

# THE SIXTH AMENDMENT RIGHTS TO FAIRNESS: THE TOUCHSTONES OF EFFECTIVENESS AND PRAGMATISM

*Robert P. Mosteller\**

I.	INTRODUCTION .....	2
II.	FREQUENTLY IGNORED FEATURES OF THE CRIMINAL PROCEDURE LANDSCAPE THAT SHAPE OPPORTUNITIES FOR IMPROVEMENT, REFORM, AND EFFICIENCY .....	5
	A. <i>The Cumulative Predominance of the State Criminal Justice Systems Despite Academic Preoccupation with Proceedings in the Federal System</i> .....	5
	B. <i>The Limited Adequacy, Often the General Inadequacy, of Counsel for Indigent Defendants in State Criminal Justice Systems</i> .....	6
	C. <i>The Limited Percentages of Criminal Cases that Go to Trial</i> .....	9
III.	THE ATTRACTION OF PROCEDURES THAT ENHANCE THE PROTECTION OF THE INNOCENT .....	11
	A. <i>Innocence as an Enabler to Progressive Reform</i> .....	11
	B. <i>A Narrow Focus on Proof of Certain Innocence</i> .....	12
IV.	A GENERAL APPROACH: FAIRNESS, PRAGMATISM, AND EFFECTIVENESS THROUGH ADMINISTRATIVE DESIGN .....	14
	A. <i>Provision of Neutral Forensic Investigators and Analysis</i> .....	16
	B. <i>Full Open-File Discovery</i> .....	17
	C. <i>Neutrality by Design of Prosecutorial Investigative and Screening Functions</i> .....	18
V.	SIXTH AMENDMENT RIGHTS TO COUNSEL BEFORE AND AT TRIAL AND CONFRONTATION .....	19
	A. <i>Improving the Operation of the Right to Counsel at Trial</i> .....	19
	1. <i>Unlikely Doctrinal Reformulation</i> .....	19
	2. <i>Improving Assistance of Counsel</i> .....	22
	B. <i>Protecting the Sixth Amendment Right to Assistance of Counsel Pretrial</i> .....	23
	C. <i>Confrontation</i> .....	24
VI.	THE DIFFERENT MEANINGS OF FAIRNESS .....	28
VII.	CONCLUSION .....	30

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\* J. Dickson Phillips Distinguished Professor of Law and Associate Dean for Academic Affairs, University of North Carolina School of Law. I would like to thank Arnold Loewy, Richard Myers, and Andy Taslitz for their comments on an earlier draft of this Article and Eric Roehrig for his work as research assistant.

## I. INTRODUCTION

The Sixth Amendment to the United States Constitution states,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>1</sup>

I take as a point of departure Akhil Amar's general description of the Sixth Amendment and his typology.<sup>2</sup> He aptly describes the Sixth Amendment as the "heartland of constitutional criminal procedure."<sup>3</sup> In this symposium, we discussed the right of confrontation and aspects of the right to counsel. Amar located those rights within the "fair trial cluster" of Sixth Amendment rights.<sup>4</sup> He linked the rights of confrontation and counsel together with compulsory process, and he characterized them as the "great engines by which an innocent man can make the truth of his innocence visible to the jury and the public."<sup>5</sup>

Amar's final statement focused on the importance of these combined rights in the presentation of evidence at the showpiece of the criminal justice system—the contested criminal trial.<sup>6</sup> Here, the defendant, aided by counsel, can demonstrate his innocence.<sup>7</sup> I am attracted to the image of the full enjoyment of these rights coming together where the decision on guilt or innocence is made. The simplest and the purest enjoyment of the right to counsel occurs in the adversarial trial with an experienced and adequately resourced defense attorney cross-examining prosecution witnesses and presenting the defendant's case.<sup>8</sup> I much prefer the idea of ensuring confrontation rights at trial by making avoidance difficult, which prompts the prosecution to find, prepare, and present the witnesses, rather than the "get out

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1. U.S. CONST. amend. VI.

2. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996).

3. *Id.* I take issue with many of Amar's most basic conclusions, but not with the framework he sets.

4. *Id.* at 642. Amar finds the amendment to have three clusters of rights: the first concerns speedy trial, the second a public trial, and the third a fair trial. *Id.* at 642-43. The fair trial rights encompass notice and the opportunity to hear and be heard. Put slightly differently, this last cluster safeguards the right to know, and defend oneself against, an accusation of criminal wrongdoing. Textually, this cluster encompasses the rights to (a) be informed of the nature and cause of accusation; (b) be confronted with prosecution witnesses; (c) compel the production of defense witnesses; and (d) enjoy the assistance of counsel in defending against the accusation.

*Id.* at 642.

5. *Id.* at 643.

6. See *id.* at 705-10.

7. *Id.* at 708.

8. See *id.* at 706.

of jail free” result for the defendant when the confrontation right is violated and critical hearsay statements are excluded.<sup>9</sup>

There are two major practical problems with Amar’s concept, however, and one conceptual one.<sup>10</sup> The two practical problems go a long way toward destroying an idealized view of the Sixth Amendment rights that come together in the adversarial defense.<sup>11</sup> In discussions about this Symposium, Andy Taslitz suggested to me that in his view, the adversarial defense is dead, dying, or at least badly injured.<sup>12</sup> He somewhat overstated the point, but the larger trends in the criminal justice system give some reality to the trend he suggested.<sup>13</sup>

What are the problems? The first is with counsel.<sup>14</sup> Clearly, that right is guaranteed by the Sixth Amendment as interpreted initially by *Gideon v. Wainwright* and expanded most recently by *Lafler v. Cooper* and *Missouri v. Frye*.<sup>15</sup> As a practical matter largely driven by resource limitations, however, the right, in a sense of effective assistance, does not exist for many defendants, even those charged with serious criminal cases.<sup>16</sup> The second is with the trial.<sup>17</sup> Again, the guarantee is theoretically clear, but we simply do not have many trials anymore.<sup>18</sup> Scholars and commentators have noted this trend for a number of years, and now the Supreme Court in *Lafler* has made it official: “[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>19</sup>

The conceptual problem is with showing that a defendant is innocent through a criminal trial. As we now conceive actual innocence—a conclusive showing that the defendant did not commit the crime—it will almost never be proven at trial.<sup>20</sup> If clear innocence is established with scientific proof or something of similar certainty, such as digital trace evidence, that proof is

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9. See ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC’Y, CRIMINAL JUSTICE IN CRISIS 12 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS] (stating that prosecutors have adjusted their practices as a result of the exclusionary rule).

10. See Amar, *supra* note 2, at 705-10.

11. See *id.*

12. See generally Mary Sue Backus, *The Adversary System is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, MICH. ST. L. REV. 945, 948-49 (2008) (arguing that a lack of reform for indigent defense has led to a broken and unreliable criminal justice system).

13. See *id.* at 947-48.

14. See *id.*

15. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

16. See ABA STANDING COMM. ON LEGAL AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 16 (2004) [hereinafter *GIDEON’S BROKEN PROMISE*] (stating that lack of funding and resources is a major cause of the indigent counsel crisis).

17. See *id.*

18. See CRIMINAL JUSTICE IN CRISIS, *supra* note 9, at 41 (claiming that underfunding has led to negotiated dispositions supplanting trials, resulting in “‘bargain-basement’ justice”).

19. *Lafler*, 132 S. Ct. at 1381.

20. See generally Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1669-70 (2008) (stating that current inconsistent criminal procedure rules hinder access to DNA evidence at trial, which is the most probative exculpatory evidence of innocence).

typically produced either before or after trial.<sup>21</sup> The best we get at trial is that the defendant may not have committed the crime—the acquittal occurring because there is some level of doubt.<sup>22</sup> Given the high percentages of defendants who are guilty, we do not know whether an acquittal was a victory or a defeat for justice, which makes it difficult to celebrate as a triumph of both accuracy and procedural fairness.<sup>23</sup> The uncertainty about innocence when the typical acquittal occurs leads to a secondary set of issues regarding the meaning of fairness and its link in Amar’s quotation to innocence, in particular, and, more generally, accuracy of results.<sup>24</sup> Obviously, a tension exists between guarantees of procedural fairness provided to all those charged with a crime and a focus on accuracy and the subset of accuracy that gets the most modern attention—innocence.<sup>25</sup>

The reality in the American criminal justice system is the inadequacy of the provision of counsel in far too many cases and the paucity of criminal trials.<sup>26</sup> The prevalence of under-resourcing and massive caseloads for defense counsel means that many are, in any practical sense of the word, ineffective regardless of how well-intentioned and vigorous they are.<sup>27</sup> Neither the inadequate provision of resources to the defense nor the relative infrequency of trials is likely to change for the better any time soon. These are persistent trends, and if anything, they are likely to get worse as the need for long-run deficit reduction systemically restricts the resources available to state and local governments for the myriad of important tasks where pressing needs exist.<sup>28</sup> In this context, it is difficult to imagine how indigent defense receives more than minimal funding because it competes against far more politically popular programs that are indeed major societal needs, such as education, roads, and healthcare.<sup>29</sup>

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21. See Robert P. Mosteller, *Evidence History and Rumblings in the Future of Proof*, 3 OHIO ST. J. CRIM. L. 523, 532-37 (2006) (describing new and expanding types of “trace” evidence such as automated recording cameras and tracking devices that provide the potential to prove locations of individuals with high degrees of certainty much earlier than trace evidence, such as fingerprints, did in earlier eras and can in larger percentages of cases than in the past prove guilt or innocence).

22. See *United States v. Scott*, 437 U.S. 82, 98 (1978).

23. See *id.* (noting that, in some cases, an acquittal is not an accurate determination of innocence).

24. See *supra* note 5.

25. See Garrett, *supra* note 20, at 1669-70 (stating that the current failure of the states or federal courts to adopt a straightforward right to preserve and present evidence of innocence contrasts criminal procedure of an earlier era).

26. See *GIDEON’S BROKEN PROMISE*, *supra* note 16, at 16.

27. See *id.* at 16-17.

28. *Id.* at 11.

29. See Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 121-22 [hereinafter Dripps, *Up from Gideon*]. Somewhat ironically, while disadvantaging defendants generally, including the innocent, who rely on underfunded indigent defense services limited funding, see *infra* Part II.B, limited state and particularly local funding may help those accused of the most serious crimes who are being prosecuted for their lives. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 275-78 (2012) [hereinafter Smith, *The Geography of the Death Penalty*] (noting that in most states counties pay for capital prosecutions and have reasons to avoid costly death penalty prosecutions that may not reflect the local electorate’s priorities).

The Sixth Amendment also confronts a problem with the scope of the right to counsel pretrial, which is also analyzed in this Symposium.<sup>30</sup> The demand that statements not be elicited from defendants represented by counsel has an exclusionary element that gives the guarantee its teeth.<sup>31</sup> Indeed, the right to counsel at trial may be practically meaningless if guilt has effectively been established against the defendant through conversations with him by government agents before trial without the aid of counsel.<sup>32</sup>

## II. FREQUENTLY IGNORED FEATURES OF THE CRIMINAL PROCEDURE LANDSCAPE THAT SHAPE OPPORTUNITIES FOR IMPROVEMENT, REFORM, AND EFFICIENCY

### *A. The Cumulative Predominance of the State Criminal Justice Systems Despite Academic Preoccupation with Proceedings in the Federal System*

I find that most academic criminal procedure discussions focus principally on the federal criminal justice system and largely ignore the states. Of course, the decisions of the federal courts with regard to constitutional rights are preeminent.<sup>33</sup> The emphasis on federal constitutional cases is not the focus of my criticism.<sup>34</sup> It is as if the American criminal justice system is the relatively well-resourced federal system, which is also characterized by an integrated and hierarchical prosecutorial structure.<sup>35</sup> In fact, the vast majority of serious criminal prosecutions are handled in the much more chaotic and underfunded state courts.<sup>36</sup> Although federal criminal law enforcement is expanding, criminal justice remains the predominant responsibility of states and localities, rather than the federal criminal system.<sup>37</sup> As measured by those incarcerated, 87.5% of inmates are confined in state prisons, and thus, 12.5%—or slightly more than 10%—are confined in the federal system.<sup>38</sup>

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30. See *infra* Part V.B.

31. See *Massiah v. United States*, 377 U.S. 201, 204 (1964).

32. But see *Kansas v. Ventris*, 556 U.S. 586, 593 (2009) (allowing impeachment using a statement obtained in violation of the Sixth Amendment right to counsel because “the accused continues to enjoy the assistance of counsel; the assistance is simply not worth much”).

33. See generally U.S. CONST. art. VI, cl. 2.

34. See *infra* note 36 and accompanying text.

35. See Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 742 n.14 [hereinafter Uphoff, *Convicting the Innocent*].

36. See Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 1015 (2009).

37. See Heather C. West & William J. Sabol, *Prison Inmates at Midyear 2008—Statistical Tables*, BUREAU OF PRISON STATISTICS 3 tbl.2 (Mar. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf>. From the end of 2000 through mid-year 2008, federal prison population grew faster than state prison population in general, moving from 10.5% of the total to 12.5%, and the federal system passing both those of Texas and California to house the largest prison population at the end of the period. *Id.* In terms of all inmates held in state or federal prisons of local jails, the increase was from 7.2% to 8.6%. *Id.* at 16 tbl.15.

38. *Id.* at 3 tbl.2 (reporting that the total federal and state prison population was 1,601,584 and the federal prison population was 201,142). When those housed in jails, which are typically the responsibility of

My perception is that most legal scholars who practiced criminal law before entering academia practiced in the federal system. I spent my seven years in practice at the Washington, D.C. Public Defender Service (PDS). PDS practiced principally, not in federal district court, but in superior court.<sup>39</sup> This was essentially like many metropolitan courts in a state court system, a court filled with a mass of humanity and an enormous number of cases.<sup>40</sup> But the prosecutors were Assistant United States Attorneys, and critically, PDS had nearly the resources of a federal defender office with, for example, its own budget line item for expert services.<sup>41</sup>

Defense resources are the key. In federal defender offices, heavy, but not unreasonable, caseloads and overall resources, in fact, permit conscientious counsel to practice effectively.<sup>42</sup> For wealthy defendants who can hire their own counsel, for federal cases generally, and occasionally in other settings, the right to counsel is meaningful, but in far too many other situations, counsel are inadequately resourced and overburdened.<sup>43</sup> Indeed, in many states, resources are woefully inadequate.<sup>44</sup> This situation has existed for decades, and if anything, the situation is likely getting worse rather than better with the prospect of limited funds for state and local governments into the foreseeable future.<sup>45</sup>

*B. The Limited Adequacy, Often the General Inadequacy, of Counsel for Indigent Defendants in State Criminal Justice Systems*

With over 80% of those charged with felonies being indigent, most defendants do not have the financial resources to retain their own lawyer.<sup>46</sup> In addition, many of those determined not to be indigent under the varying standards used are of modest means and frequently receive marginal representation with, for example, little or no investigation to develop evidence to challenge the factual picture presented by the prosecution.<sup>47</sup>

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localities rather than the states, are also included, the state and local percentage increases to 91.3%, and the federal percentage dips below the 10% level. *Id.* at 3 tbl.2, 16 tbl.15 (reporting that the total held in federal or state prisons or local jails was 2,310,984 and those in federal custody was 201,142, the federal prison population being 198,402).

39. See generally PUB. DEFENDER SERVICE FOR D.C., <http://www.pdsdc.org> (last visited Oct. 3, 2012) (describing PDS).

40. See *id.*

41. See *id.*

42. Inga L. Parsons, "Making It a Federal Case": A Model for Indigent Representation, 1997 ANN. SURV. AM. L. 837, 840 (describing her good fortune to work as a public defender "in the federal system where the culture of lawyering was based on traditional notions of adversarial advocacy and manageable caseloads").

43. See Uphoff, *Convicting the Innocent*, *supra* note 35, at 744-48.

44. *Id.* at 754.

45. See GIDEON'S BROKEN PROMISE, *supra* note 16, at 11.

46. See Uphoff, *Convicting the Innocent*, *supra* note 35, at 748.

47. See *id.* at 748, 781.

We celebrate the *Gideon* decision, which grants the right to appointed counsel.<sup>48</sup> As Professor Darryl Brown states, however, almost fifty years now after *Gideon*, the “political limit on defense counsel [underfunding] is a fixed component of criminal justice; underfunding of defense will not change except at the margins.”<sup>49</sup> Underfunded lawyers faced with excessive caseloads of necessity engage in a severe triage process, with many having minimal contact with their client and little or no independent investigation before their clients become part of the great majority who are presented with the prosecution’s plea offer and, on advice of their counsel or from despair, accept it.<sup>50</sup>

Many have noted these and similar problems as a backdrop to their discussion of the serious inadequacy of funding for state defenders.<sup>51</sup> Over the last thirty years, the American Bar Association (ABA) has prepared a number of major reports on indigent funding, which reveal essentially the same fundamental funding inadequacies in the vast majority of states.<sup>52</sup> In 1982, the Standing Committee on Legal Aid and Indigent Defendants, after an analysis of funding in forty states, summarized the state of representation as follows: “Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons . . . who have a

48. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that, under the Fourteenth Amendment, state courts are required in criminal cases to provide counsel for indigent defendants).

49. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590 (2005) (making this assertion and linking it to the legislative decision to limit defense counsel’s effectiveness because of representation of guilty clients’ interests and lack of focus on accuracy in adjudication); see also Dripps, *Up from Gideon*, *supra* note 29, at 121-22. Brown argues that although

[r]ight-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication, defense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt. Legislatures recognize this difference, and they have responded to Court mandates for defense counsel by consistently underfunding defenders in order to constrain their effectiveness.

Brown, *supra*, at 1590. Whether Brown has accurately identified the causal mechanism, it is clear he has captured the reality of the result. See *id.*

50. See Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 691 (2010) (describing the inadequate representation in many courtrooms where lawyers meet their incarcerated clients in the courtroom en masse and discuss for a brief time with them the terms of the plea offer and negotiated sentence, with waiver of rights and a guilty plea entered shortly thereafter in a “meet ‘em and plead ‘em” process).

51. See Randy Uphoff, *Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667, 667-68 (2010) (cataloging, in the foreword to a symposium on the failures of state indigent defense system, a large number of national reports, individual state studies, and articles on the frequent failure of state indigent defense systems to provide adequate representation); see also, e.g., Backus, *supra* note 12, at 952-61 (characterizing state indigent defense systems as continually underfunded); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (noting that “in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced”); Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 800-08 (describing individual injustices resulting from inadequate representation); Uphoff, *Convicting the Innocent*, *supra* note 35, at 748-79 (same).

52. See *infra* notes 53-55 and accompanying text.

constitutional right to counsel are denied effective legal representation.”<sup>53</sup> In 2004, the ABA report found that “[t]oo often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations.”<sup>54</sup> In 2011, Professor Norman Lefstein, who has been at the center of the ABA’s study process, authored a book that cited two additional national studies completed in 2009, which delivered this same message: “[T]hose who furnish public defense services across the country have far too many cases, and this reality impacts the quality of their representation, often severely eroding the Sixth Amendment’s guarantee of the right to counsel.”<sup>55</sup>

The United States Supreme Court has observed that “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty [will] be convicted and the innocent go free.”<sup>56</sup> The failure of states and localities to fund indigent defense adequately removes an essential ingredient of the adversary system—the existence of an effective opponent to the prosecution.<sup>57</sup> Indeed, it alters the basic character of American justice from its essential adversarial design.

This failure to provide adequately paid and supported defense advocates is, in my judgment, the most serious challenge to justice in the United States. Most procedural protections granted in landmark Supreme Court opinions require the assistance of a lawyer for effective enforcement.<sup>58</sup> “[Many] defenses can be independently recognized and accepted by prosecutors, but most cases proceed to the charging stage because of the apparent guilt of the defendant and the complexity of the defense or the ambiguity of the facts.”<sup>59</sup> This difficult environment requires skilled development of the evidence and the ability and resources to bring them before either the prosecutor or the jury in an

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53. NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 2 (1982); *see also* CRIMINAL JUSTICE IN CRISIS, *supra* note 9, at 35, 37 (noting in a shorter report prepared six years later a similar conclusion that “defense representation . . . is too often inadequate” because “we, as a society, [are] depriving the system of the funds necessary to ensure adequate defense services”).

54. *GIDEON’S BROKEN PROMISE*, *supra* note 16, at 7 (noting that “[t]o make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment” and that “the structure of indigent defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients”).

55. NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, CRIMINAL SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12 (2011).

56. *Herring v. New York*, 422 U.S. 853, 862 (1975).

57. *See Backus & Marcus*, *supra* note 51, at 1036 (emphasizing the need for competent defense attorneys to protect the innocent from conviction).

58. *Backus*, *supra* note 12, at 946.

59. Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design of Investigative Fairness*, 36 N.C. J. INT’L L. & COM. REG. 319, 328 (2011) [hereinafter Mosteller, *Failures of the American Adversarial System*].



understandable and persuasive form.<sup>60</sup> Without adequate assistance of counsel and supporting services, much of what our system prizes in terms of rights, fairness, and accuracy simply has no chance to be achieved.<sup>61</sup>

If I am correct, why is this effective denial of counsel not among the most prominent issues in criminal justice circles and in academic literature? One reason may be that to protest the situation is the equivalent of “tilting at windmills.” The situation will not change, and it is hard to see the significance of developing or pushing reforms if there is no effective chance they will be implemented. I suspect that another reason underfunding has not received the degree of attention deserved is that the federal system, where academic attention is centered, generally provides much better funding.<sup>62</sup> We should focus on the actual provision of counsel that exists within our operating criminal justice systems, not the assumption that provision of counsel in the federal “mansion house” is the norm.

### C. The Limited Percentages of Criminal Cases that Go to Trial

Gross data hide nuance and indeed can distort basic reality.<sup>63</sup> The increase in percentage of cases ending in guilty pleas, however, is unmistakable.<sup>64</sup> It ballooned over the last twenty-five years.<sup>65</sup> In *Missouri v. Frye*, the Supreme Court gave us its summary: “Ninety-seven percent of federal convictions and

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60. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (stating that effective assistance requires the defense to subject the state’s case to “reliable adversarial testing”).

61. See *id.* at 685. I am among those who see the right to counsel as the most important right to ensure a fair trial and to protect the innocent. See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) [hereinafter Dripps, *Ineffective Assistance of Counsel*] (“It is indeed the case that effective defense representation is the single most important of our system’s safeguards against convicting people of crimes they had nothing to do with or of more serious offenses than they actually committed. And it is indeed the case that there is no prospect of legislative action to improve the situation.”).

62. See *GIDEON’S BROKEN PROMISE*, *supra* note 16, at 8 (listing the funding of indigent defense by state); see also Ron Gottlieb et al., *Federal Assistance to State and Local Indigent Defense Programs FY 1998 and 1999*, NAT’L LEGAL AID & DEFENDER ASS’N (1998-1999), available at <http://www.nlada.org/DMS/ Documents/1013119600.02/Federal%20Assistance%20Report%20FY98-99.pdf> (outlining indigent defense funding assistance available to the states). Even this relatively generous funding in comparison to other indigent support is for many lawyers below their ordinary market rate. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 881 & n.55 (2009) (citing effort to increase pay rates for appointed attorneys in the federal system because the existing rate does not even offset overhead costs). I suspect that in combination the general adequacy of funding for both the defense and prosecutorial functions in the federal court system, the predominate experience of legal academics in that system, and the primacy of federal developments in published work produces a failure to recognize the important inadequacies of state court defense representation. My sense is that most academics at national law schools interested in criminal justice issues are not aware of inadequacies in the indigent defense systems operating in their state criminal courts.

63. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 88-89 (2005) [hereinafter Wright, *Trial Distortion*].

64. *Id.* at 90.

65. See *id.* (detailing the increase of guilty pleas in federal trials and noting a similar result in state cases without providing the detailed progression).

ninety-four percent of state convictions are the result of guilty pleas,” and as I noted earlier, announced that “ours ‘is for the most part a system of pleas, not a system of trials.’”<sup>66</sup>

According to data presented by Professor Ron Wright, the number of federal cases rose from an average of 46,202 in the decade from 1980 to 1989 to an average of 76,519 for the period 2000 to 2002.<sup>67</sup> In 1981, the percentage of federal adjudicated cases that ended in a guilty plea was 77%, but by 2002, the percentage was 95.2%.<sup>68</sup> The figures not only reveal a percentage drop in trials but also show a substantial absolute reduction in the number of trials.<sup>69</sup> Professor Wright estimated that if the trial rate was the same in 2002, the most recent year for which he had data, as in 1980, when the rate began its steady rise, the total number of federal trials and the costs associated with them would rise almost ten-fold.<sup>70</sup>

Professor Wright suggested that distortions are just as important in state courts as in federal courts based on gross characteristics of the state court caseload and resources.<sup>71</sup> Perhaps outweighing potentially larger penalties for trials in federal courts, jury trials typically get higher priority in lower volume courts dealing with more serious crimes, which is the relative nature of federal caseloads compared to those in state courts.<sup>72</sup> Pleas in such state settings are often resolved based on limited conversation between attorneys because the “going rate” for a plea in each crime with a defendant having a certain criminal record is well-established.<sup>73</sup>

Neither the percentage of cases going to trial in criminal cases nor their numbers are likely to increase in future years.<sup>74</sup> The resource-scarcity problem caused by budget cutbacks at the state court level is creating a crisis of access to justice for civil litigants.<sup>75</sup> Imagining that expanded resources are going to be

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66. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)).

67. Wright, *Trial Distortion*, *supra* note 63, at 89.

68. *Id.* at 91 fig.1. Data from 2009 reveals the same basic high rate of pleas—95.3%—as in 2002. Mark Motivans, *Federal Justice Statistics 2009—Statistical Tables*, BUREAU JUSTICE STATISTICS 12 tbl.10 (Dec. 2011), available at <http://bjs.gov/content/pub/pdf/fjs09st.pdf> (showing 81,894 guilty pleas and trials, with 78,042 of them guilty pleas (95.3%) and 3,850 trials (4.7%)).

69. Wright, *Trial Distortion*, *supra* note 63, at 91.

70. *Id.* Professor Wright argues that the increase in guilty plea rates was most likely the result of “prosecutorial . . . techniques that distorted trial outcomes” and particularly federal sentencing law that gave prosecutors and judges the ability to impose “ever larger and more certain penalty on defendants who go to trial.” *Id.* at 116-17.

71. *See id.* at 154.

72. *See id.*

73. *Id.* Even at the felony level, the rough percentage of cases going to trial in the states is much the same as in the federal courts, with fewer than 6% of felony cases going to trial in 2004. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, BUREAU OF JUSTICE STATISTICS I (July 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf>.

74. *See* Wright, *Trial Distortion*, *supra* note 63, at 90 (noting the consistently high rate of guilty pleas in recent years).

75. Edwin Meese III & William T. Robinson, *Our Liberty Depends on Funding Our Courts So They Can Protect All of Us*, FOX NEWS (Jan. 16, 2012), <http://www.foxnews.com/opinion/2012/01/16/our-liberty->

available to the criminal justice system to support trials with the unmet needs of the general public reaching crisis levels is unrealistic. Professor Stephanos Bibas has argued that the reality is that, contrary to the view of most criminal procedure scholars, the trial is not “the center of the universe,” and rational suspects should not focus on maximizing their chance of success at trial.<sup>76</sup> Most sorting and effectively adjudicating is done by prosecutors rather than judges or juries.<sup>77</sup> Indeed, protection of clear innocence may more likely occur pretrial than at any other stage.<sup>78</sup>

### III. THE ATTRACTION OF PROCEDURES THAT ENHANCE THE PROTECTION OF THE INNOCENT

#### A. *Innocence as an Enabler to Progressive Reform*

Much of the discussion of criminal procedure reforms today understandably takes place against a backdrop of concern for protecting the innocent.<sup>79</sup> Exonerations, led by DNA exonerations, have greatly increased interest in reforms that promise protection for the innocent.<sup>80</sup> As noted earlier, I spent seven years as a defense attorney PDS in Washington, D.C. For a public defender who is obligated to defend whomever he or she is assigned to represent and whose role is generally conceptualized as caring about equal treatment under the law, giving special attention to an apparently innocent client is not easily accommodated,<sup>81</sup> nevertheless, the prospect of innocence

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depends-on-funding-our-courts-so-can-protect-all-us/; Sam Favate, *Shrinking State Court Budgets: Not Just a New York Thing*, WALL ST. J. (Jan. 26, 2012, 10:59 AM), <http://blogs.wsj.com/law/2012/01/26shrinking-state-court-budgets-not-just-a-new-york-thing/>. The reduction in civil trials, particularly civil jury trials, is just as dramatic. See Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 172 (2006) (“[T]he civil jury has for all practical purposes disappeared. . .”).

76. See Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 423-24 (2003).

77. See Barkow, *supra* note 62, at 871 (arguing that in a system where only one in twenty cases goes to trial, prosecutors are not only law enforcers but also the de facto final adjudicators of nearly all cases); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1, 45-46 (1997) (arguing that defendants, whether guilty or innocent have their best opportunity for a favorable outcome through the judgments of prosecutors who “sort” far more defendants than judges or juries).

78. See Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 151-53 (2012) [hereinafter Smith, *Recalibrating Constitutional Innocence Protection*] (arguing that the trial has been displaced as the main event when it comes to innocence protection with more of the protection occurring pretrial and yet other instances of protection, particularly with the advent of some definitive scientific testing methods, such as DNA, to post-trial).

79. See *id.* at 147-48.

80. See *id.* at 143-44.

81. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 509 n.100 (2000). In describing the procedure guarantees in the Sixth Amendment to a trial and to a jury trial, Justice Scalia in *Crawford v. Washington* proceeded from an argument that the right could obviously not be eliminated simply because a judge believed it clear either that the defendant was guilty as to the right to a trial or that the hearsay was trustworthy as to the confrontation right. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004); quoted language in text accompanying *infra* note 191. Obviously, if a judge cannot dispense with a trial because of

almost inevitably holds special power.<sup>82</sup> Even more critically, concerns about innocence hold special attraction for critical groups for any successful reform effort—the public, legislatures, and judges.<sup>83</sup> Innocence acts as an enabler for progressive positions that otherwise would attract little attention.<sup>84</sup> Unfortunately, the way innocence is often presented by those supporting exoneration or legal relief, and those who are skeptical, can distort the substance of otherwise sound proposals.<sup>85</sup>

### B. A Narrow Focus on Proof of Certain Innocence

Professor Rob Smith argues that innocence is likely most often addressed today pretrial and post-trial, omitting the trial as the focus of concern.<sup>86</sup> I believe he is correct under his definition of innocence, which is definitive—or almost definitive—proof of innocence.<sup>87</sup> Except in extremely unusual situations, prosecutors willingly dismiss cases when they are provided with clear evidence of innocence.<sup>88</sup> Thus, I take little issue with Professor Smith's point that definitive proof of innocence rarely occurs at trial.<sup>89</sup> I do contest his contention that innocence is protected at trial in only a limited number of cases, a conclusion that I believe flows from the restrictive definition of innocence often used today.<sup>90</sup> That is innocence definitively established or almost definitively established through irrefutable proof.<sup>91</sup> The high bar for finding actual innocence is an understandable general perspective given the appropriate skepticism of self-serving innocence claims and particularly when, as Smith is doing, the focus is developing a post-conviction model for exoneration, which institutionally must require strong proof to overcome important interests in finality.<sup>92</sup>

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her belief of the defendant's guilt, defense counsel cannot cease to act as counsel guaranteed as another procedural right under the Constitution because she believes the client to be guilty.

82. For an effort to address this difficult balancing act, see Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 54-56 (2010) [hereinafter Mosteller, *Defense Attorneys*].

83. *See id.* at 4-5.

84. *See id.* at 2.

85. *See id.*

86. *See* Smith, *Recalibrating Constitutional Innocence Protection*, *supra* note 78, at 153.

87. *See id.* at 203-04.

88. *See* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 933-34 (2010) [hereinafter Mosteller, *Protecting the Innocent*].

89. *See* Smith, *Recalibrating Constitutional Innocence Protection*, *supra* note 78, at 153.

90. *See id.* at 143.

91. I am not here suggesting the broader concept that includes constitutional errors in addition to "actual" innocence within the term innocence. *See* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1089-90 (2011). I am instead highlighting that innocence can be actual but can remain unprovable.

92. *See* Smith, *Recalibrating Constitutional Innocence Protection*, *supra* note 78, at 141.

For many defendants, proving innocence is not possible because no definitive evidence of innocence exists.<sup>93</sup> Rather, this class of innocent defendants are mixed among and hidden within a larger group that includes many guilty defendants as well.<sup>94</sup> For the entire group, the evidence of guilt is relatively weak, and if an acquittal results, it is because the jury had a reasonable doubt.<sup>95</sup> I believe that in overall numbers, when compared to definitive proof of innocence, quite a large number of the truly innocent who are charged with a crime are contained in this group of reasonable doubt acquittals. Defendants in these cases can be identified as solid candidates for acquittal on the grounds of reasonable doubt, but they are typically not exonerated and rarely celebrated for having been proved actually innocent.<sup>96</sup> Definitively establishing innocence is particularly difficult when the defendant is innocent of the particular crime but not a stranger to crime.<sup>97</sup>

Despite the decline in the number of trials, I believe the trial continues to be a key place where innocence is protected. The limited number of acquittals surely far outstrips the number of defendants found clearly actually innocent post-trial. Nevertheless, the place of the trial in our system is declining, and in much of the rest of this paper, I put emphasis on administrative remedies.<sup>98</sup> One reason is that while trial acquittals may hold a special place for innocence protection, an acquittal without exoneration will rarely be publicly celebrated.<sup>99</sup> To outside observers, unlike scientific proof of innocence, the result will appear to be just as likely a denial of justice in the acquittal of a guilty defendant as it would be the protection of an innocent defendant.<sup>100</sup>

Nevertheless, the reality is that trials are available only for a small number of defendants.<sup>101</sup> I draw two conclusions. First, if one cares about the rights protected by the Sixth Amendment, reliance on protection of those rights at the trial proceeding will fail to reach most defendants.<sup>102</sup> A focus on trial rights is appropriate and improvements there are important, but it should be part of a broader systemic approach that includes investigative and sorting processes that occur both before and after the criminal trial.<sup>103</sup> Second, procedures that make an acquittal more likely are valuable and in fact are critical to protecting the innocent, but they will not necessarily draw public attention.<sup>104</sup> This is one

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93. See Mosteller, *Defense Attorneys*, *supra* note 82, at 3-4.

94. See *id.* at 9-11.

95. See *id.* at 35-36.

96. See Mosteller, *Protecting the Innocent*, *supra* note 88, at 977-80.

97. See Mosteller, *Defense Attorneys*, *supra* note 82, at 41-43.

98. See *infra* Part IV.

99. See Mosteller, *Protecting the Innocent*, *supra* note 88, at 977-80.

100. See *supra* note 23 and accompanying text.

101. See CRIMINAL JUSTICE IN CRISIS, *supra* note 9, at 40-41 (discussing the underfunding of appointed counsel and its connection with frequency of plea bargaining).

102. See *id.*

103. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1358-61 (1997).

104. See *supra* note 99 and accompanying text.

reason that support for more robust funding for criminal defense efforts will likely gain only modest support from the successes of the innocence movement. Improvement in overall procedures that, particularly before the trial, help sort the likely guilty from the likely innocent and provide greater fairness generally are, I suspect, the place where the most significant improvements can be made, and that is where I turn next.

#### IV. A GENERAL APPROACH: FAIRNESS, PRAGMATISM, AND EFFECTIVENESS THROUGH ADMINISTRATIVE DESIGN

As reflected in my title, my approach is to treat the Sixth Amendment rights of counsel and confrontation as part of the guarantee to a fair trial and try to develop reforms built around the principles of fairness, pragmatism, and effectiveness. I do not propose any new definition or expansion of rights. Indeed, I question whether any “discovery” of a new core meaning to the right to counsel, for instance, more than two hundred years after the framing of the Constitution, could be powerful enough to produce the massive outlays of funds needed to fund indigent defenders throughout our dispersed criminal justice system. We can, however, take important steps, principally through sets of changes at the administrative and operational level, to improve the base level of representation and the quality of justice.<sup>105</sup>

Protocol for securing eyewitness identifications by the police provides a model for administrative reforms of the type I suggest. Scholars have long criticized the weakness of the constitutional doctrines governing suggestive eyewitness identifications.<sup>106</sup> That issue could be addressed by securing experts to testify about the weaknesses of the identification procedures in the individual case, which remains potentially available as an option.<sup>107</sup> I suggest, however, the use of such experts will be of limited effectiveness because of the expense involved and the limited number of cases that go to trial.<sup>108</sup> Instead, a remedy that is likely more effective for larger numbers of defendants is a change in the procedures used by the police to obtain identifications. In my judgment, the simple mechanism of a “double-blind” procedure under which the investigative officer who conducts the identification does not know the identity of the suspect will be very important and effective in reducing suggestivity and will lead to fewer false identifications.<sup>109</sup> Innocent individuals are spared the damage of initial false accusation, and the potential inadequacy of counsel to

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105. See Givelber, *supra* note 103, at 1358.

106. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1380-88 (2007) [hereinafter Mosteller, *The Duke Lacrosse Case*] (describing generally the woeful inadequacy of the constitutional protections against suggestive identifications).

107. See *id.* at 1410.

108. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012) (acknowledging that our criminal justice system is one of pleas, not trials).

109. Mosteller, *The Duke Lacrosse Case*, *supra* note 106, at 1388-92.

investigate and try the case becomes irrelevant.<sup>110</sup> A double-blind procedure is relatively simple to administer in many instances, not overly expensive, and quite easy to explain and defend.<sup>111</sup>

Unfortunately, success with this type of reform lacks the payoff of a clear victory. With a double-blind procedure in operation, we may be confident as a matter of logic that, overall, fewer innocent defendants have been charged and convicted and more justice has been achieved, but no clear victories can be documented.<sup>112</sup> Again, my emphasis is on what works, not what derives from constitutional commands. I suggest it may be helpful, however, to identify these administrative reforms as targeted to secure guarantees fundamental to our constitutional structure—labeling them as a suite of reforms designed to help fulfill the Sixth Amendment’s goal of effective assistance of counsel, for example. In general, I have a preference for reforms that operate simply and are easy to explain and justify.<sup>113</sup> Also, proposals will have more staying power if they resonate with elementary concepts associated with good government, one of which is transparency.<sup>114</sup>

By contrast, creation of new rights or extension of rights that involve substantial monetary expenses will face significant hurdles and are likely to be modestly enforced. For example, reforms that depend on providing additional experts to defendants may be difficult to implement, even if defined as rights, because of their cost.<sup>115</sup> Also, reforms should be preferred that encourage and achieve compliance rather than principally punish violations through exclusion

110. *See id.* at 1365-71.

111. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 617 (noting that the double-blind procedure is relatively costless).

112. See Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County’s Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1, 26 (2005).

113. One of the problems I find with the new confrontation right as described by *Crawford* as covering only testimonial statements is that it is not easily explained to the skeptical. Testimonial in what way and for what purpose? See *Crawford v. Washington*, 124 S. Ct. 1354, 1359-74 (2004).

114. See David S. Levine, *The People’s Trade Secrets?*, 18 MICH. TELCOMM. & TECH. L. REV. 61, 61-64 (2011) (noting that transparency is necessary for good government).

115. See David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 74 [hereinafter Sklansky, *Hearsay’s Last Hurrah*]. Professor Sklansky has argued for an approach to confrontation rights that is broader than the simple right to cross-examine, which is particularly important when experts are involved:

In the case of forensic science, meaningful confrontation likely requires a good deal more than disclosure of the results reached by the prosecution’s analysts and their methodology. At a minimum, defendants probably need access to independent experts, to the underlying databases on which the state relies, and—where feasible—to samples and materials that will allow them to carry out their own tests. . . . It may also be that defendants cannot challenge forensic proof effectively on an individual, case-by-case basis; to make the Confrontation Clause more than an empty formalism in the increasing number of criminal cases that rely heavily on scientific proof, it may be necessary to put into place certain systemic protections—for example, regulatory oversight of forensic labs, and facilitation of information-pooling by defense attorneys.

*Id.* I find this a very interesting proposal and would only emphasize that parts requiring major outlays of resources, as in providing additional expert services for the defense, are likely to be unattainable in practice because of implementation costs, whereas less costly “good government” approaches of greater neutrality, access, and admissibility of evidence may be more viable albeit perhaps less effective.

of evidence. I will provide three examples of systems that work the appropriate way.

*A. Provision of Neutral Forensic Investigators and Analysis*

The early stages of a criminal investigation are handled by the police, who frequently are part of the “competitive enterprise of ferreting out crime.”<sup>116</sup> Largely that competitiveness will remain, but in many criminal cases a stage follows where critical pieces of evidence are examined and analyzed by forensic specialists, and here such competitiveness does not necessarily come with the task.<sup>117</sup> Efficiency and accuracy may be enhanced by facilitating high quality, neutral investigation from the beginning by a law enforcement-related investigative and forensic sciences unit. The experience in North Carolina recently with a blood analysis in the State Bureau of Investigation (SBI) demonstrates the problems that can result when forensic science is not neutral.<sup>118</sup> Evidence uncovered in an Innocence Commission proceeding and an unrelated criminal investigation revealed a systemic bias in the SBI that tested substances suspected to be blood at the crime scene and provided expert opinions on the significance of blood patterns at the crime scene.<sup>119</sup> Evidence damaging to the prosecution was frequently withheld, and members of the unit saw their job as to aid the prosecution rather than to provide neutral analysis.<sup>120</sup> Some problematic SBI units have been disbanded, and an effort is being made to demand adherence to high standards of accuracy and neutrality for those functions performed.<sup>121</sup>

In *Ake v. Oklahoma*, the Supreme Court ruled that under the Due Process Clause, in a case dependent upon testimony regarding the sanity of the defendant, the defense had the right of access to an expert, but the Court did not conclude that access had to be to a defense expert.<sup>122</sup> For effective adversarial

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116. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

117. See Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1314-33 (2004) (discussing examinations of evidence by forensic analysts with no law enforcement involvement).

118. See Joseph Neff, *Ex-SBI Agent Deaver's Testimony Could Lead to Reviews*, NEWS & OBSERVER (Jan. 22, 2012, 10:06 PM), <http://www.newsobserver.com/2012/01/01/1745785/peterson-case-just-the-start.html>.

119. See *id.* (describing pattern of erroneous results produced by one particular forensic specialist with the SBI blood analysis unit that led to the exoneration of one man in 2010, the new trial for another in 2011, and a formal outside review of and the termination of the blood stain pattern unit).

120. See *id.*

121. Mandy Locke & Joseph Neff, *Long Delays in SBI Reforms Stir Its Critics*, NEWS & OBSERVER (Aug. 7, 2011, 4:38 AM), <http://www.newsobserver.com/2011/08/07/1396114/long-delays-in-sbi-reforms-stir.html>.

122. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (“We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of



presentation, providing a defense expert has clear advantages, but a more neutral expert may be a realistic, second-best solution and perhaps the only one that is politically and financially feasible.

### B. Full Open-File Discovery

A very important reform for improving the defense, and arguably justice, is full open-file discovery. That reform is linked, in my mind, to curing the weaknesses of the enforcement of the defendant's right to receive exculpatory information from the prosecution under *Brady*.<sup>123</sup> Prosecutors understandably have difficulty fully complying with *Brady* because, as part of their ethical duty, they have reached a conclusion that the defendant is guilty after review of all the evidence.<sup>124</sup> As a result, they are likely to miss the "exculpatory" nature of evidence that they either did not notice or have already determined is not truly exculpatory.<sup>125</sup> On the other hand, if prosecutors are obligated to provide all information available to them and to government investigators working on the case, the failure of the prosecutor neither to be familiar with the information nor to recognize its exculpatory impact matters.<sup>126</sup>

Providing full open-file discovery should improve counsel's performance in terms of both preparation for trial and effectiveness of cross-examination. Investigation is one of the components of effective assistance.<sup>127</sup> Defense attorneys have less need to investigate and, if they do, an easier time conducting the investigation, if the prosecutor's full file is available.<sup>128</sup> Similarly, the resource imbalance between the prosecution and the defense is in part based on the support services available to each, with the prosecution benefitting from its ability to tap police investigative resources.<sup>129</sup> Clearly, having a defense investigator whose task is to find information useful to the defense is different from, and preferable to, relying on the investigative resources of the prosecution, but providing the product of those prosecutorial resources to the defense effectively narrows the resource gap. Similarly, full open-file

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course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.").

123. See *Brady v. Maryland*, 373 U.S. 83, 85-86 (1963). The "*Brady*" right, as it is generally known, was first recognized by the United States Supreme Court in *Brady v. Maryland* under the Due Process Clause. *Id.*

124. See generally MODEL RULES OF PROF'L CONDUCT R. 3.8 (2011) (outlining the responsibilities of the prosecutor).

125. See Christopher Deal, *Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1803 (2007).

126. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 306-11 (2008) [hereinafter Mosteller, *Exculpatory Evidence*].

127. See *United States v. DeCoster (DeCoster I)*, 487 F.2d 1197, 1204 (D.C. Cir. 1973) (describing the components of effective assistance to include "appropriate investigations, both factual and legal").

128. See Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1558-59 (2010).

129. See *id.* (noting that open-file discovery would even the playing field).

discovery will allow counsel to perform more effectively at trial, particularly in cross-examining and confronting government witnesses.<sup>130</sup>

Obviously, there is a caveat to providing full open-file discovery. That is, the potential imbalance it creates to advantage defendants, particularly defendants who are represented by excellent defense counsel with substantial funds.<sup>131</sup> As a result, provision of full access to the prosecution's investigative material requires some reciprocation by the defense in revealing its anticipated evidence.<sup>132</sup> Together with greater neutrality of investigative services, these changes could result in greater injustice as more guilty defendants, particularly those with financial resources, are acquitted. The focus here is upon achieving a larger measure of fairness and accuracy for the typical case where the defendant is indigent, and in those cases, there is less likelihood of a substantial imbalance favoring the defense. Nevertheless, measures to achieve greater fairness will come with adjustments to defense advantages and the need to be realistic about potential damage to justice.

### C. Neutrality by Design of Prosecutorial Investigative and Screening Functions

Measures should be undertaken to structure the prosecutors' offices to be more neutral at the investigative and charging phases. Professor Rachel Barkow has argued that the modern-day prosecutor essentially functions as primary adjudicator for most defendants.<sup>133</sup> This actual role should be recognized by separating the investigative function, which conceptually should be conducted more neutrally, from the trial function, which is inherently adversarial.<sup>134</sup>

Similarly, agencies that perform investigative tasks generally should be organized and operated insofar as possible to approach the task neutrally. Justice is enhanced and efficiency gained by quality investigation conducted from the beginning by an agency operating as neutrally as possible rather than

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130. See Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45, 63 (1993) (arguing that "[f]ull pretrial discovery is the key" to challenging through cross-examination expert testimony under the confrontation right); Andrew Taslitz, *Catharsis, the Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103, 113 (1993) (same).

131. See Medwed, *supra* note 128, at 1559.

132. See Mosteller, *Exculpatory Evidence*, *supra* note 126, at 273 (describing traditional arguments against full criminal discovery requirements centered in the fear of defense perjury to counter known evidence, witness intimidation, and the imbalance given the defendant's Fifth Amendment protection against required personal disclosures and the response of reformers to require rather broad reciprocal discovery from the defense).

133. See Barkow, *supra* note 62, at 876-77.

134. See *id.* at 901, 913-21 (arguing that U.S. Attorneys Offices should be organized so that separate lawyers handle investigation and charging functions); see also Mosteller, *Failures of the American Adversarial System*, *supra* note 59, at 339-43 (suggesting that a broadly considered organizational effort to make an effort at an initial neutral effort and an opportunity for later review by prosecutors who have a meaningful degree of separation from the direct prosecution of the case can facilitate a fair treatment of potential claims of innocence).

by requiring the later provision of a defense-oriented investigator or analyst to provide a competing perspective.<sup>135</sup> Although cooperation between defense and prosecution is not part of the adversarial model or the Sixth Amendment guarantee, there may be places where the advantages to the client and the benefits to the effective administration coincide.<sup>136</sup>

## V. SIXTH AMENDMENT RIGHTS TO COUNSEL BEFORE AND AT TRIAL AND CONFRONTATION

### A. Improving the Operation of the Right to Counsel at Trial

#### 1. Unlikely Doctrinal Reformulation

One way the operation of the right to counsel at trial could have been improved would have been through the definition of the effective assistance of counsel. I express this thought in the past tense because this decided issue is unlikely to be revisited. The approach of Judge David Bazelon in the initial panel decision in *United States v. DeCoster* would have provided an alternative construction of the right to effective assistance of counsel and effectively buttressed the enforcement of the right to counsel under *Gideon*.<sup>137</sup>

Judge Bazelon's opinion expressed the right to effective assistance in terms of "reasonably competent assistance," which was in turn specifically defined through a series of duties, which he termed the "minimum requirements of competent performance."<sup>138</sup> That approach was first rejected by the D.C. Circuit, sitting en banc, which eliminated the mandate of specified duties in favor of finding ineffectiveness when the performance of counsel fell "measurably below accepted standards"<sup>139</sup> and then laid to rest in the United States Supreme Court decisions in *Strickland v. Washington* and *United States v. Cronin*.<sup>140</sup>

Judge Bazelon's formulation of ineffective assistance of counsel differed from the *Washington* approach in two respects. First, it defined duties of competent counsel in advance of the specific proceeding, whereas the Supreme Court adopted a more general objective standard of reasonableness judged in

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135. Cf. *supra* note 119 and accompanying text.

136. See Smith, *The Geography of the Death Penalty*, *supra* note 29, at 270-71. Professor Smith suggests that in death penalty cases a well-developed defense presentation regarding the strength of the case for life imprisonment may allow the prosecution to reach a rational decision regarding a negotiated life sentence before committing to a costly and ultimately unsuccessful death penalty trial that, once announced, cannot politically be easily reversed. See *id.*

137. See *United States v. DeCoster (DeCoster I)*, 487 F.2d 1197, 1199-1205 (D.C. Cir. 1973).

138. *United States v. DeCoster (DeCoster II)*, 624 F.2d 196, 276 (D.C. Cir. 1976) (en banc) (Bazelon, J., dissenting); see *DeCoster I*, 487 F.2d at 1203-04 (listing obligations such as conferring with the client and "appropriate investigations").

139. *DeCoster II*, 624 F.2d at 215.

140. See *Strickland v. Washington*, 466 U.S. 688, 688-89 (1984); *United States v. Cronin*, 466 U.S. 648, 663-64 (1984).

retrospect in the context of the specific case.<sup>141</sup> Second, Judge Bazelon's *DeCoster* approach did not incorporate a requirement of prejudice into the finding of the violation,<sup>142</sup> while *Washington* requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>143</sup>

Had something like *DeCoster I* become the law, not only would ineffective assistance of counsel law be different today, but the *Gideon* right to counsel would have developed differently.<sup>144</sup> Specific activities, such as basic investigation, would have been required as a standard matter to avoid the threat of reversal on ineffective assistance of counsel grounds.<sup>145</sup> But, ex ante performance standards are not currently legal requirements of effective assistance, and I see no path for such standards to become the law.<sup>146</sup>

One potential route to something like this would be through an approach that gives primacy to a discerned core meaning of the right to counsel that includes a concept of adequacy.<sup>147</sup> The originalism route, however, at least as defined by Justice Scalia, is blocked. Scalia draws a distinction in *United States v. Gonzalez-Lopez* between the core meaning of the right to counsel and effective assistance.<sup>148</sup> He describes the core meaning of the right to counsel to historically be the right of one who does not require the appointment of counsel to have counsel of his or her own choice.<sup>149</sup> By contrast, he finds the right to effective assistance of counsel to be based on the Due Process Clause, rather than the Sixth Amendment, and derived from the purpose of ensuring a fair trial.<sup>150</sup> That derived right comes with the limitations of its secondary status, such as the requirement to prove prejudice, which is not part of the core right of choice of retained counsel.<sup>151</sup> Justice Scalia similarly concludes the broader *Gideon* right of an indigent to appointment of counsel is not part of the Sixth Amendment's core right.<sup>152</sup>

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141. See *Strickland*, 466 U.S. at 688-90.

142. See Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 24-33 (2009) (discussing the general development of the effective assistance of counsel standards in the circuit courts prior to *Washington* and the specifics of Judge Bazelon's *DeCoster* approach).

143. *Strickland*, 466 U.S. at 694.

144. See *supra* note 137 and accompanying text.

145. See *supra* note 138 and accompanying text.

146. See *supra* notes 139-41.

147. See Chhablani, *supra* note 142, at 37-42 (making an argument for a Sixth Amendment based right to effective assistance of counsel disentangled from Due Process would be akin to that developed by Judge Bazelon in *DeCoster I*).

148. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 147 (2006).

149. See *id.* at 144, 148-49.

150. *Id.* at 147.

151. *Id.* at 147-48.

152. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting) ("The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel."). See generally William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1264-66 (2011) (describing how the conclusion that appointed counsel is

Whether the rulings in *Lafler v. Cooper* and *Missouri v. Frye* will have any substantial effect on the actual meaning of effective assistance is practically unlikely but possible, particularly at a theoretical level. The cases make no direct theoretical changes in the general meaning of ineffectiveness, but the opinions suggest several changes in emphasis that may have an indirect impact on the meaning.<sup>153</sup> First, in recognizing the importance of the guilty plea process, they may bring a focus on the actual practices in what is often a high volume, low effort part of criminal defense work.<sup>154</sup> Supposedly, *McMann v. Richardson* has for over forty years required effective assistance when the right to a jury trial is given up and a guilty plea accepted, but it is hard to find in the results much attention to the adequacy of counsel's efforts.<sup>155</sup> More recently, the Court in *Padilla v. Kentucky* appeared to give some emphasis to the adequacy of at least one part of the advice before the entry of the guilty plea—the immediate consequences of that plea in producing the defendant's deportation.<sup>156</sup> But, that opinion did not suggest the strong potential for a wholesale re-evaluation of the level of scrutiny given to counsel's efforts before a guilty plea was entered.<sup>157</sup>

Now, the Court reached two conclusions that it explicitly connected in a causal chain.<sup>158</sup> It concluded, as noted earlier, that “ours ‘is for the most part a system of pleas, not a system of trials.’”<sup>159</sup> As a result, the adequacy of counsel's effort in that plea process must be guaranteed, stating “it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”<sup>160</sup>

The Court further explained that it is the negotiation of the plea that “is almost always the critical point for a defendant.”<sup>161</sup> “In order . . . [for the defendant to get the benefits of a plea], criminal defendants require effective counsel during plea negotiations. ‘Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.’”<sup>162</sup>

A second point that the Court made in *Lafler* is potentially important to the future development of the scope of effective assistance of counsel. The

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essential to a fair trial, the central argument in *Gideon*, claims to flow directly from the constitutional definition but is not originalist).

153. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1408-11 (2012).

154. See *id.* at 1407 (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)).

155. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); see also *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (ruling that *Strickland v. Washington*'s two-part test applies to ineffective assistance challenges to guilty pleas).

156. *Padilla*, 130 S. Ct. at 1481-82.

157. *Id.*

158. See *Frye*, 132 S. Ct. at 1407.

159. *Id.* (quoting *Lafler*, 132 S. Ct. at 1388).

160. *Id.*

161. *Id.*

162. *Id.* at 1407-08 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)) (internal quotation marks omitted).

Court rejected the argument that a just result is the only value protected by the right to counsel.<sup>163</sup> The “fairness and regularity of the process that [precede]” the trial also matter.<sup>164</sup> It quoted the language from *Kimmelman v. Morrison* that “[t]he constitutional rights of criminal defendants . . . are granted to the innocent and guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.”<sup>165</sup>

These observations by the Court are obviously not new, but they do bring a sense of the defendant’s right to fair procedure into plea bargaining that more closely resembles the treatment Justice Scalia gives to core Sixth Amendment rights than does *Strickland v. Washington*.<sup>166</sup> Scalia complains that the ruling in *Lafler* “embraces the sporting-chance theory of criminal law.”<sup>167</sup> Whether this different perspective on plea bargaining will suggest to courts that some minimal level of investigation and discovery, for example, are always required before guilty pleas can be properly recommended by counsel is unclear but possible. If some minimal level of performance were to be required for cases ending in guilty pleas or in rejected guilty pleas, it is difficult to understand why some basic level of performance would not be required for cases going to trial.

## 2. *Improving Assistance of Counsel*

Real benefits can be gained through developing better administrative systems for provision of counsel.<sup>168</sup> These changes can help by (1) giving a measure of independence to counsel,<sup>169</sup> (2) putting the most able, available lawyers to work on the most difficult cases; and (3) taking advantage of institutional representations in particular types of cases.<sup>170</sup> The requirements of a certain number of years of practice and expertise in the particular area of practice may not be elements of effective assistance as the United States

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163. *Lafler*, 132 S. Ct. at 1388.

164. *Id.*

165. *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)).

166. *See supra* note 152.

167. *See Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting).

168. *See* LEFSTEIN, *supra* note 55, at 20-23 (listing, after inadequate funding, the structural problems of the appointment process and independence as among the major reasons for excessive caseloads for public defenders).

169. *See, e.g.,* Smith, *The Geography of the Death Penalty*, *supra* note 29, at 265 (noting that in some counties where many death penalty cases are tried, the judges who control the appointment of counsel may choose lawyers who are expected not to cause “too many headaches for the judge”).

170. *See id.* at 260-64 (noting that, for the specialized group of death penalty cases that in Philadelphia, Pennsylvania and Los Angeles, California, public defender offices, which may not be particularly effective overall but have substantial advantages over privately appointed attorneys because those offices can better identify homicide cases that are likely to be tried as death penalty cases and can do the type of pretrial mitigation investigation and repeated client visits needed to establish a viable case for life imprisonment, and to have the relationship required to convince the client to accept a penalty of life without the possibility of parole).

Supreme Court sees it, but those characteristics can be built into the criteria for appointment utilized by an independent administrative structure.<sup>171</sup> Greater attention can also be paid—either by judges handling the trials or by new administrative agencies that appoint counsel—to ensure that the basic tasks of an adequate defense have been addressed.<sup>172</sup>

A second suggestion goes toward realistic arguments to improve funding. As I recognized earlier, significant improvement in funding levels is unlikely.<sup>173</sup> While it is unclear that any approach can overcome the systemic and political barriers, an approach that is built around rough equity between prosecution and defense resources may have a marginally better chance of success.<sup>174</sup> It also has some of the persuasive power of a good government argument to support it.<sup>175</sup>

### *B. Protecting the Sixth Amendment Right to Assistance of Counsel Pretrial*

The limited reach of the protections provided by the Sixth Amendment right to counsel pretrial against solicitation of incriminating statements from the defendant by government agents, first articulated under *Massiah v. United States*, demonstrates why a broader approach is needed to protect the interests behind the constitutional rights.<sup>176</sup> Under the formalistic doctrine developed by the Supreme Court, these protections, for example, apply only to the specific charged offenses pending at the time of the government contact and apply only if the defendant establishes that the government agent deliberately elicited the statements.<sup>177</sup> As a result, much government contact will not be covered, and

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171. See *United States v. Cronin*, 466 U.S. 648, 665-66 (1984) (rejecting an approach that judges ineffective assistance on the basis of “extrinsic” claims about the qualifications or preparation of the attorney rather than actual adequacy of counsel’s performance at trial).

172. See Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH L. REV. 133, 143-49 (2013).

173. See *supra* Part II.B.

174. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 251-52 (2004) [hereinafter Wright, *Parity of Resources*]. I have also argued for an emphasis on innocence protection. See generally Mosteller, *Defense Attorneys*, *supra* note 82 (arguing that the important role defense attorneys play in protecting innocent defendants who have no clear proof of their innocence can be an important basis for better funding for the defense function).

175. See Wright, *Parity of Resources*, *supra* note 174, at 262. Professors Ron Wright and Don Dripps have argued for an approach based on rough parity of resources between the prosecution and the defense. Professor Wright centers the argument in political practicality. See *id.* at 230-62. Dripps develops his argument as part of a revised definition of effective assistance. See Dripps, *Ineffective Assistance of Counsel*, *supra* note 61, at 244 (“The better approach would ask *before* proceedings commence whether the defendant’s lawyer can effectively represent him. Because the effectiveness of counsel is relative to the opposition, the test should be whether the defendant is represented by a lawyer roughly as good and roughly as well-prepared as counsel for the prosecution.” (emphasis added)).

176. See *Massiah v. United States*, 377 U.S. 201, 206 (1964).

177. See *Texas v. Cobb*, 532 U.S. 162, 168-72 (2001) (ruling that right to counsel attaches only to charged offenses with no exception for uncharged crimes that are “factually related” to a charged offense); *Kuhlmann v. Wilson*, 477 U.S. 436, 460 (1986) (ruling that interactions between defendant and informant placed in his cell did not constitute “deliberate elicitation” of the incriminating comments and therefore finding no Sixth Amendment violation).

the defendant may have a difficult time proving that the government agent actively elicited the challenged statements.<sup>178</sup>

In general, legislative and administrative rules should be developed to expand recording, preservation, and disclosure of encounters between the police and citizens, particularly suspects and defendants, in situations likely to be involved in criminal justice proceedings. This certainly includes all conversations between the police and defendants.<sup>179</sup>

Requirements can be developed in investigative agencies to record broad ranges of evidence gathering, such as the taking of witness statements and contacts with suspects, and prosecutors can develop standards that require protective procedures, such as corroboration and review panels in cases where guilt is fairly viewed as uncertain and dependent on informant testimony.<sup>180</sup>

While underfunding of defense services is apparently more acute, prosecutor offices are cash strapped and more and more are unable to investigate and evaluate cases extensively.<sup>181</sup> This inadequacy may help some defendants whose cases will be abandoned, but it will likely not help justice or reveal inadequacies of proof against the innocent. Moreover, as suggested earlier, prosecutors' offices should be reorganized to facilitate neutral evaluation at the investigative and charging stages.<sup>182</sup>

### C. Confrontation

Like many of the other participants in the Symposium, I have interests in both Evidence and the Criminal Procedure camp. I have a sense that the more a scholar is focused on Criminal Procedure, the more ambivalence he or she has with the Supreme Court's decision in *Crawford v. Washington*.<sup>183</sup> When *Crawford* was decided, as someone who is fully invested in Evidence scholarship despite also writing in Criminal Procedure, I met the development with great optimism, but I had some trepidation as well. The trepidation came for three reasons. First, the right was defined as limited to formalized testimonial statements; second, it was anchored in the originalism of Justices Scalia and Thomas; and third, it is difficult to explain, particularly when it is

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178. See *Kuhlmann*, 477 U.S. at 460.

179. Cf. Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 715-16 (1996) (arguing that all police encounters in which consent may be requested should be recorded by the police on body-worn recording devices as soon as they approach a suspect).

180. See Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 519 (2009).

181. See CRIMINAL JUSTICE IN CRISIS, *supra* note 9, at 5.

182. See *supra* note 134 and accompanying text.

183. See *Crawford v. Washington*, 541 U.S. 36 (2004).



presented as exclusively a historically oriented procedural right on how evidence must be presented.<sup>184</sup>

My reading of the state of hearsay and the developing concept of confrontation at the time of the framing of the Constitution persuades me that the testimonial concept gets the story roughly right as long as it is flexibly interpreted and not given a formalistic cast. We are not at the end of the *Crawford* story, but rather in the middle, so a good conclusion is still possible. However, I have a feeling of disappointment and regret at the failure of *Crawford* to meet the expectations I held for a fundamentally new approach to confrontation. I worry that *Crawford* has accomplished its single important victory—that of eliminating admission as a statement against interest of statements by co-participants in a crime to police officers interrogating them after their arrest—and that we have already seen the doctrine’s high water mark in *Davis v. Washington*,<sup>185</sup> where it seemed that the new doctrine would cover most witness statements given to police officers after the commission of a crime.<sup>186</sup>

Formalism and a restrictive definition of testimonial statements are leading the doctrine to be defined in ways that are not protective of a substantive right of confrontation based around a goal of testing major categories of hearsay that was accusatory against the defendant at the time it was made.<sup>187</sup> My larger problems with originalism are outside the scope of this paper, and I note here only two. Originalism cannot confidently answer most important modern-day issues at their cutting edge, which is where the Supreme Court decides cases, and it directs analysis, not to sound policy within the context of historically based principles, but instead to the rulings in what is usually a small set of analogous, and often ambiguous, English and American cases of the founding era.<sup>188</sup>

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184. *Id.* at 68. The argument for the necessary separation is that when confrontation is seen as derived from fairness, it becomes a hollow right that is eliminated whenever the evidence appears reliable and trustworthy and the defendant likely guilty. *See infra* note 191 and accompanying text.

185. *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* involved two cases. *Id.* at 817-20. In one, the Court ruled that a statement made by the victim of a domestic violence assault to a 911 operator during the course of an assault was not testimonial and therefore not covered by the Confrontation Clause, but in the other, it held that a statement by another domestic violence victim some period of time after the assault was concluded to police officers interviewing her in her home was testimonial. *Id.* at 828, 830. The opinion appeared to draw a bright line that clearly made testimonial statements made by witnesses to police except during a crime or its immediate aftermath and gave only minimal attention to the formality requirement. *See generally* Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 REGENT U. L. REV. 429, 433-38 (2007) [hereinafter Mosteller, “Testimonial” Statement Concept] (describing the decision in two cases and discussing the emerging definition of a modest formality requirement). Much of the apparent certainty of *Davis* seemed to be taken back by the Court’s more recent decision in *Michigan v. Bryant*. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

186. Unfortunately, *Michigan v. Bryant* eliminated much of the clarity of *Davis* as it extended the scope of the “ongoing emergency” concept. *See Bryant*, 131 S. Ct. at 1158-60.

187. *See* Mosteller, “Testimonial” Statement Concept, *supra* note 185, at 433-38.

188. The lack of concern with policy and consequences is not inadvertent by Justice Scalia but part of his basic view about the proper interpretation of the constitutional text. *See* Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH L. REV. 1203, 1204 (2011) (noting that “Justice Scalia . . . would

Justice Scalia explained why a judge's assessment of trustworthiness or reliability was immediately irrelevant with a powerful analogy.<sup>189</sup> He compared the procedurally based nature of two rights under the Framers' design—the Sixth Amendment's rights to confrontation and to a jury trial.<sup>190</sup> He argued: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."<sup>191</sup> That analogy, however, does not explain why concerns related to untrustworthiness, such as the accusatory nature of the statements, are always irrelevant, and I believe the woodenness of the originalist approach to issues of policy contributes to the begrudging enforcement of the right by trial judges.<sup>192</sup>

On the other hand, there is a core truth in *Crawford's* relatively narrow testimonial approach—or something closely resembling it.<sup>193</sup> If it were policy driven with pragmatic elements, which it is not supposed to be, it would rest on the proposition that a Confrontation Clause that covers too much hearsay will protect it only weakly or will be riddled with exceptions. As a result, the Clause must cover only or strictly the most dangerous classes of hearsay.

One of my major reasons that any definition of the Confrontation Clause right must be robust in its sanction for non-compliance is that frequently witness unavailability is subject to strategic decisions by the prosecution. In *Ohio v. Roberts*, a witness, who was alive and well but not in contact with her family, was considered by the prosecution unfindable, which the Court accepted.<sup>194</sup> But, as Justice Brennan argued in dissent, if the prosecution had not possessed a highly incriminating examination of that witness at the preliminary hearing, they would have been far more motivated to try to find the witness—efforts that may well have succeeded.<sup>195</sup>

Obviously, some witnesses, such as those who are deceased, are clearly unavailable. In many situations, however, such as with child abuse and domestic violence victims, the unavailability/availability decision is one that is subject to different outcomes based on the ease of fitting the case into an

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allow text to trump everything else, especially consequences[,] . . . [and] if you don't like the consequences, blame it on the framers' choice of words").

189. *Crawford v. Washington*, 541 U.S. 36, 61-63 (2004).

190. *Id.* at 62, 69.

191. *Id.* at 62.

192. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 115, at 74; Jeffery Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 358-61 (2012). David Sklansky with fairness and Jeff Bellin with unavailability were each searching for some guiding principle or supplemental approach to help guide *Crawford's* further development or backstop its inadequacies. See Sklansky, *Hearsay's Last Hurrah*, *supra* note 115, at 74; Bellin, *supra*, at 358-61. Both approaches, it seems to me, have promise.

193. *Crawford*, 541 U.S. at 68-69.

194. *Ohio v. Roberts*, 448 U.S. 56, 76 (1980).

195. See *Roberts*, 448 U.S. at 79-80 (Brennan, J., dissenting) ("It is difficult to believe that the State would have been so derelict in attempting to secure the witness' presence at trial had it not had her favorable preliminary hearing testimony upon which to rely in the event of her 'unavailability.'").

exception and the sanction for failing to produce a potentially available witness.<sup>196</sup> A confrontation right with real teeth at the enforcement end motivates the prosecution to produce witnesses rather than face the penalty of exclusion of their statements and results in a higher percentage of witnesses appearing at trial.<sup>197</sup> The firm and harsh remedy, however, is not without its costs, and overall it gives the defense a benefit without a necessary connection to greater accuracy.<sup>198</sup>

An advantage of providing confrontation where the witness is physically available is that providing the right is not usually very expensive because a trial is being held with counsel who can conduct physical confrontation and cross-examination.<sup>199</sup> A moderately skilled defense attorney can secure at least some marginally beneficial concessions through cross-examination in most cases.<sup>200</sup> Those benefits will be substantially enhanced if the reform advocated earlier of full open-file discovery is provided.<sup>201</sup> With such discovery and its resulting access to information regarding the prosecution's witnesses and evidence, the cross-examination made possible by the confrontation right will likely be much more complete and effective.<sup>202</sup>

A distinction generally exists between certain classes of cases, which highlights one of the difficulties with the *Crawford* approach for domestic violence cases.<sup>203</sup> When the challenged statement involves a child, children can generally be produced because they are in the care of an adult who supports the prosecution, and in many situations, the child, through careful preparation, can be made comfortable regarding testifying.<sup>204</sup> Trauma that can make effective testimony unavailable is not to be treated lightly, but it is not necessarily harmful to the well-being of the child.<sup>205</sup>

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196. When I presented this argument at a symposium at Brooklyn Law School in the fall of 2011, a defense attorney recounted that just after *Crawford* was decided, a trial judge indicated that she thought the new doctrine applied to hearsay from unavailable witnesses in two of his pending cases and scheduled a hearing to rule on the issue. However, before that hearing was held, the prosecution announced that those two witnesses, who had previously been unfindable, would testify. The attorney concluded that the threat of exclusion of their testimony had motivated a more diligent effort to locate them.

197. See Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1355-56 (2005).

198. *Id.* at 1363.

199. See Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 *CAP. U. L. REV.* 145, 178-81 (1993).

200. See Todd E. Pettys, *Counsel and Confrontation*, 94 *MINN. L. REV.* 201, 224-25 (2009).

201. See Mosteller, *Exculpatory Evidence*, *supra* note 126, at 318.

202. See *supra* note 134 and accompanying text.

203. See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 *U. RICH. L. REV.* 511, 518 (2005); Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 *S. CAL. L. REV.* 213, 215-17 (2005).

204. See John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 *PAC. L. J.* 801, 805 (1987).

205. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 *U. ILL. L. REV.* 691, 784-85 (describing research regarding the limited general effect of trauma to children resulting from testifying).

In domestic violence cases, some victims can be produced.<sup>206</sup> Others, however, become uncooperative, which can occur for a number of reasons—most are unrelated to innocence.<sup>207</sup> I find no easy or effective solution here. Proving forfeiture by wrongdoing will not be possible in many situations where it exists, and the costs of ensuring safety are considerable and of the type I have generally treated as prohibitive for effective reform.<sup>208</sup> On the other hand, assuming forfeiture by wrongdoing for a whole class of cases would deny justice to defendants, some of whom are innocent.<sup>209</sup> Domestic violence cases are the Achilles' heel of *Crawford*.<sup>210</sup> Victims frequently do not appear for trial, and although that may be because the initial accusation was false, the most frequent reason likely relates to a combination of intimidation by, and economic dependence on, the perpetrator.<sup>211</sup> Moreover, while the prosecution could provide protection and assistance to victims and remedy much of these causes of unavailability, the required resource outlay would be enormous.<sup>212</sup> Because such funds will not be forthcoming, the loss of evidence and justice in domestic violence cases under *Crawford*'s operation likely has no clear remedy.

When the prosecution is unable to produce a witness and, as a result, will lose important evidence under the confrontation right, courts will be tempted to find ways to limit the costly right.<sup>213</sup> That is the situation we often face in enforcing *Crawford*, particularly when prosecutors resist its commands.<sup>214</sup> I hope that over time the focus will shift more to finding ways to ensure confrontation rather than the prosecution fighting its enforcement and scholars supportive of the right emphasizing the developing additional ways to provide confrontation rather than the remedy of exclusion.

## VI. THE DIFFERENT MEANINGS OF FAIRNESS

Fairness has many different meanings, and I highlight only one element of those differences.<sup>215</sup> This element is the conflict between fairness designed to produce a just result and a guarantee of a fair procedure to all as a value separate from the impact on accuracy (or innocence). Justice Scalia has a clear view of the Sixth Amendment that, interestingly, is immediately unrelated to either accuracy or innocence.<sup>216</sup> The right to counsel is about the ability of

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206. See Percival, *supra* note 203, at 241.

207. *Id.* at 215-16.

208. See Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 307 (2005).

209. See *United States v. Lentz*, 282 F. Supp. 2d 399, 426-27 (E.D. Va. 2002).

210. See Percival, *supra* note 203, at 238-43.

211. See Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford's Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 683-84 (2009).

212. *Id.*

213. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 285 (2006).

214. See *id.*

215. See David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH L. REV. 103, 105 (2013).

216. See *supra* notes 148, 189.

those with the financial capability to be represented by counsel of their choice.<sup>217</sup> The right to confrontation requires a rather unbending commitment to confrontation for defendants against whom testimonial statements are offered.<sup>218</sup> Justice Scalia acknowledges that in the judgment of the Framers these rights ultimately served interests of accuracy, but in their immediate application, he contends that they cannot be modified or constrained by such concerns.<sup>219</sup> In his view, the rights do not serve goals of effectiveness or pragmatism either.<sup>220</sup> They protect the clearly guilty just as much as the innocent.<sup>221</sup> With respect to the right to counsel for indigents and ineffective assistance of counsel, he believes those are protections that owe much of their existence to the Due Process Clauses of the Fifth and Fourteenth Amendments, and as to these rights, concerns of accuracy and balancing of competing criminal justice goals do hold sway.<sup>222</sup> As a result, he protests what he views as procedural fairness for its own sake in the Court's most recent *Lafler* and *Frye* decisions.<sup>223</sup>

My approach in this paper with regard to the Sixth Amendment has been to focus on measures that are effective and likely pragmatically obtainable that in turn serve interests of fairness—particularly accuracy and innocence.<sup>224</sup> I have not cast my proposals as part of a remaking of the constitutional right but rather have concentrated on alternative procedures and administrative remedies.<sup>225</sup> As a result, I have not suggested any modifications of doctrine that might undercut protections for rights based exclusively upon demands of procedural fairness, which may be those most likely to benefit clearly guilty defendants.

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217. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 148-49 (2006).

218. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes . . . . The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept.”).

219. *Id.* at 61 (“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence . . . .”). In Justice Scalia’s view, neither the right to counsel of one’s choice for those able to retain counsel nor the right to confrontation are modified to meet the goal of trustworthiness. As he stated in *Gonzalez-Lopez*, “it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time . . . [under *Ohio v. Roberts*, 448 U.S. 56 (1980)] with regard to the Sixth Amendment’s right of confrontation—a line of reasoning that ‘abstracts from the right to its purposes, and then eliminates the right.’” *Gonzalez-Lopez*, 548 U.S. at 145 (quoting *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)). Also, harmless error does not apply to the right to counsel of one’s choice. See *id.* at 148-51 (finding the error structural, which affects the entire trial, and therefore finding harmless error inapplicable).

220. *Gonzalez-Lopez*, 548 U.S. at 150-52.

221. See *id.*

222. See *id.* at 147.

223. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1392-95 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1410-11 (2012).

224. See discussion *supra* Parts III-IV.

225. See discussion *supra* Part IV.

Nevertheless, as Professor Richard Myers has pointed out to me, the tendency of my suggestions is to separate accuracy protection, which subsumes innocence protection but also celebrates convictions of the guilty, from procedural protections that are part of our commitment to procedural fairness owed to each person—guilty or innocent—charged with a crime. My proposals can particularly help those who can prove their innocence and those who are apparently innocent, and a few may still help the clearly guilty. The latter is illustrated by the benefit of full open-file discovery to the guilty in manicuring their defense to avoid inconsistent facts available to the prosecution, which are made known through discovery.<sup>226</sup> One outcome of my suggestions may be to isolate and weaken the position of rights that are largely or exclusively to protect dignitary interests and defendants who have little plausible claim of innocence. In an era of particularly limited resources for defending those charged with crimes and not of expansion of formally declared rights, some harm to those without a claim of lack of accuracy or innocence may be almost inevitable. Hopefully, there will be larger benefits through more effective and achievable procedures that will outweigh the losses.

In my judgment, the most fundamental right to the interests of defendants in the Sixth Amendment, and indeed in the Bill of Rights, is the right to counsel and, of course, effective counsel. Resource limitations have made enjoyment of that right unattainable for a large number of criminal defendants. The recent decisions of *Lafler* and *Frye* regarding the right to counsel in guilty pleas may reshape part of the process, but I suspect that other than changing slightly the allocation of resources for defense counsel, after systemic adjustments are made, the opinions will have no impact on the allocation of state and local governments funds to indigent defense, which courts have had little long-term ability to affect.<sup>227</sup>

## VII. CONCLUSION

One function of a keynote is to link together themes of a conference or symposium. In attempting to satisfy that goal, the task taught me a lesson, and I hope that this Article has conveyed that important point. The lesson I learned in trying to link these parts of the Sixth Amendment is that they are linked in a concept of fairness. Moreover, in trying to protect and extend the functions and interests that lie behind these rights, a systemic view is warranted and helpful.

In a time in which it is painfully obvious that we have limited resources available to meet the goals of government and arguably a reticence to extend legal doctrines, those interested in progressive reform should look beyond commands based on developing new legal doctrine. The interests of fairness can be furthered by administrative mechanisms and aided by actors in the

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226. See discussion *supra* Part IV.B.

227. See *Lafler*, 132 S. Ct. at 1392-95; *Frye*, 132 S. Ct. at 1410-11.

system beyond defense attorneys and their experts and agents. The victories may not be the stirring ones of the Warren Court era or draw public note, but for the individuals not prosecuted or incarcerated erroneously, they can be extraordinarily significant and fulfill the basic promise of Sixth Amendment fairness.<sup>228</sup>

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228. See discussion *supra* Parts V-VI.