offers a critical discussion of central pretrial reform initiatives, drawing on recent scholarship. We hope to provide readers with a deeper understanding of ongoing academic and policy debates around key reform goals: reducing the use of money bail, reducing racial disparities in pretrial detention,

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8. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 1, 15 (2013).

9. Stevenson, *supra* note 5, at 12.

10. Heaton et al., *supra* note 5, at 736 tbl. 1.

11. DORIS S. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 3 (2004).

12. See, e.g., Christopher Moraff, *U.S. Cities Are Looking for Alternatives to Cash Bail*, NEXT CITY (Mar. 24, 2016), <https://nextcity.org/daily/entry/cities-alternatives-cash-bail>; PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS (2012).

evaluating risk of crime or flight, rationalizing pretrial detention, and tailoring conditions of release. In each area, we note the current direction of reform, survey relevant scholarship, and offer our own perspective on the best prospects for effective and lasting change. We evaluate pretrial reform initiatives on the basis of several criteria: effectiveness in promoting public safety and court appearance, intrusiveness to individual liberty, cost, and impact on racial and socioeconomic disparity.<sup>13</sup> Part I provides background. Part II is our substantive discussion. The chapter concludes with recommendations based on key reform priorities.

## I. THE PRETRIAL SYSTEM

### A. STRUCTURE AND HISTORY

The pretrial phase begins when a judicial officer or grand jury determines that there is probable cause to support a criminal charge, and it ends when the charge is adjudicated or dismissed. Once the state has charged someone, it has a strong interest in ensuring the integrity of the ensuing proceeding—including ensuring that the defendant appears in court and does not interfere with witnesses or evidence. The state also has an interest, as it always does, in preventing future crime, and some defendants may be particularly crime-prone. So the core goals of the pretrial system are to (1) ensure defendants’ appearance, (2) prevent obstruction of justice, and (3) prevent other pretrial crime, all while minimizing intrusions to defendants’ liberty.<sup>14</sup>

Since the turn of the 20th century, the primary mechanism for ensuring defendants’ appearance has been money bail, or a “secured financial bond.”<sup>15</sup> A defendant deposits the specified bail amount with the court as security for his appearance at future proceedings. If he does appear, the deposit is returned at the conclusion of the case. This system has inspired three waves of reform. The first, in the 1960s, sought to reduce the pretrial detention of the poor by limiting the

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13. For further guidance on bail reform, see, for example, AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3d ed. 2007) [hereinafter ABA STANDARDS]; CRIM. JUST. POL’Y PROGRAM, HARVARD LAW SCHOOL, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016); TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 21-44 (2014); and *The Solution*, PRETRIAL JUSTICE INST., <http://www.pretrial.org/solutions> (last visited Mar. 25, 2017). The general principles these sources articulate represent broadly held views among contemporary reformers, policymakers and academics.

14. ABA STANDARDS, *supra* note 13, § 10-1.1.

15. See Schnacke, *supra* note 13, at 21-40. Prior to that time, the system relied on the unsecured pledges of personal sureties. *Id.*; cf. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 296 (1769) (explaining that an accused required to give bail must “put in securities for his appearance, to answer the charge against him”).

use of money bail in favor of unsecured release (“release on recognizance”).<sup>16</sup> But rising crime during the 1970s and 1980s prompted a second reform movement, this time directed at incapacitating dangerous defendants.<sup>17</sup> The Bail Reform Act of 1984 authorized federal courts to order pretrial detention without bail on the basis of a defendant’s dangerousness.<sup>18</sup> Many states followed suit. Every jurisdiction except New York also authorized courts to consider public safety in imposing bail or other conditions of release.<sup>19</sup> More recently, money bail has been on the rise and rates of release on recognizance have declined.<sup>20</sup> The current wave of reform seeks to reverse that trend.

### B. CURRENT PRACTICE

In practice, bail hearings are a messy affair. Every person who is arrested is entitled to a judicial determination, within 48 hours, that there is probable cause to believe she has committed a crime.<sup>21</sup> Many jurisdictions combine this with a bail hearing (or “pretrial release hearing”). It is common for such hearings to last only a few minutes. They are often held over videoconference with no defense counsel present. The presiding official may be a magistrate rather than a judge, and may not even be a lawyer. Available evidence suggests that the bail judges do not often take the time to make a careful determination about what bail an arrestee can realistically afford. Some jurisdictions use bail schedules that prescribe a set bail amount for each offense.<sup>22</sup> In others, statutory law directs judges to consider various factors in imposing bail or alternative conditions of release.<sup>23</sup> These statutes provide little guidance about how to weigh the factors, or which conditions of release are appropriate to manage different pretrial risks.

16. See, e.g., John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2 (1985).

17. See generally *id.*

18. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-87 (codified at 18 U.S.C. §§ 3141-50, 3062).

19. Goldkamp, *supra* note 16, at 56 & n.57.

20. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007) (reporting that from 1990-1994, 41% of pretrial releases were on recognizance and 24% were by cash bail; from 2002-2004, 23% of releases were on recognizance and 42% were by cash bail); REAVES, *supra* note 8, at 15 (“Between 1990 and 2009, the percentage of pretrial releases involving financial conditions rose from 37% to 61%.”).

21. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975).

22. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 7 (2009) (reporting that 64% of surveyed counties use a bail schedule).

23. See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 866 (describing state statutes).

In most cases, a monetary bail amount is set, and in most cases, the defendant need not pay it directly to be released. Three mechanisms have developed for subsidizing bail. The dominant one is the commercial bail bond industry.<sup>24</sup> Commercial bail bondsmen charge defendants a non-refundable fee—usually around 10% of the total bail amount—for the service of posting the bond. Because of concern about the effect of this industry on defendants’ incentive to appear and on the fairness of the process, some jurisdictions have outlawed it. Others have developed their own partial-deposit systems, which allow defendants to obtain release by depositing only a percentage of the total bail amount with the court.<sup>25</sup> A third, less common, mechanism is the community bail fund: a nonprofit organization that posts bail on defendants’ behalf.<sup>26</sup>

### C. LAW AND POLICY

The Supreme Court has affirmed that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>27</sup> A set of federal constitutional provisions protect pretrial liberty. Most importantly, perhaps, the Equal Protection and Due Process Clauses prohibit the state from conditioning a person’s liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest.<sup>28</sup> Since 2015, a number of federal district courts have held that fixed money-bail schedules, which

24. COHEN & REAVES, *supra* note 20, at 4 (showing that 48% of all pretrial releases studied were based on financial conditions, most of which—33% of all releases—were on surety bond); *About Us*, AM. BAIL COALITION, [www.americanbailcoalition.org](http://www.americanbailcoalition.org) (last visited Jan. 31, 2017) (“The American Bail Coalition is a trade association made up of national bail insurance companies ...”).

25. *E.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J.L. & ECON. 93, 94 (2004).

26. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 600 (2017) (noting that community bail funds have proliferated recently, motivated by “beliefs regarding the overuse of pretrial detention”).

27. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

28. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that to “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine ... would be contrary to the fundamental fairness required by the Fourteenth Amendment”); *see also* Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015) (“Incarcerating individuals solely because of their inability to pay for their release ... violates the Equal Protection Clause of the Fourteenth Amendment.”) (citing *Tate v. Short*, 401 U.S. 395, 398 (1971)); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961)). *But see* Brief for Amici Curiae Am. Bail Coalition et al., *Walker v. Calhoun*, No. 16-10521 (11th Cir. June 21, 2016) (arguing that this line of case law has no application in the pretrial context).

do not take ability to pay into account, violate these provisions.<sup>29</sup> Relatedly, the Eighth Amendment prohibits “excessive” bail.<sup>30</sup> This requires an individualized bail determination: Bail must be “reasonably calculated” to ensure the appearance of a particular defendant.<sup>31</sup> The Bail Clause permits detention without bail, but may prohibit any burden on a defendant’s liberty that is excessive “in light of the perceived evil” it is designed to address.<sup>32</sup> The Due Process Clause prohibits pretrial punishment.<sup>33</sup> It also requires that any detention regime be carefully tailored to achieve the state’s interest and include robust procedural protections for the accused.<sup>34</sup> The Fourth Amendment prohibits any “significant restraint” on pretrial liberty in the absence of probable cause for the crime charged.<sup>35</sup> The Sixth Amendment, finally, requires that counsel be appointed for an indigent defendant at or soon after her initial appearance in court.<sup>36</sup> It remains an open question whether defendants have a Sixth Amendment right to representation at the bail hearing itself.<sup>37</sup>

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29. *Pierce v. City of Velda City*, 4:15-cv-570-HEA (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, 2:15-cv-34-MHT (M.D. Ala. Sept. 14, 2015); *Thompson v. Moss Point, Miss.*, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015); *Walker v. City of Calhoun, Ga.*, 4:15-cv-170-HLM (N.D. Ga. Jan. 28, 2016); *ODonnell v. Harris Cty.*, 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017). The Department of Justice took the same position under the Obama Administration. See Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance of the Issue Addressed Herein at 3, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir. Aug. 18, 2016); Letter from Vanita Gupta, Principal Deputy Assistant Att’y Gen., Civil Rights Div., Dep’t of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 7 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

30. U.S. CONST. amend. VIII (“[E]xcessive bail shall not be required.”).

31. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

32. *United States v. Salerno*, 481 U.S. 739, 754-55 (1987).

33. *Id.* at 748-52.

34. *Id.* at 747, 750-52. The Supreme Court upheld the federal pretrial detention regime against (among other things) a procedural due process challenge on the ground that it provided for an adversarial hearing, guaranteed defense representation, required that the state prove “by clear and convincing evidence that an arrestee presents an identified and articulable threat,” directed that the court make “written findings of fact” and “reasons for a decision to detain,” and provided immediate appellate review. *Id.* at 751-52.

35. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017).

36. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199, 212 (2008).

37. See *id.* at 212 n.15 (reserving judgment on that question). For a discussion of indigent defense, see Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

Beyond the federal Constitution, federal statutory law and state law regulate pretrial practice. In the federal system, the Bail Reform Act lays out a comprehensive pretrial scheme.<sup>38</sup> At the state level, there is wide variation in pretrial legal frameworks. Approximately half of state constitutions include a right to release on bail in noncapital cases. The other half allow for detention without bail in much broader circumstances.<sup>39</sup> Most states also have statutes that structure pretrial decision-making.

In the policy realm, the American Bar Association has codified standards on pretrial release that represent the mainstream consensus among scholars about best practices in the pretrial arena.<sup>40</sup> Three core principles are worth highlighting. First, wealth cannot be the factor that determines whether someone is released or detained pretrial.<sup>41</sup> Secondly, money bail should be set only to mitigate flight risk (not threats to public safety) and as a last resort.<sup>42</sup> Finally, the state should always use the least restrictive means available to mitigate flight or crime risk.<sup>43</sup>

Ultimately, though, it is local implementation that truly shapes pretrial practice. There is huge variance across counties with respect to the timing of bail hearings, the presence of counsel, the qualifications and training of bail judges, the resources allocated for bail hearings, the prevalence of commercial bondsmen, the customary standards for bail-setting, and the availability of alternatives to detention or money bail.

## II. PRETRIAL REFORM INITIATIVES

### A. REDUCING THE USE OF MONEY BAIL

Reducing reliance on monetary bail is a central goal of many pretrial reform advocates.<sup>44</sup> The use of money bail, by definition, disadvantages the poor; people who have resources or access to credit are more likely to be released than those who do not. This fact is not only unjust. It also means that money-bail systems that do not meaningfully account for defendants' ability to pay are inefficient at managing flight- and crime-risk, and likely to be unconstitutional.<sup>45</sup> Although implementing procedures to assess defendants' ability to pay may help, it is difficult to assess accurately.

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38. 18 U.S.C. §§ 3141-50, 3062.

39. WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 12.3(b) (3d ed. 2000).

40. See generally ABA STANDARDS, *supra* note 13.

41. *Id.* at 42 (§ 10-1.4(c)-(e)), 110 (§10-5.3).

42. *Id.* at 110.

43. *Id.* at 106 (§ 10-5.2).

44. To be precise, the core goal is to reduce the use of secured money bonds.

45. See *supra* notes 28-31 and accompanying text.

It is possible to operate an effective pretrial system with minimal reliance on money bail. The District of Columbia, for instance, has been running its pretrial system largely without it since the 1960s. Nearly all D.C. defendants are released on recognizance or with nonmonetary conditions; a small percentage are ordered detained. For the last six years, appearance rates have remained at or above 87% and rearrest rates at or below 12%—better than national averages.<sup>46</sup>

Replicating the D.C. model is no easy feat, however. The District benefits from an experienced and well-funded pretrial services agency. Without that infrastructure, limiting or eliminating money bail is likely to reduce appearance rates as well. Such initiatives should therefore be paired with alternative methods of ensuring appearance, such as court reminders or an expansion of pretrial services.

### B. REDUCING RACIAL DISPARITIES IN DETENTION RATES

Black defendants make up 35% of the pretrial detainee population despite constituting only 13% of the U.S. population.<sup>47</sup> A second core objective of pretrial reform is to reduce this racial disparity in pretrial detention. In order to pursue this goal effectively, it is important to understand how such disparities arise.

First, arrest itself, as well as criminal-history information, may reflect racially disparate past practices.<sup>48</sup> For example, residents of heavily policed minority neighborhoods are arrested for drug offenses at disproportionately high rates relative to the rate of offending.<sup>49</sup> Even superficially colorblind methods of making pretrial custody decisions will embed these disparities. This is not an easy problem to fix, as actual criminal behavior is unmeasurable and decision-making in criminal justice has long relied on the criminal record as its proxy. Nonetheless, educating judges about this type of disparity (or using sophisticated risk-assessment algorithms to adjust for it) may alleviate the problem.

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46. See PRETRIAL SERVICES AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST FISCAL YEAR 2017, at 1, 23 (Feb. 2016). Nationally, 16% of released defendants were rearrested and 17% missed a court date in 2009, the last year for which data is published. REAVES, *supra* note 8, at 20-21.

47. MINTON & ZENG, *supra* note 1, at 3.

48. For discussions of the issue, see David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in Volume 2 of the present Report; and Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report.

49. See, e.g., Shima Baradaran & Frank McIntyre, *Race, Prediction and Pretrial Detention*, 10 J. EMPIRICAL L. STUD. 741, 759 (2013); DRUG POLICY ALLIANCE, *THE DRUG WAR, MASS INCARCERATION AND RACE* (2014).

Secondly, bail judges may harbor explicit or implicit racial bias, which is to say that they may set higher bail or place more onerous conditions of release on minority defendants than otherwise similar white defendants.<sup>50</sup> A typical approach to measuring this type of bias is to see whether minority defendants have higher bail than white defendants after controlling for variables like charge type, criminal history, and age. Using this approach, many studies have found evidence of bias.<sup>51</sup> As the number and specificity of controls increase, however, this measure of bias tends to shrink or disappear. Baradaran and McIntyre found no evidence that judges set bail higher for black defendants than white defendants once defendants' specific charge and criminal history were accounted for.<sup>52</sup> Stevenson found no evidence that bail is systematically set higher or lower for black defendants in Philadelphia, conditional on the charge and criminal record.<sup>53</sup> While racial bias certainly exists, differential treatment of similarly situated defendants on the basis of race may not be a substantial contributor to racial disparities in pretrial detention.

Third, racial disparities may result from differing levels of wealth or access to credit across races. For example, Stevenson found that, in Philadelphia, only 46% of black defendants with bail set at \$5,000 (and who need only to pay a \$500 deposit in order to be released) post bail, compared to 56% of non-black defendants.<sup>54</sup> Stevenson estimated that 50% of the race gap in detention rates in Philadelphia is accounted for by differences in the likelihood of posting bail. The other 50% is due to the fact that black defendants in this dataset are, on average, facing more serious charges, have lengthier criminal records, and accordingly have higher bail set.<sup>55</sup> Similarly, Demuth found that black defendants do not have bail set at higher levels than white defendants, but concluded that the odds of detention for blacks are almost twice as large because they are less likely to post bail.<sup>56</sup> To the extent that racial disparities in pretrial detention rates are a direct function of socioeconomic disparity, reducing reliance on money bail should lessen them.

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50. For discussions of the role of race in court decisionmaking, see Paul Butler, "Race and Adjudication," in the present Volume.

51. See, e.g., Marvin D. Free, Jr., *Bail and Pretrial Release Decisions: An Assessment of the Racial Threat Perspective*, 2 J. ETHNICITY IN CRIM. JUST. 23, 31-33 (2004); BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT ii–iii (2014), [www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf).

52. Baradaran & McIntyre, *supra* note 49.

53. Stevenson, *supra* note 5 (manuscript at 23).

54. *Id.* (manuscript at 4).

55. *Id.* (manuscript at 25).

56. Stephen Demuth, *Racial and Ethnic Decisions in Pretrial Release and Outcomes*, 41 CRIMINOLOGY 874, 894 (2003) (finding that Hispanics generally have a higher bail set than whites, although that could be due to citizenship status).



Finally, racial disparities in pretrial detention rates can arise from disparities in charged offenses and past criminal records across racial groups that reflect actual differences in rates of criminal offending. It is extremely difficult to isolate this source of disparity. But to the extent that differential crime rates contribute to racial disparities in pretrial detention, the only long-term solution is to redress the underlying causes of the divergent rates.

### C. IMPROVING PRETRIAL PROCESS

Pretrial reform necessarily entails some changes to pretrial process. The following five approaches hold particular promise.

#### 1. Release before the bail hearing

Jurisdictions can reduce the number of people who require a bail hearing in the first place by increasing the use of citation rather than arrest, and by authorizing direct release from the police station (station-house release).<sup>57</sup> The process of arrest is obtrusive, time-consuming, expensive, and potentially damaging to community-police relations. Jurisdictions such as Philadelphia, New York, New Orleans, and Ferguson have recently begun substituting citations or summons for arrest for some categories of crime.<sup>58</sup> Even for crimes that require arrest, defendants who pose little risk of flight or serious pretrial crime should be identified rapidly and released. Risk-assessment tools may be helpful in identifying good candidates. Kentucky, for example, uses a risk-assessment tool to identify defendants who are eligible for station-house release.<sup>59</sup>

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57. See ABA STANDARDS, *supra* note 13, at 41 (§ 10-1.3), 63–74 (§§ 10-2.1–10.3.3); Rachel Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 351–352 (2016).

58. MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, DESK APPEARANCE TICKETS: THEIR PAST, PRESENT AND POSSIBLE FUTURE (2014); Bruce Egger, *New Orleans City Council Reclassifies Pot Possession, Prostitution to Reduce Criminal Dockets*, NOLA.COM (Dec. 17, 2010), [http://www.nola.com/politics/index.ssf/2010/12/new\\_orleans\\_city\\_council\\_recla.html](http://www.nola.com/politics/index.ssf/2010/12/new_orleans_city_council_recla.html); Chris Goldstein, *Philly420: Marijuana Arrests Down 73 Percent*, PHILLY.COM (Aug. 7, 2015) (describing initiative encouraging citation rather than arrest for marijuana possession), [http://www.philly.com/philly/columnists/philly420/Philly\\_marijuana\\_arrests\\_down\\_73\\_percent.html](http://www.philly.com/philly/columnists/philly420/Philly_marijuana_arrests_down_73_percent.html); Consent Decree, *United States v. City of Ferguson*, 4:16-cv-00180-CDP (E.D. Mo. Mar. 17, 2016).

59. See Amended Order, Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program, Sup. Ct. of Ky. (2017), [http://courts.ky.gov/courts/supreme/Rules\\_Procedures/201701.pdf](http://courts.ky.gov/courts/supreme/Rules_Procedures/201701.pdf).

## 2. Slowing down the bail hearing

Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.<sup>60</sup> It is hard to imagine that two minutes are sufficient to effectively evaluate the risk of flight, risk of serious crime, whether detention or conditions of release are necessary, and, if money bail is used, ability to pay. Taking more care during the bail hearing is likely to improve the courts' ability to evaluate risk and determine appropriate pretrial conditions. While slowing down the bail hearing would, barring other changes, increase costs, a bail hearing should only be required for defendants at risk of losing liberty. If more people charged with non-serious offenses were released before the bail hearing, the courts would have more time and resources to devote to evaluating whether detention or conditions of release are necessary for the remaining defendants.

## 3. Providing counsel

Decreasing the number of defendants who require a bail hearing would also lower the costs of supplying defense counsel to those at risk of losing their liberty. Currently, many jurisdictions do not provide counsel to indigent defendants at the bail hearing.<sup>61</sup> Sixth Amendment doctrine holds that defendants have the right to effective assistance of counsel at all "critical stages" of criminal proceedings.<sup>62</sup> The recent studies showing that pretrial detention substantially increases a defendant's likelihood of conviction and length of sentence support an argument that the bail hearing is a "critical stage".<sup>63</sup> While providing counsel at the bail hearing would come at some expense, the presence of counsel is

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60. See, e.g., Gerald VandeWalle, N.D. Chief Justice, 2013 State of the Judiciary Address (Jan. 9, 2013), available at <http://www.ndcourts.gov/court/news/judiciary2013.htm>; *Change Difficult as Bail System's Powerful Hold Continues Punishing the Poor*, INJUSTICE WATCH (Oct. 14, 2016); Heaton et al., *supra* note 5, at 720 n.35. In both Philadelphia and Harris County, bail hearings are only a few minutes long on average. Heaton et al., *supra* note 5, at 720 n.35; Stevenson, *supra* note 5 (manuscript at 5).

61. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011); PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA, *supra* note 22, at 8.

62. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199, 212 (2008).

63. See sources cited *supra* note 5. For additional arguments that defendants do or should have the right to representation at bail hearings, see, for example: NAT'L RIGHT TO COUNSEL COMM., CONST. PROJECT, DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING (2015); SIXTH AMEND. CTR. & PRETRIAL JUSTICE INST., EARLY IMPLEMENTATION OF COUNSEL: THE LAW, IMPLEMENTATION, AND BENEFITS (2014); Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 47 (Spring 2016); Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1763-83 (2002); Colbert, *supra* note 61, at 335; and Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013).

also useful to the system as a whole: lawyers can provide information that may help a judge determine which defendants can be safely released. Furthermore, initiating defense representation at the bail hearing would facilitate early and more-effective investigation, plea negotiations, and case resolutions.

#### 4. Information and feedback

The judges and magistrates who set bail may not be fully aware of how their decisions translate into detention rates. It may surprise some to learn how high detention rates can be even at relatively low amounts of bail. For example, 40% of Philadelphia defendants with bail set at \$500—who need only pay a \$50 deposit to secure their release—remain detained pretrial.<sup>64</sup> While it is conceivable that these detention rates are the result of well-considered policies, it is possible that the magistrates are unaware of how difficult it can be for defendants to come up with even relatively small sums of money. Increasing the flow of information and feedback to judges, magistrates, and policymakers is likely to improve pretrial decision-making.

#### 5. Court reminders and supportive services

There are many reasons why a defendant may not appear in court beyond willful flight from justice. A defendant may not know when her court date is, have forgotten about it, or struggle to make adequate preparations (such as arranging transportation, child care, or time off from work). For these defendants, court reminders in the form of mail notifications, phone calls, or automated text messages may greatly increase appearance rates. The available research shows that phone-call reminders can increase appearance rates by as much as 42%, and mail reminders can increase appearance rates by as much as 33%.<sup>65</sup> Entrepreneurial technology firms now offer automated, individually customized text-message reminders.<sup>66</sup> While the effectiveness of this type of reminder has not yet been evaluated, it holds considerable promise. Finally, improving court websites so that defendants can easily locate information

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64. See Stevenson, *supra* note 5 (manuscript at 12).

65. Brian H. Bornstein et al., *Reducing Courts' Failure to Appear Rate By Written Reminders*, 19 PSYCH. PUB. POL'Y & L. 70 (2013); Tim R. Schnacke, Michael R. Jones & Dorian W. Wildermand, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 89 (2012). These numbers, however, are best thought of as upper bounds on the effect of court reminders. These studies were randomized control trials—the “gold standard” in research—but only the “treatment on the treated” results were reported, which makes causal interpretation difficult.

66. See, e.g., *What We Do*, UPTRUST, <http://www.uptrust.co/#about-uptrust-section> (last visited Mar. 26, 2017).

relevant to their case should increase the likelihood of appearance. These methods come at relatively low cost and offer potentially significant savings.

Jurisdictions striving to reduce pretrial detention rates can also reinvest the savings by expanding supportive pretrial services. A pretrial services agency can connect defendants to a range of social services to address underlying risk factors like homelessness, joblessness, and addiction. It can also help defendants manage the logistics of attending court (transportation, child care, work leave, etc.). The D.C. Pretrial Services Agency provides these services, which may be one reason for D.C.'s low rearrest and nonappearance rates.

#### D. EVALUATING RISK

Actuarial risk assessment is a common theme in contemporary bail reform.<sup>67</sup> Reformers aspire to improve the accuracy and consistency of pretrial decision-making by assessing each defendant's statistical risk of non-appearance and rearrest in the pretrial period, and providing this assessment to judges along with a recommendation for pretrial intervention. Pretrial risk assessment holds great promise, but also raises concerns.

##### 1. The promise of risk assessment

There is reason to be optimistic about the actuarial turn in pretrial practice. Risk-assessment tools should reduce the subjective, irrational bias that distorts judicial decision-making.<sup>68</sup> They may also mitigate judicial incentives to over-detain by absolving judges of personal responsibility for "mistaken" release decisions.<sup>69</sup> They have the potential to bring consistency to pretrial decision-making and ensure that like defendants are treated alike. So long as the tools are not opaque, they may improve the transparency of pretrial release decisions. Risk-assessment tools also offer a mechanism of accountability: risk scores and defendants' outcomes can be monitored, and if the tool or its implementation is resulting in unnecessary detention, inappropriate release or unwarranted disparities, the tool or implementation rules can be adjusted.

Several recent studies argue that tying pretrial detention directly to statistical risk can minimize detention rates while maximizing appearance rates, public safety, or both. Analyzing a dataset from the 75 largest urban counties in the U.S., Baradaran and McIntyre found that the counties could have released 25%

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67. For an overview of pretrial risk-assessment tools and their expanding use, see Sandra G. Mayson, *Dangerous Defendants*, YALE L.J. (forthcoming 2017).

68. See generally John Monahan, "Risk Assessment in Sentencing," in Volume 4 of the present Report.

69. See generally Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417 (2016).

more felony defendants pretrial and reduced pretrial crime if detention decisions had been made on the basis of statistical risk.<sup>70</sup> In Philadelphia, Richard Berk and colleagues concluded that deferring to the detention recommendations of a machine-learned algorithm in domestic violence (DV) cases could cut the rearrest rate on serious DV charges (over two years) from 20% to 10%.<sup>71</sup> Jon Kleinberg and colleagues, working with New York City data, found that delegating detention decisions to a machine-learned algorithm could “reduce crime by up to 24.8% with no change in jailing, or reduce jail populations by 42.0% with no increase in crime,” while also reducing racial disparities in detention.<sup>72</sup>

These are studies of policy simulations, not actual policy changes. There has been very little research evaluating the effectiveness of risk assessment in practice. One recent study showed that a law requiring judges to consider the risk assessment in the pretrial release decision led to a small increase in pretrial release, but it also led to an increase in failures-to-appear, and possibly in pretrial crime. Furthermore, the study showed that judges ignored the recommendations associated with the risk tool more often than not.<sup>73</sup> While risk assessments have promise, realizing their benefits in practice is not simple.

## 2. Concerns over accuracy, racial equality, and contestability

Pretrial risk assessment has also sparked controversy in the popular press. In 2016, news outlet ProPublica published a study that claimed to have discovered that the COMPAS, a prominent risk-assessment tool, was “biased against blacks.”<sup>74</sup> It also opined that the COMPAS was “remarkably unreliable in forecasting violent crime,” and only “somewhat more accurate than a coin flip” in predicting pretrial rearrest generally.<sup>75</sup> Finally, the article noted that statistical generalization may be at odds with individualized justice, and that proprietary risk-assessment tools like the COMPAS pose transparency concerns. These critiques—regarding accuracy, racial equality, and contestability—represent core concerns with actuarial assessment.

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70. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012).

71. Richard A. Berk, Susan B. Sorenson & Geoffrey Barnes, *Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions*, 13 J. EMPIRICAL LEGAL STUD. 94 (2016).

72. JON KLEINBERG ET AL., HUMAN DECISIONS AND MACHINE PREDICTIONS 1 (Nat'l Bureau of Econ. Research, Working Paper No. 23180, 2017).

73. Megan Stevenson, *Assessing Risk Assessment 4* (June 2017) (unpublished manuscript) (on file with author).

74. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

75. *Id.*

Debate about accuracy would benefit from an acknowledgement that no method of prediction is 100% accurate. It is particularly hard to predict low-frequency events like violent crime. The ProPublica article concluded that the COMPAS was “remarkably unreliable” on the basis that “[o]nly 20 percent of the people predicted to commit violent crimes actually went on to do so [in a two-year window].”<sup>76</sup> But that is much higher than the base rate.<sup>77</sup> An algorithm that can identify people with a 20% chance of rearrest for violent crime provides useful knowledge.<sup>78</sup> The policy-relevant question is not whether a tool is “accurate,” but rather *what* statistical information it provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pretrial decision-making.

The concern for racial equality is similarly complex.<sup>79</sup> The most obvious source of racial bias in prediction would be if an algorithm treated race as an independently predictive factor, or over-weighted factors that correlate with race, like ZIP code, relative to their predictive power.<sup>80</sup> But none of the pretrial risk-assessment tools in current use utilize race as an input factor; the dominant tool, the Public Safety Assessment, relies exclusively on criminal-history information.<sup>81</sup> Two people of different races with the same criminal history will thus receive the same risk score. Nonetheless, risk assessment can have disparate impact across racial groups. In fact, if the base rate of the predicted outcome (e.g., rearrest) differs across racial groups, statistical risk

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76. *Id.*

77. WILLIAM DIETERICH ET AL., COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY (2016); *see also* Baradaran & McIntyre, *supra* note 70, at 561 tbl. 3 (finding that, among all felony defendants in a national dataset, rate of pretrial rearrest for a violent felony was 1.9%).

78. In fact, other pretrial risk-assessment tools classify defendants as high-risk at substantially lower probabilities of rearrest. *See* Mayson, *supra* note 67.

79. For a more thorough discussion of racial equality in risk assessment, see Sandra G. Mayson, *Bias In, Bias Out: Criminal Justice Risk Assessment and the Myth of Race Neutrality* (June 2017) (unpublished manuscript) (on file with author).

80. *See, e.g.*, Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

81. LAURA & JOHN ARNOLD FOUNDATION, PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA (2016), [www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf](http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf).

assessment necessarily *will* have disparate impact.<sup>82</sup> This was the source of the disparity that ProPublica documented: The black defendants in its dataset had higher arrest-risk profiles, on average, than the white.<sup>83</sup> There is no easy way to prevent this result.<sup>84</sup> Nor is it a good reason to reject actuarial risk assessment, because subjective risk assessment will have the same effect. It is possible to modify an algorithm to equalize outcomes across racial groups, but usually requires treating defendants with the same observable risk profiles differently on the basis of race.<sup>85</sup>

The third set of concerns with pretrial risk assessment is procedural. If people cannot meaningfully contest the basis of their risk score, actuarial risk assessment might violate due process by denying a meaningful opportunity to be heard.<sup>86</sup> This problem arises with proprietary algorithms like the COMPAS and other “black box” machine-learned algorithms, although there are ways to make machine-learned algorithms more transparent.<sup>87</sup> A related concern is that no algorithm will take account of every relevant fact about a given individual. For this reason, most scholars believe that judges must retain discretion to vary from the recommendations of a risk-assessment tool, and jurisdictions have universally followed this practice.<sup>88</sup>

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82. Where base rates differ across two groups, it is impossible to ensure that predictions are equally accurate for each group and also ensure equal false positive and false negative rates unless prediction is perfect. *See, e.g.,* Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 *BIG DATA* 153 (June 2017), Jon Kleinberg, Sendhil Mullainathan & Manish Raghavan, *Inherent Trade-Offs in the Fair Determination of Risk Scores*, *PROCEEDINGS OF INNOVATIONS IN THEORETICAL COMPUTER SCIENCE* (forthcoming 2017); Julia Angwin & Jeff Larsen, *Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say*, *PROPUBLICA.COM* (Dec. 30, 2016), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>.

83. *See* DIETERICH ET AL., *supra* note 77; Julia Angwin & Jeff Larsen, *ProPublica Responds to Company's Critique of Machine Bias Story*, *PROPUBLICA.COM* (July 29, 2016), <https://www.propublica.org/article/propublica-responds-to-companys-critique-of-machine-bias-story>.

84. This kind of disparate impact is not a constitutional violation; equal protection prohibits only formal or intentional discrimination on the basis of race. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229 (1976).

85. *See, e.g.,* Richard Berk et al., *Fairness in Criminal Justice Risk Assessments: The State of the Art* (May 28, 2017) (unpublished manuscript), [arxiv.org/abs/1703.09207](https://arxiv.org/abs/1703.09207). This is one manifestation of the difficulty of avoiding both disparate impact and disparate treatment. *See, e.g.,* Richard Primus, *The Future of Disparate Impact*, 108 *MICH. L. REV.* 1341 (2010).

86. *See, e.g.,* Hamilton, *supra* note 80; Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System* (April 15, 2017) (unpublished manuscript), available at [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2920883](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2920883).

87. *See* Joshua A. Kroll et al., *Accountable Algorithms*, 165 *U. PA. L. REV.* 633 (2017).

88. *But see generally* Wiseman, *supra* note 69 (arguing against such discretion).

### 3. Best practice in risk assessment

Given these concerns and the limitations of existing research, jurisdictions implementing pretrial risk assessment should keep a number of best practices in mind.

First, risk-assessment tools should be intelligible to the people whose lives they affect. To the greatest extent possible, the identity and weighting of risk factors should be public. Relatedly, tools that rely on objective data are preferable to tools that include subjective components.

Second, stakeholders should take care in determining what risks to assess. At present, many tools measure pretrial “failure,” a composite of flight risk and crime risk. But these two risks are different in kind and call for different responses.<sup>89</sup> As a number of studies have demonstrated, risk assessment can attain greater accuracy—and produce more-useful information—if it measures them separately.<sup>90</sup> Within each category, moreover, further divisions are warranted. Some people are at high risk for flight because they have powerful incentives to abscond. Others are just likely to struggle with the logistics of attending court. The response to these two groups should be different.<sup>91</sup> Likewise, most tools currently define crime risk as the likelihood of arrest for anything at all, including minor offenses. If society’s core concern is violent crime, then assessing the risk of any arrest is counterproductive; people at highest risk for any arrest are *not* at highest risk of arrest for violent crime in particular, and vice versa.<sup>92</sup>

Third, criminal justice stakeholders should also take care to communicate accurately about risk assessment. If a risk-assessment tool measures the likelihood of arrest, it is inaccurate to say that it measures the risk of “new criminal activity.” Risk-assessment tools should be cautious in the communication of risk assessments as well. Terms like “high risk” embed a normative evaluation.<sup>93</sup> To avoid unduly influencing courts’ or stakeholders’ judgment about the significance of a given statistical risk, an actuarial tool

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89. See Gouldin, *supra* note 23.

90. See, e.g., Baradaran & McIntyre, *supra* note 70; KLEINBERG ET AL., *supra* note 72.

91. See Lauryn P. Gouldin, *Defining “Flight Risk,”* U. CHI. L. REV. (forthcoming 2018) (manuscript on file with authors).

92. Baradaran & McIntyre, *supra* note 70, at 528-29; see also LAURA & JOHN ARNOLD FOUNDATION, *supra* note 81 (using mostly different factors to predict arrest versus arrest for violent crime).

93. See Jessica Eaglin, *Constructing Recidivism Risk for Sentencing* (Aug. 12, 2016) (unpublished manuscript), available at <https://ssrn.com/abstract=2821136>; see also CRIM. JUST. POL’Y PROGRAM, *supra* note 13, at 21.



should report its assessment in numerical terms: “Statistical analysis suggests that this defendant has an X% chance of Y event within Z time period if released unconditionally, without supportive services.”<sup>94</sup>

Fourth, criminal justice stakeholders should confront the value judgments that a detention regime guided by risk assessment will entail.<sup>95</sup> Someone must decide what degree of statistical risk justifies detention—if any does. Either the developers of risk-assessment tools will make that judgment implicitly, by choosing the “cut point” at which a risk is determined to be high and detention is recommended, or stakeholders can make it and direct the design of the tool accordingly. Similarly, any predictive system (including subjective risk assessment) will perpetuate underlying racial and socioeconomic disparities in the world, and stakeholders should determine how best to respond to this reality.

Fifth, it is imperative that actuarial risk-assessment tools are implemented carefully and monitored closely, with rigorous data collection and analysis.

#### E. RATIONALIZING PRETRIAL DETENTION

A reform model in which defendants are detained based on risk rather than ability to post bail requires that courts have authority to order pretrial detention directly. In states that still have a broad constitutional right to pretrial release, bail reform may thus require amendment of the state constitution.<sup>96</sup> This poses significant logistical challenges and raises the difficult question of when detention is warranted. In the 1970s and '80s, when the first preventive detention regimes were implemented, critics argued that due process and the Excessive Bail Clause categorically prohibit detention without bail.<sup>97</sup> The Supreme Court rejected that position in *United States v. Salerno*.<sup>98</sup> But it did not specify what type or degree of risk is sufficient to justify detention, beyond the broad principles that pretrial detention must not constitute punishment

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94. This is the “positive predictive value” of a risk classification. See, e.g., Chouldechova, *supra* note 82, at 155.

95. See generally Eaglin, *supra* note 93; Mayson, *supra* note 67.

96. New Jersey has recently completed this process. Its constitution now provides that “pretrial release may be denied” if a court finds that no condition of release would “reasonably” ensure appearance, protect the community, or prevent obstruction of justice. N.J. CONST. art. I, § 11. The state legislature has enacted statutory rules to guide these decisions. N.J. REV. STAT § 2A:162–15 *et seq.*

97. See, e.g., Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 401 (1970).

98. 481 U.S. 739, 754–55 (1987).

or be excessive in relation to its goals. Even if the Constitution imposes little substantive constraint, the question of when pretrial detention is justified is also a moral one.<sup>99</sup>

It is clear that some defendants should *not* be detained. To begin with, detention is not justified if a less restrictive and cost-effective alternative would adequately mitigate whatever risk a defendant presents. Samuel Wiseman suggests, for instance, that detention should rarely be imposed as a response to flight risk, because electronic monitoring will nearly always reduce the risk to a reasonable level.<sup>100</sup> A related principle is that detention is unwarranted for defendants who pose little risk of flight or committing pretrial crime. The great promise of risk assessment is to identify this group and ensure their release. Finally, misdemeanor pretrial detention should be rare.<sup>101</sup> Defendants charged with misdemeanors generally do not pose a grave crime risk, and incentives to abscond should be weakest in low-level cases. Some research suggests that misdemeanor pretrial detention has lasting crime-inducing effects,<sup>102</sup> thus generating more crime than it prevents.<sup>103</sup> Pretrial detention in misdemeanor cases also appears particularly likely to skew the fairness of the adjudicative

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99. A few contemporary scholars have argued that pretrial detention based on general dangerousness categorically violates the presumption of innocence. *See, e.g.*, R.A. Duff, *Pretrial Detention and the Presumption of Innocence*, in *PREVENTIVE JUSTICE* 128 (Andrew Ashworth ed., 2013); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 *OHIO ST. L.J.* 723 (2011). This argument has no legal traction in the United States, because the Supreme Court has held that the presumption of innocence is merely “a doctrine that allocates the burden of proof in criminal trials.” *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). As Richard Lippke has noted, furthermore, it is difficult to specify what a presumption of innocence would require in the pretrial context. *See generally* RICHARD L. LIPPKE, *TAMING THE PRESUMPTION OF INNOCENCE* (2016).

100. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 *YALE L.J.* 1344 (2014). Wiseman focuses on money bail that results in detention, but the argument applies to direct detention as well.

101. For a discussion of misdemeanors, see Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

102. *See, e.g.*, Heaton et al., *supra* note 5.

103. *Id.* at 72 (finding that Harris County could have saved an estimated \$20 million and averted thousands of new arrests by releasing every misdemeanor defendant detained on a bail amount of \$500 or less between 2008 and 2013).

process,<sup>104</sup> because a guilty plea often means going home.<sup>105</sup> Scholars speculate that this dynamic may be a major cause of wrongful convictions.<sup>106</sup>

Beyond these classes of defendants, there is no easy answer to the question of when pretrial detention is warranted. Some scholars have suggested that it is justified when its benefits outweigh its costs.<sup>107</sup> Others have advocated for additional criteria,<sup>108</sup> or community involvement in detention decisions.<sup>109</sup> This important debate should continue. As a baseline, jurisdictions seeking to craft new pretrial detention regimes should ensure that:

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104. Misdemeanor defendants detained pretrial in Harris County, Texas (2008-2013) were 25% more likely to be convicted than statistically indistinguishable defendants who were not detained, due almost entirely to the increased likelihood of pleading guilty. These results indicate that approximately 28,300 defendants would not have been convicted but for their detention. *Id.*

105. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 308 (2011) (“In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation.”); cf. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 9-10 (1979) (reporting that in sample of more than 1,600 cases, “twice as many people were sent to jail prior to trial than after trial”). For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

106. See, e.g., Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930-31 (2008); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316, 1343-47 (2012). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

107. The most comprehensive cost-benefit analysis of pretrial detention concludes that we could achieve cost-benefit equilibrium, detain 28% fewer people, and save \$78 million by adopting a statistical risk approach to detention decisions. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017); see also David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 760-61 (2011); Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 39 (2010).

108. See, e.g., Richard L. Lippke, *Pretrial Detention Without Punishment*, 20 RES PUBLICA 111, 122 (2014) (arguing that detention on the basis of crime-risk is justified only if the defendant is likely to commit a serious crime in the pretrial phase, no less restrictive means can prevent it, and there is “substantial evidence” of the defendant’s guilt on a serious charge); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1953 (2005) (arguing that the state should compensate detained defendants for their lost liberty); see also Mayson, *supra* note 67 (noting that there is no clear justification for pretrial detention for dangerousness if the state could not detain an equally dangerous person not accused of any crime).

109. See, e.g., Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, and the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012); Simonson, *supra* note 26.

- Pretrial release is the default, and detention is a “carefully limited exception.”<sup>110</sup>
- Detention procedures include, at minimum, the protections noted by the Supreme Court in *United States v. Salerno* (including an adversarial hearing and right to immediate appeal).<sup>111</sup>
- Detention requires clear and convincing evidence that (1) there is a substantial probability the defendant will commit serious crime in the pretrial phase or abscond from justice, and (2) no conditions of release can reduce the risk below that probability threshold. Jurisdictions should specify what numerical probability qualifies as substantial and what crime qualifies as serious for this purpose.

#### F. IMPLEMENTING NONMONETARY CONDITIONS OF RELEASE

In order to limit the use of money bail and reduce detention rates, bail reformers advocate non-financial conditions of release as an alternative for defendants who pose some pretrial risk. This section surveys the literature evaluating three common conditions: required meetings with pretrial officers, drug testing, and electronic monitoring. The emphasis is on high-quality studies such as randomized control trials (RCTs). Evidence from the probation or parole context is included if there is a lack of quality research in the pretrial context.

##### 1. Meetings with a pretrial officer

The requirement of meeting periodically (in person or over the phone) with a pretrial officer is one of the most common conditions of release. Pretrial supervision is an expensive intervention, as it requires the time of a salaried employee of the state. It imposes time burdens on the defendant, and, in increasing the requirements of release, increases the likelihood that the defendant will fail to fulfill them.

There is no good evidence to support this practice. A small experiment conducted by John Goldkamp, in which defendants were randomly assigned to low-supervision or high-supervision conditions, found no difference in appearance rates or rearrest across the two groups, either for low-risk or

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110. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

111. *Id.* at 751-52.

moderate-to-high-risk defendants.<sup>112</sup> An experiment in the 1980s randomly assigned defendants to either more-intensive pretrial supervision or less-intensive supervision plus access to services (vocational training or drug/alcohol counseling). It found no difference in appearance rate or rearrest across the groups.<sup>113</sup> Very little other research exists. A correlational study funded by the Laura and John Arnold Foundation showed that pretrial supervision is correlated with increased appearance rates but is not generally correlated with reductions in new criminal activity.<sup>114</sup> This study was conducted across multiple jurisdictions that varied in their use of, and definition of, pretrial supervision. Correlational studies are generally considered weak evidence, so it is hard to draw firm conclusions from these results.

There are several well-executed studies on required meetings with supervising officers in the probation and parole context. An RCT in Philadelphia that reduced the frequency of required meeting with probation officers found no effect on new charges or re-incarceration.<sup>115</sup> An RCT evaluating the benefits of intensive probation (which, among other things, involves extra meetings with probation officers) shows no evidence that these meetings decrease criminal behavior.<sup>116</sup> The intensive supervision does, however, increase the likelihood that a defendant will be re-incarcerated due to a technical violation, at considerable cost to the state. Another study evaluating the effects of abolishing post-release supervision showed similar results: a decreased likelihood of re-incarceration due to technical violations, but little effect on crime.<sup>117</sup>

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112. John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 154 (2006). They also include a non-experimental analysis that compares outcomes for a baseline group in a prior period who were not under supervision against the experimental groups who had varying levels of supervision. This is a weak research design, since the baseline data related to circumstances and events from four years before the experimental data, and many things could have changed in between.

113. James Austin, Barry Krisberg & Paul Litsky, *The Effectiveness of Supervised Pretrial Release*, 31 CRIME & DELINQ. 519, 523-35 (1985).

114. CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF PRETRIAL SUPERVISION ON PRETRIAL OUTCOMES 15-16 (2013).

115. Geoffrey C. Barnes, Charlotte Gill, & Ellen Kurtz, *Low-Intensity Community Supervision for Low-Risk Offenders*, 6 J. EXPERIMENTAL CRIMINOLOGY 159, 181-82 (2010).

116. Susan Turner, Joan Petersilia & Elizabeth Piper Deschenes, *Evaluating Intensive Supervision Probation/Parole (ISP) For Drug Offenders*, 38 CRIME AND DELINQ. 539 (1992).

117. Ryan Sakoda, *Efficient Sentencing? The Effect of Post-Release Supervision on Low-Level Offenders* 4 (Dec. 2016) (unpublished manuscript) (on file with author).

More high-quality research on the effectiveness of pretrial supervision is needed. At the moment, the practice is far from “evidence-based,” and the best available research shows no benefits. Indeed, the arguments for why it might be effective are fairly tenuous. Supervision implies a watchful eye and the guidance of a capable authority in troubling situations. Periodic meetings with a pretrial officer are unlikely to serve these functions. If a defendant is engaging in illicit behavior, she has every incentive to hide this from the pretrial officer, and the officer has no knowledge of such activities beyond what the defendant chooses to share. There are thus scant reasons to believe that meetings alone will have a deterrent effect or that the pretrial officer will have the information necessary to intervene if troubles arrive. Given its expense and intrusiveness, required check-ins with the pretrial officer should not be considered a core part of the portfolio of pretrial options unless better evidence emerges to support its use.

## 2. Drug testing

The use of drug testing during the pretrial period has been shown to be ineffective at reducing failure-to-appear rates or pretrial rearrest rates in a number of randomized control trials. These studies mostly date from around the time when drug testing was broadly implemented: in the late 1980s and 1990s. A large RCT in Washington, D.C., showed that defendants who were assigned to drug testing were no less likely to have a pretrial arrest or non-appearance than those who were randomly assigned to drug treatment or release without conditions.<sup>118</sup> Another sizable RCT in Wisconsin and Maryland also found that drug testing had no benefit relative to release without testing.<sup>119</sup> Several other randomized trials showed similar results.<sup>120</sup> Unfortunately, these results have been ignored, and drug testing continues to be a mainstay condition of pretrial release.

The last decade has seen a surge of optimism about the benefits of drug testing in the probation context. A famous study from Hawaii’s HOPE project showed that drug testing paired with “swift, certain and fair” sanctions can effectively reduce drug use and re-incarceration for people on probation.<sup>121</sup> In this

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118. MARY A. TOBORG ET AL., ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA 13 (1989).

119. John S. Goldkamp & Peter R. Jones, *Pretrial Drug-Testing Experiments in Milwaukee and Prince George’s County: The Context of Implementation*, 29 J. RES. CRIME & DELINQ. 430 (1992)

120. For a review of the relevant literature, see MARIE VANNOSTRAND, KENNETH R. ROSE & KIMBERLY WEIBRECHT, STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 20-24 (2011).

121. ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE 4 (2009).

formulation, people receive immediate but light sanctions for each failed drug test. Unfortunately, the successes of the HOPE program have proven difficult to replicate. Multiple RCTs have found that drug-testing programs built on swift, certain and fair principles are no more effective than status quo procedures.<sup>122</sup>

Drug testing imposes burdens on the defendant, who must report for testing whenever notified. The state must pay the lab costs and the salaries of the monitoring officers. Researchers may yet find the key to the effective implementation of drug testing, but the best available evidence shows no indication that it is worth the costs or intrusions.

### 3. Electronic monitoring

There is limited high-quality research on the effectiveness of electronic monitoring (EM) in the pretrial period. However, there is growing evidence that electronic monitoring reduces criminal activity for defendants in the probation or parole context. (The evidence is more mixed on EM's effect on technical violations or return to custody.) Electronic monitoring has been found to reduce crime relative to traditional parole for gang members and sex offenders in California,<sup>123</sup> although it increased the likelihood of returning to custody for gang members, due to an increased likelihood of technical violations.<sup>124</sup> A study in Florida found that EM reduced technical violation, reoffending and absconding relative to those placed on unmonitored home arrest; a subsequent Florida study found that EM reduced probation revocation and absconding relative to probation as usual.<sup>125</sup> A high-quality study in Argentina finds that

122. See, e.g., Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of Drug Testing and Graduated Sanctions Program for Probationers*, 15 CRIM. & PUB. POL'Y 1073, 1086 (2016); Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 CRIM. & PUB. POL'Y 1103, 1104 (2016).

123. STEPHEN V. GIES ET AL., MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM, FINAL REPORT vii (Apr. 2012); STEPHEN V. GIES ET AL., MONITORING HIGH-RISK GANG OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT vii (Nov. 2013). For a discussion of gangs, see Scott H. Decker, "Gangs," in Volume 1 of the present Report. For a discussion of sex offenders, Wayne A. Logan, "Sex Offender Registration and Notification," in Volume 4 of the present Report.

124. See, e.g., WILLIAM BALES ET AL., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING (2010); Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL'Y 61 (2006).

125. The California and Florida studies used propensity score matching, which raises some concerns that those placed on EM differ in unobservable characteristics from the control group, leading to bias in the estimator. However, those on EM are generally higher risk than those on regular probation/parole, suggesting that the bias would lead these studies to underestimate the effects if anything.

EM reduces recidivism relative to pretrial detention; other quasi-experimental studies in Europe find that EM decreases recidivism and welfare dependency relative to incarceration.<sup>126</sup> Additional high-quality research is important to assess the effectiveness of EM at preventing flight and pretrial crime in the U.S.

Whatever benefit EM provides comes at substantial cost. EM is a significant burden on a person's liberty. It places strain on family relationships, makes it difficult to find employment, and can lead to shame and stigma.<sup>127</sup> Surveys of people serving sentences find that EM is considered only slightly less onerous than incarceration.<sup>128</sup> EM is also costly to the state. Purchasing the equipment, monitoring individuals, and responding to violations entails considerable expense. Many jurisdictions charge fees for monitoring that burden the poor and often cannot be paid.<sup>129</sup> Furthermore, EM can be overused. In one survey, supervising officers believed (on average) that a third of the people they supervised on EM did not need to be on EM because they posed no danger to society.<sup>130</sup> In conclusion: EM should be used selectively, and only as an alternative to detention.

## RECOMMENDATIONS

The pretrial system is ripe for reform. An optimal pretrial system will maximize appearance rates while minimizing both intrusions to defendants' liberty and pretrial crime. The central principle that unites best practices in the pretrial arena is that any restraint on liberty should be tailored to the specific risk a defendant presents, and should be the least restrictive means available to reasonably reduce the risk. Given our existing knowledge about the operation of the pretrial system and the effectiveness of pretrial interventions, jurisdictions pursuing reform should prioritize the following strategies.

1. **Limit money bail as a condition of release**, to prevent detention on the basis of poverty.

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126. Rafael Di Tella & Ernesto Schargrodsky, *Criminal Recidivism after Prison and Electronic Monitoring*, 121 J. POL. ECON. 28, 28 (2013); Lars H. Andersen & Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL'Y 349, 351 (2014); Annais Henneguelle et al., *Better at Home Than in Prison? The Effects of Electronic Monitoring Versus Incarceration on Recidivism in France 3* (2015) (unpublished manuscript).

127. See BALES ET AL., *supra* note 124, at 89-95.

128. See, e.g., Brian K. Payne et al., *The "Pains" of Electronic Monitoring: A Slap on the Wrist or Just as Bad as Prison?*, 27 CRIM. JUST. STUD. 133, 140 (2014).

129. See BALES ET AL., *supra* note 124, at 102-103. See generally Beth A. Colgan, "Fines, Fees, and Forfeitures," in Volume 4 of the present Report.

130. BALES ET AL., *supra* note 124, at 104.



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2. **Substitute citation or summons for arrest** where possible, and release most arrested defendants immediately after booking.
  3. **Conduct thorough hearings with defense counsel** before imposing detention or other serious infringement of liberty (e.g., electronic monitoring).
  4. **Detain defendants only if there is a substantial probability they will commit serious crime in the pretrial phase or abscond from justice**, and if less intrusive methods cannot adequately reduce that risk.
  5. **Use conditions of release sparingly**, since few have been demonstrated to be effective and many involve non-trivial impositions on liberty.
  6. **Support released defendants** by expanding access to services, providing reminders of upcoming court dates, and making court websites easy to navigate.
  7. **Implement actuarial risk assessment cautiously and transparently**, with continuous evaluation by an independent third party.
  8. **Pilot new pretrial initiatives in collaboration with an academic partner**, in order to measure their effectiveness and identify necessary improvements.

These strategies will, of course, require investment, financial and political. But they have the potential to produce significant returns for defendants and taxpayers alike. If the momentum for pretrial reform translates into action, we can inaugurate a more effective and more humane system of pretrial justice.



# Prosecutor Institutions and Incentives

Ronald F. Wright\*

*Criminal prosecutors must do a complex job, one that is crucial to public safety and the quality of justice. Unfortunately, they must do so under circumstances that are tilted toward failure. The typical local prosecutor, working within the current legal framework, must “fly blind” and “fly solo.” The prosecutor flies blind because so little information is available about overall trends in case processing, prevention programs, corrections costs, and voter concerns about public safety. Prosecutors can see some details about individual cases but not so much about systemic effects of their work. Supervisors within larger prosecutor offices also operate in the dark about many case-level choices of line prosecutors. It is equally troubling that prosecutors fly solo. Judges, police, defense attorneys, and community groups have relatively little influence over the diversion, charge selection, and case resolution choices of individual prosecutors or office policies on these topics. To address the problems of flying blind and flying solo, improvements in the information available to prosecutors and changes in the partners they consult hold the greatest promise for improving prosecutors’ work.*

## INTRODUCTION

Public safety is a local matter. And in that local setting, there is no more important figure in American criminal justice than the local prosecutor—not judges, not police chiefs, and certainly not public defenders. The prosecutor drives outcomes in expensive and essential systems.

The courtroom duties of the prosecutor are the most straightforward part of the job. But in the United States, prosecutors must reach out beyond their roles as courtroom advocates in single criminal cases; they also work as system managers for the criminal courts and community leaders for public-safety efforts. While the work of a courtroom advocate is not easy to do well, the systemic parts of the job add layers of complexity and make it awfully hard to succeed as a chief prosecutor.

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Two dangerous qualities of the prosecutor's working environment tilt the map toward failure. First, prosecutors carry out their duties with little data about trends in the justice system, in the corrections system, or in the community. To use an aeronautical analogy, they are "flying blind." Some of the gaps in prosecutors' knowledge remain empty because nobody publishes the relevant information about court processing, law enforcement activities, or crime in the community. Other gaps occur because prosecutors get a skewed and anecdotal view of the community's public-safety concerns and their priorities for criminal law enforcement.

Second, prosecutors make many decisions according to their own lights: they "fly solo." Compared to many other government officials, prosecutors operate within a legal framework that leaves them free to choose office priorities that they—and they alone—believe are appropriate. Prosecutors make a lot of their case-processing choices without the approval or cooperation of other actors. They can file criminal charges, select evidence to support charges, and invoke mandatory minimum sentencing laws without asking for review or consent from judges, defense attorneys, law enforcement, or any supervisors beyond the local prosecutor's office.

Prosecutors, even though they must fly solo and fly blind, manage to do excellent work in many circumstances. But sometimes they respond poorly to the dangerous weather and they crash. In a few cases, they obtain convictions against the wrong people. Some prosecutors put too much emphasis on the wrong categories of crimes, asking for too much or too little of the state's correctional resources for certain crimes. In many places, important parts of the community distrust the justice system and feel unsafe. And prosecutors have, on the whole, contributed to an expensive prison system that produces far too little social benefit to justify its massive cost.

Legal reforms could give prosecutors the information and the community partners that they need to succeed more often. Reforms to the institutional environment of prosecutors could reduce erroneous convictions, misplaced enforcement priorities, and bloated prisons. Such reforms would give prosecutors more systemic information, along with the incentives to use that information. Improved prosecutor institutions and incentives would encourage prosecutors to consult and respond to other system actors in a wider range of situations.

The formula for improved prosecution must recognize local variety among prosecutors and the needs of the communities they serve. In particular, solutions must account for the differences among urban and rural offices. And in the end, part of the changed legal landscape must come from within

prosecutors' offices. New legal standards imposed on prosecutors from the outside, through legislation or constitutional rulings, have a poor track record and equally poor future prospects. The most promising reform strategies do not demand particular outcomes from prosecutors in criminal cases; instead, they promote community partnerships and informed prosecutor leadership on criminal justice.

Other chapters in this volume address the work of prosecutors during specific phases of the criminal adjudication process, such as charge selection, pretrial discovery, plea bargaining, and sentencing advocacy. This chapter offers instead a tour of the institutional context for the prosecutor's work. At each stop on the tour, we ask this question: How do we hold prosecutors accountable to the criminal law and to the current values of the community? Part I surveys the legal rules and practices that structure the prosecutor's environment, concentrating on the working relationships between prosecutors and other actors in the criminal courts and in the local criminal justice community. Part II summarizes and evaluates the major types of institutional and legal changes that academics have proposed. I conclude with recommendations for the handful of changes that could make the biggest difference in the quality of the prosecutors' work.

## **I. THE PROBLEMS OF FLYING BLIND AND FLYING SOLO**

In this section, I describe the current legal boundaries on the work of criminal prosecutors. These constraints include formal rules of law, as well as institutional practices and incentives that shape prosecutor choices within those formal legal boundaries.

In subsection A, I discuss the influence of prosecutors in criminal justice matters outside of the courtroom and explain the limited information available to prosecutors to monitor and pilot the overall direction of office practices, both in and out of the courtroom.

In subsection B, I describe how the prosecutor's power over criminal justice outcomes has grown stronger over time, making it less important for the prosecutor to obtain the consent of other actors. This legal environment often leaves prosecutors acting alone, without valuable input that other criminal justice actors and community groups could provide.

Finally, in subsection C, I describe the prosecutor's contribution to criminal justice results, some of them unhappy ones.

## A. FLYING BLIND

Legislatures in the United States tend to create criminal codes that are broad and deep, making it possible for prosecutors to choose among several statutory options (and sentencing levels) for many common factual scenarios. Moreover, legal tradition in the United States gives prosecutors the duty to look beyond the legal definition of terms in the criminal code. Within this tradition, the prosecutor addresses two distinct questions about each case.<sup>1</sup> First, the prosecutor reviews the investigative file and reviews potential sources of evidence to confirm the legal sufficiency of the charges. Second, after asking whether charges are *sustainable*, the prosecutor asks whether charges are *wise*. The issue is whether the provable charges will serve the ends of justice. This includes some prosecutorial judgment about how to balance public safety with public trust on the local level, and whether the charges are warranted in light of other potential uses for limited prosecutor resources. Field studies of prosecutors confirm that prosecutors routinely consider these two different levels of reasoning as they decide whether and how to charge suspects.<sup>2</sup>

The answer to the second-level “wisdom” question for a prosecutor depends on context, and the individual line prosecutor—especially a newer prosecutor—usually makes choices without much knowledge about the context. Prosecutors make choices about charges, case resolutions, and sentencing recommendations in many cases without the most rudimentary data about the defendants, the victim, or other aspects of the case. In some offices, line prosecutors resolve criminal cases without any reliable information about the collateral consequences of a criminal conviction; these include access to occupational licenses and public housing, along with loss of immigration status.<sup>3</sup>

The data problem becomes worse when managers in the prosecutor’s office need to know about the performance of the line attorneys who charge and resolve individual cases: They usually cannot reconstruct important aspects of the attorney’s performance. In this data-starved environment, case-level missteps or misconduct are hard to diagnose and control. The larger the office, the bigger

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1. Legal systems outside the common law tradition tend to characterize the prosecutor’s job as a ministerial evaluation of the legal sufficiency of charges. Systems in various countries fall along a spectrum from the principle of “mandatory prosecution” to the discretionary prosecutorial tradition in the United States. See SHAWN MARIE BOYNE, *THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW?* (2014); Glenn Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969).

2. See BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* (2012).

3. See Ingrid V. Eagley, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013).

the management challenges that flow from poor data. Any office larger than about 25 attorneys faces this issue—that’s the average size of an office serving a mid-sized city with a population greater than 100,000 and less than 1,000,000.

The problem of weak data systems for prosecutors is compounded because state prosecutors are so radically localized. District attorneys, who typically enforce the state criminal laws and promote public safety within a single county or city, do not answer to the state attorney general.<sup>4</sup> They set enforcement priorities at the local level.

As a result of this institutional fragmentation, it is difficult to compare the work of one district attorney to another or to set a performance benchmark for prosecutors’ offices. Uniform data collection and reporting throughout a state of independent offices are serious challenges. Most states have only a crude data-collection system that focuses on the needs of the statewide court system. Prosecutors cannot answer, based on this data, the questions that might inform their local performance.<sup>5</sup> Even when they declare local priorities for enforcement, the data infrastructure does not allow them to measure the overall office performance in the key areas.<sup>6</sup>

Whatever the weaknesses of case-processing data for prosecutors, the information gaps are even wider when prosecutors operate outside the courtroom. The historical core of the prosecutor’s job is to process cases by filing criminal charges based on police investigations and resolving those charges through later dismissals, acquittals, convictions after a trial, or convictions after a plea. But the prosecutor’s job today also reaches both upstream and downstream from the criminal courts.<sup>7</sup> Many offices take an active role in training and advising police departments in their districts. Some sponsor outreach programs to connect juveniles and potential defendants to social services, or track people who present a high risk of future offending or victimization.<sup>8</sup> They “divert” current defendants (or suspects about to face

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4. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011).

5. This observation is decades old, going back to the influential American Bar Foundation field studies of the 1960s. See FRANK MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154 (1969) (recommending improved documentation of discretionary choices); Joseph R. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

6. See Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (calling for more declination data).

7. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

8. See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705 (2016).

charges) out of the criminal courts and into community service and treatment programs.<sup>9</sup> Prosecutor offices also work downstream from the criminal courts, taking an advocacy role in parole proceedings or operating reentry programs for local residents when they return to the community from a prison term.<sup>10</sup>

For each of these functions outside the criminal courts, prosecutors have little reliable data to guide them. They rely on anecdotes and hunches to identify upstream programs and downstream initiatives that are most likely to prevent future crime; the same ad hoc decisions often determine which defendants stay in or go out of diversion programs.<sup>11</sup> Programs come and go, operating on tight budgets that typically do not allow for serious evaluation of their results. Thus, prosecutors move from their courtroom roles into more ambitious “community prosecution” programs with profound blind spots.

The weak data environment is not just an internal management problem for prosecutors; it is also a barrier to democratic monitoring and accountability. When prosecutors cannot describe the overall trends to legislators, they find it difficult to explain the need for new legal tools or funding. When a prosecutor knows about overall case numbers and community activities, it becomes possible to explain to legislators that less enforcement in one area frees up resources for more enforcement in other areas.

Poor information about prosecutor performance also affects the way the voters evaluate them. Chief prosecutors in the state courts are elected, most of them at the local level. This arrangement is unusual from an international perspective, and the weight of academic opinion disfavors the election of prosecutors.<sup>12</sup>

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9. See Ben David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 WAKE FOREST L. REV. 373 (2012); Gerard Rainville & M. Elaine Nugent, *Community Prosecution Tenets and Practices: The Relative Mix of “Community” and “Prosecution,”* 26 AM. J. CRIM. JUST. 149 (2002). See generally Michael Tonry, “Community Punishments,” in Volume 4 of the present Report.

10. For a discussion of reentry, see Susan Turner, “Reentry,” in Volume 4 of the present Report.

11. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691 (2006).

12. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135 (2009); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUSTICE 1 (2012).



Whatever the theoretical justification for electing prosecutors,<sup>13</sup> it does not work especially well in its current form. Incumbents typically win their races; in fact, they run unopposed more often than the typical incumbent legislator.<sup>14</sup> As a result, incumbent prosecutors do not feel compelled to explain their priorities and policies to the voters. At the same time, chief prosecutors do seem to change their behavior during campaign years, despite the low risk of an election loss. The prosecutors in those offices dismiss fewer cases, take more cases to trial, and take greater legal risks during the proceedings.<sup>15</sup>

Faulty information infects both sides of this electoral connection: Voters know little about the actual performance of prosecutors, while the prosecutors themselves have only selective knowledge about the public-safety fears and enforcement priorities of voters in the district. There are early signs of change on both sides. Some prosecutors solicit input from community groups during the long stretches between elections, both through engagement with civic groups and through public surveys.<sup>16</sup> Voters, for their part, seem in recent electoral cycles to pay closer attention to prosecutor performance, both for notorious cases such as filing decisions in police-involved shootings, and for general office practices, such as the office strategies for drug possession and juvenile matters.<sup>17</sup>

It is still too early to judge the strength of these changes in the atmosphere. But it is clear that these exchanges of information still leave prosecutors and their communities too much in the dark.

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13. The election of prosecutors reflects important value choices about the relative importance of positive law and policy discretion in the prosecutor's work. See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011).

14. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?* THE ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> (describing research by David Schleicher and Elina Treyger).

15. See Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141 (2014); Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417 (2007); Bryan C. McCannon, *Prosecutor Elections, Mistakes, and Appeals*, 10 J. EMPIRICAL LEGAL STUD. 696 (2013).

16. Some observers have designated this trend as "community prosecution," noting parallels with the well-established community policing movement. See Brian Forst, *Prosecutors Discover the Community*, 84 JUDICATURE 135 (2000).

17. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017). For a discussion of juvenile matters, see Barry C. Feld, "Juvenile Justice," in Volume 1 of the present Report.

*B. FLYING SOLO*

The signature constitutional structure in the United States fragments power among different levels of government (that is, federalism) and among branches within a single level of government (separation of powers). Furthermore, constitutional doctrines and traditions force each actor to obtain cooperation from other actors at some points along the way before government action is complete (checks and balances).

These power-sharing arrangements, however, recede to the background in the context of criminal justice. Other legal actors have little to say about the prosecutor's selection from the wide menu of charges or about the terms that prosecutors offer to resolve cases. Similarly, other government officials have little input into the priorities of the local prosecutor's office.

The analogy I use here—the prosecutor flying solo—does not imply that prosecutors act alone or without legal constraints. Rather, the point is that prosecutors' offices, relative to other government entities, look internally to set their priorities. They have no legal obligation or institutional habit of consulting other legal actors about their major choices. If the law does not require or incentivize them to consult with others, prosecutors (like anyone else) will not routinely involve outsiders in choosing strategy or direction.

The relationship between prosecutors and police (or other law enforcement agencies) varies from place to place. In some places, prosecutors explain their case priorities to the police and they respond by shifting their investigations and arrests to match the targets that the prosecutor designated. Sometimes the prosecutor-police relationship includes cooperation at the case level. Individual prosecutors advise police officers at key points in the investigation, such as a search warrant application. In other locations, prosecutors and police pursue their own conflicting agendas with neither deferring to the other; in those settings, prosecutors routinely decline to prosecute high percentages of the cases that the police deliver to them. And finally, in a surprising number of jurisdictions, prosecutors charge cases more or less as the police deliver them, even if the prosecutors themselves would choose other priorities.<sup>18</sup> Whatever form it takes, however, prosecutors can themselves choose the amount of input that they accept from police departments about their cases and overall priorities for public safety.

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18. See Brian Forst, *Prosecutor Policy and Errors of Justice*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 51 (John Worrall & M. Elaine Nugent-Borakove eds., 2014); Ronald F. Wright & Marc L. Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29 (2002).

Local judges do not have much practical input into prosecutor choices or priorities, either. Judges do not overturn prosecutors after they decline to file charges, explaining that this choice remains solely in the executive branch under the separation-of-powers doctrine.<sup>19</sup> The defense can test the sufficiency of the evidence to support the charges, but the standard is low (probable cause) and easy to satisfy. It is quite unusual to see a judge dismiss a case based on insufficient evidence to “bind over” the defendant for trial. When judges review plea agreements, they usually endorse whatever deal the parties negotiated.

Finally, neither juries nor public defenders get much input into the choices of prosecutors. Grand juries can indict a case, as the prosecutor requests, based on a small amount of evidence, amounting only to “probable cause.” While trial juries do have the power to acquit defendants when the prosecutor overreaches,<sup>20</sup> the trial rate remains low. Furthermore, prosecutors hold some power to decide who serves on a jury—in effect, prosecutors choose their own bosses. And while public defenders might threaten to drive up the local trial rate by advising all of their clients to reject plea offers, the ethical codes that govern defense lawyers make it difficult for them to advise individual defendants to refuse a good deal.

The relative autonomy of the prosecutor’s office has strengthened over the last few decades. Up until the last quarter of the 20th century, fertile criminal codes and the prosecutor’s robust charging authority co-existed—uneasily—with the constitutional tradition of fragmented power. Interdependent working groups in the courtroom mediated between these conflicting forces. Prosecutors shared de facto power with other full-time courtroom actors, especially judges and defense attorneys, in the processing of cases.<sup>21</sup> Each needed the others to cooperate in processing the high volume of cases passing through the courts.<sup>22</sup>

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19. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 101 (2016).

20. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

21. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); PETER F. NARDULLI, JAMES EISENSTEIN & ROY B. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (1988).

22. See Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857 (2000).

During the last decades of the 20th century, however, a combination of factors pushed other courtroom actors to the sidelines and left prosecutors in the center of the frame. New sentencing laws created more-severe punishments, available on the motion of the prosecutor. Defendants faced a higher “trial tax” (the gap between a typical sentence after conviction at trial and the ordinary sentence that defendants received after pleading guilty). Not surprisingly, the trial rate in the federal and state courts went down. In this world, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>23</sup>

Instead of adversarial justice, with parties presenting their competing views of facts to a judge, criminal courts with low and ever-dropping trial rates operate through administrative justice. Prosecutors mostly decide cases on their own, sometimes after presentations and negotiations with the defense; judges check the quality of the executive officer’s work only in extraordinary cases.<sup>24</sup>

Sentencing rules designed to constrain the sentencing discretion of judges also make prosecutors relatively more powerful.<sup>25</sup> State sentencing guidelines in particular make the prosecutor’s selection of charges a critical determinant of the final sentence.<sup>26</sup> Sentencing guidelines also place great weight on the prior convictions of a defendant, giving prosecutors an incentive to file charges even in low-priority cases; the resulting conviction in today’s case sets the stage for a much more severe penalty later if the defendant reoffends or violates probation terms.<sup>27</sup> In other jurisdictions, new mandatory minimum sentencing statutes

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23. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992), *quoted in* *Missouri v. Frye*, 566 U.S. 134, 144 (2012). For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

24. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *WASH. & LEE L. REV.* 1413 (2010); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

25. See David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 *JUDICATURE* 196 (1995).

26. See David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion under Mandatory Minimum Sentencing*, 48 *J.L. & ECON.* 591 (2005); Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 *AM. J. SOC.* 1357 (2000); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 *J. CRIM. L. & CRIMINOLOGY* 155 (1987); J. Langley Miller & John J. Sloan, *A Study of Criminal Justice Discretion*, 22 *J. CRIM. JUST.* 107 (1994).

27. For a discussion of sentencing guidelines, see Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report.

give the prosecutor all of the important sentencing power: Their choices to pursue some statutes as mandatory penalty cases while charging others under the ordinary sentence laws make all the difference.<sup>28</sup>

Growth in diversion and deferral programs also expands the map of places where prosecutors act without serious input from other actors. In some cases, prosecutors do not simply decline prosecution. Instead, they set conditions for the suspect or defendant to meet, whether it be restitution to victims, treatment programs, or community service. If and only if the person meets the stated conditions, the prosecutor declines to file charges or dismisses the charges that were filed earlier. Both the nature of the conditions offered to the defendant and the ultimate judgment about whether the person complied with those terms rest entirely with the prosecutor; it amounts to a form of pre-conviction sentencing with no involvement from the judge.

Just as prosecutors face no effective checks and balances from their counterparts in the criminal courts, they also experience no real supervision from the legal-ethics enforcement authorities responsible for the discipline of attorneys. Historically, complaints against prosecutors led to discipline less often than complaints against other lawyers.<sup>29</sup> This situation, however, may be changing. More recently, bar authorities have revised ethics rules to cover more of the specialized situations that prosecutors face. There are preliminary signs that the treatment of prosecutors in disciplinary proceedings has become more aligned with the treatment of other lawyers in recent years.<sup>30</sup>

Because prosecutors fly solo these days—without effective input from other legal actors—the important ways to promote regular and predictable conduct from line prosecutors come from within their local offices. Many chief prosecutors issue internal guidance to their assistants about the appropriate

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28. See Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 *LAW & SOC'Y REV.* 393 (1979); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 *AM. CRIM. L. REV.* 231 (1989); Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 *J. RES. CRIME & DELINQ.* 427 (2007). For a discussion of mandatory minimums, see Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

29. See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275 (2007); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721 (2001).

30. See Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 *OHIO ST. J. CRIM. L.* 143 (2016).

charges to file and the acceptable resolution of cases before trial.<sup>31</sup> While these policies routinely declare that they create no judicially enforceable rights, they do shape and regularize the choices of line prosecutors. For many individual prosecutors, team membership is a powerful force even though it lacks binding legal authority. The local office culture gives the most important guidance about how to prioritize among different types of criminal cases, in a world of scarce resources.

### C. EFFECTS

What have been the effects when prosecutors engage less completely with other criminal justice actors and operate with such impoverished performance data? That is, what have been the results of flying solo and flying blind?

By definition, it is impossible to know the full effects of flying blind. The nature of the complaint is that prosecutors cannot see the systemic effects of their case-specific actions. Thus, one can point to anecdotes galore, showing both good and bad outcomes from prosecutor offices. A large number of idealistic and public-spirited people work very hard in prosecutor offices; one might safely assume that positive results for the public result from all of that sincere effort.

And yet, it is not surprising to find field studies that point to some troubling results that prosecutors create. For one thing, many studies find evidence that prosecutors, in the aggregate, contribute to disparate treatment of suspects based on race, gender, and other extra-legal factors.<sup>32</sup> Other studies point to the “tunnel vision” and “conviction mentality” that lead some prosecutors to pursue wrongful convictions of innocent defendants, and to resist efforts to address those errors when new evidence comes along.<sup>33</sup>

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31. See Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335 (1990).

32. See Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651 (2001); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 1 (2013). For discussions of the impact of race on adjudication and sentencing, see Paul Butler, “Race and Adjudication,” in the present Volume; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

33. See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110-119 (1975); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

Residents in some places—especially those who are racial minorities—hold the criminal justice system in low regard.<sup>34</sup> They do not trust in the legitimacy of its outcomes and do not believe that criminal justice makes them any safer. Police relationships with the public drive much of this distrust, but prosecutors and courts also contribute to perceptions of broader problems in the system. Prosecutors might address this trust deficit more effectively if they had better information about community needs and better listening habits.

Finally, it is clear that prosecutors contributed to the phenomenal growth in the use of prisons over the last two generations in the United States.<sup>35</sup> Our current incarceration rates are many times higher than historical norms for this country and many times higher than rates in other countries. There is consensus (albeit not uniform) that this level of prison usage is wasteful and cruel. Prosecutors have not slowed down this systemic and sustained failure in American criminal justice.<sup>36</sup> Indeed, some analyses place the responsibility first and foremost on the increase in prosecutor filings of felony charges.<sup>37</sup>

## II. POTENTIAL PARTNERSHIPS AND PERFORMANCE MEASURES

In this section, I review the most prominent ideas for improving prosecutor action that is too uninformed and unilateral. These proposals give prosecutors more information about their communities and about their own work, and give the public more-specific information about prosecutor performance. The ideas also aim to restore or create new competing centers of power to counterbalance prosecutor choices, or partnerships to give prosecutors stronger abilities or insights to address community needs.

I evaluate these proposals within the boundaries of political reality. Unlike prosecutors in some other nations, prosecutors in the United States apply criminal codes that create many possible charges and punishments for a given factual scenario. I assume, based on decades of futile efforts to create robust and

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34. See generally Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; David A. Harris, “Racial Profiling,” in Volume 2 of the present Report; L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report.

35. For a discussion of mass incarceration, see Todd R. Clear & James Austin, “Mass Incarceration,” in Volume 4 of the present Report.

36. See NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* 70–103 (Jeremy Travis et al. eds., 2014).

37. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237 (2012) (most important contributor to prison expansion is prosecutor felony filings per arrest); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491 (2011). But see NAT’L RESEARCH COUNCIL, *supra* note 36 (attributing prison growth during period 1980–1990 to increased admissions and during period 1990–2000 to increased sentence lengths).

coherent criminal codes, that code revision is not a viable strategy. While much of the world relies on robust legal standards and detailed bureaucratic controls to produce sound prosecutor decisions, the United States puts its hopes into looser legal controls, weaker bureaucratic structures, and stronger political accountability.<sup>38</sup> The ability of voters and community groups to monitor and check prosecutors is the best available way to domesticate the prosecutor's free-ranging power to "do justice" and to use limited resources wisely. I treat that basic blend of political and legal controls as foundational.

Similarly, I embrace local variety, the differences one encounters between local prosecutors' offices within a single state. Even though the offices operate under the same criminal codes and court systems, urban and rural districts deliver remarkably different flavors of criminal justice. They face different patterns of crime and respond to different expectations from local voters about the greatest threats to public safety. Variety among prosecutors is desirable to some degree, and probably inevitable. For that reason, reforms face long odds of success if they attempt to impose uniform legal standards on prosecutors who work in very different local environments.

I organize the leading academic reform proposals along two axes. One variable is the *source* of the influence on the work of prosecutors: Some inputs come from sources external to the prosecutor's office and others from inside the office. A second variable is the *substantive or procedural nature* of the input for prosecutors. Some reforms take the form of pre-declared substantive rules of law, banning or requiring certain outcomes from the prosecutor. Others pursue a procedural strategy. They take the form of a required exchange of information—what I call notice and consultation—that leaves the prosecutor free to choose among all legal options after completing the required exchange.<sup>39</sup> The following grid lays out four possibilities, each addressed in a subsection below.

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38. See Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1 (2014); David Alan Sklansky, *Unpacking the Relationship between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (Maximo Langer & David Alan Sklansky eds., 2017).

39. For a similar organizational scheme that sorts legal regulation from enhanced information regimes, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).



	External Source	Internal Source
Pre-Declared Substantive Legal Rule	Subsection A	Subsection B
Notify and Consultation Process	Subsection C	Subsection D

Legal scholars have developed most fully the prospects for reform in Subsection A. But in light of the poor track record of those proposals and the great variety among prosecutors' offices, a more diversified portfolio offers a better bet. The reforms in Subsections C and D deserve more attention and funding than they have received until now.

#### *A. SUBSTANTIVE LEGAL STANDARDS, IMPOSED FROM EXTERNAL SOURCES*

The center of gravity for reform proposals sits in this quadrant. Over the years, many scholars have observed the remarkable amount of discretionary power that prosecutors hold over criminal proceedings and how little the law seems to matter.<sup>40</sup> The solution, then, might be more law, creating more guard rails to keep the prosecutor on track. Just as the “Due Process Revolution” replaced some police discretion with legal standards for many important search and interrogation techniques, and just as sentencing guidelines cut back on judicial discretion in selecting a punishment, so a new body of law might create more-specific legal standards for prosecutors to meet during the charging, pretrial proceedings, plea negotiation, trial, and sentencing.

Which legal rules might create new standards to structure the discretionary choices of prosecutors? There is no shortage of proposals to rewrite criminal codes, aiming to thin out the extra options. While criminal-code reform might accomplish quite a bit, that is a decades-long project. It must somehow overcome long-standing political incentives and habits that created the current expanded menu of crimes and punishments.<sup>41</sup> Reform is likely to make inroads elsewhere. In particular, proposals for new, specific legal standards are most realistic when they empower *other* criminal justice actors rather than reducing the range of legal options available to the prosecutor.

40. For an overview, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2009).

41. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

Legislative proposals to restore judicial power in the selection of sentences hold some promise. The legislature might pass laws to cut back on the coverage of expensive mandatory minimum sentencing laws, as the U.S. Congress did in 2010.<sup>42</sup> Because the selection of charges directs the sentencing judge into boxes with relatively few legal options under the sentencing guidelines or similar structured sentencing laws, some reformers propose an increased judicial power to review declinations<sup>43</sup> or to dismiss charges after filing based on factors beyond the sufficiency of the evidence.<sup>44</sup> The number of counts also profoundly affects the available sentence, so new statutes that increase judicial sentencing authority in multi-count cases might also restore some balance of powers to the law of sentencing.<sup>45</sup> There is also some promise in revisions to rules of criminal procedure that allow judges to participate more actively in plea negotiations; judges who involve themselves in these discussions tend to create a counterweight to inexperienced or uncompromising prosecutors.<sup>46</sup> Such rule changes would give judges a stronger hand to block the worst case outcomes.

Some reform proposals relate to prosecutor performance during trial preparation or the trial itself rather than prosecutor choices at the moment of charging or guilty-plea negotiations. Expanded discovery rules offer one example.<sup>47</sup> This is an area where non-judicial actors, such as professional ethics

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42. See Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 191 (2015); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

43. See Brown, *supra* note 19.

44. See Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629 (2015); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981) (proposing laws to compel written prosecutor charging guidelines that would bolster judicial enforcement of equal protection claims).

45. See Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107 (2005).

46. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

47. See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016). For a discussion of such rules, see Darryl K. Brown, "Discovery," in the present Volume.

enforcers, might have a weighty role.<sup>48</sup> Another set of proposals focuses on cheaper summary proceedings as alternatives to a full-blown jury trial, to give judges and juries more opportunity to evaluate the charging decisions of prosecutors.<sup>49</sup>

When it comes to substantive legal standards that legislators create, prosecutors are likely to have some influence during the drafting process. Prosecutors lobby the legislature on criminal justice bills, either individually or through their professional associations. They do not write their own tickets in the legislative process. Prosecutors do, however, often exercise an effective veto over changes to the criminal code or to sentencing laws that limit their options. As a result, the views of prosecutors about acceptable political responses to the public-safety needs of the day will say a lot about which bills can pass through the legislature. Prosecutors—or at least some of them—must be convinced of the wisdom of substantive standards before others will enact them into law.<sup>50</sup>

#### B. SUBSTANTIVE LEGAL STANDARDS, IMPOSED FROM INSIDE

As we saw in the previous subsection, pre-declared standards for prosecutors to follow as they do their work might take the form of constitutional rules, legislation, procedural rules, or ethics rules enforced by legal actors outside the prosecutor's office. But pre-declared standards for prosecutors might also originate from inside the prosecutor's office.<sup>51</sup>

A great many prosecutors' offices already issue internal guidance for line prosecutors, instructing them about the proper charging decisions to make based on the presence of certain provable facts. For instance, the leadership in an office might declare that line prosecutors must file felony burglary charges whenever a suspect entered some part of a residence other than the garage. It is also common to find chief prosecutors who issue guidance to their assistants

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48. See Harry M. Caldwell, *Everybody Talks About Prosecutorial Conduct But Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. (forthcoming) (proposing creation of an independent commission empowered to investigate and discipline prosecutorial misconduct).

49. See Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010).

50. See Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in PROSECUTORS AND DEMOCRACY, *supra* note 38.

51. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (conceptions of neutrality all flow from assumption of articulable standards). For a more detailed examination of this collection of reform proposals, see John F. Pfaff, "Prosecutorial Guidelines," in the present Volume.

about the proper resolutions to offer during plea negotiations. These “price lists” vary in the amount of choice they leave to the line prosecutor, and often focus on a group of high-priority crimes, leaving other types of charges unregulated.<sup>52</sup>

Internal declarations of standards typically do not create judicially enforceable rights: If a prosecutor were to violate the standard, judges would not order the prosecutor to comply or invalidate the prosecutor’s action.<sup>53</sup> Nevertheless, these pre-declared standards do change conduct among prosecutors who try to follow the internal rules of their offices.

While prosecutors themselves choose the content of these rules, the decision to issue the rules does not always originate with the prosecutor. Sometimes legislatures pass statutes that mandate the use of internal guidance documents in specialized enforcement areas such as domestic violence.<sup>54</sup> In a few unusual situations, judges have ordered prosecutors to issue internal guidance.<sup>55</sup> Some proposals call for sentencing commissions or other government agencies with expertise in criminal justice to press prosecutors for a declaration of standards in selected areas.<sup>56</sup>

These internal rules take advantage of the specialized knowledge of prosecutors regarding the tradeoffs between enforcement spending in various areas.<sup>57</sup> They also raise the question of publication: To what extent should prosecutors keep their standards strictly internal, to avoid their use in arguments during court proceedings or plea negotiations? The realities of modern communications media suggest that publication will be the dominant norm going forward.<sup>58</sup>

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52. See Wright & Miller, *supra* note 18.

53. See Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J.L. & PUB. POL’Y 167 (2004).

54. See WIS. STAT. § 968.075 (“Each district attorney’s office shall develop, adopt and implement written policies encouraging the prosecution of domestic abuse offenses.”).

55. See *State v. Brimage*, 706 A.2d 1096 (N.J. 1998) (requiring prosecutors to issue statewide guidelines for filing of school-zone drug charges with mandatory sentencing implications).

56. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

57. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

58. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

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### C. INFORMING AND CONSULTING, ENFORCED FROM THE OUTSIDE

The next group of policy reforms for prosecutors step away from pre-declared substantive standards to govern the decisions of line prosecutors. Instead, these proposals pay attention to the groups or the sources of information that a prosecutor consults before making a decision. They also address the information that prosecutors themselves provide to others (both inside and outside their offices) about their decisions. Put another way, these proposals address the *process* that the prosecutor uses to decide how to handle a case, rather than the substantive standards that the choices must meet.

The “inform and consult” framework that I use to analyze these proposals draws loosely on the successful policymaking model for administrative agencies.<sup>59</sup> For that reason, the sources of law most relevant to reform might reside in public-records statutes, budget rules, election law, and state administrative law.

#### 1. Reforms that require or encourage the prosecutor to consult

One of the most intriguing proposals on the “consult” side of the equation relates to the state corrections budget. As several scholars have noted over the years, the local prosecutor can benefit from a “correctional free lunch.”<sup>60</sup> That is, local residents benefit from their use of prison beds and other correctional resources, even though taxpayers all over the state fund those correctional programs. From the local prosecutor’s vantage point, voters elsewhere in the state will fund a local benefit: the most expensive form of crime control.

One possible remedy for this mismatch problem is to inform prosecutors (and perhaps their constituents in the district) about the local usage of state corrections resources on a regular basis, in comparison to other local prosecutors in the state.<sup>61</sup> The local prosecutor would receive a report showing the actual spending attributable to local cases, alongside a target per capita level of proportional spending. Such a report would require some metric for determining the pro rata share of corrections resources that each local prosecutor is entitled to use, and many such metrics are possible.

Some variations on this proposal treat the local spending of state corrections dollars as something more than just information for the prosecutor to consult, converting the report into a budget. Any prosecutor overuse in the state corrections

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59. Cf. 5 U.S.C. § 553 (notice and comment procedures for legislative rules issued by administrative agencies); see also Sekhon, *supra* note 38; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

60. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991).

61. See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008).

budget might trigger local tax increases to pay for the extra resources, or greater use of the local jail.<sup>62</sup> Another variation on this theme would allow prosecutors to make the best use of their limited corrections budgets by requesting parole release for past convictions as a way of staying under budget.<sup>63</sup>

The concept of community prosecution could also get a boost from state statutes. A legislature might require the local prosecutor to provide reports about topics of special interest to community groups, or to create internal processes for exchanging views with local interest groups. These might include groups involved in juvenile justice, domestic violence, or recurring business frauds.

Another group of consultation ideas deals with the quality of information that the prosecutor receives about criminal investigations and evidence. When prosecutors operate or supervise their own forensic laboratories and other support functions for criminal investigations, it compromises the quality of the information they receive; best practices call for management of labs and similar functions from government (or private) entities that are independent of the prosecutor.<sup>64</sup>

Prosecutors also depend on defense attorneys to test the quality of the information that they plan to use as evidence in criminal cases. In those places where the defense attorneys for indigent defendants are underfunded when compared to the prosecution, that quality-control function slips out of reach.<sup>65</sup> A state law—or even a routine budget practice—that enforces parity of funding between prosecution and defense would reinforce the quality of information that the prosecution uses to support the convictions the office pursues.<sup>66</sup>

Finally, various reforms to election laws might encourage prosecutors to listen more carefully to the priorities of local voters and community groups with special interests in criminal justice. While larger prosecutor districts might

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62. See Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?* 51 WAKE FOREST L. REV. 677 (2016); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

63. See Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 359 (2017).

64. See SANDRA GUERRA THOMPSON, *COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES* (2015); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013). For a discussion of issues raised by forensic evidence, see Erin Murphy, “Forensic Evidence,” in the present Volume.

65. See generally Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

66. See TENN. CODE § 16-2-518 (“any increase in local funding for positions or office expenses for the district attorney general shall be accompanied by an increase in funding of 75 percent in the increase in funding to the office of the public defender in such district,” reflecting percentage of defendants represented by public defender).

be more efficient to operate, they allow the chief prosecutor to ignore the views of minority groups most directly affected by criminal enforcement policies.<sup>67</sup> Smaller operating units for prosecutors lead the office to consult more carefully with the local groups most invested in their work.

## 2. Reforms that require or encourage the prosecutor to inform

On the “inform” side of the equation, a number of reform proposals call for legislation or other external prompts, forcing prosecutors to give to the public more information about their work. These reports might give voters more-detailed information about office policy or performance. Such reports already appear in the press on a sporadic basis; legislatures or other legal actors might compel or encourage prosecutors to inform the public on a regular basis about specific aspects of office performance.<sup>68</sup> Because all prosecutors would report the same metrics, comparisons across districts would become possible. The proposals reflect a distinctive view of democracy and prosecution: They treat criminal justice as a place to encourage popular participation, rather than insulating criminal justice experts from the excesses of popular passions.<sup>69</sup>

Some of these reporting proposals focus on prosecutor estimates of the costs of investigation and prosecution of crimes, along with estimates of the potential costs of cases declined for prosecution.<sup>70</sup> Others focus on aspects of prosecutor performance that current court data could capture.<sup>71</sup> Still others call for other criminal justice actors to collect and disseminate their views about the performance of individual prosecutors.<sup>72</sup>

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67. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

68. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2017) (exploring role of internet in setting public attitudes about prosecutor misconduct and performance).

69. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016) (diagnoses repercussions caused by defendants’ lack of information and understanding, laymen’s lack of voice, and the public’s lack of information and participation).

70. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004) (asking prosecutors to consider enforcement costs); Gold, *supra* note 13 (proposing required disclosure of prosecution and declination costs to address voter information deficits).

71. See Andrew M. Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016) (exploring potential aggregation of court data to report on prosecutorial performance); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. (forthcoming 2017) (exploring examples of potential analytics to address race-based jury selection practices, prosecutorial misconduct, and other measures of prosecutorial performance).

72. See BIBAS, *MACHINERY*, *supra* note 69.

The varieties of information that prosecutors might collect and report to the public about their activities are almost endless. Most academics agree that the “conviction rate” of the office is an unhelpful measure of office quality; beyond that, the proposals fan out in all directions, each writer proposing a different set of metrics.<sup>73</sup> In this setting, it would be wise to tap the insights of prosecutor professional associations to develop a short consensus-based list of relevant measures that legislatures or others might require prosecutors to collect and report.

#### *D. INFORMING AND CONSULTING, ENFORCED FROM THE INSIDE*

Finally, we turn to instances when prosecutors decide for themselves—without external prompts—to consult sources and to collect information that could inform wise prosecutorial policy. Similarly, prosecutors sometimes inform voters, community groups, and other criminal justice actors about the trends and practices in the office.

In an effort to obtain more-specific information about public priorities than prosecutors can obtain through the blunt instrument of vote totals in elections, offices might resort to public polling, focus groups with community organizations, and other methods to solicit specific views and values from the residents of the district. This feedback loop between the office and the public is fundamental to the concept of community prosecution.

Collection of data is also a fundamental building block for management of prosecutor offices.<sup>74</sup> The topics that prosecutors might inquire about include the possible racial disparities in their charging and plea practices.<sup>75</sup> Managers of a prosecutor’s office also might generate data about performance to inform their choices about hiring,<sup>76</sup> training of new prosecutors, the creation of

73. See Sklansky, *supra* note 38.

74. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (discussing “internal transparency”); William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY, *supra* note 38 (key elements of post-bureaucratic organization are presumptive rules, root cause analysis, peer review, and performance measurement).

75. See Angela J. Davis, *Prosecutors, Democracy and Race*, in PROSECUTORS AND DEMOCRACY, *supra* note 38 (discussing use of racial impact analyses in Milwaukee).

76. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988) (emphasizes hiring and training rather than standards or external review); Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012) (advocating an office staff with a range of experience).



specialized units within the office,<sup>77</sup> compensation schemes,<sup>78</sup> and auditing systems for diagnosis of errors.<sup>79</sup>

These internal uses of data, if they are to become standard practice among prosecutors across a wide range of offices, must originate from prosecutors themselves. They must grow out of typical management needs in prosecutors' offices. For that reason, professional associations of prosecutors might address the topics for data collection and the uses of such data. Every state has a professional association for district attorneys, which typically addresses the training and management issues that chief prosecutors face around the state.<sup>80</sup> National groups also provide a space for the development of professional standards among prosecutors.<sup>81</sup> If these groups were to develop metrics for successful prosecution, they might gain credibility because the use and collection of this data grows out of the daily experiences and needs of prosecutors. These professional associations might prove to be the most important incubators of reform.

### RECOMMENDATIONS

In an effort to improve the performance of prosecutors who find themselves, too often, flying solo and flying blind, reformers have a range of realistic options. Any of them might improve the institutional environment to promote sound prosecution. In an effort to spotlight the best of those possible reforms, I list below one promising possibility from each of the four major categories of reforms reviewed above. Because of the great variety among local prosecutors' offices, I prioritize the reforms that stress notice and consultation rather than changes in substantive legal standards.

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77. See Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005).

78. See Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

79. See JOHN HOLLWAY, *A SYSTEMS APPROACH TO ERROR REDUCTION IN CRIMINAL JUSTICE* (2014); *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1995-2010 (2010).

80. The full-time staff for each of these statewide prosecutor groups come together nationally to form the National Association of Prosecutor Coordinators.

81. These groups include the National District Attorneys' Association, the Association of Prosecuting Attorneys, and the Institute for Innovation in Prosecution. The NDAA and the APA have drafted performance standards for use within prosecutors' offices. See M. ELAINE NUGENT-BORAKOVE, LISA M. BUDZILOWICZ & GERARD RAINVILLE, *PERFORMANCE MEASURES FOR PROSECUTORS: FINDINGS FROM THE APPLICATION OF PERFORMANCE MEASURES IN TWO PROSECUTORS' OFFICES* (2007).

1. **Advocate for professional associations to set standards** that assure specific amounts and topics for training of new prosecutors, aiming to give prosecutors early awareness of the public-safety priorities of the local office.
2. **Issue reports to local prosecutors and to the public regarding the annual use of state correctional resources by local prosecutors**, in comparison to an expected baseline of usage.
3. **Revise sentencing laws and practices** to restore the judicial input into the sentence imposed as a meaningful counter-weight to prosecutor control over the initial selection of charges.
4. **Enact legislation or sentencing guidelines that require prosecutors to declare local or statewide standards for the selection of charges**, especially in categories of crimes that present particular risks of unequal treatment among cases or special interest for the voting public.

In the end, legislators and others who care about the quality of the prosecutor's work should balance the reform portfolio, paying some attention to each of the quadrants discussed above. There is no single definitive change in prosecutor institutions and incentives that will make all the difference. In a world with so many local prosecutor offices, working in so many distinct environments, a full menu of reform options will be necessary.

# Plea Bargaining

Jenia I. Turner\*

*Plea bargaining dominates the criminal process in the United States today, yet it remains highly controversial. Supporters defend it on the grounds that it expedites cases, reduces processing costs, and helps authorities obtain cooperation from defendants. But critics contend that it can generate arbitrary sentencing disparities, obscure the true facts, and even lead innocent defendants to plead guilty. Lack of transparency and limited judicial involvement frustrate attempts to correct flaws in the process. As policymakers and legislators prepare to tackle reform of sentencing laws and prosecutorial discretion, they should also consider reforms to plea bargaining that would make the practice fairer, more transparent, and more honest.*

## INTRODUCTION

As the Supreme Court recently acknowledged, in the U.S., “criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>1</sup> More than 95% of convictions in the federal and state systems are the product of negotiated guilty pleas.<sup>2</sup> Roughly every two seconds during typical work hours, a person pleads guilty.<sup>3</sup> In some jurisdictions, individual prosecutors may practice for months without trying a case.<sup>4</sup> Courts, policymakers and scholars for the most part view plea bargaining as an inevitable feature of our criminal process. The general assumption is that without guilty pleas, the criminal justice system

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1. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2012—STATISTICAL TABLES tbl.4.2 (2015) (97% of federal convictions disposed of via guilty plea). For state statistics, see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2004—STATISTICAL TABLES tbl.4.1 (2004) (95% of state convictions obtained through a guilty plea); *Court Statistics Project DataViewer*, NAT’L CTR FOR STATE COURTS, [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Criminal](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal) (showing that for most states, jury trials amounted to only about 1-2% of criminal dispositions).

3. Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001).

4. Don Stemen et al., *Plea Bargaining in Wisconsin: Prosecutor Effects on Charge Reductions Outcomes 9* (2015) (unpublished manuscript) (on file with author) (noting that “there are many prosecutors with no trials over the study period,” 2009-2013).

would grind to a “screaming halt.”<sup>5</sup> Even if the system could afford to provide more contested trials than it currently does, many believe that plea bargaining helps allocate resources more sensibly—away from trials of clear-cut cases and toward more valuable programs, such as probation, parole, and reentry.<sup>6</sup>

Another stated advantage of plea bargaining is that it helps the prosecution to obtain cooperation in complex cases. Informants are often indispensable to uncovering the operation of organized crime, for example, and plea discounts can be critical to obtaining their cooperation.<sup>7</sup> Plea bargaining has also been defended for sparing reluctant and vulnerable witnesses the ordeal of testifying and for providing victims with closure more quickly than trials do.<sup>8</sup> Some courts and commentators have also stated that guilty pleas can facilitate the rehabilitation of defendants by encouraging them to accept responsibility and by leading to the swifter imposition of punishment.<sup>9</sup>

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5. Eileen Nimm, *Plea Bargains Crucial to Efficient Court System*, APG MEDIA WISCONSIN (July 6, 2016), [http://www.apg-wi.com/plea-bargains-crucial-to-efficient-court-system/article\\_c73f2715-fbb7-5c89-953f-b135b0aa257d.html](http://www.apg-wi.com/plea-bargains-crucial-to-efficient-court-system/article_c73f2715-fbb7-5c89-953f-b135b0aa257d.html) (citing Wisconsin prosecutor); see also Santobello v. New York, 404 U.S. 257, 260-61 (1971); J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1138-44 (2014) (discussing various benefits of plea bargaining, including its efficiency). *But see* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE 104-05, 154-55 (2016); Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 705 (2013); Mary E. Vogel, *The Negotiated Guilty Plea: Vacancies as an Alternative to the Caseload Pressure Explanation*, 21 J. MATH. SOCIOLOGY 241, 241 (1996) (noting that “the claim that crowded courts induce plea bargaining as part of an effort by prosecutors, judges and attorneys to move cases more rapidly has been called increasingly into question”).

6. See, e.g., Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440-41 (1971) (quoting Arnold Enker, *Perspectives on Plea Bargaining*, in PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967)); see also Susan Turner, “Reentry,” in Volume 4 of the present Report.

7. See, e.g., Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 31 (2009); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 293 (1996).

8. Wilkinson, *supra* note 5, at 1142. For a discussion of crime victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in the present Volume.

9. E.g., Brady v. United States, 397 U.S. 742, 753 (1970); Wilkinson, *supra* note 5, at 1142. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

These perceived advantages of plea bargaining have made it an increasingly popular feature of criminal justice reform around the world. Countries as diverse as France, Germany, India, Japan, Nigeria, Russia, and South Africa have adopted some form of negotiated justice.<sup>10</sup> Even international criminal courts, dealing with the gravest crimes against humanity, have relied on plea bargaining to dispose of cases.<sup>11</sup>

But while plea bargaining continues to spread globally, its use remains highly controversial. Perhaps the greatest concern is that, at least as currently practiced in the United States, plea bargaining can be so coercive as to lead some innocent people to plead guilty.<sup>12</sup> Broad prosecutorial discretion to set high plea discounts, combined with harsh baseline sentences, places significant pressure on defendants to take a plea. Data from the National Registry of Exonerations (NRE) support these concerns: As of January 2017, roughly 18% of recorded exonerations (343 out of 1,956) in the NRE were the product of guilty pleas.<sup>13</sup> As discussed below, many more false guilty pleas likely remain unreported.

Apart from its potential to coerce innocent defendants to plead guilty, the current practice of plea bargaining in the U.S. is criticized for conflicting with the search for truth. Even if defendants are guilty of *some* offense, incomplete investigations, inadequate disclosure, limited adversarial testing, perfunctory judicial oversight, and sizeable plea discounts can lead defendants to plead guilty to crimes different from the ones they committed. Some of the same factors can also produce sentences that are disproportionately lenient or

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10. See, e.g., JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 1 (2009); *Critics Hit Japan's New Plea-Bargaining System, Say It Opens Door to False Testimony*, JAPAN TIMES (May 29, 2016), <http://www.japantimes.co.jp/news/2016/05/29/national/crime-legal/critics-hit-japans-new-plea-bargaining-system-say-opens-door-false-testimony/#.WHL38FMrKM8>.

11. TURNER, *supra* note 10, at 213; *Malian Jihadi To Plead Guilty in ICC Cultural Destruction Trial*, THE GUARDIAN (May 24, 2016), <http://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial>.

12. See, e.g., Lucian E. Dervan, *The Injustice of the Plea-Bargain System*, WALL ST. J. (Dec. 3, 2015), <https://www.wsj.com/articles/the-injustice-of-the-plea-bargain-system-1449188034>; Tim Lynch, *Americans Are Bargaining Away Their Innocence*, WASH. POST (Jan. 20, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/01/20/americans-are-bargaining-away-their-innocence/?utm\\_term=.e5b3744dffdb](https://www.washingtonpost.com/news/in-theory/wp/2016/01/20/americans-are-bargaining-away-their-innocence/?utm_term=.e5b3744dffdb). For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in the present Volume.

13. *Exoneration Detail List*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 4, 2017).

disproportionately harsh. They also allow the negotiation of plea bargains that vary based on arbitrary factors such as race, “wealth, sex, age, education, intelligence, and confidence.”<sup>14</sup>

Plea bargaining is further criticized for reducing the fairness and legitimacy of the criminal justice system. When defendants plead guilty, they waive most procedural protections associated with a trial and opt for a non-transparent process with limited judicial review and little to no adversarial testing. The lack of transparency in plea bargaining impairs the legitimacy of the process in the eyes of not only defendants, but also victims and the general public.<sup>15</sup> Public attitudes toward plea bargaining are overwhelmingly negative, in large part because of the lack of transparency and the perception that it is allowing guilty defendants to get away with unduly lenient punishment.<sup>16</sup>

So far, courts and legislatures have taken a largely hands-off approach to plea bargaining, imposing few constraints on its operation.<sup>17</sup> To address the serious concerns about the fairness and accuracy of the process, judges and policymakers ought to consider more comprehensive regulation. As subsequent sections discuss, regulation may range from small fixes, such as requiring that plea agreements be reduced to writing and placed on the record, to more significant reform, such as mandating broader pre-plea disclosure, more thorough judicial scrutiny of guilty pleas, and limits on plea discounts. Even more ambitiously, broader criminal justice reform—aimed at narrowing the scope of criminal codes, increasing judicial sentencing discretion, and providing better funding for prosecutors and defense attorneys alike—is also important for ensuring that plea bargaining functions in a fair manner.

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14. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468 (2004); see also Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1125-26 (1976) (noting that plea bargaining is influenced by “a defense attorney’s charm, by past favors that he had rendered, by the extent of his friendship with prosecutors or trial judges, by the race, wealth or bail status of the defendant, by the unusual weight that a particular judge might choose to give to a defendant’s choice of plea, by a prosecutor’s mood or his desire to finish work early on an especially busy day, by the publicity that a case had generated, or by any of a number of other factors, irrelevant to the goals of the criminal process”). For discussions of the impact of race in adjudication and sentencing, see Paul Butler, “Race and Adjudication,” in the present Volume; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

15. See, e.g., Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

16. Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590-92 (2004).

17. See, e.g., BROWN, *supra* note 5, at 91.

## I. PLEA-BARGAINING LAW AND POLICY

Despite its central place in criminal law practice, plea bargaining remains remarkably lightly regulated. The Supreme Court has imposed limited constraints grounded in the Due Process Clause, the privilege against self-incrimination, and the Sixth Amendment right to counsel.<sup>18</sup> Statutes and rules provide only minimal additional regulation.

In *Brady v. United States*, the Supreme Court held that because a guilty plea is a waiver of the right to trial, the Due Process Clause requires that the plea be voluntary and knowing.<sup>19</sup> But in both *Brady* and subsequent decisions, the Court interpreted these requirements narrowly.

The Court held that the threat of a significantly more severe penalty (even the death penalty) upon conviction is not so coercive as to invalidate a guilty plea.<sup>20</sup> Indeed, few governmental actions short of physical coercion would render a guilty plea involuntary.<sup>21</sup> For example, neither threats to bring more serious charges against the defendant nor threats to charge family members have been held to constitute impermissible coercion, as long as the prosecutor has probable cause to support the charges.<sup>22</sup>

The requirement that a guilty plea be informed is also not particularly demanding. Judges must confirm that the defendant understands the essential elements of the crime to which he is pleading guilty.<sup>23</sup> In most jurisdictions, rules of procedure and statutes further require judges to inform defendants of the direct consequences of a guilty plea<sup>24</sup> and of rights waived by pleading

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18. For arguments that the Supreme Court should impose more stringent constitutional limits, see Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 597, 599-600 (2013); Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 722-23 (2013).

19. *Brady v. United States*, 397 U.S. 742, 748 (1970).

20. *Id.* at 755.

21. *E.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 218-26 (1978); *United States v. Carpenter*, 25 F. App'x. 337, 343-44 (6th Cir. 2001) (guilty plea was not involuntary even though it was part of a "package deal" under which the prosecution would refrain from seeking the death penalty only if both the defendant and his codefendant brother agreed to plead guilty); *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995). Certain rules and case law, however, presume that judicial participation in plea negotiations renders a subsequent guilty plea involuntary. *E.g.*, *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. P. 11(e)(1).

22. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Pollard*, 959 F.2d 1011, 1021-22 (D.C. Cir. 1992).

23. *Henderson v. Morgan*, 426 U.S. 637, 652-53 (1976).

24. *E.g.*, *United States v. Rivera-Maldonado*, 560 F.3d 16, 22 (1st Cir. 2009); *Jamison v. Klem*, 544 F.3d 266, 276-277 (3d Cir. 2008); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(d) n.116 (4th ed. 2016).

guilty.<sup>25</sup> However, a guilty plea may be informed even when the prosecution fails to disclose evidence favorable to the defense.<sup>26</sup> Likewise, judges need only give minimal notice of the meaning of the right to counsel before defendants waive that right at a plea hearing.<sup>27</sup>

And while federal and state criminal procedure rules generally require guilty pleas to be based on facts, the factual-basis standard remains quite vague.<sup>28</sup> As a result, judges rarely go beyond reviewing the indictment and then confirming that the facts alleged comport with the defendant's brief statement at the plea colloquy.<sup>29</sup> Given this rather perfunctory factual inquiry, parties remain free to engage in fact bargaining and frequently do so.<sup>30</sup> The Court has also allowed

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25. LAFAVE ET AL., *supra* note 24, § 21.4(e) n.190. Some courts have held that a warning of the rights waived is required in order for the plea to be informed. *See id.* n.194; *cf.* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (requiring a record of a knowing and voluntary waiver of rights inherent in guilty plea).

26. Ruiz v. United States, 536 U.S. 622, 623 (2002) (holding that a guilty plea may be informed even when the prosecution has failed to disclose evidence that serves to impeach the credibility of prosecution witnesses). Ruiz concluded that the government is not constitutionally required to disclose impeachment evidence before a guilty plea, but it did not squarely resolve whether the government must disclose factually exculpatory evidence. *Id.* at 628. Circuit courts have split on this question. *Compare, e.g.,* Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) (holding that a prosecutor need not disclose exculpatory evidence when a defendant waives a trial and pleads guilty), *with, e.g.,* McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (suggesting that, if a prosecutor fails to disclose factually exculpatory evidence before a defendant enters a guilty plea, this would likely violate the Due Process Clause); *see also* Buffey v. Ballard, 2015 WL 7103326, at \*11 (W. Va. Nov. 10, 2015) (reviewing federal and state decisions on this question and concluding “that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage”).

27. Iowa v. Tovar, 541 U.S. 77, 80 (2004) (holding that the court must inform the defendant “of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea” but does not need to “(1) advise the defendant that ‘waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked’; and (2) ‘admonis[h]’ the defendant ‘that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty’”).

28. LAFAVE ET AL., *supra* note 24, § 21.4(f).

29. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212–23 (2006); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 10 (1997), <https://www.fjc.gov/sites/default/files/materials/2017/gssurvey.pdf> (reporting that 25% of judges stated that they have never “‘go[ne] behind’ a plea agreement and rule[d] against a prosecutor’s recommendation that tends to lower a sentence by either stipulating facts or recommending the application, or nonapplication, of specific offense characteristics” and that of the 75% who do “go behind plea agreements,” only about 8% do so “somewhat or very frequently”).

30. Turner, *supra* note 29, at 212–23.



judges to accept guilty pleas even when defendants profess their innocence, as long as sufficient factual basis independently supports the conviction.<sup>31</sup>

Courts have also failed to regulate the practice of charge bargaining in any meaningful way. They have interpreted separation-of-powers principles to prevent judges from interfering with prosecutors' decisions to reduce or dismiss charges.<sup>32</sup> Because decisions about charges have profound effects on sentencing (particularly in systems with mandatory minimums, recidivist enhancements, or sentencing guidelines),<sup>33</sup> prosecutors can typically induce guilty pleas by offering favorable charging concessions to defendants.

The Supreme Court has also done little to ensure the transparency and reviewability of negotiated judgments. It has allowed the parties to waive the right to appeal—a practice that is now routine—and it has not required agreements to be reduced to writing or otherwise placed on the record.<sup>34</sup> Victims have no right to take part in the negotiations and in some jurisdictions are not even consulted about the possibility of resolving the case through a plea bargain.<sup>35</sup> Plea negotiations thus remain opaque and largely immune from review in most U.S. jurisdictions.<sup>36</sup>

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31. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (equivocal guilty pleas are acceptable when there is strong factual evidence supporting guilt). *But cf.* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.015, <https://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.015> (last updated Oct. 2016) (instructing federal prosecutors not to consent to *Alford* pleas “except in the most unusual of circumstances” and only after supervisory approval).

32. *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379-81 (2d Cir. 1973); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); *cf.* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) (critiquing this jurisprudence as “inconsistent with the history of criminal justice administration in many states”).

33. *See, e.g.*, Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1977 (2006) (finding that “charge bargaining over the offense seriousness is one of the central ways that cases are resolved” and that “these charge reductions have substantial effects on the severity of sentences imposed”).

34. *See, e.g.*, *United States v. Toth*, 668 F.3d 374, 378 (2012); *Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011); *see also* Nancy King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (“In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.”).

35. LAFAVE ET AL., *supra* note 24, at § 21.3(f) (“Provisions on prosecutor/victim consultation ... exist in about two-thirds of the states as well as on the federal level” and “a substantial minority of the states appear to authorize a victim to appear at [plea hearings] and to be heard on the matter.”); *see also* Cassell, *supra* note 8.

36. A few states have begun enacting rules requiring that plea offers be placed on the record. *See Missouri v. Frye*, 566 U.S. 133, 146-47 (2012) (discussing Arizona and New Jersey rules requiring that plea offers be placed on the record).

While otherwise taking a laissez-faire approach to plea bargaining, the Court has been more active in regulating defendants' rights to effective assistance of counsel at the guilty-plea stage.<sup>37</sup> The Court has held that defense counsel must advise defendants of certain significant consequences of pleading guilty, such as the possibility of deportation.<sup>38</sup> It has also affirmed that counsel must relay to clients any plea offers made by prosecutors and must competently advise clients of the legal advantages and disadvantages of accepting an offer.<sup>39</sup> But the court has yet to clarify the duties of defense counsel in preparation for and during plea negotiations, and it has not attempted to directly regulate prosecutorial conduct in the process.

## II. PLEA-BARGAINING CRITIQUES

While a few commentators have defended plea bargaining on the grounds of its efficiency and ostensible benefits to the parties involved,<sup>40</sup> most have been critical of the practice. In the 1980s, some called for outright abolition of plea bargaining.<sup>41</sup> At this point, perhaps in recognition of the entrenched position of plea bargaining in the United States, scholarship has shifted focus toward correcting the worst excesses of the practice.<sup>42</sup> Empirical research has also attempted to identify more systematically areas in need of reform. Scholars' concerns fall into three principal categories: (1) the risk of coercion; (2) the risk of inaccuracy; and (3) insufficient procedural protections.

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37. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lafler v. Cooper*, 566 U.S. 156, 170-72 (2012); *Frye*, 566 U.S. at 145-46.

38. *Padilla*, 559 U.S. 356.

39. *Lafler*, 566 U.S. 156; *Frye*, 566 U.S. at 145 ("As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused.").

40. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1914-15, 1968 (1992); Wilkinson, *supra* note 5; Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730 (2006) (offering a qualified defense of plea bargaining based on its "value in inducing defendants to cooperate in investigations of other suspects").

41. See, e.g., Albert W. Alschuler, *Implementing the Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1048 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2003-08 (1992).

42. Alschuler, *supra* note 5, at 706-07 ("[T]he time for a crusade to prohibit plea bargaining has passed. Instead, the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful. Improving the plea bargaining process should be one of their goals.").

## A. COERCION

Much has been written about the concern that excessive plea discounts may coerce defendants to plead guilty and unduly penalize those who choose to go to trial.<sup>43</sup> This risk is particularly serious when steep discounts are combined with harsh baseline sentences.<sup>44</sup> Together, these two features may induce even defendants with good odds of prevailing at trial to accept a plea bargain.

Since the 1980s, mandatory sentencing laws, sentencing guidelines, and the abolition of parole have led to a sharp rise in sentence length in most states and the federal system.<sup>45</sup> Just as sentences have grown longer, rewards for pleading guilty have also increased.<sup>46</sup> Some of these rewards are expressly granted by rules or statutes, such as reductions for accepting responsibility or cooperating with the prosecution. Others are offered indirectly, by giving prosecutors broad discretion to reduce charges for defendants who agree to plead guilty.<sup>47</sup>

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43. See, e.g., *id.* at 678-81; Russell Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 (2008); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2346 (2006); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224-28 (2006); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 49 CRIM. L.Q. 67, 87-90 (2005); Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 109 (2005).

44. See, e.g., Ross, *supra* note 40, at 718.

45. Turner, *supra* note 29, at 205; see also Cullen, *supra* note 9; Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report; Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report. Even after the Federal Sentencing Guidelines became merely advisory, judges continue to follow the Guidelines in a large majority of cases. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G. REP. 326, 328-29 (2011). This leaves prosecutors with significant power to set the plea discount through charging decisions and motions for substantial assistance departures.

46. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 (2015) (finding that "federal defendants convicted at trial receive sentences that are sixty-four percent longer than similar defendants who plead guilty, excluding the effects of charge and fact bargaining"); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial In Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75, 992 (2005) (studying sentencing practices in five states and finding trial penalties ranging from 13 to 461%); McCoy, *supra* note 43, at 90 (finding an average trial penalty of 44.5 months in state felony cases); HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102 (2013) (finding that average federal drug sentences in cases that went to trial were three times harsher than average sentences in cases that were resolved by a plea).

47. See, e.g., Wright & Engen, *supra* note 33, at 1948-50.

Empirical studies suggest that innocent defendants are at the greatest risk of pleading guilty in four situations: (1) when there is a significant differential between the negotiated sentence and the sentence expected upon conviction after trial;<sup>48</sup> (2) when the plea offer is to probation, while the expected sentence post-trial entails imprisonment;<sup>49</sup> (3) when the plea offer is to imprisonment, while capital punishment is a possibility after trial; and (4) when the defendant is detained, and a guilty plea results in release for time served.<sup>50</sup>

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48. E.g., Wright, *supra* note 43, at 84-86, 116-17, 147-48 (reviewing the increase of guilty plea rates and the decrease of acquittals in the federal system since the rise of mandatory sentencing and concluding that deep discounts for “acceptance of responsibility” and “substantial assistance” may have led defendants in the federal system to abandon meritorious trial defenses and plead guilty); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 36 (2013) (in an experiment involving college students accused of cheating, finding that “well over half of the innocent study participants ... were willing to falsely admit guilt in return for a reduced punishment”). Studies relying on self-reports by convicted offenders also offer qualified support for the proposition that the threat of harsher punishment after trial might induce some innocent defendants to plead guilty. Kenneth S. Bordens & John Basset, *The Plea Bargaining Process from the Defendant’s Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93, 109 (1985) (finding that convicted defendants had accepted plea bargains primarily in order to minimize punishment); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 88 (2010) (finding that 37% of offenders with mental illness reported having tendered a false guilty plea at some point in their life, and nearly two-thirds of them stated that they did so to secure release from jail or a shorter sentence).

49. For example, a 1984 mock bargaining experiment involving college students found that in certain circumstances, particularly when conviction was seen as highly likely and probation was offered upon a guilty plea, “innocent” study subjects would accept a plea bargain “in order to cut their losses.” Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCH. 59, 71 (1984).

50. After reviewing real cases of exonerees who had pleaded guilty, John Blume and Rebecca Helm identified a similar set of factors contributing to false guilty pleas. See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

For example, the most recent data reported by the National Registry of Exonerations show that roughly 18% of recorded exonerations (343 out of 1,956) were the product of guilty pleas.<sup>51</sup> The NRE identified large plea discounts as a key factor driving false guilty pleas.<sup>52</sup> Other analyses of plea-based exonerations have similarly found that innocent defendants plead guilty to avoid the risk of harsher punishment after trial.<sup>53</sup>

Certain types of plea discounts appear to be especially coercive. The plea discount that Brady claimed had induced him to plead guilty—the threat of receiving the death penalty if convicted after trial—is an important example. A recent study of capital charging and sentencing decisions in Georgia in the period between 1993 and 2000 found “strong evidence that the threat of the death penalty ha[d] a robust causal effect on the likelihood of a plea agreement.”<sup>54</sup> The threat of the death penalty was found to increase the probability of a guilty plea by roughly 20% to 25%.<sup>55</sup> While the study did not reach any conclusions about the effects of the death-penalty threat on *innocent* defendants, other studies have documented cases in which innocents have pleaded guilty to avoid the death penalty.<sup>56</sup> As the NRE noted, “[e]xcluding drug cases, most guilty-plea exonerations are for homicide or sexual assault, two categories that account for 70% of all known exonerations.”<sup>57</sup> Among the homicide exonerees, almost three-

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51. *Exoneration Detail List*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 4, 2017). Of these exonerations based on guilty pleas, 50.1% (172/343) were for drug offenses, and most of these came from one county—Harris County, Texas—where they were uncovered as a result of the work of the Harris County D.A.’s Office Conviction Integrity Unit. *Id.*; *Innocents Who Plead Guilty*, NAT’L REGISTRY OF EXONERATIONS, (Nov. 24, 2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [hereinafter *Innocents Who Plead Guilty*]. For a discussion of some of the reasons why exoneration data might underrepresent the prevalence of false guilty pleas, see Dervan & Edkins, *supra* note 48, at 21–22. See generally Garrett, *supra* note 12.

52. *Innocents Who Plead Guilty*, *supra* note 51; see also Blume & Helm, *supra* note 50, at 180.

53. Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1173 (2013) (examining the mass exonerations in the Rampart case in California and the Tulia case in Texas and finding that, in those two cases involving police misconduct, innocent defendants pleaded guilty at a rate of 77%).

54. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 475 (2013). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

55. Thaxton, *supra* note 54, at 475.

56. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005); *Innocents Who Plead Guilty*, *supra* note 51.

57. *Innocents Who Plead Guilty*, *supra* note 51, at 2.

fourths were convicted of homicide, and “[i]t appears that the great majority [pleaded guilty] to avoid the risk of execution. All but 2 were prosecuted in death penalty states, and 70% had falsely confessed (31/44).”<sup>58</sup>

On the other side of the punishment spectrum, a plea offer of time served for detained defendants has also been found to lead innocent defendants to plead guilty. Misdemeanor defendants are frequently detained for the simple reason that they cannot afford to post bail, and they are commonly offered plea deals to “time served.”<sup>59</sup> They are then subject to significant economic and familial pressures to plead guilty in order to be released from jail. A recent empirical study found that misdemeanor detainees “plead guilty at a 25% higher rate than similarly situated releasees.”<sup>60</sup> The authors concluded that “[m]isdemeanor pretrial detention ... seems especially likely to induce guilty pleas, including wrongful ones.”<sup>61</sup>

### B. INACCURACY

Apart from coercive plea discounts, several other plea-bargaining features heighten the risk of inaccurate and unjust outcomes: (1) limited time and resources for investigations, especially by the defense; (2) principal-agent problems on both the defense and prosecution sides; and (3) insufficient judicial review. These flaws increase the risk that defendants may plead guilty to inaccurate charges or receive punishment that is undeservedly lenient or undeservedly harsh.

In theory, if the prosecution attempts to pressure a defendant into a guilty plea despite weak evidence of guilt, the defense attorney could advise the client to reject the plea offer. In practice, counsel is frequently unable to do so because of overwhelming caseloads, cuts in indigent-defense funding, and rules that limit defense investigations.<sup>62</sup> Defense attorneys lack search and subpoena

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58. *Id.* at 3; *see also* Blume & Helm, *supra* note 50, at 180 (identifying the threat of the death penalty as a factor in pushing innocent defendants to plead guilty).

59. Paul S. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 715 (2017); Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL. L. REV.* 1313, 1322 (2012) [hereinafter Natapoff Article]; *see also* Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume; Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

60. Heaton et al., *supra* note 59, at 747.

61. *Id.* at 716; Natapoff Article, *supra* note 59, at 1347.

62. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CAL. L. REV.* 1585, 1590 (2005); *see also* Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

powers and the authority to depose witnesses.<sup>63</sup> Pre-plea discovery is also limited; for example, prosecutors are not constitutionally required to disclose impeachment evidence, which could greatly help the defense uncover flaws in the government's case.<sup>64</sup> Some courts have even held that prosecutors need not disclose factually exculpatory evidence before a guilty plea.<sup>65</sup> While state rules may mandate more robust disclosure, such mandates often apply before trial, but not before a plea.

Various incentives for the defendant to plead guilty as early as possible further discourage thorough defense investigation.<sup>66</sup> Charging and sentencing concessions are frequently predicated on timely "acceptance of responsibility."<sup>67</sup> When defendants are presented with "exploding offers," defense attorneys are left with scant opportunity to investigate the case.<sup>68</sup>

Agency problems also affect prosecutors' and defense attorneys' actions in plea negotiations. When defense attorneys carry heavy caseloads or are paid flat fees, they have an incentive to settle cases quickly even when their clients might prefer to test the case at trial or when a more thorough investigation might uncover viable defenses or mitigating factors.<sup>69</sup> On the flip side, prosecutors dealing with high caseloads may negotiate overly generous plea bargains to dispose of a case more swiftly.<sup>70</sup> This risk is heightened because victims have little to no input into prosecutorial decisions during plea bargaining.

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63. See Brown, *supra* note 62, at 1601. *But see* FLA. R. CRIM. P. 3.220(a)(1)(ii) (providing for pretrial depositions by the defense).

64. United States v. Ruiz, 536 U.S. 622, 623 (2002).

65. Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000); Walton v. State, 165 So. 3d 516, 525 (Miss. Ct. App. 2015).

66. U.S. ATTORNEYS' MANUAL § 9-27.420, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.420> (last updated Jan. 2017) (prosecutors "should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date, and *well in advance* of the trial date") (emphasis added). For a discussion of evidentiary disclosure, see Darryl K. Brown, "Discovery," in the present Volume.

67. E.g., U.S. SENTENCING GUIDELINES MANUAL § 3E.1.1 cmt., app. 1 (2016); *id.* § 6B1.2 cmt.

68. Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCHOL. PUB. POL'Y & L. 250, 251 (2016) ("Anecdotal data abound to suggest that prosecutors (and sometime judges) attach very stringent time constraints on defendants, such that defense attorneys have little to no time to vet evidence or investigate cases.").

69. Alschuler, *supra* note 5, at 682; Bibas, *supra* note 14, at 2477.

70. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968); Bibas, *supra* note 14, at 2474.

In theory, judges could provide a neutral check on the parties and ensure that bargaining decisions are consistent with the facts of the case. But in reality, the law provides judges few tools to do so, and judges rarely make use of the powers they do have to check plea bargains. As discussed earlier, the factual-basis inquiry remains rather perfunctory, and fact bargaining is common.<sup>71</sup> Furthermore, in many jurisdictions, judges are prohibited from participating in or commenting on the plea negotiations.<sup>72</sup> Yet it is precisely during the negotiations that judges are likely to have the greatest impact on the fairness and accuracy of the outcome. Once the parties have arrived at a deal, they have little incentive to reveal anything that might disturb the agreement. The judge's inquiry into the facts at the plea hearing is therefore unlikely to unearth discrepancies that place the deal in jeopardy.

As a result, plea bargains often fail to fully reflect the facts of the case. Negotiated charges may allege a crime that is more serious, less serious, or simply quite different from the actual conduct of the defendant. Similarly, because of the lack of publicity and adequate judicial checks on plea bargaining, a defendant who pleads guilty may get a sentence that does not accurately reflect his guilt. For example, a defendant may receive a harsher sentence than deserved, based on arbitrary factors such as race, gender, age, wealth, or the relationship between defense counsel and the prosecutor.<sup>73</sup> Conversely, a defendant may get a sentence that is undeservedly mild if a prosecutor is too overworked or if the factors mentioned above bias prosecutors in favor of leniency.<sup>74</sup> In the rush to dispose of the case, without adequate judicial scrutiny or publicity, the parties can settle for bargains that depart from the "shadow of trial" and from the truth.<sup>75</sup>

### C. INADEQUATE PROCEDURAL SAFEGUARDS

Another failing of plea bargaining is its opaqueness. The parties negotiate the disposition in private, typically without the participation of a neutral third party or direct input from victims. Plea bargains are rarely written or recorded in any fashion. The lack of record and transparency hinders accountability

71. See *supra* note 30 and accompanying text.

72. E.g., *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. P. 11(e)(1); Turner, *supra* note 29, at 202 & n.6 (listing jurisdictions).

73. See *supra* note 14 and accompanying text; Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUSTICE Q. 398, 420 (2016); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 835-36 (2009).

74. E.g., Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 297 (2005); Turner, *supra* note 29, at 259.

75. See, e.g., RICHARD LIPPKE, *ETHICS OF PLEA BARGAINING* ch. 9 (2011).



for flaws in the process or the outcome. It also taints the process in the eyes of the public and victims.<sup>76</sup> Public rates of disapproval of plea bargaining are strikingly high, at least in part because of the covert nature of the practice.<sup>77</sup> The lack of a clear record also makes empirical research into plea bargaining difficult and frustrates scholars who aim to offer data-based analysis.<sup>78</sup>

In addition to lacking transparency, plea bargains increasingly require defendants to waive important procedural rights that are designed to ensure fair and accurate outcomes. Inherent in a guilty plea are waivers of the right to remain silent, the right to confront witnesses, the right to a public trial, and the right to a jury trial. Increasingly, however, as part of plea negotiations, prosecutors regularly demand waivers of critical additional rights. These include the following rights: to appeal the validity of the plea and associated sentence;<sup>79</sup> to discovery (including discovery of exculpatory evidence);<sup>80</sup> to post-conviction DNA testing;<sup>81</sup> to have a pre-sentence investigation and report prepared;<sup>82</sup> and to challenge ineffective counsel.<sup>83</sup> These types of waivers insulate plea bargains from judicial review, thus allowing prosecutorial overreaching

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76. Bibas, *supra* note 14, at 2547; Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 444-46 (2008).

77. Herzog, *supra* note 16, at 591.

78. Brian D. Johnson et al., *Sociolegal Approaches to the Study of Guilty Pleas and Prosecution*, 12 ANN. REV. L. & SOC. SCI. 481-82 (2016). For a notable example of a state statute requiring a record, for purposes of maintaining statistics, of the sentencing and charging concessions made in exchange for a guilty plea, see KY. REV. STAT. § 27A.420.

79. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT’G. REP. 326, 327-28 (2011); Nancy King & Michael O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 212 (2005) (finding that “in nearly two-thirds of the cases settled by plea agreement [in the federal system], the defendants waived their rights to review”). See generally Nancy J. King, “Criminal Appeals,” in the present Volume.

80. Hofer, *supra* note 45, at 327-28; Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 (2015); see also Brown, *supra* note 6.

81. Klein et al., *supra* note 80, at 83; see also Garrett, *supra* note 12.

82. Hofer, *supra* note 45, at 327-28 (in districts with “fast-track programs ... defendants, in order to avoid excessive punishments, are required to waive their rights to indictment, to discovery of the evidence against them, to have a pre-sentence investigation and report prepared, to argue for a reduced sentence before the judge, and to appeal a mistaken sentence”).

83. Klein et al., *supra* note 80, at 88.

and other procedural failures and factual inaccuracies to remain unchecked.<sup>84</sup> They are also arguably uninformed, as most defendants cannot adequately understand some of the claims they are waiving.<sup>85</sup> While some people defend such waivers on the grounds that defendants should have the freedom to exchange their rights for shorter sentences, these arguments underestimate the long-term damage to the integrity of the system that widespread waivers of critical rights can inflict.

### III. REFORM PROPOSALS

The increasing number of exonerations of people who pleaded guilty has revived interest in proposals to reform plea bargaining. These range from complete abolition to discrete doctrinal fixes.<sup>86</sup>

#### A. REDUCING COERCION

One set of proposals aims to reduce the coerciveness of plea bargaining by limiting the size of plea discounts. Proposals include setting a fixed plea discount (e.g., one-third of the anticipated post-trial sentence), enacting caps on plea

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84. As one court explained about negotiated waivers of the right to appeal the sentence: The condition sought to be imposed by the government is inherently unfair; ... it will undermine the error correcting function of the courts of appeals in sentencing; it will create a sentencing regime where courts of appeals will never have the opportunity to review an illegal or unconstitutional sentence, or a sentence that has no basis in fact, unless those sentencing errors work to the disadvantage of the government.... A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.

United States v. Raynor, 989 F. Supp. 43, 49 (D.D.C. 1997); see also Klein et al., *supra* note 80, at 114 (“[Waivers of ineffective assistance claims] remove the ‘only remaining ‘checks’ in our system of plea-agreement justice. If the defendant is allowed to give up this right at the plea stage, there is little cushion left to protect her against unwise tactical decisions, prosecutorial misconduct or overzealousness, or waiver of important other rights.”).

85. Klein et al., *supra* note 80, at 107-08; Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1641 (2011) (noting ethical and legal concerns with discovery waivers).

86. For a sampling of recent reform proposals by policy organizations, judges and legislators, see FAIR TRIALS, COMMUNIQUE—A FAIR DEAL: NEGOTIATING JUSTICE (2015), <https://www.fairtrials.org/wp-content/uploads/Final-Washington-Plea-Bargain-roundtable-communique.pdf>; Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, BRENNAN CTR. FOR JUST. (Apr. 27, 2015), <https://www.brennancenter.org/analysis/reduce-federal-crimes-and-give-judges-flexibility>; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>; *American Prosecutors Have Too Much Power: Hand Some of It to Judges*, ECONOMIST (Oct. 4, 2014), <http://www.economist.com/news/leaders/21621784-american-prosecutors-have-too-much-power-hand-some-it-judges-plea-change>.

discounts (e.g., no more than one-third of the anticipated post-trial sentence), setting a limit on the “trial penalty” that courts might impose, or giving courts the power to review whether plea discounts are proportionate to the expected post-trial sentence.<sup>87</sup> Such limits exist—and appear to work fairly successfully—in foreign jurisdictions that have adopted forms of plea bargaining.<sup>88</sup> But they are typically embedded in legal regimes that give judges broader sentencing discretion and greater authority to amend charges.<sup>89</sup> By contrast, U.S. jurisdictions that have to impose limits on plea discounts have been less successful because prosecutors have been able to circumvent such limits through their charging decisions.<sup>90</sup> To ensure that plea-discount limits are effective, therefore, legislators must adopt

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87. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2313-17 (2006); McCoy, *supra* note 43, at 103; *see also* Covey, *supra* note 18, at 622 (proposing limits on the trial penalty rather than on the plea proposed by the prosecutor).

88. *See* SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE (rev. 2007), [https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-Revised\\_20071.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_20071.pdf) (setting a recommended sentence reduction of one-third when a guilty plea is entered at the earliest reasonable opportunity and less if entered later); Julian V. Roberts & Ben Bradford, *Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends*, 12 J. EMPIRICAL LEGAL STUD. 187, 196 (2015) (finding that “almost all cases where a plea was entered attracted reductions of one-third or less”); Turner, *supra* note 29, at 235 (discussing how German courts are required to ensure that post-plea as well as post-trial sentences remain proportionate to the offense committed and how plea discounts tend not to exceed one-third of the anticipated post-trial sentence); C.P.P. art. 444 (Italy), *cited in* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 466 (2004) (setting the plea discount to one-third of the maximum sentence to be imposed post-trial in Italian criminal cases).

89. *See, e.g.*, BROWN, *supra* note 5, at 108 (observing that English constraints on prosecutorial discretion “are less rigorous, but still somewhat greater than in the United States”); Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT’L L. & COM. REG. 297, 318 (2010) (arguing that although Italy has introduced a form of plea bargaining, “the principle of compulsory prosecution prevents a real out-of-court settlement between the defendant and the prosecution. Compulsory prosecution requires, in all cases, an evaluation on the merits by a judge and a monitoring on the content of the agreement, in accordance with the legality principle.”); Turner, *supra* note 29, at 219-20, 225-32 (describing the extensive involvement in plea negotiations by German judges for the purpose of controlling prosecutorial discretion and ensuring a proportionate sentence and an accurate outcome).

90. *See, e.g.*, Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 274 (2009) (noting that although a New York statute, N.Y. CRIM. PROC. LAW § 220.10, imposed caps on the size of post-indictment charge bargains, the parties would evade the limits by entering into pre-indictment plea agreements); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601 (1997) (“As the experience with the federal sentencing guidelines makes clear, merely introducing a moderate and standard plea discount, without simultaneously controlling the prosecutorial charging decision, does little to constrain prosecutorial bargaining power or to prevent rampant charge and fact bargaining.”).

them alongside more comprehensive reform of the criminal justice system, which would include restoring judicial discretion over sentencing and limiting prosecutorial discretion in charging decisions.<sup>91</sup>

Some have also argued that to reduce coerciveness in plea bargaining, courts and legislators should reject the Supreme Court's hands-off approach to prosecutorial threats to overcharge defendants who refuse a plea offer. Instead, rules could require prosecutors to provide justification for adding charges later in the process and perhaps require new evidence for such additions.<sup>92</sup> In a number of states, courts acting "in the interests of justice" may be able to dismiss charges that were added by prosecutors solely to induce a plea bargain.<sup>93</sup> As an alternative, some scholars have called on prosecutors' offices to develop protocols that require line prosecutors to "refrain from pressure tactics like exploding offers and charging threats."<sup>94</sup>

#### B. IMPROVING ACCURACY

Other reform proposals have focused on enhancing the accuracy of plea bargains. One critical step toward ensuring well-informed plea bargains would be a requirement of broad pre-plea discovery.<sup>95</sup> A number of states have already adopted liberal discovery rules, and more are likely to follow suit in the near future.<sup>96</sup> If enacted with due care to protect witness safety, discovery reform would come at little cost, while making an important contribution to the accuracy of plea bargains.<sup>97</sup>

91. See, e.g., John F. Pfaff, "Prosecutorial Guidelines," in the present Volume; Luna, *supra* note 45.

92. BROWN, *supra* note 5, at 102 (discussing pre-*Bordenkircher* cases that constrained prosecutorial charging threats).

93. E.g., CAL. PENAL CODE § 1385(a); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 647 (2015) (discussing state statutes that provide for judicial dismissal of charges in the interest of justice).

94. O'Hear, *supra* note 76, at 431; see also *United States v. Kupa*, 976 F. Supp. 2d 417, 422 (E.D.N.Y. 2013) ("The Attorney General needs to expressly prohibit the use of prior felony information to coerce defendants into pleading guilty or to punish those who refuse to do so.").

95. See, e.g., Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (discussing scholarship advocating for broader pre-plea discovery); Brown, *supra* note 66.

96. For a list of key features of state and federal discovery rules, see Turner & Redlich, *supra* note 95, at 400.

97. *Id.* at 352-72 (reporting the views of North Carolina prosecutors and defense attorneys on the advantages and disadvantages of open-file discovery in their state).

At the same time, for broad discovery to provide its intended benefits, it must be accompanied by provisions for well-funded defense.<sup>98</sup> Defense attorneys must have the time and resources to review, analyze, and further investigate facts disclosed by the prosecution.

Judicial oversight of plea bargains can also increase the truthfulness of the process. This could be accomplished by involving judges in the negotiations<sup>99</sup> or by demanding a more thorough inquiry into the factual basis of the guilty plea.<sup>100</sup>

Most states already require judges to ensure that guilty pleas are factually based.<sup>101</sup> At a minimum, reform aimed at ensuring accurate guilty pleas must include this basic rule;<sup>102</sup> preferably, the rule would also delineate how searching the inquiry should be. In the United States, perhaps the most robust factual-basis inquiry occurs in the military justice system; it can serve as a model for states wishing to provide greater judicial oversight over the guilty-plea process.<sup>103</sup> Military judges must engage the accused in a “dialogue in which the military judge poses questions about the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct.”<sup>104</sup> The dialogue is supposed to entail a genuine effort to elicit the

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98. See, e.g., Ben Grunwald, *The Fragile Promise of Open File Discovery*, 49 CONN. L. REV. \*1, \*5 (forthcoming); Primus, *supra* note 62.

99. Alschuler, *supra* note 14, at 1060; Turner, *supra* note 29; Rakoff, *supra* note 86; *American Prosecutors Have Too Much Power*, *supra* note 86.

100. E.g., BROWN, *supra* note 5, at 110; Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013).

101. LAFAVE ET AL., *supra* note 24, § 21.4 nn.205-06.

102. SUPREME COURT OF OHIO, PROPOSED AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE IN OHIO COURTS (2016), <http://www.supremecourtsohio.gov/ruleamendments/documents/Public%20Comment--2016%20Rules%20of%20Practice%20and%20Procedure%20proposed%20amendments.pdf> (proposing the adoption of a factual basis requirement for guilty pleas in Ohio).

103. Continental European systems also typically require the court, as part of its duty to investigate the truth, to conduct a searching inquiry into the facts underlying a plea agreement or guilty plea. E.g., Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial*, in WORLD PLEA BARGAINING 297, 368 (Stephen C. Thaman ed., 2010).

104. *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011).

true facts, and judges are not supposed to ask leading questions that produce simple “yes” and “no” responses.<sup>105</sup> Judges may also reject the guilty plea if the evidence presented at the hearing is inconsistent.<sup>106</sup>

Another way to enhance the accuracy of plea bargains would be to allow judges to participate in the negotiations. Judicial participation provides a neutral assessment of the facts at a point when such assessment can still make a difference; it minimizes the risks of coercion by prosecutors; and it provides the parties with early certainty about the sentencing outcome of a plea-bargained case. Such involvement also entails some risks—undermining the perceived neutrality of the judge or pressuring the parties to settle in order to expedite dispositions.<sup>107</sup> But states can adopt procedural safeguards that address these problems—for example, by requiring, as Connecticut and Maryland do, that a different judge preside over a trial should the plea negotiations falter.<sup>108</sup> Interviews with practitioners in states that permit judicial participation in plea negotiations suggest that, on the whole, judicial involvement tends to produce more-informed and fairer plea bargains.<sup>109</sup> Experimental studies and public surveys further suggest that involving judges in the process is likely to enhance public perceptions of the legitimacy of plea bargaining.<sup>110</sup>

105. *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004), *aff'd*, 64 M.J. 439 (C.A.A.F. Feb. 21, 2007) (“We have repeatedly advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from an accused ‘yes’ and ‘no’ responses during the providency inquiry.”).

106. *E.g.*, *United States v. Pintero*, 60 M.J. 31, 34 (C.A.A.F. 2004); MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8 (2012) (“The military judge should be alert to discrepancies in the accused’s description or between the accused’s description and any stipulation. If the accused’s discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused’s description raises the possibility of one.”).

107. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 359–64 (2016) (noting that concern about managing cases more efficiently is a key factor motivating judicial participation in plea negotiations); Turner, *supra* note 29, at 202–04 (discussing concerns about judicial participation in plea negotiations).

108. MD. R. 4–243(c)(5) (“If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.”); *State v. D’Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003).

109. King & Wright, *supra* note 107, at 364–81; Turner, *supra* note 29, at 252–56.

110. *See, e.g.*, Herzog, *supra* note 16, at 593, 606 (discussing surveys of Canadian citizens and experimental study involving Israeli citizens).

Finally, prosecutors' offices can take measures to improve the accuracy of plea bargaining. Specifically, chief prosecutors can adopt internal guidelines that prohibit plea bargaining in so-called "half-baked cases."<sup>111</sup> Instead of bargaining away cases with weak evidence, prosecutors could be encouraged to either screen out such cases or bring them to trial. It is precisely in cases with weak evidence that defendants are most likely to be innocent and yet prosecutors are most likely to grant enormous plea discounts to induce a plea. To reduce the risk of wrongful convictions, prosecutors could refrain from bargaining in such cases.

### C. ENHANCING TRANSPARENCY AND FAIRNESS

Other proposed reforms of plea bargaining focus on increasing transparency and procedural fairness. One such proposal would require that plea agreements be written and placed on the record. The written agreements would contain a clear statement of the key expected sentencing and collateral consequences. A few jurisdictions have already adopted such rules.<sup>112</sup> They aim to protect defendants from uninformed guilty pleas and from basing the decision to plead guilty "upon certain promises made by the prosecutor where the judge has in fact not accepted the state's recommendation."<sup>113</sup> While seemingly adding an onerous layer of documentation, such requirements can also "help prevent the possibility of disputes concerning the specific terms of a plea bargain" and prevent spurious claims of ineffective assistance of counsel.<sup>114</sup> Furthermore, they provide a measure of transparency that protects the interests of victims and the public in understanding the terms of the bargain.

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111. See, e.g., RICHARD LIPPKE, *ETHICS OF PLEA BARGAINING* ch. 8 (2011) (arguing that "officials committed to principled prosecution would be reluctant to engage in half-loaf plea bargaining," i.e., plea bargaining to obtain conviction in cases with weak evidence); Welsh, *supra* note 6, at 442-43 (discussing such policies in the Philadelphia D.A.'s Office, but noting that actual practice differed somewhat from office policy); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29, 117 (2002) (holding up as an example the New Orleans D.A.'s Office, which relied on internal prosecutorial guidelines to get prosecutors to screen out, rather than bargain away weak cases).

112. See, e.g., *IND. CODE ANN.* § 35-35-3-3 (providing that plea agreements in felony cases must be in writing to be accepted by the court); *MD. R.* 4-243(d); *N.J. CT. R.* 3:9-1(b) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney").

113. *Davis v. State*, 418 N.E.2d 256, 260 (Ind. App. 1981).

114. *Missouri v. Frye*, 132 S. Ct. 1399, 1408-09 (2012); 16A *IND. PRAC., CRIMINAL PROCEDURE—TRIAL* § 13.3; see also Joel Mallard, Comment, *Putting Plea Bargaining on the Record*, 162 *U. PA. L. REV.* 683, 685 (2014); Stephanie Stern, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 *HARV. J. LEGIS.* 245, 250-51 (2015). To promote transparency in plea bargaining, the German Constitutional Court has held that trial courts must record the existence, substance, and outcome of any plea negotiations and must not accept negotiated appeals waivers. Thomas Weigend & Jenia I. Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 *GERMAN L.J.* 81 (2014).

To strengthen the fairness of plea bargaining, courts and legislatures can also impose limits on permissible waivers. These include limits or outright bans on: waivers of the right to appeal the plea and accompanying sentence; waivers of ineffective assistance of counsel claims; waivers of post-conviction DNA testing; and waivers of discovery rights.<sup>115</sup> Such waivers are becoming more widespread in the federal system, but are less common and in some instances expressly prohibited in state systems, as violations of public policy or of professional responsibility rules.<sup>116</sup>

Finally, commentators have proposed alternatives to current forms of plea bargaining that expedite proceedings, but at a lesser cost to procedural fairness. Some have suggested that bench trials (possibly with simplified rules of procedure) would be a fairer, yet sufficiently expeditious and cost-effective alternative to plea bargaining.<sup>117</sup> Others have gone further, proposing that the parties negotiate away certain trial procedures, but still retain the basic form of a trial as a substitute for plea bargaining.<sup>118</sup> One commentator has proposed a plea jury, which would examine the validity of a guilty plea to ensure that it is voluntary, knowing, and factually based.<sup>119</sup> These alternatives have been criticized by some for not offering the same demanding process that trials do.<sup>120</sup> But in a system where trials are the rare exception, abbreviated bench trials and jury plea hearings can be defended as superior alternatives to the norm of procedurally deficient plea bargains.

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115. *E.g.*, Klein et al., *supra* note 80, at 94, 114; FAIR TRIALS, *supra* note 86.

116. *See, e.g.*, *People v. Stevenson*, 231 N.W.2d 476, 477 (Mich. Ct. App. 1975) (holding that negotiated waivers of the right to appeal are against public policy); Ala. State Bar Office of Gen. Counsel, Op. 02, at 1, 4 (2011), <https://www.alabar.org/assets/uploads/2014/08/2011-02.pdf> (opining that prosecutors and defense attorneys seeking to negotiate waivers of ineffective assistance claims would violate the state's rules of professional responsibility); *see also* Klein, *supra* note 100, at 582-83; Turner & Redlich, *supra* note 95, at 346-52 (finding that waivers of discovery rights are rarely negotiated in Virginia and North Carolina).

117. Alschuler, *supra* note 41, at 1033 (“Since bench trials can be completed in a matter of minutes, they serve substantially the same purpose as guilty pleas.”); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037, 1037 (1984) (“[B]ench trials can be ... genuine adversary proceedings in which defendants retain many of the constitutional protections that plea bargaining sacrifices.”).

118. Gregory Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 621 (2016) (“Trials could be streamlined through various waivers, while maintaining the legitimizing effect of jury verdicts.”).

119. Laura I. Appleman, *The Plea Jury*, 85 INDIANA L. J. 731, 733 (2010) (arguing that a plea jury would return the community to its traditional role in deciding guilt and punishment in criminal cases, enhance the procedural rights of defendants, strengthen the inquiry into the factual basis of the plea, add transparency to the process, and reduce prosecutorial power in plea bargaining).

120. *E.g.*, Scott & Stuntz, *supra* note 40, at 1950.



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## RECOMMENDATIONS

Most of the above proposals address distinct problematic aspects of plea bargaining. They ought to be considered for adoption not in isolation, but as part of a comprehensive package that aims to ensure that plea bargaining produces just and accurate outcomes.

1. **Require written plea agreements.** Perhaps the easiest plea-bargaining reform for legislators to undertake is requiring that plea agreements be placed in writing and entered into the record. As noted earlier, several jurisdictions have already adopted such requirements. They help ensure that defendants receive notice of the terms of the agreement, allow for a more informed judicial review of the plea, and make the process more transparent to the public.

The California Judicial Council has created a plea form that lists a number of direct and collateral consequences that might follow a guilty plea and invites the parties to identify which of these consequences apply to their case. It also outlines rights that the defendant is waiving by pleading guilty and provides space for the parties to list other terms of the agreement. This form can serve as a blueprint for other jurisdictions.<sup>121</sup>

With respect to placing plea agreements on the record, the Maryland rule offers a good model: “All proceedings pursuant to this Rule, including the defendant’s pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.”<sup>122</sup> In cases where cooperating defendants might frequently be subject to retaliation (e.g., organized-crime cases), the recording requirement may be modified or

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121. See California Courts, *Plea Form, With Explanations and Waiver of Rights—Felony*, <http://www.courts.ca.gov/documents/cr101.pdf>. For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

122. Md. R. 4-243(d); see also *State v. Poole*, 583 A.2d 265 (Md. 1991) (holding that while the rule does not require that bench conferences relating to plea agreement be recorded, judges should make a record of pertinent discussion and decisions reached or at least summarize essential parts of the agreement).

even eliminated. The federal system is currently studying options for balancing these interests in cases where the safety of cooperating witnesses might be compromised.<sup>123</sup>

2. **Prohibit waivers of critical rights.** Courts or legislatures should prohibit the parties from negotiating waivers of several key rights that help protect the fairness and accuracy of plea bargains—the right to appeal the validity of the guilty plea and the accompanying sentence, the right to discovery, the right to subsequent DNA testing, and the right to effective assistance. Some jurisdictions already restrict or prohibit such waivers, but there is a troubling increase in the waivers negotiated in other systems, especially the federal system. These waivers undermine critical protections against uninformed and unfair plea bargains. To restore a measure of due process in plea bargaining, it is critical to prohibit their use by statute, case law or ethical rules.<sup>124</sup> At the very least, prosecutor’s offices ought to restrict the negotiation of such waivers except in special circumstances requiring supervisory approval.
3. **Provide broad pre-plea discovery and ensure that defense attorneys have the time and resources to review it.** To ensure that innocent defendants do not plead guilty and to improve the fairness of plea bargains, legislatures should also adopt broad pre-plea discovery.<sup>125</sup> Specifically, discovery rules should be amended to require prosecutors to disclose to the defense, before a guilty plea, at a minimum, the following types of evidence: (1) impeachment and exculpatory evidence, without regard to its materiality; (2) witness names and statements, redacted as

123. ADVISORY COMM. ON CRIMINAL RULES, COOPERATOR SUBCOMMITTEE REPORT 245, 250-51, 310-12 (2016), [http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda\\_book\\_0.pdf](http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf) (endorsing federal court rules that require, among else, that any discussion of presence or absence of cooperation be included in a sealed supplement to plea agreements). *See generally* Richman, “Informants and Cooperators,” *supra* note 7.

124. *See, e.g.,* *People v. Ventura*, 531 N.Y.S.2d 526, 531 (App. Div. 1988) (holding that “the public policy of this State requires that before the People can condition a plea to the defendant’s waiver of his right to appellate review, it must advance some legitimate State interest”); Klein et al., *supra* note 80, at 95-106 (discussing state ethical rules that have been interpreted to bar negotiated waivers of ineffective assistance of counsel claims); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c)(1)(B) (2012) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of ... the complete and effective exercise of post-trial and appellate rights.”).

125. *See, e.g.,* Cruz, *supra* note 86 (“Congress should pass legislation that requires the government—whether constitutionally required or not—to disclose material exculpatory evidence before the accused enters into any plea agreement. This reform will reduce the risk of false guilty pleas by helping ensure that the accused is better informed before sealing his or her fate.”); *see also* Brown, *supra* note 66.

necessary to protect witnesses from risk of harm; and (3) police reports, again redacted as needed to protect the safety of witnesses. A number of states have already adopted such rules;<sup>126</sup> some, like North Carolina and Texas, have gone even further and adopted open-file pre-plea discovery.<sup>127</sup> The evidence so far suggests that broad discovery can be implemented at a reasonable cost and without undue hardship to witnesses. It is the first step toward ensuring that parties are negotiating fair, well-informed, and factually based plea bargains and that innocent defendants are not coerced into pleading guilty.

For open-file discovery to have its intended positive effects, defense counsel must have the time and resources to review and investigate the facts revealed through discovery.<sup>128</sup> Open-file discovery therefore must be coupled with reforms that ensure adequate funding of criminal defense.<sup>129</sup> Legislators, courts, and prosecutors' offices should also strictly limit or entirely prohibit "exploding" offers. Such offers prevent defendants and their counsel from adequately evaluating the evidence disclosed and conducting further investigations if needed, before making a decision whether to plead guilty or proceed to trial. Therefore, states may require (as Louisiana has done) that guilty pleas be accepted only after a certain period has passed since arrest<sup>130</sup> or (as in Texas) that prosecutors make

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126. See, e.g., ARIZ. R. CRIM. P. 15.1 (requiring the prosecutor to make available to the defendant all reports regarding relevant information within the prosecutor's control); COLO. R. CRIM. P. 16 (same); N.J. CT. R. 3:13-3 (requiring the prosecutor to put together a discovery packet or allow defendant to inspect, copy, and photograph relevant information); OHIO R. CRIM. P. 16 (allowing a defendant access to relevant case materials subject to few limitations).

127. N.C. GEN. STAT. ANN. § 15A-903 (allowing a defendant to make a motion entitling her to receive "the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation"); TEX. CODE CRIM. PROC. ANN. art. 39.14 (allowing defendants upon request access to documents and items that are "material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state").

128. E.g., Cruz, *supra* note 86 ("Mitigating the coercive effect of the plea-bargaining process will require empowering the defense. And one way to do that is to reduce the informational asymmetry between prosecutors and defense counsel. Plea offers are often foisted upon the accused before the defense has had enough time to investigate the facts, and the longer the investigation takes, the less generous the plea off may become.").

129. See Primus, *supra* note 62.

130. LA. CODE CRIM. PROC. ANN. art. 559 (banning felony guilty pleas within 48 hours of arrest).

discovery available to the defense before a court can accept a guilty plea.<sup>131</sup> Prosecutors' offices could also consider adopting internal protocols that discourage "exploding offers."<sup>132</sup>

4. **Strengthen judicial oversight of plea bargains and guilty pleas.** Judicial participation in plea negotiations allows a neutral party to assess the terms of the plea bargain and the facts of the case at a point in the proceeding when such oversight can make a real difference. A number of states permit such participation, and recent qualitative studies suggest that it is perceived to provide greater certainty, fairness, and much-needed oversight of the plea-bargaining process. The risk of judicial coercion can be minimized through procedures that allow a different judge to preside over trial when plea bargaining falls apart.<sup>133</sup> Legislators should therefore expressly permit judicial participation in plea negotiations, but require judicial recusal if a case proceeds to trial after negotiations fail.

At a minimum, legislators should demand that judges conduct a more searching inquiry into the facts underlying the guilty plea and accompanying agreement. Judges should not rely merely on factual stipulations or summaries of the evidence presented by the prosecution, but should question the defendant and review any available materials to ensure that the conviction and the proposed plea agreement reflect the true facts of the case. Military courts—as well as courts in continental European systems that have adopted plea bargaining—engage in more thorough vetting of the facts before accepting guilty pleas, and they can offer helpful guidance for civilian U.S. jurisdictions.<sup>134</sup>

5. **Adopt limits on plea discounts.** Courts and legislatures should also limit the charging and sentencing concessions that prosecutors can offer in exchange for a guilty plea. Enormous discounts heighten the risk of innocent persons pleading guilty and may produce unjust sentencing disparities. Legislatures can address this problem by limiting plea discounts to no more than a third of the expected post-trial sentence; alternatively or in addition, courts can use any sentencing discretion they have to reduce discounts that are more than 30% to 35%.<sup>135</sup> In many U.S. jurisdictions today, prosecutors can circumvent plea-discount caps through their charging decisions. But the experience of foreign systems

131. TEX. CODE CRIM. PROC. ANN. art. 39.14.

132. O'Hear, *supra* note 76, at 431.

133. See *supra* note 108 and accompanying text.

134. See *supra* notes 104-106.

135. See *supra* note 88.

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like England and Germany suggests that such limits can be effective if coupled with broader judicial discretion to scrutinize charges and impose proportionate sentences. For that reason, policymakers should consider this proposal in tandem with ideas for comprehensive reform of the criminal justice system. Excising overlapping criminal statutes—a stated goal of reformers—would constrain prosecutorial discretion to evade plea-discount limits through charge bargains.<sup>136</sup> Reducing sentencing severity and restoring judicial discretion over sentencing can also help courts ensure that plea discounts remain reasonable. Finally, chief prosecutors themselves can also take the initiative and adopt internal regulations that limit the size of plea discounts line prosecutors can offer.

The proposals above offer a range of practical solutions that can help make plea bargaining fairer, more transparent, and more honest. Given the central place of plea bargaining in our criminal justice system, any serious reform of the process ought to consider them.

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136. For discussions of the overcriminalization phenomenon, see Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; and Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.



# Prosecutorial Guidelines

*John F. Pfaff\**

*Reformers are increasingly aware of the central role prosecutors have played in driving up the U.S. prison population. Yet few if any reform efforts have sought to directly restrict prosecutorial power. This chapter argues that reformers should design binding charging and plea bargaining guidelines to limit who prosecutors can charge, what they can charge them with, and what sentences they can demand at trial or during plea bargaining. Such guidelines could advance public safety, reduce the role of race and other impermissible factors, and help smartly reduce our prison population size.*

## INTRODUCTION

In his widely watched TED talk, former Suffolk County (Boston) prosecutor Adam Foss talks about a case he received when he was a junior prosecutor, barely two years out of law school.<sup>1</sup> A young man had stolen several computers from a major retailer, and with little to no guidance from superiors, Foss decided to work out a reparation plan with the store in lieu of charging the kid with a crime. Several years later, Foss runs into the young man at a party, where the man explains that he got his life back on track after his run-in with Foss and that he now had a management position at a bank, something that would have been impossible with a criminal record.

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\* Professor of Law, Fordham Law School.

1. Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED (Feb. 2016), [https://www.ted.com/talks/adam\\_foss\\_a\\_prosecutor\\_s\\_vision\\_for\\_a\\_better\\_justice\\_system](https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system).

It is, as Foss himself would quickly admit, a story that is at once heartwarming and terrifying. Heartwarming, of course, because it has a happy ending. Terrifying because there are so many ways it could have gone wrong. What if Foss had been less lenient—because internal policies or external politics incentivized him to be harsh, or simply because it was close to lunch or the Celtics had lost the night before?<sup>2</sup> A chance at rehabilitation would have been squashed. On the other hand, by his own admission, Foss was not sure if his approach would work. He had no formal training on risk assessment, nothing to help him decide if his on-the-fly diversion program would work. What if he guessed wrong, and the young man went on to commit a serious violent crime that could have been avoided had Foss locked him up when he had the chance?

The prosecutor's job is a legal one, and so it is one that must be staffed by lawyers. But we give prosecutors tremendous discretion so that they can "do justice," and part of justice—perhaps the biggest part, at least in today's political climate—is preserving public safety. Unfortunately, determining how to effectively promote public safety is *not* something that lawyers are trained to do. Safety is a matter of psychology and public policy, not of case law or statutory interpretation. It is not taught in law schools, and it is not part of continuing legal education. As it stands right now, prosecutors make "public safety" decisions without adequate training, based on instinct and institutional knowledge. And that "institutional knowledge" is just the aggregation of those same problematic instincts, handed down over time.<sup>3</sup>

That prosecutors may misuse their discretion due to a lack of training is troubling in and of itself, but it is not the only reason why we should be concerned about how unregulated prosecutorial discretion is. There are also numerous "structural" reasons that likely push prosecutors to wield their discretion in excessively punitive ways. If nothing else, the politics of prosecutorial elections make the risks of being lenient far greater than the risks of being harsh: fear of being blamed for the next "Willie Horton" will trump the Blackstonian ideal of "better ten guilty men go free."<sup>4</sup> Moreover, while prosecutors are elected and

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2. See, e.g., Zoë Corbyn, *Hungry Judges Dispense Rough Justice*, NATURE (Apr. 11, 2011), <http://www.nature.com/news/2011/110411/full/news.2011.227.html>; Emily Deruy, *Judge's Football Team Loses, Juvenile Sentences Go Up*, THE ATLANTIC (Sept. 7, 2016), <https://www.theatlantic.com/education/archive/2016/09/judges-issue-longer-sentences-when-their-college-football-team-loses/498980/>.

3. Cf. Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume. Nothing here should be seen as denigrating prosecutors, who strive like everyone else to make the best decisions they can. As we will shortly see, *all* professionals involved in making diagnostic calls find the task hard to accomplish without substantial guidance.

4. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352; see *infra* note 17.



(generally) funded at the county level, prisons are maintained and paid for by the state, which creates a serious “moral hazard” problem (i.e., when an individual has an incentive to act in a costly manner because someone else bears the costs). Prisons are “too cheap” for prosecutors who can ignore the financial costs of locking people up while reaping the political benefits of being “tough on crime.” And in many urban counties, prosecutors may be more responsive to politically powerful suburbs, which feel the benefits of reduced crime but experience few of the costs of aggressive enforcement, leading prosecutors to err on the side of punitiveness.

The idea of regulating prosecutorial discretion should not be that controversial, since there is no other actor in criminal justice who has so much power yet is subjected to so little oversight. Many states, for example, have constrained judges through sentencing guidelines and other structured sentencing laws, and parole boards are increasingly required to use actuarial risk-assessment tools.<sup>5</sup> Yet no effort has been made to restrain prosecutors, despite the fact that their power is greater than that of judges or parole board members. If we are concerned about judges misusing discretion, why not prosecutors as well? As one reformer joked—although, in the end, his point is bracingly serious—“one premise of mandatory minimums is that prosecutors are competent to decide appropriate sentences until they become judges.”<sup>6</sup> In other words, I am not suggesting that prosecutors are uniquely fallible (or infallible), only wondering why if we do not trust someone’s discretion when she is a judge, we still assume she used it well in her earlier career as a prosecutor? Especially since there are so many more chances to misuse it, and often with more serious consequences.

In this brief chapter, I will argue that while prosecutorial discretion is essential, *unregulated* discretion is not. We can, and should, regulate how prosecutors act. I propose that states should adopt charging and plea-bargaining guidelines that are legally binding on county prosecutors. Such guidelines would help ensure that prosecutors charge based on evidence about public safety and risk, not based on their gut instincts; that prosecutors rely on race and other problematic factors far less frequently; that the public have more say in how prosecutor offices balance the various error costs of being too harsh or insufficiently aggressive; and that states are better able to rein in the

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5. See, e.g., Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report; John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

6. @gnewburn, TWITTER (Oct. 9, 2015, 7:23 AM), <https://twitter.com/gnewburn/status/652489497742077952>. See generally Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

moral hazard problem posed by state-funded prisons. Guidelines could also help level the playing field between prosecutors and public defenders, and they would inject necessary transparency into the part of the criminal justice system that is the most critical, complex, and opaque.

### I. THE POWER OF PROSECUTORS

It is hard to understate how much power prosecutors have. They have almost-unreviewable authority over choosing whether to charge someone with a crime or drop all charges, whether to charge that person with a felony or a misdemeanor, whether to divert the person to treatment, whether to charge an offense that carries a mandatory minimum. The only real restraints on prosecutors are the facts of the case, the statutory definitions of crimes, and whatever sort of voluntary, internal policy limits the office chooses to impose on itself. In fact, given the centrality of plea bargaining, the pressures of expanded pretrial detention, and the underfunding of public defense,<sup>7</sup> prosecutors are limited less by the *provable* facts of the case and more by what defendants *fear* could be provable; and given how much criminal codes have expanded over the years<sup>8</sup>—New York state alone has approximately 20 different forms of assault crimes<sup>9</sup>—statutory definitions impose few limits as well.

Given how much discretion they have and the political pressures they face, it is not surprising to find out that prosecutors have been central to driving up prison populations, especially since crime began its steady decline in the early 1990s. My analysis of felony filing data in state courts in 34 states between 1994 and 2008 demonstrated that almost all the growth in prison populations during that time came from prosecutors filing more cases against a shrinking pool of arrestees.<sup>10</sup> While the total number of crimes and thus the total number of arrests fell, the total number of felony cases rose, to such an extent that the probability that an arrest turned into a felony case nearly doubled. Little else changed during that time: the chance that a felony case resulted in a prison

7. For discussions of these issues, see Jenia I. Turner, “Plea Bargaining,” in the present Volume; Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume; and Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume.

8. See generally Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.

9. See N.Y. PENAL LAW § 120.

10. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. L. REV. 1237, 1250 (2012); John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?ab-abstract\\_id=1990508](https://papers.ssrn.com/sol3/papers.cfm?ab-abstract_id=1990508).

admission remained fairly constant,<sup>11</sup> as did the amount of time spent behind bars. Data from the Bureau of Justice Statistics' National Judicial Reporting Program shows a similar pattern. Between 1994 and 2006, total arrests nationwide fell by 3%, with arrests for index violent crimes falling by 21%, for index property crimes by 29%, and for drug trafficking and distribution by 5%—yet the number of guilty verdicts in state courts rose by over 30%.<sup>12</sup>

As many states attempt to smartly reduce their prison populations in this time of low crime, high incarceration, and continuing post-financial-crisis fiscal austerity, it is disappointing that none has sought to regulate the power of prosecutors. None of the reform bills that have been passed by state legislatures has directly limited the power prosecutors have to charge defendants, although some have done so indirectly (like by raising the minimum threshold for felony theft or felony drug cases). Perhaps the most graphic example of this oversight was Hillary Clinton's proposed "end to end" criminal justice reform plan, which included reforms aimed at police and parole authorities but said nothing about prosecutors: more "end *and* end" than "end *to* end."<sup>13</sup>

Although our distinct lack of data on prosecutors' offices makes it hard to say exactly why they have become more aggressive, some theories do stand out. First, some of this expansion in prosecutorial aggressiveness is surely due to changes in staffing and funding. From 1974 to 1990, as crime rates rose, the number of line prosecutors grew by only 3,000, from 17,000 to 20,000. From 1990 to 2007 (the last year with data), the number of line prosecutors grew three times as fast, from 20,000 to 30,000, even as crime *fell*. Moreover, the

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11. In theory, we would like to look at trends in convictions per felony case and then in admissions per conviction, but little usable conviction data exists. However, what data we do have suggests that almost all cases that move forward from arrest to prosecution result in a guilty plea, so likely little changed in terms of the fraction of felony filings yielding guilty verdicts. See THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010), <https://www.bjs.gov/content/pub/pdf/fdluc06.pdf>.

12. Arrest data comes from the BJS's online data tool, <https://www.bjs.gov/index.cfm?ty=dataool&surl=/arrests/index.cfm>. NJRP guilty verdict data from the first table in SEAN ROSENMERKEL, MATTHEW DUROSE, & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf>. The NJRP uses data from prosecutors' offices, not courts, and thus serves as an independent check on my case-filing results. Note, however, that the NJRP has not been conducted since 2006. The declines in arrests for index crimes and drug trafficking are likely more relevant to trends in prison populations than that in total arrests, given the offenses that tend to land people in prison (as opposed to, say, jail or probation).

13. See, e.g., Annie Karni, *Clinton Promises 'End to End' Criminal Justice Reform in Pitch to Black Voters*, POLITICO (Oct. 2, 2016), <http://www.politico.com/story/2016/10/hillary-clinton-charlotte-speech-criminal-justice-reform-229023>.

percentage of prosecutor offices with at least one full-time prosecutor rose from 45% in 1974 to 85% in 2007.<sup>14</sup> In other words, large urban offices hired more line prosecutors, and more-rural offices professionalized. Although we have little data on prosecutor caseloads, various proxies—crimes per prosecutor, arrests per prosecutor, prison admissions per prosecutor—all show the same pattern: less that *individual* prosecutors were working harder or becoming more aggressive during the 1990s and 2000s, more that the growing number of prosecutors kept finding cases to prosecute, even as arrests declined.

At the same time, we systematically underfund indigent defense.<sup>15</sup> Approximately 80% of those facing prison or jail time qualify for a government-provided counsel, yet we spend very little on these lawyers, especially when compared to prosecutors.<sup>16</sup> Not only are prosecutor budgets larger, but prosecutors have access to all sorts of free assistance that public defenders often must pay for. Unlike defense attorneys, for example, prosecutors can offshore most of their investigatory responsibilities to the police. An adversarial legal system only works if the two sides are genuine adversaries—and given the staffing and funding disparities between prosecutors and defense counsel, that is simply not the case in the United States right now.

Moreover, as noted earlier, there is a powerful moral hazard problem that runs through our criminal justice system. Prisoners are held by the state, but they come from the counties: the number of people entering state prisons is determined by the charging decisions of county-level prosecutors. Critically, these prosecutors do not have to think about the costs their decisions impose on the states, since states do not charge prosecutors or counties for the people they send into the state prison system. In fact, the incentives are perhaps even worse. While the state pays for prisons, the counties pay for jails and probation—the sanctions imposed on misdemeanants. Upcharging someone with a felony thus not only gives a prosecutor more tough-on-crime political capital, but it *saves* his district money.

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14. See, e.g., PFAFF, LOCKED IN, *supra* note 10.

15. See generally Primus, *supra* note 7.

16. See PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html>. In 2007, state and local governments spent about \$5.5 billion on prosecutors compared to \$4.5 billion on public defenders. But one study from North Carolina suggests that prosecutors budget may effectively *triple* when we take into account police and other local, state, and federal investigatory services that they can use at no cost. N.C. OFFICE OF INDIGENT DEFENSE SERVICES, NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM: A COMPARISON OF PROSECUTION AND INDIGENT DEFENSE RESOURCES (2011), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/ProsecutionOfIndigentDefense.pdf>.

This free rider/moral hazard problem in turn interacts dangerously with what is perhaps most famously known as the “Willie Horton Effect.”<sup>17</sup> The error costs that prosecutors face are asymmetrical. A single errant act of leniency produces a clear, identifiable political cost: a political opponent can point to the offender and victim and state, “Because you were soft on Alan, Bob ended up stabbed.” Overly aggressive punishment, however, does not have the same costs. It is much harder to establish that Alan is needlessly in prison, that if released sooner he surely would not offend again. Even if counties had to pay for the people they send to state prison, prosecutors are politically incentivized to be pre-emptively tough; that this toughness is actually free only magnifies this effect.

In other words, there are identifiable, structural defects in the design of our criminal justice system that explain why prosecutors continued to send people to prison in such large numbers even as crime steadily fell. Many of these are problems that charging and plea-bargain guidelines would directly address. Guidelines would help level the playing field between public defenders and prosecutors. They would also help states address the impact of expanded staffing when they have little control over county-level hiring decisions,<sup>18</sup> and they could be designed to limit the extent to which prosecutors can free-ride off state-funded prisons. These structural issues alone thus make a strong case for exploring how to design guidelines for prosecutors.

## II. THE HUMAN NEED FOR GUIDELINES

Even putting aside all the structural problems discussed above, however—and we should definitely *not* put those aside—charging and plea guidelines make sense from a behavioral perspective as well. When prosecutors are deciding what charges to file against a defendant and what punishments to seek, moral (i.e., retributive) issues play a role, but I would expect public-safety concerns generally matter much more. And public safety is a complex policy question, one that few prosecutors are well-trained to answer. Most lawyers do

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17. Willie Horton was an inmate in Massachusetts who in 1986 absconded from a weekend-leave program. A year later he brutally raped a woman and assaulted her boyfriend. Horton was an outlier—more than 99% of those allowed to go home on leaves returned without incident. But in 1988, Horton’s case was used in an infamous attack ad launched by George H.W. Bush in his successful presidential campaign against Massachusetts Gov. Michael Dukakis. Although the impact of the ad on the outcome of the election has been overstated, politicians quickly learned its lesson: Even smart leniency is politically costly, but severity is not.

18. In most states, the central state government provides some funding to local prosecutor offices, giving them some control over things like staff size. But counties still retain a significant degree of discretion here. STEVE W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005 (2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>.

not have formal training in psychology or other quantitative behavioral fields coming into law school, and law schools rarely if ever provide any training on these topics.<sup>19</sup> As Adam Foss points out in his TED talk, we call on young prosecutors with little training to make these calls; to the extent they rely on the “expertise” of more-senior prosecutors, that expertise is itself informal, and is based on a system with problematic feedback.<sup>20</sup>

Furthermore, a growing body of evidence shows that decision-makers in criminal justice are often vulnerable to troubling swings in behavior. One famous study found that Israeli judges were more likely to grant prisoners parole the sooner after eating they had to decide: hunger led to harshness.<sup>21</sup> Another, more recent study suggested that judges were more likely to sentence juvenile defendants harshly the Monday following an unexpected loss by their undergraduate alma mater’s football team.<sup>22</sup> Of course, none of these judges would admit this was happening. It is all subconscious—but no less prejudicial to the defendant because of that. And while studies of such effects generally focus on judges, there is no reason to assume prosecutors are any more immune to the same impulses (judicial decisions are just more public, and thus easier to study).

More comprehensively, and more unavoidably, is the problem of implicit racial bias (IRB). Even people who believe they are making race-blind decisions frequently turn out to be taking race into account.<sup>23</sup> As far as I can tell, there are no studies that explicitly measure IRB in prosecutors. But one study finds evidence of IRB among defense attorneys who take on capital cases, which seems like a group that would self-select along lines that would *minimize* IRB if that were possible; that these lawyers are nonetheless vulnerable to it

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19. Only about 5% of law school applicants have undergraduate degrees in psychology, and under 10% in some sort of relevant behavioral science—and that is an upper bound on those who would be able to evaluate the risks posed by a criminal defendant without further assistance. See *Undergraduate Majors of Applicants to ABA-Approved Law Schools*, LSAC, [http://lsac.org/docs/default-source/data-\(lsac-resources\)-docs/2014-15\\_applicants-major.pdf](http://lsac.org/docs/default-source/data-(lsac-resources)-docs/2014-15_applicants-major.pdf).

20. Foss, *supra* note 1. Prosecutors only see the people who both fail to stop offending and who fail to avoid arrest for some new offense. This is not a random sample of those they previously prosecuted, much less of those who engage in criminal behavior, making it hard for them to assess what factors predict recidivism or desistance.

21. See Corbyn, *supra* note 2.

22. See Deruy, *supra* note 2.

23. Cf. L. Song Richardson, “Police Use of Force,” in Volume 2 of the present Report.

strongly suggests that prosecutors are as well.<sup>24</sup> Making matters worse, the political pressures that push prosecutors to be tough on crime—like the fear of a “Willie Horton”-type mistake—interact with IRB in deeply troubling ways: prosecutors (like everyone else) may fear the costs of leniency more for groups they are subconsciously biased against, further amplifying racial disparities in their charging and pleading decisions.

That prosecutors are not necessarily good at making risk assessments should come as no surprise. We consistently see that even people with extensive formal training—psychologists and psychiatrists making mental-health assessments, medical doctors making medical diagnoses—succumb to systematic errors, and that these errors are often successfully corrected (or at least mitigated) by actuarial models.<sup>25</sup> To be fair, these models are not without controversy, especially within the realm of criminal justice, and if poorly designed, they can certainly reinforce racial and other problematic biases that run through the criminal justice system.<sup>26</sup> But prosecutors are already vulnerable to these biases and pressures, so the question is comparative: which approach is *better*? And the answer generally points toward guidance, that prosecutors would be well served by guidelines that help them choose who to charge and how aggressively to do so.

Given the structural and behavioral problems prosecutors face, it should be clear why giving them unfettered, unstructured discretion raises serious concerns. It is true that some offices may have their own internal guidelines, but these are inadequate. First, they are likely based far more on tradition and assumption than rigorous empirical models looking at risk. Second, they lack the force of law and thus need only be followed when it is in the office’s self-interest to do so; legally binding guidelines, as mentioned above, could give public defenders some much-needed assistance.

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24. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004). For a general discussion of IRB, see Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009). See also Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012). Note that there is little direct evidence about IRB in prosecutors, although it is surely the case that it affects them.

25. See, e.g., Robyn M. Dawes, David Faust, & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 SCI. 1668 (1989).

26. See, e.g., BERNARD E. HARCOURT, *AGAINST PREDICTION* (2006); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

Finally, internal guidelines are not designed with public input. Any sort of charging or plea decision reflects a wide range of values, not just about public safety, but about how to prioritize various crimes, about what defendants or what circumstances deserve mercy or compassion, and which ones demand increased severity. Internal guidelines simply reflect the prosecutor office's internal take on these issues. This is troubling on its own terms, but particularly so when we realize that prosecutor offices are often called upon to enforce the law in areas that do not have a strong political voice. District attorneys are elected by county voters, and at least in urban counties the safer, wealthier suburbs often play a major role in selecting the prosecutor, even though crime tends to be concentrated in the poorer areas of the more-urban parts of the county. This creates a dangerous divide: the more-powerful suburban voters feel the benefits of reduced crime (they feel safer whenever they go into the city, for example) but none of the social costs that may come from aggressive enforcement—it is not their families or friends who suffer when prosecutors file charges in cases that should have been dismissed, or when prosecutors seek out harsher sanctions than necessary.<sup>27</sup> Our nation's ongoing struggle with racial discrimination and segregation only amplifies this effect, creating a persistent racial divide between the suburbs and cities. Publicly enacted guidelines would require a public debate about how prosecutors should tackle crime, and would thus enable underrepresented groups to play a bigger role in shaping the policies that disproportionately affect them.

I will not belabor the arguments for guidelines. They are not the only approach, but there is much to be said in their favor. What, then, should they look like?

### **III. A (VERY) BRIEF HISTORY OF PLEA-BARGAINING GUIDELINES**

This idea of prosecutorial guidelines is not some sort of abstract academic flight of fancy—they exist in the field. Admittedly, in just one state, just for pleas (not for charging), and for only a small set of crimes, but they exist. And it quickly becomes clear that expanding these guidelines to cover charging and diversion decisions, as well as a far wider set of offenses, should not be all that difficult.

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27. See, e.g., PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *Why Do Prosecutors Go After Innocent People?*, WASH. POST (Jan. 21, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/01/21/why-do-prosecutors-go-after-innocent-people/?utm\\_term=.8cff6a635e75](https://www.washingtonpost.com/news/in-theory/wp/2016/01/21/why-do-prosecutors-go-after-innocent-people/?utm_term=.8cff6a635e75); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).



Since the 1970s, the New Jersey Supreme Court has wrestled with the Legislature over the extent to which mandatory minimums and other sentencing laws reallocated sentencing authority from the judiciary to the executive.<sup>28</sup> In 1998, in *State v. Brimage*,<sup>29</sup> the court required the state attorney general to develop binding guidelines to regulate the pleas that prosecutors could offer defendants charged with any of six major drug crimes.<sup>30</sup> Revised in 2004, the *Brimage* guidelines look very much like the sentencing guidelines that restrict judges around the country.<sup>31</sup> Each offense has a grid, with offense severity on the left axis and the defendant’s prior criminal history on the top axis. Each severity-history pairing has a range of permissible pleas—three ranges, actually, depending on when in the case the plea is accepted (the quicker the deal, the more favorable the terms are for the defendant). Each box on the grid also contains aggravated and mitigated options, which the prosecutor can offer only if he establishes certain aggravating or mitigating factors. Figure 1 provides one of the *Brimage* tables as well as part of the worksheet for assessing aggravators and mitigators, which should both look familiar to anyone who has seen sentencing guidelines before.

Figure 1: The *Brimage* Guidelines

TABLE 3 OFFENSES UNDER N.J.S.A. 2C:35-6 (USING A JUVENILE IN A DRUG-DISTRIBUTION SCHEME)							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-6 no weapons defendant less than 3 years older than juvenile used/employed	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63
B.	2C:35-6 no weapons	Pre-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Initial Post-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Final Post-Indictment	33 39 45	39 45 51	45 51 57	57 63 69	63 69 75
C.	2C:35-6 weapons	Pre-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Initial Post-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Final Post-Indictment	39 45 51	45 51 57	51 57 63	63 69 75	69 75 81

28. See, e.g., *State v. Leonardis*, 363 A.2d 321 (N.J. 1976); *State v. Lagares*, 601 A.2d 698 (N.J. 1992); *State v. Vasquez*, 609 A.2d 29 (N.J. 1992); *State v. Brimage*, 706 A.2d 1096 (N.J. 1998).

29. *Brimage*, 706 A.2d 1096.

30. Following a similar holding in *Vasquez*, 609 A.2d 29, the attorney general had developed model guidelines but allowed county prosecutor offices to ultimately design their own. In *Brimage*, 706 A.2d 1096, the court held that these county-level decisions introduced too much inconsistency and required the attorney general to design one set for the entire state.

31. See OFFICE OF THE ATT’Y GEN., STATE OF N.J., *BRIMAGE* GUIDELINES 2 (2004 REVISIONS); REVISED ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12 (Sept. 15, 2004), <http://www.state.nj.us/oag/dcj/agguide/directives/brimagerevision.htm>.

**SCHEDULE II**

**AGGRAVATING AND MITIGATING FACTORS**

(Consult Brimage Guidelines 2 for definitions and rules regarding "double counting")

Defendant Name \_\_\_\_\_

Promis Number \_\_\_\_\_

AGGRAVATING FACTORS	Points	Yes	No	Insufficient Facts	Value
<b>1. Community Impact.</b>					_____
a. Children were present in premises; <b>OR</b>	2	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Offense occurred in a drug-free park, public housing, or public building zone; <b>OR</b>	2	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Offense occurred in a designated "Quality of Life" special enforcement zone	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>2. Bail Violation.</b>					_____
Offense occurred while on bail or defendant has committed a bail violation after arrest in present case (3 points or 4 points if defendant was fugitive or failed to appear in court in present case)	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>3. Risk of Injury to Officers or Others.</b>					_____
a. Offense involved threatened violence; <b>OR</b>	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Resisting arrest; <b>OR</b>	3 to 5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Flight or Eluding; <b>OR</b>	4 or 5	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Attempted destruction of evidence/hindering apprehension	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>4. Organization.</b>					_____
a. Part of a sophisticated drug-distribution operation; <b>OR</b>	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Defendant is involved in organized criminal activity; <b>OR</b>	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Middle or upper-echelon participant in a drug-distribution scheme; <b>OR</b>	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
d. Defendant substantially influenced another person in committing the offense; <b>OR</b>	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
e. Defendant contributed special skills to the criminal conduct	3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>5. Profiteering.</b>					_____
a. Criminal conduct provided a substantial source (3 points) or primary source (4 points) of income or livelihood; <b>OR</b>	3 or 4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
b. Offense involved actual distribution for money (2 points, or 3 points if sale to undercover officer or informant); <b>OR</b>	2 or 3	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
c. Defendant is eligible for anti-drug profiteering penalty	4	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

**AGGRAVATING TOTAL**

Sadly, I have been unable to find any formal analyses of the impact of the *Brimage* Guidelines on plea outcomes in New Jersey, despite the growing attention reformers are paying to prosecutorial power. Some anecdotal evidence, however, seems to be positive. The Attorney General's Office has subsequently adopted guidelines to cover shoplifting and aggravated sexual assault of a minor, indicating that it finds them appealing—although none of the subsequent guidelines are as rigorous as the *Brimage* Guidelines.<sup>32</sup> And some informal discussions of the guidelines suggest they have improved plea bargain consistency.<sup>33</sup>

Perhaps one reason why the *Brimage* Guidelines have received so little attention is because of the idiosyncrasies of New Jersey, which is one of only four states where county prosecutors are appointed instead of elected. The New Jersey attorney general appoints and retains county prosecutors, which gives guidelines issued by his office authority they would lack in other states. This is not an irrelevant point, but it is more a red herring than it seems at first. It does not mean that other states could not adopt guidelines, only that they would likely have to follow a different, and slightly more difficult, path.

It is true that if the attorney general in New York suddenly issued charging and plea guidelines, local prosecutors—who do not report to him—would likely ignore them. However, if the *courts* insisted that the prosecutors follow the guidelines, they would have no choice. In every state, courts sign off on plea deals; if courts permit defense attorneys to appeal prosecutorial violations of the guidelines, or if they refuse to accept pleas whenever such concerns arise, prosecutors would find themselves compelled to follow the guidelines.

To me, this means that guidelines would have to originate with the legislature, not the attorney general or governor. In states where prosecutors do not report to the attorney general, courts would likely view legislatively written guidelines as legitimate and thus binding. Even guidelines written by the attorney general would likely be enforced by the courts as long as the AG's authority came from a statute. After all, judges already follow legislatively adopted sentencing guidelines that constrain their *own* power; why would they resist enforcing similar guidelines that limit *prosecutors'* power?

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32. See, e.g., Memorandum from John J. Farmer, Jr., Att'y Gen., to All County Prosecutors and All Municipal Prosecutors, Attorney General Guidelines—Prosecution of Shoplifting Offenses (Jan. 16, 2001), <http://www.state.nj.us/lps/dcj/agguide/shoplift.pdf>; Memorandum from John J. Hoffman, Acting Att'y Gen., to Elie Honig, Dir., Div. of Crim. Justice, and All County Prosecutors, Uniform Plea Negotiation Guidelines to Implement the Jessica Lunsford Act, P.L. 2014, c. 7 (May 29, 2014), [http://www.state.nj.us/lps/dcj/agguide/lumsford\\_act.pdf](http://www.state.nj.us/lps/dcj/agguide/lumsford_act.pdf).

33. Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

Another possible reason why the *Brimage* Guidelines have not been discussed more is their complexity. Although they cover only six drug offenses, the guidelines run to over 100 pages, including separate offense grids for each crime. This seems to argue against expanding them to cover not just more crimes but more of the decision points that prosecutors face. But like the role of appointed prosecutors in New Jersey, this concern is easily overstated. State sentencing guidelines, for example, consistently cover the entire criminal code with just one or two grids; surely prosecutor guidelines could be designed in a more streamlined manner as well. And much of the detail in the *Brimage* Guidelines, like the lists of aggravators and mitigators, and how prosecutors are to calculate and use prior history scores, are fairly universal in scope; adding more offenses would not require adding much more detail or explanation. In many ways, developing guidelines is like the pharmaceutical industry: creating the first pill or the guideline for the first crime requires tremendous work, but the second pill/crime guideline comes much more quickly.

#### IV. THE CASE FOR FAR-REACHING GUIDELINES

So far, the only real-world example of prosecutorial guidelines looks only at pleas, but I think it is essential to apply them far more expansively. Recall the story told by Boston prosecutor Adam Foss at the start of this piece. With little training or oversight, Foss successfully worked out an alternative sanction for a young man charged with theft.<sup>34</sup> Although Foss made the right call in that case, it starkly illustrates that guidelines that focus only on plea bargains enter the picture late in the game: prosecutors make multiple critical decisions with little to no rigorous assistance long before the case gets to the plea-bargain phase, decisions that are often more important than the final plea outcome. After all, the resolution to Foss's story is that the young man obtained a management position at a bank—an outcome that almost certainly would have been impossible had the man simply been convicted of felony, or perhaps even a misdemeanor, regardless of the sanction imposed by the final plea deal.

That New Jersey's guidelines focus solely on pleas and sentencing is due in no small part to their unique procedural history.<sup>35</sup> These guidelines are a promising start, but we should aim higher. It is hard to understate how many decisions relatively young line prosecutors are called on to make: whether to charge or dismiss, whether to divert or move the case forward, whether to

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34. Foss, *supra* note 1.

35. *Brimage* was ultimately based on a separation of powers argument. Sentencing has long been a judicial power, and the state supreme court was concerned about how mandatory minimums reallocated that authority to the executive. Charging, however, has always been a core executive decision and thus was not part of the discussion in *Brimage*.

charge with a felony or a misdemeanor, whether to charge the felony with or without the mandatory minimum, whether to file one or six different charges against a defendant, and so on. And—critically—there is no reason to view the final sentence as the only thing that needs regulation from a policy perspective. Given all the collateral costs, both formal and informal, that can come from a conviction, the decision about whether to prosecute at all may be more significant than (or at least as significant as) the final punishment.<sup>36</sup> In fact, just the decision to arraign someone can impose serious costs, if the defendant cannot make bail and suffers through a lengthy period of pretrial detention. Just think of the story of Kalief Browder, who committed suicide at age 22 after spending over three years of pretrial detention at Rikers Island in New York City only to have all the charges against him dropped.<sup>37</sup>

Guidelines will promote accuracy and consistency. They will make prosecutor offices more transparent. They will target idiosyncratic shocks like hunger and persistent ones like implicit racial bias. And they can help regulate structural problems like the moral hazard created by state-funded prisons. These concerns exist at every stage of the prosecutorial process, and thus should be regulated at every stage as well.

Of course, because of this, charging and plea guidelines will be more complex than sentencing guidelines, since they will need to cover a wider range of choices. But that is actually an argument *for* such guidelines, not *against*. The complexity of such guidelines—which, as we will quickly see, can be made quite manageable—reflects just how knotty the underlying moral and policy issues are. This does not prevent us from thinking about what comprehensive guidelines would look like.

*Decision to charge.* The guidelines should include a risk-needs assessment tool to determine if public safety (and justice—a close, but not always perfect, correlate) requires the case to move forward at all. Guidelines here could include rules such as defendants with low enough risk scores must have their cases

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36. The Council of State Governments' new tool displaying the collateral legal consequences of a conviction for each state provides a breathtaking view of how many conditions exist nationwide. See COUNCIL OF STATE GOVERNMENTS, <https://niccc.csgjusticecenter.org/map/>. Even without formal impediments, a conviction makes it harder to get a job, and simply going through the criminal justice system imposes real costs on both the defendant and his family and friends. See, e.g., Gabriel J. Chin, "Collateral Consequences of Criminal Conviction," in Volume 4 of the present Report.

37. Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Rikers for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>. See generally Stevenson & Mayson, *supra* note 7.

dismissed unless certain aggravating factors exist (where aggravators could relate to public-safety issues or retributive values or resource-management concerns). Conversely, the guidelines could hold that some offense/risk combinations could require charging absent certain mitigators.

*Diversion.* For those cases moving forward, the guidelines could determine who is eligible for diversion to a drug- or other alternate-treatment court.<sup>38</sup> Right now, such decisions turn on the prosecutor's subjective sense of who would be amenable to treatment, even though this seems like the sort of quasi-medical diagnosis for which objective guidance would be quite important and helpful.

*Charging.* Assuming the defendant does not have his case dismissed and does not qualify for diversion, the guidelines could then assist in selecting the appropriate charge. They could hold that certain acts must be charged as misdemeanors if certain mitigators exist, or as felonies if certain aggravators exist. Guidelines could also impose some structure about what felony charges prosecutors can file, like stipulating that an offense with a mandatory minimum cannot be filed if there is a similar offense without a mandatory, absent certain aggravators. The guidelines could even transparently balance various competing normative goals of punishment, requiring certain minimum charges on retributivist grounds even if actuarially too harsh from an incapacitation perspective, or conversely refusing to permit certain severe charges even when they seem morally justifiable due to a lack of any public-safety justification.<sup>39</sup>

*Plea bargaining.* Once the charges are selected, the guidelines—like those in New Jersey—can specify the appropriate plea, or range of pleas (including both the in/out decision about prison or jail vs. probation, as well as the length of any such sentence), again shaped by various aggravating and mitigating factors, and again explicitly accounting for both public-safety and justice concerns.

At first blush, guidelines like these may sound almost impossible to create and implement, but it should be possible to design them in a way that would be easy for prosecutors to use, even when caseloads are high. In practice, almost all these decisions could be made at one time. When the prosecutor's office takes over the case, it can gather the necessary information for the risk-needs tool, and almost everything flows directly from that information. The risk score and prior history, along with the offense, may say that charges need to be filed; the needs score may say that the defendant is unlikely to succeed in the available

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38. Cf. Richard C. Boldt, "Problem-Solving Courts," in the present Volume; Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

39. For a discussion of the goals of punishment, see Jeffrie G. Murphy, "Retribution," in Volume 4 of the present Report; Daniel S. Nagin, "Deterrence," in Volume 4 of the present Report; and Shawn D. Bushway, "Incapacitation," in Volume 4 of the present Report.

diversion programs; the case file and prior history may point to a felony over a misdemeanor, but the risk score along with other evidence may then lead the guidelines to point to a lower level of felony within the set of viable charges.

It is worth stressing the somewhat counterintuitive point that these guidelines do not actually change *what* prosecutors do every day, just *how* they do it. Prosecutors already are called on to assess risk, and amenability to treatment, and how those relate to both incapacitation and deterrence and moral blameworthiness; and they are already required to balance all the various competing goals of the criminal justice system. And—let us be completely clear here—they are *already* doing so using a proprietary actuarial model: the one in their head. It is a model so proprietary that the prosecutor himself does not really have access to it (as the implicit racial-bias research makes so abundantly clear); but it is a model nonetheless. Guidelines, then, are less a change in substance than in form—although a change in form that may lead to systematically more consistent, rational, and just outcomes.

#### V. A FEW CHALLENGES TO THINK ABOUT— BUT WHICH MAKE THE ARGUMENTS EVEN STRONGER

Although there are clearly strong arguments for imposing structure on what prosecutors do, there are also important questions of implementation that deserve attention. Should the guidelines, for example, be presumptive or binding? Guidelines could say “you must charge [conduct] as a misdemeanor, unless [set of conditions] hold, in which case you *may* dismiss the charges,” or they could replace the *may* with *must*. The former are presumptive—the prosecutor *can* dismiss but does not *have* to—while the latter are binding. Most sentencing guidelines (other than the pre-*Booker* federal guidelines) are presumptive.<sup>40</sup> For prosecutors, however, there could be an argument for some asymmetry: presumptive for severity (“may charge a more severe offense”) but binding for leniency (“must impose a lesser charge”). The politics of punishment (perhaps best exemplified by the “Willie Horton Effect”) generally push prosecutors toward severity and away from leniency;<sup>41</sup> presumptive severity and mandatory leniency could mitigate this effect.

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40. See generally Berman, *supra* note 5.

41. See PFAFF, LOCKED IN, *supra* note 10; John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951 (2016).

In other words, binding guidelines could provide important political cover. A prosecutor may think a case should be dismissed, but he also knows both that he faces political blowback if the defendant recidivates and that neither he nor his county bear any of the costs of locking the person up in prison. For prosecutors, incarceration is both cheap and politically safe, pushing prosecutors to err on the side of severity. Binding guidelines, however, give a prosecutor a certain amount of plausible deniability: “I wanted to charge the defendant, but the model forced me not to.” Leniency is riskier under a presumptive system, where the prosecutor still has to decide whether to be lenient. Given the asymmetric pressure of the politics of crime, binding leniency and presumptive severity may actually enable prosecutors to make the choices they would *prefer to make* were the public less emotionally reactive to sensationalistic outlier cases.

Guidelines will also have to be designed in such a way that they permit the outcomes to change with new information. The risk tool may say “do not dismiss” at the start of the case, but as prosecutors and police investigate further, they may uncover information that shifts the assessment to “dismiss.” Prosecutors should be required to periodically update the model with new, relevant evidence—where “relevance” is now determined not by the contestable subjective beliefs of the prosecutors but by the specific requirements of the model.

This updating approach highlights the benefits of using public guidelines as opposed to internal ones that only the prosecutor’s office knows about. With a public model, the defense attorney could easily “double-check” the prosecutor’s work, imputing any new information the defense attorney learns of and seeing how that changes the recommended outcome. Right now, all a defense attorney can say is, “I think you’re ignoring/undervaluing this exculpatory/mitigating evidence,” but with guidelines it is more possible to show that such evidence is *in fact* being undercounted. Even if prosecutors are loath to update the model, public models would allow defense attorneys to do so.<sup>42</sup>

There is also the challenge of how to “calibrate” the guidelines. One concern people raised with the *Brimage* Guidelines, for example, was that they effectively “suburbanized” plea deals. Prior to the adoption of the guidelines, urban prosecutors generally offered much more favorable deals to people arrested for the covered crimes than suburban prosecutors. The guidelines, however, set their defaults along lines that were more suburban than urban, forcing urban

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42. Of course, the use of model cannot stop *Brady* violations, when the prosecutor fails to turn over exculpatory evidence to the defense, but the fact that models can not cure all ills is not a strong argument against using them.



prosecutors to impose sentences harsher than they would have before adoption.<sup>43</sup> This is not a problem with guidelines *per se* but with how they are written and implemented—but it is a problem that deserves attention, especially in states that hope to use guidelines to rein in prison growth. Rural areas tend to wield disproportionate power in state capitals, and rural places tend to favor tougher punishments than more-urban areas, introducing the risk that guidelines, if not carefully designed, could make sentences tougher, not smarter.<sup>44</sup>

Obviously, there are other implementation issues as well. For example, how and when could the defense challenge what he sees as misuse or misapplication of the standards? And what burden of proof should prosecutors have to meet when including evidence, particularly aggravating evidence, in the assessment?<sup>45</sup> But none of this is intractable; none, I think, poses a serious threat, at least in the abstract. Politics, of course, could make some of these issues hard to resolve in practice, but none is conceptually, which is where we need to start.

### CONCLUSION

Given the nature of their task, prosecutors need discretion—but that discretion does not need to be unfettered. For various political, structural, and behavioral reasons, prosecutors are primed to wield their discretion in overly aggressive ways. One systematic way to confront these problems would be to design guidelines that provide some structure at each critical decision point in the prosecutorial process, from the decision to charge at all to what sanction to seek following a conviction or plea. We already impose detailed, binding, publicly debated guidelines on judges around the country. Although perhaps more complicated to design, such guidelines are all the more essential for prosecutors.

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43. Wright, *supra* note 33.

44. See, e.g., Alan Greenblatt, *Rural Areas Lose People But Not Power*, GOVERNING (Apr. 2014), <http://www.governing.com/topics/politics/gov-rural-areas-lose-people-not-power.html>; Josh Keller & Adam Pearce, *This Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C., Combined—Why?*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html>.

45. Guidelines, for example, might state that punishments can be aggravated when the victim was “particularly vulnerable.” How convincingly must the prosecution establish that the victim met the “particularly vulnerable” definition?

## RECOMMENDATIONS

While reformers increasingly appreciate the central role that prosecutors play in driving criminal justice outcomes, they have taken few steps to directly regulate the discretion that gives them so much power. There are several steps we can take to start imposing some restrictions on prosecutorial discretion and power.

1. **Fund indigent defense.** Perhaps the easiest way to regulate prosecutorial aggressiveness would be to ensure that their adversaries are adequately funded. Of the nearly \$200 billion state and local governments spend on the criminal justice system, only about \$4.5 billion goes to indigent defense, despite 80% of those facing prison time qualifying for a state-provided lawyer. With better funding, public defender offices and other providers of indigent defense could better check prosecutorial behavior.
2. **Address the “prison moral hazard” problem.** As things stand now, county prosecutors do not have to take into account any of the costs of felony incarceration, since those costs are all borne by the state, not the county. In fact, making things worse, less-severe punishments, like jail or probation, often are incurred by the county: being harsher is cheaper. States could make prosecutors take into account the costs they are imposing on the state in various ways, such as charging them for bed space or introducing some sort of “cap and trade” system for bed space in prisons (which would force counties with high demand for incarceration to purchase bed space from less-punitive counties).
3. **States should adopt binding charging and plea bargaining guidelines.** Guidelines that restrict when prosecutors can bring charges, what types of charges they can file, and what sorts of pleas they can demand would accomplish several goals. First, they would help prosecutors make better calls about how to advance public safety by providing actuarial risk/needs assessments. They would also ensure greater consistency in charging decisions and limit the impact of racial and other biases. And they could be designed to limit unwarranted harshness in either charges filed or sentences sought.

# Defense Counsel and Public Defense

*Eve Brensike Primus\**

*Public-defense delivery systems nationwide are grossly inadequate. Public defenders are forced to handle caseloads that no one could effectively manage. They often have no funding for investigation or expert assistance. They aren't adequately trained, and there is little to no oversight of their work. In many jurisdictions, the public-defense function is not sufficiently independent of the judiciary or the elected branches to allow for zealous representation. The result is an assembly line into prison, mostly for poor people of color, with little check on the reliability or fairness of the process. Innocent people are convicted, precious resources are wasted, and the legitimacy of the entire criminal justice system is undermined. This chapter suggests that effective reform is possible if policymakers address how public-defense delivery systems are structured, whether they are independent, the sources and amount of funding allocated to public defense, and the adequacy of training and oversight mechanisms.*

## INTRODUCTION

There is broad agreement that indigent-defense delivery systems in this country are grossly inadequate. More than 80% of American criminal defendants are indigent,<sup>1</sup> so the failure to provide for the public-defense function compromises the legitimacy of the entire criminal justice system. A lack of sufficient funding forces public defenders to handle caseloads that no one could effectively manage. Defenders' abilities to provide quality representation are further compromised by a lack of independence from other branches of government, an absence of attorney training programs, and a failure at all levels to oversee effectively the provision of public-defense services. The result is an assembly line into prison, mostly for poor people of color, with little check on the reliability or fairness of the process.

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\* Professor of Law, University of Michigan Law School. I am grateful to Susan Bandes, Darryl Brown, David Carroll, Beth Colgan, Jennifer Laurin, Richard Leo, Justin Murray, and Jonathan Sacks for helpful comments. In addition, I would like to thank Erik Luna and the staff at Arizona State University College of Law for their Herculean efforts in organizing this project and the Charles Koch Foundation for funding this endeavor.

1. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES (Nov. 2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.

In recent years, many nonprofit organizations have issued reports documenting the public-defense crisis.<sup>2</sup> Recognizing the importance of the problem, two-thirds of the states have created indigent defense commissions to think about and implement reform.<sup>3</sup> President Obama created the Office for Access to Justice<sup>4</sup> to provide federal support to the reform efforts, and legislatures around the country are thinking about suggested improvements.

This chapter explores the contours of the public-defense crisis and explains why it is an essential area for criminal justice reform, canvasses the scholarship on this problem, and identifies possible reforms to fix the system. Ultimately, I recommend that policymakers address how public-defense delivery systems are structured (as public-defender offices, assigned-counsel systems, or contract systems); whether they are independent of the judicial, legislative, and executive branches in their jurisdictions; the sources and amounts of funding allocated to public defense; and what training and oversight mechanisms exist to ensure defense attorneys are effective. Through a combination of reforms in these areas, policymakers can begin to fix broken public-defense delivery systems.

## I. THE PUBLIC-DEFENSE CRISIS AND WHY IT MATTERS

In 1963, the Supreme Court held that criminal defendants facing felony charges have a Sixth Amendment right to trial counsel regardless of their ability to pay for it.<sup>5</sup> The Court later extended this right to alleged misdemeanants facing actual imprisonment upon conviction.<sup>6</sup> It also recognized a constitutional

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2. See, e.g., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), [https://www.opensocietyfoundations.org/sites/default/files/justice\\_20090511.pdf](https://www.opensocietyfoundations.org/sites/default/files/justice_20090511.pdf) [hereinafter JUSTICE DENIED]; NAT'L ASS'N OF CRIMINAL DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), <https://www.nacdl.org/reports/misdemeanor/> [hereinafter MINOR CRIMES]; NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM—SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008), [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) [hereinafter RACE TO THE BOTTOM]; ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [hereinafter BROKEN PROMISE].

3. THE SPANGENBERG PROJECT, STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 5 (2010), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) [hereinafter EXPENDITURES].

4. See Office for Access to Justice, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atj>.

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

6. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

right to counsel for criminal defendants on their first appeals<sup>7</sup> and for juveniles facing delinquency proceedings that result in a loss of freedom.<sup>8</sup>

In response to the judicial mandate, Congress passed the Criminal Justice Act of 1964,<sup>9</sup> requiring federal district courts to adopt local plans for furnishing counsel to indigent defendants in federal court. Each plan was to include either a Federal Public Defender Organization (a governmental entity in the judicial branch) or a Community Defender Organization (a private, nonprofit organization) in addition to a court-approved panel of private attorneys available to take indigent criminal defense cases.

Some states and localities have followed suit and created public-defender programs. Others rely on assigned-counsel systems under which private attorneys are appointed on case-by-case bases and are paid per hour, per case, or per event in a case. Still others have contract systems under which private attorneys, law firms, or nonprofit entities contract with the state or local government and are paid flat fees to provide representation in a percentage of indigent-defense cases. Many states use some combination of public-defender offices, assigned-counsel programs, and contract systems to provide for indigent defense.

The right to counsel has always been an unfunded mandate. As criminal codes proliferated in the 1970s and '80s as part of the war on drugs, and legislatures earmarked more funding for law enforcement, criminal court dockets exploded but without corresponding increases in public-defense funding. Numerous investigative reports now document a public-defense crisis characterized by funding problems, a lack of independence, and a failure of training and oversight. These structural problems create a culture of indifference in criminal courts, leading to the wrongful conviction of innocent people<sup>10</sup> and undermining the legitimacy of the criminal justice system.

#### A. FUNDING PROBLEMS

The vast majority of American criminal defendants are indigent, and funding for public defense is grossly insufficient for providing adequate legal representation to such a large client base. A few numbers should make the point. According to the American Bar Association (ABA), no defender should

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7. See *Douglas v. California*, 372 U.S. 353 (1963).

8. See *In re Gault*, 387 U.S. 1 (1967).

9. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified at 18 U.S.C. § 3006A).

10. See Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in the present Volume.

handle more than 400 misdemeanor cases in a year.<sup>11</sup> In Chicago and Atlanta, however, public defenders have had to handle more than 2,000 misdemeanor cases annually.<sup>12</sup> In New Orleans, funding shortages have forced public defenders to handle almost 19,000 misdemeanor cases per year.<sup>13</sup> Similarly, the ABA recommends that no defender handle more than 150 felony cases each year,<sup>14</sup> but public defenders in Florida's Miami-Dade County have had to handle more than 700.<sup>15</sup> Countless reports document excessive defender caseloads arising from the lack of funding.<sup>16</sup> The sheer volume of cases means that many defendants sit in jail for months before speaking to their court-appointed lawyers.<sup>17</sup>

In addition to lacking the funds to pay an adequate number of attorneys, public-defender offices lack the funds necessary to provide the attorneys they do have with training, mentorship, or supervision. Lacking training and support, and asked to handle far more cases than is feasible, defenders commonly feel overwhelmed. They often burn out and quit after only a year or two on the job, leaving much indigent-defense representation to a rotating crop of new, inexperienced attorneys.

A lack of funding also means insufficient resources for adequate investigative assistance. In 2013, six states reported that they had fewer than 10 total investigators on staff for all of the state's public-defender offices.<sup>18</sup> Many cases are resolved with no investigation whatsoever.

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11. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM* 5 n.19 (2002) [hereinafter *TEN PRINCIPLES*]. The American Bar Association has sent mixed signals about whether it recommends that no attorney handle more than 300 or 400 misdemeanor cases in a year. Compare *id.* (400 cases), with ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 72, 72 n.13 (3d ed. 1992) (300 cases). Under either number, current defender caseloads far exceed the recommendation.

12. See *MINOR CRIMES*, *supra* note 2, at 21.

13. *Id.*

14. *TEN PRINCIPLES*, *supra* note 10.

15. See KAREN HOUPPERT, *CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE* 91–94 (2013).

16. See, e.g., *MINOR CRIMES*, *supra* note 2, at 21 (reporting excessive caseloads in Texas, Arizona, Tennessee, Utah, and Kentucky); *JUSTICE DENIED*, *supra* note 2, at 65–70; *RACE TO THE BOTTOM*, *supra* note 2, at 27; *BROKEN PROMISE*, *supra* note 2, at 16.

17. See Eric Holder, U.S. Att'y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009) (discussing these delays).

18. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS*, 2013 (Nov. 2016), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [hereinafter *STATE-ADMINISTERED SYSTEMS*].

This lack of funding is striking when compared to the funding for the prosecution and law enforcement. Prosecutors often have higher salaries than defenders,<sup>19</sup> lighter caseloads, and more access to investigative and expert assistance.<sup>20</sup> Prosecutors have the police department and state crime labs to help with their investigations, whereas defense attorneys often have neither investigative nor expert assistance readily available.

The source of public-defense funding is also troubling. A 2010 report found that only 23 states completely fund their indigent-defense systems at the state level.<sup>21</sup> In 19 states, counties shoulder the burden for more than half of the funding. Pennsylvania requires its counties to provide *all* of the funding for indigent defense. A lack of state funding means that financial resources cannot be spread across the state. Urban counties with large indigent populations are overwhelmed and have resorted to conscripting unwilling and inexperienced attorneys who have no criminal-defense background and no financial incentive to be zealous advocates to represent indigent criminal defendants. Other urban counties resort to flat-fee contract systems to save money, resulting in defense lawyers who carry large caseloads for little compensation. These contract lawyers often have to supplement their incomes with other work, resulting in less time for their indigent-defense clients.

Many less-populous rural counties rely on assigned-counsel systems under which attorneys are paid as little as \$40 per hour with hard caps on how much an attorney can earn per case.<sup>22</sup> With caps as low as \$500 per felony case,<sup>23</sup> these attorneys have no financial incentive to go to trial, do legal research, or investigate. They are better off pleading out a case, getting the fee, and getting a new client.

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19. Some jurisdictions with large public defender offices have achieved salary parity through legislation or local practice, but disparities persist in many jurisdictions. *See, e.g.,* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

20. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

21. *See* EXPENDITURES, *supra* note 3, at 5.

22. *See* THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (2007), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_2007felony\\_comp\\_rates\\_update\\_nonfelony.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_2007felony_comp_rates_update_nonfelony.authcheckdam.pdf).

23. *Id.* at 9–16.

Even in counties that can afford public-defender offices, the reliance on county funds often means that the income stream for the office is not stable. In New Orleans, for example, the public-defense budget relies on traffic-ticket revenue.<sup>24</sup> If the police do not issue enough tickets, there is no money for indigent defense.

### B. LACK OF INDEPENDENCE

Many indigent-defense attorneys cannot provide effective representation, because they are not sufficiently independent of the judiciary. A statewide survey of Nebraska judges revealed that some judges punish court-appointed attorneys who take cases to trial rather than pleading them out by not reappointing those attorneys in future cases.<sup>25</sup> In Texas, there are reports of judges appointing those with whom they have personal relationships.<sup>26</sup> And in Detroit, Michigan, some claim that judges give cases to attorneys who make contributions to their re-election campaigns.<sup>27</sup>

Independence problems also exist when elected legislative or executive officials have too much control over public-defender offices. A recent report documented nine states in which the governor had the power to fire the chief public defender,<sup>28</sup> and claims persist that governors have used their removal power to fire especially zealous defenders.<sup>29</sup> In Onondaga County, New York, the Legal Aid Society lost a contract to handle city court cases after the director was questioned by a legislative committee about why she was filing motions and making discovery requests instead of pleading cases.<sup>30</sup> And in some jurisdictions, the public defender is chosen by an advisory board that consists entirely of law enforcement personnel and prosecutors who have a vested interest in ensuring that prosecutions are successful.<sup>31</sup>

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24. See *State v. Peart*, 621 So. 2d 780 (La. 1993); see also David Carroll, *Indigent Defense Progress Stunted by Outdated Funding Mechanism in Louisiana*, SIXTH AMENDMENT CENTER (Sept. 26, 2012), <http://sixthamendment.org/indigent-defense-progress-stunted-by-out-dated-funding-mechanism-in-louisiana/>. For a more general description of the problems associated with using fines and fees to fund the criminal justice system, see Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report.

25. JUSTICE DENIED, *supra* note 2, at 82–83; Holder Remarks, *supra* note 17.

26. JUSTICE DENIED, *supra* note 2, at 82–83.

27. RACE TO THE BOTTOM, *supra* note 2, at 27.

28. STATE-ADMINISTERED SYSTEMS, *supra* note 18.

29. See Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1790 & n.116 (2016) (collecting examples).

30. See JUSTICE DENIED, *supra* note 2, at 81.

31. See, e.g., Manny Araujo, *New Public Defender Set to Start Amid Questions About Hiring Process*, EUREKA TIME-STANDARD (Feb. 18, 2017), <http://www.times-standard.com/article/NJ/20170218/NEWS/170219800>.



Such independence problems are built in to the federal defender system, because the Criminal Justice Act vests control over the structure of appointment and funding for indigent defense in the local courts.<sup>32</sup> This means local judges decide which attorneys can be panel attorneys and whether to approve their payment vouchers or expense requests. Similarly, circuit courts hire the heads of the federal defender organizations and determine how many attorneys can work in the offices. Moreover, the judiciary is charged with asking Congress for funding for both the courts and the defense function at the same time. A 2015 report documented judicial concern that the Executive and Budget Committees sought to reduce the defender budget in order to protect and grow the judiciary's own budget.<sup>33</sup>

### C. FAILURE TO TRAIN AND OVERSEE

Too often, defenders are thrown into the job without training, and their performance is never evaluated. Many offices do not have training directors or funds for training programs. Attorneys learn in court, and defenders often get no constructive feedback from, or substantive review by, supervisors. In assigned-counsel and contract systems, there is often no supervisor at all—just a bureaucrat who coordinates appointments. And the local bar associations do a terrible job of finding and removing ineffective attorneys.<sup>34</sup>

Courts have done little to address these problems. Citing separation-of-powers principles, judges have been loath to inject themselves into state funding issues. Moreover, given the prevailing constitutional standard for judging the adequacy of trial representation, the very fact that defenders are persistently underfunded and overwhelmed *prevents* courts from ruling that any particular failure of representation is a constitutional violation for which a court could order a remedy. Under *Strickland v. Washington*,<sup>35</sup> there is no constitutional violation of the right to effective counsel unless the defendant shows that (a) his attorney performed unreasonably given prevailing norms of practice (with a heavy measure of deference to the trial attorney's strategic decisions and a presumption that decisions were strategic) and (b) the attorney's deficient performance prejudiced the case outcome. When prevailing norms of practice require attorneys to carry excessive caseloads and meet clients for the first time on the trial date, it is hard to show deficient performance. And when there is little to no pretrial investigation, it is hard to demonstrate prejudice.

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32. See 18 U.S.C. § 3006A.

33. See NAT'L ASS'N OF CRIMINAL DEF. LAW., FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 24 (2015).

34. See, e.g., Carol Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2705 (2013) (arguing that bar associations could do more).

35. 466 U.S. 668 (1984).

Given the difficulty of getting courts to rule that the representation in any given trial was inadequate under *Strickland*, some public defenders and advocacy groups have filed pretrial lawsuits arguing that funding and independence problems in particular jurisdictions violate the Sixth Amendment, because they constructively deny indigent defendants counsel altogether.<sup>36</sup> These lawsuits present courts not just with individual cases of abysmal representation, but with data demonstrating the gross inadequacy of public-defense delivery systems as a whole. Nonetheless, many courts have been reticent to get involved. Some courts have dismissed the cases on procedural grounds;<sup>37</sup> other cases have settled.<sup>38</sup> And even in the few places where courts have found systemic constitutional violations,<sup>39</sup> the process has been extremely time- and resource-intensive, and the long-term impact of favorable decisions remains unclear.<sup>40</sup>

#### D. A BROKEN SYSTEM WITH SERIOUS CONSEQUENCES

The lack of funding, excessive caseloads, minimal training, lack of independence, and failure of oversight make it impossible for defense attorneys to do their jobs. The result is a breakdown in the adversarial system that results in wrongful convictions and undermines the legitimacy and fairness of the system. In too many jurisdictions, criminal-defense attorneys show up on the day of court having never met their clients and having conducted no investigation or legal research into their cases. After a hurried five-minute conversation, the client is pushed into a plea and forced down the assembly

36. See *United States v. Cronic*, 466 U.S. 648 (1984) (noting that, if “the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance,” it would be appropriate to presume ineffectiveness); see also Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices are Suing—and Starting to Win*, A.B.A. JOURNAL (Jan. 1, 2017) (describing lawsuits); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) (same); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010) (same).

37. See, e.g., *Luckey v. Miller*, 976 F.2d 673, 676–79 (11th Cir. 1992); *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010); see also Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2687–88 (2013) (collecting cases and discussing procedural barriers).

38. See, e.g., *Hurrell-Harring v. State of New York*, 930 N.E.2d 217 (N.Y. 2010) (settlement order available at [http://www.nyclu.org/files/releases/10.21.14\\_hurrellharring\\_settlement.PDF](http://www.nyclu.org/files/releases/10.21.14_hurrellharring_settlement.PDF)).

39. See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

40. Even after the New York settlement in *Hurrell-Harring*, for example, the state had trouble implementing legislative reforms. See Press Release, ACLU, Governor Rejects Bipartisan Reform of Public Defense System (Jan. 3, 2017), <https://www.aclu.org/news/governor-rejects-bipartisan-reform-public-defense-system>; see also Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1331 (2013) (noting that systemic litigation is time-consuming and expensive). But see Press Release, NYCLU, Lawmakers Pass Major Statewide Reforms of Public Defense System (April 10, 2107), <https://www.nyclu.org/en/news/lawmakers-pass-major-statewide-reforms-public-defense-system>.

line to prison.<sup>41</sup> Many indigent criminal defendants do not even get that five-minute conversation with an attorney; their constitutional rights to counsel are simply ignored, and they are forced to navigate the justice system without any help whatsoever.<sup>42</sup> No one listens to the defendant's side of the story, questions the adequacy of the prosecution's proof, or even explains to the defendant what is happening. All that the defendant's family and friends see is another poor person of color being processed through the system.<sup>43</sup> Sometimes defendants' pleas are taken en masse as group after group of men in orange jumpsuits are corralled into the courtroom and carted off to prison.<sup>44</sup>

This failure to provide defendants with adequate representation contributes to the wrongful imprisonment of innocent people. Scientific advances like DNA testing have made the public more aware that wrongful convictions happen.<sup>45</sup> Defense lawyers are supposed to fight to prevent the conviction of innocent people, but crushing caseloads and a lack of time and funding to investigate cases inhibits their ability to perform that vital role. The chief district defender for Orleans Parish in Louisiana recently acknowledged that his office is not able to guarantee "the timely retrieval of ... important evidence before it [is] routinely erased" and, as a result, innocent people can be imprisoned.<sup>46</sup>

The fact that our system does not care about or listen to the people it imprisons is problematic not just for the innocent. It also undermines the legitimacy of the system in the eyes of the public. As a matter of procedural justice, when people do not feel that they have been treated fairly, it is hard for them to respect the system's results.<sup>47</sup> That lack of respect, in turn, encourages lawlessness and undermines the goals of the criminal justice system. Indigent

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41. See, e.g., *Pub. Defender, Eleventh Judicial Circuit v. State*, 115 So. 3d 261, 278 (Fla. 2013) ("Witnesses from the Public Defender's Office described 'meet and greet pleas' as being routine procedure."); see also *BROKEN PROMISE*, *supra* note 2, at 16 (describing this practice in other jurisdictions). For a more detailed description of the plea bargaining system and its problems, see Jenia I. Turner, "Plea Bargaining," in the present Volume.

42. See *RACE TO THE BOTTOM*, *supra* note 2, at 15–16 (describing denials of counsel and explaining that local practitioners often refers to arraignment days in court as "McJustice Day" for this reason).

43. See Paul Butler, "Race and Adjudication," in the present Volume.

44. See *United States v. Roblero-Solis*, 588 F.3d 692, 693–94 (9th Cir. 2009) (describing this practice). I have personally witnessed this group-plea process in Genesee County, Michigan. See *Primus*, *supra* note 29, at 1777.

45. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); see also Garrett, *supra* note 10.

46. Derwyn Bunton, *When the Public Defender Says "I Can't Help,"* N.Y. TIMES (Feb. 19, 2016), [https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?\\_r=0](https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=0).

47. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

criminal defendants routinely complain that their trial attorneys assume that they are guilty, don't listen to them, and don't communicate with them.<sup>48</sup> That is a problem in any system that wants to be perceived as legitimate, but it is particularly problematic in an adversarial system that relies on zealous defenders to justify its results.

The failure to provide defendants with adequate trial representation also creates inefficiencies in the system and generates larger costs later in the process. Society pays to imprison people who would have been released had they had competent counsel to argue for them.<sup>49</sup> And money is wasted at the appellate and post-conviction stages relitigating cases that would not be in the system if they had been properly litigated at trial.<sup>50</sup>

## II. RESEARCH ON THE PUBLIC-DEFENSE CRISIS

Researchers have addressed the funding, independence, training, oversight, and cultural problems discussed above. There is also research that more generally considers how to improve the reliability and quality of defense representation assuming a financially strained environment.

### A. FUNDING

Many have argued for more public-defense funding at the national level as well as at state and local levels.<sup>51</sup> Some suggest that funding should be tied to data-supported workload standards.<sup>52</sup> Others want to compare defense and prosecutorial funding.<sup>53</sup> For example, prosecutors and defenders could create weighted caseload studies about their needs and ask the legislature to commit to funding the same percentage for each side or to develop a formula that would

48. See Primus, *supra* note 29, at 1776.

49. See Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in the present Volume (noting that the lack of counsel at bail review hearings leads to larger rates of pretrial incarceration).

50. See Nancy J. King & Joseph L. Hoffmann, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (arguing that money spent in federal habeas review might be better spent upfront on better trial representation); see also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (noting that money is wasted when appellate counsel are not able to raise ineffective-assistance-of-trial-counsel claims); Nancy J. King, "Criminal Appeals," in the present Volume (describing waste at the appellate level).

51. See, e.g., BROKEN PROMISE, *supra* note 2, at 41; Chemerinsky, *supra* note 37 (discussing the need for funding); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2173–74 (2013)

52. Missouri and Texas have conducted these studies and others are underway in Colorado, Louisiana, Rhode Island, and Tennessee.

53. See Wright, *supra* note 19.

require defender funding to be at least a specified percentage of prosecution and law enforcement funding.<sup>54</sup>

Many have argued that it would be more cost-effective to provide most public-defense services through public-defender offices rather than assigned-counsel or contract systems.<sup>55</sup> It is more efficient to pay for and run one office than to fund many individual practitioners who are working separately but doing the same thing. Defenders working together can pool resources from office space and computer resources to support services and intellectual capital.<sup>56</sup> They can divide their work more efficiently, systematically train and supervise entering attorneys more readily, and share information in ways that promote efficiency and improve the quality of their representation. Studies in Texas document that public-defender offices would cost 23% to 31% less per misdemeanor and 8% to 22% less per felony than assigned-counsel systems, resulting in annual statewide savings of \$13.7 million.<sup>57</sup> Similar studies in New

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54. See *id.* at 238–41 (noting how Tennessee has a ratio that allocates 75 cents to public defense for every dollar given to the prosecution and how Connecticut funding targets for public defense are set at 2/3 the level for the prosecution); David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017) (arguing that public defense funding should be linked to a percentage of law enforcement and prosecutorial funding).

55. See Primus, *supra* note 29, at 1806-07; MICHIGAN INDIGENT DEFENSE COMMISSION, DELIVERY SYSTEM REFORM MODELS: PLANNING IMPROVEMENTS IN PUBLIC DEFENSE (Dec. 2016), <http://michiganidc.gov/wp-content/uploads/2015/04/Delivery-System-Reform-Models-Final-Dec-2016.pdf> (explaining why public defender offices promote higher quality representation, are more cost-effective, and provide institutional resources to the system); TEXAS TASK FORCE ON INDIGENT DEFENSE & THE SPANGENBERG GROUP, BLUEPRINT FOR CREATING A PUBLIC DEFENDER OFFICES IN TEXAS (June 2008), <http://www.tidc.texas.gov/media/36005/2008blueprintfinal.pdf> [hereinafter BLUEPRINT] (same); see also Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2328 (2013) (“Those who are receptive to the smart-on-crime approach eventually will recognize that the better equipped our indigent defense system is, the less waste and inefficiency our criminal justice system will produce.”).

56. See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 21–22 (2012), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_national\\_indigent\\_defense\\_reform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf) [hereinafter SOLUTION].

57. See TEXAS TASK FORCE ON INDIGENT DEFENSE, EVIDENCE FOR THE FEASIBILITY OF PUBLIC DEFENDER OFFICES IN TEXAS (2011), [http://www.tidc.texas.gov/media/31124/pd-feasibility\\_final.pdf](http://www.tidc.texas.gov/media/31124/pd-feasibility_final.pdf).

York and Iowa project cost savings of between \$125 and \$200 per case.<sup>58</sup> Other studies conclude that public-defender offices often deliver lower conviction rates and shorter sentences than assigned-counsel systems, which would result in reduced probation and prison costs down the line.<sup>59</sup>

Some scholars have suggested that tradeoffs within the criminal justice system can and should be made to make more funding available. For example, Professors Nancy King and Joseph Hoffmann have argued that Congress should drastically cut federal habeas corpus review and divert the money saved to public defense.<sup>60</sup> More recently, some scholars have argued for reducing public-defense costs by permitting non-lawyers to represent criminal defendants in limited circumstances.<sup>61</sup> Professor Stephanos Bibas has gone further, suggesting that we (a) shrink the constitutional right to counsel so it applies only to felonies that result in imprisonment or (b) modify criminal justice procedural rules to

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58. According to a 2014 study in upstate New York, public defenders spent an average of \$255.28 per weighted case whereas assigned counsel spent an average of \$382.59 per weighted case. See NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES, ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK—2014 UPDATE (Nov. 2015), <https://www.ils.ny.gov/files/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202014%20Update%20-%20FINAL.pdf>. Given that assigned counsel handled 239,525 weighted cases in 2014, see *id.*; the state could have saved \$30,493,927.75 had those cases been handled by public defender offices. A 2007 report from Iowa documented a cost per case for public defenders at \$227 as compared to \$427 for court-appointed private attorneys. See OFFICE OF THE IOWA STATE PUBLIC DEFENDER, STATE PUBLIC DEFENDER'S EFFICIENCY REPORT 2 (Dec. 7, 2007), <https://www.legis.iowa.gov/docs/publications/DF/7519.pdf>.

59. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012) (noting that public defenders reduce their clients' murder conviction rate by 19% and lower the probability that their clients will receive a life sentence by 62% and that public defenders reduce overall expected time served in prison by 24% when compared to assigned counsel); RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL (Nat'l Bureau of Econ. Res. Working Paper No. 13187, 2007), <https://www.ils.ny.gov/files/Iyengar%202007.pdf> ("Defendants with CJA panel attorneys are on average more likely to be found guilty and on average receive longer sentences. Overall, the expected sentence for defendants with CJA panel attorneys is nearly 8 months longer.").

60. See King & Hoffmann, *supra* note 50. I am not persuaded that streamlining federal habeas corpus review in the ways that Professors King and Hoffmann propose will result in significant cost savings, and, given the injustice that currently plagues public-defense delivery in the states, I am reticent to impose additional limits on access to the federal courts. See Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887 (2012).

61. See Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH. L. REV. 113, 127 (2012); Drinan, *supra* note 40, at 1335–44; Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012). I am skeptical of this proposal for the reasons discussion in Part III, *infra*.

eliminate many rules of evidence and adopt more of an inquisitorial system that would not need lawyers.<sup>62</sup> Finally, a number of experts argue that the costs of public-defense delivery can be reduced by decriminalizing nonviolent offenses, diverting certain offenses to pretrial service programs, or reclassifying offenses as civil infractions.<sup>63</sup>

In my own work, I have argued that policymakers need to improve the sources as well as the amounts of public-defense funding.<sup>64</sup> Placing the fiscal and organizational responsibilities for indigent defense at the county level creates an impoverished, dependent, and unstable defender culture. It is accordingly essential that public defense be funded on a statewide basis.

### B. INDEPENDENCE

Although many experts have argued that a lack of funding contributes to the public-defense crisis, it is not just about money. A number of scholars have also recognized that the public-defense function must be sufficiently independent of the judiciary, chief executive, and legislature so that defenders can provide zealous representation without fear of repercussions.<sup>65</sup> Whether the indigent-defense commission or public-defender office should be run by an independent public-interest board of trustees or housed under the executive or legislative branches remains contested,<sup>66</sup> but scholars agree that judges should not oversee the hiring, payment, and assignment of cases to the attorneys who appear before them. They also agree that public-defense delivery systems must be sufficiently insulated from the legislative and executive branches that they can provide zealous advocacy without fear of losing jobs or funding.

### C. TRAINING AND OVERSIGHT

Scholars urging more training for entry-level defenders have pointed to defender programs like the Public Defender Service in Washington, D.C., as providing a model.<sup>67</sup> These experts contend that initial training should be

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62. See Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013).

63. See, e.g., SOLUTION, *supra* note 56, at 9, 14–17; Fairfax, *supra* note 55, at 2329–32; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

64. See Primus, *supra* note 29, at 1783–89.

65. See, e.g., Primus, *supra* note 29, at 1789–91; Patton, *supra* note 54.

66. See Patton, *supra* note 54.

67. See, e.g., Primus, *supra* note 29, at 1813–15; Steiker, *supra* note 34, at 2707; Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90–92 (1995); SOLUTION, *supra* note 56, at 11.

followed by a period of supervision with access to mentors.<sup>68</sup> Indigent-defense administrators should develop metrics designed to measure the performance of their line attorneys and should, at regular intervals, evaluate their progress.<sup>69</sup> Some contend that local bar associations and indigent-defense commissions can play important oversight roles both in preparing and publishing standards that represent best practices and in coordinating and superintending the oversight of appointed counsel and public-defender systems.<sup>70</sup>

The judiciary also has an important oversight role to play, so long as its oversight functions do not compromise defender independence by directly involving judges in the hiring, case assignment, and payment of attorneys. For example, scholars have proposed that courts should review the adequacy of public-defense delivery systems and the defenders' abilities to provide zealous representation. Some scholars want trial judges to be sensitive to caseload pressures and resource constraints and more willing to take creative pretrial steps to address these issues. For example, Professor Donald Dripps has argued that courts, during initial plea colloquies, should inquire in open court and make affirmative findings that defense counsel has provided effective assistance before being willing to enter a guilty plea.<sup>71</sup> He also contends that trial courts should inquire before a trial whether the defense is institutionally equipped to litigate as effectively as the prosecution.<sup>72</sup> Professor Carol Steiker encourages trial judges to refer inadequate attorneys for bar discipline.<sup>73</sup>

Others contend that courts should be more willing to entertain legal challenges to indigent-defense delivery systems and use their supervisory powers to impose caseload limits or catalyze legislative reforms.<sup>74</sup> Courts in Missouri and Florida have taken bold steps forward by empowering public defenders to withdraw from or prevent future appointments in cases once their caseloads reach a certain level.<sup>75</sup> In many states, the mere threat that the

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68. See THE CAPITAL AREA PRIVATE DEFENDER SERVICE, ANNUAL REPORT 2015 (2015), [https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity\\_public&page=1](https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity_public&page=1) [hereinafter CAPITAL AREA REPORT] (describing a mentoring program that exists in Texas).

69. See, e.g., Primus, *supra* note 29, at 1816; SOLUTION, *supra* note 56, at 25–26.

70. See, e.g., Primus, *supra* note 29, at 1818; Drinan, *supra* note 40, at 1315–19 (discussing the importance of creating professional standards); SOLUTION, *supra* note 56, at 18–24.

71. See Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH & LEE L. REV. 883, 918 (2013).

72. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997).

73. See Steiker, *supra* note 34, at 2705.

74. See, e.g., Primus, *supra* note 29, at 1819.

75. See Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261, 279 (Fla. 2013); State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc).



judiciary is going to get involved has been sufficient to prompt legislative action. In Massachusetts, for example, the Supreme Judicial Court once threatened that it was going to order the release of all defendants detained pretrial unless attorneys were appointed for them within a specific time period. In response, the Massachusetts Legislature increased the defender office's funding.<sup>76</sup> Cases in Georgia, Washington, Pennsylvania, Connecticut, and Louisiana have all catalyzed similar reforms.<sup>77</sup>

Finally, scholars have argued that the federal government could do more to protect the right to counsel. Some have suggested that a greater share of the federal funding currently provided to support state and local criminal justice projects should be earmarked for indigent defense or that such funding should be conditioned on state compliance with minimal standards for the provision of public defense.<sup>78</sup> Others want Congress to pass legislation creating a National Criminal Justice Commission—an oversight body designed to review state and federal criminal justice systems and make recommendations for improvement.<sup>79</sup> Professor Cara Drinan has argued for a National Right to Counsel Act that would create a private right of action for individuals to sue in federal court alleging right-to-counsel violations.<sup>80</sup> I have suggested that Congress enact legislation that would give the Justice Department and other

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76. See Steiker, *supra* note 34, at 2703 (discussing the Massachusetts example).

77. See VIDHYA K. REDDY, INDIGENT DEFENSE REFORM: THE ROLE OF SYSTEMIC LITIGATION IN OPERATIONALIZING THE GIDEON RIGHT TO COUNSEL 17–36 (Wash. U. Sch. of Law Working Paper No. 1279185, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1279185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185) (discussing cases).

78. Steiker, *supra* note 34, at 2709.

79. See, e.g., Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL'Y 597, 612–13 (2011).

80. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010). Although I support such an act in theory, it could face constitutional challenges in federal court. Abstention doctrine requires the federal courts to refrain from interfering with ongoing state court criminal proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971). It remains unclear whether abstention is constitutionally required or merely prudential. Thus, it is unclear whether Congress can legislate around it. As a result, I have counseled against relying solely on a private cause of action to get federal courts to address these problems. See EVE BRENSIKE PRIMUS, AM. CONST. SOC'Y FOR L. & POL'Y, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS (2010).

deputized interest groups the power to file enforcement actions against any state that engages in a pattern or practice of conduct that deprives criminal defendants of the right to effective counsel.<sup>81</sup>

#### D. RELIABILITY AND QUALITY OF PUBLIC DEFENSE

One simple way to improve the reliability and quality of public-defense representation is to allow defense lawyers to give cases the time that they require rather than mass-processing them. For private attorneys, that means banning flat-fee contracts (as Nevada recently has done), that incentivize the speedy disposition of cases over quality representation.<sup>82</sup> It also means paying private attorneys a reasonable hourly wage for taking indigent-defense cases. For public defenders, it means putting caps on caseloads, like those that now exist in Washington and Massachusetts.<sup>83</sup> Not surprisingly, empirical research shows that attorneys can spend more time with their clients, investigate cases more thoroughly, and provide better representation when their caseloads are capped.<sup>84</sup>

One county in Texas is currently experimenting with a client-choice model of defender assignment to improve defender culture. Originally proposed by Professors Stephen Schulhofer and David Friedman,<sup>85</sup> this model permits defendants to select the attorneys who will represent them at state expense. The idea is that attorneys who communicate effectively with their clients and do well for their clients will be sought after, while those who do not will lose business and be driven out of the market.

I have argued that state-funded, statewide public-defender offices improve the quality of indigent-defense representation and are better than assigned-counsel or contract systems.<sup>86</sup> Their group structure tends to promote more training and

81. See PRIMUS, *LITIGATION STRATEGIES*, *supra* note 80. I also proposed federal legislation that would create a post-trial habeas action that would permit litigants to bring systemic violations of the right to counsel to light and permit federal courts to address them without running into abstention doctrine concerns. See *id.*; see also Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1 (2010).

82. See, e.g., Primus, *supra* note 29, at 1811; SOLUTION, *supra* note 56, at 30.

83. See MINOR CRIMES, *supra* note 2, at 24; Primus, *supra* note 29, at 1809–10.

84. See, e.g., MELISSA LABRIOLA ET AL., *INDIGENT DEFENSE REFORMS IN BROOKLYN, NEW YORK: AN ANALYSIS OF MANDATORY CASE CAPS AND ATTORNEY WORKLOAD* (2015), [http://www.courtinnovation.org/sites/default/files/documents/Case\\_Caps%20\\_NYC\\_0.pdf](http://www.courtinnovation.org/sites/default/files/documents/Case_Caps%20_NYC_0.pdf).

85. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993); see also Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505 (2015) (describing the Texas experiment).

86. See Primus, *supra* note 29, at 1806–09; see also MICHIGAN INDIGENT DEFENSE COMMISSION, *supra* note 55 (explaining why public defender offices promote higher quality representation, are more cost-effective, and provide institutional resources to the system); BLUEPRINT, *supra* note 55.

oversight, better communication and informal mentoring, and more pooled resources that save attorneys time and allow them to do their jobs better.

### III. IMPLEMENTING REFORM

States interested in reforming their public-defense delivery systems should consider creating a statewide task force charged with collecting data about the scope of the problem and making recommendations about how best to structure public-defense delivery in the state. The task force can be created by the governor (as in Michigan),<sup>87</sup> the legislature (as in Idaho),<sup>88</sup> or the judiciary (as in Utah).<sup>89</sup> A diverse group of criminal justice stakeholders and policymakers (including a number of defense attorneys from different areas of the state) should be members of the task force, and they should engage national technical assistance to help them assess their current delivery systems and learn about best practices nationwide.<sup>90</sup> Ultimately, the task force can recommend judicial, legislative, and executive interventions to improve the system. To be effective, however, these reforms must be multifaceted, addressing the funding, lack of independence, failure of training and oversight, and quality problems discussed above.

#### A. STRUCTURE

Reformers in a given jurisdiction should first examine how public-defense delivery systems are structured. Is there a public-defender office, an assigned-counsel system, a contract system, or some combination? Research shows that statewide public-defender offices are more efficient and cost-effective and also improve the quality and reliability of indigent-defense services.<sup>91</sup> They can more easily provide training, mentorship, and supervision for entry-level attorneys. And their group structure allows them to effectively deploy investigative, expert, and staff support.

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87. See David Carroll, *Michigan Passes Public Defense Reform Legislation*, SIXTH AMENDMENT CENTER (June 19, 2013), <http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/>.

88. See David Carroll, *Idaho Empowers State Commission with New Authority and New Funding*, SIXTH AMENDMENT CENTER (March 23, 2016), <http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/>.

89. See David Carroll, *Utah Reforms Indigent Defense with First-Ever State Dollars for Trial Representation*, SIXTH AMENDMENT CENTER (March 16, 2016), <http://sixthamendment.org/utah-reforms-indigent-defense-with-first-ever-state-dollars-for-trial-representation/>.

90. For example, the National Legal Aid and Defender Association provided technical reports to aid reforms in Michigan and Idaho while the Sixth Amendment Center issued a report on Utah's practices.

91. See *supra* note 55 (collecting sources).

Despite this research, only 22 states have statewide public-defender offices.<sup>92</sup> Some states have not been willing to invest the initial capital that would be required to create a statewide office (even though it would be more cost-effective over time). Others have refused to adopt statewide offices because of political pressure from attorneys who benefit from the quick, easy fees they can obtain in assigned-counsel or contract systems. Still others have legislators who are reticent to reform public-defense delivery systems in ways that appear soft on crime for fear of losing re-election.

Policymakers should think creatively about how to move more states toward statewide public-defender offices or, at the very least, toward public-defense delivery systems that are structured to mimic the benefits of statewide public-defender offices. If there is entrenched political opposition to a statewide public-defender office because attorneys fear a loss of revenue, the state might start with a statewide office that handles only a small percentage of the public-defense caseload<sup>93</sup> and gradually increase the caseload over time. Even a relatively small statewide office can organize training programs for attorneys throughout the state, collect and disseminate defender resources, and improve the quality of representation.<sup>94</sup> Alternatively, the state could create a statewide indigent-defense commission responsible for working with each county to ensure that the counties provide effective defense representation. That commission could, in turn, work with counties or regions to create local public-defender offices, and the commission could function much as the central administration of a statewide agency would by creating standards, implementing training programs, and overseeing the provision of services throughout the state.<sup>95</sup>

Even with public-defender offices, states will need other indigent-defense delivery systems to provide representation in cases where conflicts of interest prevent one office from representing all defendants and to ensure that the

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92. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007 (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf>.

93. The Public Defender Service in Washington, D.C., for example, is not permitted to handle more than 60% of the indigent defense caseload. See D.C. CODE § 2-1602.

94. States can also opt to create statewide public defender offices for certain stages of the process. For example, a dozen states have statewide appellate public defender offices even though they do not have statewide services at the trial level. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 45 (Winter 1995); see also King, *supra* note 50.

95. States that are unwilling to create public defender offices should find ways to create similar group structures to take advantage of economies of scale and provide support, training, and oversight to criminal defense attorneys in the state.

private bar remains actively involved in defense representation.<sup>96</sup> Flat-fee contract systems should be banned, because they perversely encourage attorneys to process cases quickly rather than representing their clients well. Instead, states should adopt managed assigned-counsel systems.<sup>97</sup> In a managed assigned-counsel system, experienced administrators hire, train, supervise, and coordinate the assignment of cases to private attorneys. A good managed assigned-counsel system will create a cohesive, experienced, and knowledgeable private criminal-defense bar that ensures quality representation and takes advantage of economies of scale by sharing resources and intellectual capital. It will work closely with any local public-defender office, sharing training information and other resources, to ensure quality representation throughout the system.

Although it is too early to reach definitive conclusions about the client-choice model based on Texas's ongoing experiment, I see considerable reasons for skepticism. The client-choice model assumes that defendants will have the requisite information to make good choices for themselves. Perhaps career criminals who learn the system well will know who the good attorneys are, but it seems unlikely that most arrestees will know whom to choose. Advertising may be more important than skill. Good-looking white men might be chosen over less attractive women or minorities based merely on stereotypes. Moreover, client choice could create an aura of competition among defenders that is destructive to defender culture—for example, if attorneys refuse to share resources or advice with one another for fear of helping the competition. When the Texas experiment is fully evaluated, one important question to ask will be how the client-choice model affected defender culture and the quality of the resulting representation.

All indigent-defense delivery systems—whether public-defender offices, indigent-defense commissions, or managed assigned-counsel systems—need to be structured to be independent of other branches of government. Public-defender offices, indigent-defense commissions, and managed assigned-counsel systems should be run by independent commissions or boards of trustees. No elected official should have the power to hire and fire the head of the agency. And these boards should not be comprised solely of prosecutors

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96. Some states have adopted separate public defender offices specifically to handle conflict cases. This has the advantage of maintaining the benefits of the group structure discussed above, but it does not encourage the private bar to remain engaged in defense representation.

97. For an example of a managed assigned-counsel system, see THE CAPITAL AREA PRIVATE DEFENDER SERVICE, ANNUAL REPORT 2015 (2015), *available at* [https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity\\_public&page=1](https://assets.adobe.com/link/d1b1b70a-4a44-474e-64b3-247893a13829?section=activity_public&page=1) (describing the managed-assigned-counsel system in Travis County, Texas).

and law enforcement officials, but rather should be staffed by a diverse group of individuals, many of whom have criminal defense experience. The public-defense function also needs to be independent of the judiciary. Courts should not make appointments; approve experts, investigators, and payment vouchers; or evaluate the performance of individual attorneys, except in the context of legal challenges to the adequacy of an attorney's representation. Rather, the public defender's office, indigent-defense commission, or administrators in the managed assigned-counsel system should make those judgments. In the federal system, the Criminal Justice Act needs to be amended to create an independent body to oversee the appointment and payment of federal defenders.<sup>98</sup>

### B. FUNDING

More money must be spent on public defense. Funding should be grounded in data-supported workload studies that include consideration of the funding earmarked for the prosecutorial function (including law enforcement). Several firms now perform data-driven workload studies in cooperation with state indigent-defense commissions, public-defender offices, or bar associations.<sup>99</sup> Policymakers should consider commissioning workload analyses to determine how much of a funding problem exists in particular jurisdictions and then use the results to argue for caseload caps and for additional funds as necessary for public defense.

If a legislature cannot fully fund the public-defense function, it should take into account how its proposed budget compares to the prosecution's budget. Prosecutors and defenders should be equally compensated, and the prosecutorial and defender budgets should be proportionate to the caseloads each office handles. When private attorneys are employed through an assigned-counsel system, they should be paid reasonable hourly fees to handle indigent-defense cases.

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98. See Patton, *supra* note 54 (proposing amendments).

99. For example, the American Bar Association, in association with the consulting firm RubinBrown and the Missouri State Public Defender System, recently conducted a study (using survey techniques and empirical analytical methods) to quantify how much time a public defender should reasonably spend on different types of cases to provide effective assistance of counsel. See RUBINBROWN LLP, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS WITH A NATIONAL BLUEPRINT (June 2014), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/lis\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_5c_the_missouri_project_report.authcheckdam.pdf). The Missouri public defender used the study to lobby for more funding and the legislature responded. See Laird, *supra* note 36 (describing how the legislature relied on the data and attempted to allocate more funding).

State legislatures should provide for statewide funding of indigent defense even if the delivery systems are chosen at the county level. That would at least ensure some financial stability and more independence from the influence of local politics. Legislatures should also identify stable and dedicated funding streams for public defense rather than relying on traffic fines, court fees, or other assessments that are highly erratic and often fall heavily on the poorest citizens. This would minimize the need to ask future legislatures to raise public-defense funding, which is important given the political challenges of asking elected officials to do anything that might appear to be soft on crime.

Finally, policymakers should consider ways to reduce criminal justice system costs overall. By fully decriminalizing certain nonviolent offenses or reclassifying them as civil infractions, lawmakers could alleviate caseload burdens for defenders while also achieving larger benefits for society.<sup>100</sup> I am more skeptical of suggestions to reduce costs by shrinking the right to counsel and having laypeople argue in court on behalf of criminal defendants. Laypeople might be productively used as initial intake interviewers, subpoena servers, public-records collectors, or liaisons to a client's family member. In fact, many public-defender offices already use law clerks, interns, and investigators who are not lawyers to perform many of these functions. But an attorney is needed in court to navigate the complexities of the substantive and procedural laws when a person's liberty is at stake.

### C. TRAINING AND OVERSIGHT

Entry-level public defenders need to be adequately trained before they begin representing people in court, and each new defender should have a period of supervision with an experienced mentor once on the job. After that supervision period ends, every defender should be evaluated by supervisors in the defender office according to established and recognized metrics and be given feedback about how to improve. The Atlanta-based organization Gideon's Promise provides a model for rigorous, entry-level defender training combined with supervision and mentoring over a three-year period.<sup>101</sup> Each state should have a state-funded indigent-defense training director (housed in the administration of the public-defender office, indigent-defense commission, or managed assigned-counsel system) whose job is to ensure that entry-level defenders get quality training and mentorship. Quality training should include more than

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100. See Natapoff, *supra* note 63.

101. See Primus, *supra* note 29, at 1814 (describing the program); Steiker, *supra* note 34, at 2710–11. More information about Gideon's Promise training and mentorship programs is available at <http://www.gideonspromise.org/>.

trial advocacy classes or information about the mechanics of the court system. It should also teach entry-level attorneys how to relate to and communicate with clients and how to deal with the challenges of the job.<sup>102</sup> Each state should also create objective metrics for assessing defender performance. Evaluation should include observing the attorney in court, reviewing trial transcripts and pleadings involving that attorney, looking at case outcomes, and speaking to the clients and court personnel who have worked with the attorney.

Here too, judges can play an important role without compromising the independence that defenders need. I agree with those who have argued that trial judges should make *ex ante* inquiries into whether defenders have been able to meet with their clients, investigate their cases, and provide effective representation. Judges should also be more amenable to using their supervisory authority to impose caseload limits, entertain motions to withdraw from overwhelmed public defenders, refer ineffective attorneys to the local bar association for disciplinary action, and encourage legislatures to address funding and independence problems.

At the federal level, Congress should create a federal oversight body designed to review state and federal criminal justice systems and make recommendations for improvement. A federal body could communicate with the many indigent-defense commissions and nonprofit organizations that are currently working on this crisis to collect, analyze, and distribute information and prevent duplication of work. Congress should also give the Department of Justice federal enforcement authority to bring actions against states that systematically violate the right to counsel and permit the Department to extend its own reach in this area by deputizing private individuals or interest groups to file enforcement actions in its name.<sup>103</sup>

## RECOMMENDATIONS

There is no one silver bullet that will solve the public-defense crisis. Rather, policymakers must adopt reforms that address the structure of public-defense delivery, ensure that the defense function is independent of the other branches of government, alleviate the excessive caseloads that defenders currently have, increase and restructure public-defense funding, and ensure that mechanisms are in place to train attorneys and oversee the defense function.

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102 See Primus, *supra* note 29, at 1814 (describing model training programs).

103. Even without new legislation, the federal government can continue to earmark federal grants for states that are collecting data and trying to fix broken public defense delivery systems. Alternatively, the Justice Department could continue its recent practice of filing *amicus* briefs in support of plaintiffs challenging indigent defense delivery systems in court. Such interventions have been critically important in encouraging states to settle these cases and make improvements in their delivery systems.



1. **Statewide task force.** Policymakers should begin by creating a statewide task force consisting of a diverse group of criminal justice stakeholders and policymakers (including a number of defense attorneys from different parts of the state) to collect data, analyze the current public-defense delivery systems in the state, and make recommendations for improvements. The task force should engage national technical assistance to help it assess the current delivery systems and learn about best practices nationwide.
2. **Structure.** Policymakers should strive to create state-funded, statewide public-defender offices to handle most cases. Those statewide offices should be supplemented by state-funded, managed assigned-counsel systems to handle conflict-of-interest cases and continue the involvement of the private bar in indigent-defense representation. Flat-fee contract programs for attorney assignment should be banned. If in a given state there is not enough political support to create a state-funded, statewide public-defender office, policymakers should strive to create a state-funded, statewide indigent-defense commission that can then work with localities to create county-based or regional public-defender offices and managed assigned-counsel systems. If a state chooses to proceed with an indigent-defense commission, it should ensure that the commission has sufficient power vis-à-vis the counties to ensure that counties do not choose public-defense delivery systems that are inefficient or encourage poor advocacy.
3. **Independence.** Policymakers should ensure that each of a state's chosen public-defense delivery systems—whether public-defender offices, managed assigned-counsel systems, or indigent-defense commissions—are sufficiently independent of the judiciary, legislature, and executive branch that defenders need not fear retaliation for vigorous advocacy. Judges should never be responsible for assigning cases, approving costs, or monitoring individual attorney performance. Instead, administrators in the public-defender office, managed assigned-counsel system, or indigent-defense commission should be responsible for attorney assignment, cost and fee approval, and individual oversight. Those administrators should be appointed by a board that is independent of the political branches of government.
4. **Excessive caseloads.** Policymakers should consider imposing caseload caps based on data-driven case-weighting studies that indicate how many cases attorneys in a given jurisdiction can effectively handle. In jurisdictions where this is not possible, defense attorneys should, consistent with

American Bar Association guidelines,<sup>104</sup> notify the courts of their inability to accept additional cases if doing so will compromise their ability to provide effective representation. If they cannot provide competent representation, they should move to withdraw from appointments, and courts should be receptive to such requests. Bar associations should be more willing to advocate for judicial and legislative enforcement of ethics rules that prohibit excessive caseloads.

5. **Funding.** Policymakers should ensure statewide funding for public defense instead of relying on individual counties to pay the costs. The amount of funding should be tied to data-driven case-weighting studies that indicate how much public-defense funding is necessary to provide effective representation, and it should take into account how much funding is earmarked for the prosecution and law enforcement. Moreover, public-defense funding should have a stable and dedicated source so that defenders—rarely a popular constituency in budgeting processes—do not need to continually renegotiate the source and amount of their funding. Prosecutors and public defenders should have pay parity, and assigned counsel should be paid a reasonable wage. Policymakers should also consider reducing the cost of the public-defense function by fully decriminalizing some nonviolent offenses.
6. **Training and oversight.** Each public-defense delivery system should have a training director responsible for developing and implementing a mandatory training program for entry-level attorneys. Entry-level training should be complemented by a mentorship program that links entry-level defenders to senior defense attorneys. All defense attorneys should be regularly evaluated according to established metrics and should receive feedback on how to improve.

Judges should be willing to (a) make *ex ante* inquiries into the effectiveness of defense counsel; (b) impose caseload caps; (c) grant motions to withdraw when caseloads are excessive; (d) refer ineffective attorneys to the local bar for discipline; and (e) be receptive to systemic challenges to public-defense

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104. See ABA COMM. ON ETHICS & PROF. RESP., FORMAL OPINION 06-441 (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE (2009), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf).

delivery systems. Local bar associations should take a more active role as well, supporting public-defense reform efforts and being more willing to discipline ineffective attorneys.

The federal government should continue to encourage states to adopt best practices for public-defense delivery through its funding choices and by filing amicus briefs in lawsuits challenging broken public-defense delivery systems. It should also pass proposed legislation that would (a) create a federal oversight body to collect, analyze, and distribute information about best practices and (b) give the Department of Justice authority to file federal enforcement actions (or deputize others to do so) when states systematically violate indigent defendants' rights to counsel.



# Discovery

Darryl K. Brown\*

*Rules of pretrial evidence disclosure vary widely in state criminal justice systems. In all states, discovery is more restricted than it is in civil litigation. In a substantial minority of states, it remains dramatically restricted. That is in part a relic of the common law tradition when it was assumed most cases would be resolved by trial. But trials are now rare; nearly all convictions are the result of a plea bargain. The pretrial stage is the only place in which adversarial process operates and in which parties can evaluate evidence. Most states have adopted broader discovery rules in light of this reality, because disclosure failures have led to wrongful convictions, and because experience shows that risks related to certain disclosures are easily managed. The primary agenda for discovery reform in state criminal justice is to persuade those states that still adhere to outdated disclosure policies to join the majority of their peers and require more evidence to be exchanged between prosecutors and defense attorneys prior to plea bargaining.*

## INTRODUCTION

At common law and in U.S. jurisdictions until the 20th century, no rules obligated prosecutors and criminal defendants to disclose anything to each other before trial. As a formal matter, the rules assumed that criminal litigation was ordinarily a *trial* process, rather than what it has been for well over a century—a pretrial process that is usually resolved by a guilty plea. The traditional notion behind the adversarial trial process is that neither party is obliged to forewarn the other of the witnesses or evidence they would present at trial, or otherwise to assist the opponent’s preparation. This model came

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to be criticized as “trial by surprise” (or “by ambush”), a process that treated adjudication more as a secretive “poker game” or competitive “sporting contest” than a well-designed search for truth.<sup>1</sup>

All U.S. criminal justice systems (and those in other common law countries) have moved away from this old model to some degree. All now require the parties to make at least some modest disclosures of certain kinds of evidence before trial. But discovery rules remain remarkably diverse across 50 state jurisdictions and the federal courts. There is nothing close to a standard American model of pretrial criminal discovery. There is, however, a distinct *trend* toward requiring much more pretrial disclosure in criminal litigation. The consistency of this trend, and the seemingly random group of jurisdictions that resist it, suggest that reasons for holding on to narrow-discovery regimes have less to do with the merits and costs of broader regimes and more to do with status-quo bias—the appeal of the familiar—as well as the idiosyncrasies of state politics and reform processes. Arguments for and against broad discovery have barely changed for several decades. But evidence to *settle* those arguments, provided by decades of experience in a large and diverse group of state justice systems, has steadily accumulated.

The most serious arguments against broad discovery relate to risks of witness intimidation, victim privacy, and the need for secrecy in ongoing criminal investigations that involve covert surveillance or undercover operatives. These risks are serious, but they are realistic concerns only for certain kinds of criminal cases, which make up a relatively small part of state criminal dockets. (These risks loom larger for federal court prosecutions.) State criminal justice systems with broad-discovery rules have found ways to manage those risks while also requiring prosecutors to disclose their evidence against a defendant. Largely, they do so by carving out exceptions to disclosure when justified in particular cases. The collective experience of these broad-discovery states decisively undercuts arguments for the traditional model of limited discovery. The narrow-disclosure rules that remain in some states are remnants of an earlier era, one with weaker standards of fairness for how the

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1. See, e.g., *Williams v. Florida*, 399 U.S. 78, 82, 117 n.12 (1970) (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279) (“The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”); *id.* at 106 (Burger, C.J., concurring) (praising “an enlarged and truly reciprocal pretrial disclosure of evidence” as a “move away from the ‘sporting contest’ idea of criminal justice”). Chief Justice Burger frequently referenced “the evil ‘sporting contest’ theory of criminal justice,” most commonly to criticize recognition of expanded defense rights as contributing to it. See *Batson v. Kentucky*, 476 U.S. 79, 131 (1986) (Burger, C.J., dissenting).

state treats its citizens and one in which policymakers could still pretend that evidence in most cases would eventually be disclosed at trial. Modern notions of fair play are stronger, and vanishingly few criminal cases now go to trial.<sup>2</sup> As a result, adversarial justice systems in most states (as well as in other common law countries such as England and Canada) require parties to disclose some types of evidence—sometimes nearly all of which they are aware—to each other before trial. The rationale is not only to reduce “trial by surprise” but also to enable more accurate and fair resolution of criminal charges without trial. When “plea bargaining ... *is* the criminal justice system,”<sup>3</sup> the adversarial scrutiny of evidence that formerly occurred in public trials must take place instead in the pretrial stage. Unless the defense can assess and “confront” the state’s evidence, judgments resulting from guilty pleas are too likely to turn on something other than evidence and adversarial process. More specifically, they will turn on the judgments of executive branch officials without meaningful checks or balances from either defense attorneys or judges. As a matter of principle and prudence, that is wrong.<sup>4</sup>

While broad-disclosure requirements facilitate the shift of traditional adversarial process to the pretrial stage, narrow-discovery rules have the effect of reinforcing executive-branch power in a justice system in which prosecutors rarely face the scrutiny of defense lawyers, judges, and jurors. Minimal disclosure requirements give prosecutors the power to decide what evidence they will disclose before trial. Combined with their power to pressure defendants to plead guilty, that gives them considerable power to determine how much adversarial scrutiny their evidence will face, and how much the plea-bargain negotiations will be based on parties’ mutual knowledge of the evidence.<sup>5</sup> Many prosecutors routinely share more evidence than the rules require, but these voluntary disclosure practices vary widely according to the preference of the local prosecutor, and they are based not only on prosecutors’ assessments

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2. Reasons for the steady increase in plea bargaining over the last forty years (from a longstanding baseline in which a majority of cases were resolved by guilty pleas) don’t merit attention here, but they include the evolution of rules by courts and legislatures, and tactics by prosecutors, to make plea bargaining more successful and trials easier to avoid.

3. *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

4. Even if guilty defendants presumably know the critical facts of whether they “did it,” the government, due to its greater investigative authority and capacity, nearly always knows much more about the evidence than the defense. The U.S. Supreme Court has acknowledged “the State’s inherent information-gathering advantages,” which “suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.” *Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973).

5. For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

of threats to witnesses or undercover operations but also on their calculations of tactical advantages to be gained from disclosure or concealment. Broad-discovery rules, by contrast, do more than dictate many of these disclosure decisions; many of them also shift judgments about whether nondisclosure is justified in particular cases from prosecutors to *judges*.<sup>6</sup> Broad-disclosure systems are built on the twin premises now universally accepted for civil litigation. First, when conducted by parties who are well prepared in advance to confront all evidence, trials are more likely to produce accurate judgments than “trial by surprise.” Second, negotiated settlements are better substitutes for trial judgments when both parties have access to the evidentiary record. Negotiated dispositions are more likely to be accurate and fair when the checks and balances of adversarial process can operate in this pretrial stage.<sup>7</sup>

Few defenders of limited discovery any longer justify nondisclosure by arguing for the superior fact-finding virtues of “trial by surprise.” The arguments instead point to a familiar set of concerns from government disclosure—defendants might intimidate witnesses, harass victims, fabricate rebuttal evidence, and frustrate ongoing investigations. In light of the slow but steady march of state criminal justice systems toward broader pretrial disclosure, however, these concerns seem to retain their persuasive power mostly to those who practice in minimal-disclosure regimes and must rely mostly on their speculation about how these risks are managed under broader rules with which they have no experience. That pattern of resistance suggests that status-quo bias, rather than evidence-based policymaking, account for the holdouts against broader discovery laws.

## I. DESCRIPTION OF EXISTING LAW AND POLICY

### A. EVIDENCE CATEGORIES AND CONSTITUTIONAL DISCLOSURE RULES

Criminal disclosure rules distinguish between three categories of evidence: (1) evidence in the government’s possession that prosecutors *do* plan to use at trial—that is, incriminating evidence; (2) government evidence that prosecutors do *not* intend to use at trial, some of which is material and favorable to the

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6. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c) (state must inform defense of any non-disclosure, and upon a defense request the judge must determine whether non-disclosure is justified).

7. Chief Justice Burger stressed this point in *Williams v. Florida*, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring) (“I see an added benefit to the ‘notice of alibi’ rule in that it will serve important functions by way of disposing of cases without trial in appropriate circumstances—a matter of considerable importance when courts, prosecution offices, and legal aid and defender agencies are vastly overworked.”).



defense, and some of which may seem to have no obvious value to either party; and (3) evidence in possession of the defense.

### 1. Evidence favoring the government's case

The minority of jurisdictions that adhere to narrow-disclosure statutes require little disclosure of the first type, in accord with common law and constitutional traditions. The principle that “there is no general constitutional right to discovery in a criminal case” refers in particular to this kind of evidence—government evidence that suggests the defendant’s guilt.<sup>8</sup> Debates about discovery rules center mostly on this first category—what incriminating (or non-exonerating) evidence the government should give defendants access to before trial.

### 2. Evidence not favoring the government's case

Two types of evidence in the second category—that which is in the government’s possession but that it does not intend to use at trial—are regulated quite differently. First, according to *Brady v. Maryland* and its progeny, constitutional due process requires prosecutors to disclose any evidence that favors the accused, either because it is exculpatory in its own right or because it impeaches the credibility of the government’s evidence.<sup>9</sup> The prosecution has an affirmative duty to search for, obtain, and disclose *Brady* material that is in the possession of police and other agencies working on the government’s behalf.<sup>10</sup> This duty is limited in two respects. In effect, prosecutors need only

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8. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (“[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . .”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987) (finding that defendant’s right to discovery does not include the unsupervised authority to search through the government’s files); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”).

9. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating that “suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that prosecutors must disclose material that tends to impeach the credibility of government witnesses); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that *Brady* evidence is “material” if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” where a reasonable probability is “a probability sufficient to undermine confidence in the outcome.”); *accord United States v. Agurs*, 427 U.S. 97, 104 (1976) (“[M]aterial *Brady* evidence is that which might have affected the outcome of the trial.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987) (prosecutor’s *Brady* obligation continues throughout proceedings). The *Brady* disclosure duty is not excused by prosecutors’ good faith or inadvertence.

10. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

disclose such evidence if it is “material,” meaning likely to change the trial outcome or sentence.<sup>11</sup> In addition, because *Brady* disclosure is “a right that the Constitution provides as part of its basic ‘fair trial’ guarantee,” the Supreme Court has concluded the Constitution does not require prosecutors to make disclosures *before* trial, nor before the parties enter a plea agreement.<sup>12</sup> Some jurisdictions reiterate the *Brady* disclosure duty in statutes or court orders, and some modestly expand it by requiring prosecutors to turn over not only all “material” evidence but evidence that, for example, “may be favorable” to the defense or that “tends to negate” guilt or “to reduce the punishment.”<sup>13</sup>

The other type of evidence state officials possess—evidence they will not plan to use at trial—is generally of uncertain value. The U.S. Constitution requires only that police and prosecutors not destroy such evidence in “bad faith.”<sup>14</sup> A number of state statutes go further and require prosecutors to alert the defendant to all evidence or persons with knowledge “concerning the offense charged.” As noted below, this duty appears in some of the broadest state discovery laws.

### 3. Defense evidence

The federal Constitution requires no defense disclosures, but it permits statutes that compel defendants to disclose virtually any evidence they possess—save for compelled testimony—as long as “reciprocal” disclosure

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11. *Bagley*, 473 U.S. at 682.

12. *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002). By comparison, discovery law in the United Kingdom followed a different path. Prosecutors were first required to share their inculpatory trial evidence; disclosure of exculpatory evidence followed later, prompted by wrongful conviction scandals in which officials withheld such evidence.

13. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(h) (“tends to negate”); IDAHO R. CRIM. P. 16(a) (“would tend to negate”); D. VT. LOCAL R. CRIM. P. 16(a)(2) (“may be favorable”). For a discussion, see Daniel S. McConkie, *Structuring Pre-Plea Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1 (2017).

14. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984).

duties apply to prosecutors.<sup>15</sup> Under statutes or court rules, defendants may have to disclose their intended trial witnesses and affirmative defenses; to submit to mental exams and lineup identification procedures; or to provide blood, handwriting, and other samples for analysis. In short, defendants can be required to do almost anything to assist prosecutors' pretrial evidence preparation short of giving "testimonial" statements compelled by subpoena or post-arrest interrogation.<sup>16</sup> The first statutory disclosure duties mandated these kinds of defense disclosures. States required defendants to give advance notice of intent to use alibi evidence and other defenses as early as the 1920s.<sup>17</sup>

### B. STATUTORY DISCLOSURE RULES

Aside from constitutional duties defined by *Brady*, most disclosure law resides in statutes, procedural rules, and court orders. The critical points of disagreement tend to be the following, all of which are recommended in the most recent ABA standards for criminal discovery:<sup>18</sup>

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15. *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) (striking down state requirement that defendants give notice of alibi defense without reciprocal disclosures required from the state, because "in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street."); *id.* at 475:

The state may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of the defendant's own case while at the same time subjecting him or her to the hazard of surprise concerning refutation of the very pieces of evidence which he or she disclosed to the state.

*See also* *Williams v. Florida*, 399 U.S. 78, 81, 83-86, 117 n.17 (1970) (approving defense disclosure requirement that is "carefully hedged with reciprocal duties requiring state disclosure to the defendant"); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (finding that a compelled blood test does not violate privilege against self-incrimination).

16. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966) (statements of defendants in-custody interrogation are admissible only if defendant was informed of rights to remain silent and consult with an attorney); *Massiah v. United States*, 377 U.S. 201 (1964) (government cannot elicit statements from defendants after Sixth Amendment right to trial counsel attaches). Despite limits on compelled, uncounseled testimony, law enforcement nonetheless has steady success eliciting voluntary statements from defendants.

17. Michigan's requirements of notice for alibi and insanity defenses, now codified at MICH. COMP. LAWS §§ 768.20 & 768.20(a), were enacted by statute in 1927. *See* 1927 Mich. Pub. Acts No. 175, ch.8, § 20 (effective Sept. 5, 1927) (cited in Mark A. Esqueda, *Michigan Strives to Balance the Adversarial Process and Seek the Truth With Its New Reciprocal Criminal Discovery Rule*, 74 U. DET. MERCY L. REV. 317, 329 n.80 (1997)).

18. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

1. whether the parties are required to disclose in advance of trial the identities of their non-expert trial witnesses, as well as those witnesses' prior statements, criminal records, and contact information;
2. whether the government must disclose not only its planned trial witnesses but also "all persons ... known to have information concerning the offense charged,"<sup>19</sup> along with those persons' statements, regardless of whether they will be prosecution witnesses;
3. whether additional disclosure extends beyond persons-with-knowledge to all documents and tangible evidence that "pertains" to the case;
4. whether rules specify the government must disclose any relationship with its witnesses, such as pending charges or the terms of cooperation agreements—this information should be disclosed under *Brady/Bagley*, but some states clarify these duties with regard to fraught sources such as jailhouse informants,<sup>20</sup> or to reduce disputes about whether such information is "material";
5. how much information must be disclosed regarding experts' qualifications and the substance of their expected testimony;
6. whether defendants receive codefendant statements regardless of whether they are joined for trial; and
7. which details, if any, regarding investigation sources and personnel involved in evidence-gathering, to facilitate motions to suppress.<sup>21</sup>

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19. FLA. R. CRIM. P. 3.220(b)(1)(A); *see also* ALASKA R. CRIM. P. 16(b)(1)(A)(i); N.J. CT. R. 3:13-3(b)(1)(F).

20. FLA. R. CRIM. P. 3.220(b)(1)(M)(i)-(v) (requiring disclosure of, *inter alia*, "the informant witness's prior history of cooperation, in return for any benefit, as known to the prosecutor"); NEB. REV. STAT. § 29-1912(1)(h)-(k) (criminal history, law enforcement agreements, and prior prosecution testimony of "jailhouse witness").

21. *See e.g.*, ALASKA R. CRIM. P. 16(b)(2); MASS. R. CRIM. P. 14(a)(1)(A)(viii); MD. R. CRIM. P. 4-263(a)(2); FLA. R. CRIM. P. 3.220(b)(A)(I).

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### C. DIFFERENCES IN STATE DISCOVERY RULES

Fifteen states and the federal courts define the narrowest approach.<sup>22</sup> States in this group, which include New York, Utah, and Virginia, generally follow the federal model and have rules or statutes that require very little in the above categories—not even disclosure of witness names before trial.<sup>23</sup> A few of them have laws that go beyond the federal rule on a few points. Georgia’s discovery statute, for example, requires witnesses to be disclosed to counsel only (i.e., not to the defendant) and only if defendants opt in to reciprocal disclosure obligations by requesting disclosures from prosecutors. (Even so, it makes no mention of disclosing witnesses’ criminal histories or cooperation agreements.)

By contrast, at the other end of the spectrum, six states—including some of the largest, such as Florida and New Jersey—have regimes of very broad discovery that include most or all of these requirements, especially notice of intended trial witnesses and information about sources of evidence the state does not intend to use.<sup>24</sup> New Jersey, for example, requires informing defendants about “any persons whom the prosecutor knows to have relevant evidence or information.”<sup>25</sup> North Carolina requires prosecutors to share “any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.”<sup>26</sup>

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22. ALA. R. CRIM. P. 16.1–16.5; DEL. SUPER. CT. CRIM. R. 16; D.C. SUPER. CT. CRIM. R. 12.1, 12.2, 16; FED. R. CRIM. P. 16; GA. CODE ANN. §§ 17-16-1 to -10; IOWA R. CRIM. P. 2.14; KAN. STAT. ANN. §§ 22-3212, 22-3218 to -3220; KY. R. CRIM. P. 7.24; LA. CODE CRIM. PROC. ANN. art. 716–729.6; N.Y. CRIM. PROC. LAW §§ 240.60–90, 250.10–40; R.I. SUPER. R. CRIM. P. 12, 16; S.C. R. CRIM. P. 5; S.D. CODIFIED LAWS §§ 23a-9-1, 23a-10-1, 23a-13-1; TENN. R. CRIM. P. 12.1–12.3, 16; UTAH R. CRIM. P. 15, 16; VA. SUP. CT. R. 3A:11; WYO. R. CRIM. P. 12.1–12.3, 16. Subject to some updates, additions, and reclassifications added here, this classification of state discovery laws and the those that follow can be found at WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 20.2(b) nn.10, 17, 33-36 (4th ed. 2016).

23. Some federal courts, however, require pretrial disclosure of witnesses as a matter of local court rules, a standing court order, or court orders in specific cases. *See* McConkie, *supra* note 13 (collecting and discussing such local rules and orders). Some state courts may do the same.

24. ALASKA R. CRIM. P. 16; FLA. R. CRIM. P. 3.220; MINN. R. CRIM. P. 9.01–9.05; N.J. CT. R. 3:13-3, 3:13-4; N.C. GEN. STAT. ANN. §§ 15A-902 to 15A-910. Indiana codifies some disclosure rules in state statutes, but most discovery obligations are defined by local court rules, which are generally very broad. *See* IND. CODE ANN. §§ 35-36-2, 35-36-4 (notice of defenses); *id.* § 35-36-11-2 (notice to introduce forensic evidence); *id.* § 35-37-4-3; IND. R. TRIAL PROC. 30 (civil deposition rules apply to criminal cases); IND. VANDERBURGH SUPER. CT. CRIM. R. 2.04 (prosecutor and “law enforcement agencies which are involved in the case shall produce to the defense attorney the entire case file, including a list of all evidence held,” but defense attorney must keep some witness identifying information confidential).

25. N.J. CT. R. 3:13-3(b)(1)(F).

26. N.C. GEN. STAT. ANN. § 15A-903(a)(1)a.

The remaining states can be described as adopting intermediate types of disclosure rules. Seven states require modestly more disclosure than the federal rule; all require at least disclosure of trial witnesses.<sup>27</sup> The rest—the largest group, comprised of nearly half the states—impose still broader disclosure standards, generally including prior statements and criminal records of intended trial witnesses.<sup>28</sup> Among the states with broader discovery, five even allow defendants to take pretrial witness depositions on nearly the same terms that civil litigants do (although sometimes without the defendant present), and others allow depositions upon a somewhat generous standard of good cause, such as a witness’s refusal to grant a voluntary interview.<sup>29</sup>

Beyond these substantive differences, states differ in how exchanges of evidence are administered and how discovery disputes are settled. One division follows from how jurisdictions allocate responsibility for the scope of disclosures between prosecutors and judges. Although parties handle most discovery issues everywhere, generally the states with broad-discovery rules give judges a somewhat greater role. To get an exception to a disclosure obligation, prosecutors in these states often need judicial permission; alternately, they can withhold evidence initially and judges can then review the nondisclosure to confirm it is justified by circumstances such as threats to witness safety.<sup>30</sup> These states also tend to give judges explicit discretionary authority to expand

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27. ARK. R. CRIM. P. 17.1–19.7; ARK. CODE ANN. § 16-89-116; CONN. PRAC. BOOK §§ 40-1 to 40-43; MASS. R. CRIM. P. 14; NEB. REV. STAT. §§ 29-1912 to 29-1927; NEV. REV. STAT. §§ 171.1965, 174.233 to 174.235; PA. R. CRIM. P. 567–573 (witness names disclosed only at discretion of court upon showing by defense); W.VA. R. CRIM. P. 12.1, 12.2, 16.

28. ARIZ. R. CRIM. P. 15.1–15.9; CAL. PENAL CODE §§ 1054.1–1054.9; COLO. R. CRIM. P. 16; HAW. R. PENAL P. 12.1, 16; IDAHO R. CRIM. P. 12.1 & 16; ILL. SUP. CT. R. 412-415; 725 ILL. COMP. STAT. ANN. 5/114-13; ME. R. CRIM. P. 16; MD. R. CRIM. P. 4-262, 4-263; MICH. CT. R. 6.201; MICH. COMP. LAWS ANN. §§ 767.40a, 767.94a, 768.20, 768.21, 768.21b, 768.27a; MISS. URCCC 9.04–.07; MO. R. CRIM. P. 25; MONT. CODE ANN. §§ 46-15-322 to 46-15-329; N.H. R. SUPER. CT. 98, 99-a; N.M. DIST. CT. R. CRIM. P. 5-501, 5-502; N.D. R. CRIM. P. 12.1, 12.2, 16; OHIO R. CRIM. P. 12.1 & 16; OKLA. STAT. ANN. tit. 22, § 22-2002; OR. REV. STAT. §§ 135.815–135.845; TEX. CODE CRIM. PROC. ANN. art. 39.14, 39.15; VT. R. CRIM. P. 12.1, 16; WASH. SUPER. CT. CRIM. R. 4.7; WIS. STAT. ANN. § 971.23.

29. See FLA. R. CRIM. P. 3.220(h)(7); IND. CODE § 35-37-4-3; IND. R. TRIAL PROC. 30; IOWA R. CRIM. P. 2.13(2); MO. SUP. CT. R. CRIM. P. 25.12(c), 25.15; VT. R. CRIM. P. 15; see also ARIZ. R. CRIM. P. 15.3(a) (deposition allowed if testimony is “material” and witness “will not cooperate in granting a personal interview”); ARIZ. R. CRIM. P. 39(b)(8)-(11) (victim’s right to refuse an interview or a deposition with defense, or to have support persons present).

30. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c); UTAH R. CRIM. P. 16(b)(9)(A)(3), 16(b)(9)(B) (defense can seek review of prosecution’s redactions of digital media evidence); CAL. PENAL CODE § 1054.7.

discovery requirements.<sup>31</sup> In states with minimal disclosure duties, by contrast, prosecutors alone generally decide whether to disclose more than the minimum the rules require, and defendants usually have no right to seek a judicial order that dictates otherwise. Virginia, a state with very limited disclosure provisions, authorizes judges to “deny, restrict, or defer” discovery but not to expand discovery obligations beyond what the statute provides.<sup>32</sup> But in some narrow-disclosure jurisdictions, judges have some authority to increase disclosure duties, at least as to timing.<sup>33</sup>

Discovery laws vary in other administrative respects as well. Some state statutes require disclosure from prosecutors or both parties even without a party request.<sup>34</sup> More often, disclosure is contingent on the opposing party making a formal request for it.<sup>35</sup> A few states require both that parties file motions for discovery and that courts grant the request.<sup>36</sup> Perhaps the most important difference among these options is that making disclosure contingent upon defense requests creates the possibility that defendants will not receive information from prosecutors because of their attorneys’ negligence or poor judgment.

Details about timing differ as well. Some require prosecution disclosures as soon as an indictment is returned, or as soon as practical after the charge is filed or after a defense request. Some specify a deadline measured in the number of days after a charge is filed or after the defendant’s arraignment. Others set a deadline of 10 to 30 days before trial. This choice matters because early disclosure is necessary for well-informed negotiations about guilty pleas, which is how nearly all cases are resolved. Rules that mandate disclosure only a few days before trial reflect the outdated assumption that the purpose of disclosure is to prepare for trial, which in most cases never happens.

Presumably, these differences have effects on how prosecutors and defense attorneys actually handle criminal cases, but there is an important reason that law-on-the-books is not the same as law-in-practice. In apparently every state, disclosure obligations can be waived by defendants and prosecutors can

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31. See, e.g., UTAH R. CRIM. P. 16(b)(10) (“Upon motion of the defendant showing substantial need ... for additional material or information not otherwise covered by this Rule 16(b), ... the court in its discretion may order the additional material or information to be made available to the defendant.”).

32. VA. R. SUP. CT. 3A:11(f).

33. See McConkie, *supra* note 13 (citing examples of federal judge orders that expand on Federal Rule 16 disclosure duties).

34. See, e.g., CAL. PENAL CODE §§ 1054.1 & 1054.3; N.J. CT. R. 3:13-3(a)-(b).

35. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14; FLA. R. CRIM. P. 3.220(a) (requires “notice of discovery”).

36. See, e.g., VA. R. SUP. CT. R. 3A:11.

encourage those waivers. That means, absent trial judges' insistence otherwise, disclosure ultimately is a matter of party negotiation rather than legislative policy. Nonetheless, there is good evidence that state rules make a difference in what is disclosed. Prosecutors in broad-discovery states disclose more than their counterparts in narrow-disclosure states, and those same prosecutors disclose more after their states impose broader disclosure obligations than they did under rules that are more limited.<sup>37</sup>

## II. REVIEW OF TRADITIONAL ARGUMENTS

Since the Federal Rules of Civil Procedure adopted a revolutionary and influential model of broad pretrial discovery in 1938, lawyers and policymakers have debated whether, and to what degree, criminal discovery rules should be reformed in the same direction. The Federal Rules of Criminal Procedure, adopted in 1944, were dramatically narrower than their civil counterparts were, and for decades they influenced rule-makers in state justice systems to stick with similarly minimal duties. As noted above, more than a dozen states still do. But gradually, over decades, most states have departed from that model and expanded their disclosure obligations.

The key issues in debates about criminal discovery reform have been remarkably consistent. The same arguments that justify civil discovery support broader pretrial criminal disclosure as well. Parties will settle more cases when both know the evidence before trial. More importantly, they will negotiate outcomes that are more accurate because both are well informed about the evidence. The consensus is now strong that disclosure improves accuracy.

Several states adopted broader discovery rules in the wake of wrongful convictions that greater disclosure likely would have prevented.<sup>38</sup> Few any longer claim that "trial by surprise" is a plausible way to optimize truth-finding and achieve accurate judgments. And fairness arguments for broad disclosure are even stronger in the criminal than the civil context: the state should not treat

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37. See Jenia I. Turner & Allison Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (survey data finding North Carolina prosecutors disclose more than Virginia prosecutors); TEX. CRIM. DEF. LAW. ASS'N, *THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT* (2015) (reporting differences in disclosure before and after 2014 statutory reform); Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 245, 249, 260 (2006) (describing practices under broad-discovery rules in Florida and Connecticut).

38. Texas is one example. For a description of the wrongful conviction motivating reform there, see Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEX. TECH L. REV. 893 (2016).



trials as a “sporting contest,” nor should it “ambush” unprepared defendants. Disclosure provides some balance in light of the state’s advantages in investigation and evidence-gathering.<sup>39</sup> Advocates point to one other advantage as well. Greater limits on disclosure overall require prosecutors to make difficult judgments about the nature or value of evidence to the defense. Constitutional disclosure duties under *Brady* pose these challenges: prosecutors must sort out evidence that is “exculpatory” or “material”—determining evidentiary value before trial and sometimes without knowledge of other evidence that affects value. That difficulty has played a role in innumerable *Brady* violations, surely in part because the duty calls on prosecutors to think *against* their adversarial role—that is, to think whether an item would help the defense attorney.<sup>40</sup> Broad-discovery rules reduce this problem through two kinds of changes. One is to require prosecutors to disclose all evidence of a certain type—material or not, whether favorable to the defense or the state. The other is to transfer some decisions about disclosure to the *judge*, who does not have the same adversarial bias. Broad-discovery rules often require judges to approve specific nondisclosures based on some special risk such as witness safety. Narrow-discovery regimes leave these judgments in prosecutors’ hands by requiring no disclosures and letting prosecutors share information whenever they choose to voluntarily. Collectively, these arguments have persuaded a majority of state criminal justice systems to expand their pretrial-disclosure requirements.

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39 Two of the most prominent mid-century arguments in favor of broader criminal discovery were made by two of the most influential U.S. jurists of the twentieth century, William Brennan and Roger Traynor. See Brennan, *supra* note 1; Roger J. Traynor, *Ground Lost & Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964).

40. Prosecutors face challenges even in making judgments about mandatory disclosures. Miriam Baer has insightfully described how decisions to disclose exculpatory evidence can grow more difficult as litigation progresses. A prosecutor who recognizes exculpatory evidence early on will be more willing to disclose it if not dismiss the case in which she has so far invested little. But disclosure judgments become psychologically more challenging as litigation progresses and prosecutors invest more in the case. See Miriam Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015); see also John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2140-41 (2000):

[Voluntary prosecutor disclosures beyond what rules require] tends to work best when it matters least. Prosecutors aiming for guilty pleas have the strongest incentive to disclose in cases where their evidence is most overwhelming. In the weaker cases, the very ones where discovery is most likely to make a difference to the defendant, there is less incentive for a prosecutor to disclose and more reason to play “hard ball” when the rules permit it.

Opponents of broad disclosure for decades have stressed a core set of concerns that also speak to accuracy and, less convincingly, to fairness.<sup>41</sup> They worry that if defendants are told the identities of government witnesses well in advance of trial, some of them (or their fellow gang members) will intimidate, bribe, or harm those witnesses. Even if they do nothing, some witnesses will *feel* intimidated by some defendants' reputations and choose on their own not to cooperate with law enforcement. Additionally, revealing the identities of undercover informants or agents—or disclosing the existence of surveillance recordings—would compromise ongoing investigations and blow the cover of undercover operatives.<sup>42</sup> Some witnesses, especially victims, may have legitimate privacy interests that justify nondisclosure of, say, medical histories. Less realistically, some have speculated that, given forewarning of prosecution evidence, defendants could more effectively fabricate perjury or other false evidence that might unjustly prevent a conviction. Finally, broader disclosure rules raise worries about the greater costs and administrative burdens they put on parties, especially prosecutors' offices. Beyond these concerns, narrow-discovery advocates insist that most prosecutors treat defendants fairly and voluntarily disclose more than statutes require, making broader disclosure mandates unnecessary.

Given that most states now operate with disclosure rules that are broad enough to confront these risks, we have plenty of evidence to settle these debates in practical experience in the “laboratories of democracy.” A large majority of states, after all, require at least advance disclosure of trial witnesses and so have experience in assessing and managing risks of witness intimidation or informants' secret identities.

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41. Two of the classic judicial arguments against disclosure to criminal defendants can be found in *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (arguing against discovery in criminal cases); and *State v. Tune*, 98 A.2d 881 (1953) (justifying limited criminal discovery rules and drawing a dissent from then-state justice William Brennan). More commonly now, opponents of broad discovery are prosecutors and police in jurisdictions without broad discovery, sometimes joined by victims' rights advocates. See, e.g., Michael R. Doucette, *Virginia Prosecutors' Response to Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 415 (2016) (Virginia prosecutor); Vincent Stark, *New York Discovery Reform Proposals: A Critical Assessment*, 79 ALBANY L. REV. (forthcoming 2017); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675, 684 (1988-89) (noting prosecutor, police, and victim-advocate opposition to criminal depositions).

42. Another argument, now less commonly invoked, was that the prosecution should not have to disclose much to defendants given that defendants are shielded from being compelled to testify by the privilege against self-incrimination. See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URBAN L.J. 1097, 1145-52 (2004) (noting and rebutting this argument and others).

### III. ANALYSIS AND ASSESSMENT

#### A. ASSESSING THE RISKS OF BROAD DISCLOSURE

How do states that operate their criminal justice systems with broad pretrial-disclosure requirements deal with the risks to witnesses, victims, and undercover agents? They simply provide targeted exceptions to disclosure obligations for exactly these circumstances. If prosecutors suspect a witness or victim is at risk, or that an informant needs ongoing secrecy, rules provide either that they (a) ask judges for exceptions to disclosure in those cases, or (b) withhold evidence initially and notify defendants or the court of the nondisclosure, after which their decision can be reviewed by the trial judge.<sup>43</sup> In addition, judges in all states have clear authority to issue a broad range of protective orders for witnesses and victims, with respect to privacy as well as security interests.<sup>44</sup> And most state rules specify that certain kinds of sensitive information are non-disclosable, such as witnesses' home addresses, financial information, and identification numbers. Some guard witnesses' and victims' interests also by limiting disclosure of their information to defense *counsel* while barring defendants themselves from access to it.<sup>45</sup>

In ways such as these, states over time have revised the details of their broad-disclosure rules in light of experience. It is telling that not a single state has abandoned broad disclosure in light of their justice system's experience with it. That is surely the best indicator that states that have tested broad disclosure find these safeguards to be effective at minimizing the genuine risks that are present in some cases. But it also bears emphasizing that state courts handle fewer cases with these risks than do federal courts, where prosecutions against organized crime and large-scale drug gangs are concentrated.<sup>46</sup> Most state prosecutions do not arise from the work of undercover agents or long-term surveillance

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43. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 39.14(c).

44. See, e.g., *id.* (limiting disclosure in light of "security and privacy interests of any victim or witness"); FLA. R. CRIM. P. 3.220(1) (court can restrict discovery "to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy"); N.C. GEN. STAT. ANN. § 15A-904(a4) (nondisclosure of victim impact statements); UTAH R. CRIM. P. 16(e) ("reasonable limitations" of "sensitive information" to "protect victims and witnesses from ... undue invasion of privacy").

45. See, e.g., CAL. PENAL CODE § 1054.2; TEX. CODE CRIM. PROC. ANN. art. 39.14(f); IDAHO R. CRIM. P. 16(d)(1)(C).

46. Criminal cases prosecuted in the federal justice system much more often target criminal organizations and involve bigger undercover operations. Those differences support stronger arguments for its long-standing system of severely restricted disclosure, so I leave aside here any discussion of reforms in that unique setting. See generally John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995).

operations. And while witness harassment is a real concern in some cases, the best evidence suggests that it rarely results *from disclosure*.<sup>47</sup> That is because defendants often have other ways (particularly in domestic-violence cases) of learning victims' and witnesses' identities without any help from the state.

The risk that defendants' fabrication of evidence would increase with advance knowledge of the state's evidence was always a less serious concern. That is partly because withholding disclosure can at best *shorten* defendants' opportunities for such mischief. A state cannot eliminate the issue because defendants watch the government present its trial evidence before they present their own. On top of that, there is little reason to think that defendants have much luck defeating government evidence with their own self-serving testimony, even if they can enlist supporting perjury from family or friends. (Physical evidence or records are hard to fabricate, even with advance notice.) Defendants face inherent credibility challenges even when they tell the truth. Finally, it is worth noting that civil litigants face the same temptations to fabricate and should be more successful at it given their broad-discovery rules, yet that problem has not crippled modern civil litigation.

In sum, the arguments against broad criminal disclosure requirements seem to be definitively settled by the collective experience of the majority of states, which have operated with some version of such rules for many years. Large states such as California, Florida, and New Jersey, where law enforcement agencies confront more than their fair share of violent and well-organized criminal offenders, have long experience under rules that provide for the broadest pretrial disclosure found anywhere in the United States.

The case for limited disclosure is strongest in cases with violent offenders and gang-related criminal activity, especially for serious charges in which the stakes are highest. But these cases are a fairly small portion of state criminal prosecutions.<sup>48</sup> Homicide prosecutions in particular often depend on witness information or testimony, but homicides make up less than 1% of state-court felony caseloads. *All* violent crimes comprise only about a quarter of state felonies.<sup>49</sup> Assault cases, which are roughly 12%, are an important example.<sup>50</sup>

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47. Roberts, *supra* note 42, at 1145-52 (citing a Florida study on witness intimidation).

48. Given the overlap in state and federal crimes and the focus of federal prosecutors on more complex and more serious offenses, many cases that present the greatest problems for broad disclosure are shifted to the federal system, where the limited discovery system is well entrenched. See Miriam Baer, *Some Skepticism about Criminal Discovery Empiricism*, 73 WASH. & LEE L. REV. ONLINE 347, 356-57 (2016); Jeffries & Gleeson, *supra* note 44.

49. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 2-3 & tbl. 1 (2013).

50. *Id.* at 2.

By definition, they involve both injured victims and violent defendants, and most assault prosecutions depend on evidence from victims and (less often) other witnesses. But most defendants and victims in assault cases have pre-existing relationships.<sup>51</sup> The same is true in rape cases, which constitute about 1% of felonies.<sup>52</sup> These victims can benefit from protective orders, safe houses for victims, and other security assistance, but limiting disclosure of victims' identities (as opposed to their addresses or locations) usually serves little purpose. When it occasionally does, special exceptions permit nondisclosure.

Victims' interests are a central concern of criminal process,<sup>53</sup> but many prosecutions involve no direct victims at all, and most felony charges are for nonviolent offenses. Based on data from the 75 most populous counties, drug crimes are the single largest felony-offense category in state courts and account for roughly a third of defendants.<sup>54</sup> State-court drug offenses rarely involve victims, or even civilian witnesses who could be at risk of harm. The key testimony typically comes from law enforcement officers or their informants.<sup>55</sup> Law enforcement officers are less vulnerable to intimidation, and—as noted—all disclosure rules limit disclosures about informants; many also restrict police officers' personal information such as home addresses. Most drug prosecutions are based on police surveillance, police-managed undercover buys, or other sting operations. Prosecutors are most likely to charge in such cases when they have police witnesses, audio/video recordings, and “pre-recorded buy money” from the sting.<sup>56</sup> Pretrial-disclosure rules always accommodate the central concern in this context of confidentiality for still-active undercover agents or surveillance devices. In light of this, state criminal dockets are well-suited for

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51. See JOSEPH PETERSON ET AL., NAT'L INST. OF JUSTICE, THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 42-54 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf> (study of 859 assault cases in Los Angeles and four Indiana cities). The same study found that, out of 400 homicide cases, 15.8% had eyewitness reports from *victims* who spoke to police before they died. *Id.* at 74-76.

52. *Id.* at 90-91 & tbl. 17 (in a study of 602 rape cases in Los Angeles and four Indiana cities, finding defendant was a stranger to the victim in 21.1% of cases, a friend/acquaintance in 42.7%, and a family member in 36.2%).

53. See generally Paul G. Cassell, “Crime Victims’ Rights,” in the present Volume.

54. REAVES, *supra* note 49, tbl. 4.1. The next largest category—roughly three in ten felony charges—is property offenses, with burglary the most common. *Id.*

55. For a discussion of informants, see Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report.

56. Besiki L. Kutateladze et al., *Does Evidence Really Matter? An Exploratory Analysis of The Role of Evidence in Plea Bargaining in Felony Drug Cases*, 39 LAW & HUM. BEHAV. 431, 433 (2015) (analyzing data from over 1,000 New York County drug cases, finding “prosecutors made more punitive charge [bargain] offers when they had audio/video evidence,” among other types of evidence).

discovery rules in which disclosure is the general rule and nondisclosure the exception. Narrow-discovery rules do it the other way around: nondisclosure of most information is the rule, with prosecutors free to grant exceptions and disclose more when they choose.

On top of these practical considerations, limited pretrial-discovery obligations are in tension with prevailing rules of professional ethics and best-practice standards. Somewhat beyond the constitutional standard, one of the *ABA Model Rules of Professional Conduct* requires that a prosecutor “make timely disclosure to the defense of all evidence or information ... that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information.”<sup>57</sup> The *ABA Criminal Justice Standards* advise that prior to a plea agreement, “the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.”<sup>58</sup> They “should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules.”<sup>59</sup> Relatedly, “[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of ... the evidence likely to be introduced at trial.”<sup>60</sup>

#### *B. CONCLUSION: EXPLAINING RESISTANCE TO BROAD DISCLOSURE*

What, then, accounts for the differences that remain among state justice systems? It is puzzling that relatively similar states operate under very different discovery regimes. For example, North Dakota’s rules are broader than South Dakota’s, and North Carolina’s are much broader than those in neighboring Virginia or South Carolina. The steady march of states toward adopting broader discovery rules, together with the patchwork of recalcitrant states that still resist these reforms, suggest an answer. Whether a state sticks with a narrow-discovery system does not turn on unique state conditions that make broad discovery

57. AM. BAR ASS’N, MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

58. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-5.6(f) (4th ed. 2015).

59. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS—PLEAS OF GUILTY standard 3-5.6(f) (3d ed. 1999).

60. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION standard 4-6.1(b) (4th ed. 2015); *see also* STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION guideline 6.1(A) (2011), *reprinted in* 74 TEX. BAR J. 616, 626 (July 2011).

unworkable. Instead, it is a product of entrenched local customs and professional culture, which reinforce a bias for the status quo. In many places, that probably combines with policymaking procedures that make reform easy to hinder.<sup>61</sup>

## RECOMMENDATIONS

For nearly half the states—those with the most limited disclosure obligations that mimic or barely exceed the federal rules—the agenda is straightforward. A half-dozen states have operated under the broadest models for pretrial discovery for decades, and a majority have years of experience with notably more-expansive rules than the minority retain. Broad rules, and the safeguards that accompany them, have been tested in a variety of contexts including both large and small metropolitan areas, and high- as well as lower-crime jurisdictions. The evidence is in. Broader discovery—far beyond the federal model—is feasible for all state justice systems.

### A. SUBSTANTIVE RECOMMENDATIONS

At a minimum, states that currently retain the most limited statutes should reform their disclosure statutes to require:

1. disclosure of the witnesses who provide relevant evidence for the state and who the prosecution would call if the case went to trial, along with the witnesses' relevant prior statements, their criminal records and other information affecting their credibility, and a means for defense counsel to contact or interview those witnesses;
2. defense access to all medical examinations or expert forensic analysis related to the case in the state's possession, even if the prosecution does not intend to use the information at trial;
3. copies of police reports and other relevant reports or resources from investigators, such as body-cam and dash-cam footage;
4. disclosure—modestly beyond the constitutional requirements—of all evidence in the possession of law enforcement agencies that might be favorable to the defense (so that prosecutors do not have to struggle with decisions about what information could be “material” to the defense); and
5. disclosure of codefendants' statements even if they will be tried separately from the defendant.

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61. See Turner & Redlich, *supra* note 37 (comparison of Virginia and North Carolina disclosure practices).

All these disclosures should be accompanied by the standard limitations: judges should have the power to grant (or review) prosecution exceptions to disclosure for active informants, ongoing investigations, and the redaction from police reports and other sources of private information about victims or witnesses. As an alternative for some of this sensitive information, such as victim/witness contact information, disclosure can be limited to defense attorneys while barred to defendants themselves. Notice that this list leaves off additional disclosures that several states have long required: state disclosure of non-witnesses who have relevant information, and notice about which law enforcement personnel were involved in evidence seizures.

### B. ADMINISTRATIVE RECOMMENDATIONS

Beyond these substantive reforms, three administrative ones are important:

1. The timing of disclosure should be early in the process, so that both parties are well-informed during plea negotiations. Disclosure should be set soon after charges are filed (and, following New Jersey's model, should accompany a *pre-charge* offer of a plea bargain), rather than measured backward from the scheduled date for a trial that, in all likelihood, will never occur. Early disclosure fits with the criminal justice system we really have—one in which 90% or more of convictions come by guilty pleas, and jury trials are rare. Early disclosure makes it possible for the adversarial system to work in the pretrial stage, where adjudication now nearly always occurs.
2. Disclosure should be straightforwardly required by statute, rather than contingent on one party requesting disclosure from the other, or on a judicial order to disclose in each case.
3. Following the practice in Texas, attorneys on both sides should be required to confirm that they have made their required disclosures, either in a signed writing or by oral affirmation on the record in court. That duty not only prompts lawyers to double-check that they have met their obligations but also provides a basis for judicial or bar-imposed sanctions against those who fail to.

One additional administrative practice is critically important, but it is not easily codified in a statute; it depends instead on judicial vigilance. Some leeway for the parties to negotiate waivers of disclosure obligations are a practical necessity. But disclosure statutes could be rendered meaningless if prosecutors routinely insist that defendants forgo much or all of the information for which the rules provide, and if defense attorneys, whether by lack or diligence or as concession to prosecutorial pressure, too often agree to broad waivers. The



evidence from broad-discovery jurisdictions such as North Carolina suggests that, once expansive rules are in place and attorneys on both sides see that the obligations are feasible,<sup>62</sup> the professional culture adjusts to new “default” practices of broader disclosures. But judges can play a crucial role in reinforcing a custom of broad discovery, by issuing standing orders that specify disclosure duties or by requiring both attorneys during guilty-plea hearings to describe and justify substantial discovery waivers.<sup>63</sup>

### C. DEFENSE DISCLOSURES

Again, all of these practices have been well-tested in many states. But for them to win adoption in the holdout states, it is fair (and likewise well-tested) for expanded government disclosure obligations to be accompanied by additional disclosure requirements for the defense as well. Nearly all states already require defendants to give advance notice of any expert evidence and of witnesses they will use for certain defenses (such as alibi, self-defense, and insanity), and also to cooperate in “giving evidence” through means such as blood tests or participation in identification lineups. It is a minimal and fair burden to require also that the defense reciprocate by providing the names and statement summaries of their intended trial witnesses.

### D. PRACTICAL SUPPORT

To ensure that broad-disclosure rules succeed without unduly burdening or confusing busy attorneys, all states would be well-served by following the example of Texas and other jurisdictions that provide for ongoing training of prosecutors (and defense attorneys) about disclosure rules, especially when they adopt new reforms.<sup>64</sup> Finally, state policymakers should consider another way to ease the cost and administrative burdens of disclosures, especially given that evidence sources are steadily increasing—especially in the form of digital information such as dash-cam, body-cam, and surveillance videos, as

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62. See Turner & Redlich, *supra* note 37. On the other hand, some Texas prosecutors initially sought to minimize their disclosures by seeking defense waivers in the first year after the state’s new discovery law took effect. TEX. APPELEED & TEX. DEF. SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT’S FIRST YEAR 31-35 (2015).

63. At the insistence of prosecutors, waivers of discovery and many other rights have become increasingly common in federal prosecutions. See generally Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015). On the other hand, some federal judges have used their authority to issue standing order or enact local court rules to require broader or earlier disclosure. See McConkie, *supra* note 13.

64. See TOWARDS MORE TRANSPARENT JUSTICE, *supra* note 62, at 21-25 (describing training programs after discovery reform).

well as forensic analysis of cell-phone databases and other digital archives.<sup>65</sup> These developments are a boon for accuracy and accountability in criminal justice, but they add to practical challenges, particularly for prosecutors. Many local prosecution agencies lack the technical capacity for electronic case management and evidence storage enjoyed by their counterparts in better-funded localities and now commonly used in civil litigation and private law firms.<sup>66</sup> States could greatly assist their local prosecution offices, both in general and with respect specifically to sharing evidence, by assisting those offices (and local courthouses) in acquiring the technology for electronic case management, document filing, and evidence disclosure.

### SUMMARY OF RECOMMENDATIONS

1. State law should require prosecutors to disclose names, prior statements, and other key information about their intended trial witnesses.
2. The defense should have access to all of the prosecution's expert reports and forensic analysis related to the case, as well as copies of police reports and other investigation resources such as police camera videos.
3. Prosecutors should give defendants *all* evidence from law enforcement agencies that might be favorable to the defense, rather than trying to decide which evidence will be "material" for the defense; they should also disclose codefendants' statements even if they will be tried separately from the defendant.
4. Disclosure should occur early in the process, soon after charges are filed, and statutes should mandate it for both parties, rather than making one party's disclosure contingent on what the other does.
5. Attorneys on both sides should have to affirm personally that they have fulfilled all their disclosure duties.
6. Judges must be vigilant in preventing attorneys from developing a local custom of agreeing to waive disclosure duties.

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65. For a discussion of digital surveillance, see Christopher Slobogin, "Policing, Databases, and Surveillance," in Volume 2 of the present Report. For a discussion of forensic evidence, see Erin Murphy, "Forensic Evidence," in the present Volume.

66. See *THE COST OF COMPLIANCE*, *supra* note 37 (describing electronically stored evidence and difficulties local prosecutor offices in Texas that lack electronic evidence or case-management capacity).

7. Defendants should continue to disclose expert testimony and analysis that they will rely on at trial and to cooperate with the state's evidence discovery by participating in blood tests, ID lineups, and the like.
8. States should ensure that prosecutors are continually trained on their disclosure obligations, and should assist their prosecutor offices with the resources they need to handle growing volumes of digitally stored evidence such as surveillance video.



# Forensic Evidence

*Erin Murphy\**

*The field of forensic science has come under increasing scrutiny in the past decades. DNA-exoneration cases revealed the pervasive problem of misuse of forensic evidence, blue-ribbon panels of experts have critiqued common methods of forensic science as fundamentally unsound, and a series of laboratory scandals have called into question the integrity of the institutions and actors who deliver forensic findings. Although this attention reveals a system of scientific evidence that is badly broken, the body of scholarly and governmental criticism of the field, along with innovations and expertise at the state and national level, offer clear pathways to reform. This chapter aims to distill that wide body of work into a broad diagnosis of the problems presented in the current state of forensic science, and synthesize some of the best and most promising proposals for reform.*

## INTRODUCTION

The task of appraising the treatment of forensic evidence in the criminal justice system and setting out recommendations for reform requires first defining the term “forensic evidence.” On its face, forensic evidence means evidence derived from the use of a field of science or the scientific method in order to investigate and prove crimes. Accordingly, the phrase encompasses a broad range of disciplines—ranging from “softer” fields of study like psychology or social science to “harder” methods such as biology or chemistry. “Forensic evidence” thus includes everything from a DNA match to a mental-illness diagnosis to the results of a study that reveals cognitive biases in eyewitness identification.

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Because other chapters in this volume address some of the advances in social science most pertinent to criminal cases,<sup>1</sup> this chapter will focus instead on the methods that make up the heartland of forensic evidence. Specifically, in offering a critique and making recommendations, this chapter reviews fields such as DNA typing, fingerprint, fire science, and firearm, toolmark, fiber, hair, and bite-mark analysis. That said, many of the observations shared in this chapter apply across a wide array of methods and techniques, including those drawn from disciplines as diverse as medicine (e.g., “shaken-baby syndrome”) or social science (e.g., forensic psychology).

Fortunately, forensic science has received increased attention in the past decade. Early scholars offered trenchant critiques that highlighted the lack of a scientific foundation to support most familiar forensic methods, the lack of standardized qualifications and skills testing for forensic analysts, and the culture of law enforcement that pervades the field.<sup>2</sup> Those views, once considered outliers, have since been augmented and amplified by a new generation of scholars as well as scientific authorities.<sup>3</sup>

The signature assessment of forensic evidence remains the 2009 report by a blue-ribbon panel convened by the National Research Council of the National Academy of Sciences (NAS), *Strengthening Forensic Science in the United States*,<sup>4</sup> which surveyed a wide array of disciplines and offered a critical assessment of their status, while also proposing concrete suggestions for restructuring the delivery of forensic science to the criminal justice system. One of the clearest dictates of that report was the call to remove forensic science from the management and control of law enforcement, where it has historically settled. In 2016, the President’s Council of Advisors on Science and Technology (PCAST) issued a report titled *Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* that endorsed and amplified

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1. See, e.g., Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report; Richard A. Leo, “Police Interrogation and Suspect Confessions,” in Volume 2 of the present Report; Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report; John Monahan, “Risk Assessment in Sentencing,” in Volume 4 of the present Report.

2. Although this work is too voluminous to cite in full, and at the risk of leaving out others, some of the most prominent early scholars include Paul Giannelli, Michael Saks, Michael Risinger, Jane Campbell Moriarty, David Kaye, Jennifer Mnookin, Jonathan Koehler, and David Faigman.

3. See, e.g., Jennifer Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011) (interdisciplinary document urging the “development of a research culture” in forensic science).

4. NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter 2009 NAS REPORT].

the critical findings of the 2009 NAS Report.<sup>5</sup> Both reports contain a wealth of resources, including detailed assessments of specific disciplines and overarching recommendations for improving the use of forensic science in criminal courts.

As a result of the 2009 NAS Report, in 2014 the United States Department of Justice and the National Institute of Standards and Technology (NIST) jointly convened the National Commission on Forensic Science, a multidisciplinary body that issues its own recommendations.<sup>6</sup> At the same time, the agencies also jointly launched the Organization of Scientific Area Committees for Forensic Science (OSACs), a series of expert groups nested within NIST and tasked with the crafting of technical standards and guidelines for the practice of forensic science.<sup>7</sup>

The Commission served a critical role in marshaling expertise to provide balanced and reasonable recommendations on a wide array of topics.<sup>8</sup> Although not immune to criticism, it was widely considered a success. Yet sadly, after political changes in the executive branch, the Commission was disbanded by Attorney General Jeff Sessions.<sup>9</sup> It now appears that many of the tasks of the Commission will return to the exclusive control of prosecutors within the Department of Justice rather than a neutral entity that is primarily scientific in character and represents the full array of constituencies. If so, then important

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5. PRESIDENT'S COUNCIL ON ADVISORS ON SCI. AND TECH., *FORENSIC SCIENCE IN THE CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (2016) [hereinafter PCAST REPORT].

6. National Commission on Forensic Science, U.S. DEP'T OF JUSTICE ARCHIVES, <https://www.justice.gov/ncfs>.

7. Organization of Scientific Area Committees (OSAC) for Forensic Science, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, <https://www.nist.gov/forensics/organization-scientific-area-committees-forensic-science>. The stated goal was to "create a sustainable organizational infrastructure dedicated to identifying and fostering the development of technically sound, consensus-based documentary standards and guidelines for widespread adoption throughout the forensic science community." John M. Butler, *The National Commission on Forensic Science and the Organization of Scientific Area Committees: Proceedings of the International Symposium on Human Identification* (2014), <https://www.nist.gov/sites/default/files/documents/forensics/Butler-ISHI-Proceedings2014.pdf>. The OSACs are in some respects an outgrowth of the Federal Bureau of Investigation's Scientific Working Groups, one of which (pertaining to DNA) remains and which similarly were technical, field-specific bodies that set standards. Scientific Working Groups, FEDERAL BUREAU OF INVESTIGATION, <https://www2.fbi.gov/hq/lab/html/swg.htm>.

8. Recommendations have covered issues such as accreditation and proficiency testing, error correction and reporting, reporting and terminology issues, and pretrial discovery, among other things. See generally National Commission on Forensic Science, *Work Products*, U.S. DEP'T OF JUSTICE ARCHIVES, <https://www.justice.gov/ncfs/work-products-adopted-commission>. The Commission has weathered criticism, much of it grounded in the selection of the initial appointees.

9. See Erin E. Murphy, *Sessions is Wrong to Take Science Out of Forensic Science*, N.Y. TIMES (Apr. 11, 2017), [https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-forensic-science.html?\\_r=0](https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-forensic-science.html?_r=0).

progress is at risk of stalling, leaving the criminal justice system vulnerable to the very dynamics that gave rise to the crisis in forensic science in the first place.<sup>10</sup>

In light of these changes, it may be more important than ever to shore up existing improvements in the use of forensic evidence in criminal courts, and fortify against calls to dismiss or disregard the need for continued momentum. Against this background, this chapter addresses each of the major components essential to ensuring the integrity of forensic evidence—the scientific basis of evidence, its execution in a particular case, and the checks in place in the criminal justice system—and makes recommendations as to each.

## I. SCIENTIFIC BASIS

The scientific integrity of forensic evidence depends on its successful navigation of three safeguards: its methodological validity, its statistical validity, and its execution in a particular case. Unfortunately, as Table 1 illustrates, many familiar forensic techniques have long been admitted as evidence in criminal cases without meeting all—and often times *any*—of these foundational requirements.

### A. METHODOLOGICAL VALIDITY

Methodological validity refers to the method's scientific foundation. It measures whether the discipline is valid and reliable; that is, whether the method accurately measures what it purports to measure, and does so in a manner that generates consistent, reproducible results. Palm-reading may be reproducible in the sense that different readers, examining the same palm, would make the same judgments about the length of different lines and their significance, but it is not valid because there is no evidence showing that those readings in fact measure what they purport to measure (for instance, that the length or quality of your life turns on the lines on your palm). Conversely, a valid measurement (say, determining the height of a person) can be undertaken in an unreliable fashion (say, by checking shoe size). It is the two together—an accurate measure taken in a reliable way—that determines scientific legitimacy.

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10. Indeed, the Department of Justice and some prosecutorial professional associations have already occasionally proven a reluctant partner in much-needed reforms. See, e.g., Erin Murphy, *What 'Strengthening Forensic Science' Today Means for Tomorrow: DNA Exceptionalism and the 2009 NAS Report*, 9 J. L. PROBABILITY & RISK 7 (2010), <https://doi.org/10.1093/lpr/mgp030> (detailing history leading up to creation of NAS Report, as well as reactions to its issuance); see also *infra* note 12.



Nearly all of the forensic techniques familiar to laypeople from television dramas or media reports in fact lack this kind of rigorous foundation.<sup>11</sup> The range of support varies dramatically. Some methods have no scientific basis whatsoever, and future research is unlikely ever to establish such foundations. Other methods have surprisingly thin histories of empirical testing, but may become rigorous upon greater study. Some disciplines—such as fire investigation—have undergone recent revamping, having conducted research that invalidated familiar methods as nonscientific while also refining and improving legitimate aspects of investigation (such as chemical analysis). The 2009 NAS Report and the 2016 PCAST Report, although contested to some extent,<sup>12</sup> provide excellent templates for assessing the current state of the science across a range of disciplines. The 2009 NAS report also describes the history that led courts to regularly admit and rely upon nonscientific methods, placing blame largely at the feet of the historical entwining of law enforcement and forensic science.<sup>13</sup> Table 1 summarizes the state of the science, as recounted in these reports, for the most common disciplines.

Importantly, assessment of methodological validity is a dynamic, not static, process. As scientific knowledge advances, it may overturn long-held beliefs or improve upon prior practice. When such changes occur, the legal system must be able to adapt, rather than cling stubbornly to the old ways. History suggests that tension can arise between scientific culture, with its emphasis on challenge and refinement, and legal culture, with its emphasis on precedent, consistency, and finality. But if the criminal justice system is to properly accommodate scientific knowledge, it must devise structures that can accommodate evolution in scientific knowledge when it occurs.

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11. See generally 2009 NAS REPORT, *supra* note 4, at 127-82; PCAST REPORT, *supra* note 5, at 67-123.

12. Both studies were met with resistance of varying degree, typically from professional organizations in criticized disciplines, or from prosecutorial bodies. For example, the United States DOJ responded to the PCAST Report with a letter that critiqued aspects of the study, although it did not include citations to work it claimed the Commission had overlooked. *Comments on President's Council of Advisors on Science and Technology Report to the President*, FEDERAL BUREAU OF INVESTIGATION (Sept. 20, 2016), <https://www.fbi.gov/file-repository/fbi-pcast-response.pdf/view>. The National District Attorneys Association released a similar response, adding the tautological argument that the use of such evidence in court offered support for its scientific basis. Press Release, National District Attorneys Association, National District Attorneys Association slams President's Council of Advisors on Science and Technology report (Sept. 2, 2016), <http://www.ndaa.org/pdf/NDAA%20Press%20Release%20on%20PCAST%20Report.pdf>.

13. 2009 NAS REPORT, *supra* note 4.

TABLE 1: SUMMARY OF PCAST AND NAS ASSESSMENTS OF SELECT FORENSIC TECHNIQUES

METHOD	METHODOLOGICAL VALIDITY	STATISTICS	COMMENTS
Drug testing	Gas chromatography-mass spectrometry (GC-MS) for most controlled substances other than marijuana; well-established and generally reliable when performed according to established standards.	Not commonly included in reports, although such data should be included.	Field tests may be unreliable.  Precise weights require regular calibration of instruments.
DNA typing (STR)	Single-source and simple mixture DNA analysis using STR typing is well-founded and rigorously established.  Complex mixtures and mixtures involving low amounts of template require special care, and reliable methodologies for traditional analysis may not work properly on samples of low quantity or quality.	The statistics underpinning single-source and simple mixture DNA matches allow for quantitative probability statements, typically as a random match probability. The Combined Probability of Inclusion (CPI) should not be used in mixture cases, as it may be unfairly biased against the defendant.	Probabilistic genotyping software may provide a promising method for analyzing complex mixtures, but at present such software is validated only for mixtures of no more than 3 persons, where the minor contributor offers at least 20% of the DNA in the mixture.
Fingerprint	ACE-V method most commonly used, and judged foundationally valid. But it does not specify specific measurement criteria or match standards. Instead, it depends on subjective judgments of analyst. Evidence suggests the method is susceptible to analyst bias, and has a high false-positive rate.	Examiners have reported an identification (i.e., an individualized match), exclusion, or inconclusive findings. But there is not yet a statistical basis to assert individualization, although such research is underway.	As studies continue, latent print identification may move from a subjective to objective field. As a subjective discipline, analyst training, proficiency, and protection from bias is critical.
Firearm/toolmark identification	Methodology identifies using “class characteristics” and “individualizing marks.” PCAST declares that “firearms analysis currently falls short of the criteria for foundational validity,” and NAS cautions that “not enough is known about the variabilities among individual tools and guns,” and there is a lack of established match protocol.	Analysts may testify that an item was the “source” of the mark, but this conclusion is based on subjective intuition rather than rigorous science.	As with other pattern-matching disciplines, research is ongoing to establish foundational validity. As a subjective discipline, analyst training, proficiency, and protection from bias is critical.
Hair analysis	Both PCAST and NAS judge hair analysis as lacking scientific foundation. NAS notes there are “no uniform standards on the number of features on which hairs must agree before an examiner may declare a ‘match’.”	The DOJ underscores that hair analysis “cannot lead to personal identification,” and NAS concludes that “no scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population,” thus no individualizing statements should be made.	A recent review by the FBI found that 90% of cases involving hair analysis contained erroneous statements, suggesting a need for great caution with respect to hair testimony. In place of hair analysis, nuclear or mitochondrial DNA testing offer more-reliable findings.

Bite-mark identification	PCAST concludes that “bitemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards.” NAS reports that “there is still no general agreement among practicing forensic odontologists about national or international standards for comparison.”	NAS states that “[a]lthough the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, no scientific studies support this assessment, and no large population studies have been conducted.”	Bite-mark evidence not only lacks any scientific foundation, it also is unlikely to establish such foundation due to variations in how human skin registers bite marks, the uncertain uniqueness of human dentition, and the variability in how bites transfer patterns. As PCAST reports, “available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bitemark with reasonable accuracy.”
Arson/fire investigation	Fire investigation involves a wide variety of methods, including chemical detection of accelerants and observation of fire debris to deduce burn patterns, etc. The use of established principles of chemistry is well-founded; in contrast, many canards of fire investigation (e.g., “alligatoring,” stippling, crazed glass) have been wholly discredited.	Fire investigators may testify that certain burn characteristics indicate (or even firmly establish) that a fire was intentionally set; many of those rules of thumb lack scientific basis. Even chemical tests that indicate the presence of an accelerant may be confounded by residue from burned household products with similar signatures.	Experiments are underway to improve the knowledge base and training of fire investigators, but such research already indicates that “flashover”—whole room involvement in a fire—may occur early and complicate analysis.
Impressions/pattern analysis (shoe, tire, etc.)	Class characteristics (e.g., determining shoe size or make from an impression) and individualizing marks (e.g., “randomly acquired characteristics”). Both lack established methodology and a rigorous empirical basis; PCAST judges individualizing efforts “not scientifically valid.”	Typically reported qualitatively not quantitatively, such as “positive identification” or “nonidentification,” but such statements unsupported by statistical surveys, and may mislead jurors if not properly contextualized.	Largely a subjective discipline, with a high degree of variation among analysts and little testing of many assumptions underlying the field. Current studies by NIST and FBI underway. As a subjective discipline, analyst training, proficiency, and protection from bias is critical.
Fiber analysis	NAS reports that “[N]o set standards, for the number and quality of characteristics that must correspond in order to conclude that two fibers came from the same manufacturing batch,” and “no studies of fibers ... on which to base such a threshold” or “whether environmentally related changes ... are distinctive enough to reliably individualize.”	Matches can provide only “class” based evidence, that fibers could have come from the same type of item, not individualization evidence.	More rigorous studies of the chemistry underpinning fiber analysis would enhance the discipline. As a subjective discipline, analyst training, proficiency, and protection from bias is critical.

*B. STATISTICAL VALIDITY*

Statistical validity is a shorthand for the value that can properly be ascribed to the results of a forensic matching test. It is an umbrella term meant to capture of range of ideas that underpin how an analyst reports the value of a forensic match. Typically, forensic evidence is introduced to prove the ultimate issue in a criminal case: the guilt of the defendant. This purpose often invites analysts and prosecutors to engage in “source attribution”—the claim that because a piece of evidence matches a characteristic of the defendant, it must have come from the defendant alone, or even more pointedly that it alone provides proof of the defendant’s guilt.

But nearly all forensic methods lack the scientific foundation necessary to establish that a piece of evidence in fact came from any one individual person to the exclusion of all others. And our legal culture dictates that the question of guilt is for the factfinder to answer, not any individual witness. Even if evidence may be said to match a person (typically, the defendant), it is necessary to properly contextualize that match within scientific parameters that show how common or uncommon such matches might be. For most nonscientific evidence, this is intuitive: If a witness says the robber had blonde hair, and the factfinder observes the defendant also has naturally blonde hair, the factfinder uses lived experience to gauge the value of that match, which might change if one lives in Minnetonka versus El Paso. Depending on the community, blonde hair may be more or less common and thus render the match more or less powerful evidence. But of course, even where blonde hair is rare, the match alone cannot provide proof that the defendant is the source; there remains the possibility that the defendant matches the evidence by coincidence.

When an expert witness reports on a match between a piece of forensic evidence and the accused, however, these background frequencies—the rate at which such matches occur by coincidence—are all too often not known, much less shared to the jury. Juries do not have intuitive sensibilities about the frequency of the loops and whorls of a fingertip match or the microscopic characteristics of a hair or fiber, and so they are wholly dependent on the analyst’s testimony not just to accurately report observed matches, but to contextualize the import of those matches. Yet all too often, analysts write reports or testify in court in a manner that inflates the value of the match beyond its scientific basis. In other words, analysts engage in source attribution, notwithstanding the lack of a statistical basis upon which to make such conclusions. In the scholarly literature, this is known as the “individualization fallacy”—the idea that simply because certain characteristics of a piece of evidence match the defendant,

it is possible to conclude that the defendant is the source of that evidence.<sup>14</sup> Forensic analysts may report simply that evidence “matches the defendant” without clarifying that a match alone does not mean the evidence must have come from the defendant, or even make much more powerful declarations—at times even inventing statistics or making unfounded, quantitative claims (“In my 10-year career, I’ve never seen a match this good.”)—notwithstanding the lack of a scientific basis upon which to make such claims.<sup>15</sup>

Both the 2009 NAS Report and the 2016 PCAST Report sharply criticize the practice of reporting the significance of a match in language that either misleads as to the strength of that match or outright fabricates a statistical basis. The National Commission on Forensic Science issued formal recommendations encouraging greater transparency in report-writing,<sup>16</sup> so that, at minimum, analysts make clear whether their judgments rest on identifiable and reliable criteria, or simply on their experience or personal intuitions (which, unless scientifically documented, are of course opaque and thus problematic). The Commission has also expressly discouraged the use of specific common but misleading language. For instance, the Commission urged rejection of the phrase “reasonable degree of scientific certainty,” which had been widely adopted by forensic analysts as an invented measure of the significance of their findings, without any scientific support.<sup>17</sup> All consumers of forensic evidence should pay close attention to the language used to express the significance of test

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14. The literature is full of scathing critiques and examples of the individualization fallacy. See, e.g., Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic Science Evidence*, 61 VAND. L. REV. 199 (2008). The mistaken equation of the probability of a random match with the probability that the defendant is the source even has acquired its own catchphrase: the “prosecutor’s fallacy.” William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor’s Fallacy and the Defense Attorney’s Fallacy*, 11 LAW & HUM. BEHAV. 167 (1987).

15. See, e.g., Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009) (surveying invalid testimony in wrongful conviction cases).

16. Nat’l Comm’n on Forensic Sci., Recommendation to the Attorney General Documentation, Case Record, and Report Contents (2016), <https://www.justice.gov/ncfs/page/file/905536/download> (“Reports should clearly state: the purpose of the examination or testing; the method and materials used; a description or summary of the data or results; any conclusions derived from those data or results; any discordant results or conclusions; the estimated uncertainty and variability; and possible sources of error and limitations in the method, data, and conclusions.”).

17. Nat’l Comm’n on Forensic Sci., Recommendations to the Attorney General Regarding Use of the Term “Reasonable Scientific Certainty” (2016), <https://www.justice.gov/ncfs/file/839726/download> (“Forensic discipline conclusions are often testified to as being held ‘to a reasonable degree of scientific certainty’ or ‘to a reasonable degree of [discipline] certainty.’ These terms have no scientific meaning and may mislead factfinders about the level of objectivity involved in the analysis, its scientific reliability and limitations, and the ability of the analysis to reach a conclusion.”).

results and whether such expressions in fact have sound scientific footing. Not every jurisdiction will be willing or able to conduct original research in order to determine the scientific validity of forensic methods. But every jurisdiction is capable of adopting and endorsing a rigorous approach to forensic evidence, using resources made available at the national level.

## II. EXECUTION

Even a methodologically sound, statistically supported technique must also be properly executed in order to produce trustworthy results. Proper execution is particularly important for many of the pattern-matching disciplines, because what little methodological validity exists depends almost entirely on quality of the execution. That is, the integrity of the findings in disciplines grounded primarily on an analyst's experience hinges directly on the integrity of the examination process. But even methods with greater scientific rigor, such as DNA testing, are still only as reliable as the laboratory and analyst that conduct that testing.

Indeed, the soundness of the testing process has as great a bearing on evidentiary reliability as anything that happens within the judicial process itself. Perhaps the single most culpable contributor to our current broken system of forensic science has been the misplaced belief that courts and lawyers would serve as a bulwark against faulty evidence. In fact, the first and most important line of defense against faulty forensics is a well-run laboratory staffed with trained and competent personnel, who engage in founded scientific inquiry using testing protocols designed to minimize and immediately remedy error. Unfortunately, the key components to scientific integrity remain lacking in all too many jurisdictions. Although some states, such as New York, Virginia, and Texas, have attempted to impose greater oversight on crime laboratories, those efforts have met with various degrees of success; more significantly, even these modest efforts are altogether absent from too many jurisdictions.

Generally speaking, there are three key components to effective oversight: meaningful accreditation, imposition of certification or qualification standards for analysts, and regular and effective proficiency testing. As described in greater detail below, accreditation determines the quality of the laboratory itself and its standard operating procedures; certification verifies that analysts have acquired certain skills or technical abilities necessary to perform their job; and proficiency testing ensures that the analyst's actual practice meets the prescribed standards of accuracy and excellence.

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### A. ACCREDITATION

Accreditation standards for crime laboratories, like those for other institutions, require that the laboratory meet certain pre-established criteria. Clinical testing laboratories that perform medical analysis are by and large reliable in the United States, no doubt in part because they must adhere to demanding standards of oversight.<sup>18</sup> In contrast, crime laboratories historically have not been required to meet any accreditation standards at all. Nevertheless, in the past decades, tremendous progress has occurred in accrediting labs, and as of now, roughly 88% of 409 publicly funded crime laboratories in the nation hold accreditation from a professional forensic-science organization.<sup>19</sup> The problem is that 73% of labs hold accreditation from ASCLSD/LAB,<sup>20</sup> which has proven too lax an accreditor.

ASCLD/LAB is a spinoff from ASCLD, which is a professional organization of crime-laboratory directors.<sup>21</sup> These original accreditation programs were largely decorative, with little by way of arduous review. Eventually, the accreditation arm of ASCLD broke off, forming an independent entity known as ASCLD/LAB. That group aimed to impose more-demanding standards, and eventually implemented an accreditation process that required laboratories to meet the international ISO/IEC 17025 standard.<sup>22</sup> ASCLD/LAB also gained prominence as a result of a rule imposed upon DNA testing laboratories by the FBI, which required that laboratories earn accreditation in order to access the national DNA database.

Unfortunately, the ASCLD/LAB accreditation process has largely proven a failure. Nearly every major lab has weathered a major scandal of incompetence or malfeasance,<sup>23</sup> and almost all were accredited by ASCLD/LAB. Critics charge that the accreditation process lacks the necessary seriousness to truly correct or deter bad practices. Accreditation reviews are primarily reviews of documents submitted by the lab, with advance notice, done by peers who are unlikely to penalize a fellow lab.

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18. See generally Clinical Laboratory Improvement Amendments of 1988, 42 U.S.C. § 263a; see also 42 C.F.R. § 493.

19. ANDREA M. BURCH ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBLICLY FUNDED CRIME LABORATORIES: QUALITY ASSURANCE PRACTICES, 2014 (Nov. 2016), <https://www.bjs.gov/content/pub/pdf/pffclqap14.pdf>.

20. *Id.* at 2.

21. See Am. Soc'y of Crime Lab. Dirs., <http://www.anab.org/> (last visited Apr. 1, 2017); see also ERIN MURPHY, *INSIDE THE CELL: THE DARK SIDE OF DNA* 59-65 (2015).

22. See MURPHY, *supra* note 21, at 59-65.

23. 4 DAVID FAIGMAN ET AL., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 30:15 (2016) (listing laboratories involved in just DNA-related scandals).

However, ASCLD/LAB was recently acquired by ANAB,<sup>24</sup> and there are indications that the accreditation process may become more rigorous. Truly meaningful oversight would require that every lab that conducts forensic testing—no matter the kind—be accredited, and by an accrediting agency that conducts intensive reviews. An excellent process of accreditation would involve random, unannounced inspections; regular review (clinical labs generally follow a two-year schedule, for instance, in contrast to five years for crime labs); and standards for alerting the accreditor when major errors are discovered and for determining and correcting the root cause of such errors, among other things.

### B. CERTIFICATION

Certification is a process by which an individual examiner demonstrates that she or he has acquired the specialized knowledge and expertise to carry out specific testing duties. Certification is akin to licensing; whereas a license is issued by the state to authorize an individual to engage in a particular practice restricted to licensees, certifications are typically voluntarily undertaken and simply signify that the person has met particular standards of achievement. Certifications or licenses may be awarded on the basis of a variety of assessment methods, including through “exams, proficiency testing, evaluation of education, training, and practical experience, adherence to codes of ethics, and other standards.”<sup>25</sup> As expected, any particular certification program can impose more or less demanding standards.

As with accreditation, the fraction of labs with at least one externally certified analyst, as well as the overall percentage of certified analysts, has steadily climbed over the past two decades. As of now, 72% of public crime labs have at least one externally certified analyst,<sup>26</sup> but far too few analysts overall have such certifications. Moreover, no jurisdiction requires that all forensic analysts be licensed, even as most jurisdictions require licensing for occupations as diverse as manicurists or private investigators. Without such requirements, an analyst may be entrusted to perform evaluations, supervise others, or train subordinates without having met any external requirements to ensure that the person is capable of performing the assigned tasks.

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24. ANAB stands for the ANSI-ASQ National Accreditation Board, an entity formed in the 1990s in response to the need for an American certification body that would ensure private-sector compliance with international standards developed to facilitate commerce in the nascent European Union. In 2011, it expanded into forensic science with the acquisition of Forensic Quality Services, an established accreditor of forensic laboratories; and in 2015 it acquired ASCLD/LAB. See generally ANSI-ASQ National Accreditation Board, *About ANAB*, <http://www.anab.org/about-anab>.

25. BURCH ET AL., *supra* note 19, at 3.

26. *Id.* at 6.



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### C. PROFICIENCY

Proficiency is a measure of a particular lab employee's actual performance. With regard to a forensic analyst, proficiency typically refers to measures designed to determine whether the analyst is executing forensic tests properly. The term can also refer to supervisors or others in the chain of evidence processing, who may likewise be tested to ensure that they are accurately performing their duties. Proficiency is distinguished from certification in that the latter measures whether the person knows the rules and standards of the job, whereas proficiency measures whether the person actually can fulfill their duties.

Proficiency tests may be conducted many different ways, and those variables affect the degree to which the test actually captures an individual's likely performance in normal working conditions. For instance, tests may be given internally by personnel within a laboratory, or administered by external authorities. They may be declared, so that the analyst is aware that the test is taking place, or blind, so that the analyst is unaware that his or her work will be scrutinized. Tests may mirror casework conditions, which entails the kinds of difficult judgments that an analyst makes in the field, or be conducted using artificially pristine or clear-cut samples designed to determine basic competence. And reviews may involve fabricated samples inserted into the regular routine, or they may involve post-hoc case reanalysis of actual work conducted by the analyst in a real case (called "case re-analysis"). For obvious reasons, each of these variables has significant effect on the degree to which a proficiency test actually measures typical field performance.

Proficiency testing has been a continued source of debate and controversy within the forensic-science community.<sup>27</sup> Without question, the most demanding measure of proficiency would involve blind testing, in fieldwork conditions, by an external tester. Perhaps second would be random case reanalysis, wherein an external reviewer randomly pulls a sampling of analysts' completed files and conducts a full re-analysis. Because these two approaches are more likely to uncover malfeasant or incompetent actors, numerous expert bodies have recommended that either blind testing or random re-analysis become a regular feature of laboratory oversight.<sup>28</sup> But some laboratories have

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27. See 2009 NAS REPORT, *supra* note 4, at 207-08 (recounting debate over feasibility of blind proficiency testing).

28. PCAST REPORT, *supra* note 5, at 58 ("[P]roficiency testing should *ideally* be conducted in a 'test-blind' manner—that is, with samples inserted into the flow of casework such that examiners do not know that they are being tested.").

insisted that such testing is too costly and not feasible, even as others have willingly implemented blind exams.<sup>29</sup>

For reasons that are not clear, the use of random case re-analysis and blind proficiency testing have declined in recent years, even as greater numbers of labs gain accreditation and greater attention has focused on the quality of forensic evidence. In 2014, only 35% of labs conducted random case analysis (down from 54% in 2002), and only 10% conducted blind exams (down from 27% in 2002).<sup>30</sup> These declines are worrying; although 98% of labs conduct some kind of proficiency testing, the vast majority of labs rely on declared tests to gauge proficiency.<sup>31</sup> Yet a declared test—which oftentimes does not even include samples that truly replicate the ambiguity or difficulty inherent in real-world conditions—is a poor means by which to judge an analyst’s typical work performance. The reluctance of accreditors and other oversight entities to require blind proficiency testing or regular random case re-analysis may be the single greatest factor contributing to continued laboratory failures.

### RECOMMENDATIONS

In nearly every jurisdiction, the governance structures of existing forensic science are inadequate to safeguard the integrity of forensic evidence. That is why so many jurisdictions have endured a major laboratory or analyst scandal of some kind. All too commonly, prosecutors and legislators cite the adversarial system itself as the best safeguard against admission of faulty forensic evidence, expecting that the courtroom or the legal process can somehow substitute for rigor and precision in the testing process itself. But the task of ensuring the integrity of forensic evidence begins at the crime scene, extends through the testing stage, and ends in the courtroom. The judicial branch ought to serve as the last, not first, line of defense against bad science.

Consistent with this vision, a wealth of expertise has emerged that provides guidance and instruction to jurisdictions seeking to overhaul their systems of forensic evidence. The list below draws upon that rich literature.

1. **Statewide oversight commission.** A handful of states, including New York, Virginia, and Texas, have created statewide commissions that oversee forensic science.<sup>32</sup> The duties, composition, and actual function of these commissions vary significantly, and not all are equally successful.

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29. *Id.* at 59 & nn.139-40.

30. BURCH ET AL., *supra* note 19, at 4.

31. *Id.*

32. See, e.g., TEX. CODE CRIM. PRO. ANN. art. 38.01 *et seq.*; 37 TEX. ADMIN. CODE § 651.1 *et seq.*; N.Y. EXEC. LAW § 995 *et seq.*; VA. CODE ANN. § 9.1-1109 *et seq.*

One determinant of success seems to be the balance of power on such commissions, which can easily tilt heavily pro-government, given that seats apportioned by constituency may naturally align prosecutors, police, and lab personnel together against a sole criminal defense attorney representative. Another imperative of success seems to be that the commission be housed independent of law enforcement or prosecutor offices, and staffed in an even-handed and independent fashion, including with persons formally trained in the scientific method. Commissions have also faltered as a result of inadequate resources or structures incompatible with the oversight expectations. A commission that meets a handful of times a year, composed of busy professionals supported only by a thin permanent staff, may simply not have the bandwidth to carry out a lengthy roster of duties or conduct searching inquiries. Success requires a substantial commitment—in time, personnel, and resources.

The Texas Commission, established in 2005 and then given expanded powers in 2015, has emerged as a model in many respects. Commission members—nine individuals appointed by the governor, half of whom by designation are academic faculty with scientific expertise<sup>33</sup>—have shown repeated willingness to directly confront shortcomings in forensic science. The Commission has issued guidance documents and ordered the reopening of compromised cases. The Commission manages an impressively transparent website, where it posts its official positions on scientific topics, offers an avenue to lodge complaints against specific labs or analysts, and issues comprehensive annual reports. In addition, as of 2015, the state Legislature has required that testing labs be accredited, and charged the Commission with overseeing that accreditation process.<sup>34</sup> The state likewise requires the Commission to create and execute a licensing program for analysts within certain forensic disciplines. In short, the Commission has proven itself indispensable to the project of ensuring

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33. Member Appointments, TEXAS FORENSIC SCIENCE COMMISSION, <http://www.fsc.texas.gov/member-appointments>. Interestingly, none of the seats are specifically reserved for law enforcement; and there is only one prosecutor and one defense attorney. By comparison, the New York Commission on Forensic Science has twelve members appointed by the government, and a third are reserved for persons connected with law enforcement or state crime labs. *See* N.Y. EXEC. LAW § 995-a (requiring two seats for persons connected with crime labs in the state, one for the director of the office of forensic services, and one for law enforcement, along with two criminal defense representatives and one prosecutor).

34. Unfortunately, the legislation exempts several disciplines, such as latent print examination and breath testing, from that requirement. 37 TEX. ADMIN. CODE § 651.6. For allegations involving unaccredited labs or disciplines, the Commission maintains disciplinary authority but cannot make findings of negligence or misconduct; it can only report observations and make recommendations.

methodological soundness, statistical competence, and integrity in the execution of forensic tests.

Texas provides one successful model, but each jurisdiction must respond to local needs in crafting its own commission. In all cases, however, properly staffed and resourced oversight bodies of this kind serve an important institutional role. They function as both repositories of information and watchdogs. In their best iteration, a commission of this kind might set out and enforce standards (or translate nationally set standards) for testing, report-writing and disclosure, and consistent terminology. Commissions can superintend the accreditation process, and flex their muscle in order to encourage outside accrediting agencies to adopt more-demanding review processes. In well-resourced states, such commissions might also identify areas of necessary research, and even foster or apportion funds in support of research activity.

Perhaps most importantly, statewide commissions can serve as coordinators and regulators in a field rife with error and misunderstanding. The Texas Commission, for instance, has undertaken discipline-specific investigative reviews in an array of fields, including microscopic hair analysis, fire investigation, bite-mark analysis, and DNA mixture interpretation. Those reviews may involve official statements about faulty forensics as well as reopening of closed cases. The goal is to generate, or transmit, authoritative findings that reflect a research-oriented approach to forensic disciplines, rather than simply perpetuate baseless methods because they are familial to legal actors.<sup>35</sup> The Commission has also conducted reviews of specific forensic scientists and laboratories,<sup>36</sup> and produced guidance and training documents for an array of actors.

However, it is important to note that a commission is not a stand-in for the difficult kinds of judgments that legislative, executive, and judicial actors must make regarding forensic policy. It exceeds the proper scope of

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35. See, e.g., Mnookin et al., *supra* note 3.

36. The Paul Coverdell National Forensic Science Improvement Act was intended to operate as a check on laboratory quality, because it conditioned receipt of grant funds on a laboratory's identification of an outside auditor to investigate allegations of serious negligence or misconduct. But, in keeping with concerns about prosecutorial or law enforcement oversight of lab quality, the Department of Justice—entrusted to enforce this provision—largely ignored its oversight responsibilities until the Inspector General criticized this neglect in an investigation. See Murphy, *supra* note 21, at 286; see also *id.* at 288 (detailing criticism of DOJ's seeming bias in awarding research grants).

a commission to set policy about compulsory DNA collection or privacy-impinging searches, for instance. Nor should executive or judicial actors consider the judgments of the commission unimpeachable.

A commission's findings may enhance and embolden a court's understanding of the reliability of a forensic method under the evidentiary rules, but it should not supersede the court's own responsibility to apply evidentiary standards of admissibility. And while a police department might be guided by a commission's dictates as to collection or handling procedures, absent express legislative authority, determinations of that kind ultimately fall to the executive branch.

Notwithstanding clear limits on its authority, an active, empowered commission with adequate resources and proper personnel can achieve great strides in safeguarding forensic integrity. A good commission would engage in methodological and as-applied preventative maintenance and error correction, setting best practices for the future while also demonstrating a willingness to identify past errors and engage in a transparent assessment and correction of their systemic, root causes. It would also serve as a repository and record-keeper, generating important data (about forensic practices in the state) that could be shared widely and made available for analysis and inspection.

- 2. Meaningful accreditation requirements for all laboratories.** As the prior section noted, accreditation ought to be compulsory for all testing laboratories. At the same time, current data suggest that most labs are already accredited; the problem is no longer lack of accreditation, but lack of *meaningful* accreditation. At this time, there is an opportunity to influence the manner in which crime-laboratory accreditation processes unfold, because the two major accrediting entities—known as ASCLD/LAB and FQS—have been subsumed into a single new organization, ANAB.<sup>37</sup>

A full accounting of the components of effective accreditation are too lengthy to recount here, but the critical components include requiring: that laboratories undertake certain bias-reducing strategies, given extensive

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37. ANAB even recently sought comments on the accreditation requirements they ought to impose on forensic laboratories. *Comments Sought on ANAB-ASCLD/LAB Requirements*, <http://anab.org/news/latest-news/comments-sought-on-anab-ascldlab-requirements/> (Nov. 28, 2016) (last visited Apr. 1, 2017). ANAB also administers the ABFT accreditation program, which accredits toxicology labs. In addition, a longstanding accreditor of non-forensic labs, known as A2LA, has recently sought to expand its forensic laboratory accreditation. See <https://www.a2la.org/>.

scholarly evidence of the problems of unconscious bias in testing;<sup>38</sup> that laboratories adopt a framework for root-cause analysis of significant errors that arise, and report transparently on those findings, rather than dismiss such problems as idiosyncratic or atypical;<sup>39</sup> that analysts undergo certification and regular, effective proficiency testing; and that meaningful inspections include surprise visits, random case re-analysis, or other means to ensure that the laboratory's true face, and not just its best face, is presented for evaluation.

**3. Certification/licensing and meaningful proficiency testing of analysts.**

Few states require that any forensic analysts be licensed, even though such standards of demonstrated competence are required for employees tasked with arguably less consequential work, such as manicurists or athletic trainers. Meaningful forensic reform would impose a licensing or certification standard on all analysts. Such requirements would require an initial demonstration of capability and be followed by regular proficiency testing and continuing-education requirements. Proficiency tests and certification requirements not only ensure an analyst's basic competence, they also can provide useful data as to the frequency and probability of error in the testing process.

In some disciplines, such as drug analysis, blind proficiency testing may be more feasible and common (in part due to the need to ensure that analysts do not substitute or remove controlled substances). In other disciplines, simulating casework may prove more challenging. But even where costs or logistics prohibit regular blind testing, no such limits preclude random spot checks of an analyst's prior work. Random case re-analysis, while not ideal, is preferable to a program wholly dependent on the analyst's performance on declared tests that often little replicate actual casework conditions.

Finally, it should be acknowledged that, for some disciplines, a certification and proficiency test process is likely not possible, because the underlying methodology is fundamentally unsound. But that is a reason to impose such requirements, not to avoid them. A discipline that cannot be objectively measured and assessed is one that has no place in evidence in the criminal courts.

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38. See, e.g., Itiel E. Dror et al., *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, 54 JUDGES J. 4, 8 (2015). Dr. Dror is likely the most recognized empirical expert in cognitive bias in forensic testing, with a large body of relevant work. See generally <http://www.ucl.ac.uk/~ucjtldr/>.

39. See, e.g., N.Y.C. ADMIN. CODE § 17-207 (requiring that municipal DNA testing laboratory engage in root cause analysis following any "significant event").

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4. **Training for legal actors.** Forensic disciplines are subject to change and evolution, as researchers make new findings or unseat received wisdom. Without clear conduits of this information, however, legal actors are unlikely to possess the wisdom necessary to perform their systemic roles. Apart from large jurisdictions with the capacity to develop dedicated dockets, the typical judge, defense attorney, or prosecutor may encounter any single forensic method only sporadically and infrequently.

Some critics charge that legal actors are simply impervious to education, and thus alternative solutions (such as independent, court-appointed experts or specialist teams of attorneys) pose the only way of ensuring forensic integrity. But such an approach is both unrealistic in the vast majority of jurisdictions, and perhaps too fatalistic. At the federal level, resource manuals and judicial trainings offer an opportunity for judges to learn about specific methods and their shortcomings. Prosecutors often have direct access to laboratory personnel, who typically align themselves with the government's interests. And defense attorneys have increasingly taken up the mantle of peer education through professional programs and continuing legal education trainings.

A state-level commission might be explicitly tasked with ensuring adequate opportunity for legal actors to acquire scientific expertise, including programs that cover fundamental principles of the scientific method and statistical competence. But even in the absence of a commission, resources must be made available on the state and local level for such education and access to expertise.

5. **Defense access to experts.** The problem of inadequate access to expertise particularly plagues defense counsel. All too often, counsel's ability to secure expert advice turns on the leniency of a court or judicial officer who must grant a request for added expenditures. But that process raises the specter of impropriety, both in that it requires the defense attorney to petition the judge, thereby compromising client confidentiality, as well as by placing an attorney at the mercy of the court in assessing the validity of the claim. What is more, the thin market for defense experts may mean that the kind of resources most valuable to a defense attorney—such as transcripts from prior testimony of the government's expert or consultations regarding the kind of available challenges to the evidence—are not available.

Ideally, a jurisdiction would make generous awards for defense access to experts, or endow institutional defenders with sufficient funds to

provide such services. But in reality, solutions that depend on large capital expenditures by the government, in favor of the defense, often face political obstacles.<sup>40</sup>

In 2010, North Carolina's Office of Indigent Defense Services, which is charged with overseeing indigent defense in the state, created the position of Forensic Resource Counsel (FRC).<sup>41</sup> That office, staffed by a single attorney, provides an array of services to indigent defenders in the state. The FRC oversees a collection of databases that provide information about state experts for both the prosecution and defense, free online training courses in an array of topics, state laboratory protocols and procedure documents, the latest scientific research, and pertinent news stories. The blog, which is regularly updated, serves as a conduit for important information, and the webpage offers a bank of motions and briefs that may serve as templates for everything from discovery to orders to suppress evidence or appoint experts. The FRC also provides limited consultation and referral services.

Of course, perhaps the most critical determinant of the success of a position of this kind is personnel; the attorney who originated the role and still serves in that position has shown remarkable industry and innovation in establishing the office. But apart from conducting a thorough job search, the precise job description could include specific mandates to generate and maintain materials like those outlined above.

Another benefit of a position of this kind is to give a statewide voice to the needs of criminal defendants as regards forensic science. A statewide resource counsel is well positioned to identify structural infirmities in the delivery of forensic evidence in the state, and to provide feedback to regulators and oversight entities—including a statewide commission, which might even appoint the counsel *ex officio*. A statewide resource counsel's office might also propose or comment on existing legislation, from the express standpoint of a representative of the defense community. This kind of insight may become even more critical as sophisticated forensic evidence continues to feature in ordinary criminal cases. For instance, DNA testing increasingly involves results from private, for-profit software companies that use secret algorithms to determine the significance of a DNA sample, and defense access to DNA databases is

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40. See, e.g., Eve Brensike Primus, "Defense Counsel and Public Defense," in the present Volume.

41. See North Carolina Office of Indigent Defense Services, <http://www.ncids.com/forensic/index.shtml> (last visited Apr. 1, 2017).



increasingly a point of contention. Digital forensics likewise relies upon technically sophisticated information that companies are often reluctant to reveal. As such evidence continues to surface in courts, it is imperative that institutional actors hear from those close to the ground—not just on the prosecution but also defense side—as to how best to ensure the integrity of such evidence.

6. **Legal reform to accommodate changes in science.** A final critical area of reform that the criminal justice system must undertake to ensure the reliability of forensic evidence involves the systemic response to changes in scientific knowledge. The problem is twofold: existing, even well-researched scientific methods may become eclipsed by newer, improved methods, and current techniques may be revealed problematic or infallible by future work, thereby calling the integrity of prior convictions into question. Both situations present challenges for a criminal justice system that heavily relies on finality and certainty in deciding cases.

Again, here, legal reforms in Texas provide a valuable template. In 2013, the state Legislature enacted a series of reforms aimed at providing convicted persons with an avenue of relief under habeas corpus in the event that science upon which the conviction was based was later discredited, or new scientific methods emerged that might establish innocence.<sup>42</sup> But too many jurisdictions still impose procedural hurdles to overturning convictions, even when the science upon which those convictions are based has proven demonstrably false.<sup>43</sup> Statutory reforms are needed to ensure that defendants have adequate access to evidence pretrial, as well as avenues for accessing and testing evidence,<sup>44</sup> or seeking redress for wrongful convictions, when the state of the science changes.

## CONCLUSION

This chapter offered several concrete suggestions for reforming forensic science, drawn from the author's own work as well as a rich scholarly literature. However, this list is by no means exhaustive. Some common recommendations were deliberately left off; for instance, the 2009 NAS report and many scholars have called for independent forensic crime laboratories. That recommendation, while fundamentally sound,

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42. TEX. CODE CRIM. PRO. ANN. art. 11.073 (allowing reopening of cases if scientific evidence “was not available to be offered by a convicted person” or that “contradicts scientific evidence relied on by the state at trial”). Around the same time, the state also passed the Michael Morton Act, which enhanced discovery requirements for criminal defendants.

43. See generally Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008).

44. With respect to DNA evidence, reforms must include avenues to allow defendants access to DNA database for exculpatory searches. See MURPHY, *supra* note 21, at 149-50 & nn.39-41.

has met with strong resistance at the state and national level, and thus it appears politically challenging at this time. Similarly, calls to increase funding and support for crime laboratories and their personnel, while also important, rest more upon the fiscal (and political) inclinations of legislators and less upon reasoned argument. In laying out the suggestions above, this chapter aimed to provide feasible, consensus-oriented targets for immediate and meaningful reform.

# Actual Innocence and Wrongful Convictions

Brandon L. Garrett\*

*In response to wrongful convictions, there has been a revolution in criminal procedure and in research in law and science. Scholars have increasingly studied the characteristics of known wrongful-conviction cases and they have conducted interdisciplinary research designed to assess potential changes to procedures used in criminal cases. Scientific bodies have made important recommendations based on this research, and in response, a wide range of jurisdictions have adopted noteworthy changes designed to safeguard crucial types of evidence, such as confession, forensic, and eyewitness evidence, during police investigations and at trial. As a result, both law and science have come together to produce tangible improvements to criminal justice.*

## INTRODUCTION

An entire criminal justice system can learn from its mistakes: just take the case of wrongful convictions, which, after coming to light as never before, including due to the modern technology of DNA testing, contributed to a wide variety of changes to criminal justice in the United States. Judicial opinions, academic research, criminal procedure reform legislation, changed post-conviction standards, new police practices focused on accuracy, new prosecution practices, and changes to legal education have all flowed from this focus on innocence. While in decades past it was thought to be rare if not impossible to convict the innocent, large numbers of exonerations in the U.S. have prompted wholesale re-examination of traditional rules that limited ability to raise new evidence of innocence post-conviction, as well as investigative procedures that did not accurately collect or document evidence. Indeed, similar forces have prompted a range of changes in other countries across the globe.

Accuracy has become an increased concern in criminal justice. Two broad areas of research into the nature of these wrongful convictions have influenced the understanding of how law and policy can improve accuracy of criminal convictions. First, descriptive research has analyzed the characteristics of

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known wrongful-conviction cases. One set of research has examined DNA exoneration cases, including due to their prominence and the clarity of the evidence of innocence in those cases. Post-conviction DNA testing has proven over 350 men and women innocent; 20 had been sentenced to death.<sup>1</sup> Additional research has studied broader groups of exonerations. The best known such research is that reported by the National Registry of Exonerations, which documents over 2,000 individuals who have been exonerated in the United States in just the past 20 years.<sup>2</sup> A body of empirical research has now explored the facts underlying DNA exonerations in the United States.

A second body of research, both scientific and legal, has increasingly focused on the causes of wrongful convictions and what mechanisms can improve accuracy. Archival and descriptive research has examined not just the characteristics of exoneration cases, but detailed how evidence became altered or erroneous during the investigation and adjudication of those cases. Qualitative and sociological research has studied the attitudes and culture of actors that can produce wrongful convictions. Experimental research has tested mechanisms that can produce errors in criminal investigations. Theoretical research has examined sources for cognitive errors and statistical errors, for example, that underlie wrongful convictions. Thus, wrongful-conviction research has involved interdisciplinary contributions from the social sciences, neuroscience, genetics, statistics, and law, among the relevant fields.

Each of these fields of study has resulted in suggested changes that can, for example, improve the accuracy of eyewitness identification procedure, confession procedures, forensics used in crime laboratories, and investigations more broadly. While responses to wrongful convictions differ widely across different jurisdictions, all legislatures in the United States have enacted statutes to permit broader post-conviction access to new evidence of innocence, and many have improved procedures concerning interrogations, lineups, and other types of evidence. Still larger numbers of individual policing agencies have adopted changes, with national and international agencies endorsing changes and a new focus on accuracy in policing. Likewise, prosecutors have created

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1. For a current count of such cases, see *Exonerated by DNA*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/all-cases/#exonerated-by-dna> (last visited July 30, 2017). For an in-depth study of the first 250 such cases, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011). For detailed data regarding DNA exoneration cases, see *CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE*, <http://www.convictingtheinnocent.com/> (last visited July 30, 2017).

2. A current count of all exonerations may be found on the National Registry's website. See NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited July 30, 2017).

“Conviction Integrity Units” tasked with reinvestigating closed cases. This chapter will discuss characteristics of known exoneration cases, the research on wrongful convictions, and then specific research focusing on particular ways to improve accuracy in order to prevent wrongful convictions. Some of those topics are explored in greater detail elsewhere in this volume so they will be only summarized here. Finally, this chapter concludes by describing accuracy-based policy reforms flowing from this body of research.

## I. THE RISE OF EXONERATIONS

### A. A DEATH ROW EXONERATION

“From this day forward, I no longer shall tinker with the machinery of death,” wrote Supreme Court Justice Harry Blackmun in 1994. Justice Blackmun added that “human error is inevitable,” and “our criminal justice system is less than perfect.”<sup>3</sup> What about “the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat,” Justice Antonin Scalia raged in response. “How enviable a quiet death by lethal injection compared with that!”<sup>4</sup>

The Justices were talking about the cases of Henry McCollum and Leon Brown, two brothers sentenced to death in North Carolina. The North Carolina courts had reversed the brothers’ convictions in 1988 on appeal due to an error in the jury instructions. After new trials, in 1991 McCollum was sentenced to death again and Brown was resentenced to life in prison.<sup>5</sup> When McCollum’s case did reach the Supreme Court in 1994, Justice Blackmun insisted that although the crime was “abhorrent,” there was “more to the story.” After all, McCollum had “an IQ between 60 and 69 and the mental age of a 9-year-old. He reads on a second-grade level.” Justice Blackmun wrote, “This factor alone persuades me that the death penalty in his case is unconstitutional.”<sup>6</sup> Yet the Supreme Court denied relief.

“Get to know Henry McCollum. He RAPED AND MURDERED AN 11 YEAR OLD CHILD,” screamed the political ads in North Carolina in 2010, attacking a “criminal coddler” candidate who supported a law to examine whether the death penalty was racially discriminatory. If that law passes, McCollum “might be moving out of jail and into your neighborhood sometime soon.”<sup>7</sup> The law

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3. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

4. *Id.* at 1143 (Scalia, J., concurring in denial of certiorari).

5. State v. McCollum, 364 S.E.2d 112 (N.C. 1988).

6. 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting).

7. Joseph Neff, *New DNA Evidence Could Free Two Men in Notorious Robeson County Case*, NEWS & OBSERVER (Aug. 30, 2014).

did pass, but the then-majority leader of the General Assembly and an attorney-general candidate were both defeated after being on the receiving end of these flyers.<sup>8</sup> Decades later, McCollum's case was still a poster child for death-penalty supporters in North Carolina.

Yet in September 2014, a standing ovation shook the walls of the Robeson County courtroom, with relatives of Henry McCollum and Leon Brown weeping for joy. The judge ordered their convictions reversed. A special guest sat in the room: Judge I. Beverly Lake Jr., who several years earlier had stepped down as Chief Justice of the Supreme Court of North Carolina. Before he retired, Judge Lake spearheaded the creation of the North Carolina Actual Innocence Inquiry Commission in 2007, the first of its kind in the U.S., an independent agency that investigates potential wrongful convictions. The Center for Death Penalty Litigation had been pushing for years to get cigarette butts and other crime-scene evidence tested, but police had said for years that the evidence was all lost. In fact, the box had been sitting in storage. However, once the Commission took the case, the Commission's investigators tracked down the evidence box and conducted DNA tests. The tests cleared both brothers and implicated another man who had lived a block from the murder victim and had been convicted of another rape and murder in the town of Red Springs. Based on the DNA tests, the Commission recommended that the court reverse both of their convictions. It had taken thirty years to finally set the brothers free.

All that happened in McCollum and Brown's case is part of a familiar pattern. For decades, courts had assumed the brothers were guilty because they had confessed in detail to a brutal murder. Yet we now know that the police, during lengthy and overbearing interrogations, had put words in their mouths. They were innocent and had no way of knowing how the crime happened. At trial, though, the jury heard the prosecutor and the detectives describe how the brothers had supposedly volunteered inside information that only the killers could have known. Although no other evidence connected them to the crime and they had no criminal records, they were sentenced to death.

Twenty individuals have been exonerated from death row based on DNA evidence in the United States, and many more have been exonerated from death row based on other new evidence of their innocence. The system did not quickly recognize their innocence. Almost half, like McCollum and Brown, endured multiple criminal trials before DNA exonerated them. Six had two trials and two had three criminal trials before their eventual exoneration. Eight cases involved eyewitness identifications, and sometimes multiple eyewitnesses who

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8. John Boyle, *No GOP Apologies for Nasty McCollum Ad*, *CITIZEN-TIMES* (Sept. 6, 2014).

were all mistaken about what they had seen. Kirk Bloodsworth was the first to be exonerated, from Maryland's death row: five eyewitnesses had misidentified him. Fourteen involved forensic evidence, including a series of cases with unreliable and flawed forensics. Ten cases had microscopic hair-comparison evidence, a type so unreliable that the FBI and crime labs in several states are conducting full audits into decades of testing and testimony. Two more had quite similar fiber comparisons. Two had still more notoriously unreliable bite-mark comparisons, a type of forensics that the scientific community has stated should not be used to identify individuals until meaningful research is done to validate it. Some had more than one type of unreliable forensics. The crime-lab analysts, who typically worked for law enforcement, often described the forensics like smoking-gun evidence, telltale traces pointing straight to the murderer. In these cases, the evidence against innocent individuals seemed strong. In hindsight, we might think we would not have convicted them, and we would not have sentenced them, but the truly frightening prospect is that, hearing the same evidence, we might actually have done exactly what the jurors did in the case of Henry McCollum and Leon Brown.

#### B. CRIMINAL PROCEDURE, FINALITY, AND ACCURACY

In the past, wrongful convictions were thought to be rare if not impossible occurrences. Judge Learned Hand famously called “the ghost of the innocent man convicted” an “unreal dream.”<sup>9</sup> Justice Sandra Day O'Connor touted how “[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”<sup>10</sup>

Constitutional criminal procedure long reflected traditional view. A classic expression of these concerns can be found in the U.S. Supreme Court's 1993 ruling in *Herrera v. Collins*. In declining to recognize a freestanding constitutional claim of actual innocence, the Court noted the “disruptive effect that entertaining claims of actual innocence would have on the need for finality,” as expressed in the limitations periods that prevent late filing of new trial motions.<sup>11</sup> But this sentiment extended beyond cases dealing directly with claims of innocence, as other criminal procedure rulings incorporated a view that reliability and accuracy of criminal judgments was not of central concern. For three decades, the Supreme Court has not revisited the factors set out in *Manson v. Brathwaite* for examining eyewitness identifications tainted by

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9. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

10. *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring).

11. *Id.* at 417 (majority opinion).

police suggestion, despite decades of research showing how faulty this test is.<sup>12</sup> For almost as long, the Court has adopted a view that absent sufficient evidence of coercion, a highly unreliable confession statement is not of constitutional concern. Such questions of accuracy and reliability were relegated to state evidence law or police practices. Today, this body of state evidence law and police practices has rapidly begun to change, and constitutional criminal procedure may eventually follow.

Take the example of post-conviction rules of finality, in which all jurisdictions in the United States experienced complete change in those rules in the space of about a decade. All jurisdictions had some provision in place for a new trial based on newly discovered evidence, but most states had rules limiting introduction of such new evidence of innocence to a time period of one to three years, or sometimes much less (in 1993, the Supreme Court reported in *Herrera v. Collins* that seventeen states had limitations periods of less than 60 days, and eighteen had limitations periods between one and three years).<sup>13</sup> The federal rule requires that a motion based on newly discovered evidence be filed within three years, and it may only be granted “in the interest of justice,” if a new trial “would probably produce an acquittal,” and if prior diligence had been exercised in seeking such evidence, among other requirements.<sup>14</sup> In the 1990s, only two states, Illinois and New York, had statutes providing a right to access post-conviction DNA testing.<sup>15</sup> Many of the people freed by DNA tests in the first decade and a half of its use waited years to obtain those DNA tests and relief. Clemency is one final avenue for those with evidence of factual innocence, but there has been a sharp trend toward declining grants of clemency applications.<sup>16</sup>

The innocence revolution changed all of that. As DNA exonerations showed how powerful new evidence of innocence could come to light years and even decades after a conviction, the law across the United States began to change.<sup>17</sup> In 2015, in the United States, six individuals were exonerated from death row, and Justice Stephen Breyer wrote an opinion calling for briefing

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12. *Manson v. Brathwaite*, 432 U.S. 98 (1977); see also *Perry v. New Hampshire*, 565 U.S. 228 (2012).

13. *Herrera*, 506 U.S. at 410–11.

14. FED. R. CRIM. P. 33.

15. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631, 1646–50, 1673–75 (2008).

16. See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 251 (2003); see also Mark Osler, “Clemency,” in this Report; Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GEO. ST. L. REV. 1124 (2012).

17. See Garrett, *Claiming Innocence*, *supra* note 15; see also Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005).



of the issue whether the current practice of the death penalty is categorically unconstitutional, including because of evidence from such exonerations.<sup>18</sup>

## II. RESEARCHING WRONGFUL CONVICTIONS

First, a set of research has examined the characteristics of exoneration cases. Initially, much of that research was conducted in the United States, given the large numbers of exonerations documented in the American legal system and access to good criminal justice records even in older criminal cases. One set of research has focused on DNA exonerations. In my book, *Convicting the Innocent*, I reported a set of studies of the first 250 DNA exonerations. In these cases, the average length of time from conviction to exoneration was 14 years.<sup>19</sup> The DNA exonerees were convicted mostly of rape, but also murder. Twenty had been sentenced to death.

Research has also focused on a broader set of exonerations, including non-DNA exonerations. Early research on wrongful convictions examined a broad range of new evidence involved in exonerations. In some of that work, the focus was on wrongful convictions defined in different ways, and there had been debates about how well the researchers identified cases involving innocent convicts. Recent research has tended to focus on exonerations defined procedurally, focusing on whether the court or executive vacated the conviction based at least in part on newly discovered evidence of innocence. Professor Sam Gross began to study exoneration cases, including non-DNA cases, and his work led to the creation of the National Registry of Exonerations, which now details such cases from 1989 to present. Eight percent of those known exonerations occur in cases in which defendants were sentenced to death. About 20% of the

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18. *Glossip v. Gross*, 135 S. Ct. 2726, 2757–58 (2015) (Breyer, J., dissenting); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2015: YEAR END REPORT (2015), <http://www.deathpenaltyinfo.org/YearEnd2015>; see also Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

19. See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 30, 2017); see also GARRETT, *CONVICTING THE INNOCENT*, *supra* note 15, at 5 (finding an average length of time of 13 years from conviction to exoneration among the first 250 DNA exonerations). For updated data reflecting the first 330 DNA exonerations, see Brandon L. Garrett, *Convicting the Innocent Redux*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* (Daniel Medwed ed., 2017).

Registry cases include false confessions. A larger number, 28% of the Registry cases, involved false or misleading forensic evidence. Still more involved some form of witness perjury, false accusation, or “official misconduct.”<sup>20</sup>

Additional research from an array of disciplines explores the causes of wrongful convictions. Archival and descriptive research has examined not just the characteristics of exoneration cases, but detailed sources of error in those cases. Experimental research, including psychological studies, have tested mechanisms that can produce errors in criminal investigations, including by testing mock jurors, forensic analysts, and pressure on individuals to confess. Theoretical research has examined cognitive errors and statistical errors underlying wrongful convictions, and major reports from the National Academy of Sciences have provided the framework for large-scale research agendas and reform. Below I describe how wrongful-convictions research has involved interdisciplinary contributions from the social sciences, statistics, and law, by focusing on several of the key areas in which such research has been conducted.

#### A. EYEWITNESS MISIDENTIFICATIONS

Psychological research studying eyewitness memory predated the innocence movement by several decades, and beginning in the 1970s, psychologists embarked on memory research that would transform our understanding of human memory.<sup>21</sup> They uncovered how something as seemingly benign as a police lineup, designed to take some care to test the memory of an eyewitness, can actually reshape and alter an eyewitness’s memory. However, the experience of hundreds of DNA exonerees, whose cases heavily involved eyewitness errors, powerfully emphasized the importance of taking eyewitness memory research seriously and improving the way that lineups are conducted. Prompted by the experience of those exonerations and the decades of research, involving thousands of studies, the National Academy of Sciences produced a detailed report in 2014, informed by neuroscience, social science, and statistics, that set out best practices for policing agencies, recommendations for courts, and a research agenda for further eyewitness memory research.<sup>22</sup> Crucial recommendations included that all eyewitness identification procedures use

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20. As of 2016, 21 of 116 death row exonerations on the National Registry involved false confessions, 32 of 116 involved false or misleading forensics, and 81 involved perjury or false accusations, while 90 of the cases involved “official misconduct.”

21. See generally Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report.

22. See NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014).

clear, standardized instructions, that they be conducted blind, so that the administrator does not know which is the suspect, that the confidence of the eyewitness be documented, and that the entire procedure be video-recorded.

### B. FLAWED FORENSIC ANALYSIS

The experience of exonerees, who were freed by DNA testing but who were (more often than not) convicted based on false or even falsified forensics, powerfully affected the forensics community as well.<sup>23</sup> Of the first 330 DNA exonerations in the United States, 71% or 234 cases involve forensic testimony.<sup>24</sup> The bulk of these DNA exoneree trials included traditional forensics, not DNA testing, and much of that evidence was presented in an outright erroneous or overstated manner, or in a vague manner. Of the 234 cases, 54% or 126 cases involved invalid, erroneous, or concealed forensics. Twenty-eight cases involved concealed and exculpatory forensic evidence that could have supported a claim of innocence at trial if it had been disclosed to the defense. Twenty-nine of the cases involved analysis that was erroneous, including due to lab errors. Of the remaining cases, not involving invalid or erroneous or concealed evidence, an additional 19 cases involved vague testimony that evidence like hairs or fibers or bite marks were “similar” or “consistent” with the defendant. Well over half of these DNA exoneration cases, at least 62% or 145 of the 234 cases, involved invalid, erroneous, concealed, unreliable, or vague presentation of forensics.

In response, scholars increasingly called for wholesale reforms of forensics, including independence of crime labs, scientific standards for reaching forensic conclusions, studies of error rates, and efforts to combat cognitive bias, as well as an end to the most unreliable forensic techniques. Those calls were echoed in 2009 by an influential National Academy of Sciences report that concluded: “With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”<sup>25</sup> Seven years later, the 2016 report by the President’s Council of Advisors on Science and Technology (PCAST) issued a report highlighting that little had changed and more strongly stating that several forensic techniques should no longer be used in court until sufficient scientific

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23. See generally Erin Murphy, “Forensic Evidence,” in the present Volume.

24. See GARRETT, CONVICTING THE INNOCENT, *supra* note 15; Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 68 (2009).

25. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7 (2009).

research is done to validate their accuracy and reliability.<sup>26</sup> That report also highlighted the need for information about error rates in forensic disciplines and proficiency of particular examiners and laboratories.<sup>27</sup> The report added: “courts should never permit scientifically indefensible claims such as: ‘zero,’ ‘vanishingly small,’ ‘essentially zero,’ ‘negligible,’ ‘minimal,’ or ‘microscopic’ error rates; ‘100 percent certainty’ or proof ‘to a reasonable degree of scientific certainty’; identification ‘to the exclusion of all other sources’; or a chance of error so remote as to be a ‘practical impossibility.’”<sup>28</sup> The National Commission on Forensic Science has similarly recommended that no examiner use “reasonable scientific certainty” conclusions.<sup>29</sup>

Research from several disciplines has aimed to redress some of the flaws in forensics. A new generation of statistical work has examined whether machine learning or more sophisticated statistical models can provide a sound empirical basis for traditional pattern-matching forensics like fingerprinting or ballistics, that have involved subjective and not quantitative conclusions in the past.<sup>30</sup> A new generation of psychological work has examined cognitive-bias issues in forensics, including how a range of biases in information and practices can alter the conclusions that forensic analysts reach. Studies of jury decision-making have examined how well fact-finders understand and how they evaluate the conclusions that forensic examiners reach, which in the past were often highly confident and exaggerated. Some of that research, as described below, has already led to improvements in how forensic work is done.

### C. FALSE CONFESSIONS

In the first 21 years of post-conviction DNA testing, 250 innocent people were exonerated, 40 of whom had falsely confessed.<sup>31</sup> In just the last five years there have been 26 more false confessions among DNA exonerations. In general, false-confession cases have been concentrated in cases involving a

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26. PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 57, 102 (2016).

27. *Id.* at 12.

28. *Id.* at 19.

29. Memorandum from the Nat’l Comm’n on Forensic Sci., Nat’l Inst. of Standards & Tech., Testimony Using the Term “Reasonable Scientific Certainty” (Apr. 2013).

30. See, e.g., Ryan Spotts et al., *Optimization of a Statistical Algorithm for Objective Comparison of Toolmarks*, 60 FORENSIC SCI. 303 (2015); NICHOLAS PETRACO ET AL., APPLICATION OF MACHINE LEARNING TO TOOLMARKS: STATISTICALLY BASED METHODS FOR IMPRESSION PATTERN COMPARISONS (2012).

31. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); GARRETT, CONVICTING THE INNOCENT, *supra* note 1, at 21–44; see also Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report.

murder—20 had been sentenced to death. In the entire group of 66 exonerees who falsely confessed, 42 involved a rape and a murder, 9 a murder, and 15 a rape.<sup>32</sup> The cases invariably involved lengthy interrogations that took place for more than three hours, with few exceptions. Second, many exonerees waived their *Miranda* rights when they were questioned by the police. Third, 94% of false confessions by DNA exonerees to date were contaminated by allegedly “inside” information. Almost without exception, these confession statements were contaminated with crime-scene details, which in retrospect, could not have been known until the individuals being questioned learned of them from law enforcement.<sup>33</sup> Additional exonerees had been questioned informally by the police, outside of an interrogation room, and were reported to have made inculpatory statements.

Data on false confessions reveals disproportionate numbers of young people and individuals with disabilities make such confessions, including in studies of non-DNA exonerations and large-scale surveys of juveniles in the U.S. and in Europe.<sup>34</sup> In a group of 66 false confessions, for example, over one-third, or 22, were juveniles, and at least 20 had an intellectual disability or were mentally ill.<sup>35</sup> The American Law Institute is currently drafting a “Restatement on Children and the Law” which will address juvenile interrogations, including videotaping such interrogations.<sup>36</sup>

#### D. APPELLATE AND POST-CONVICTION LITIGATION

An earlier study of appellate and post-conviction litigation by DNA exonerees found that court opinions written before DNA exonerated the individuals concluded with some regularity that errors asserted by the later-exonerated defendants were harmless or otherwise failed to demonstrate

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32. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 400 & n.18, 402, 404 (2015); see also GARRETT, CONVICTING THE INNOCENT, *supra* note 1.

33. Garrett, *Contaminated Confessions Revisited*, *supra* note 32, at 402, 404; see also GARRETT, CONVICTING THE INNOCENT, *supra* note 1, at 20, 37.

34. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004); see also Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY & INDIVID. DIFFER. 49 (2006); Ingrid Candel et al., “I Hit the Shift-key and then the Computer Crashed”: *Children and False Admissions*, 38 PERSONALITY & INDIVID. DIFFER. 1381 (2005); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (2003).

35. Garrett, *Contaminated Confessions Revisited*, *supra* note 32, at 399–400, n.16.

36. AM. LAW INST., RESTATEMENT ON CHILDREN AND THE LAW, PROJECTED OVERALL TABLE OF CONTENTS (2016), [https://www.ali.org/media/filer\\_public/71/bb/71bb767c-a5df-4561-806c-d0b881945992/pages\\_from\\_children\\_and\\_the\\_law\\_-\\_pd\\_2\\_-\\_online.pdf](https://www.ali.org/media/filer_public/71/bb/71bb767c-a5df-4561-806c-d0b881945992/pages_from_children_and_the_law_-_pd_2_-_online.pdf).

prejudice because of “overwhelming evidence of guilt.”<sup>37</sup> Evidence of innocence sufficient to persuade judges and executive actors to grant relief rarely surfaces until many years after convictions become final and initial rounds of post-conviction review are exhausted. Almost one-third of the first 250 people exonerated by DNA brought such claims.<sup>38</sup> They rarely succeeded, although about half of the exonerees who did obtain reversals of their convictions *before* they were exonerated by DNA testing did so based in part on prosecutorial misconduct and concealed exculpatory evidence.<sup>39</sup>

### E. PROSECUTORIAL MISCONDUCT

An Innocence Project study found that 37% of the DNA exoneration cases involved the suppression of exculpatory evidence, 25% involved the knowing use of false testimony, and 11% involved the undisclosed use of coerced witness testimony.<sup>40</sup> Subsequently, those allegations regarding concealed evidence resulted in 24% of those convictions being overturned.<sup>41</sup> A similar pattern can be observed among death-penalty cases generally, and not just those that eventually resulted in exonerations from death row, in which as many as one-fifth resulted in reversals due to concealed exculpatory evidence that came to light years after the conviction and death sentence.<sup>42</sup> Of course, evidence that is not disclosed to the defense (and perhaps not even to prosecutors) may never come to light. We have no way of knowing just how common such discovery and constitutional violations are in practice. Indeed, most cases are plea-bargained and discovery may be more informal and limited. Plea bargaining and its largely unregulated procedures itself contributes to wrongful convictions.<sup>43</sup> Guilty pleas by the innocent may often go undetected, including because persons who plead waive their rights to appeal or post-conviction review,

37. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 109 (2008). For a general discussion of issues in appellate review, see Nancy J. King, “Criminal Appeals,” in the present Volume.

38. GARRETT, CONVICTING THE INNOCENT, *supra* note 1, at 205 (based on review of those cases with available written opinions).

39. *See id.* at 207–08

40. BARRY SCHECK, JIM DWYER & PETER NEUFELD, ACTUAL INNOCENCE (1st ed. 2001). For a discussion of disclosure issues, see Darryl K. Brown, “Discovery,” in the present Volume.

41. *See* EMILY M. WEST, THE INNOCENCE PROJECT, COURT FINDINGS ON PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 1, 4, 5 (2010), [https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc\\_appeals\\_255\\_final\\_oct\\_2011.pdf](https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf).

42. *See* JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (Columbia Law Sch., Pub. Law Research Paper No. 15, 2000), [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf) (documenting Brady violations in 16% to 19% of capital cases).

43. Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2015). *See generally* Jenia I. Turner, “Plea Bargaining,” in the present Volume.

and they may be barred from later obtaining exculpatory evidence such as DNA. Each of those studies—showing how serious discovery violations occur in high-profile wrongful convictions and in the most serious capital cases, and how innocent people feel pressure from prosecutors to plead guilty—lends support to further work aimed at improving criminal discovery and the adjudication process.

### III. PREVENTING WRONGFUL CONVICTIONS

In its 2009 report, the National Academy of Sciences recommended that a comprehensive regulatory approach be adopted for our entire system of forensics, including oversight by a National Institute of Forensic Science that would promulgate scientific standards, audit labs, and conduct basic research to shore up forensic disciplines.<sup>44</sup> While legislation has been introduced in Congress, no such agency has been created. However, federal agencies have improved their funding and support for basic research to support forensics. The National Commission on Forensic Science has supported efforts to consider scientific standards for forensics.

Nevertheless, highly unreliable forensics continue to be used. Scientific standards are still needed for a wide range of forensic disciplines.<sup>45</sup> Quality controls at labs are still lacking, and large-scale scandals involving lab errors persist. Indeed, new unreliable forensic techniques continue to be introduced, and new errors from low-copy DNA, poor interpretation of DNA mixtures, use of field drug tests of uncertain reliability, use of new algorithms for facial recognition without scientific testing, and more, raise a host of new challenges. Still, some labs have adopted independent scientific oversight and have created new quality controls, such as blind proficiency testing and blind verification. Researchers have conducted more “black box” studies, or at least a few more, that begin to document error rates in forensic disciplines. Far more needs to be done.

In fall 2014, the National Academy of Sciences published an important report, *Identifying the Culprit: Assessing Eyewitness Identification*.<sup>46</sup> The report evaluated decades of research on eyewitness memory, and it details scientific procedures that can help to prevent error. Those recommended procedures include conducting identifications “blind” or “blinded” so that the person running the procedure cannot inadvertently signal the answer. More agencies are improving their eyewitness-identification procedures. In 2017, the U.S. Department of Justice adopted a set of guidelines on the best practices for

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44. See STRENGTHENING FORENSIC SCIENCE, *supra* note 25, at 7.

45. See Murphy, *supra* note 23.

46. See IDENTIFYING THE CULPRIT, *supra* note 22. As a matter of full disclosure, I was a member of the committee that produced the report.

federal law enforcement agencies. More state courts have recognized the importance of the issue and ruled that jurors should hear from experts who can explain eyewitness memory issues to them, or alternatively offered model jury instructions detailing the sometimes counterintuitive research on eyewitness memory. More research needs to be done to examine how to best present that science to jurors. Many more police agencies need to use blind lineups, and record and carefully document lineup procedures. And more research needs to be done on new possibilities for assessing eyewitness reliability.

In the area of false-confession research, an important white paper from the American Psychology and Law Society lays out a set of reforms to prevent contaminated and false confession statements. Most important is that entire interrogations be videotaped.<sup>47</sup> However, more research and policy is being directed at considering less coercive models for police interrogation. Those concerns also extend to the use of police informant and other incentivized witnesses, who claimed to have overheard inculpatory statements in DNA exoneration cases.<sup>48</sup> Far more research needs to be done to examine how to safeguard informant testimony, if it is to be permitted.

### RECOMMENDATIONS

To prevent inevitable errors, we must invest in getting criminal investigations right, not just in death-penalty cases, but in all cases relying on confessions, eyewitnesses, forensics, informants, and the rest. Our criminal justice system is less than perfect, but even without the death penalty, the same challenges remain. We must take measures to protect against wrongful convictions. What practical, accuracy-enhancing measures have been identified?

1. **Interrogations should be videotaped in their entirety—and not just the confession statement itself, but the questioning that came before and after.** There should be a record of who said what during interrogation. Judges should carefully review the reliability of all interrogation evidence. Police should not be allowed to use coercive interrogation tactics. Experts should be allowed to explain the phenomenon of false confessions to jurors. And police should be trained to take special care when questioning juveniles or disabled or other vulnerable individuals.

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47. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 *LAW & HUM. BEHAV.* 3, 19 (2010).

48. See generally Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report.



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2. **Informant testimony, whether jailhouse informants or other incentivized witnesses, should not normally be allowed, at least not without written police policies set out concerning their use, videotaped interviews, and careful screening for reliability.** Very little has been done anywhere in the country to prevent false convictions due to incentivized testimony of informants.
  3. **Eyewitness evidence should be used only when eyewitnesses are tested using reliable and non-suggestive lineups.** Most important is that the lineup be conducted blind, so that the person administering the lineup does not know which person or photograph is the suspect. Judges should carefully review eyewitness evidence to assure its reliability and they should not allow dramatic, but potentially misleading, in-court identifications. Experts should be used to explain eyewitness memory to jurors. The National Academy of Sciences has laid out detailed reforms and recommendations to safeguard eyewitness evidence in our courtrooms, but much work needs to be done to ensure that police and judges actually use the evidence properly. Many police departments traditionally had no written policies at all on how to do lineups. Now that is changing, but many (if not most) police departments still use outdated procedures that can outright contaminate the memory of an eyewitness. Good evidence that can be used to convict guilty people may be routinely lost, and flawed eyewitness identifications continue to be used to convict the innocent.
  4. **Forensic evidence should be carefully collected by trained crime-scene analysts and analyzed by impartial, independent scientists, with clear scientific standards for what they can say about the forensics.** The National Academy of Sciences and other scientific bodies have laid out detailed reforms and recommendations to improve the use of forensics in this country. After all, most criminal cases, even murders, do not have any DNA to test. The same types of unreliable forensics are still commonly used today, and more research needs to be done to provide a more reliable scientific basis for fingerprint and ballistics and other types of comparisons. Slowly, crime labs have started to audit the forensics they used back in the 1980s and 1990s, and the community has started to consider scientific standards for what can be said in the courtroom. Quality controls in crime labs will hopefully improve too, but like so much in our criminal system, when police and crime labs mass process vast numbers of cases, quality suffers when quantity is overwhelming.

In response to mass forensic errors, some jurisdictions have developed aggregate remedies to reopen large numbers of cases, and best practices should be put into place to handle such systemic problems.<sup>49</sup>

5. **Ineffective assistance of counsel is an endemic problem.**<sup>50</sup> Most exonerees were indigent and could not afford counsel; as a result, many received substandard representation, including failure to litigate their innocence, and when they tried to litigate the ineffectiveness of counsel post-conviction, they typically failed. Plea bargaining makes it all the more challenging to assess what adequate counsel could have obtained for a client. As a result, a focus on accuracy must be complemented by a focus on funding for adequate defense resources, including to conduct investigations. Sentencing errors, while not a main topic in this chapter, are also a serious problem, and defense resources to investigate issues such as mitigation, are also essential to ensure accuracy in sentencing.
6. **Criminal discovery practices should be revamped, with judicial supervision, and broad disclosure of evidence from investigations, in court, and in an ongoing manner.** Prosecutors and police should not be able to hide evidence supportive of claims of innocence, as was done in so many DNA exoneree cases. In many cases, it was only because of the special energies dedicated to death-penalty cases that lawyers eventually uncovered evidence of innocence after years of trying. One wonders how often evidence is poorly documented, concealed, or disregarded in more routine criminal cases. Open-file discovery should be required of police and prosecutors so that the defense can see all of the evidence that they have, with representations in open court concerning what evidence has been gathered. Fortunately, more jurisdictions, including North Carolina and particularly Texas, which has a robust court-supervised model, are adopting these improvements, often in response to the stories<sup>51</sup> about what death-row exonerees had endured.
7. **Post-conviction rules should be adapted to the modern era as well.** New evidence of innocence should not be restricted. The federal law that impedes exonerations—the Antiterrorism and Effective Death Penalty

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49. For an evaluation and comparison of such mechanisms, see Brandon L. Garrett, *Bad Hair: The Legal Response to Mass Forensic Errors*, 42 LITIGATION 32 (2016).

50. See generally Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

51. TEX. CODE CRIM. PROC. ANN. art. 39.14; see also Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1384–86 (2012); Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015).

Act of 1996 (AEDPA)<sup>52</sup>—should be scrapped or at least overhauled with a clear exception for claims of innocence. Innocence commissions should be created, like the one in North Carolina and those established in many other countries, tasked with carefully investigating innocence claims. Conviction Integrity Units, in which prosecutors reopen closed cases, should be established across the country, as is beginning to happen.

8. **Police departments should generally focus on accuracy, both in procedures and in responses to errors, by considering scientific research and conducting risk assessments and sentinel events analysis when evidence does go wrong.** This approach is recommended by leading organizations such as the International Association of Chiefs of Police and the Presidential Task Force on Twenty-First Century Policing have recommended.<sup>53</sup>

How do jurisdictions consider making such changes? Take the case of Timothy Cole, convicted in 1986 and exonerated by DNA testing in 2010. He was exonerated 11 years too late; he died in prison in 1999. But Texas is now a poster-child state for reforms to prevent wrongful convictions. Lawmakers convened a Timothy Cole Advisory Panel on Wrongful Convictions. In 2011, that commission recommended an entire platform of reforms. Most have since been enacted. Texas adopted a law requiring all police to use best practices for eyewitness-identification procedures. A law broadened access to DNA testing. A statute to permit post-conviction challenges based on changed science was passed. A Texas Forensic Science Commission made recommendations and conducted audits of old cases involving potentially erroneous forensic evidence. A Michael Morton Act, named after another Texas DNA exoneree, adopted in 2013, requires broad and shared discovery in criminal cases.<sup>54</sup> A Timothy Cole Exoneration Review Commission in 2016 recommended still additional changes, including that interrogations be recorded.<sup>55</sup> If one had a scorecard for states' adoption of measures to improve the accuracy of criminal cases, Texas would now score fairly high on the list.

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52. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

53. INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS (2013), [http://www.theiacp.org/portals/0/documents/pdfs/Wrongful\\_Convictions\\_Summit\\_Report\\_WEB.pdf](http://www.theiacp.org/portals/0/documents/pdfs/Wrongful_Convictions_Summit_Report_WEB.pdf); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 22–23 (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) (Recommendation 2.3).

54. TEX. CODE CRIM. PROC. ANN. art. 39.14; *see also* MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE (2014).

55. TIMOTHY COLE EXONERATION REVIEW COMMISSION (2016), <http://www.txcourts.gov/media/1436589/tcerc-final-report-december-9-2016.pdf>.

Perhaps the growing body of interdisciplinary research aimed at preventing wrongful convictions, and the spread of criminal procedure reforms can be of some comfort, at least, to the innocent people who suffered for so many years in prison for crimes that they did not commit. There are many paths toward adoption of the improvements described in this chapter. In many states, as in Texas, lawmakers have enacted legislation after study commissions initially examined the causes of wrongful convictions, familiarized themselves with the research discussed here, and then adopted responses. In other jurisdictions, it was law enforcement agencies that led the way by changing their policies. In some places, it was the courts that adopted rules to address accuracy concerns.

New types of errors that come to light as well as new research will continue to suggest new types of reforms. New research regarding sentencing errors, misdemeanor justice, bail decisions, mental-health diversion, juvenile justice, and many areas discussed in this volume,<sup>56</sup> will produce changes that can promote accuracy. New research regarding eyewitness memory, forensic science, and cognitive science research may produce still more improvements in the years ahead.<sup>57</sup> DNA exonerations placed the U.S. at the forefront of using science to improve the accuracy of criminal justice. That progress will continue to be made and it will expand.

The same practical problems have driven reform across a host of very different jurisdictions. Indeed, outside the United States, a range of civil- and common-law countries have similarly experienced exonerations in recent years and have also responded by adopting reforms, from new post-conviction rules to new interrogation methods.<sup>58</sup> There is increasingly an international dialogue among researchers, innocence projects, and policymakers regarding the causes and cures for wrongful convictions. Wrongful convictions provide us all with an opportunity to improve the accuracy of criminal justice.

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56. See, e.g., Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report; Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume; Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report; Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

57. See, e.g., Wells, *supra* note 21; Murphy, *supra* note 23; Leo, *supra* note 31.

58. For an overview, see Brandon L. Garrett, *Towards an International Right to Claim Innocence*, 105 CAL. L. REV. (forthcoming 2017).

# Race and Adjudication

Paul Butler\*

*Racial discrimination in criminal adjudication is unlawful, destructive, and ubiquitous. At virtually every step of adjudication—charging, setting bail, plea-bargaining, jury selection, trial, and sentencing—law enforcement officials exercise discretion in ways that disproportionately harm people of color. Studies have shown that African American and Latino defendants are, for example, significantly more likely than white defendants to be arrested on charges that are not prosecutable, to be detained pretrial, and to be wrongly convicted. The Supreme Court has made it very difficult to challenge racial discrimination in the criminal process, effectively silencing a defendant’s claim to equal protection of the law unless she can produce “smoking gun” evidence of racist intent. Given inadequate legal recourse, efforts to reduce racial discrimination in criminal adjudication should focus on limiting contact between people of color and law enforcement officials and constraining those officials’ discretion. Specifically, policymakers should work to end money bail, decriminalize misdemeanors, require racial-impact analyses for new criminal justice policies, and collect data on prosecutors’ offices. Legislation implementing these recommendations would go a long way toward improving policy in an area where courts and law enforcement officials have been largely ineffectual.*

## INTRODUCTION

Race matters at every stage of the criminal process, from the prosecutor’s initial charging decision to the sentence handed down by the judge. White defendants tend to have more favorable outcomes than similarly situated African-Americans and Latinos. People of color are more likely to be charged with serious offenses, jailed prior to trial, convicted, and to receive a harsher sentence. These disparities exist even when factors like the severity of the crime and the criminal history of the accused person are the same.

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The United States Constitution makes it unlawful for government actors, including legislators, prosecutors, juries and judges, to discriminate on the basis of race. But the Supreme Court has set high standards for how discrimination in the criminal process can be proved. Because there are many factors relevant to the disposition of a criminal case, the Supreme Court has been reluctant to single out race, despite substantial evidence that it plays a major role. When there is evidence of race disparities, most courts have been unwilling to infer discrimination.

When a person is accused of a crime, it is fundamentally unfair and un-American for her race to influence whether she is found guilty or not guilty and how much time she gets. The United States criminal process is a long way from the ideal that people should be judged by the content of their character and not the color of their skin. To reduce the prejudice that African-Americans and Latinos face, this chapter recommends reducing prosecutorial discretion and limiting contact between law enforcement and communities of color.

Part I describes the process of adjudication. Part II analyzes the role race plays in adjudication. Part III identifies and discusses the major Supreme Court cases on race and adjudication. Part IV proposes several recommendations to curtail racial bias in this stage of the criminal justice process.

## I. THE BASICS OF ADJUDICATION

Criminal adjudication describes the practices and procedures after an individual has been arrested. After an individual is arrested, prosecutors decide how (or whether) to charge her. The individual might be charged with just one criminal offense, or multiple offenses. Because there are many overlapping criminal laws on the books, prosecutors often have considerable discretion over charging decisions.<sup>1</sup>

The next step is the bail determination. Bail is the money<sup>2</sup> an arrested person has to pay in order to secure her release from jail. The purported purpose of bail is to ensure that the defendant will attend all court proceedings if she is released from custody. A judge sets bail at a hearing based on a number of factors, including the severity of the defendant's crime, the defendant's criminal history, and the risk that the defendant will flee or hide to avoid appearing in court. The practices for setting bail vary across different jurisdictions—some states have detailed guidelines, while others leave more discretion to judges and magistrates. The amount set for bail is important. An individual is more likely

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1. See generally Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume; John F. Pfaff, "Prosecutorial Guidelines," in the present Volume.

2. Bail can also be paid in the form of property or a bond.

to be convicted if she is held prior to trial.<sup>3</sup> The higher the bail amount, the more likely an accused person is to remain in pretrial detention—especially if she is economically disadvantaged.

After bail is set, the case looks to be on its way to trial—but criminal cases rarely go to trial. According to recent estimates, less than 5% of criminal cases go to trial.<sup>4</sup> Instead, most criminal prosecutions are resolved out of court through plea bargaining. The prosecutor and the defendant negotiate over, for example, whether the defendant will plead guilty to a lesser charge in exchange for the prosecutor dropping a more serious charge, or whether the defendant will plead guilty in exchange for the prosecutor recommending a more lenient sentence. The two sides can reach a plea agreement any time before the jury reaches a verdict, so negotiations may be ongoing during the trial.

If the case goes to trial, a jury must be selected. Jurors are chosen from the “jury pool” for the relevant jurisdiction—a list of names usually derived from voter-registration lists or driver’s license lists. Through a process called *voir dire*, the lawyers question potential jurors to determine whether they are biased. If a lawyer thinks that a juror cannot decide a case fairly—because, for example, the juror is related to the defendant—then she can ask the judge to strike that juror for cause. Lawyers also have the ability to make “peremptory challenges,” which permit them to dismiss jurors without providing a reason. Peremptory challenges cannot be racially discriminatory, but, as we will see, it can be difficult to prove that peremptories were made on the basis of race.

At trial, the jury hears opening statements, the evidence for and against the defendant, and closing statements. The lawyers might make objections to admitting certain pieces of evidence or hearing testimony on a particular subject. After hearing the evidence, the jury goes into deliberations to reach a verdict. In a criminal case, the possible verdicts are “guilty” or “not guilty.” The standard for convicting a criminal defendant is “beyond a reasonable doubt.”

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3. Pretrial detention weakens a defendant’s bargaining position and increases the likelihood of a guilty plea. See WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, THE EFFECTS OF PRETRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES (Nat’l Bureau of Econ. Research, Working Paper No. 22511, 2016). See generally Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume.

4. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

If the defendant is convicted, the next step in the adjudicatory process is sentencing. In most jurisdictions, a judge decides on the appropriate sentence. However, in most death-penalty cases, a jury decides on whether the defendant should be executed.<sup>5</sup> In a non-death-penalty case, the judge makes the sentencing determination based on various factors, including the nature of the offense and any prior criminal history. Federal judges typically make decisions based on the U.S. Sentencing Guidelines, which prescribe factors to consider and suggested ranges; however, the Guidelines are advisory rather than mandatory.<sup>6</sup>

The defendant can appeal to challenge the verdict based on some legal error that occurred at trial.<sup>7</sup> For example, the defendant might argue on appeal that the judge's instruction to the jury was incorrect, or that a piece of harmful evidence was unfairly admitted. A criminal defendant convicted in *state* court can also file a writ of habeas corpus in *federal* court to argue that she was deprived of her constitutional rights. However, laws passed by Congress in the 1990s make it very difficult for prisoners to challenge their convictions or their living conditions in prison.<sup>8</sup>

## II. THE ROLE OF RACE IN ADJUDICATION

Many studies demonstrate that African-Americans and Latinos are treated differently at every stage of the criminal process. Race plays a role in charging decisions, bail determinations, plea bargaining, convictions, and sentencing.

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5. There is some debate over whether only a jury can impose the death penalty under the Eighth Amendment, which prohibits "cruel and unusual punishment." The Supreme Court recently invalidated a capital sentencing scheme in which a jury rendered an "advisory sentence" but a judge independently weighed aggravating and mitigating factors to determine whether the death penalty was appropriate. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *see also Ring v. Arizona*, 536 U.S. 584 (2002). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in Volume 4 of the present Report.

6. *See United States v. Booker*, 543 U.S. 220 (2005); *see, e.g., Douglas A. Berman*, "Sentencing Guidelines," in Volume 4 of the present Report.

7. *See generally* Nancy J. King, "Criminal Appeals," in the present Volume.

8. *See* John Pfaff, *Bill Clinton Is Wrong About His Crime Bill—So Are the Protesters He Lectured*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/12/magazine/bill-clinton-is-wrong-about-his-crime-bill-so-are-the-protesters-he-lectured.html> (discussing the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act).



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### A. CHARGING DECISIONS

Prosecutors have wide discretion about what crime to charge someone with. African-American men are almost twice as likely as white men to be charged with a federal crime that carries a minimum mandatory sentence.<sup>9</sup> A study of the Manhattan District Attorney's Office by the Vera Institute of Justice found that African-Americans and Latinos were more likely to have charges dismissed than whites and Asian-Americans.<sup>10</sup> The study's authors didn't have enough information to conclude whether this reflected leniency on the part of the DA's office, or that African-Americans and Latinos were more frequently arrested for cases that were not prosecutable. Other findings in the study, including that blacks and Latinos are more likely to be held for misdemeanors and receive less favorable plea offers, would seem to refute the leniency explanation.

### B. BAIL

A Justice Department study examined bail determinations in 45 counties. Controlling for a number of other factors, "the study found that African Americans were sixty-six percent more likely to be in jail pretrial than were white defendants, and that Latino defendants were ninety-one percent more likely to be detained pretrial. Overall, the odds of similarly-situated African American and Latino defendants being held on bail because they were unable to pay the bond amounts imposed were twice that of white defendants."<sup>11</sup> Race affects the amount of bail as well. In a study examining bail practices in Connecticut, scholars found that "bail amounts set for black male defendants were thirty-five percent higher than those set for their white male counterparts," even after "controlling for eleven variables relating to the severity of the alleged offense."<sup>12</sup>

The Vera Institute study of the Manhattan DA's Office found that blacks and Latinos are more likely to be held in jail prior to trial, because either no bail is set or if a bail is set, it requires more financial resources than the defendants have.<sup>13</sup>

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9. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014) (noting that black men "have 1.75 times the odds of facing" charges carrying mandatory minimum sentences). For a discussion of mandatory minimums, see Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

10. BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, VERA INST. OF JUST., RACE AND PROSECUTION IN MANHATTAN (2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan>.

11. Cynthia E. Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 941 (2013).

12. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994).

13. KUTATELADZE ET AL., *supra* note 10.

### C. PLEA BARGAINING

Most criminal cases never go to trial. More than 95% of criminal cases are resolved by plea bargains.<sup>14</sup> African-American defendants are more likely to be offered plea deals that include prison time than white or other minority defendants.<sup>15</sup>

### D. CONVICTIONS

The problem of racial disparities affects convictions as well. For example, wrongly convicted defendants are disproportionately likely to be African-American or Latino.<sup>16</sup> A recent study of almost 2,000 exonerations over the last three decades showed that African-Americans convicted of murder or sexual assault “are significantly more likely than their white counterparts to be later found innocent of the crimes.”<sup>17</sup>

What is the source of these disparities? One possible explanation is jury composition. A study of felony trials in Florida between 2000 and 2010 showed that all-white juries convicted black defendants 16% more often than white defendants, a gap that was “entirely eliminated when the jury pool includes at least one black member.”<sup>18</sup> These findings show how devastating discriminatory peremptory strikes can be on the fairness of our criminal justice system. Another possible explanation for disparities in convictions is bias on the part of trial judges. Studies have shown that judges harbor implicit racial biases that can influence their decisions during trials.<sup>19</sup>

14. DEVERS, *supra* note 4; *see also* Rakoff, *supra* note 4. For a discussion of plea bargaining, see Jenia I. Turner, “Plea Bargaining,” in the present Volume.

15. KUTATELADZE ET AL., *supra* note 10.

16. Karen F. Parker, Mari A. Dewees & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 127–28 (Saundra D. Westervelt & John A. Humphrey eds., 2001). For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

17. Niraj Chokshi, *Black People More Likely to Be Wrongly Convicted of Murder, Study Shows*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/us/wrongful-convictions-race-exoneration.html>.

18. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012).

19. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2008).

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### E. SENTENCING

Racial bias also enters into sentencing decisions. African-American offenders receive sentences that are 10% longer than the sentences for similarly situated white defendants.<sup>20</sup> African-Americans “are 21 percent more likely to receive mandatory-minimum sentences than white defendants and are 20 percent more like[ly] to be sentenced to prison.”<sup>21</sup> A rigorous statistical study of judges in Cook County, Illinois, found that “at least some judges treat defendants differently on the basis of their race” and that the “magnitude of this effect is substantial.”<sup>22</sup>

As discussed below, the so-called “Baldus study” (at issue in *McCleskey v. Kemp*) demonstrated that racial factors affect the likelihood of a death sentence. More recent research has shown that “the probability of receiving the death penalty is significantly influenced by the degree to which the defendant is perceived to have a stereotypical Black appearance (e.g., broad nose, thick lips, dark skin).”<sup>23</sup>

### III. MAJOR SUPREME COURT CASES ON RACE AND ADJUDICATION

There is surprisingly little case law on racial bias in the criminal process. As discussed below, the Supreme Court has decided important “race” cases on jury composition, sentencing, and selective prosecution, but given the vast race disparities in arrests and incarceration, and the considerable scholarship devoted to these issues, one might expect there to be more decisions from the Court addressing the problems.

This relative dearth of case law may be a circumstance that the Court has helped to create. As discussed below, its case law makes it difficult for accused persons to even obtain data from prosecutors that would make it possible to compare their treatment of various racial groups. It is also possible that racial-justice advocates have been reluctant to take their claims to a conservative Court that has been seen, for the last three decades, as unsympathetic to civil-rights claims. Indeed, in the three major cases discussed below, the African-American

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20. U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (2010). See generally Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

21. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CENTER FOR AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

22. David Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (2012).

23. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

litigants lost two of them. In the other case, *Batson v. United States*, the civil-rights claim prevailed, but the opinion has been widely regarded as ineffectual. A third explanation might be that defendants have the most incentive to raise Fourth Amendment claims, because the remedy for a violation is exclusion of the evidence. There is no exclusionary rule for equal protection violations.<sup>24</sup>

Racial discrimination in criminal adjudication is unconstitutional. However, racial *disparities* in criminal justice are not necessarily proof of discrimination. In a number of decisions over the years, the Supreme Court has made racial discrimination difficult to prove.

#### A. RIGHT TO “EQUAL PROTECTION OF LAW” IN JURY COMPOSITION

In criminal cases, the prosecutor and the defendant both play a role in selecting the jury. If there is a reason to think a potential juror cannot be fair, either side can ask the judge to dismiss the juror “for cause.” The prosecutor and defendant also have a limited number of “peremptory challenges,” which allow them to strike jurors without any explanation to the judge. In *Batson v. Kentucky*, the Supreme Court held that a prosecutor may not use these challenges to exclude potential jurors based on race.<sup>25</sup> The Court ruled that when a prosecutor exercises a peremptory challenge based on race, the defendant’s constitutional right to “equal protection under law” has been denied. At the same time, the Court was careful to note that a defendant has no right to have a jury that includes members of his or her own race. The Constitution requires only that the process of selecting the jury pool be free of racial bias.

Justice Thurgood Marshall, the first African-American to sit on the Supreme Court, agreed with the majority opinion but wrote separately to make the point that the goal of eliminating racial discrimination in jury selection “can be accomplished only by eliminating peremptory challenges entirely.”<sup>26</sup>

In *Georgia v. McCollum*, the Court extended its holding in *Batson* to defense attorneys, prohibiting them from using their peremptory challenges to exclude jurors based on race.<sup>27</sup> In spite of *Batson* and *McCollum*, evidence suggests that race discrimination in jury selection remains a problem, but it is difficult to prove because lawyers can usually identify “race neutral” reasons explaining why they have struck a potential juror. For example, the Supreme Court rejected a *Batson* challenge brought by a Hispanic defendant because it

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24. Pamela Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

25. *Batson v. Kentucky*, 476 U.S. 79 (1986).

26. *Id.* at 103 (Marshall, J., concurring).

27. *Georgia v. McCollum*, 505 U.S. 42 (1992).

found that the ability to speak Spanish—the prosecutor’s professed reason for striking the juror—was race-neutral.<sup>28</sup>

In addition, some studies suggest that race might play a role in how jurors evaluate criminal cases; for example, an African-American juror, based on her life experiences, might be more suspicious of the police than a white juror. If that’s true, then *Batson* and *McCullum* require lawyers to ignore race when they might perceive it to be in the best interests of their client to pay attention to it.<sup>29</sup>

*Foster v. Chatman* is one of the few recent cases in which the Supreme Court has found discrimination in the criminal process.<sup>30</sup> In the death-penalty trial of Timothy Foster, an African-American man, Georgia prosecutors established a code to designate potential jurors who were African-American and then used their peremptory strikes to exclude them. Among other things, the prosecutors took notes that marked potential black jurors as “B1,” “B2,” and “B3,” and put “n” for “no” next to the names of all those jurors. Another note referred to a potential juror’s affiliation with the Church of Christ and was annotated “NO. No Black church.”<sup>31</sup> A draft affidavit from an investigator compared black prospective jurors and concluded, “[i]f it comes down to having to pick one of the black jurors, [this one] might be okay.”<sup>32</sup>

In addition to this smoking-gun evidence of discrimination, the Court noted that the prosecutors’ “proffered reason[s] for striking” black jurors “applie[d] just as well” to similarly situated white jurors.<sup>33</sup> The Court also found relevant the prosecution’s “shifting explanations” and “misrepresentations of the record,” as well as the “persistent focus on race in the prosecution’s file.”<sup>34</sup> Considering this mountain of damning evidence, the Court held that the standard of purposeful discrimination had been met and ordered a new trial. While this decision was a good outcome for Mr. Foster, it nonetheless underscores the difficulty of proving discrimination in jury selection. In most cases, there will be no smoking gun, and clever prosecutors will be able to point to plausible race-neutral reasons for striking black jurors.

### B. DISCRETION VERSUS EQUAL JUSTICE

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28. *Hernandez v. New York*, 500 U.S. 352 (1991).

29. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfer*, 53 MD. L. REV. 107 (1994); Nancy J. King, *Post-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 88 n.92 (1993).

30. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

31. *Id.* at 1744.

32. *Id.*

33. *Id.* at 1754.

34. *Id.*

Racial disparities do not necessarily prove racial discrimination. The mere fact that, for example, African-Americans receive harsher sentences than similarly situated whites does not show that those sentences are the product of discrimination. The Supreme Court's decision in *McCleskey v. Kemp* illustrates the insufficiency of showing disparities in sentencing.

Warren McCleskey was an African-American man who had been convicted of killing a white police officer during an armed robbery in Georgia. He was sentenced to death and he appealed, arguing that the state's capital-punishment regime violated the constitutional right to equal protection of law and the Eighth Amendment prohibition against "cruel and unusual" punishment. McCleskey's claims were based on empirical evidence that suggested that African-Americans who killed white persons were more likely to be executed than whites who killed blacks, or blacks who killed other blacks. An elaborate statistical study (the Baldus study) indicated that, in Georgia, the death penalty was assessed in 22% of the cases involving black defendants and white victims, 8% of cases involving white defendants and white victims, 1% of cases involving black defendants and black victims, and 3% of cases involving white defendants and black victims.

The Baldus study controlled for hundreds of variables, including the race of the defendant and the victim, in capital trials. It found that race did not matter much in those cases in which juries rarely imposed the death penalty (for example, a man who kills his wife) or almost always imposed the death penalty (for example, mass murderers). In a mid-range of cases (including cases in which law enforcement officials were victims), however, juries sometimes imposed death and sometimes did not. In those cases, race made a significant difference, with the killers of white victims being most likely to be punished with death.

The Supreme Court, for the purposes of its analysis, assumed that the empirical evidence was correct. Nonetheless, the Court found that the death penalty in Georgia was constitutional, for several reasons.<sup>35</sup> First, the Supreme Court's equal protection doctrine requires intentional discrimination and McCleskey failed to prove that the Georgia Legislature intended to discriminate against blacks when it established the death penalty. Second, the Baldus study did not include McCleskey's own case and thus, even if the study proved discrimination in the abstract, it did not prove that McCleskey himself had been a victim of discrimination. Finally, the Court held that there are so many variables in a jury's decision to impose death that the Baldus study did not demonstrate that race was a significant factor.

The Court also suggested that even if race discrimination existed in the

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35. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

administration of criminal justice, McCleskey's proposed remedy of abolishing the Georgia death-penalty law was impractical. Justice Lewis Powell wrote that, "taken to its logical conclusion, [McCleskey's proposal to eliminate capital punishment in Georgia because it is administered in a discriminatory manner] throws into serious question the principles that underlie our entire criminal justice system." Justice Powell was concerned that if the Court eliminated the death penalty because of discriminatory enforcement, it would create precedent that would require the elimination of other kinds of punishment also found to be administered in a discriminatory manner. The Court concluded its analysis by suggesting that arguments about, and proposed remedies for, any racial consequences of capital punishment are "best presented to the legislative bodies."<sup>36</sup>

A study by the U.S. Department of Justice found large race disparities in imposition of the death penalty in federal courts.<sup>37</sup> Between 1995 and 2000, 72% of the federal cases approved for the death penalty involved minority defendants. White defendants were nearly twice as likely to receive plea bargains that waived the death penalty as African-American and Latino defendants.<sup>38</sup> The study noted that minority defendants make up a disproportionate percentage of federal death-penalty cases. According to the Justice Department, "the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. A factor of particular importance is the focus of federal enforcement efforts on drug trafficking enterprises and related criminal violence."<sup>39</sup>

Therefore, under existing case law, disparities do not conclusively demonstrate unlawful discrimination. On the one hand, it is true that some of these disparities are attributable to differences in crime rates. According to one study, about 60% of the black incarceration rate can be explained by higher rates of criminal behavior among African-Americans.<sup>40</sup> Of course, that leaves another 40% that likely result from "the foreseeable effects on blacks and whites of police tactics in the war on drugs and sentencing policies for violent

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36. *Id.*

37. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS, AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), <https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm>.

38. *See id.* (noting that "a plea agreement to a non-capital charge ... has occurred for 48% of White defendants, 25% of Black defendants, and 28% of the Hispanic defendants in cases where the Attorney General approved the death penalty.")

39. *Id.*

40. Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008).

and drug offenses.”<sup>41</sup> The problem with explaining sentencing disparities by pointing to offending rates is that this argument ignores selective enforcement and government policies that incentivize illegal behavior. African-Americans do not use or sell drugs at significantly higher rates than whites, but they are more heavily prosecuted for those crimes.<sup>42</sup> While African-Americans are more likely to be involved in violent crime, this violence is largely a result of an illegal market for drugs and a lack of economic opportunity.<sup>43</sup> Understanding the problems in the criminal justice system requires a broad conception of discrimination, but the Supreme Court has insisted on a narrow definition.

### C. DIFFICULTY OF PROVING DISCRIMINATION

Proving discrimination in the workings of the criminal justice system can be quite difficult. *United States v. Armstrong* shows that black defendants claiming discrimination are fighting an uphill battle.

Christopher Lee Armstrong alleged that he was selectively prosecuted for offenses involving crack cocaine because he is African-American.<sup>44</sup> At his trial, Armstrong presented evidence that in each of the 22 crack distribution and conspiracy cases brought in Los Angeles in 1991, the defendant was African-American. He filed a motion for “discovery,” which is the process by which lawyers acquire information about the other side’s case prior to trial. Armstrong requested records about the race of people who had been prosecuted for crack offenses in the last three years. The prosecution refused to provide the evidence.

The Supreme Court ruled that Armstrong did not have a right to the evidence. In an 8-1 decision, the Court held that, in order to obtain discovery, a defendant who claims selective prosecution must make a threshold showing that “the Government declined to prosecute similarly situated suspects of other races.” Chief Justice William Rehnquist stated, “If the claim . . . were well founded, it should not have been an insuperable task to prove that persons of a different race were not prosecuted.”<sup>45</sup>

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41. *Id.*

42. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 60–61 (2014) (“[T]he prevalence of drug use is only slightly higher among blacks than whites for some illicit drugs and slightly lower for others; the difference is not substantial. There is also little evidence, when all drug types are considered, that blacks sell drugs more often than whites.”).

43. *Id.* See generally Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report.

44. *United States v. Armstrong*, 517 U.S. 456 (1996).

45. *Id.*



In dissent, Justice Stevens chastised the Court for essentially requiring defendants to “prepare sophisticated statistical studies in order to receive mere discovery in cases like this one.” He argued that “evidence based on a drug counselor’s personal observations or on an attorney’s practice in two sets of courts, state and federal, can ‘ten[d] to show the existence’ of a selective prosecution.”

*United States v. Armstrong* makes it difficult for defendants claiming selective prosecution to even get their feet in the courthouse door. The large number of overlapping criminal offenses gives prosecutors a great deal of discretion on what to charge.<sup>46</sup> Decisions like *Armstrong* have significantly curtailed judicial oversight of that discretion.

### RECOMMENDATIONS

In a memorandum written to his fellow justices as they were considering the *McCleskey* case, Justice Antonin Scalia observed that “racial antipathies” are “ineradicable.”<sup>47</sup> If Scalia was correct, this suggests that African-Americans and Latinos will continue to experience discrimination no matter what kinds of reforms are implemented. It seems inevitable that law enforcement officials, even when well intentioned, will exercise their vast discretion in ways that burden people of color. The most effective remedies, then, will be those that seek to reduce contact between people of color and police and prosecutors, and those that reduce the discretion that law enforcement officials have. What follows is a number of recommendations that would reduce bias in criminal adjudication.

1. **End money bail.** Money bail discriminates against low-income defendants. Studies have found that “most people who are unable to meet bail fall within the poorest third of society.”<sup>48</sup> Money bail has a particularly harmful effect on people of color. “[T]he typical Black man, Black woman, and Hispanic woman detained for failure to pay a bail bond were living below the poverty line before incarceration.” It is simply unfair to “punish[] defendants before they get their day in court.”<sup>49</sup> Moreover, none of the

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46. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

47. Memorandum from Justice Antonin Scalia to the Conference Re: No. 84-6811—*McCleskey v. Kemp* (Jan. 6, 1987), available at <http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf>.

48. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, *DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME* (2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

49. Shaila Dewan, *When Bail Is Out of Defendant’s Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

purported justifications for money bail hold up to scrutiny. Most people are not arrested for serious violent crimes. Many defendants are held only because they are poor and cannot afford bail.

Finally, ending money bail would not prevent the government from holding dangerous offenders or ensuring that people show up for court proceedings. In the District of Columbia, for example, courts release about 90% of arrestees without requiring money bail; instead, individuals must “promise to return to court and meet conditions such as checking in with a pretrial officer or reporting for drug testing.”<sup>50</sup> Potentially dangerous individuals are not eligible for pretrial release. Studies have shown that even a short period of pretrial detention can ruin people’s lives and increase the chances of recidivism.<sup>51</sup> Indeed, there is growing recognition among law-enforcement officials that money bail “is not a rational system.”<sup>52</sup> Maryland, New Jersey, Kentucky, and New Mexico have already limited the use of money bail.<sup>53</sup> More states should join them.

2. **Decriminalize misdemeanors.** While much of the attention around criminal justice reform has focused on reducing incarceration, policymakers must also address the millions of misdemeanor cases filed each year. As Alexandra Natapoff has explained, defendants charged with misdemeanors often find themselves deprived of basic due-process protections. The results of “the slipshod quality of petty offense processing” are devastating:

[E]very year the criminal system punishes thousands of petty offenders who are not guilty. Misdemeanants routinely plead to low-level crimes for which there is little or no evidence, without assistance of counsel or any other meaningful adversarial process. In some cases, defendants are demonstrably innocent. In others, the process is so lax that we cannot say with any certainty

50. Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.’s Way*, WASH. POST (July 4, 2016), [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html).

51. Michael Hardy, *In Fight Over Bail’s Fairness, a Sheriff Joins the Critics*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html>.

52. *Id.* (quoting Harris County Sheriff Ed Gonzalez).

53. Ovetta Wiggins & Ann E. Marimow, *Maryland’s Highest Court Overhauls the State’s Cash-Based Bail System*, WASH. POST (Feb. 7, 2017), [https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d\\_story.html](https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html).

whether defendants are guilty or not. Moreover, because many of these underprocessed convictions are for urban disorder offenses, the phenomenon disproportionately affects minority and other heavily policed groups.<sup>54</sup>

This method of treating misdemeanor offenses is a grave injustice. It also disproportionately hurts African-Americans. As Devon Carbado has pointed out, “blacks are more likely to be arrested for low-level crimes than whites.”<sup>55</sup> Criminal misdemeanor offenses, which often encompass vague conduct like “disturbing the peace” or “loitering,” grant police officers a wide range of discretion. “Against the background of mass criminalization,” Carbado writes, “police officers can almost always find a justification to investigate an African-American for some crime.”<sup>56</sup> Misdemeanor offenses “provide[] police officers with a kind of free-floating probable cause—or free-floating reasonable suspicion—that they can use to justify their repeated interactions with African-Americans.”<sup>57</sup>

One solution is to decriminalize misdemeanors—that is, imposing fines rather than prison sentences for offenses like marijuana possession, disorderly conduct, and loitering. Decriminalizing misdemeanors can have unintended consequences: police forces such as the Ferguson Police Department have used less serious offenses as revenue-collection devices, preying on low-income communities; individuals can still be incarcerated for their failure to pay the fines; and individuals may still face “collateral consequences” for being convicted of a misdemeanor.<sup>58</sup> As a result, policymakers must not only decriminalize misdemeanor but also reduce “the burdens associated with minor offenses” and reconsider “the punitive turn that fueled the carceral explosion of the late 20th century.”<sup>59</sup> Decriminalization should be a means of reducing the punitive aspects of the criminal justice system, not simply reintroducing those aspects in a different form.

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54. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012); see also Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

55. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486 (2016).

56. *Id.* at 1490. See generally Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report.

57. Carbado, *Blue-on-Black Violence*, *supra* note 55, at 1490.

58. Alexandra Natapoff, *Decriminalizing Misdemeanors*, 68 VANDERBILT L. REV. 1055, 1077–1102 (2015) (discussing the “dark side of decriminalization”). See generally Beth A. Colgan, “Fines, Fees, and Forfeitures,” in Volume 4 of the present Report; Gabriel J. Chin, “Collateral Consequences,” in Volume 4 of the present Report.

59. Natapoff, *Decriminalizing Misdemeanors*, *supra* note 58, at 1116.

3. **Require racial-impact analysis for criminal justice policies.** Before government agencies approve construction projects or promulgate regulations, they are often required to produce environmental-impact statements and engage in cost-benefit analysis. The rationale for these requirements is that “policies often have unintended consequences that would be best addressed prior to adoption of new initiatives.”<sup>60</sup> Criminal justice policies such as mandatory-sentencing laws often have disparate impacts on communities of color. Several states have passed laws that “require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies.”<sup>61</sup> Racial-impact statements would alert lawmakers to the potential costs of criminal justice policies and would ensure that those policies do not “exacerbate any unwanted disparities.”<sup>62</sup>
4. **Collect more data on prosecutors’ offices.** “What gets measured gets noticed.”<sup>63</sup> The Vera Institute’s study of the Manhattan DA’s office provided useful data on prosecutors’ charging decisions and sentencing outcomes.<sup>64</sup> Similar studies of other prosecutors’ offices would tell us more about racial disparities in criminal adjudication. Data by itself will not solve the problem. But more studies that document instances of disparate treatment can help policymakers pinpoint areas for improvement.

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60. Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16 (2009).

61. *Id.*

62. *Id.*

63. See, e.g., Hillary Rodham Clinton, Keynote at the Opening Session of the Fourth High-Level Forum on Aid Effectiveness (Nov. 30, 2011), available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/11/177892.htm>.

64. KUTATELADZE ET AL., *supra* note 10.

# Crime Victims' Rights

Paul G. Cassell\*

*Over the last 40 years, advocates for crime victims have succeeded in enshrining victims' rights in state constitutions and other enactments. These provisions show that a consensus has developed around the country on certain core victims' rights. Included in the core are, among other things, the right to notice of court hearings, to attend court hearings, to be heard at appropriate court hearings, to proceedings free from unreasonable delay, to consideration of the victims' safety during the process, and to restitution. The current challenge for the country is ensuring that these core rights are fully and effectively implemented and that victims have a means for enforcing these rights. Strengthened enforcement language in state constitutions and, ultimately, perhaps placing victims' rights in the United States Constitution offer the best prospects for fully protecting crime victims' interests in the criminal justice system.*

## INTRODUCTION

The other chapters in this volume on criminal justice reform have largely focused on prosecutors' interests in bringing criminals to justice or defendants' (or potential defendants') interests in protecting their personal privacy or receiving due process. But no discussion of criminal justice would be complete without considering the interests of an important group: crime victims. Crime victims have compelling concerns in the criminal justice system. No system of criminal justice can gain broad community acceptance if it fails to attend appropriately to victims' interests.

Over the last 40 years, acting on a bipartisan basis, the vast majority of states have adopted significant statutory and even constitutional protections for crime victims. These enactments rest on the widely shared premise that "[w]hile defendants have strong interests in fair trials, victims likewise have strong personal interests in being listened to and taken seriously."<sup>1</sup> This chapter

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1. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 91 (2012).

looks carefully at the federal and state crime victims' rights protections that have become an important—but often underappreciated—part of the current architecture in American criminal justice. While these protections differ in detail from jurisdiction to jurisdiction, when examined as a group, many common features emerge.

The goal of this chapter is to attempt to distill from these enactments a core set of shared values for victims' rights in these American provisions.<sup>2</sup> This chapter begins by briefly discussing the history of the crime victims' rights movement over the last several decades. It then reviews crime victims' enactments to identify the core set of values that have emerged. It finally offers some thoughts about what appears to be the most pressing current challenge for crime victims' rights: the need for effective enforcement. This chapter concludes that strengthened state constitutional amendments—and perhaps even a federal constitutional amendment protecting crime victims' rights—offer the best path for ensuring that crime victims' interests are properly protected in our criminal justice process.<sup>3</sup>

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2. Similar shared values about the importance of victims' rights exist in foreign and international law as well, but are beyond the scope of this short chapter. See, e.g., HUMAN RIGHTS WATCH, MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> (discussing the many “international human rights instruments [that] address or touch on [crime] victims' rights”); cf. Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015); Michael K. Browne, *International Victims' Rights Law: What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a “Victim's Rights Amendment” to its Constitution*, 27 HAMLINE L. REV. 15 (2004) (discussing German victims' law).

3. This chapter draws on some of my earlier articles discussing victims' rights. See, e.g., Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U.L. REV. COLLOQUY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

## I. THE CRIME VICTIMS' RIGHTS MOVEMENT

While a comprehensive history of the treatment of crime victims in the system remains to be written, the broad outlines can be quickly sketched. At our country's founding, crime victims played an important role in criminal prosecutions, often bringing their own "private" prosecutions.<sup>4</sup> Over time through the 19th century, however, a system of public prosecution steadily displaced victims.<sup>5</sup> Ultimately, well into the 20th century, the system had moved to the point where it seemed fair to describe the victim as "the forgotten man" of the system.<sup>6</sup>

The Crime Victims' Rights Movement developed in the 1970s because of this perceived imbalance. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it . . . found voice in a nationwide 'victims' rights' movement."<sup>7</sup> Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.<sup>8</sup> These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.<sup>9</sup> The victims' rights movement brought together a broad and diverse coalition, including women's rights advocates concerned about the treatment of rape victims in court proceedings, advocates for racial minorities concerned about inadequate protection against racially motivated violence, and "law and order" advocates concerned that victims' interests were given inadequate attention by judges focused on defendants' rights.

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4. William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

5. BIBAS, *supra* note 1, at 88; Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U.L. REV. 1135, 1138-42 (2007).

6. McDonald, *supra* note 4, at 650.

7. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 3-35 (3d ed. 2010); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Goldstein, *supra* note 5; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. 379 (2012).

8. See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255; Cassell, *Balancing the Scales*, *supra* note 7, at 1380-82.

9. See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517.

The victims' rights movement received considerable impetus in 1982 when the President's Task Force on Victims of Crime reviewed the treatment of victims.<sup>10</sup> In a report issued that year, the task force concluded that the criminal justice system "has lost an essential balance. ... [T]he system has deprived the innocent, the honest, and the helpless of its protection. ... The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."<sup>11</sup> The task force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.<sup>12</sup> The task force also urged that courts should receive victim-impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.<sup>13</sup> In its most sweeping recommendation, the task force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."<sup>14</sup>

In the wake of the recommendation for a federal constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try to initially enact state victims' amendments. They have had considerable success with this "states first" strategy.<sup>15</sup> To date, about 35 states have adopted victims' rights amendments to their own state constitutions protecting a wide range of victims' rights.

The state constitutional amendments were passed in two waves. Beginning with Rhode Island's enactment of a statement amendment in 1986<sup>16</sup> and Michigan's in 1988,<sup>17</sup> more than 30 states passed the state constitutional amendments in what might be regarded as the first wave of protection of crime victims' rights. The amendments provided a broad range of crime victims' rights in the criminal justice process. And even in states without constitutional protection, statutory protections for victims' rights were enacted. In many

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10. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982), available at <https://www.ovc.gov/publications/presdntstskforcrprt/welcome.html>.

11. *Id.* at 114.

12. *Id.* at 63.

13. *Id.* at 72-73.

14. *Id.* at 114 (emphasis omitted).

15. See S. REP. NO. 108-191 (2003).

16. RHODE ISLAND CONST. art. I, § 23.

17. MICH. CONST. art. I, § 24



states, however, the amendments and statutes lacked effective enforcement mechanisms to ensure that their rights were fully implemented. As Attorney General Janet Reno explained in 1997 after a Justice Department review of the landscape, these state efforts “failed to fully safeguard victims’ rights.”<sup>18</sup>

One way of improving enforcement of state crime victims’ rights enactments is through strengthened state constitutional protections. In 2008, a second wave of state constitutional efforts began. In California, Dr. Henry T. Nicholas (the co-founder of Broadcom Corp.) backed the enactment of “Marsy’s Law,” named after his sister Marsalee (Marsy) Nicholas. She was stalked and killed by her ex-boyfriend in 1983. Only a week after her murder, Dr. Nicholas and Marsy’s mother walked into a grocery store after visiting Marsy’s grave and were confronted by the accused murderer. The family had not been told that he had been released on bail.<sup>19</sup> The family also suffered further indignities during the criminal justice process.

Determined to prevent mistreatment of other victims in the process, Dr. Nicholas supported a comprehensive rewrite of California’s state constitutional amendment protecting crime victims. In November 2008, California voters overwhelming approved Proposition 9,<sup>20</sup> making California’s amendment arguably the strongest and most comprehensive in the country. Since then, similar Marsy’s Law amendments have been added to the state constitutions of Illinois in 2014,<sup>21</sup> and Montana, North Dakota, and South Dakota in 2016.<sup>22</sup> Efforts are currently underway to add enhanced state constitutional protections for victims in Georgia, Idaho, Kentucky Maine, Nevada, North Carolina, Ohio, Oklahoma, and Wisconsin, among other states.<sup>23</sup>

## II. CORE CRIME VICTIMS’ RIGHTS

The enactment of state crime victims’ rights amendments across the country suggests, when viewed together, an emerging consensus that certain core victims’ rights should be protected. This section briefly reviews a number of these core rights,<sup>24</sup> making the case for each of them and then explaining how protection has been operationalized in the current state constitutional (and, in some cases, statutory) enactments.

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18. *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att’y Gen.).

19. *See About Marsy’s Law*, MARSY’S LAW FOR ALL, <https://marsyslaw.us/about-marsys-law/>.

20. CAL. CONST. art. I, § 28.

21. ILL. CONST. art. I, § 8.1.

22. Respectively, MONT. CONST. art. II, § 36; N.D. CONST. art. I, § 25; and S.D. CONST. art. VI, § 29.

23. *See About Marsy’s Law*, *supra* note 19.

24. In this brief chapter, I don’t discuss every right that might be considered “core” or important to victims.

## A. THE RIGHT TO NOTICE OF COURT HEARINGS

A crime victim's right to notice about criminal proceedings is an important right that is now broadly recognized. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about any subsequent prosecution and any associated hearings. Notice of court hearings is traditionally recognized as a core part of due process.<sup>25</sup> While victims may not suffer a loss of liberty as the result of a criminal proceeding, they certainly have strong claim to be kept fully informed about the progress of a criminal case. Knowing what is happening can, for example, greatly reduce a victim's anxiety about the process.<sup>26</sup> For reasons such as these, the President's Task Force on Victims of Crime urged that "[p]rosecutors should keep victims informed about the status of the case from the initial decision to charge or to decline prosecution."<sup>27</sup>

To guarantee that victims will be kept informed about the progress of court cases, many state constitutional and statutory provisions promise crime victims that they will be notified about court hearings. The California Constitution, for example, guarantees crime victims "reasonable notice" of all public proceedings.<sup>28</sup> The Idaho Constitution guarantees the right "to prior notification of trial court, appellate and parole proceeding."<sup>29</sup> And the Texas Constitution promises "the right to notification of court proceedings ... on the request of a crime victim."<sup>30</sup>

Some state provisions spell out notifications in more detail. For example, my own state of Utah has enacted the Utah Rights of Crime Victims Act, which provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges."<sup>31</sup> The initial notice must contain information about "electing to receive

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25. See, e.g., *Dusenberg v. United States*, 534 U.S. 161, 167 (2002).

26. PRESIDENT'S TASK FORCE, *supra* note 10, at 64 (quoting victim to this effect).

27. *Id.*; cf. Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume (suggestion declaration of standards for prosecutors, standards which could include crime victims' rights protections).

28. CAL. CONST., art. I, § 28(b)(7).

29. IDAHO CONST., art. I, § 22(3); see Note, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 184-86 (1997) (discussing enforcement of notification provisions).

30. TEX. CONST. art. I, § 30 (order rearranged).

31. UTAH CODE ANN. § 77-38-3(1). See generally Cassell, *Balancing the Scales*, *supra* note 7.

notice of subsequent important criminal justice hearings.”<sup>32</sup> In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or, more recently, a computer-generated letter that victims simply return to the prosecutor’s office to receive subsequent notices about proceedings. The return letter serves as the victims’ request for further notices. In the absence of such a request, a prosecutor need not send any further notices.<sup>33</sup>

Fortunately, with developing new electronic technologies, keeping victims informed about court hearings is becoming easier than ever.<sup>34</sup> Automated victim-notification systems abound, most prominently the so-called VINE (Victim Information Notification Everyday) system.<sup>35</sup> Under such a system, a victim registers for notification through e-mail or phone call. Then, when court hearings are scheduled, a computerized notification is made.

In some cases (e.g., terrorist bombings or massive financial frauds), the large number of victims may render individual notifications impractical. In such circumstances, notice by means of a press release to daily newspapers in the area has been regarded as a reasonable alternative to actual notice sent to each victim at his or her residential address.<sup>36</sup> New technologies may also provide a way of affording reasonable notice. For example, some federal courts have approved notice by publication, where the publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.<sup>37</sup>

### B. THE RIGHT TO ATTEND COURT HEARINGS

Victims also deserve the right to attend all public proceedings related to a crime, as is recognized across the country. The President’s Task Force on Victims of Crime articulated the basis for this right: “The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.”<sup>38</sup>

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32. *Id.* § 77-38-3(2). The notice will also contain information about other rights under the victims’ statute. *Id.*

33. *Id.* § 77-38-3(8); see also Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims’ Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 434 (2015) (discussing victim notification in Arizona).

34. See BIBAS, *supra* note 1, at 150 (“With the advent of email, notifying victims ... is even easier”).

35. See, e.g., VINE, APPRISS SAFETY, <https://apprissafety.com/solutions/vine/>.

36. United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at \*1-2 (W.D.N.C. Sept. 15, 2009).

37. See, e.g., United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at \*1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at \*1-2 (E.D.N.Y. Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at \*2-3 (S.D. Ill. 2006).

38. PRESIDENT’S TASK FORCE, *supra* note 10, at 80.

Several strong reasons support such a right. As Professor Doug Beloof and I have argued at length elsewhere,<sup>39</sup> the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. And it is widely recognized that the “victim’s presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim.”<sup>40</sup>

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, improperly used broad witness-exclusion rules to harm victims.<sup>41</sup> Moreover, without a right to attend the trial, “the criminal justice system merely intensifies the loss of control that victims feel after the crime.”<sup>42</sup> It should come as no surprise that “[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum.”<sup>43</sup> One crime victim put it more directly: “All we ask is that we be treated just like a criminal.”<sup>44</sup> Defendants take full advantage of their right to be in the courtroom.<sup>45</sup>

To ensure that victims can attend court proceedings, many state amendments extend to a crime victim an unqualified right to attend trial,<sup>46</sup> while others extend a qualified right to attend unless the victim’s testimony would be materially affected by attendance.<sup>47</sup> Typically such provisions give victims a right not to be excluded from public proceedings. The right is phrased in the

39. See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

40. Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

41. See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, *THE CRIME VICTIM’S RIGHT TO BE PRESENT* 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).

42. Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

43. Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

44. *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES’ HOME J., Sept. 1986).

45. See LINDA E. LEDRAY, *RECOVERING FROM RAPE* 199 (2d ed. 1994) (“Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.”).

46. See, e.g., ALASKA CONST. art. I, § 24 (right “to be present at all criminal ... proceedings where the accused has the right to be present”); MICH. CONST., art. I, § 24(1) (right “to attend the trial and all other court proceedings the accused has the right to attend”); OR. R. EVID. 615 (witness exclusion rule does not apply to “victim in a criminal case”); see also Beloof & Cassell, *supra* note 39, at 504-19 (providing a comprehensive discussion of state law on this subject).

47. See, e.g., FLA. CONST. art. I, § 16(b) (“Victims of crime or their lawful representatives ... are entitled to the right ... to be present ... at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused”).

negative—a right *not* to be excluded—thus avoiding the possible suggestion that a right “to attend” carried with it a victim’s right to demand payment from the government for travel to court.<sup>48</sup> Such an unqualified right does not interfere with a defendant’s right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.<sup>49</sup>

The victim’s right not to be excluded is limited to public proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. Generally, the way that state amendments work is not to interfere with court closure policies, but simply to indicate that when a proceeding is closed, the victim may be excluded as well.<sup>50</sup>

### C. THE RIGHT TO BE HEARD AT RELEVANT PROCEEDINGS

Many states have also properly recognized that crime victims deserve the right to be heard at appropriate points in the criminal justice process, thus allowing victims to participate directly in criminal proceedings. Allowing such victim participation can provide important information to judges. Having the actual victim speak is useful because “gauging the harm to a unique human being, not a faceless abstraction, requires evidence of how that particular victim suffered.”<sup>51</sup> And victim participation can lead to important therapeutic benefits. As Professor Bibas has explained at length in his important book *The Machinery of Criminal Justice*, “it is simple participation that helps to empower and heal victims. Participants see the law as more fair and legitimate when they have some control over the process and they have been heard, whether or not they control ultimate outcomes.”<sup>52</sup> Hearing victim voices can be important regardless of any formal effect on criminal penalties, as recent experience with “reconciliation commissions” in other countries attests.<sup>53</sup>

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48. Cf. ALA. CODE § 15-14-54 (right “not [to] be excluded from court ... during the trial or hearing or any portion thereof ... which in any way pertains to such offense”). This negative formulation may be excessive caution, because no right-to-be-present provision has been interpreted to require the state to pay for victims to travel.

49. See Belooof & Cassell, *supra* note 39, at 520-34; see, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008).

50. See generally WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

51. BIBAS, *supra* note 1, at 91; see also Laurence H. Tribe, *McVeigh’s Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25.

52. BIBAS, *supra* note 1, at 151.

53. See, e.g., Mary Burton, *Custodians of Memory: South Africa’s Truth and Reconciliation Commission* 32 INT’L J. LEGAL INFO. 417 (2004).

Recognizing such benefits, states have extended a right to participate in various ways. For example, the recently enacted constitutional provision in South Dakota promises crime victims the “the right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated.”<sup>54</sup> A number of states have added similar provisions to their state constitutions guaranteeing victim participation.<sup>55</sup>

The existing state amendments frequently recognize several points in the process as appropriate times for crime victims to be heard. First, the amendments commonly extend the right to be heard regarding any *release* proceeding—i.e., bail hearings. This right allows, for example, a victim of domestic violence to warn the court about possible violence should the defendant be granted bail. At the same time, however, nothing in these rights gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with the judge. The victim’s right to be heard regarding bail simply provides the judge with more information on which to base that decision. Release proceedings typically include not only bail hearings but other hearings involving the release of accused or convicted offenders, such as parole hearings. Victim statements to parole boards are particularly important because they “can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release.”<sup>56</sup>

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54. S.D. CONST. art VI, § 29.

55. See, e.g., ARIZ. CONST. art. II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); FLA. CONST. art. I, § 16(b) (right to be heard when relevant at all stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

56. Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT’L REV. VICTIMOLOGY 121, 134 (1994); see also Laura L. Richardson, *The Impact of Marsy’s Law on Parole in California*, 49 CRIM. L. BULL. 1091 (2013) (discussing changes in parole hearings after Marsy’s law enactment); Kathryn M. Young, *Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431 (2016).

The right to be heard also typically extends to any proceeding involving a plea bargain. Under the present rules of procedure in most states, a plea bargain between the prosecution and a defendant must be submitted to the trial judge for approval.<sup>57</sup> If the judge believes that the bargain is not in the interests of justice, she may reject it.<sup>58</sup> Unfortunately in some states, a victim does not always have the opportunity to discuss a plea with the prosecution while it is being negotiated<sup>59</sup> or to present to the judge information about whether to approve the plea. Indeed, it may be that in some cases, “keeping the victim away from the judge ... is one of the prime motivations for plea bargaining.”<sup>60</sup> Yet victims have compelling reasons for some role in the plea bargaining process:

The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine. ... [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.<sup>61</sup>

As with the right to be heard regarding bail, victims have a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

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57. See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 422 (discussing this issue); John F. Pfaff, “Prosecutorial Guidelines,” in the present Volume (discussing broad discretion for prosecutors in plea bargaining); Jenia I. Turner, “Plea Bargaining,” in the present Volume (arguing for greater transparency in plea bargaining practices).

58. See, e.g., UTAH R. CRIM. P. 11(e) (“The court may refuse to accept a plea of guilty ...”); State v. Mane, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding “[n]othing in the statute requires a court to accept a guilty plea”).

59. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 377 (2016) (discussing diversity in practice about victim involvement in plea negotiations).

60. HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).

61. BELOOF, CASSELL & TWIST, *supra* note 2, at 423. See generally Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (discussing victims' rights during plea); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (advancing reasons for victim participation in plea discussions); Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 330-32 (2007) (victim involvement in plea bargains improves perception of fair treatment and increases public confidence in the process).

State amendments typically extend to victims the right to be heard at proceedings for determining a sentence. Defendants, of course, have the right to directly address the sentencing authority before sentence is imposed.<sup>62</sup> Victims' enactments typically extend the same basic right to victims.<sup>63</sup>

Elsewhere, I have argued at length in favor of such victim-impact statements.<sup>64</sup> The essential rationales are that victim-impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing.<sup>65</sup> The arguments in favor of victim-impact statements have been generally persuasive in this country, as the federal system and all 50 states provide victims the opportunity to deliver a victim-impact statement.<sup>66</sup> It is important to emphasize that victims "are not reflexively punitive" and a number of "[e]mpirical studies find that participation by victims does not lead

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62. See, e.g., FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

63. See generally NORMA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 349-58 (3d ed. 2013) (discussing victim impact statements).

64. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

65. *Id.* at 619-25.

66. *Id.* at 615; see also Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).



to harsher sentences.”<sup>67</sup> Nor does the claim that victims’ impact statements might be somehow “emotional” carry much weight, given that many other parts of the law recognize that it is proper to have such arguments.<sup>68</sup>

Victims can exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court’s consideration. Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-information.<sup>69</sup>

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67. BIBAS, *supra* note 1, at 91; *see also* Cassell, *supra* note 64, at 634-37 (“good evidence that victim impact statements generally lead to harsher sentences is lacking”); Edna Erez, *Who’s Afraid of the Big Bad Victims? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 548 (“sentence severity has not increased following the passage of [victim impact] legislation”); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 308 (2003) (“We find [no] significant relation between the introduction of [victim impact evidence] and sentencing outcomes.”); EDWIN VILLMOARE & VIRGINIA N. NETO, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS’ BILL OF RIGHTS 61 (1987) (“[t]he right to allocution at sentencing has had little net effect ... on sentences in general”); Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994) (finding “no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy”); ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that the result of the study “lend[s] support to advocates of victim impact statements” since no evidence indicates that these statements “put[] defendants in jeopardy [or] result in harsher sentences”); *cf.* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004) (“Victims do not want vengeance so much as additional rights to participate.”). *But cf.* Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1050 (2014) (discussing limitations of the current studies and making suggestions for future research); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166-67 (2012) (arguing that mock jury research shows victim impact evidence leads to punitiveness).

68. Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 356 (2008) (“Rather than bemoaning emotional reactions, reformers should acknowledge emotion as the legitimate battlefield of criminal justice.”); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment*, 1999 UTAH L. REV. 479, 486-96 (victim impact statements convey information, not emotion).

69. *See generally* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

Finally, many state amendments extend to a victim a general right to be heard at any proceeding involving any right established by the amendment. This allows victims to present information in support of a claim of right under the amendments, consistent with normal due-process principles.<sup>70</sup>

#### D. THE RIGHT TO PROCEEDINGS FREE FROM UNREASONABLE DELAY

Many state provisions also extend to crime victims the right to “a speedy trial and a prompt and final conclusion of the case”<sup>71</sup> or to proceedings “free from unreasonable delay.”<sup>72</sup> Such provisions are designed to be the victim’s analogue to a defendant’s Sixth Amendment right to a speedy trial.<sup>73</sup> The defendant’s right is designed, among other things, “to minimize anxiety and concern accompanying public accusation” and “to limit the possibilities that long delay will impair the ability of an accused to defend himself.”<sup>74</sup> The interests underlying a speedy trial, however, are not confined to defendants. The Supreme Court has acknowledged that “there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”<sup>75</sup>

Victims often suffer significantly from delays in the criminal justice system.<sup>76</sup> For example, victims of violent crime frequently suffer from post-traumatic stress disorder (PTSD).<sup>77</sup> A connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide has also been reported in the academic literature.<sup>78</sup> Delays in the criminal process then exacerbate these initial injuries. Indeed, a “common problem in the prosecution of crimes against victims is that the trial is typically delayed through scheduling conflicts,

70. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (“For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard.” (internal quotation omitted)).

71. See, e.g., CAL. CONST., art. I, § 28(b)(9).

72. See ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art. I, § 9m.

73. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ...”).

74. Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

75. Barker v. Wingo, 407 U.S. 514, 519 (1972).

76. See Brief of Amicus Curiae Arizona Voice for Crime Victims (AVCV) at 6-9, Ryan v. Washington, 137 S. Ct. 1581 (Feb. 2017) (No. 16-840) (collecting research). This section draws heavily on the research collected in the AVCV brief.

77. See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUM. STRESS 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUM. STRESS 119, 119 (2003).

78. Parsons & Bergin, *supra* note 77, at 182.

continuances, and other unexpected delays throughout the course of the trial.”<sup>79</sup> It thus is not surprising that multiple studies suggest “the negative effect on a victim’s healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim.”<sup>80</sup> And “[t]he long delay between reporting a crime to the police and the beginning of the trial represents [a] source of psychological stress for crime victims.”<sup>81</sup>

Academic literature confirms the ways in which delays in the criminal justice system compound the crime’s initial effects on a victim.<sup>82</sup> A victim’s experience with the justice system often “means the difference between a healing experience and one that exacerbates the initial trauma.”<sup>83</sup> For example, one study examining the effect of offender punishment on crime victim recovery found that most victims experienced improved recovery when there was an increased perceived punishment of the offender.<sup>84</sup>

Delays in proceedings can also be particularly hard on child victims, who have difficulty healing until the anxiety of legal proceedings can be brought to an end.<sup>85</sup> More broadly, all victims have difficulty healing from the trauma of the crime until the trial is over and they can turn the page to the next chapter in their lives.<sup>86</sup> The harm caused by drawn-out judicial proceedings is especially acute in cases involving capital punishment, where the delay between the initial sentencing and an execution can stretch for decades.<sup>87</sup> Delay in death-penalty cases means that “[c]hildren who were infants when their loved ones were murdered are now, as adults, still dealing with the complexities of the criminal justice system.”<sup>88</sup>

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79. Mary Beth Ricke, *Victims’ Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J. L. & POL’Y 181, 183 (2013).

80. *Id.* at 193.

81. Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 215 (2004).

82. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUM. STRESS 159, 159 (2003).

83. Parsons & Bergin, *supra* note 77, at 182.

84. Joel H. Hammer, *The Effect of Offender Punishment on Crime Victims’ Recovery and Perceived Fairness (Equity) and Process Control* (1989) (unpublished dissertation, The New School).

85. Cassell, *Balancing the Scales*, *supra* note 7, at 1402-07.

86. See PRESIDENT’S TASK FORCE, *supra* note 10, at 75.

87. See *Hill v. McDonough*, 547 U.S. 573, 585 (2006) (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”); see also Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 322.

88. Dan S. Levy, *Balancing the Scales of Justice*, 89 JUDICATURE 289, 290 (2006).

To reduce such suffering, state constitutional provisions now often extend to crime victims the right to proceedings free from unreasonable delay. These provisions do not require courts to follow victims' demands for scheduling trial or for ending all delay, but rather to insure against "unreasonable" delay.<sup>89</sup> In interpreting these provisions, courts can look to the body of case law that already exists for resolving defendants' speedy-trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy-trial challenge in the wake of a delay.<sup>90</sup> As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy-trial right; and (4) whether the defendant was prejudiced by the delay.<sup>91</sup> The same sorts of considerations apply to victims and could be evaluated in assessing victims' claim to the need for a speedy resolution.

#### E. THE RIGHT TO NOTICE OF RELEASE OR ESCAPE OF THE ACCUSED

Another commonly recognized right concerns protections for victims. Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten or carry out violence to permanently silence the victim and prevent subsequent testimony. Or a convicted offender may later attack the victim in a quest for revenge. These dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.<sup>92</sup> Authorities soon placed him in jail for violating that order.<sup>93</sup> He later posted bail and tracked McHugh to a relative's apartment, where, on January 20, 1994, he fatally shot both Colleen McHugh and himself.<sup>94</sup> No one had notified McHugh of Boettcher's release from custody.<sup>95</sup>

To prevent such travesties, a number of states have enacted constitutional provisions requiring notice to crime victims whenever an offender is no longer in custody. California's amendment, for example, gives victims, upon request, the right to be informed of "the scheduled release date of the defendant, and the release

89. See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).

90. *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972).

91. See *id.* See generally LAFAYE ET AL., *supra* note 50, § 18.2.

92. Jeffrey A. Cross, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pretrial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

93. *Id.*

94. *Id.*

95. See *id.* (providing this and other examples).

of or the escape by the defendant from custody.”<sup>96</sup> Other states have comparable requirements.<sup>97</sup> These provisions ensure that victims are not suddenly surprised to discover that an offender is back on the streets—one of the animating concerns for the recent Marsy’s Law efforts.<sup>98</sup> Generally, notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant or a pardon,<sup>99</sup> or an *escape*. The administrative burdens associated with such notification requirements have recently been minimized by technological advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.<sup>100</sup>

#### F. THE RIGHT TO CONSIDERATION OF THE VICTIM’S SAFETY

Given the safety concerns of a crime victim in a criminal case, a number of states have also recognized a right for crime victims to have their safety considered during court proceedings. For example, about 15 states extend to victims the constitutional right to be reasonably protected from the accused—such as the California constitutional provision extending a right to victims to “be reasonably protected from the defendant and persons acting on behalf of the defendant” and to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.”<sup>101</sup> Virginia extends to victims “[t]he right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release.”<sup>102</sup> Sometimes such enactments are supplemented by giving victims the

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96. CAL. CONST. art. I, § 28(b)(12).

97. See, e.g., ARIZ. CONST. art. II, § 2.1 (victim’s right to “be informed, upon request, when the accused or convicted person is released from custody or has escaped”); S.C. CONST. art. I, § 24 (“victims of a crime have a right to ... be reasonably informed when the accused or convicted is arrested, released from custody, or has escaped”); MICH. CONST. art I, § 24 (crime victims have the right to information about the conviction, sentence, imprisonment, and release of the accused”).

98. See *supra* note 19 and accompanying text.

99. Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims’ Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89 (2015).

100. See, e.g., VINELINK, <https://www.vinelink.com>.

101. CAL. CONST. art. I, § 28(b)(2)-(3).

102. VA. CONST. art. I, § 8-A.

right to be free from harassment.<sup>103</sup> Federal law, too, gives victims “[t]he right to be reasonably protected from the accused.”<sup>104</sup>

These provisions are designed to require that a crime victim’s safety be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.<sup>105</sup> For example, in considering whether to release a suspect on bail,<sup>106</sup> a court following such a provision is required to consider the victim’s safety. This dovetails with the earlier-discussed provisions giving victims a right to speak at proceedings involving bail.<sup>107</sup> Once again, it is important to emphasize that nothing in these provisions gives the victim any sort of veto over the release of a defendant. To the contrary, the provisions merely establish a requirement that due consideration be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective order.<sup>108</sup> For instance, in many domestic-violence cases, courts may release a suspected offender on the condition that he<sup>109</sup> refrain from contacting the victim. In many cases, consideration of the safety of the victim will lead to courts crafting appropriate no-contact orders and then enforcing them through the ordinary judicial processes currently in place.

103. See, e.g., CAL. CONST. art. I, § 28(b)(1) (victims have a right to “be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process”); TENN. CONST. art. I, § 35 (victims shall be entitled to the “right to be free from intimidation, harassment and abuse throughout the criminal justice system”); ILL. CONST. art. I, § 8.1 (crime victims have the right to “right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process”).

104. 18 U.S.C. § 3771(a)(1). See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-96 (2010).

105. In the case of a mandatory release of an offender (e.g., releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim’s safety.

106. See generally Megan Stevenson & Sandra Mayson, “Pretrial Detention and Bail,” in the present Volume.

107. See *supra* note 56 and accompanying text.

108. See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 310-23.

109. Serious domestic violence defendants are predominantly, although not exclusively, male.

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### G. THE RIGHT TO PROTECTION OF PRIVACY AND DIGNITY

Victims also have considerable privacy and dignity interests at stake in criminal proceedings.<sup>110</sup> Sexual-assault victims, for example, suffer the ultimate invasion of privacy from the crime, and run the risk of continued loss of privacy during the criminal justice process.<sup>111</sup> A criminal justice system should be structured so that it avoids unnecessary invasions of privacy and insults to dignity.<sup>112</sup>

Recognizing the legitimacy of protecting such victims' interests, about 20 states extend to crime victims protection for their privacy and dignity interests. For example, California promises a victim a right "[t]o be treated with fairness and respect for his or her privacy and dignity."<sup>113</sup> Arizona promises crime victims the right "[t]o be treated with fairness, respect, and dignity ... throughout the criminal justice process."<sup>114</sup> And Indiana extends to victims "the right to be treated with fairness, dignity and respect throughout the criminal justice process."<sup>115</sup> Federal law, too, guarantees crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."<sup>116</sup>

The precise scope of these general rights remains to be fully defined. At a minimum, such provisions provide constitutional dignity to various other enactments that help protect victim privacy. For example, some states have enacted so-called victim-counselor privilege laws, which enable victim counselors to maintain the confidentiality of information revealed to them by crime victims, subject of course to constitutional disclosure obligations.<sup>117</sup> Constitutional protection for victims' privacy may help to ensure that such statutes operate as intended.<sup>118</sup>

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110. See generally Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015).

111. See Paul Marcus & Tora McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019 (1991).

112. Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43 (2016).

113. CAL. CONST. art. I, § 28(b)(1).

114. ARIZ. CONST. art. II, § 2.1.

115. IND. CONST. art. I, § 13(b).

116. 18 U.S.C. § 3771(a)(8).

117. See, e.g., 735 ILL. COMPILED STAT. ANN. 5/8-802.1 (protecting confidentiality of statements made to rape crisis personnel). See generally Bonnie J. Campbell, *Preface* to U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION (1995).

118. See *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005) (noting justifications for victim-counselor privilege); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 907 (discussing victims' privacy interests).

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### H. THE RIGHT TO RESTITUTION

Finally, all states have recognized, to some degree, a crime victim's right to restitution,<sup>119</sup> and about 20 states have added a state constitutional right to restitution. For example, Illinois promises to a crime victim simply "[t]he right to restitution."<sup>120</sup> North Carolina extends to a crime victim "[t]he right as prescribed by law to receive restitution."<sup>121</sup> The California Constitution contains perhaps the most elaborate provision:

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.<sup>122</sup>

Congress has also enacted broad restitution provisions in the federal system. In the Mandatory Victims Restitution Act,<sup>123</sup> Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. The law provides that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined elsewhere,] the court *shall* order ... that the defendant make restitution to the victim of the offense."<sup>124</sup> In justifying this approach, the Judiciary Committee explained that "the principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time."<sup>125</sup> While restitution is critically important, the committee also found that restitution orders were only sometimes entered and, in general, "much progress remains to be made in

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119. PEGGY M. TOBOLOWSKY ET AL., *CRIME VICTIM RIGHTS AND REMEDIES* 171 (3d ed. 2016).

120. MICH. CONST. art. I, §(a)(12). For discussion of Illinois's provision, see Jeffrey A. Parness, *The New Illinois Constitutional Crime Victim Restitution Right: A Revolutionary Amendment?*, 27 DCBA BR. 26 (2015).

121. N.C. CONST. art. I, § 37(1)(c).

122. CAL. CONST. art. I, § 28(b)(13).

123. 18 U.S.C. §§ 3663A, 3664.

124. 18 U.S.C. § 3663A(a)(1) (emphasis added).

125. S. REP. NO. 104-179, at 12-13 (1995) (*quoting* S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. See H.R. CONF. REP. NO. 104-518, at 111-12 (1996).



the area of victim restitution.<sup>126</sup> Accordingly, restitution was made mandatory for crimes of violence in federal cases.

Questions continue to swirl around the breadth of these restitution provisions. While some decisions interpret restitution provisions broadly to ensure that victims have been made whole,<sup>127</sup> other courts appear to be unwilling to give any real content to constitutional protections for a victim's right to restitution.<sup>128</sup> And new crimes have posed particularly vexing challenges, such as the issues surrounding how to provide full restitution for victims of child-pornography crimes when many widely distributed offenders are responsible for the victims' losses.<sup>129</sup> Perhaps the best response to these concerns will be legislative enactments clarifying that victims truly do deserve full restitution.<sup>130</sup> Legislatures have broad discretion to act in this area, because only "utterly disproportionate" restitution awards against defendants raise any constitutional concerns.<sup>131</sup>

Under restitution provisions, courts are often required to enter an order of restitution against the convicted offender. However, frequently offenders lack the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.<sup>132</sup>

In determining the contours of the victims' restitution right, well-established bodies of law can be examined.<sup>133</sup> Moreover, details are often explicated in implementing legislation accompanying state amendments. For instance, in determining the compensable losses, an implementing statute might rely on the

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126. S. REP. NO. 104-179, at 13.

127. See, e.g., *United States v. Kaplan*, 839 F.3d 795, 800-03 (9th Cir. 2016) (allowing restitution to capture "sentimental value" of destroyed property).

128. See, e.g., *A.B. v. Lynch*, No. CV-16-0192-PR (Ariz. 2017) (petition for review granted, and then later dismissed, regarding review of trial court decision upholding an artificial \$10,000 cap on restitution in certain traffic-related criminal cases despite Arizona constitutional provision guaranteeing right to "receive prompt restitution" from a convicted defendant).

129. See, e.g., *Paroline v. United States*, 134 S. Ct. 1710 (2014) (reversing order for full restitution to child pornography victim and ordering only proportional restitution).

130. Paul G. Cassell & James R. Marsh, *Full Restitution for Child Pornography Victims: The Supreme Court's Paroline Decision and the Need for a Congressional Response*, 13 OHIO ST. J. CRIM. L. 5 (2015). See generally Warren Binford, *A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims*, 13 OHIO ST. J. CRIM. L. 37 (2015).

131. See Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 44-45 (2016).

132. Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

133. See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982); cf. RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).

current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.<sup>134</sup> It is important to understand that victims' interests and defendants' interests can sometimes align on restitution. A defendant who pays restitution may be able to raise a well-deserved claim for mitigation of other penalties, perhaps gaining a shorter term of imprisonment or perhaps even no imprisonment at all so that he can continue to work and make restitution payments to victims.<sup>135</sup>

### III. THE FUTURE OF CRIME VICTIMS' RIGHTS

Given the emerging consensus concerning core victims' rights as reflected in many state constitutions as well as in federal law, credible criminal justice reform efforts cannot ignore crime victims' interests. In moving forward, several recommendations for the future suggest themselves.<sup>136</sup> Perhaps the most basic—but also most important—goals for the future should be expanding the coverage of these core rights across the country. As a result of the history surrounding the adoption of these amendments, current coverage is incomplete, both with regard to the number of states with amendments in place and the breadth and enforceability of these amendments.

Currently, 15 states lack any constitutional protection for crime victims' rights. The absence of a victims' rights amendment does not appear to be due to lack of support for such rights by citizens in those states, but simply the happenstance that the political processes in these states have blocked a straight up-or-down vote on these issues. Crime victims' rights measures are generally in place throughout the West, where the initiative process permits direct access to the ballot. Most of the states lacking such rights are in the Northeast and Upper Midwest (including the populous states of New York, Pennsylvania, and Wisconsin), where such direct ballot access is not generally possible. Working within existing political structures, efforts should be made to bring the number of states with victims' rights amendments much closer to 50, so that the core rights are available to all victims in all states.

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134. See 18 U.S.C. § 3663A.

135. Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161, 194 (2016) (reporting survey finding “strong agreement among judges that victim compensation could be mitigating”); see also Benji McMurray, *The Mitigating Power of a Victim Focused Sentencing*, 19 FED. SENT'G REP. 125 (2006). *But cf.* Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 673 (2003) (arguing that “the victim's rights movement further imperils the traditional goals of sentencing in that it tends, by its nature, to serve only the goal of retribution”).

136. See generally Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015).

Even within the roughly 35 states where victims' rights amendments currently exist, much work remains to be done. Some of the first states to pass such amendments included only a small number of rights in their amendments. Illustrative of such a bare-bones amendment is Florida's, which provides only that victims "are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings."<sup>137</sup> The failure of Florida's amendment to more fulsomely cover the other core rights discussed in this article appears to be due not to some policy decision to exclude those other rights, but simply the fact that the amendment was passed nearly 30 years ago when other, more expansive models were unavailable.

Related to these coverage limitations are implementation problems. Victims' rights advocates have long been concerned that current enactments "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."<sup>138</sup> As the Justice Department reported in 1997:

[E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims['] rights advocates have sought reforms at the State level for the past 20 years and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.<sup>139</sup>

While more recent and comprehensive statistics are lacking, the general consensus appears to be that victims' rights "enforcement is wildly uneven."<sup>140</sup> The limited statistics that are available present cause for concern. Consider, for example, one of the seemingly simplest rights to extend: the right to notice of court hearings. In the federal system, despite the Crime Victims' Rights Act (CVRA) extending a right to notice to crime victims (and the availability of federal resources), many victims continue to be unaware of that right. A Government Accountability Office report, for example, found that approximately 25% of the responding federal crime

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137. FLA. CONST. art. I, § 16(b).

138. Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

139. *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

140. BIBAS, *supra* note 1, at 90.

victims were unaware of their right to notice of court hearings.<sup>141</sup> Even larger percentages of failure to provide required notices were found in a survey of (presumably less well-funded) state criminal justice systems.<sup>142</sup> Distressingly, the same survey found that racial minorities were less likely to be notified than their white counterparts.<sup>143</sup>

Against this backdrop, it would make sense to push for strengthening the prominence and enforcement of crime victims' provisions throughout the country. The recent efforts to pass Marsy's laws—strong constitutional amendments—in states that are currently lacking fully effective victims' protections should be encouraged. The Marsy's Law formulations contain clear enforcement mechanisms for crime victims, by directly providing standing to pursue judicial enforcement<sup>144</sup> as well as the right to a prompt trial court decision and, if necessary, appellate review. Such clear provisions—lodged in state constitutions—offer the best short-term mechanism for fully vindicating crime victims' important interests.

Also important are efforts to provide legal counsel for crime victims. Enforcement of victims' rights often requires legal assistance.<sup>145</sup> And yet all too often, crime victims lack the guiding hand of counsel as they confront the daunting and often novel legal questions of how to protect their interests in criminal proceedings. While Congress' enactment of the CVRA in 2004 was accompanied by funding for legal clinics for victims, in recent years that funding has dissipated. Efforts should be made to restore that funding. Perhaps Justice Reinvestment Initiatives, which attempt to re-channel certain criminal

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141. U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 82 (Dec. 2008).

142. National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in BELOOF, CASSELL & TWIST, *supra* note 7, at 631-34.

143. *Id.* See generally Paul Butler, "Race and Adjudication," in the present Volume (discussing other responses to addressing racial discrimination in criminal cases).

144. See Lawrence Schlam, *Enforcing Victims' Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U.L. REV. 597 (2015).

145. John W. Gillis & Douglas Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGEORGE L. REV. 689, 692 (2002).

justice expenditures,<sup>146</sup> can be tapped as a source of funds. Recent steps by the American military to provide legal counsel for sexual-assault victims illustrate how such programs to provide legal assistance to victims can be effective.<sup>147</sup>

It would also be useful to explore ways of expanding participation of victims through innovative “restorative justice” models of criminal justice.<sup>148</sup> These models can enhance victim participation by affirmatively seeking the active participation of crime victims in criminal processes.<sup>149</sup> Restorative justice approaches bring outside-the-box thinking to ensure that victims’ voices are heard.

Taking the longer view, it is well worth considering whether crime victims’ rights should be placed in the United States Constitution. While this brief essay is not the place to explore all of the issues surrounding such a step,<sup>150</sup> it is worth noting that the idea has attracted bipartisan backing, including support by both Presidents Bill Clinton and George W. Bush.<sup>151</sup> Of course, the Constitution should never be amended merely to achieve short-term, partisan, or purely policy objectives. But a federal Victims’ Rights Amendment would protect the basic rights of crime victims not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted

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146. LINDSEY CRAMER ET AL., URBAN INST., THE JUSTICE REINVESTMENT INITIATIVE—EXPERIENCES FROM THE LOCAL SITES (2014), available at <https://www.bja.gov/Publications/UI-JRI-Local-Sites.pdf>. Cf. John Schwartz & Emma Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/10/us/10illinois.html> (noting funds saved through abolition of death penalty to be reinvested in things such as services for victims’ families).

147. Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015).

148. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 223; MARK S. UMBREIT, VICTIM MEETS OFFENDER 2-5 (1994); Jessica M. Marshall, *(I Can’t Get No) Satisfaction: Using Restorative Justice to Satisfy Victims’ Rights*, 15 CARDOZO J. CONFLICT RES. 569 (2014); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990); see also Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349 (Randy E. Barnett & John Hagel III eds., 1977). See generally *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1 *et seq.*

149. Luna, *supra* note 148, at 228-29.

150. See generally *Victims’ Rights Amendment: Hearing Before the House Judiciary Subcomm. on the Constitution*, 114th Cong., 1st Sess. (2015); *Special Symposium Issue: A Proposed Victims’ Rights Amendment to the Constitution*, 5 PHOENIX L. REV. 301 (2012). Compare, e.g., Cassell, *Barbarians at the Gates*, *supra* note 68 (arguing for the amendment), and Steven J. Twist, *The Crime Victims’ Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999) (same), with, e.g., Robert Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (arguing against the amendment).

151. See Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) (providing a comprehensive history of victims’ efforts to pass a constitutional amendment).

offenders. These are the very kind of rights with which our Constitution is typically and properly concerned—the right of individuals to participate in all those government processes that strongly affect their lives.<sup>152</sup> Perhaps in years to come, the experience of the states in amending their constitutions to protect crime victims will serve as the basis for crafting a federal amendment that will ensure, once and for all, that these important rights are enshrined in and protected by our nation’s fundamental charter.

### RECOMMENDATIONS

To ensure appropriate protection for crime victims in the criminal justice process, the following measures are recommended:

1. **Each state should adopt its own state constitutional amendment protecting core crime victims’ rights**—such as the Marsy’s Law amendments currently contained in the state constitutions of California, Illinois, Montana, North Dakota, and South Dakota.
2. **Each state should ensure that its constitutional and other crime victim enactments are fully enforceable**, by giving crime victims standing to enforce their rights and appellate review of trial court denials of their rights.
3. **The states and the federal government should find ways to expand legal services for crime victims**, by increasing funding for crime victims’ legal clinics.
4. **Congress should approve a federal crime victims’ rights amendment and send it to the states for ratification.**

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152. Tribe & Cassell, *supra* note 138, at B5.

# Appeals

Nancy J. King\*

*This chapter identifies three costly and persistent problems plaguing judicial review in state criminal cases: its failure to correct wrongful convictions, the absence of supervision of lower courts' handling of certain categories of issues of particular public concern, and unnecessary delay. Suggested reforms include steps to identify and remedy errors that research has shown evade correction, provide appellate vigilance of activity in the lower courts that too often escapes oversight, and reduce delay in appellate processes.*

## INTRODUCTION

Appellate courts develop and clarify much of the law that governs the actions of police, prosecutors, defense attorneys, and judges in criminal cases. They also enforce the law, correcting error and ensuring that trial judges and other actors adhere to legislative and constitutional commands.<sup>1</sup> This chapter examines steps to improve performance of these two key functions, while more efficiently managing caseloads to save resources.<sup>2</sup>

### I. REVIEW OF CRIMINAL CASES TODAY

Any reform proposal must rest on a sound understanding of the subject of that reform, so this introductory section summarizes the key features of appellate review in criminal cases in the states. The most common structure for reviewing noncapital<sup>3</sup> criminal judgments includes an intermediate appellate

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1. See generally Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459 (2009).

2. Federal cases make up only a very small percentage of criminal cases nationwide, hence the focus on state appeals.

3. This chapter targets reforms for non-capital cases only. Judicial review for capital cases raises separate issues, and warrants more attention than this summary treatment can provide. For more on these issues, see CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 117–53, 202–05 (2016). See also Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

court in which a convicted defendant is entitled to seek direct appeal,<sup>4</sup> a court of last resort with the discretion to review decisions of the intermediate court, and one or more post-conviction remedies, usually initiated in the trial court. Generally, direct appeal is limited to claims based on the trial court record, and post-conviction review to claims that could not have been raised on direct appeal, either because they rely upon proof that was not in the record, or a new rule announced after appeal was complete.

The volume of criminal appeals is significant, making up roughly 30% to 40% of appellate caseloads,<sup>5</sup> even though only a fraction of the more than 1 million felony and more than 3 million misdemeanor convictions imposed each year in state courts are appealed.<sup>6</sup> A nationwide study of state criminal appeals decided in 2010 estimated that about 50,000 cases reach intermediate appellate courts each year, with another 19,000 filings in courts of last resort. The government sought review of the trial-court decision in about 7% of the intermediate court appeals; about 4% of court-of-last-resort cases were appeals by the government.<sup>7</sup> State criminal judgments appealed tend to be those with longer sentences; fewer than 10% are misdemeanors.<sup>8</sup> Post-conviction review, typically limited to those still in custody after direct appeal, is even more out of reach for defendants with shorter sentences.<sup>9</sup> More than half of those convicted of felonies in state courts are sentenced to probation or short jail terms; those

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4. Dozens of states created intermediate courts in the past several decades. See Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 285 (1989); Roger A. Hanson, *American State Appellate Court Technology Diffusion*, 7 J. APP. PRAC. & PROCESS 259, 262 (2005) (in 1957 only 13 states had intermediate appellate courts). Nevada opened its intermediate court in 2015. See ANNUAL REPORT OF THE NEVADA JUDICIARY, FISCAL YEAR 2016, at 26 (2016), [http://nvcourts.gov/Supreme/Reports/Annual\\_Reports/2016\\_Annual\\_Report/](http://nvcourts.gov/Supreme/Reports/Annual_Reports/2016_Annual_Report/).

5. COURT STATISTICS PROJECT, <http://www.courtstatistics.org/> (last visited Apr. 7, 2017).

6. *Id.*; SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (rev. Nov. 2010).

7. NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL APPEALS IN STATE COURTS 4–5 (2015).

8. *Id.* In many states, the only review of misdemeanor convictions is in the felony trial court. In some states that do provide a right to appellate review for misdemeanor cases, a single judge rather than a panel decides those appeals. See, e.g., NAT'L CTR. FOR STATE COURTS, REVIEW OF CASEFLOW IN THE WISCONSIN COURT OF APPEALS FINAL REPORT 3 (Oct. 2001). For a discussion of the issues raised by misdemeanors, see Alexandra Natapoff, "Misdemeanors," in Volume 1 of the present Report.

9. Thomas M. Place, *Commonwealth v. Holmes and the Rule of Deferral: Short Sentences, Long Sentences and the Illusory Nature of the Good Cause Exception*, 25 WIDENER L.J. 49, 52 n. 21 (2016); Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2449 (2013).



sentenced to prison serve an average of just over three years,<sup>10</sup> barely long enough to complete the full appeal process.

The rate of appeal is particularly low among those defendants who plead guilty. Plea agreements may include terms waiving any right to challenge the plea and sentence,<sup>11</sup> and guilty pleas generally forfeit the right to appeal a conviction based on errors preceding the plea.<sup>12</sup> Judicial review varies among states in significant ways, including which claims and cases may be appealed and when review is waived. Some states permit challenges to the validity of a plea only by motion to withdraw the plea or a post-conviction petition.<sup>13</sup> In Michigan, courts have discretion not to hear any appeal in a guilty-plea case,<sup>14</sup> while California bars appeals after guilty pleas unless the trial judge certifies there is an issue “not clearly frivolous and vexatious.”<sup>15</sup> Even when a defendant is allowed to challenge his plea-based conviction in court, negotiated resolutions are rarely reviewed. A defendant risks a worse outcome if the plea is vacated and the prosecutor refuses to offer the same concessions.<sup>16</sup> Even states that allow limited plea challenges often disallow any review of sentences negotiated by agreement. Consequently, those defendants who do seek judicial review after pleading guilty commonly contest only non-negotiated sentences. This dynamic, along with the development of new sentencing law and procedure that is enforceable on appeal, may help to explain why nearly a third of appeals-of-right include a challenge to the sentence.<sup>17</sup>

Most defendants’ criminal appeals do not receive anything close to the “full judicial treatment.”<sup>18</sup> Facing continuing caseload growth and restricted resources, unable to expand the number of judgeships or to impose economic

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10. ROSENMERKEL ET AL., *supra* note 6, at 5 tbl. 1.2.1, 6 tbl. 1.3; *see also* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, AGING OF THE STATE PRISON POPULATION, 1993-2013 (2016).

11. *See generally* WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c) (4th ed. 2016).

12. *See generally id.* § 21.5(b).

13. *E.g.*, *People v. Edwards*, 197 Ill. 2d 239, 275-76 (2001) (“The defendant who pleads guilty has given up his right to appeal unless he has grounds to withdraw his plea.”); LAFAVE ET AL., *supra* note 11, § 27.1(a).

14. *Halbert v. Michigan*, 545 U.S. 605, 613 (2005).

15. CAL. PENAL CODE § 1237.5; CAL. RULES OF COURT 8.304(b).

16. LAFAVE ET AL., *supra* note 11, at § 13.7(c) (noting courts have denied vindictive charging claims raised by defendants charged with more serious crimes after an appeal when the prosecutor advances a non-vindictive basis).

17. Michael Heise, Nancy J. King & Nicole A. Heise, *State Criminal Appeals Revealed*, 71 VAND. L. REV. (forthcoming 2017).

18. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 16 (2d ed. 1989).

deterrents to discourage meritless criminal appeals,<sup>19</sup> state courts have concluded that most criminal cases warrant less judicial time.<sup>20</sup> Cases chosen for curtailed review receive abbreviated or no oral argument, an unpublished summary decision instead of a published opinion, and adjudication primarily by staff supervised by judges rather than by judges themselves. Called “the most radical answer to caseload growth,” in 1989,<sup>21</sup> such summary consideration is now routine practice.<sup>22</sup> More than 80% of the criminal cases that are entitled to review are decided without oral argument, and more than half of all criminal appellate decisions lack a full, memorandum, or per curiam opinion.<sup>23</sup> Law clerks and staff attorneys perform much of the work,<sup>24</sup> a practice critics claim undermines the “thoughtful consideration of the merits of the case by a multi-judge panel,”<sup>25</sup> and shifts judicial responsibilities to those not appointed or elected to perform them.<sup>26</sup>

When defendants appeal, only 15% of appeals-of-right and only 2.8% of discretionary appeals resulted in any reversal, modification, or remand of a lower-court decision.<sup>27</sup> The large percentage of meritless defense appeals reflects the absence of any financial incentive for indigent criminal defendants<sup>28</sup>

19. William F. Rylaarsdam, *The Crisis of Volume in California's Appellate Courts: A Reaction to Justice in The Balance 2020 and a Proposal to Reduce the Number of Nonmeritorious Appeals*, 32 *LOY. L.A. L. REV.* 63, 64–76 (1998).

20. See, e.g., ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, APPELLATE COURT PERFORMANCE STANDARDS 17–18 (1995); AM. BAR ASS'N, STANDARDS RELATING TO APPELLATE COURTS § 3.36(b) cmt. at 65 (1995).

21. Marvell, *supra* note 4, at 290.

22. COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE 15 (2012) (hereinafter CCJSCA) (describing summary calendar for criminal cases in New Mexico: a single judge approves a memo with a recommended calendar assignment prepared without transcript or oral argument by a staff attorney who reviews a ‘docketing statement’ filed by counsel that outlines the facts, issues, and relevant authority).

23. Heise et al., *supra* note 17, tbl. 3; BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SURVEY OF STATE COURT CRIMINAL APPEALS, 2010: CODEBOOK 38-39 (2015), available at <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/36465?q=36465>.

24. See generally COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, COMPARATIVE ATTRIBUTES OF LEGAL STAFF IN INTERMEDIATE APPELLATE COURTS (2011); CCJSCA, *supra* note 22, at 18–19 (describing per curiam dockets for criminal cases).

25. AM. BAR ASS'N, *supra* note 20, §§ 3.10, 3.19; HANSON, *supra* note 20, at 1–2.

26. STERN, *supra* note 18, at 17–18.

27. Heise et al., *supra* note 17, tbl. 3 (also reporting decisions favorable to the defense in 45% of the defense-appealed cases granted review by courts of last resort).

28. State-paid attorneys outnumber appellants with privately retained attorneys in state criminal appeals ten to one. *Id.*

to forgo bringing losing appeals.<sup>29</sup> Some portion of the low relief rate may also reflect barriers to success for what would otherwise be meritorious claims. For example, inattentive or inexperienced trial counsel too often squander a defendant's chance of appellate and post-conviction relief for valid claims of trial-court error by failing to raise those claims when the error occurs.

Appellate review also is essential to enforce the law when errors in lower-court proceedings disfavor the state. When the state is the appellant, appellate courts at both levels reverse lower-court decisions at a rate much higher than when defendants appeal.<sup>30</sup>

## II. ROOM FOR IMPROVEMENT

### A. GAPS IN ERROR CORRECTION

Until recently, it was difficult to confirm or deny arguments that appeals were not working and that prejudicial errors were evading correction by judicial review. Then came DNA analysis, exposing how badly courts performed in cases of wrongful conviction, leaving actual perpetrators unpunished and innocents locked away. Professor Brandon Garrett studied hundreds of exonerated noncapital defendants who, before securing their DNA proof, had challenged their flawed convictions in court.<sup>31</sup> He found that courts provided no help to 90% of them. Because these defendants obtained DNA proof only after courts had reviewed their convictions, their experience is similar to that of innocent defendants who have no exonerating DNA evidence to support their innocence claims.<sup>32</sup> Garrett also investigated *why* the judicial system failed to correct its own mistakes. Error-correction by reviewing courts in these cases was hindered by three conditions, two of which are not limited to cases of wrongful conviction.

First, for those who were able to file challenges to their convictions, the deferential legal standards courts used to review trial-court decisions defeated their efforts. Even if a defendant can prove an error occurred, the court may

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29. See, e.g., AM. BAR ASS'N, *supra* note 20, § 3.20 cmt. at 49 (“an indigent client, unlike one who must pay counsel, has no economic incentive to bring the litigation to rest” and “may feel unjustly treated unless all possibilities of appellate review have been pursued”).

30. Waters et al., *supra* note 7, at 5 (reporting states' attorneys succeeded in 38% of their appeals).

31. See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 178-212 (2011); see also J. B. GOULD ET AL., *PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE* 22 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf>.

32. Estimates of wrongful convictions in noncapital cases range from 1 to 5%. See, e.g., Marvin Zalman, *Measuring Wrongful Convictions*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE* 3047-58 (Gerben Bruinsma & David Weisburd eds., 2014).

ignore that error if it decides the error could not have affected the outcome. Relief for errors overlooked by counsel in the trial court is even more difficult to secure. Such forfeited claims may not be reviewed at all, or require the defendant to establish that but for the error he would not have been convicted. Garrett found that courts granted relief for only 7% or 8% of the challenges to faulty eyewitness testimony, false confessions, and ineffective assistance of counsel raised by the innocent defendants in his study.<sup>33</sup> Judges often recognized errors but considered them “harmless” or lacking “prejudice” when they found other evidence of guilt convincing.<sup>34</sup> Not one of these innocent defendants was able to convince a reviewing court that the evidence presented to the fact-finder was insufficient to find guilt.<sup>35</sup>

Second, many of those wrongfully convicted were unable to challenge the particular errors that occurred in their cases. The reasons why impact criminal defendants generally, not just those wrongfully convicted. The normal mechanisms for judicial review do not work well for procedural errors often associated with wrongful convictions such as claims of ineffective assistance of counsel, juror misconduct, or the state’s failure to disclose or preserve exculpatory evidence.<sup>36</sup> Evidence needed to prove these errors is rarely in the trial-court record. Without the ability to introduce new evidence on direct appeal, these “non-record” claims fail.<sup>37</sup> New trial motions do allow the introduction of new evidence, but are not adequate substitutes for appeal. Trial attorneys cannot challenge their own competency, and proof of misconduct by jurors or prosecutors usually is not available in time for such a motion. Moreover, a new trial motion requires the defendant to convince the trial judge that the evidence could not have been discovered earlier and that retrial would probably end in acquittal, a very high bar.<sup>38</sup> That leaves state and federal post-conviction review as the only routes to relief for these non-record claims. Garrett found

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33. GARRETT, *supra* note 31, at 185, 203. For further discussion of these errors, see Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report; Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report; and Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

34. GARRETT, *supra* note 31, at 200–202, 206–07.

35. *Id.* at 204.

36. For a discussion of evidentiary disclosure, see Darryl K. Brown, “Discovery,” in the present Volume.

37. See generally Jeffery C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016 (2013); Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 614 (2009).

38. Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 218 (Allison D. Redlich et al. eds., 2014).

that inaccessibility,<sup>39</sup> procedural requirements,<sup>40</sup> reluctance to appoint counsel or grant evidentiary hearings,<sup>41</sup> and daunting standards of review combined to make post-conviction review a dead end for the innocent defendants in his study.<sup>42</sup> The incapacity of judicial review to recognize or remedy valid claims of non-record error in wrongful-conviction cases suggests that the very same errors are escaping correction in other cases as well.

Judicial review also failed the innocent because some of those convicted of crimes they did not commit could point to no flaw in the proceedings that led to their convictions, even though new evidence supported their innocence. A recurring example is a defendant armed with new science showing that the forensic evidence at trial was actually unreliable, but no rule barred admission of that evidence at the time.<sup>43</sup> According to existing Supreme Court precedent, a state does not violate the Constitution by punishing a defendant convicted through legal procedures, even if later evidence proves he is innocent.<sup>44</sup> Unless and until a convincing showing of innocence itself is an independent basis for relief, judicial review will be worthless for some of those convicted for crimes they did not commit.

States have a responsibility to do more to reduce the human and financial toll of these mistaken convictions. In taxpayer dollars alone, the problem is enormous, including compensation paid to wrongfully convicted inmates, judgments or settlements from civil-rights lawsuits, as well as the cost of prison

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39. See *supra* text accompanying notes 11-12.

40. About half of the cases filed by noncapital prisoners in federal habeas proceedings, and an unknown proportion of those in state post-conviction proceedings, are dismissed without merits review. NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES AND THE FUTURE OF THE GREAT WRIT* 78 (2011) (reporting results of nationwide study of habeas litigation in district courts).

41. King, *supra* note 9, at 2442-46 (documenting low rate of counsel and hearings in state post-conviction proceedings).

42. In post-conviction review, relief rates appear to be even lower than on appeal. See King, *supra* note 9, at 2447-48 (estimating relief rates in five states ranging from 1 to 16%). While only about 5% of appeals-of-right involved a *pro se* defendant, Heise et al., *supra* note 17, tbl. 3; in many states most defendants seeking post-conviction relief have no counsel. King, *supra* note 9, at 2442-45. A state prisoner who is still in custody may seek habeas corpus relief for constitutional claims in federal court once state review is complete, but as a means to correct error in noncapital state criminal cases, federal habeas is largely irrelevant. An even smaller proportion of defendants ever file, typically those serving the most serious sentences, and of those an even smaller percentage receive merits review. The estimated relief rate for noncapital petitioners is less than 1%. KING & HOFFMANN, *supra* note 40, at 36.

43. King, *supra* note 38, at 224. See generally Erin Murphy, "Forensic Evidence," in the present Volume.

44. See generally LAFAYETTE ET AL., *supra* note 11, § 28.3(e).

housing, and prolonged trials and appeals. A study released in 2016 estimated that for 692 exonerated defendants in California, these expenses cost taxpayers \$282 million.<sup>45</sup> In Illinois, a 2011 study found that 85 wrongful convictions in that state had cost taxpayers more than \$214 million.<sup>46</sup> These cases also have a devastating impact on the families of the innocent men and women behind bars. Victims and the public pay a price, too, when the real culprits remain at large.<sup>47</sup> While the priority must be steps to prevent wrongful convictions,<sup>48</sup> better efforts to correct them are essential as well.

### B. GAPS IN LAW DEVELOPMENT

In addition to the troubling shortcomings described above, there is an increasing mismatch between the law developed and enforced by reviewing courts and the activity in the trial courts. Two areas demand more attention than they are receiving in appellate courts today.

First, the law regulating plea bargaining, “the means by which most criminal convictions are obtained,”<sup>49</sup> is presently underdeveloped.<sup>50</sup> Unsettled issues affecting bargained cases seldom reach reviewing courts. Recently, the Supreme Court has invited more judicial oversight of this most central part of the criminal justice process by recognizing that incompetent defense representation that leads to the loss of a favorable plea deal denies a defendant the constitutional right to effective assistance of counsel.<sup>51</sup> Yet in many jurisdictions, trial judges provide little supervision over bargaining; appellate courts even less.<sup>52</sup>

45. Tom Jackman, *Wrongful Convictions Cost California Taxpayers \$282 Million over 24 Years*, *Study Finds*, WASH. POST (March 14, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/03/14/wrongful-convictions-cost-california-taxpayers-282-million-over-24-years-study-finds/?utm\\_term=.7ee22871722c](https://www.washingtonpost.com/news/true-crime/wp/2016/03/14/wrongful-convictions-cost-california-taxpayers-282-million-over-24-years-study-finds/?utm_term=.7ee22871722c).

46. John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTERGOV.ORG (June 18, 2011), <http://www.bettergov.org/news/special-investigation-the-high-costs-of-wrongful-convictions>.

47. *Id.* (noting the real perpetrators in the studied cases committed nearly 100 felonies); Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031 (2015) (citing study of the impact of wrongful convictions on victims funded by the U.S. Department of Justice finding that crime victims in wrongful conviction cases reported feeling guilty for the additional crimes the actual offender was able to commit while free).

48. See Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in the present Volume.

49. *Missouri v. Frye*, 566 U.S. 133, 153–55 (2012) (Scalia, J., dissenting).

50. See generally Jenia I. Turner, “Plea Bargaining,” in the present Volume.

51. *Frye*, 566 U.S. at 148–49.

52. See *supra* text accompanying notes 11–17. For a recent study of judicial involvement in plea negotiations, see Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

Second, because double jeopardy principles bar the state from prosecuting a defendant for a crime once acquitted, the government's opportunity to seek clarification of some issues on appeal can be limited.<sup>53</sup> Erroneous interpretations of the scope of an offense and faulty jury instructions, for example, are trial-court errors that may lead to acquittal. When writs of mandamus are not available to prosecutors to correct such error, the limits on government appeals create uncertainty and allow "trial courts to avoid accountability."<sup>54</sup>

### C. DELAY

Because disposition time has proven to be relatively simple for appellate courts to track, most states are actively investigating ways to get appellate delay under control.<sup>55</sup> Yet even after decades of combatting delay in the review process, one quarter of criminal appeals filed in state intermediate courts take more than a year and a half to resolve, and review in most criminal appeals accepted by courts of last resort takes even longer, with 5% of those cases taking many years.<sup>56</sup> Prolonged delay in resolving criminal appeals is unacceptable. It harms successful appellants for whom relief is postponed, risks the loss of evidence needed for retrials, and can undermine rehabilitation and deterrence.<sup>57</sup>

## III. POTENTIAL REFORMS

Because state courts differ in fundamental ways, a one-size reform agenda won't fit all. What follows are alternatives that could prove useful for states looking for ways to address some of the shortcomings catalogued above.<sup>58</sup>

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53. See generally Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1 (2008).

54. *Id.* at 8–9; see also *id.* at 51–52 (“[i]f the trial court takes action that leads to a jury acquittal or the entry of a judgment of acquittal by the court, ... [or] grants a mistrial, the government may have no recourse”; “issues arising in connection with jury instructions and pro-defendant evidence rulings are frequently beyond the reach of government appeal”).

55. JOHN P. DOERNER, NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE APPELLATE COURTS 4 (2014).

56. See generally NICOLE L. WATERS & KATHRYN J. GENTHON, NAT'L CTR. FOR STATE COURTS, CASELOAD HIGHLIGHTS: ACHIEVING TIMELY RESOLUTION FOR CRIMINAL APPEALS IN STATE COURTS (2016); Waters et al., *supra* note 7, at 7–8.

57. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

58. Other issues affecting the review of criminal cases deserve more attention than this brief overview can provide. They include the potential recognition of a federal constitutional right to appellate or post-conviction review, attacks on judicial independence, lack of diversity on the bench, the scope of interlocutory appeals, the content of harmless error, plain error, and retroactivity rules, the appropriate role of unpublished decisions, and the use of perceptions of fairness and legitimacy as performance measures.

Examined first are steps to more efficiently allocate scarce appellate resources with error correction in mind, followed by reforms to improve the review of non-record and innocence claims and provide more judicial oversight of bargaining. Ideally, any reform would include data collection so that policymakers and courts could measure whether the change is accomplishing its intended goals.

### A. INCREASING EFFICIENCY

Several states have found the following steps can free up time and resources for more effective review of convictions.

**1. Eliminating duplicate mandatory review.** Some states require the court of last resort to review certain cases already reviewed by an intermediate court, such as cases with a dissenting opinion or involving serious felonies.<sup>59</sup> These provisions are low-hanging fruit for reformers interested in reducing caseloads in courts of last resort. A single appeal-of-right plus the opportunity for the state's high court to exercise review in its discretion (or, as in Florida, the discretion of the court of appeals to certify review) is sufficient.<sup>60</sup>

**2. E-filing and e-records,** two technology-driven changes, have brought significant savings to many states. Thirty-three state appellate courts had adopted e-filing by 2014.<sup>61</sup> For a state yet to switch over, the initial outlay is well worth the cost, given the savings achieved.<sup>62</sup> The filing of the trial-court record still takes many months in most states.<sup>63</sup> To address this, several states

59. See AM. BAR ASS'N, *supra* note 20, § 3.10 cmt. at 20; STERN, *supra* note 18, at 30, 57, 142.

60. Florida's 1980 constitutional amendment requiring intermediate court certification to the Supreme Court reportedly cut the number of cases appealed to the Supreme Court in half. STERN, *supra* note 18, at 39.

61. DAVID SCHANKER & TIMOTHY A. GUDAS, E-FILING IN STATE APPELLATE COURTS: AN UPDATED APPRAISAL 2 (Sept. 2014), <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/appellate/id/1036>; *Status of State Court E-Filing January 2016*, NAT'L CTR. FOR STATE COURTS (Jan. 26, 2016), <https://courtechbulletin.blogspot.com/2016/01/status-of-state-court-e-filing-january.html>; Eric J. Magnuson & Samuel A. Thumma, *Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future*, 15 J. APP. PRAC. & PROCESS 111, 114 (2014). For federal experience, see generally Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386 (2014); and WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013).

62. CCJSCA, *supra* note 22, at 20–21.

63. Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467, 487–88 (2002) (reporting only one of six courts studied had a notice-to-record average of less than two months); MINN. JUDICIAL BRANCH, MINNESOTA COURTS PERFORMANCE MEASURES KEY RESULTS AND MEASURES, ANNUAL REPORT 31 (2014) (noting delays in criminal appeals caused by court reporters' need for more time to prepare transcripts).



have implemented automated transcript-management systems and eliminated traditional court reporters statewide.<sup>64</sup> For example, Utah's recent switch from decentralized digital transcript production to a statewide system slashed transcript delivery time from an average of 138 days to 22 days for cases on appeal, and saved approximately \$1,350,000.<sup>65</sup>

**3. Separate review for appeals challenging sentencing alone.** The proportion of cases in which prosecutors or defendants challenge sentences has grown along with rules that restrict the sentencing discretion of trial judges. One promising reform adopted already in some state appellate courts is a "sentencing calendar" to provide expedited review of these sentence-only appeals.<sup>66</sup> In these cases, legal issues are more likely to be settled, and claims "can be resolved based on a review of a limited record typically just the judgment of conviction, presentence investigation report, and sentencing hearing transcript that can be prepared on an expedited basis."<sup>67</sup> In addition to these cost-saving efficiencies, separate calendars may allow courts to achieve greater consistency in reviewing criminal sentences.<sup>68</sup> A separate track in the existing court is better than a separate court for sentence-only appeals, for many of the same reasons that have persuaded all but a handful of states to reject separate appeals courts

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64. CCJSCA, *supra* note 22, at 20. These systems often use certified transcribers to finalize official transcripts. See LEE SUSKIN, JAMES McMILLAN & DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, MAKING THE RECORD UTILIZING DIGITAL ELECTRONIC RECORDING (2013), <http://www.ncsc.org/Services-and-Experts/Court-reengineering/~media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx>; *Technology Widespread*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Technology-Widespread.aspx> (last visited Apr. 6, 2017); *Marion County (Indianapolis) Courts Launch Web-Based Transcript System*, NAT'L CTR. FOR STATE COURTS (Mar. 16, 2016), <https://courtechbulletin.blogspot.com/2016/03/this-and-that-in-court-technology-march.html> (describing transcript ordering by attorneys through a secure web portal).

65. DANIEL J. BECKER, NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2012: REENGINEERING: UTAH'S EXPERIENCE IN CENTRALIZING TRANSCRIPT MANAGEMENT 96 (2012), [http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/ReengineeringUtahsExperience\\_Becker.ashx](http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/ReengineeringUtahsExperience_Becker.ashx).

66. CCJSCA, *supra* note 22, at 18. See, e.g., *Superior Court, Appellate Division*, NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/appdiv/> (last visited Apr. 6, 2017) (describing "Sentencing Calendars"). Several federal courts of appeals route sentencing-only appeals to a non-argument track. See generally Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013).

67. CCJSCA, *supra* note 22, at 18.

68. *Id.*

for criminal cases.<sup>69</sup> Although several states have established a special forum for sentencing appeals, they have limited that review to only some sentences or sentencing challenges.<sup>70</sup> Any fair and efficient sentencing appeal mechanism should include the authority to review *all* noncapital sentences and sentencing claims raised by either party that would otherwise be subject to appellate review.

**4. Making oral argument count.** Rather than deny oral argument in even more cases, some states have compromised by modifying the oral-argument process. Informal “focus memos” or “focus letters” from the parties, answering questions from the court, provide better information for judges and litigants without the time and expense of more-formal special briefing.<sup>71</sup> Another interesting practice is to provide a tentative opinion to the parties *before* the oral-argument phase. This process reportedly improves the usefulness and efficiency of argument when requested.<sup>72</sup> One Arizona court has embraced this technique for years. After an informal conference, one judge of the panel prepares a draft decision, then provides it to the parties. The judges of this court tout its advantages, and almost all (97%) of litigants surveyed about the practice

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69. Separate courts for criminal cases generally exist in only five states; two have separate courts of last resort for criminal cases, and three have separate intermediate appellate courts. For commentary, see generally Ed Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008); Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005); STEIKER & STEIKER, *COURTING DEATH*, *supra* note 3, at 132–33; STERN, *supra* note 18, at 27, 54–56 (collecting authority); AM. BAR ASS'N, *supra* note 20, at § 3.01 cmt. at 13.

70. See *State v. Rickman*, 183 P.3d 49, 51–52 (Mont. 2008) (Sentence Review Division considers the inequity and disparity of the sentence, while the Supreme Court reviews other legal challenges to the sentence or the sentencing process); *Commonwealth v. Barros*, 460 Mass. 1015, 1016 (2011) (review by appellate division of superior court is limited to review of a sentence within the range set by statute for the offense of conviction and is otherwise lawful); CONN. GEN. STAT. ANN. § 51-195 (review by the Sentence Review Division of the Superior Court limited to sentences of at least three years' incarceration). Other states have three-judge panels that may modify sentences. See *Morrison v. State*, 7 P.3d 955 (Alaska Ct. App. 2000); *Benefield v. State ex rel. Baker*, 276 Ga. 100 (2003) (review confined to death sentences or those involving a serious violent felony); *Resper v. State*, 354 Md. 611 (1999); N.H. REV. STAT. ANN. § 651:67.

71. Martin J. Siegel, *Let's Revamp the Appellate Rules Too*, 42 LITIGATION 1, 5 (2016), [http://www.americanbar.org/content/dam/aba/publications/litigation\\_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/litigation_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf) (noting use of “focus orders” in Florida and suggesting experimentation with emailed requests); Joshua Stein, *Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime*, 14 J. APP. PRAC. & PROCESS 159, 159 (2013) (discussing pre-argument focus letters as well as “oral tentative” opinions).

72. Stein, *supra* note 71; *Innovations by Stage—Preparing the Opinion/Decision*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Preparing-the-Opinion.aspx> (last visited Apr. 6, 2017) (noting that proposed decisions are generally prepared in advance of oral argument in New York Appellate Division, Second Judicial Department).

agreed that it “assists counsel’s preparation for and conduct of the argument.” Another appellate court in California does something similar—before deciding whether to request or waive oral argument, counsel receive a tentative opinion, along with information about whether the other judges concur.<sup>73</sup> In response to critics’ objections to this technique,<sup>74</sup> one judge explained that the court works to preserve collegiality and guard against confirmation bias, and that the practice created no additional work for the court, but “merely move[d] the opinion-producing work and consultation to a point earlier in the process.”<sup>75</sup> Finally, many states have turned to video conferencing<sup>76</sup> to preserve the opportunity to discuss cases with attorneys without spending the time and resources that travel to the argument would entail.

**5. Improving screening and review of conviction challenges.** Some measures that could significantly reduce the cost of reviewing criminal cases changing the right to appeal into an opportunity to apply for leave to appeal, for example can significantly undermine the goal of improving error-correction. Some have argued that discretionary review can provide all the entitlements of an appeal-of-right,<sup>77</sup> but most states have chosen appropriately not to take this step.<sup>78</sup> Almost all appeals-of-right presently receive merits review; almost all discretionary appeals do not. In Virginia, the only state where all criminal appeals are discretionary, only 15% of criminal cases appealed to the court of

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73. See generally Clark Collings, *Oral Argument Reform in Utah’s Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification*, 2013 UTAH L. REV. ONLAW 174 (2013) (describing Arizona and California practice); Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194 (2014) (noting several courts that circulate internally tentative opinions before argument, claiming that “releasing a tentative opinion at least makes the process transparent and gives the party on the losing side of the tentative ruling a fair shot of pointing out the deficiencies and the adverse implications of the preliminary decision”).

74. Susan L. Kelsey, *Improving Appellate Oral Arguments Through Tentative Opinions and Focus Orders*, 88 FLA. BAR J. 28 (2014) (listing as objections negative impact on collegiality if only one judge prepares the “tentative,” that is consumes additional judicial time, that judges would be unreceptive to changes, that an insufficiently polished draft opinion would reflect badly on the court, that judges would forget the case in the interval between drafting the opinion and oral argument).

75. *Id.*

76. In 2015, Kansas and Colorado joined a number of states already holding videoconferenced oral arguments. See *Other Appellate Court Innovations*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Appellate/Appellate-Catalog/Appellate-Innovations/Other-Innovations.aspx> (last visited Apr. 6, 2017); see also Siegel, *supra* note 71, at 30.

77. Bernard G. Barrow, *The Discretionary Appeal: A Cost Effective Tool of Appellate Justice*, 11 GEORGE MASON U. L. REV. 31 (1988); see also Rylaarsdam, *supra* note 19, at 82–84 (arguing “defendants should be required to obtain a certificate of probable cause from the trial court before being permitted to file any appeal in a criminal or juvenile proceeding”).

78. Indeed, New Hampshire and West Virginia recently moved in the opposite direction, replacing discretionary review with of-right review.

appeals are reviewed on the merits.<sup>79</sup> Rather than eliminate the right to review for entire categories of cases, a better approach is to improve screening mechanisms that separate the potentially meritorious from the meritless appeals.

One alternative is defense-counsel screening, authorized by a line of cases beginning with *Anders v. California*.<sup>80</sup> Under the Court's precedent, an attorney who believes there are no meritorious issues for appeal may file a motion to withdraw from representation, and a brief discussing each potential issue. After affording the client a chance to respond, the court must make a "full examination of all the proceedings, to decide whether the case is wholly frivolous." California's version of this procedure requires the attorney to file a "*Wende* brief," but does not require the attorney to state his opinion that the issues are meritless, nor file a motion to withdraw.<sup>81</sup> Critics argue these approaches are not sufficiently protective of the defendant's right to appeal. But they are probably better than the summary staff screening that normally accompanies discretionary review. An alternative criticism is that these procedures require too much time from counsel and courts, "divert[ing] attention from meritorious appeals."<sup>82</sup> Little research has tested this. We do know that approximately 11% of state defendants' appeals-of-right in 2010 included a no-merits statement or brief, and that in these cases oral argument is rare (4% of cases compared to 21% of non-*Anders/Wende* cases).<sup>83</sup> Additional sources suggest that the "full examination" of the case is commonly assigned to staff attorneys.<sup>84</sup>

For the large proportion of criminal cases screened by staff, fostering subject-specific expertise among staff attorneys, lengthening their terms of service, and taking steps to ensure they are not discouraged from sending non-argument cases to the argument calendar, are all steps that could improve the quality of screening.<sup>85</sup> Review could also be improved if those evaluating claims learned more about wrongful convictions. Harmless error, plain error, and sufficiency review doctrines that have contributed to the futility of judicial review for the wrongfully convicted are unlikely to be modified anytime soon,

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79. Statistic derived from SURVEY OF STATE COURT CRIMINAL APPEALS, *supra* note 23.

80. 386 U.S. 738, 744–45 (1967).

81. See *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

82. *Id.* at 282 n.13 (observing that "to the extent this criticism has merit, our holding today that the *Anders* procedure is not exclusive will enable States to continue to experiment with solutions to this problem").

83. Heise et al., *supra* note 17, tbl. 3A.

84. Hoffman & Mahoney, *supra* note 63, at 482 n.23; see also *Smith v. Robbins*, 528 U.S. 259, 299 (2000) (Souter, J., dissenting, joined by Stevens, Ginsberg, and Breyer, JJ.) (bemoaning the delegation of *Anders* review of issues to staff attorneys).

85. Levy, *supra* note 66, at 415–20; see also Levy, *supra* note 61, at 2410 n.128 (noting some staff attorneys could specialize in sentencing).

but perhaps courts could apply those doctrines more knowledgeably and make fewer mistakes when assessing the conclusiveness of proof.<sup>86</sup> Professor Keith Findley has urged, for example, closer review of cases with “evidence that is associated with wrongful convictions, and about which juror intuition is often wrong, such as eyewitness identifications, confessions, informant testimony, and forensic science evidence.”<sup>87</sup>

### B. STEPS TO NARROW THE ERROR CORRECTION GAP

This section reviews proposals to increase the capacity of courts to remedy those errors that research has shown repeatedly evade correction and contribute to the costs of wrongful conviction.

#### 1. Provide a more accessible forum for litigating non-record claims.

Accelerating the timing of post-conviction review of non-record claims prior to the completion of direct appeal is one way to ensure that indigent defendants sentenced to average terms of incarceration have the opportunity to raise these claims, with the assistance of counsel.<sup>88</sup> One variant of this approach is practiced in Wisconsin, where a defendant, represented by new counsel, may file a motion for post-conviction review before filing a notice of appeal.<sup>89</sup> Another variation exists

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86. Findley, *supra* note 37, at 633. See generally Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ L. REV. 639 (2009).

87. Findley, *supra* note 37, at 633; see also Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; Garrett, *supra* note 48; Leo, *supra* note 33; Murphy, *supra* note 43; Wells, *supra* note 33.

88. Proposals for “unitary review” procedures were advanced even before the Supreme Court recognized a basis for several of the non-record claims commonly reserved for post-conviction review today, including claims of ineffective assistance of trial counsel. See generally Nejelski & Emory, *Unified Appeal in State Criminal Cases*, 7 RUT.-CAM. L.J. 484 (1976). Several states have adopted unitary review for capital cases. E.g., COLO. REV. STAT. ANN. § 16-12-201 *et seq.*; Fairchild v. Trammell, 784 F.3d 702, 721 (10th Cir. 2015).

89. See *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014) (“Wisconsin law expressly allows—indeed, in most cases requires—defendants to raise claims of ineffective assistance of trial counsel as part of a consolidated and counseled direct appeal, and provides an opportunity to develop an expanded record”); NAT’L CTR. FOR STATE COURTS, *supra* note 8, fig. 2.

in Oklahoma.<sup>90</sup> In 2013, Pennsylvania courts authorized review of non-record-based claims of ineffective assistance of trial counsel along with record-based claims upon “good cause shown,” but no provision has been made to appoint counsel, and defendants waive their right to later post-conviction review.<sup>91</sup>

Professor Eve Primus has argued that review for ineffective-assistance-of-counsel claims before the completion of appeal allows more defendants to raise such claims, ensures the assistance of counsel that would likely not be provided were the claim postponed until post-conviction, and produces fewer meritless appeals.<sup>92</sup> Those opposed to moving the adjudication of ineffective assistance or other non-record claims earlier have expressed concerns that it would further strain indigent-defense resources, increase the number of post-conviction cases filed without a corresponding increase in meritorious findings, and lengthen judicial review overall.<sup>93</sup> Any claim based on evidence discovered later, or raising ineffective assistance by appellate counsel, for example, could require a second post-conviction proceeding. Very little research tests these competing predictions. Findley, a proponent of the Wisconsin approach, examined a random sample of convictions from that state and found that defendants who sought post-conviction review initially had more success than those who appealed without seeking post-conviction review, and that at least some of those who lost at the post-conviction review stage declined to file an appeal.<sup>94</sup>

**2. Establish statewide appellate offices.** Appellate attorneys from statewide offices have important advantages over more-local advocates. Statewide offices allow the development of expertise in selecting, briefing, and

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90. Oklahoma’s process has been described as follows: an application to the Court of Appeals “must be accompanied by ‘affidavits setting out those items alleged to constitute ineffective assistance of trial counsel’ [and] affidavits showing that the claims of ineffectiveness could not have been raised in the direct appeal .... [T]he application and affidavits must contain sufficient information to show by clear and convincing evidence that there is a strong possibility trial counsel was ineffective.... If the Court of Criminal Appeals determines that this burden is met, it will remand the matter to the trial court for an evidentiary hearing, and direct the trial court to make findings of fact and conclusions of law solely on the issues and evidence raised in the application ... within 30 days from the date of remand ....” 6 OKLA. PRAC.: APPELLATE PRACTICE § 25:49 (2016).

91. See generally Place, *supra* note 9 (describing process and advocating amendments).

92. See generally Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

93. E.g., Edward A. Tomlinson, *Post-Conviction in Maryland: Past, Present and Future*, 45 MD. L. REV. 927 (1986); Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho’s Flawed Process*, 2 J. APP. PRAC. & PROCESS 85 (2000).

94. Findley, *supra* note 37, at 609–17.

arguing issues on appeal and post-conviction.<sup>95</sup> At least one study suggests, for example, that appellate defenders deliver superior results on appeal compared to either appointed or retained attorneys, even though defendants who pay for their lawyers should be more selective about which cases they appeal.<sup>96</sup> Many states already delegate some authority for the state's representation on appeal to the attorney general rather than local prosecutors;<sup>97</sup> both sides should be developing this expertise in all states.

A second advantage of a statewide appellate defender office is its potential to provide conflict-free counsel for ineffective-assistance-of-counsel claims, whenever those claims are raised. Limited resources for indigent-defense services make representation for every post-conviction petitioner unrealistic, but judges could appoint more petitioners counsel in their discretion, as they already do in many states.<sup>98</sup>

**3. Provide a mechanism to review bare-innocence claims.** Some innocent defendants will have no means of seeking relief in the courts so long as new evidence is admissible only to show the process was flawed, not that the result was false. Although a “stand-alone” or “bare innocence” claim under the Constitution has yet to be recognized by the Court, nothing prevents states from recognizing such a claim as cognizable in post-conviction proceedings.

Several states have already taken steps to make post-conviction review more meaningful for the wrongfully convicted, by exempting claims supported by new evidence of innocence from filing deadlines, successive petition bars, and other procedural barriers. Many have expanded post-conviction remedies to accommodate convincing stand-alone claims of innocence based on new evidence, and there is no indication that these new actual-innocence claims have been burdensome for post-conviction courts to handle. Too many states,

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95. J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The “Ethical” Issue of Issue Selection*, 80 DENV. U. L. REV. 155, 197 (2002).

96. Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROCESS 183, 184–85 (2015) (study of Iowa criminal appeals showing “appellate defenders generally perform better than court-appointed lawyers they win more cases, have fewer procedural and technical problems, seek further review in more cases, and obtain further review more often”).

97. Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 560–61 (2011).

98. King, *supra* note 9, at 2455. Or the defenders’ office itself could screen cases. *Id.* at 2454.

however, have limited innocence claims and remedies in unjustifiable ways, barring defendants whose persuasive proof of innocence is not DNA evidence, or defendants who pleaded guilty rather than going to trial.<sup>99</sup>

Instead of adding bare-innocence claims to the list of claims that can be raised in existing post-conviction procedures, a few states have adopted special judicial remedies designed particularly for claims of actual innocence. In Virginia, for example, between 16 and 27 applications are filed each year seeking a “writ of actual innocence” from the court of appeals based on non-DNA evidence.<sup>100</sup> Utah, too, provides a new judicial remedy for prisoners with non-DNA evidence of innocence, with even fewer applications.<sup>101</sup>

A third option is to establish an independent commission like the North Carolina Innocence Inquiry Commission. Based on similar commissions in Canada and the United Kingdom, the eight-member Commission operates as a separate agency, outside the judicial branch. Its members screen approximately 200 claims received annually, rejecting most of them because the claimant has no new evidence, has no way to prove innocence, or did not claim complete factual innocence. After investigating the remaining claims, the Commission decides which to transfer to a three-judge panel for a hearing and appropriate relief. Since 2007, the Commission has exonerated nine claimants. Its activities are supported by a federal grant to assist with the costs of DNA testing in cases involving DNA.<sup>102</sup> Advocates have argued that an innocence commission is a more cost-effective and manageable alternative for addressing claims of innocence than expanding existing judicial remedies or recognizing new constitutional claims.<sup>103</sup>

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99. All states now have DNA testing statutes, but these too vary in scope, sometimes available only for certain crimes or defendants, or with time limits for applying for relief, for example. For a complete listing, see DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS* § 1.8 (2016).

100. COURT OF APPEALS OF VIRGINIA STATISTICAL REVIEW 2015, at 2 tbl.1 (2016), [http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/cav/cav\\_caseload\\_rpt\\_2015.pdf](http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/stats/cav/cav_caseload_rpt_2015.pdf); cf. *Yonga v. State*, 446 Md. 183, 216–17 (2016) (person who has pled guilty may not later avail himself of the relief afforded by petition for a writ of actual innocence).

101. See generally Nic Caine, *Factually Innocent Without DNA? An Analysis of Utah’s Factual Innocence Statute*, 2013 UTAH L. REV. ONLAW 258; Justin Higginbottom, *Shadow of Guilt: Until the Utah Supreme Court Weighs in on Her Factual Innocence, Debra Brown Lives One Day at a Time*, SALT LAKE CITY WEEKLY (May 8, 2013), <http://www.cityweekly.net/utah/article-17508-shadow-of-guilt.html>.

102. LINDSEY GUICIE SMITH, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, 2015 ANNUAL REPORT 5 (2016).

103. King, *supra* note 38, at 229 (collecting authority).



### C. STEPS TO NARROW THE LAW DEVELOPMENT GAP

Three very specific barriers blocking needed review of bargaining in guilty pleas should be lifted in order to allow appellate courts to guide the bargaining process. Appeal waivers and guilty pleas undoubtedly shield valid claims from appellate review: “[t]he whole point of a waiver ... is the relinquishment of claims regardless of their merit.”<sup>104</sup> But terms in plea agreements waiving the right to appeal should not protect the attorneys who negotiate them from judicial scrutiny of their own conduct. Authorities in at least eight states have already interpreted ethics rules to bar defense counsel from advising a client to waive the right to bring a claim of ineffective assistance challenging that same counsel’s representation; more states should join them.<sup>105</sup> Because even unethical waivers remain enforceable in the courts, states should also consider barring enforcement of ineffectiveness waivers under state law, or “creating a presumption of invalidity, subject to rebuttal by a specified showing (such as clear benefit to the defendant or extraordinary circumstances).”<sup>106</sup>

Second, courts committed to uncovering false convictions and their causes should not enforce waivers of the right to DNA-evidence preservation or testing, nor the right to use the remedy designated for claims of actual innocence.<sup>107</sup>

In addition, the minority of states that presently do not recognize the “conditional plea” should adopt this procedure. A conditional plea permits a defendant to plead guilty while reserving the right to appeal a specified issue. Required consent to a conditional plea by the court and the prosecutor can limit claims reserved for appeal to those that present close or recurring questions that would otherwise escape review.<sup>108</sup>

Finally, to allow appellate courts to address issues of concern to the government and the public now shielded from scrutiny because they recur in cases ending in acquittal, states could ensure that judicial review of lower-court action is available through “advisory appeals.” An advisory appeal cannot disturb the defendant’s acquittal, but it does permit the appellate courts to clarify and correct misunderstandings about important legal issues for other

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104. United States v. Medina-Carrasco, 815 F.3d 457, 463 (9th Cir. 2016).

105. Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance*, 51 DUQ. L. REV. 647, 662–63 (2013); see also Susan Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015).

106. King, *supra* note 105, at 669–672.

107. See generally Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952 (2012).

108. See generally LAFAYE ET AL., *supra* note 11, § 21.6(b); Marjorie Whalena, “A Pious Fraud”: *The Prohibition of Conditional Guilty Pleas in Rhode Island*, 17 ROGER WILLIAMS U. L. REV. 480 (2012).

cases.<sup>109</sup> To ensure that this mechanism is reserved for recurring and important issues, appellate courts should have the discretion to select which prosecution requests for review they will grant.

### RECOMMENDATIONS

This chapter has outlined three sets of reforms to improve the ability of state courts to correct error and develop the law in criminal cases.

- 1. Provide more efficient review without increasing the risk that erroneous convictions will escape correction.** Suggested steps include: (1) eliminating duplicative appeals-of-right; (2) adopting e-filing and digital recording in all trial courts along with a central system for digital transcription; (3) creating separate review mechanisms for appeals that challenge only the sentence; (4) improving case screening instead of replacing mandatory with discretionary review; and (5) modifying rather than eliminating oral argument.
- 2. Address error-correction deficiencies exposed by research into cases of wrongful conviction.** Three reforms were outlined in this chapter: (1) providing a more accessible forum for litigating ineffective assistance of trial counsel and other non-record claims; (2) establishing statewide appellate defender and state's attorneys' offices to enable better advocacy on appeal and new counsel for non-record claims; and (3) recognizing a claim of actual innocence that can provide relief from conviction through post-conviction review, or a process specially designed for that purpose, such as an innocence commission.
- 3. Address gaps in appellate oversight of the plea-negotiation process and errors disfavoring the prosecution that lead to acquittal.** To give reviewing courts the information and opportunity they need to guide the development of the law, states should: (1) allow conditional pleas with the consent of the court and the state; (2) reject waivers of the rights to seek DNA testing or access the state's remedy for actual innocence; (3) refuse to enforce terms in plea agreements purporting to waive challenges to the competency of counsel; and (4) authorize the prosecution to seek "advisory appeals" of recurring error, at the discretion of the reviewing court.

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109. LAFAVE ET AL., *supra* note 11, § 27.3(a); Poulin, *supra* note 53, at 11–12.

# Problem-Solving Courts

Richard C. Boldt\*

*Problem-solving courts have emerged as a significant feature within the criminal justice system. This chapter describes the origins of the problem-solving courts movement as a pragmatic response to perceived dysfunction within the criminal justice system in the last part of the 20th century, and reports on research regarding drug-treatment courts and mental-health courts, two of the most prominent examples of the problem-solving methodology. It then offers an assessment of the promise and perils of the problem-solving approach, and describes the “risk-need-responsivity” model, which has been developed to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that are most likely to reduce reoffending in a given case. The chapter recommends that policymakers prioritize alternatives to criminal system-located problem-solving courts for low-level drug offenses and other quality-of-life infractions. Problem-solving courts should focus on higher-risk offenders, offer a menu of services that match the full range of participant needs, and adopt structural features that minimize the tendency of rehabilitative intentions to devolve into punitive practices.*

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## INTRODUCTION

Problem-solving courts have emerged as a significant feature within the criminal justice system.<sup>1</sup> There are now well over 3,000 specialized courts in the United States that pursue a problem-solving approach.<sup>2</sup> The majority of these problem-solving courts are focused on offenders who misuse drugs.<sup>3</sup> Other specialized courts have been established, however, to address mental illness, intimate violence, and other concerns that proponents believe are suitable to a problem-solving methodology.<sup>4</sup> In addition to the continued expansion of this universe of separate problem-solving courts, advocates eager to see problem-solving jurisprudence “go to scale” are now encouraging court systems to adopt policies that would facilitate the incorporation of problem-solving practices more broadly into ordinary criminal courts and other general jurisdiction courts.<sup>5</sup> These efforts to develop and expand problem-solving jurisprudence have received support from leaders within the bench and bar.<sup>6</sup> In 2000, the United States Conference of Chief Justices and the Conference of State Court Administrators approved a joint resolution calling for the “broad integration”

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1. Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 35 (2005); see also CTR. FOR JUSTICE INNOVATION, PROBLEM-SOLVING COURTS: AN EVIDENCE REVIEW (2015); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (2009).

2. Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What's a Critical Supporter of Problem-Solving Courts to Do?*, 10 MD. L.J. RACE RELIGION GENDER & CLASS 89, 89 (2010); see also Ojmarrh Mitchell, *Drug and Other Specialty Courts*, in THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 843, 847-48 (Michael Tonry ed., 2011).

3. CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 3.

4. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 3 (2005); JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 8 (2009); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125 (2001).

5. ROBERT V. WOLF, CTR. FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1-2 (2007); Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 57-58 (2005). Jane Donoghue has described a notable effort to mainstream problem-solving methods in the U.K. In 2005, the Home Office introduced a number of specialized “Anti-Social Behaviour Response Courts” in England and Wales. These specialized courts, which pursued a problem-solving approach, were phased out in 2009 and the “ASBRC model was then subsequently embedded into all magistrates’ courts in England and Wales.” Jane C. Donoghue, *Anti-Social Behaviour, Community Engagement and the Judicial Role in England and Wales*, 52 BRIT. J. CRIMINOLOGY 591, 592 (2011). According to Donoghue’s research, the results of this effort have not been promising. See *id.*

6. Farole et al., *supra* note 5.

of problem-solving methods into the criminal justice system.<sup>7</sup> Subsequently, the American Bar Association passed a resolution encouraging public and private entities to support “education and training about the principles and methods employed by problem-solving courts.”<sup>8</sup>

This chapter describes the origins of the problem-solving courts movement as a pragmatic response to perceived dysfunction within the criminal justice system in the last part of the 20th century, and reports on research regarding drug-treatment courts and mental-health courts, two of the most prominent examples of the problem-solving methodology. It then offers an assessment of the promise and perils of the problem-solving approach, noting the particular challenges presented by efforts to intermix rehabilitative and punitive functions within existing criminal justice institutions, and describes the so-called “risk-need-responsivity” model, which has been developed to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that are most likely to reduce reoffending in a given case. Given the limitations in the research, the inherent risks of the problem-solving approach, and the importance of attending to the risk-need-responsivity criteria, the chapter recommends that policymakers prioritize alternatives to criminal system-located problem-solving courts for those who currently are brought into the system as a consequence of low-level drug offenses and other quality-of-life infractions. These better alternatives include diversion prior to arrest or pre-adjudication, health and social-service interventions in the community, and the removal of some minor offenses altogether from penal codes. Moreover, to the extent that problem-solving courts are employed, either to adjudicate criminal charges or to manage offenders after a plea, they should focus on higher-risk offenders, particularly those with multiple risk factors. If they target this more challenging population, these courts should offer a menu of services that match the full range of needs these participants present, not just their drug-use disorders or mental illnesses, and should draw upon a diverse service-provider network offering a range of modalities of treatment. Finally, this chapter recommends that drug-treatment courts and other problem-solving courts adopt structural features designed to minimize the tendency of these rehabilitative intentions to devolve into punitive practices. These features include a preference for the pre-adjudication version of the problem-

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7. CONF. OF CHIEF JUSTICES, CONF. OF STATE COURT ADMINISTRATORS, RESOLUTION 22: IN SUPPORT OF PROBLEM-SOLVING COURT PRINCIPLES AND METHODS (2000), <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf>.

8. NOLAN, *supra* note 4, at 7.

solving court model and an expectation that they adopt formal procedures governing the use of graduated sanctions and other responses to participant noncompliance with program requirements.

## I. OVERVIEW OF THE ORIGINS AND DEVELOPMENT OF THE PROBLEM-SOLVING COURTS MOVEMENT

### A. ORIGINS

The modern origins of the problem-solving courts movement can be traced to the mid-1980s, when specialized drug courts or court calendars began appearing as a consequence of a dramatic increase in the number of criminal cases involving drug offenses that were flooding the system. Originally, these drug courts were designed to expedite or fast-track drug cases in order to reduce the crushing caseloads occasioned by the “war on drugs.”<sup>9</sup> Beginning in 1989 in Dade County, Florida, however, a new kind of court began to appear.<sup>10</sup> These drug-treatment courts were different from the expedited drug calendars in that they were designed to integrate traditional criminal case processing features with community-based treatment for substance-use disorders. While many variations on the basic model have developed, certain “key components” of the drug-treatment court approach are regarded by advocates as essential.<sup>11</sup> These key features include: the referral of defendants to substance-use treatment programs; the use of the threat of traditional criminal penalties as leverage to retain defendants in treatment; judicial monitoring of defendants’ progress in treatment through the use of regular urinalysis testing and periodic “status hearings” in open court; and the imposition of increasingly severe “graduated sanctions” in instances of noncompliance with the treatment regime and graduated rewards for successes.<sup>12</sup>

The first generation of drug-treatment courts has served as a model for the development of a number of other problem-solving courts, including mental-health courts, community courts, re-entry courts, and others, that also ground

9. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1207 (1998); Mitchell, *supra* note 2, at 843; cf. Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report.

10. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517 (2003); see also RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE (2009).

11. DRUG COURT STANDARDS COMM., NAT’L ASS’N OF DRUG COURT PROF’LS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997).

12. See STEVEN BELENKO, RESEARCH ON DRUG COURTS 6–7 (1998); Ojmarh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60, 61 (2012).

their legitimacy on a set of pragmatic assertions about “what works.”<sup>13</sup> Over time, advocates and others associated with the problem-solving courts movement have sought to identify a set of core principles shared generally by these undertakings.<sup>14</sup> To this end, researchers at the Center for Court Innovation have developed “performance indicators” for evaluating “problem-solving justice,” which they have grouped into three organizing principles.<sup>15</sup> The first is termed a “problem-solving orientation,” which they define as “a focus on solving the underlying problems of litigants, victims, or communities.”<sup>16</sup> This orientation, they explain, most often “implies an interest in individual rehabilitation,” but on occasion “the defining ‘problems’ of interest belong less to the presenting litigant than to the victims of crime, including the larger community.”<sup>17</sup> The second organizing principle is “collaboration.”<sup>18</sup> This principle “highlights the role of interdisciplinary collaboration with players both internal and external to the justice system.”<sup>19</sup> Consistent with its emphasis on the rehabilitation of offenders and the provision of therapeutic and other social services to individuals enmeshed in the criminal system, the problem-solving model’s collaboration principle contemplates the integration of adjudicative, penal, and human services professionals into interdisciplinary teams, often operating under the supervision of criminal court judges.<sup>20</sup> The third principle is “accountability,” which “focuses on promoting compliance by participants/litigants, quality services among service providers, and accountability by the court itself to the larger community.”<sup>21</sup>

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13. PAMELA CASEY & WILLIAM E. HEWITT, COURT RESPONSES TO INDIVIDUALS IN NEED OF SERVICES: PROMISING COMPONENTS OF A SERVICE COORDINATION STRATEGY FOR COURTS 23, 26–29 (2001).

14. See generally CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 32–33 (“The Common Components of Problem-Solving Courts”).

15. RACHEL PORTER ET AL., CTR. FOR COURT INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING? iii (2010).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Mitchell B. Mackinem & Paul Higgins, *Introduction to PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* i, vii (Paul Higgins & Mitchell B. Mackinem eds., 2009).

21. PORTER ET AL., *supra* note 15, at iv; see also WOLF, *supra* note 5, at 7 (“By insisting on regular and rigorous compliance monitoring—and clear consequences for non-compliance—the justice system can improve the accountability of offenders. It can also improve the accountability of service providers by requiring regular reports on their work with participants.”).

Despite these efforts to articulate a common set of governing principles, a wide range of institutional structures and a diverse set of practices have been adopted by the various courts associated with the problem-solving courts movement.<sup>22</sup> One leading advocate has observed that “[t]here is no single foundational document, no unified theory, that summoned problem-solving courts into existence.”<sup>23</sup> Given the incremental and local nature of their development and the lack of a single authoritative blueprint for their design and operation, it should come as little surprise that the “problems” addressed and the “solutions” attempted by these courts vary considerably.<sup>24</sup> Nevertheless, a consistent theme in the problem-solving courts literature is that they seek “to address a ‘broken system’ symbolized by a ‘revolving door’ through which repeat offenders continually circulate while underlying problems remain ignored.”<sup>25</sup>

*B. THE DEVELOPMENT OF A MOVEMENT:  
EFFECTIVENESS AND PRAGMATISM<sup>26</sup>*

The driving force behind the problem-solving courts movement from its inception has been its express commitment to effectiveness. This is a commitment to doing what works.<sup>27</sup> The focus on effectiveness is apparent both in the critical account of “traditional courts” articulated by advocates of the movement and in the accompanying affirmative counter-story of speciality

22. See PORTER ET AL., *supra* note 15, at 2 (recognizing “the wide variation across today’s problem-solving court models”). This great local variation in the design and operation of problem-solving courts complicates efforts to generalize research findings on the outcomes of individual programs. See KING & PASQUARELLA, *supra* note 10, at 2.

23. Greg Berman, *Problem-Solving Justice and the Moment of Truth*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 20, at 1, 3–4.

24. See PORTER ET AL., *supra* note 15, at 1 (noting that problem-solving courts “each seek to address a different set of problems”).

25. Victoria Malkin, *Problem-Solving in Community Courts: Who Decides the Problem?*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 20, at 139.

26. The Congressional Research Service, in its 2010 review of drug treatment courts, termed the growth of these problem-solving courts a “movement” precisely because it took place “largely in the absence of empirical evidence of benefit.” JOANNE CSETE & DENISE TOMASINI-JOSHI, DRUG COURTS: EQUIVOCAL EVIDENCE ON A POPULAR INTERVENTION 7 (2016), <https://www.opensocietyfoundations.org/sites/default/files/drug-courts-equivocal-evidence-popular-intervention-20160928.pdf> (citing CRS report).

27. See, e.g., Rekha Mirchandani, *What’s So Special About Specialized Courts? The State and Social Change in Salt Lake City’s Domestic Violence Court*, 39 LAW & SOC’Y REV. 379, 385 (2005) (“Special courts promise new methods to help judges and attorneys process cases quickly and efficiently ... with maximum effectiveness ....”); cf. Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 956 (2003) (noting that the emergence of problem-solving courts has otherwise engendered serious debate surrounding one of its foundational principles, that is, whether “the problem-solving protocols employed by these courts are effective”).



courts that often attends their discussions. According to this narrative of failure and redemption, traditional courts set up to generate a “legal resolution” in time-limited and subject-matter-limited “cases” through the operation of an “adversarial process” have become overwhelmed by a crush of offenders with untreated substance misuse, other mental-health problems, and a host of other unmet human needs who cycle repeatedly through the system.<sup>28</sup> This breakdown of the traditional court system is the result of a perfect storm: the co-occurrence of a broad failure of public and private institutions—including schools, families, religious institutions, and the public health-care system—that should be dealing more effectively with the individual and social pathologies often associated with criminality,<sup>29</sup> and the persistence of punitive national, state, and local policies toward street crime and drug offenses, characterized by the adoption of mandatory minimum sentences and the like, which also have contributed to system overload.<sup>30</sup>

On virtually any reasonable set of criteria, the advocates argue, the traditional criminal court system is in crisis. It fails individual offenders because the system cannot afford consistently to provide effective defense counsel or full adversarial proceedings,<sup>31</sup> instead disposing of the vast majority of cases through a plea-negotiation process that does little to address offenders’ underlying human-services and health-care needs.<sup>32</sup> It fails the legal professionals working in the

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28. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125, 128–29 (2004) (“State court dockets tend overwhelmingly to be the stuff of everyday life: defendants who return to court again and again on a variety of minor criminal charges.... Conventional case processing may dispose of the legal issues in these cases, but it does little to address the underlying problems that return these people to court again and again.”); Mackinem & Higgins, *supra* note 20, at viii (“Traditional courts aim to move many cases as fast as can be reasonably done.”); *see also* NOLAN, *supra* note 4, at 8 (acknowledging “the ‘revolving door’ phenomenon of repeat offenders”).

29. Former Chief Judge Judith Kaye of the New York Court of Appeals, for example, has been quoted as saying: “We’ve witnessed the breakdown of the family and of other traditional safety nets.” Greg Berman, *What Is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000) (quoting Kaye).

30. *See* Berman, *supra* note 23, at 7; *see also* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 421–22 (2009) (“[D]rug court was explicitly envisaged as a response to the proliferation of court caseloads and prison overcrowding resulting from the War on Drugs.”).

31. *See, e.g.*, Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1474–75 (2004); *see also* Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

32. In 2006, 94% of all felony convictions in state courts were resolved by guilty pleas. *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009). *See generally* Jenia I. Turner, “Plea Bargaining,” in the present Volume.

system—judges, prosecutors, and defense attorneys—who “feel frustrated and belittled” by the diminished professional discretion left to them in a bureaucratically managed assembly-line process of justice.<sup>33</sup> And it fails the broader community, which is losing confidence in the criminal justice system and other public institutions assigned responsibility for maintaining social cohesion and public safety.<sup>34</sup>

The affirmative counter-story advanced by problem-solving courts advocates promises a “collaborative process” in place of the adversarial, due process-based proceedings that the system no longer can afford consistently to provide.<sup>35</sup> It offers “therapeutic outcomes” for participants, rather than “legal resolutions” for cases.<sup>36</sup> Most importantly, it offers the promise of informal, individualized engagement by judges and other court officials in order to find “what works” instead of settling for the operation of formal, rule-based procedures that do not.<sup>37</sup>

A leading judicial supporter of problem-solving courts, former Chief Judge of the New York Court of Appeals Judith Kaye, captured the essentially pragmatic nature of the movement in her published writing on the subject. These courts, she explained, “bring together prosecution and defense, criminal justice agencies, treatment providers and the like, all working with the judge toward a more *effective* outcome than the costly revolving door.”<sup>38</sup> Another problem-solving court judge has observed that “the system from which the problem-solving courts have emerged was a failure on any count. It wasn’t a legal success. It wasn’t a social success. It wasn’t working.”<sup>39</sup> Specialized problem-solving courts, on the other hand, are said to work. They save money, they reduce recidivism, and, supporters claim, they save lives.<sup>40</sup>

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33. Berman, *supra* note 23, at 4.

34. NOLAN, *supra* note 4, at 9.

35. Mackinem & Higgins, *supra* note 20, at viii. *But see* Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484, 508–09 (2011) (providing a more problematic account of the collaboration that takes place in mental health courts).

36. Mackinem & Higgins, *supra* note 20, at viii. Donoghue describes ASB courts as “alter[ing] their focus from simply processing cases to improving outcomes for victims, communities and offenders.” Donoghue, *supra* note 5, at 595.

37. Nolan quotes a domestic violence court judge as saying: “[T]o me, if it works, do it.” NOLAN, *supra* note 4, at 144.

38. *Id.* at 224 n.32.

39. *Id.* at 145.

40. *See* Berman, *supra* note 23, at 6–7 (citing drug courts as a practical example of the success of specialized problem-solving courts).

The commitment to pragmatism that virtually all problem-solving courts share is in tension with the values of procedural regularity and retributive (proportional) justice that generally are thought to guide our system of criminal blaming and criminal sentencing.<sup>41</sup> On the process side, the system rests on the premise that individual cases will be resolved through formal adversarial disputing, notwithstanding its pervasive reliance on plea negotiations. Two key features of the traditional adversarial model are its use of neutral, detached decision-makers and formal rules of procedure. Taken together, these two features reflect an understanding that the interests of an individual criminal defendant ordinarily are adverse to those of the state and that the structure of a criminal prosecution is inherently unstable.<sup>42</sup> As Martin Shapiro observed long ago, the triadic configuration of a criminal prosecution (or any adversarial proceeding) is prone to collapse into “two against one” once the decision-maker announces a winner and a loser.<sup>43</sup> To prevent the delegitimizing consequences of such a collapse, our system ordinarily relies upon formality and neutrality to prevent even the appearance of an alliance between the judge and the prevailing party.<sup>44</sup> In drug-treatment courts and many other problem-solving courts, by contrast, the stabilizing influence of judicial neutrality and formal rules of procedure are diminished precisely because the interests of the defendant are now seen as consonant with those of the state.<sup>45</sup> The notion that the judge is bound to adopt a “neutral position in the resolution of conflict” is replaced in these courts by a role conception in which “the judge is partisan, aiming to

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41. See generally Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 86–88 (2006).

42. See *id.*

43. Martin Shapiro, *The Logic of the Triad*, in HANDBOOK OF POLITICAL SCIENCE 321 (Fred I. Greenstein & Newson W. Polsby eds., 1975), reprinted in THE STRUCTURE OF PROCEDURE 284, 285 (Robert Cover & Owen Fiss eds., 1979).

44. *Id.* at 286.

45. See KING & PASQUARELLA, *supra* note 10, at 12.

cure the offender of his addiction.”<sup>46</sup> In effect, the judge is understood to be the leader of the defendant/patient’s “treatment team,” and to be performing a therapeutic function on his or her behalf.<sup>47</sup>

The judicial undertakings that result from this redefinition of role are remarkable. As James Nolan, a longtime problem-solving court scholar, has pointed out, drug-treatment court judges see themselves as privileged to engage the defendants in their courtrooms on an unmediated, personal level.<sup>48</sup> They prize “empathetic connection,” often encourage hugs, and take personally the successes and failures of those who appear before them. And, from time to time, they send their “clients” to jail.<sup>49</sup>

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46. Philip Bean, *America’s Drug Courts: A New Development in Criminal Justice*, 1996 CRIM. L. REV. 718, 720.

47. See Miller, *supra* note 30, at 417 (drug courts’ “central methodology is to replace the parole officer with the judge as primary supervisor of each defendant’s treatment program”).

The fact that drug court judges are directly involved in the tasks of monitoring defendants’ behavior and imposing sanctions or conferring rewards is more than merely stylistic. Many substance abusers in the initial stages of recovery are most likely to be helped by a treatment regime focused on “practical problem solving and the acquisition of cognitive-behavioral relapse prevention skills,” which a judge is capable of managing.... In operational terms, this means that the judge’s role in sanctioning and rewarding defendants is to help them understand that their choices have consequences for which they will be held responsible, and that they control their own fate. Thus, when the judge responds promptly to a positive urine test or a missed group therapy meeting with a proportional sanction, he or she is helping to provide treatment to the defendant.

Richard C. Boldt, *The Adversary System and Attorney Role in the Drug Treatment Court Movement*, in DRUG COURTS IN THEORY AND IN PRACTICE 115, 124 (James L. Nolan, Jr. ed., 2002).

48. See James L. Nolan, Jr., *Therapeutic Adjudication*, 39 SOCIETY 29 (Jan.-Feb. 2002).

49. See *id.* at 32:

A participant in the Syracuse, NY Drug Court lost his job. The judge called the employer and learned that the client was regarded as a “damn good employee”; and that the boss would “hire him back in a heartbeat” if the judge could guarantee that he was drug free and wouldn’t miss any work. So the judge made a deal with the employer. He said to him: “Okay, I’ll make a deal with you, you take him back and I’ll add another weapon to your arsenal. If he doesn’t come to work when he is supposed to, doesn’t come to work on time, if he comes to work under the influence, I’ll put him in jail, on your say so.” The judge told the client about the deal. “I’ll get your job back for you, but you’ve got to promise you’ll be at work when you’re supposed to and not take any drugs. Your employer is now on the team of people who are reporting to me. When he calls up and tells me that you are late or that you’re not there, I’m going to send the cops to arrest you.” The judge acknowledged that these actions probably violated the canon of judicial ethics ....

The frank pragmatism of problem-solving court judges is also in tension with the substantive claim that criminal blaming and sentencing in the United States is primarily directed toward the accomplishment of retributive justice.<sup>50</sup> Drug-treatment courts and other problem-solving courts place an enormous premium on individualized dispositions, even when this process of individualization comes at the expense of consistency in sentencing,<sup>51</sup> a goal that was at the center of the decline of the rehabilitative ideal 40 years ago and that has played an important role in the dramatic growth of determinate sentencing schemes. In fact, there is good reason to conclude that the energetic support problem-solving courts have received from judges has a great deal to do with their frustration over contemporary sentencing policy.<sup>52</sup> Judges see in these courts an opportunity to redefine their role in response to the diminished judicial discretion and autonomy brought about by the determinate sentencing movement, sentencing grids and guidelines, and the straightjacket of mandatory minimum sentences.<sup>53</sup> “A common frustration expressed by drug-court judges is the unwelcome constraints they experience from legislatively imposed mandatory minimum sentences. Drug courts are liberating in that they allow more flexibility in the way a judge can respond to a client.”<sup>54</sup> Many judges who serve in problem-solving courts note the autonomy and sense of efficacy they derive from these courts. “Judges even go so far as to argue that the drug court has positive therapeutic outcomes for the judge. As two judges write, ‘judging in this non-traditional form becomes an invigorating, self-actualizing and rewarding exercise.’”<sup>55</sup>

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50. See, e.g., CAL. PENAL CODE § 1170(a)(1) (“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.”).

51. See KING & PASQUARELLA, *supra* note 10, at 10.

52. See Nolan, *supra* note 48, at 37.

53. See McCoy, *supra* note 10, at 1529; Nolan, *supra* note 48, at 36. See generally Douglas A. Berman, “Sentencing Guidelines,” in Volume 4 of the present Report; Erik Luna, “Mandatory Minimums,” in Volume 4 of the present Report.

54. Nolan, *supra* note 48, at 36.

55. *Id.* at 38. As Miller explains, “the drug court judge gets something out of the relationship, too. She also gets a lifestyle change, and is reconstituted as a different type of judge, one engaged in healing rather than punishment, a specialist rather than a grunt.” Miller, *supra* note 30, at 434.

## II. RESEARCH ON PROBLEM-SOLVING COURTS

There is a substantial body of quantitative research on drug-treatment courts' effectiveness.<sup>56</sup> While research on other problem-solving courts is beginning to provide some evidence of their respective benefits and costs, the clearest research picture pertains to drug-treatment courts.<sup>57</sup> Overall, the evidence suggests that adult drug-treatment courts can be effective for some participants in reducing substance misuse and future criminal system involvement, particularly for offenders who present a high risk of reoffending.<sup>58</sup> By contrast, the evidence on juvenile drug-treatment courts is inconclusive, with some research indicating that these courts may potentially have a harmful impact on younger participants.<sup>59</sup> The evidence on mental-health courts is incomplete and paints a more complex picture. In general, it suggests that these courts may have an overall positive impact on criminal system re-involvement for some clients, but likely do not measurably improve participants' mental health.<sup>60</sup>

### A. RESEARCH LIMITATIONS

Several important limitations characterize much of this research. First, because it is difficult to create a research design in this area with randomly assigned study and control groups, many of the studies use comparisons between study subjects who have participated in problem-solving courts and others who have not but have similar characteristics (in terms of demographic and criminal justice factors).<sup>61</sup> Some recent studies have used fairly sophisticated techniques for controlling for confounding variables,

56. There is a smaller body of qualitative or ethnographic research on drug treatment courts and other problem-solving courts. See, e.g., Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416 (2003); Stacy Lee Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 J. CONTEMP. ETHNOGRAPHY 720 (2008).

57. See generally CTR. FOR JUSTICE INNOVATION, *supra* note 1; NAT'L ASS'N OF CRIM. DEF. LAWYERS, *supra* note 1; Mitchell et al., *supra* note 12; see also CSETE & TOMASINI-JOSHI, *supra* note 26.

58. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 9–11; CSETE & TOMASINI-JOSHI, *supra* note 26, at 6–7; Mitchell et al., *supra* note 12, at 66.

59. See LESLIE BLAIR ET AL., U.S. DEP'T OF JUSTICE, OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE DRUG COURTS: A PROCESS, OUTCOME, AND IMPACT EVALUATION (2015), <https://www.ojjdp.gov/pubs/248406.pdf>; Mitchell et al., *supra* note 12, at 64.

60. See Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Analysis*, 39 J. CRIM. JUST. 12 (2011); see also Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231 (2017).

61. CSETE & TOMASINI-JOSHI, *supra* note 26, at 12. Thus, of the 92 studies included in their meta-analysis of drug treatment court outcomes, Mitchell and colleagues report that only 3 used random control groups. Mitchell et al., *supra* note 12, at 63.

but the gold-standard double-blind methodology is rare in this area.<sup>62</sup> In addition, many of the studies focus on recidivism as the primary or only outcome measure (other measures include court appearances, convictions, or self-reported substance use or criminal behavior).<sup>63</sup> The relatively few studies that have measured outcomes such as employment, housing status, or family attachment have reported mixed success.<sup>64</sup> Moreover, much of the research measures reoffending in the short-term. Some, although not all,<sup>65</sup> of the studies that have measured longer-term recidivism rates have been disappointing.<sup>66</sup> For example, a study of Baltimore's drug-treatment court found that participants were less likely than a control group to be rearrested in the first two years after their initial involvement in the treatment court, but that after three years this difference became statistically insignificant, "with a stunning 78 percent of drug court participants being re-arrested."<sup>67</sup>

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62. See Richard C. Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 10 MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 51–52 (2010); see also DRUG POLICY ALLIANCE, *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 9 (2011). In 2011, the GAO reported that fewer than 20% of the 260 studies of drug courts it reviewed used "sound social science principles." CSETE & TOMASINI-JOSHI, *supra* note 26, at 7.

63. See KING & PASQUARELLA, *supra* note 10, at 5–6.

64. See Boldt, *supra* note 62, at 57. "A health-centered response to drug use assesses improvement by many measures—not simply by people's drug use levels, but also by their personal health, employment status, social relationships and general wellbeing. 'Success' in the criminal justice context, by contrast boils down to the single measure of abstinence ...." DRUG POLICY ALLIANCE, *supra* note 62, at 16; see also Mitchell, *supra* note 2, at 855 ("Very few evaluations assessed drug courts' effects on non-crime outcomes such as employment, welfare use, or physical health ....").

65. For example, "[s]ix drug courts in New York state averaged a 29% reduction in re-arrest measured over 3 years following participants' initial arrest," and "[a]n evaluation of the Ulnomah County, Oregon drug court found a 24% reduction in drug arrests for participants thirteen years after initial entry into the program." KING & PASQUARELLA, *supra* note 10, at 6 (quoting Michael Rempel & Christine Depies Destefano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Treatment Court, 1996-2000*, in DRUG COURTS IN OPERATION: CURRENT RESEARCH 91–93 (2001)).

66. Mitchell found that "drug courts' recidivism suppressing effects diminish as the length of recidivism tracking period increases." Mitchell, *supra* note 2, at 859.

67. See Denise Gottfredson et al., *The Baltimore City Drug Treatment Court 3-Year Self-Report Outcome Study*, 29 EVALUATION REV. 42 (2005) (49.5% percent of Treatment Court participants at the three-year mark report re-arrest within prior 12 months versus 58% of control group; 66% of Baltimore City Drug Treatment Court participants had been rearrested within two years of admission, compared with a rate of 81% for defendants who had been processed through Baltimore's traditional criminal courts system; 78% of Drug Treatment Court participants had been rearrested at the three year mark compared with 88% of controls).

*B. DRUG-TREATMENT COURTS: COSTS AND BENEFITS*

With these limitations in mind, the scorecard for drug-treatment court success is guardedly optimistic. While a majority of studies show some positive results, ranging from significant to slight, others report no statistically significant effect on recidivism.<sup>68</sup> Among the more promising recent reports is a multisite adult drug-treatment court evaluation sponsored by the National Institute of Justice, a funder of drug-treatment courts. The findings of this study were reported in 2011. Included were 23 courts in six sites. The NIJ study found statistically significant lower rates of self-reported criminal conduct in the 24 months after respondents began their involvement in a drug-treatment court compared to a control group, and somewhat lower rearrest rates, although the difference was not statistically significant. In addition, study subjects underwent an oral-swab drug test at the 18-month mark, and the group that had participated in the treatment court showed a positive test result of 29% versus the control group's 46%.<sup>69</sup>

For a number of reasons, however, the results of most of the individual studies and the available meta-analyses indicating positive recidivism effects for treatment-court participants should be interpreted with caution. Given the limited use of randomly assigned double-blind study and control groups, it is difficult to "attribute causal impact" to the treatment court alone. "Thus, while there is a great deal of research on drug courts, very little of it identifies outcomes that can be said to be the direct result of drug court participation."<sup>70</sup> As one group of observers has pointed out:

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68. For example, a 2011 review by the U.S. Government Accountability Office (GAO) determined that 56% of the jurisdictions under study experienced statistically significant reductions in re-arrest rates for drug treatment court participants. See U.S. GOV'T ACCOUNTABILITY OFFICE, ADULTS DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS (2011), <http://www.gao.gov/assets/590/586793.pdf>. Mitchell and colleagues report that "the average effect of participation is analogous to a drop in recidivism from 50% to 38%," but that drug courts' "effectiveness in reducing recidivism remains ambiguous as several issues have not been sufficiently addressed." Mitchell et al., *supra* note 12, at 60.

69. See SHELLI B. ROSSMAN ET AL., URBAN INST., THE MULTI-SITE ADULT DRUG COURT EVALUATION (2011).

70. CSETE & TOMASINI-JOSHI, *supra* note 26, at 12.



Gender, age, race, socioeconomic background, criminal history, and substance abuse history have all been shown to impact treatment outcomes. Many of these variables are not accounted for in analyses of drug court effectiveness. Operationalizing drug court variables can be difficult and outcome measures may be reflecting the interaction of these variables with the treatment modality.<sup>71</sup>

Moreover, many of the studies omit data on treatment-court failures or fail to distinguish between those currently in the drug-treatment court process and those who have completed the program.<sup>72</sup> These features of the research are troubling, because drug-treatment court graduates tend to have much better rearrest rates and other recidivism measures than those who drop out or are dismissed.<sup>73</sup> Because the graduation rates vary considerably and can be quite low, these omissions are consequential.<sup>74</sup> Indeed, “[s]ome studies suggest that among drug court dropouts, time spent in treatment had little if any effect on post-program recidivism.”<sup>75</sup>

In addition, some experts suggest that the claims of effectiveness urged by drug-treatment court advocates and demonstrated by some of the research reflect in part the practice of courts to “cherry-pick” persons who are most likely to complete the program instead of those who most need the resources they offer.<sup>76</sup> “This, in turn, gives rise to misleading data because it yields drug court participants who are, on the whole, more likely to succeed than a comparison group of conventionally sentenced people who meet drug court eligibility criteria but who are not accepted into the drug court.”<sup>77</sup> Indeed, the effects of cherry-picking may be even more pronounced in those jurisdictions that have adopted eligibility criteria that favor easy-to-treat offenders and that exclude others with more severe drug-use histories and more extensive histories of criminal system involvement.<sup>78</sup>

Taken as a whole, while the quantitative research, warts and all, tells a story of modest success, the costs of drug-treatment courts may outweigh their potential benefits. Even given that adult drug-treatment courts appear to

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71. KING & PASQUARELLA, *supra* note 10, at 6–7.

72. See DRUG POLICY ALLIANCE, *supra* note 62, at 9–10.

73. See Boldt, *supra* note 62, at 57.

74. See DRUG POLICY ALLIANCE, *supra* note 62, at 7, 9 (drug treatment court completion rates range from 30% to 70%); see also Mitchell et al, *supra* note 12, at 61 (reporting a graduation range from 36% to 60%).

75. KING & PASQUARELLA, *supra* note 10, at 7.

76. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 8.

77. DRUG POLICY ALLIANCE, *supra* note 62, at 10.

78. See *id.* at 13.

reduce recidivism, the effects are modest and may not be as favorable as other correctional programs that adhere to the principles of effective intervention. For example, “[a]ccording to one major study from the Washington State Institute for Public Policy ... adult drug courts reported a reduction in recidivism of 8.7%—significantly less than reductions recorded in probation-supervised treatment programs (18%) and on par with reduction recorded by programs offering community-based drug treatment (8.3%), neither of which used incarceration as a sanction.”<sup>79</sup>

Problems with respect to net-widening, implementation and organizational constraints are also worrying.<sup>80</sup> As are reports that drug-treatment courts may increase racial disparities within the criminal justice system.<sup>81</sup> Unnecessarily intensive supervision and monitoring of participants, especially those who are relatively low-risk, together with weak procedural protections, have the potential to undermine the legitimacy of these courts and diminish the criminal system’s interest in procedural justice.<sup>82</sup> Finally, for those who fail to graduate, the outcomes often are more punitive and involve longer incarcerative sentences than similarly situated defendants who do not participate in problem-solving courts. Indeed, a 2013 meta-analysis “concluded drug court participants in the jurisdictions studied did not spend less time overall incarcerated than non-participants because of the long sentences imposed on people who ‘failed’ the court-dictated treatment plan.”<sup>83</sup>

### C. MENTAL-HEALTH COURTS: THE COMPLEX RELATIONSHIP BETWEEN MENTAL ILLNESS AND OFFENDING

With respect to mental-health courts, advocates frequently assert two rather straightforward premises underlying their efforts to link therapeutic services to criminal-case management. The first is that there is a direct causal relationship

79. *Id.* at 11. In contrast, Mitchell reports that the treatment effects of drug courts, although “modest,” are larger than “other widely applied criminal justice based drug treatment program.” Mitchell, *supra* note 2, at 859.

80. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 29–30.

81. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 11–12; DRUG POLICY ALLIANCE, *supra* note 62, at 8; see also Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 477–87 (2009). For discussions of the impact of race on adjudication and sentencing, see Paul Butler, “Race and Adjudication,” in the present Volume; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

82. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 29–30.

83. CSETE & TOMASINI-JOSHI, *supra* note 26, at 9.

between mental illness and criminal conduct.<sup>84</sup> The second is that the effective treatment of an offender's underlying mental illness is likely to prevent his or her future criminality (or at least reduce recidivism).<sup>85</sup> As it happens, the association between mental illness and criminality is more complex than this account suggests, and, in most cases, is not directly causal.<sup>86</sup> Researchers studying the question have concluded that the group of offenders whose mental disorders can be said to have directly caused their criminal conduct is actually quite small.<sup>87</sup> A second category of offenders, which is much larger, is comprised of offenders whose criminal conduct is best understood as only indirectly the result of mental illness.<sup>88</sup> In the case of these individuals, the effects of their mental disorders generally are mediated by factors either brought about by their underlying illness or at least associated with it, such as homelessness, low educational attainment, weak family and community ties, and the like.<sup>89</sup> A third category is made up of offenders who suffer both from mental illnesses and co-occurring substance-use disorders and/or personality disorders.<sup>90</sup> Here

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84. See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 552 (2012) (“At the core of mental health courts is a belief that, were it not for eligible offenders’ mental illnesses, these individuals would not have engaged in the criminal behavior that prompted their arrest.”). See generally Stephen J. Morse, “Mental Disorder” and Criminal Justice,” in Volume 1 of the present Report.

85. As Johnston explains, most “mental health courts justify segregating and diverting individuals with certain mental illnesses on the ground that their illnesses likely contributed to their criminal behavior[] ... [and] operate under the assumption that the amelioration of symptoms of these mental illnesses will reduce the likelihood of future criminal behavior.” Johnston, *supra* note 84, at 551.

86. See *id.* at 528 (“Since many mental health courts do not require a demonstrated nexus between an individual’s mental illness and his criminal offense, courts’ assumption of a causal link appears misplaced.”); see also CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 14; Mulvey & Schubert, *supra* note 60, at 9–10.

87. One group of researchers reported that only about 10% of offenders with mental illness who engage in criminal conduct do so as a direct consequence of their disability. See Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 117–18 (2010) (identifying a study that found out of 113 arrestees with mental illness, “8% had been arrested for offenses that their psychiatric symptoms probably-to-definitely caused, either directly (4%) or indirectly (4%)”).

88. Johnston, *supra* note 84, at 560.

89. *Id.* at 573. A significant percentage of offenders with mental illness become enmeshed in the criminal justice system because their mental disabilities “contributed to their job loss, decline into poverty, and/or movement into environments rife with antisocial influences, all generic risk factors for criminal justice involvement.” *Id.* at 560.

90. *Id.*

again, it is difficult to attribute direct causal significance to this group's mental illnesses, given that their co-occurring disorders also contribute in important ways to their criminal-system involvement.<sup>91</sup>

Consistent with this more nuanced understanding, the best evidence is that a number of the risk factors most associated with criminality (substance misuse, weak family ties, and so forth) are also associated with severe mental illness.<sup>92</sup> Understood in this fashion, while mental illness in itself is not highly predictive of criminal recidivism, mental illness does play an important indirect role in fostering a set of circumstances that are positively associated with criminal justice system involvement. Not surprisingly, programs that target this broad spectrum of "criminogenic needs" produce greater "treatment effects" than do programs that are more narrowly focused on mental illness and medication management alone.<sup>93</sup>

Because mental illness does not hold a simple, causal relationship with criminality (the first premise often advocated by mental-health court advocates), medication management and other treatment interventions targeting participants' mental illness, taken in isolation, are unlikely to produce robust and sustainable reductions in recidivism (the second premise).<sup>94</sup> Instead, courts that formulate a broader and more comprehensive understanding of the problem, and thereby seek to address a fuller range of associated needs contributing to the dysfunction and distress of the offenders before them, are more likely to have a measurable impact on the daily functioning of these

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91. See *id.* (discussing the findings of William H. Fisher et al., *Community Mental Health Services and Criminal Justice Involvement Among Persons with Mental Illness*, in *COMMUNITY-BASED INTERVENTIONS FOR CRIMINAL OFFENDERS WITH SEVERE MENTAL ILLNESS* 43–44 (William H. Fisher ed., 2003)); see also Mulvey & Schubert, *supra* note 60, at 12.

92. See Skeem et al., *supra* note 87, at 116–18 (identifying evidence "that major predictors of violence and recidivism are not unique to offenders with mental illness, but instead shared with general offenders").

93. See Johnston, *supra* note 84, at 574–75 ("Studies show that the most effective programs for reducing recidivism are those that target the specific risks and needs predictive of criminality."); see also Mulvey & Schubert, *supra* note 60, at 14. As Francis Cullen explains, "Risk factors are salient because they influence the cognitive decision to commit a crime by making it more rewarding or less costly. Research has confirmed the causal importance of eight factors .... Referred to as the 'central eight,' these risk factors are also called 'criminogenic needs' because they are deficits that must be fixed if recidivism is to be lowered." Francis T. Cullen, "Correctional Rehabilitation," in Volume 4 of the present Report.

94. See Skeem et al., *supra* note 87, at 114 (recognizing that different treatments may reduce recidivism, but "there is no evidence that they do so by linking individuals with evidence-based psychiatric treatment or by achieving symptom reduction"); see also Johnston, *supra* note 84, at 573 ("[T]he provision of mental health treatment alone is not an effective strategy for reducing the recidivism of offenders with mental illnesses.").

individuals.<sup>95</sup> Moreover, if the definition of the problem is informed by an acknowledgement that the relationship between mental disorder and criminal system involvement is not directly causal in most cases, but instead is mediated by a range of associated characteristics, then the identification of appropriate goals is also likely to take on a broader, more comprehensive cast, to include not just (or even primarily) a reduction in criminal recidivism.<sup>96</sup>

#### D. THE RISK-NEED-RESPONSIVITY MODEL

The risk-need-responsivity (RNR) model was first developed in the early 1990s to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that would be most likely to reduce reoffending in a given case. Today, although it has been criticized by some and has undergone considerable refinement,<sup>97</sup> the model is considered the “dominant paradigm for working with offenders.”<sup>98</sup> The RNR model is comprised of the principles of risk, need, and responsivity. The *risk* principle promotes the use of empirically validated assessment tools that measure both static risk factors such as age and criminal history and dynamic risk factors, including substance misuse, to ensure that intensive case management and intervention services are reserved for high-risk offenders.<sup>99</sup> The *need* principle states that to reduce recidivism, treatment should target a group or package of “criminogenic needs” rather than a single need thought to be a risk factor. Thus, instead of focusing solely on drug-use treatment for persons with drug

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95. See Skeem et al., *supra* note 87, at 121 (finding that “the effectiveness of correctional programs in reducing recidivism is positively associated with the number of criminogenic needs they target”).

96. Johnston explains the point as follows:

[B]y broadening the stated goals of mental health courts beyond decreasing arrests or incidents of reconviction—which some mental health courts do—a theory of rehabilitation could potentially justify mental health courts as currently constituted.... [O]ther measures of social welfare—such as improvement in aspects of offenders’ psychological health, conduct, and life-style—could also serve as viable measures of success. Mental health courts may succeed at enhancing the human potential, psychological health, or welfare of offenders, even in the face of static re-arrest rates.

Johnston, *supra* note 84, at 576–77.

97. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 4 (“[T]he critique from advocates of the Good Lives Model has been the most important. This critique focuses primarily on the practice of RNR. It suggests that RNR’s emphasis on risk and harm focuses practitioners on the public interest, rather [than] on asking critical questions around offender motivation. This can lead to a neglect of the individual as a whole and their self-identity, despite the growing evidence around this being the key to desistance.”).

98. See *id.*

99. See *id.*

problems or medication management for offenders with mental illness, the need principle calls for the delivery of an integrated suite of services designed to meet all (or at least most) of the deficits that collectively contribute to their criminal involvement.<sup>100</sup> The *responsivity* principle urges officials to adapt interventions to the specific needs of offenders. In general, treatments based on cognitive-social learning methods are thought to be the most effective at reducing criminal behavior, and intervention strategies tailored to match the offender's individual learning styles, motivations, and abilities (e.g., physical disabilities, mental health, level of intelligence) are encouraged.<sup>101</sup> Research has demonstrated the value of adherence to the RNR model for the purposes of risk reduction in offender populations.<sup>102</sup>

Problem-solving courts increasingly are being structured as post-adjudication programs (thus, typically, requiring a plea), or, occasionally, as probation-based programs.<sup>103</sup> The requirements imposed on participants, therefore, frequently are structured either as conditions associated with a suspended sentence or conditions of probation.<sup>104</sup> Consistent with the set of insights about risk, need, and the importance of matching interventions to the individual characteristics of individuals inherent in the RNR model, and given the high rates of reoffending among persons under supervision generally, the best evidence suggests that treatment-court programs should be targeted to those most likely to need them and limited by length and by the terms of participation so that these interventions do not themselves promote reoffending and inhibit the reintegration of offenders.<sup>105</sup>

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100. See Mary Ann Campbell et al., *Multidimensional Evaluation of a Mental Health Court: Adherence to the Risk-Need-Responsivity Model*, 39 LAW & HUM. BEHAV. 489, 490–91 (2015); see also Michael Rempel, *Evidence-Based Strategies for Working with Offenders*, CTR. FOR CT. INNOVATION (Apr. 2014), <http://www.courtinnovation.org/sites/default/files/documents/Evid%20Based%20Strategies.pdf>.

101. See Campbell et al., *supra* note 100, at 491.

102. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 4.

103. See *id.* at 2 (“In the United States, the vast majority of drug courts—an estimated 93 percent—offer treatment ‘post adjudication’ ... 59 percent of U.S. drug courts had post-adjudication services only.”); see also Mitchell, *supra* note 2, at 852. There are additional variations among these courts. Some courts require defendants to enter a plea and/or an agreed upon statement of facts, but postpone a final judgment until participants either complete the program or fail to graduate. Others enter judgment but delay the imposition of sentence, and still others make the conditions of the treatment program a part of participants’ terms of probation. See Miller, *supra* note 30, at 453.

104. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 9.

105. See DRUG POLICY ALLIANCE, *supra* note 62, at 13 (“[D]rug courts work better for those who are at an inherently higher risk for future criminal behavior.”).

The reporters to a recent American Law Institute project revising the Model Penal Code's provisions on community supervision and intermediate sanctions pointed out that "while probation and other intermediate punishments have often been promoted as alternatives to incarceration, the history of the last several decades is otherwise. Community supervision systems have expanded alongside the nation's prisons and jails since the 1970s and at a comparable pace."<sup>106</sup> So, "[i]nstead of one class of sanctions substituting for the other, all the major forms of punishment have grown in parallel," with the result that today "one of every 50 adults in the U.S. is under community supervision on any given day."<sup>107</sup> The reporters cautioned:

[L]egislatures, sentencing commissions, courts, and corrections agencies should be watchful that their efforts do not produce more crime than would exist without their interventions. No one wants the effects of legal sanctions to amount to 'public endangerment.' Research suggests, however, that this unintended outcome occurs with unsettling frequency. Much progress in public safety could be made by rethinking current practices in community supervision ... and collateral sanctions that are themselves causes of crime.<sup>108</sup>

As applied to problem-solving courts, the evidence suggests that targeting the most intensive services and treatment to higher-risk offenders yields better recidivism outcomes.<sup>109</sup> This works in two directions. First, it turns out that providing intensive treatment and other interventions to lower-risk offenders can increase their rates of recidivism.<sup>110</sup> Especially for offenders with drug-use disorders, while the effectiveness of treatment ordinarily increases with duration, the results can diminish if treatment goes on too long.<sup>111</sup> More generally, the research shows that requiring lower-risk offenders to participate in intensive or multiple programs can disrupt their social functioning and actually introduce new risk factors.<sup>112</sup>

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106. Kevin R. Reitz & Cecelia M. Klingele, *Reporters' Introduction*, in MODEL PENAL CODE: SENTENCING XX (Tentative Draft No. 3, 2014).

107. *Id.*

108. *Id.* at xxii. See generally Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

109. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 29–30.

110. See *id.* ("It is clear from studies that where over-dosing occurs, especially with low-risk offenders, we can actually worsen their outcomes. As might be expected, high-risk offenders given low doses of intervention are more likely to reoffend. However, overdosing low-level offenders with interventions can also increase the chances of reoffending ....").

111. See KING & PASQUARELLA, *supra* note 10, at 14–15 (attributing much drug treatment court failure to inappropriate treatment matching).

112. See CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 29–30.

On the other hand, for offenders with multiple risk factors, including severe mental illness, co-morbid drug or alcohol problems, and/or personality disorders, more intensive interventions may provide better recidivism outcomes. For these individuals, and indeed for most offenders brought into problem-solving courts, it appears that the most effective techniques include cognitive behavioral approaches and structured social learning, where new skills and behaviors are modeled and practiced.<sup>113</sup> Programs that focus on fear, shaming, and other emotional appeals consistently have been found to be ineffective.<sup>114</sup>

### III. ANALYSIS AND ASSESSMENT

The contemporary problem-solving court movement may have begun with the first drug-treatment court in Dade County in 1989, but the conceptual roots of the movement can be traced back even further, to a tradition that includes the juvenile-court movement and other still earlier reform efforts.<sup>115</sup> This history alerts us to the dangers inherent in contemporary efforts to meld punishment and treatment. These risks are inherent in the hydraulics of virtually all treatment/punishment hybrids, under which therapeutic impulses tend over time to collapse into punitive practices.<sup>116</sup>

As the broad but ultimately unsuccessful effort to adopt rehabilitative penal approaches in the middle part of the 20th century (and the more particularized failures of the juvenile-court movement over most of the last century) suggests, joining punitive and therapeutic functions within a single hybrid institutional structure is fraught with risks.<sup>117</sup> These risks derive from a number of sources, but especially from what the mid-century critics of the “rehabilitative ideal” referred to as the inherent tendency of these merged enterprises “in practical application to become debased and to serve other social ends far removed from and sometimes inconsistent with the reform of offenders.”<sup>118</sup> The critics argued that the “natural

113. *See id.*

114. *See* Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does It Relate to Drug Courts?*, 41 OHIO N.U. L. REV. 757 (2015); *see also* Rempel, *supra* note 100; STEVE AOS ET AL., WASH. ST. INST. FOR PUB. POL’Y, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT (Jan. 2006), <http://www.wsipp.wa.gov/ReportFile/924>.

115. *See* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL’Y 57 (2009); Boldt, *supra* note 9, at 1269–78. For a discussion of the juvenile court movement, *see* Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

116. Boldt, *supra* note 62, at 65.

117. *See* Boldt, *supra* note 9, at 1218–45, 1269–78; *see also* FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA’S JUVENILE COURT EXPERIMENT* (1978).

118. ALLEN, *supra* note 117, at 49.



progress of any program of coercion is one of escalation,”<sup>119</sup> and that a persistent “competition between rehabilitation and the punitive and deterrent purposes of penal justice ... [in which the] rehabilitative ideal is ordinarily outmatched in the struggle”<sup>120</sup> helps to explain this inclination toward debasement.<sup>121</sup>

While a “predominant narrative” of the problem-solving court movement is that it turns on “efforts of ‘integrating’ and ‘harmonizing’ the professional approaches of justice and treatment,” some observers have suggested that “[t]he ontological framework of ‘crime’ and ‘disease,’ applied to the problem of drug addiction, makes for fundamentally different assumptions, practices and goals.”<sup>122</sup> Indeed, “[t]hese perspectives are not only fundamentally different,” they may well be “contradictory and exclusionary in many of their assumptions and principles.”<sup>123</sup> Thus, “the actual meaningfulness of jointly applying the figurative ‘tomahawk’ and the ‘healing balm’ ... to the offender, in principle and practice, remains an open question.”<sup>124</sup>

Additionally, the very design of these courts tends to reinforce the primacy of the criminal justice components over the therapeutic/helping elements. Although the judge, attorneys, probation and parole officials and service providers often are described as functioning as a “treatment team,” it is significant that the team is headed by the judge, who, by training, professional

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119. AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 25 (1971).

120. ALLEN, *supra* note 117, at 53–54.

121. The critics asserted that debasement is virtually inevitable given the “conceptual weakness” of rehabilitative punishment, and the fact that criminal justice institutions “must serve punitive, deterrent, and incapacitative ends.” *Id.* at 51–53.

122. Benedikt Fischer, *Doing Good with a Vengeance: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 CRIM. JUST. INT’L J. POL’Y & PRAC. 227, 234–35 (2003).

123. *Id.* at 235.

124. *Id.* Eric Miller makes a related point in describing the methodology of drug treatment courts. He suggests that “a central feature of the therapeutic methodology is the drug ... courts’ characterization of the offender as an individual in need of discipline, rather than medical help. Accordingly, the court embraces the central expertise of the judicial office in the context of sentencing: dispensing punishment.... [T]he point of drug courts is discipline-as-treatment.” Miller, *supra* note 30, at 419–20. Ojmarrah Mitchell has also noted this feature of drug courts. In his account, the growth of these specialty courts was due in part to the fact that their disposition toward drug use disorders “meshed well with the larger Reagan/Bush philosophy of user accountability: ‘[I]n a free society we’re all accountable for our actions. If this problem is to be solved, drug users can no longer excuse themselves by blaming society. As individuals, *they’re responsible.*’” Mitchell, *supra* note 2, at 849 (quoting Reagan). For Miller, “[c]riminality becomes a matter of personal control rather than poverty or racial discrimination, and the government’s role becomes one of inducing self-discipline rather than ameliorating social ills.” Miller, *supra* note 30, at 438.

culture, and role definition, is bound to enforce legal norms. Thus, unlike treatment services provided voluntarily in the community, fundamental decisions made in problem-solving courts, including decisions about whether a violation of conditions should be met with a therapeutic response or a more punitive imposition of incarceration or expulsion from the program, are made authoritatively by an actor bound to a larger institutional system that takes as its goals deterrence, retribution and incapacitation.<sup>125</sup>

Given this baked-in structural vulnerability to debasement, several more specific concerns associated with the problem-solving model arise. The first, which was especially prevalent in drug-treatment courts in the first decades of their development, is the tendency of these courts to “cherry-pick” low-risk offenders, which may have a net-widening effect and may also actually increase reoffending. Some observers have reported that problem-solving court officials who have an incentive to produce high graduation rates in order to secure or continue public funding “face incentives to cherry pick clients, thereby avoiding individuals who pose the greatest risk.”<sup>126</sup> Perhaps as a consequence of this dynamic, other research has suggested that as many as a third of all participants in some drug-treatment courts may not be in need of intensive treatment for a substance-use disorder.<sup>127</sup>

Problem-solving courts may provoke net-widening even when court officials resist cherry-picking clients. Indeed, the presence of these courts may increase the number of low-level drug arrests and other arrests for “quality of life” offenses.<sup>128</sup> “Some studies suggest that since drug courts provide an additional venue in which to process offenders, law enforcement officials are able to make more arrests of lower-level offenders.”<sup>129</sup> Ironically, many of these new defendants will face more severe criminal sanctions because of the limited

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125. Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 20, at 13, 20–21. For discussions of these goals, see Jeffrie G. Murphy, “Retribution,” in Volume 4 of the present Report; Daniel S. Nagin, “Deterrence,” in Volume 4 of the present Report; and Shawn D. Bushway, “Incapacitation,” in Volume 4 of the present Report.

126. CSETE & TOMASINI-JOSHI, *supra* note 26, at 8.

127. *See id.* at 8–9.

128. *See* Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1167 (2014); *cf.* Jeffrey Fagan, “Race and the New Policing,” in Volume 2 of the present Report; Henry F. Fradella & Michael D. White, “Stop-and-Frisk,” in Volume 2 of the present Report.

129. KING & PASQUARELLA, *supra* note 10, at 17.

capacity and strict eligibility criteria maintained by treatment courts, even though their arrests were in some sense stimulated by the perceived availability of a problem-solving court venue.<sup>130</sup>

A second problem is associated with treatment-court failure. A 2013 meta-analysis of incarceration outcomes, using data from 19 studies in the United States, concluded that drug-treatment court participants overall do not spend less time incarcerated than similarly situated non-participants, primarily because of the relatively long sentences imposed on those who fail to graduate.<sup>131</sup> Given that substance-use disorders tend to be chronic, relapsing conditions, and given that graduation rates vary widely from court to court (and in many courts are extremely low), this means that the reduced time in jail spent by those who succeed may be offset by the additional time triggered by treatment failures. The National Association of Criminal Defense Lawyers reports that “[t]he sentences in many courts are significantly higher for those who seek drug treatment and fail than for those who simply avoid drug treatment and take a plea, at both the misdemeanor and felony level.”<sup>132</sup> The costs associated with these increased criminal sentences are borne, of course, by the corrections system, but also by the affected offenders and their families and communities.<sup>133</sup>

In addition, there are costs to system legitimacy incurred as a result of the diminished procedural safeguards and broad procedural informality that characterize the sentencing decisions of problem-solving court judges.<sup>134</sup> “[T]he National Institute of Justice as well as a New York State drug court evaluation noted that many courts do not have a formal system under which sanctions are imposed, nor are records kept for when and why sanctions are

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130. See DRUG POLICY ALLIANCE, *supra* note 62, at 14. “[S]ome observers have leveled this concern especially at problem-solving courts for two overlapping reasons. First, problem-solving courts may offer a route to support services such that courts become ‘the only place to secure help’ for justice-involved people. Second, a court process perceived as a possible route to help for defendants by justice system actors may erode efforts at diversion, such that cases that previously would have avoided court are now actively pushed towards it (i.e., up-tariffing).” CTR. FOR JUSTICE INNOVATION, *supra* note 1, at 29.

131. See Eric L. Sevigny et al., *Do Drug Courts Reduce The Use of Incarceration?: A Meta-Analysis*, 41 J. CRIM. JUST. 416 (2013).

132. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 14.

133. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (“[A] central focus of this research is community members other than inmates, including family members, friends, and neighbors of prisoners who suffer adverse consequences that flow beyond the prison gates.”).

134. See Casey, *supra* note 31, at 1483; see also Donoghue, *supra* note 5, at 595 (“[T]he court’s ‘transformed role’ presents a number of practical problems ... the ‘enhanced’ role of sentencers may undermine the principle of judicial neutrality.”).

enforced. ... While flexibility should be a hallmark of a well-designed drug court, running a court in the manner described above threatens inconsistent and arbitrary outcomes.<sup>135</sup> This relaxed procedural stance may be relatively benign in those instances in which participants adhere to program requirements and thereby avoid further criminal punishment, but it produces a corrosive effect in the class of cases in which participants fail at treatment and are subjected to augmented punishment ordered by a decision-maker whose capacity for formal fairness has been compromised by problem-solving informality.<sup>136</sup>

A third concern, inherent in the design of many of these courts, has to do with the use of criminal punishment as a response to treatment failure. As the Open Society Foundations observed in a recent report on this subject: “Punishment for a subjectively judged treatment ‘failure’ violates international standards of care of drug dependence and flies in the face of basic tenets of the right to health.”<sup>137</sup> Some researchers have noted an increase in the total amount of time that many treatment-court participants spend in jail even when they ultimately are successful in the program, because of the frequent use in some jurisdictions of brief periods of incarceration as a response to program infractions. “In at least some jurisdictions, incarceration is the single most widely utilized sanction despite the range of sanctions available to judges.”<sup>138</sup> Thus, participants may be punished with “multiple stays in jail,” for offenses that would have resulted in far shorter periods of incarceration if they had never enrolled in the treatment court.<sup>139</sup> Similarly, in the context of mental-health courts, particularly as more of these courts move to a post-plea model, some research has shown that the use of incarceration as a sanction has increased, as well as a shift toward the use of criminal justice mechanisms of supervision as opposed to supervision by mental-health officials.<sup>140</sup>

135. KING & PASQUARELLA, *supra* note 10, at 10.

136. See *id.* (discussing the judge’s discretion in sentencing decisions as impacted by “a subjective impression that the defendant [who failed out of drug treatment] is not putting forth sufficient effort”); see also KING & PASQUARELLA, *supra* note 10, at 12–13; Casey, *supra* note 31, at 1483 (“Th[e] moment of failure is also where the judge exercises the most discretion .... The decision of the court that the defendant did not complete the treatment program is based not on a legal standard, but on a clinical standard, or perhaps on a subjective impression ....”).

137. CSETE & TOMASINI-JOSHI, *supra* note 26, at 10.

138. DRUG POLICY ALLIANCE, *supra* note 62, at 12.

139. See REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUST., DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 6 (2000).

140. See Lisa Callahan et al., *A Multi-Site Study of the Use of Sanctions and Incentives in Mental Health Courts*, 37 LAW & HUM. BEHAV. 1 (2013).

As noted earlier, a fourth concern is that the operation of some problem-solving courts may increase racial disparities already present in the criminal justice system. Scholars have suggested several reasons for this effect.<sup>141</sup> First, if treatment courts stimulate more low-level arrests (net-widening), then that increased enmeshment in the system may fall disproportionately on communities of color that are already subject to more-intensive policing.<sup>142</sup> In addition, some research has shown that African-Americans are at least 30% more likely than whites to be expelled from drug-treatment courts.<sup>143</sup> This higher rate of failure may be due, at least in part, to a lack of “culturally appropriate treatment programs,”<sup>144</sup> although at least one study has found that it narrows considerably when socioeconomic status, employment and family support are controlled for.<sup>145</sup> In any event, to the extent that persons who fail to complete problem-solving courts tend to receive increased sentences of incarceration relative to those who do not enter these programs, the elevated rates of failure experienced by persons of color ensure that this additional punishment falls disproportionately on African-Americans and Latinos.<sup>146</sup>

A fifth concern has to do with uneven access to appropriate treatment, particularly in drug-treatment courts. “Drug courts often inadequately assess people’s needs and, as a result, place them in inappropriate treatment. . . . Insufficiently trained court staff often send participants to services irrespective of their specific needs. Some courts use a ‘shotgun’ approach in which they subject participants to several programs with incompatible philosophies.”<sup>147</sup> Poor treatment matching not only violates the principles of the RNR model, it also leads to a high rate of program failure.<sup>148</sup> Moreover, individuals may be “harmed more than helped” by treatment programs that are “insensitive to their race, socioeconomic status, gender, sexuality, or, ironically, the severity of their drug problem.”<sup>149</sup> At the same time, effective treatment for drug-use disorders and other mental disabilities often requires a group of coordinated interventions that “respond to the complex needs of participants.” Too frequently, treatment courts fail to deliver the full range of other medical, legal, and social services necessary for success in the program.<sup>150</sup>

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141. See generally O’Hear, *supra* note 81.

142. See DRUG POLICY ALLIANCE, *supra* note 62, at 8.

143. See *id.*

144. *Id.*

145. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 12.

146. See KING & PASQUARELLA, *supra* note 10, at 17–18.

147. DRUG POLICY ALLIANCE, *supra* note 62, at 12.

148. See *id.* at 13.

149. *Id.*

150. KING & PASQUARELLA, *supra* note 10, at 16..

For many years, a majority of drug-treatment courts did not permit opioid maintenance treatment with methadone or buprenorphine, on the theory that replacing one drug of dependence with another was inconsistent with the abstinence goal by which success in these courts is defined.<sup>151</sup> Indeed, according to a 2013 survey, 44% of drug treatment courts did not offer pharmacotherapies for opioid addiction.<sup>152</sup> In February of 2015, the federal government announced that federal funds would not be allocated to drug courts that refuse to offer treatment with buprenorphine.<sup>153</sup> Nevertheless, the resistance to harm reduction in many drug-treatment courts and other problem-solving courts in the United States stands in stark contrast to the approach reported by those who have studied problem-solving efforts in a comparative context.

James Nolan, for example, has highlighted a dramatic “difference between the U.S. and the other countries as it concerns the salience of defining treatment philosophies.”<sup>154</sup> While drug-treatment courts and other problem-solving courts in the United States maintain a stubborn insistence on “total abstinence,”<sup>155</sup> requiring that participants remain drug- and alcohol-free for a specified period of time in order to “graduate,”<sup>156</sup> Nolan reports that problem-solving courts established in recent years in Great Britain, Ireland, Canada, and Australia tend to be much more flexible in defining success and in accommodating participants’ partial compliance with program rules.<sup>157</sup> Thus, he quotes an Australian drug-court magistrate, who explains: “We don’t expect participants to be totally drug free. . . . We do tolerate some cannabis use. And we do tolerate some prescription drugs.”<sup>158</sup> He also includes the remarks of Canadian commentators who point out that the Toronto court permits participants who have suspended the use of more serious drugs and

151. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 10.

152. See Harlan Matusow et al., *Medication Assisted Treatment in U.S. Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, 44 J. SUBSTANCE ABUSE TREATMENT 473 (2013).

153. See CSETE & TOMASINI-JOSHI, *supra* note 26, at 10.

154. James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL’Y 31 (2010).

155. *Id.* at 36.

156. *Id.*; see also Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 761–62 (2008) (discussing the requirement of total abstinence).

157. NOLAN, *supra* note 4, at 148. While the focus in text is on participants’ use or misuse of drugs and alcohol, a similar approach to harm reduction or harm minimization is reported by Nolan in other non-U.S. problem-solving courts, including, for example, courts centered on the problem of prostitution. See *id.* at 103 (describing harm-reduction philosophy in the prostitution court in Melbourne, Australia).

158. See *id.* at 104 (quoting Libby Wood, magistrate of the Perth drug court).

have reduced their use of marijuana to move forward in the program, even if they are not reliably and totally abstinent.<sup>159</sup> Finally, Nolan shares the story of the development in the United Kingdom of “Drug Treatment and Testing Orders” (“DTTOs”), which were “[i]nspired by the U.S. drug court model” and which served as the forerunners of the drug-treatment courts now in operation in Great Britain.<sup>160</sup> Significantly, the performance of the first DTTOs, which were tested in pilot programs begun in 1998 in Gloucestershire, Liverpool, and South London, were regarded by British officials as a success despite the fact that offenders in these programs “were still using drugs and were still participating in criminal activity, albeit at reduced rates.”<sup>161</sup> In the view of the Home Office, the enterprise was a success because the average number of crimes committed per month by offenders on DTTOs was reduced, as was the amount that participants spent each week on illegal drugs.<sup>162</sup>

### RECOMMENDATIONS

In light of the instability of the treatment/punishment hybrid and the significant costs incurred when participants fail to complete a problem-solving court regime, policymakers should be thoughtful about the choice between devoting additional resources to problem-solving courts as opposed to investing in programs designed to divert low-risk offenders out of the criminal system and into therapeutic and other social services in the community. As a rule, having a need for substance-use or mental-health treatment should never be a sufficient reason for an individual’s entry into the criminal justice system, and the criminal system should never be the only or primary means of obtaining needed treatment.<sup>163</sup> In addition, more conscious attention should be given to designating the “problems” that problem-solving courts are designed to address and the “solutions” they seek to accomplish.<sup>164</sup>

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159. See Nolan, *supra* note 154, at 45 (quoting Natasha Bakht and Paul Bentley).

160. See *id.* at 44 (detailing the development of drug treatment and testing orders in Britain). For additional discussion of DTTOs, see Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 324–25 (2010) (describing the basic features of DTTOs).

161. See Nolan, *supra* note 154, at 44.

162. *Id.* at 44–45. For an additional discussion on this issue, see PAUL J. TURNBULL ET AL., HOME OFFICE RESEARCH STUDY, DRUG TREATMENT AND TESTING ORDERS: FINAL EVALUATION REPORT i (2000) (reporting the reduction in drug use as a result of DTTOs following an eighteen-month evaluation in three pilot locations).

163. Cf., DRUG POLICY ALLIANCE, *supra* note 62, at 4 (setting out these principles as a component of a “health-centered approach” to drug use).

164. See generally Boldt, *supra* note 128.

In the context of substance-use disorders in particular, these inquiries highlight the pressing importance of considering a harm-reduction approach.<sup>165</sup> Court designs that view all drug-use problems through the lens of traditional understandings of addiction, and consequently insistent on complete abstinence as the only acceptable outcome or solution to the problem of drug misuse, are a poor fit for the scores of offenders who can benefit from pharmacotherapies and other harm-reduction interventions that can have meaningful impact on the daily functioning of these individuals.<sup>166</sup>

These basic principles yield a number of conclusions:

1. **Prioritize alternatives for low-level drug offenses and other quality-of-life infractions.** Policymakers should prioritize alternatives to criminal system-located problem-solving courts for those who currently are brought into the system as a consequence of low-level drug offenses and other quality-of-life infractions.<sup>167</sup> These alternatives include “pre-arrest diversion, health and social service interventions, and legislative change to remove these infractions from penal codes.”<sup>168</sup> A promising model in this regard is the Law Enforcement Assisted Diversion (LEAD) Program in Seattle, Washington, under which police “encountering low-level, non-violent drug offenders can direct them to a gamut of community services and support without deep involvement with the criminal justice system.”<sup>169</sup> Of course, a policy that seeks to direct low-risk offenders into community-based treatment must have adequate resources available outside of the criminal justice system. Unfortunately, the public treatment system has not kept pace with the growth in criminal justice referrals, and “[a]s a result, treatment access for people seeking treatment voluntarily outside of the criminal justice system has diminished.”<sup>170</sup> This is a misallocation of valuable resources and a rebalancing is urgently needed.

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165. A harm-reduction approach defines goals in this area in terms of reduced alcohol or other drug misuse, higher social functioning, and reduced offending. See Nolan, *supra* note 154, at 34–35 (analyzing the harm-reduction theory as it pertains to drug and alcohol treatments); see also Gordon Roe, *Harm Reduction as Paradigm: Is Better than Bad Good Enough?*, 15 CRITICAL PUB. HEALTH 243, 243–48 (2005) (discussing the harm-reduction theory and its origins).

166. See DRUG POLICY ALLIANCE, *supra* note 62, at 16.

167. See Mulvey & Schubert, *supra* note 60, at 21, 25 (recommending that jurisdictions “[d]ivert seriously mentally ill individuals charged with less serious crimes out of the criminal justice system at the earliest possible stages of official processing, preferably before or in lieu of jail entry”).

168. CSETE & TOMASINI-JOSHI, *supra* note 26, at 5.

169. *Id.* at 14.

170. DRUG POLICY ALLIANCE, *supra* note 62, at 6 (reporting that the proportion of treatment capacity available to those who seek treatment voluntarily fell from 65.1% in 1997 to 62.5% in 2007).



2. **Problem-solving courts should focus on high-risk offenders.** Problem-solving courts should focus on higher-risk offenders, particularly those with multiple risk factors. “[D]rug courts work better for those who are at an inherently higher risk for future criminal behavior.”<sup>171</sup> This means resisting the cherry-picking that some observers have noted in many jurisdictions. It also may require treatment courts to refrain from excluding persons with histories of violent offending, or at the least to rework eligibility criteria so that mere possession of a weapon at the time of arrest for a drug offense does not work as an exclusion.<sup>172</sup>
3. **Problem-solving courts should offer a menu of human services to match the full range of needs for this more challenging population.** If they have targeted this more challenging population, these courts should offer a menu of human services that match the full range of needs these participants present with, not just their drug-use disorder or mental illness.<sup>173</sup> These courts should draw upon a diverse service-provider network offering a range of modalities of treatment, including methadone maintenance and/or buprenorphine treatment for some clients with severe opioid use disorders.
4. **Problem-solving courts should adopt structural features to prevent rehabilitative features from turning into punitive practices.** Drug-treatment courts and other problem-solving courts should adopt structural features designed to minimize the tendency of rehabilitative intentions to devolve into punitive practices. Pre-plea or pre-adjudication models should be favored over post-adjudication approaches that require participants to enter a guilty plea before entering treatment. Defense counsel should be accorded sufficient independence from the court’s “treatment team” to ensure that participants’ essential trial rights are safeguarded.<sup>174</sup> The use of incarceration as a response to relapse should be minimized, and judges should follow written protocols for the imposition of graduated sanctions. Drug testing should never be used as a punishment.<sup>175</sup> Finally, while drug-treatment courts and other problem-solving courts should increase intensity based upon risk, overall the duration of these programs should be reduced. Many participants in drug-treatment courts in particular spend too long going through the

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171. *Id.* at 13.

172. See KING & PASQUARELLA, *supra* note 10, at 4.

173. See *id.* at 16.

174. See Boldt, *supra* note 9, at 1286–1300.

175. See DRUG POLICY ALLIANCE, *supra* note 62, at 19.

program and, as a result, completion rates are often too low.<sup>176</sup> Problem-solving courts, in short, should be reserved for those most likely to benefit from them, and should be designed to maximize the likelihood that participants will succeed.

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176. See KING & PASQUARELLA, *supra* note 10, at 4; *see also* Miller, *supra* note 30, at 435 (critiquing the tendency of “intense court supervision” to produce a “long, invasive, and potentially arduous treatment regime”).



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