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### Public Perception, Justice, and the "Search for Truth" in Criminal Cases

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# PUBLIC PERCEPTION, JUSTICE, AND THE “SEARCH FOR TRUTH” IN CRIMINAL CASES

CRAIG M. BRADLEY\* and JOSEPH L. HOFFMANN\*\*

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## THE MICKEY MOUSE CORPORATION

To: All Employees

From: R. Dangerfield, V.P. for Marketing and Attorney-at-Large

As I'm sure you're all aware, we have been successful in our bid to take over the criminal trial system of the State of California as part of the Legislature's "privatization" move. We have paid a lot of money for this, and now it's up to all of you to work together to make this venture a success. Let me run a few ideas up the flagpole and see if anyone salutes.

First, I know that a lot of people say the criminal justice system "failed" in the O.J. Simpson trial. This claim is duck poop! How can a show with ratings like that be considered a "failure"? Thus, it must be our policy not to "change the criminal trial system," as pointy-headed academics might urge, but to free the system of those remaining constraints that might cut into future ratings success.

Above all, we must recognize that *a continued supply of celebrity defendants is not something we can depend upon*. (Note to Psychology Department: Is there anything we can do to ensure a steady supply of big-name defendants? How about a series of TV specials on how to murder your wife (husband, girlfriend, boss, etc.) and get away with it? Will celebrity *victims* suffice in the absence of celebrity *defendants*?) Accordingly, we have to ensure that the trial is *entertaining in*

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*its own right*, rather than depend on celebrity “guest stars” for our ratings.

For starters, we need to change our idea of what a trial is! We must bag, once and for all, the outmoded notion that a trial is a somber “search for truth.” Surely no one believes that old chestnut after witnessing the Simpson melodrama—complete with a villain, buffoons (the LAPD), hired guns (the defense attorneys), sympathetic victims, secret never-revealed evidence and court jesters (the “expert” witnesses). (Note to self: Hire Judge Ito as a consultant on this one.)

Instead, do not regard the Simpson trial as just the pilot for a series of exciting trials, but see it as the beginning of a reconceptualization<sup>1</sup> of the entire criminal justice system. Let’s face it, folks—with the exception of a few famous trials, the criminal justice system is dull, DULL, DULL!

Once we accept that the criminal trial has nothing to do with a “search for truth,” many of the hidebound notions that currently constrict trials’ popularity could be lifted. (To give credit where it’s due, the Supremes took the first giant step in this direction by allowing TV coverage of trials.) For example, the concept of a “jury” is much too narrow. Instead, the “finder of fact” should be *the entire studio audience*. (Note to self: Potential audience members should be screened according to their willingness to wear silly costumes and engage in outrageous behavior on camera. If they have a grudge against one of the participants that they are willing to vent on camera, so much the better.) In order to gain a conviction, the prosecutor must score over ninety percent on the Applause-O-Meter.

Instead of only the lawyers being allowed to ask questions, the audience, spurred on by the emcee (formerly known as the judge), should be allowed to shout questions at any time. (Note to Props Department: Should the audience be allowed to fling rotten vegetables at the parties if they are dissatisfied, or would that just be too icky? How about simulated rotten vegetables?) However, the bailiff should attempt to squelch questioning by anyone who seems to be acting too serious. (Note to Wardrobe Department: look into suitable bailiff costumes. See if Nixon White House guard suits are still available. How about scarlet and ermine for judge’s robes—very Rumpolean.) To

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1. I realize that this word is too long. In the future, legal commentary on criminal cases should be limited to one and two syllable words, à la Mickey Spillane: “They claimed that the ex-jock, Mr. All-America, croaked his skirt with a shiv. But Mike Cochran (“Johnnie” is too fey) would show it was a put up job.”

maintain a sense of historic continuity, the "judge" should be encouraged to bang his gavel a lot. Arrivals in or departures from the courtroom by the emcee should always be accompanied by chants of, "Here come de judge" or some similar, but tasteful, chant. Bag that "Oyez, oyez" crap. Totally retro.

The emcee should be strict with witnesses, eliminating all dry and boring testimony like that tedious "scientific" stuff about DNA. However, audiences enjoy the exposure of lies by the lawyers, so witnesses should be encouraged to "lie" now and then, with TV monitors apprising the audience of this situation. Then the suspense will build as viewers wait to see if the lawyers are sharp enough to expose these falsehoods. The lawyers should engage in less petty bickering than in the Simpson trial—dullsville—but should have an occasional serious blowup with lots of shouting and really vile personal epithets. Fistfights among the lawyers should be saved for sweeps month. (Note to casting: Let's try to find some female lawyers with a little more sex appeal than that witch Marcia Clark.) (Note to Marcia: Marcia, baby . . . I loved the *topless shots*. *Kudos to your agent for that one!*)

Another feature of the Simpson trial that could be improved upon: While it's great to have envelopes with secret evidence in them, both the presentation and the use of this evidence was straight from Duckburg. Instead of just having some clod hand the envelope to the judge, it would be better if, with alarms and excursions off camera, a *courier* dashed into the courtroom with the envelope held high. The judge could then place it in a prominent position and *never open it during the trial*. Then, after the verdict, the judge could dramatically *open the envelope*, and judge and audience would have a good laugh if it showed that the result of the trial should have been different.

In summary, mouseketeers, let's keep those mouse ears pricked for the main chance and try to keep our tails out of the wringer. Happy Trials!

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Attention, readers! The above memo is *fiction* . . . for now. However, in the eyes of the American public, it represents the extreme toward which the criminal trial—the symbolic centerpiece of our criminal justice system—is rapidly evolving.

Public criticism of lawyers and judges is not, of course, a modern phenomenon.<sup>2</sup> However, recent celebrated criminal cases, including the Bobbitt, Colin Ferguson, Hinckley, McMartin, Menendez, Oliver North, William Kennedy Smith and von Bulow cases, as well as the multiple criminal trials following the beating of Rodney King, have severely battered the public's image of the criminal justice system. Even mainstream mass-circulation publications like *Readers' Digest* regularly lament the system's failings.<sup>3</sup>

The O.J. Simpson trial has only made matters worse. According to a post-Simpson-case poll, fifty-one percent of Los Angeles County residents said their confidence in the criminal justice system had decreased as a result of the trial, while only nine percent said it had increased. Overall, when asked whether they had "a great deal, quite a lot, only some, or very little" confidence in the system, thirty-six percent answered "very little"; only twenty-six percent said they had "a great deal" or "quite a lot" of confidence.<sup>4</sup> Among African Americans and Latinos, confidence was even lower.<sup>5</sup> The *A.B.A. Journal* found similar results nationwide in a poll taken during the Simpson trial.<sup>6</sup> Furthermore, a CNN/USA Today Gallup Poll showed that eighty-two percent of respondents thought the criminal justice system, as reflected by the Simpson trial, had broken down.<sup>7</sup>

We believe the public's response is the most important legacy of the O.J. Simpson trial. The Simpson case cannot provide us with the answers to questions about the best way to select juries, or the most effective rules of evidence or the ethical boundaries of lawyers' behavior. Within the broad range of criminal trials, the Simpson case is so aberrant that it does not even represent a very useful piece of empirical evidence about such matters. Moreover, since we do not know, and may never know, the real truth about who killed Nicole Brown Simpson and Ronald Goldman, it would be dangerous to use the Simpson case—even if it were typical rather than aberrant—to draw

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2. "Dissatisfaction with the administration of justice is as old as law." Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 40 AM. U. L. REV. 729, 729 (1906).

3. See Steven J. Adler, *Why Our Jury System Is in Trouble*, READER'S DIGEST, Dec. 1994, at 55.

4. See Cathleen Decker, *Fairness in Justice System Drops*, in *The Simpson Legacy: Los Angeles Times Special Report*, L.A. TIMES, Oct. 8, 1995, at S2.

5. *Id.*

6. See Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52-53.

7. See *Dissatisfied—And Bored—With Judicial System*, USA TODAY, June 12, 1995, at 4A.

conclusions about particular criminal procedure rules and their usefulness (or lack thereof) in the "search for truth." The proper way to draw such conclusions is on the basis of sound empirical science, not anecdotal evidence, despite many inherent difficulties in studying criminal trials.<sup>8</sup>

What is most important about the O.J. Simpson trial is the central role it has played in the loss of public respect for, and trust in, our criminal justice system. We believe that the Simpson case should serve as a wake-up call; an opportunity for serious soul-searching by all of us—lawyers, judges, legislators and legal academics—who are involved in the administration and study of the criminal justice system. We also believe that the primary end-product of this soul-searching should be a renewed effort to include the viewpoint of ordinary American citizens in the ongoing dialogue about the best way to conduct criminal trials.<sup>9</sup> This effort is essential because a criminal justice system cannot long endure if it loses touch with the deeply held values of its society.

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We must remember that criminal trials serve more than one purpose. The first and most obvious purpose of criminal trials is to "search for truth."<sup>10</sup> We want the innocent to be acquitted and the guilty to be convicted. Much of what we do before, during and even after criminal trials is quite appropriately designed to further this "search for truth."

But criminal trials also serve another very important purpose: They express our society's deepest shared notions of institutional justice and fair play. In the words of Peter Arenella, "criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness

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8. For an interesting and helpful discussion of some of the problems in using empirical data to inform legal decision-making, see J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137 (1990).

9. The same sentiment was recently expressed by American Bar Association President Roberta Cooper Ramo: "The justice system doesn't belong to lawyers, it belongs to all the people in America. Our job is to explain to the American public that what we do is right and to *listen to them* to make sure that those things we do wrong are changed." Michelle Mahoney, *New Mexico Woman Taking ABA Helm*, DENV. POST, May 10, 1995, at F1 (emphasis added).

10. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

of its processes as well as the reliability of its outcomes."<sup>11</sup> Criminal trials remind us all of the procedural and substantive values that we hold dear. Criminal trials represent public, highly visible, morality plays, through which order and balance are restored to a community that has suffered an often grievous loss. However, true restoration can occur only through criminal trials that are perceived to be just and fair. As Barbara Babcock has written:

Trials can bring "community catharsis," but to do so they must serve not only the substance but also "the appearance of justice." This language brings to the surface the *communicative* purposes of criminal trials. . . . [T]he trial is an important occasion for dramatic enactment, the symbolic representation of the community's most deeply held values. On the one hand, we desire the reassurance of safety and the satisfaction of revenge. . . . On the other hand, we require the reaffirmation of our individualist values, of the separateness and sanctity of every individual; these are the values expressed in the rights and restrictions, even the "technicalities," embedded in our criminal procedure. The criminal trial, as the most vivid and visible intersection of state and individual, simultaneously affirms the needs of both our collective and separate selves."<sup>12</sup>

In short, criminal trials are a form of civic theater that allows us to define who we are as a people, helps to educate all of us about that definition and provides us with an opportunity to foster our self-confidence in the fundamental morality of our society.<sup>13</sup>

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11. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983). In the same article, Arenella explains:

Criminal procedure can . . . attempt to justify the state's use of coercion by articulating fair process norms that place some substantive and procedural limits on the state's exercise [sic] of power.

Some of these fair process norms (e.g., compelling proof of guilt . . .) are valued in part because of their instrumental effect on the system's outcome. These process norms contribute to good results—the reliable conviction of the guilty and the exoneration of the innocent. . . . But, "in legal ordering man does not live by results alone." Criminal procedure also articulates fair process norms that have value independent of their "result-efficacy." . . . The content of these dignitary norms should reflect society's normative aspirations, embodied in its positive laws, customs, religions, and ideologies about the proper relationship between the individual and the state. Some of these fair process norms (e.g., grand jury review . . .) also promote political values like community participation . . . . Finally, some of these norms also reflect procedural values (e.g., procedural regularity . . .) that underlie society's conception of the rule of law.

*Id.* at 200-01 (footnotes omitted).

12. Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1140 (1982).

13. See also William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 17 (1990) ("[T]he ceremonial or dramatic elements of a trial . . . have caused trials to be compared to theatrical events . . . . The theater metaphor is legitimate, I think, because criminal trials are and are intended to be richly symbolic

In our view, the American criminal justice system seems to be teetering on the brink of completely losing the public's trust. In part, this loss of trust results because the public perceives the system to be administered in ways that are inimical to the "search for truth." In part, it is because the public sometimes deeply disagrees with the system's basic definitions of "justice" and "fairness." Either way, however, when criminal trials are viewed more as entertainment and lawyer make-work than as a just and fair "search for truth," then the system has failed in its symbolic, cathartic purpose.

We find the loss of trust in the criminal justice system especially unfortunate at this particular moment in our history, when our faith in, and the influence of, other institutions—such as our government, our schools, the family, churches and even the preeminent position of America in the world—have also recently declined. For example, in 1966, forty-two percent of Americans had a "great deal" of confidence in Congress, forty-one percent in the Executive Branch, fifty-five percent in major companies, and seventy-three percent in medicine. By contrast, in 1994, the figures were eight percent (Congress), twelve percent (the Executive Branch), nineteen percent (major companies), and twenty-three percent (medicine).<sup>14</sup> As Americans gradually lose confidence in these other institutions, they tend—notwithstanding widespread disdain for lawyers—to turn more quickly and frequently to "the law" to solve their problems. As John Updike has observed, we have become a nation in which "rights" take precedence over "duties."<sup>15</sup> We do not trust corporations to act responsibly toward the environment or to build safe products. Instead, we rely on laws that force them to act. We do not trust government agencies either, subjecting them to a variety of constraints, such as imposing school integration requirements on the states and freedom of information laws on all levels of government. We use laws to keep religion out of the

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and educational—that is part of their function in a society governed by the rule of law . . . ."); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 969 (1987) ("The determination of factual guilt or innocence is the overt function of a criminal trial . . . . Criminal trials also serve other purposes . . . . [T]he criminal trial's quality as ritual drama is vital to the denunciatory function of criminal justice.").

One commentator has even gone so far as to argue recently that "[t]he appearance of justice, accurate or not, may be more important than justice itself." David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786 (1993).

14. Robert J. Samuelson, *Great Expectations, The Good Life and Its Discontents*, NEWSWEEK, Jan. 8, 1996, at 24, 32.

15. John Updike, *The 50's: Each Man Was an Island*, NEWSWEEK, Jan. 3, 1994, at 36, 37.

schools, to limit television advertising, to make public accommodations accessible to disabled people and to ensure that women have access to abortion services. We even use laws as a primary method for settling disputes among neighbors, friends and family. It is hardly surprising that the United States today not only has more lawyers per capita than any other country, it also has nearly four times as many lawyers as it did forty years ago.<sup>16</sup>

Law (in the formal sense) has become the predominant external influence over how we conduct our affairs.<sup>17</sup> We have become, now more than ever, a nation of individuals, which, lacking a common ethnicity, religion and cultural heritage, relies on a formal system of laws to bind them together. The large supply of lawyers in this country did not just happen. It was a response to a demand for legal services.<sup>18</sup> We depend on lawyers to create and vindicate our strongly felt individual rights because we cannot be governed by a group ethic, as more homogeneous countries may be. It is thus critically important that Americans have faith in our legal system, for it is one of the few ties that allow us to remain a unified "country" rather than a collection of mutually hostile racial, ethnic, religious and economic groups.

Empirical research by E. Allan Lind and Tom R. Tyler has demonstrated that perceptions of fairness of the legal system can directly affect public compliance with laws, voting, protest conduct and

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16. There were approximately 222,000 lawyers in the United States in 1951. By 1991, that number had expanded to approximately 805,000. Compare DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 155 (1970) with DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 212 (1995). The number of lawyers per capita more than doubled during the same period. See BARBARA A. CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988 1 (1991).

17. For a detailed discussion of this point, see Craig Bradley, *The Rule of Law in an Unruly Age*, 71 IND. L.J. 949 (1996).

18. At least one noted critic of typical claims about American litigiousness, Marc Galanter, has pointed out that the increase in demand for legal services appears to be a worldwide phenomenon. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 80 (1983) ("The number of lawyers has been increasing everywhere—in many places at a faster rate than in the United States."). Even Galanter acknowledges, however, that the United States has long been, and continues to be, a world leader in the number of lawyers per capita. See *id.* at 80-81 ("America is a highly legalized society that relies on law and courts to do many things that other industrial democracies do differently. For a long time the United States has supported far higher numbers of lawyers per capita than nations with comparable economies. There is no reason to think American lawyers are less efficient than their counterparts elsewhere, although it appears they are due to the dispersal of wealth, the fragmentation of authority, the absence of traditional elites or other reasons. . . . However, the United States' lawyer total [sic] compare with those of others, we do have more lawyers and many lament this condition.") *id.* at app. (summarizing comparative statistics on lawyers per capita).

general participation in institutional activities.<sup>19</sup> As Fred W. Friendly has put it, "Law is nothing unless close behind it stands a warm living public opinion."<sup>20</sup>

On a self-interested level, if we lawyers do not act to put our own house in order, legislative bodies (often led by non-lawyer representatives) will likely do it for us in ways that will be damaging not only to the legal profession, but to the rights of individuals who have legitimate claims to vindicate.<sup>21</sup> In the tort law context, the Indiana legislature recently fired a salvo limiting *total* damages for medical malpractice to \$750,000, even if the plaintiff/victim was crippled for life and would face out-of-pocket medical expenses of much more than that amount over his or her lifetime.<sup>22</sup>

Some of the problems of the American criminal justice system are obvious, but largely uncorrectable by changes in the system itself. We are a nation with a crime rate vastly higher than other western democracies. As such, our criminal justice system is overburdened. We lack sufficient police to capture criminals, as well as lawyers and judges to try them and prisons to house them. Such fundamental social problems are primarily the responsibilities of the nation's legislative and executive bodies and are beyond the scope of this Article.

But there are things that can be done to better the public's perception of the criminal justice system, without simultaneously diminishing the system's ability to perform its truth-seeking function.

Much of the trouble with public perception stems from the fact that the criminal justice system of the 1990s has been designed exclusively by lawyers for lawyers. Law is a unique institution in that the rulemakers, the participants and the rule-enforcers are all lawyers. Laws and lawyers serve as major checks on the operation of other societal institutions, such as medicine, business and government. But lawyers, who frequently serve in legislatures, dominate legislative staffs and hold a virtual monopoly within the court system, make almost all of the rules that govern lawyers. Lawyers (that is, judges and

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19. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 211 (1988).

20. Fred W. Friendly, *On Judging the Judges*, in *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 70, 76 (National Center for State Courts, 1978).

21. V. Robert Payant, President of the National Judicial College, recently cautioned: "Lawyers, judges and the legal profession should take the lead in this [reform]. We are the people with the experience, knowledge and expertise. Anytime politics are added, there are dangers." Mark Curriden, *Jury Reform*, A.B.A. J., Nov. 1995, at 72, 73.

22. IND. CODE ANN. § 27-12-14-3 (Burns 1994).

bar disciplinary committees) are also responsible for enforcing those rules. Of course, lawyers are not completely unchecked. For example, as previously noted, legislatures sometimes impose rules that most lawyers oppose. But most of the time, the legal system—unlike hospitals, corporations and government agencies—is regulated by the same people who operate within that system; namely, lawyers.

This self-governance of the legal profession produces a predictable overemphasis on procedure (the way a particular decision gets made), often to the near-exclusion of substance (the outcome of that decision), in any discussion about reform of the legal system. Lawyers may differ (and often do) on what procedures are best, and even on how much “process” is “due” in any particular situation. But one thing that is common to lawyers—and not nearly as common in almost any other group in society—is a strong belief in the transcendent value of procedure. Indeed, we lawyers often behave as if we believe that procedure is even more important than substance.

Contributing to this overemphasis on procedure is the difficulty in evaluating the outcome of many of the decisions made within the legal system. As Richard Wasserstrom has noted,<sup>23</sup> when a doctor is deciding whether to perform surgery for cancer or rely on chemotherapy, at least the goal is clear: curing the patient. Similarly, we can usually test governmental or business decisions by their outcomes. If a new drug cures more people than it harms, or if a certain feature sells more cars, then the decision to implement those changes is good.<sup>24</sup> By contrast, if, as a result of evidentiary exclusion or effective cross-examination of a witness, a defendant is acquitted or a plaintiff wins a tort suit, is that result “good” or “bad”? We cannot easily tell. Even assuming that we can determine (by empirical research) the effect that a proposed legal reform would have on conviction rates, is the decision to implement that reform “good” or “bad”? Again, we cannot tell. So, unable to evaluate such results in a meaningful way, we strive to create a procedural system that we hope and believe will lead to “good” results. The trend in criminal justice over the last forty

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23. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 14-15 (1975).

24. Of course, it can often be hard to tell whether the outcome of a medical, business or governmental decision is “good” or “bad” when more than one value is at stake. For instance, a medical decision might help the patient survive, but with considerable pain and suffering. Or a business decision to change a car’s design might produce more sales, but with a greater risk of harm to consumers. Nevertheless, even in these cases, it is easy to evaluate the decision in terms of each particular value; the only hard part is balancing the competing values against each other.

years has been constantly to refine our procedures in a vain quest for consistently "good" results—the achievement of which cannot be easily known. In our view, we have succeeded in planting so many procedural trees that the sun of "justice" often can no longer shine through the forest.<sup>25</sup>

Our constitutional structure itself is also partly responsible for the overemphasis on procedure in lawyers' discussions about the criminal justice system. The U.S. Supreme Court under Chief Justice Earl Warren took an especially hard look at state criminal justice systems in the early 1960s and did not like what it saw—questionable police tactics and frequent mistreatment of minorities.<sup>26</sup> But the Court did not perceive its proper role to be simply to reverse individual state convictions because the prosecutor had withheld exculpatory information,<sup>27</sup> or because an accused had not been informed of the accused's constitutional rights before being questioned by the police.<sup>28</sup>

Instead, using the specific provisions of the Bill of Rights, the Court set out to ensure that the government followed proper procedures from the beginning to the end of every criminal case. Thus, numerous requirements were placed on police investigations and on trials, including, most significantly, the requirement that almost every criminal defendant have a lawyer.<sup>29</sup> This, the Court believed, would advance the dual goals of the criminal justice system—achieving a correct result in a proceeding that was fundamentally fair.

The Court was, in large measure, correct. No informed person would seriously claim that criminal trials today are less fair, or are less likely to produce a correct result, than in the 1950s.

However, whenever courts (as opposed to legislatures) undertake to create detailed bodies of rules—as the Warren Court did in the criminal procedure area during the 1960s—there are potential problems. Perhaps the biggest problem is what has been called the

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25. This reflects the broader trend in modern society, exemplified by government programs such as the "War on Poverty," to attempt to right all social wrongs. For a discussion of this phenomenon, see SAMUELSON, *supra* note 14.

26. For a discussion on these developments see CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

27. See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

28. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

29. See, e.g., *Scott v. Illinois*, 440 U.S. 367 (1979) (defendant has a constitutional right to a lawyer in every case in which imprisonment is imposed). In order to help ensure that state trials would be conducted according to the newly required federal procedures, the Court also expanded the jurisdiction of the federal courts to review state convictions. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963) (expanding federal habeas jurisdiction).

"Uncertainty Principle."<sup>30</sup> This principle holds that new rules created by courts tend to engender more uncertainty than they resolve. This is because courts are constrained to promulgate new rules through the traditional common law method of deciding individual cases on their unique facts. The common law method is not forward-looking, but instead relies on the application and extension of prior judicial holdings to new facts. A narrow rule based on the facts of one case will not suit the next case and will have to be expanded or contracted or distinguished, depending on the inclination of the court in the later case.<sup>31</sup> Unless the later case is strictly limited to answering an unresolved question from the first case, without trying to limit or expand the first holding (which, in the Supreme Court, it rarely is), the two cases together will raise new issues about the meaning of the first case that were not previously apparent. Each of these new uncertainties will give rise to new arguments as to how the rule should be construed in subsequent cases, etc.

In contrast, legislatively created rules, which are unhindered, both in their inception and in their amendment, by *stare decisis*, and which are not limited to resolving present "cases or controversies," can often reduce uncertainty.<sup>32</sup> To the extent that legislative rules anticipate future cases in advance, and establish clear rules for handling such cases, they can reduce the volume of litigation. To be sure, such rules are not themselves free from gray areas and poor fits in unanticipated cases, but they are less prone to such problems than court-made rules.

We believe that codified rules governing *police* investigations would give vastly better guidance than a series of thirty- to forty-page Supreme Court decisions declared over a period of some thirty-five years, complete with concurring and dissenting opinions. This better

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30. BRADLEY, *supra* note 26, at 62-83. Originally published as *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1.

31. Other problems with Court-made rules, such as the way they are affected by *stare decisis*, are set forth in BRADLEY, *id.*

32. This observation is also true, of course, for judicial rules created in a manner resembling legislative rules. Perhaps the best example of such a "forward-looking," "bright-line" judicial rule is the one created by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Although there is still considerable litigation about the scope and application of *Miranda*, there is undoubtedly less than would have resulted from a continuation of the case-by-case "voluntariness" approach of the pre-*Miranda* era.

guidance would in turn make both the police and the citizenry more confident about distinguishing proper from improper behavior.<sup>33</sup>

Detailed rules governing *trial procedure* are a different matter. Unlike police investigations, trials are conducted by a neutral party, the judge, whose job it is to ensure fairness and just results. While inequities certainly occur at trials every day, in our view the cost of trying to eliminate these inequities by detailed rules has rendered trials so complex that, not only has the search for truth been compromised, but the very fairness that was the goal of these procedural rules has been somewhat diminished in actuality, and greatly compromised in public perception.

To cite but one example, there is no doubt that peremptory challenges were unfairly used to exclude qualified jurors because of their race.<sup>34</sup> This led the Supreme Court to hold, in *Batson v. Kentucky*,<sup>35</sup> that if a trial judge concluded that a prosecutor might be using peremptories for this purpose, the prosecutor could be required to offer a race-neutral explanation for his challenges.

To ensure fairness, the Court later extended this rule to peremptory challenges by criminal defendants<sup>36</sup> and then to civil litigants as well.<sup>37</sup> To ensure more fairness, the rule was extended to challenges of jurors based on gender.<sup>38</sup> Other courts have struggled with whether to extend the rule to challenges arguably based on other characteristics of prospective jurors.<sup>39</sup> The result of all this procedural "fairness" is a trial within the trial, which may extend the process of choosing the jury for days, and which has no direct bearing on the

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33. However, as discussed in text accompanying notes 69-73, *infra*, we would temper this increased and more detailed rulemaking with a discretionary exclusionary rule that would avoid the most unpopular (and, to many, illogical) aspect of the current system. That is, the fact that crucial evidence is suppressed where the police rule violation was minor, or even impossible to avoid. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966), where a voluntarily confessed rapist had his conviction reversed because the police had not given him a series of warnings that were not required until the *Miranda* case itself.

34. Indeed, the unfairness that inheres in peremptory challenges, as well as their tendency to prolong the *voir dire*, has led us to urge their abandonment. *See* text accompanying notes 51-53, *infra*.

35. 476 U.S. 79 (1986).

36. *McCollum v. Georgia*, 505 U.S. 42 (1992).

37. *Edmonson v. Leesville Optical Co.*, 500 U.S. 614 (1992).

38. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

39. *See, e.g.*, *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988) (*Batson* rule applies to exclusion of Italian-Americans); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (rejecting, in split decision, extension of *Batson* rule to exclusion based on religion); *State v. Everett*, 472 N.W.2d 864 (Minn. 1991) (rejecting extension of *Batson* rule to exclusion based on age).

reason for the trial in the first place—to determine the defendant's guilt.<sup>40</sup>

Trials have become showplaces of "fair procedures," which means that they have become places where lawyers can display their artistry. Thus, we have lengthy attorney-conducted voir dres, numerous legal objections to admission of evidence, largely unlimited time allotted to lawyers to conduct direct and cross-examinations of witnesses and extended opening and closing arguments. The public, less enamored of impressive lawyering (that is, aggressive use of procedures) and more interested in the achievement of a just and fair result (that is, substance—whether that result happens to be guilt or innocence), is understandably disturbed and this bodes ill for the system's future. We think that now that trial courts have become much better educated as to what constitutes a "fair trial," we might be better served by removing those procedural constraints that are seen by the public more as "affirmative action for lawyers" than as advancing the system's true goals.

To summarize, the criminal trial must advance the "search for truth," but it must also satisfy society that it is a "just and fair" trial. The presence of television in the courtroom, as in the O.J. Simpson case, often serves to expose irrationalities in the system to public view and criticism. Much of what the public finds most objectionable about the system falls within the general category of procedural rules that the public, correctly, does not see as either part of the "search for truth" or essential to a fair trial.

The legal profession's standard response to this problem, which has surfaced again since the O.J. Simpson trial, is to say that the American public just doesn't understand the realities of the criminal trial and the importance of all of the procedures that have been created (mostly since the 1960s) to safeguard the Bill of Rights.<sup>41</sup> We

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40. We recognize that, especially in the situation dealt with by *Batson* itself, excluding all or most jurors of the defendant's own race from the jury may well lead to an unjust result and will certainly lead to a trial that appears unfair. We would solve this problem by eliminating not only peremptory challenges, but attorney conducted voir dire altogether.

41. For instance, Alan Dershowitz, one of O.J. Simpson's lawyers and a famous law professor, was asked by CNN why 82% of Americans surveyed in a CNN/USA Today poll believed that the Simpson verdict showed that the criminal justice system had "broken down." His reply: Well, it's mostly because of ignorance. I think that any American who really wants to appreciate the American criminal justice system should travel abroad and see that our system really is the envy of the world. It's not broken. It needs some minor repair but on balance I would say about the American criminal justice system what Winston Churchill once said about democracy, it may be the worst possible system except for all the others.

believe that this response, while understandable (and at least partially correct), is inadequate. We prefer the forthright approach suggested recently by Merrill Astin Tarlton, Chair of the "Beyond the Breaking Point" Task Force for the Law Practice Management Section of the A.B.A.: "It is time, as a result of . . . a public process, that [w]e restructure America's justice system to focus again on justice—not entertainment, not bureaucracy, not the selling of dispensation, not the process at the expense of the solution, not the law—justice."<sup>42</sup>

We certainly do not contend that the criminal justice system should be altered to fit the changing day-to-day tastes of the American public. Such tastes (as might be expressed in public opinion polls or on television talk shows) are far too fickle and susceptible to influence by demagogues and media sensationalists. Rather, what we must strive to restore to the criminal justice system is its connection with the most deeply held values of American society—the shared conventions about fairness and justice by which most of us lead our daily lives.<sup>43</sup>

There follows a brief discussion of some specific aspects of the criminal justice system that are not essential to, and often are in direct conflict with, the search for truth while at the same time not substantially advancing the overarching goal of just and fair trials. In our view, the negative public image of the criminal justice system is based in part on the fact that the public correctly perceives that many such practices occur. In other words, if trials came closer to achieving the due process ideal, rather than providing a forum for lawyers to demonstrate their skills, "public perception" would take care of itself.

We emphasize that these brief suggestions are intended as starting points for discussion, not as final prescriptions for reform. But we

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*The Late Edition: The O.J. Simpson Trial and the Justice System*, (CNN television broadcast, Oct. 1, 1995).

42. Merrilyn A. Tarlton, in *Is the Legal Profession on the Trash Heap?*, *BUS. & SOC'Y REV.*, June 22, 1995, at 14.

43. For most of our nation's history, the Supreme Court tested state criminal trial procedures against a single constitutional benchmark that was largely based—in theory, if not always in practice—on such societal conventions. The due process standard of "fundamental fairness," applied case by case, looked to the "immutable principles of justice as conceived by a civilized society," see *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J., concurring), and principles that were "fundamental to the American scheme of justice," see *Duncan v. Louisiana*, 391 U.S. 145 (1968). This relationship between society's shared norms and values and the Court's constitutional criminal procedure jurisprudence, however, has gradually weakened. Since the heyday of incorporation, criminal procedure law has been cast adrift from its societal moorings, becoming more and more a set of technical legal doctrines crafted by and for lawyers.

urge that in considering reform of the criminal trial, the concept of fundamental societal consensus be returned to its proper place at the center of the analysis.

## I. DISCOVERY

In recent years there has been a movement in some states toward opening up pretrial discovery on both sides.<sup>44</sup> This action is good but should become much more widespread. Since the public rightly believes that the criminal trial is supposed to be primarily a "search for truth" rather than a "sporting event,"<sup>45</sup> every reasonable effort to make relevant information available to both sides should be undertaken.<sup>46</sup>

In particular, we can see no good reason to resist adopting an "open file" policy under which each side would presumptively enjoy access to the other side's case files. For example, in the English criminal justice system the prosecution must turn over any materials bearing on the case (whether or not it will be used at trial), any witness statements or summaries of the facts, a witness list (complete with names and addresses) of all persons believed to have material evidence (whether or not they will be called at trial) and impeachment evidence on anticipated prosecution witnesses.<sup>47</sup> There are longstanding concerns about subjecting crime victims to threats from defendants who find out their identity in discovery, but these concerns can be dealt with in the context of a presumption that all evidence is discoverable absent a showing by the prosecution of a "paramount interest in nondisclosure," as is the law in Indiana.<sup>48</sup> Similarly, it does not seem an undue burden on a defendant's right against self-incrimination to require the defendant to be similarly forthcoming.<sup>49</sup>

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44. See Brennan, *supra* note 13, at 10-11. For a detailed discussion of discovery by both prosecution and defense, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §§ 19.3-19.4 (1984).

45. *But see* Babcock, *supra* note 12, at 1135-36 (arguing that the "metaphor of the sporting event . . . aids one's understanding of the requirements of the adversary system.").

46. Justice Brennan was long a proponent of this view. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279; Brennan, *supra* note 13.

47. See Brennan, *supra* note 13, at 15-16. See generally ARCHBOLD, *PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES* 328-33 (Stephen Mitchell, P.J. Richardson & John H. Buzzard eds., 1985).

48. *Bernard v. State*, 230 N.E.2d 536, 540 (Ind. 1967).

49. See *Williams v. Florida*, 399 U.S. 78 (1970) (upholding that state's alibi notice law). Federal Rules of Criminal Procedure 12.1 is similar. However, these notice provisions can only

## II. JURY SELECTION

The choosing of the jury presents perhaps the most egregious example of the adversary system run amok. Lawyers are allowed to use peremptory challenges to exclude apparently competent and reasonable jurors—who have already been determined to be free of bias under the Sixth Amendment—because a psychological profile prepared by a jury consultant suggests that another juror in the venire would be more likely to be biased *in favor of* their client. The lawyers exclude jurors for this reason (assuming the client can afford it) because they feel bound to do everything possible, not to ensure a fair trial, but to achieve a favorable result for their client. In the end, if the lawyers for both sides do their jobs well, then the selected jurors turn out to be no more fair than the first twelve qualified and unbiased people who walk in the door; if both sides do not, however, then either the prosecution or the defense obtains a jury skewed in their favor. The system—of the lawyers, by the lawyers, and for the lawyers—not only allows, but seems to encourage such tactics. As in any war, if one side gets a new weapon, the other side wants it too. Consequently, in cases like the O.J. Simpson case, both sides use jury consultants, leading to an excruciatingly prolonged process of jury selection.

A system that is more just, both in appearance and in reality, would drastically curtail this process. Voir dire should be conducted primarily by the judge and limited to very few questions designed to ferret out bias among prospective jurors.<sup>50</sup> Peremptory challenges, which readily lend themselves to abuse based on racial<sup>51</sup> or gender discrimination,<sup>52</sup> as well as pure arbitrariness, should be abolished.<sup>53</sup>

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be triggered by a prosecutorial request, rather than being a necessary part of the discovery process. As a result, it was the policy in the U.S. Attorney's Office in Washington D.C. when I worked there never to use this provision and thus avoid its requirement of reciprocal discovery. (C.B.).

50. Currently, FED. R. CRIM. P. 24(a) provides that the judge *may* conduct voir dire. This should be mandatory.

51. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992).

52. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

53. Several prominent judges and academic commentators have previously proposed abolishing peremptory challenges. See, e.g., *Batson*, 476 U.S. at 107-08 (Marshall, J., concurring); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199-211 (1989); Akhil R. Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1287-89 (1984).

Our approach, emphasizing the viewpoint of the average citizen, likely would not support the more ambitious proposal made by some commentators to select juries (at least in some cases) in a manner consciously designed to achieve racial balance. See, e.g., Sheri Lynn Johnson,

Juror questionnaires, which are the “meat and potatoes” of jury consultants, should be prohibited.<sup>54</sup> These changes (which for the most part have been implemented without apparent difficulty in England<sup>55</sup>) would largely eliminate jury consultants from the jury selection process,<sup>56</sup> speed up the trial and help convince jurors and spectators alike that the system is designed to choose an impartial jury, rather than a jury whose impartiality, if it exists, is merely a side-effect of lawyer combat.<sup>57</sup>

Streamlining jury selection would go a long way toward making criminal trials more efficient. If trials were more efficient, we would have the resources to try more cases and engage less often in the cynical and destructive process of plea bargaining, whereby the defendant gives up the constitutional right to a trial and pleads guilty to a lesser crime than he actually committed.<sup>58</sup>

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*Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1695-1700 (1985). Johnson's proposal would likely be seen as an example of the same kind of lawyerly procedural rule that the non-lawyer public generally finds undesirable. *But see* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994) (pointing out that empirical evidence is sparse and unclear, and suggesting further research to determine whether race-conscious jury selection might increase, rather than undermine, public confidence in the jury system).

54. Once voir dire is given over primarily to the judge, and peremptory challenges are abolished, there would seem to be no remaining need for juror questionnaires. Their prohibition would also help to address growing concerns about the privacy rights of those who are called for jury duty. *See* Nancy J. King, *Nameless Justice: The Case for More Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996); Mark Curriden, *Now Jurors May Have a Right to Remain Silent*, A.B.A. J., Nov. 1995, at 74, 75 (describing Texas prospective juror who was ordered jailed after refusing to answer 12 out of 110 questions on juror questionnaire on the ground that she considered it “intrusive” and “violative of her privacy”; the objectionable questions related to her family income, religious and political affiliations, and television viewing habits).

55. *See* Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. INT'L L.J. 287, 304-08 (1988) (describing in general the English jury selection process). Under the English system, lawyers are not permitted to question jurors prior to their selection, *id.* at 306, and the peremptory challenge was abolished by statute in 1988, *id.* at 308. However, the 1988 statute did not abolish a related procedure called “standby,” under which a prospective juror can be asked by the prosecution to wait until there are no more jurors available before the prosecution must identify the reason for the challenge. *Id.* at 306.

56. Some jury consultants admit that they may be more useful in helping lawyers prepare their litigation strategies for trial than in helping to select juries. *See* Maura Dolan, *Role of Jury Consultants Controversial and Extensive*, L.A. TIMES, Sept. 26, 1994, at A1, A18.

57. This proposal is discussed in more detail in Craig M. Bradley, *Reforming the Criminal Trial*, 68 IND. L.J. 659 (1993).

58. These, and other ways to make the trial more efficient, are discussed in *Id.* at 659-64.

## III. THE RIGHT TO SILENCE

The constitutional privilege against self-incrimination, enshrined in the Fifth Amendment, is one of our fundamental rights and a bastion against an inquisitorial system of criminal justice. Very few Americans would want to live in a society where an accused person would have to choose between taking the stand and admitting guilt, lying and thereby facing a perjury charge or going to jail for contempt of court.<sup>59</sup> Yet neither the language of the Fifth Amendment<sup>60</sup> nor the common-sense views of average Americans dictate that a defendant who declines to take the stand (like O.J. Simpson) must be completely protected against all negative effects that might flow from a decision to remain silent in the face of criminal charges. Although a federal statute has long prohibited any comment on a defendant's decision not to take the stand in the defendant's own defense, it was not until 1965, in *Griffin v. California*,<sup>61</sup> that the Supreme Court held that such comment was proscribed by the "spirit" of the Fifth Amendment. The Court's decision explicitly acknowledged, but ultimately purported not to be influenced by, the rather obvious fact that "the inference of guilt for failure to testify is in any event natural and irresistible. . . ."<sup>62</sup>

One of the authors of this Article has previously argued against overruling *Griffin* and allowing comment on a defendant's silence at trial.<sup>63</sup> We agree with most average Americans that it is generally desirable to encourage defendants to testify, and that a defendant's silence is often probative evidence of the defendant's guilt. The problem is that as long as the main reason for a defendant not testifying is the fear of impeachment with what would otherwise be inadmissible prior convictions, it is inappropriate for the prosecutor to claim

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59. This "cruel trilemma" was recognized by the U.S. Supreme Court in *Murphy v. Waterfront Comm'r of New York Harbor*, 378 U.S. 52, 55 (1964). See generally Louis M. Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149 (1990) (exploring the promise and limits of a consequentialist approach, focusing on the process by which ends are determined and the means by which ends are achieved in relation to the Fifth Amendment right against self-incrimination); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988) (exploring excuse-principles and self-protection against perjury under the Fifth Amendment right to be free from self-incrimination).

60. The Fifth Amendment provides that no person shall be "compelled . . . to be a witness against himself." U.S. CONST. amend. V, § 1.

61. 380 U.S. 609, 613 (1965).

62. *Id.* at 614.

63. See Craig M. Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH. L. REV. 1290 (1981).

(or the jury to infer) that the defendant did not testify because of guilt.

The tough issue we must confront is whether it is simply too prejudicial, as a general matter, to admit a defendant's prior convictions against the defendant. When an armed robbery defendant has three previous armed robbery convictions, such previous convictions *do* tend to make most people believe (and rightly so as a matter of statistical probability) that it is more likely that the defendant committed the crime in question. Yet it also seems unfair for someone who may now be a totally rehabilitated, productive, law-abiding member of society to be subject to a permanently increased risk of criminal conviction because of a crime committed in the past.

No matter how we decide to strike the balance concerning admissibility of prior convictions, we believe that the current system, under which the fear of impeachment discourages defendants from testifying, is flawed. We should either forbid prosecutorial use of prior convictions at trial<sup>64</sup> or allow such use *whether or not the defendant testifies*.<sup>65</sup> If the defendant were thus unfettered in the decision whether to testify, it would then be appropriate for the prosecutor to comment adversely on (and the jury to draw inferences from) the defendant's silence, unless the defendant were able to satisfy the court that such silence was justified by some exceptional circumstance (such as where the defendant's physical or mental condition might make it difficult for the defendant to testify in a credible manner).

As with discovery and jury selection, England has recently reformed its criminal justice system with respect to the right to silence.<sup>66</sup> Under a 1994 statute, a defendant's silence—either during police questioning or at trial—can provoke negative comment by the prosecutor and support an inference of guilt.<sup>67</sup> The English judge, however, retains discretion to absolve the defendant from the duty to testify if

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64. This should be subject to the narrow exceptions currently in place, such as where prior acts show motive or a common scheme.

65. Included in this decision would be such subissues as whether certain kinds of prior convictions should be treated differently (because of their unusually prejudicial impact) from other kinds of prior convictions, and what relationship—if any—should be required between the prior convictions and the current crime before admissibility would be warranted.

66. See Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994).

67. Criminal Justice and Public Order Act 1994 §§ 34-35, in 3 CURRENT LAW STATUTES 1994 at 33-42 to 33-46 (1995).

the judge is persuaded that the defendant has a good reason for remaining silent.<sup>68</sup> Although the current English system is not quite what we would propose, given its failure to address the tough issue of admitting prior convictions, these recent English reforms support our overall conclusion that the *Griffin* rule is not necessarily an inherent component of a "just and fair" trial.

#### IV. EVIDENTIARY ADMISSIBILITY

##### A. THE EXCLUSIONARY RULE

The exclusion of relevant evidence because of police misbehavior in obtaining it is another feature of the criminal trial that is unfathomable to the public because it is often inconsistent with the "search for truth." As we lawyers know, exclusion does advance another important goal: deterrence of police misconduct, which most people would support.<sup>69</sup> But to the extent that police failure to obey the rules is a result of the "rules" being unclear or even undeclared, the public is justifiably outraged.<sup>70</sup> For example, even civil libertarians must have been a little unsettled when the Supreme Court reversed the conviction of (voluntarily) confessed rapist Ernesto Miranda because the police failed to give him a series of warnings that were not required until the Court wrote its famous opinion in his case.<sup>71</sup>

A more limited exclusionary principle under which the trial judge weighs, case by case, the gravity of the police misdeed and the cost to

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68. *Id.* at § 35(5)(b).

69. Cf. Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994) (advocating use of pretrial juries, or parallel civil juries, to resolve Fourth Amendment legal issues). Bacigal bases his argument (at least in part) on the idea that "[p]lacing search-and-seizure law within the exclusive domain of the judiciary gives rise to the cynical, but accurate, observation that in 'legal interpretation there is only one school and attendance is mandatory.'" *Id.* at 428. Bacigal's proposal, on the other hand, would "serve a democratic function by testing various policies and practices of the government against the community's political-moral directives." *Id.* at 430. "Under my proposed model . . . the legal dialogue over liberty and security in society need not be closed off *ipse dixit* with the latest Supreme Court decision. Instead, . . . judges, legislators, and administrators . . . could benefit from a systematic accounting of juries' perceptions of reasonable searches and seizures." *Id.* at 428; see also Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (suggesting replacing Fourth Amendment exclusionary rule with damages awarded by civil juries).

Although we do not necessarily agree with Bacigal's specific proposals, we share his fundamental belief that the views of "the people" should be given greater weight in "legal dialogue." In our opinion, this should be so not only in Fourth Amendment law, but throughout the general realm of criminal procedure law.

70. The need for clearer and more comprehensive rules of criminal procedure is the theme of BRADLEY, *supra* note 26.

71. *Id.* at 28-30 (discussing the public outcry surrounding the *Miranda* decision).

the system of using tainted evidence against the cost of exclusion, would likely find more public support. The current "automatic exclusion" system sometimes lets the guilty go free due to excusable police misdeeds. At other times it leads courts, trying to avoid exclusion, to claim that no constitutional violation existed when a seventh grader could see that, by the rules under which the police operated, a clear violation had occurred. In Western Europe, Canada and Australia, the mandatory exclusionary rule is eschewed and a more flexible discretionary rule is employed instead.<sup>72</sup> We should perhaps follow their lead.

## B. KEEPING OTHER EVIDENCE FROM THE JURY

Despite the fact that much time is lavished on choosing the jury, and much ink is devoted to exalting that body as a mighty bastion of liberty, lawyers often do not trust jurors.<sup>73</sup> Consequently, elaborate rules have been devised to keep relevant evidence from the jury on the ground that it might be too prejudicial.

The hearsay rule, with its multiple, hypertechnical exceptions, exemplifies this complexity. If we trust jurors, then we should generally let them hear such evidence while reminding them that it may be less reliable than other evidence. Presumably, it was belief in the common sense of the jury that partly led us to use it in the first place. It is not worth the time, confusion and loss of juror and public goodwill to have lawyers constantly holding bench conferences to debate technical evidentiary issues while the jury cools its heels<sup>74</sup> or to

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72. *Id.* at 95-143.

73. Laura Gaston Dooley has recently written a provocative essay in which she argues that modern "cultural ambivalence" about the jury may be a reflection of fundamental power struggles between a privileged, mostly white, mostly male-dominated class of lawyers and judges and a more democratic, multi-gendered, multi-ethnic class of jurors. She notes that the jury has been increasingly "marginalized" by "language that frames it as feminine." Laura G. Dooley, *Our Juries, Ourselves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995). She argues that we should consider restoring much of the jury's historic power (which has been stripped in recent years) to receive information and to participate actively in the trial. Although her essay addresses primarily juries in civil cases, we can find many parallels in the criminal context. See *id.* at 327-28.

74. A former Chief Justice of the Michigan Supreme Court has proposed a novel solution to this particular problem: Let the entire criminal trial take place without the jury present, and preserve it on videotape, so that admissibility rulings can be made by the trial judge (and even appealed by the parties, if necessary) without fear of either tainting or boring the jury. Then, when all sides have exhausted their arguments about what should be on the videotape, select a jury and let them decide the case based on the videotape. See Thomas E. Brennan, *Video Justice*, DALLAS MORNING NEWS, June 11, 1995, at 1J.

reverse convictions due to errors on evidentiary matters.<sup>75</sup> A system that leaves jurors feeling that they have not been able to find out enough information to render a just verdict on all the evidence fails to instill public confidence in that system.

If we do not trust the jury any more, then let us abolish the jury system<sup>76</sup> and go to the Continental model. In this system, the trial is conducted largely by the judge (though lawyers can also question witnesses and make arguments), and guilt is decided by a mixed panel of judges and lay persons. This panel has access to *all* of the evidence, but must justify its result in a detailed written judgment from which, for example, improperly used evidence must be excluded.<sup>77</sup> In our view, it would be better to have shorter, "summary" trials for all defendants than to have full-blown trials that are so procedurally constrained and time-consuming that they can be afforded only to a small minority of defendants.<sup>78</sup>

## V. THE PRESENTATION OF EVIDENCE

### A. THE USE OF EXPERT WITNESSES

Another prime example of the excesses of the adversarial system is the treatment of expert witnesses. An expert should be a neutral witness paid by the court to provide independent advice. Instead, our experts are scientific paladins who gallop toward each other from the

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75. For example, in the recent case of *Williamson v. United States*, 114 S. Ct. 2431 (1994), the U.S. Supreme Court vacated the defendant's conviction because a nontestifying co-felon's hearsay statement, which was largely a statement against the declarant's penal interest and hence admissible under FED. R. EVID. 804(b)(3), could not be used against the defendant insofar as it tended to cast blame on him. However, the Court could not muster a majority for the entire opinion. The mere fact that there *is* a Rule 804(b)(3), with the complexity and prolixity that that number suggests, ought to signal to reasonable people that something may be amiss.

76. Moving the states to the Continental model would not require a constitutional amendment, but simply the reversal of the U.S. Supreme Court decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). At the least, we should consider abandoning jury trials for misdemeanor cases. Currently, *Baldwin v. New York*, 399 U.S. 66 (1970), requires jury trials if imprisonment for six months or more is authorized, even if the defendant is not actually to be imprisoned at all.

Among the civilized, democratic countries that have eliminated jury trials in criminal cases are India and Japan. See Laura Mansneras, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, § 1 (National Report), at 9. Even in Britain, from whence our love for the jury system sprang, "only 1% of civil trials and 5% of criminal trials are heard by juries." *Id.*

77. See Bradley, *supra* note 57, at 659, and sources cited therein.

78. Summary non-jury trials, based on defense waivers of the right to trial by jury, have been a common practice in Philadelphia and Pittsburgh, and at least one commentator has argued that such a system has numerous advantages over one that places heavy reliance on plea-bargaining. See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

extreme ends of their discipline to see who will prevail in combat. As John Langbein has observed:

The European jurist who visits the United States . . . expresses amazement . . . bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests. In the German system, experts are not even called as witnesses. They are thought of as "judges aides."<sup>79</sup>

By comparison, American experts are chosen and paid by the opposing parties. Of course, these "experts" will be hired only if it is anticipated that they will be partisan and, as Langbein points out from his own experience as an expert witness, the pressure to be biased toward your "side" is powerful. "The more measured and impartial an expert is, the less likely he is to be used by either side."<sup>80</sup> Such "trial by combat" of expert witnesses, where one insists that gray is white and the other that it is black, may possibly end up with a just result, but we are skeptical, and so are many who study jury behavior.<sup>81</sup> The system definitely does not enhance public faith in the process. Nor, for that matter, does it do much good for the public perception of those professions (such as psychology or even medicine in general) from which expert witnesses are commonly drawn.

## B. THE ROLE OF THE TRIAL JUDGE

Another aspect of evidence presentation which the Europeans may have found a better way of dealing with is the direct examination of witnesses. In Germany, for example, it is the trial judge who generally serves as the "examiner-in-chief," conducting the direct examination.<sup>82</sup> The lawyer for whose side the witness is testifying may ask

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79. John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985). Although Langbein was discussing civil trials, the Continental approach to criminal cases is similar. Moreover, although Langbein acknowledged the differences between criminal and civil litigation, including the desire to "over-protect" defendants in criminal cases, he also noted his own disagreement with the proposition that "adversary procedure is a particularly effective way to implement our concern for safeguard in the criminal process." See *id.* at 842-43 & n.70.

80. *Id.* at 835.

81. See, for example, the comments of Thomas Munsterman, Director of the Center for Jury Studies at the National Center for State Courts, discussing the results of jury exit questionnaires: "If there is one expert who says yes and another expert that says no, the jurors basically tune out the experts. They say, if these two learned people, both being recognized by this court as experts, can't agree, what are we to do? Maybe we'll just base it on something else." Barbara Bradley, *DNA: 'Blood Evidence'*, WASH. TIMES, Apr. 24, 1995, § Insight, at 9.

82. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 62 (1977).

questions only after the judge has concluded.<sup>83</sup> Adopting some variant of this approach in the United States would largely eliminate the opportunity for lawyers to try to "coach" or "steer" their witnesses on the stand and would also reduce the number of evidentiary objections and the risk of repetitious questioning.

In general, the trial judge is an under-utilized resource whose role currently is largely limited to "refereeing" the attorneys. If the trial judge were more active, both in ensuring that the jury hears the full story and in limiting "sporting contest" behavior by attorneys, the criminal trial would be greatly improved.

### C. THE ROLE OF THE JURY

Arizona has recently adopted a set of innovative rules designed to improve the jury's understanding and retention of the evidence presented to it. These new rules will, among other things, allow jurors to ask questions of the witnesses (by submitting them in writing to the judge who will screen them and, if they are not improper, pose them to the witnesses), take notes, discuss the evidence among themselves during the trial and engage in dialogue with the judge during deliberations should they feel the need for further instructions or even arguments from the lawyers.<sup>84</sup> We applaud such experiments, which are consistent not only with the public's view of how trials should be conducted, but also with empirical evidence about effective jury decision-making.<sup>85</sup>

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83. This would not be barred by *Ferguson v. Georgia*, 365 U.S. 570 (1961), which recognizes the right of the defendant to be examined directly (but not necessarily exclusively) by the defendant's own lawyer.

84. See Curriden, *supra* note 21, at 75-76.

85. See *id.* at 76 (quoting Arizona Supreme Court Chief Justice Stanley Feldman: "While many of these things sound radical, they are not based on mere intuition. They are based on the latest studies of how people digest information.").

University of Delaware Professor Valerie Hans, a noted jury expert and author of *Judging the Jury*, has explained the current situation this way:

I say to my students, "Okay, imagine you have to take a midterm exam. . . . You have to sit there for several months. You are not allowed to take notes. You cannot ask any questions if you are confused—you have to allow other people to ask questions for you, and of course they may not ask the ones you were concerned about. . . ." It really brings it home to them how antiquated this system is.

Barbara Bradley, *Juries and Justice: Is the System Obsolete?*, WASH. TIMES, Apr. 24, 1995, § Insight, at 6.

## VI. PLEA-BARGAINING

Perhaps the least popular facet of the criminal justice system in the eyes of the American public is the widespread practice of plea-bargaining. Approved (in general) by the U.S. Supreme Court in 1978,<sup>86</sup> plea-bargaining is common in nearly all American jurisdictions. Plea-bargaining is widespread for a variety of reasons, including (in some jurisdictions) caseload pressure, the need to "settle" weak or tainted cases and the desire to agree on a "proper" sentence that might differ from the one that would likely be imposed after a full-blown trial.<sup>87</sup> But the public perceives plea bargaining to be nothing more than a rank sell-out, an exchange of richly deserved prison time for a few dollars (and hours) saved by the prosecution. The public gets so upset by this practice that some prosecutors have adopted policies against it,<sup>88</sup> and in California a constitutional amendment was passed to ban it.<sup>89</sup>

If criminal trials were made less elaborate and costly (as in some of the ways we have already suggested) it might be possible to eliminate plea-bargaining completely (at least to the extent it is motivated by economic considerations).<sup>90</sup> Failing this challenge, we make the following alternative suggestion: We should try to separate the legitimate purposes of plea-bargaining from the illegitimate purposes. If

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86. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

87. For the definitive empirical study of plea-bargaining and the motivations of prosecutors, defense attorneys, and judges for engaging in it, see MILTON HEUMANN, *PLEA BARGAINING* (1977).

88. See, e.g., Michael L. Rubenstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 *JUDICATURE* 266 (1978-79).

89. The constitutional amendment, Proposition 8 (otherwise known as the "Victim's Bill of Rights"), was approved on June 8, 1982. See CAL. CONST. art I, § 28 (1982); CAL. PENAL CODE § 1192.7 (West Supp. 1996); CAL. WELF. & INST. CODE § 1732.5 (West Supp. 1996). Perhaps unsurprisingly, Proposition 8 did not have the desired effect of eliminating plea-bargaining in California. This is because the measure, which purported to ban plea-bargaining in all serious felonies, applied only while those felony cases were pending in superior court, and not during the initial period when most felony charges were filed in municipal court. Candace McCoy, in an extensive study of proposition 8, concluded that this loophole permitted prosecutors and defense attorneys to adapt by conducting plea-bargaining before serious felony cases were transferred to superior court. See CANDACE MCCOY, *POLITICS AND PLEA BARGAINING: VICTIM'S RIGHTS IN CALIFORNIA* 37-38 (1993); Jeff Brown, *Politics and Plea Bargaining: Victim's Rights in California*, 45 *HASTINGS L.J.* 697, 699-701 (1994) (book review).

90. In 1983 Albert Alschuler concluded that three-day jury trials could be provided for all felony defendants for no more than \$850 million more than is presently spent on the criminal justice system. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931, 936, 948 (1983).

caseload pressure is a problem in a jurisdiction, or the prosecutor simply wants to offer defendants an incentive to avoid costly trials, then we should create (by statute if necessary) a standardized schedule of sentencing "discounts" available to all defendants who are willing to plead guilty to the original charges filed against them. This method will not only help satisfy the general public (who, as taxpayers, will readily appreciate the concept of the "discount"), but will also help explain the apparently disparate treatment of otherwise similarly situated defendants. On the other hand, where the motivation for plea-bargaining is to settle weak cases, then the prosecutor should not be encouraged to engage in such plea-bargaining. The same should hold true for the desire to avoid overly punitive sentences that might be imposed after a full-blown trial. These motivations should be viewed as illegitimate bases for plea-bargaining. A prosecutor should be required to file whatever charges he or she believes the defendant merits at the outset, and should not be allowed to "negotiate" a drop in those charges or a discretionary reduction in the defendant's sentence.<sup>91</sup>

## VII. VICTIM IMPACT TESTIMONY AT SENTENCING

One of the most popular tenets of the modern "victims' rights movement" has been the right of victims (or their survivors) to make statements at sentencing about the impact the crime has made on their lives. The offered justifications for such a right include the victims' ability to bring out facts that might otherwise go unnoticed, their desire to influence the sentence imposed and their emotional need to confront the convicted defendant and to express their anger and moral indignation in open court. So long as these so-called "victim impact statements" are not given undue weight by the sentencer (who, in non-capital cases, is usually the judge), we see no reason why victims should not be allowed to exercise this right.<sup>92</sup> Perhaps some victims will choose to remain silent and get on with rebuilding their lives,

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91. See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 211 (1979).

92. For a thoughtful critique of the use of victim impact statements, as well as other aspects of the "victims' rights movement," see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985). We agree with Henderson that "victims' rights" are often asserted cynically by those with conservative political agendas. At the same time, we do not believe that the expressed desires of victims themselves should be dismissed on grounds that we, or the people who run the legal system, know better than they what will be good for them—especially when "they" are a diverse group with differing needs and desires. *But see*, Joachim Hermann, *Bargaining Justice—A Bargain for German Criminal Justice*, 53 U. PITT L. REV. 755, 756 (1992)

or will prefer to extend mercy to the person who has harmed them. Others, however, may obtain some psychic benefit from the sense (real or imagined) that they may regain part of their lost autonomy by exerting the right to participate (even in a minor way) in the defendant's sentencing. Who, other than the victims themselves, should claim the right to decide such a question on their behalf? If the convicted defendant is aggrieved by victims' participation at sentencing, so be it—we see it as a form of “psychic restitution,” in which the defendant gives up something in order to help restore some victims to their pre-crime state of mind. Moreover, these victims' sense of vindication would likely extend to the general public as well.

Our view does not necessarily extend to the propriety of using “victim impact statements” in capital cases where the sentencing issue is often more emotionally charged and always more important than in non-capital cases. This issue has reached the U.S. Supreme Court three times;<sup>93</sup> present federal constitutional law allows at least the limited use of “victim impact statements” in capital cases,<sup>94</sup> although the states are split on their use as a matter of state law.<sup>95</sup>

### VIII. APPEALS

Consistent with the way the rest of our criminal justice system is designed, our system of appellate review often seems to focus too much on procedure and not enough on substance. We should think seriously about changing the system in two important respects. First, we should generally open the doors of the appellate courthouse to all colorable claims of actual innocence. State procedural barriers like the one invoked by Texas in the notorious capital case of *Herrera v.*

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(noting that, by the nineties, “plea-bargaining takes place in roughly twenty to thirty percent of all cases”).

Victims are not monolithic. For some, healing and even reconciliation are attainable. However, for others, particularly the victims of the most serious crimes, nothing can give them what they want—to be victims no longer. Each new chance to exert control or to affect punishment becomes virtually an obligation to seek justice for a lost loved one or to continue a quest for wholeness.

Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 494 (1995) (book review).

93. See *Payne v. Tennessee*, 501 U.S. 808, 816-30 (1991) (overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987)).

94. See *Payne*, 501 U.S. at 830 n.2 (overruling prior cases and allowing use of testimony dealing with victims' personal characteristics and impact of murder on victims' survivors, but declining to address use of survivors' opinions about crime, defendant and appropriate sentence).

95. See, e.g., *Bivins v. State*, 642 N.E.2d 928 (1994) (holding victim impact evidence generally inadmissible under Indiana constitution).

*Collins*,<sup>96</sup> barring a convicted defendant from raising "newly discovered evidence" more than thirty days after the conclusion of the trial, should generally give way to the overriding importance of the "search for truth."<sup>97</sup> Second, we should continue the Supreme Court's recent trend in the direction of expanding the use of "harmless error" rules.<sup>98</sup> Such rules help to ensure that substantively valid convictions are not overturned based on procedural mistakes that likely did not affect the outcome, and can thus somewhat ameliorate the entire problem of procedural over-emphasis discussed in this Article. For example, we should recognize that mistakes in jury instructions, which (as everyone who has ever tried a case knows) cannot be fully comprehended even by the most attentive juror,<sup>99</sup> should almost always be "harmless" unless the mistake also gives rise to improper attorney arguments.

### IX. HABEAS CORPUS

Habeas corpus is a remedy that goes back hundreds of years in Anglo-American jurisprudence (it was an important part of the Magna Carta and is expressly guaranteed, at least in its common law form, by the Constitution). The "Great Writ" provides vital protection for our civil liberties and should not lightly be curtailed. However, recent congressional and presidential statements indicate that the "Great Writ" may be in jeopardy, at least in connection with review of state capital cases. Severe time limits, scope restrictions and other limitations are on the potential legislative horizon. It is time to reexamine the purposes of habeas corpus and determine how to fit the "Great Writ" into our modern criminal justice system.

We think the American public will readily understand and appreciate the need for habeas corpus, so long as that need can be tied

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96. 506 U.S. 390 (1993).

97. Here, we might learn something useful from our neighbors across the Pacific. In Japan, the system of appellate review discourages procedural claims, but is relatively hospitable to factual claims based on new evidence or some other indication of factual innocence. See Daniel H. Foote, *"The Door That Never Opens"?: Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan*, 19 BROOK. J. INT'L L. 367, 421-22, 471-77 (1993).

98. See *Chapman v. California*, 386 U.S. 18 (1967) (establishing "beyond reasonable doubt" standard for finding constitutional error "harmless" on direct appeal); *Rose v. Clark*, 478 U.S. 570 (1986) (identifying limited categories of errors not subject to the *Chapman* "harmless error" rule); *Brecht v. Abrahamson*, 507 U.S. 619, 623-24 (1993) (applying "substantial influence on jury's verdict" standard for finding constitutional error "harmless" on federal habeas review).

99. "According to B. Michael Dann, a superior court judge in Phoenix, several studies have shown that jurors do not understand 50 percent of the judge's instructions at the end of the trial—the equivalent of assembling all the ingredients of a cake but failing to follow the recipe." Bradley, *supra* note 85, at 10.

directly to one of the two underlying purposes of the criminal trial—the “search for truth” and the fulfillment of the desire for “justice.” Habeas serves the first goal by providing yet one more opportunity to determine whether an innocent person was erroneously convicted. It serves the second goal to the extent that federal habeas review helps to deter state courts (which always get the first chance to examine the defendant’s claims) from ignoring constitutional rights. Our proposed approach, then, is to limit habeas corpus relief to two kinds of situations: (1) where the petitioner can make out a colorable claim of factual innocence (with or without a corresponding claim of procedural error at his trial), and (2) where the state courts have unreasonably denied the petitioner’s constitutional claim and thus need to be sent a deterrence message.<sup>100</sup> We would deny habeas review in all other cases. For example, when a state trial court makes a disputed but reasonable decision about the constitutionality of admitting a challenged confession, and that decision is upheld by other state courts (also acting reasonably) on direct appeal, we would not allow further litigation in federal habeas of the same constitutional issue unless the defendant can make out a colorable claim of factual innocence (“I did not commit the crime”) as opposed to legal innocence (“I would not have been convicted without the confession”).<sup>101</sup>

## X. LAWYER ETHICS

In many respects, lawyer ethics is the most difficult subject of all. A large part of the public’s disdain for lawyers, and for the criminal justice system in general, can be attributed to the perception that lawyers are simply *too* adversarial, seeking to “win at all costs” without regard to the “truth” or the interests of the larger society. We certainly do not want to suggest that the adversarial system itself should be rejected, or that lawyers should be told that they should regularly pursue either the “truth” or society’s best interests at the expense of the interests of their clients.

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100. See Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 69.

101. The U.S. Supreme Court has already taken a step in a similar direction by expanding the definition of “harmless error” in habeas cases. See *Brecht v. Abrahamson*, 507 U.S. 619 (1993). But we prefer our proposal for two reasons: first, a “harmless error” rule (even as expanded in *Brecht v. Abrahamson*) focuses on legal innocence, while our proposal would focus on factual innocence; and second, a “harmless error” rule applies even to cases where the state courts acted “unreasonably” in denying constitutional claims, a situation where we believe that federal habeas review and reversal of the conviction can serve an important deterrence goal.

At the same time, we believe that many in the legal profession have for too long avoided confronting some of the difficult ethical questions that attach to the roles of prosecutor and, especially, defense counsel.<sup>102</sup> The legal profession has generally chosen the easy road, imposing on itself the relatively simple task (in ethical terms) of pursuing clients' interests as vigorously as humanly possible without running afoul of any of the specific provisions set out in statutes or ethical codes like the Model Rules of Professional Conduct. Lawyers have even further simplified their lives by tending to define their clients' interests in narrow, short-term ways; lawyers need think only in terms of what will produce a conviction or an acquittal, rather than in terms of what might be best for the long-term interests of *both* their clients and society at large. This process of sharp role-differentiation allows lawyers effectively to separate their human nature (which recognizes the social harm sometimes caused by the actions of lawyers) from their professional role (which involves the freedom to act in a largely amoral fashion without worrying about the social consequences).

Harvard Law Professor Alan Dershowitz, a prominent commentator on the legal system and a member of O.J. Simpson's defense team, recently made the following classic statement of the defense lawyer's role-differentiation:

FSF [interviewer]: Chief Justice Charles Evans Hughes once said that a good lawyer helps his clients not to evade the law, but to obey it.

AD [Dershowitz]: Yeah, well, that's the kind of thing lawyers say, but that's not realistic. That's not what lawyers do. Lawyers help their clients evade the law.

FSF: So is that your definition of a good lawyer?

AD: . . . Basically, I have one job when I take on a criminal case—to help my client get the lowest possible sentence or get acquitted. I would never lie for a client, and I would never allow a client to lie or to break a rule in helping himself get acquitted. But if I can get him off, consistent with my legal and ethical obligations, that's my goal. And so, for example, . . . I have nothing but praise for Leslie Abramson for having pulled the wool over the eyes of the Menendez juries, which hung when they should have convicted. I have nothing

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102. The ethical responsibilities we discuss herein apply equally to both prosecutors and defense lawyers; however, given that prosecutors already have a well-established ethical responsibility to do justice, not merely pursue a "victory" for their "client," defense lawyers will tend to be more frequently confronted with the kinds of ethical dilemmas we discuss herein than will their prosecutorial counterparts.

but praise for Lisa Kemler, the lawyer for Lorena Bobbitt, who achieved a sensational acquittal by reason of insanity for her cold, guilty client. But I have nothing but contempt for the stupid jurors who fell for those lawyers' brilliant advocacy. And I have nothing but contempt for the rules of law that allow that result to be achieved. Now, I'm furious, personally, with the results in both of those cases. I'd be furious if William Kuntsler [Note by authors—Kuntsler died shortly after the Dershowitz interview] managed to get Colin Ferguson off on the grounds of black rage; that would be a horrible decision. But I'd have nothing but praise for him as an advocate and a lawyer. He'd be doing his job.<sup>103</sup>

To many lawyers, Dershowitz' words undoubtedly constitute a persuasive defense of the "adversary model" of criminal justice. To the public, however—including the "stupid jurors" and the (presumably stupid) legislators who helped write the "rules of law"—his words express exactly what is most disturbing about the legal profession. Moreover, lest it seem that defense lawyers are the only ones susceptible to amoral adversarial excesses based on role-differentiation, consider the words of Maurice Nadjari, a prosecutor, who once told fellow prosecutors at a national forum that their "true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible . . . . You must never forget that your goal is total annihilation."<sup>104</sup>

There are many specific issues in criminal cases that might present challenging ethical dilemmas—if only lawyers were not so good at sidestepping such dilemmas. In a fascinating article (written *before* the O.J. Simpson trial), David Luban identified a number of specific practices that might help a defense lawyer's client obtain an acquittal and that do not violate any formal rules, but might nevertheless be unethical. They include:

*Arguing that the evidence supports a conclusion that you know is false. . . .*

*Impeaching a witness known to be testifying truthfully . . . .*

*Hear no evil:* ensuring that the client and witnesses never tell the defender inconvenient facts—facts the knowledge of which would

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103. Frederica S. Friedman, *The Law in a Whole New Light*, INTERVIEW MAG., Sept. 1994, at 118, 121. Although we have concerns about the views expressed by Dershowitz regarding lawyer ethics, we agree with his (implicit) suggestion that the rules of criminal procedure law should be changed to make fancy lawyering less influential in criminal trials.

104. MARVIN E. FRANKEL, *PARTISAN JUSTICE* 32 (1980) (quoting Maurice Nadjari, *Selection of the Jury (Voir Dire)*, Lecture to the National College of District Attorneys, University of Houston (Summer 1971)).

turn useful things a defender might say to the prosecutor into lies. . . .

*If it has some factual basis, and I don't know it's false, I can treat it as true:* offering convenient arguments or assertions, occasionally hedged with "might" or "could" or "possibly" or "probably," that are not lies because the defender does not actually know that they are false, though she has reason to suspect that they are.<sup>105</sup>

On a recent National Public Radio show, Stephen Gillers talked about a (fictional) case involving the last two of these practices.<sup>106</sup> The famous movie, "Anatomy of a Murder,"<sup>107</sup> contains a scene in which Jimmy Stewart tells Ben Gazzara the four defenses to murder, and why three of them could not be true in his case. Stewart then asks Gazzara whether the fourth defense is true—namely, insanity. Gazzara immediately replies, "I was mad. I was insane at that time." This information, deliberately elicited, allows Stewart to assert the insanity defense without violating his ethical duty not to facilitate perjury. Gillers explained that not only do real-world lawyers often behave like Stewart, but such behavior is consistent with the current ethical standards of the legal profession.<sup>108</sup>

On the same show, the interviewer later posed a hypothetical case: A defense lawyer is at her client's house, going through closets and looking under beds. The client is accused of murdering someone with a knife. The defense lawyer opens a drawer and finds a knife, apparently overlooked by the prosecution. Should the defense lawyer turn the knife over to the prosecution? The lawyer-participants in the discussion agreed that the best course of action, consistent with A.B.A. guidelines, would be to leave the knife exactly where it was found and say nothing about it.<sup>109</sup>

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105. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1760-61 (1993).

106. *All Things Considered: Defense Attorneys Face Difficult Challenge with Clients* (National Public Radio broadcast, July 9, 1994, Transcript # 1538-6) available in LEXIS, News Library, Transcript File.

107. ANATOMY OF A MURDER (Columbia Pictures, 1959).

108. See *supra* note 106.

109. *Id.* Interviewer Daniel Zwerdling then asked, "[B]ut isn't that sort of a lie, in society, by omission?" Seymour Wishman, a retired defense lawyer, agreed, saying that such ethical conflicts caused him to leave the defense bar. Elizabeth Semel, a current defense lawyer, objected:

That slippery slope is exactly what leads to systems of public confessions, to the gulag. . . . The notion that if the government cannot establish, beyond a reasonable doubt, that my client is guilty to the satisfaction of 12 people, is something about which I feel proud. And I feel—that is not to say that on a societal level and on a human level, that I'm not just as concerned with people who are injured or people who are killed, but in

Perhaps even more problematic are certain practices classified by David Luban under the general heading of "dirty tricks":

In a different category altogether are tactics like obtaining continuances in the hope of witnesses forgetting (or, to borrow a dramatic L.A. Law plot, obtaining continuances until a terminally ill witness dies), forum shopping, greymail, digging up dirt on the prosecutor, appealing to a jury's racism, or the legendary Clarence Darrow tactic: smoking a cigar with a wire running through it lengthwise, so that during the prosecutor's closing argument the jury would become fascinated and distracted by Darrow's ever-lengthening cigar ash.<sup>110</sup>

None of the practices mentioned above would obviously violate the ethical rules that bind the legal profession. That does not mean, however, that these practices are ethical. Of course, we cannot say whether, in any particular case, it would be unethical for a defense lawyer to engage in any of these practices. Ethical issues are not easily resolved by generally applicable rules.<sup>111</sup> What we find troublesome is the way that the "adversary model" of criminal justice is commonly offered up by lawyers as a simplistic justification for the conclusion that all of these practices (and more) are not only ethically acceptable, but desirable components of "zealous advocacy," thus avoiding the need to grapple with the ethical issues on an individual, case by case basis.

Why shouldn't lawyers engage in more serious, personal soul-searching about the morality of these kinds of practices—especially, as suggested by David Luban, if a defense lawyer is considering using them on behalf of a client whom the lawyer knows to be guilty and whose acquittal would not serve the collateral goals of combatting racism, class bias or procedural deficiency in the criminal justice system? Why shouldn't criminal lawyers, on both sides of the courtroom, have a responsibility to grapple with the thorny problem of identifying the

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terms of my professional responsibility, I hope that I—that I feel proud and I hope that I feel that I have performed a public service, as well as a personal service, to the client.

Prosecutors, of course, have an ethical obligation to dismiss a criminal prosecution if they discover evidence that would exonerate the defendant. See *supra* note 106 and accompanying text.

110. Luban, *supra* note 105, at 1761.

111. This is part of the problem with the legal profession's current approach to ethical issues. As David Luban notes, "[i]o say that a norm is discretionary does not, of course, mean that it is standardless . . . it means only that the norm indicates a range of responses to different conditions and leaves the task of determining which response is appropriate in a given situation to the actor." *Id.* at 1757; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-33 (2d ed. 1978) (discussing discretion); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169.

true "best interests" of both the defendant and the society at large?<sup>112</sup> Why shouldn't prosecutors have the responsibility to consider, in every case, whether justice (that is, the conviction of a guilty defendant) or mercy (for example, an acquittal) would be more likely to turn the defendant into a law-abiding citizen?<sup>113</sup> Why shouldn't defense attorneys have the responsibility to consider, in every case, whether defendants might be better off in the long run if defendants accepted responsibility for their conduct and tried to make amends to the victim and society, rather than fighting for an acquittal?<sup>114</sup>

We offer no pat answers to these kinds of questions for we believe that there are none. We suggest only that we should stop thinking that there are pat answers, and that we should reject the view that our only ethical responsibility as lawyers is to conform to the adversary model without violating the Model Rules or Model Code. Of course, in an imperfect world, there will always be a need for rules and sanctions; and it is certainly possible to draft ethical rules more tightly, in ways that would produce better results in some of the situations we have discussed. But we can, and should, also try harder to become ethical human beings—not simply lawyers who are good at obeying rules.<sup>115</sup> No single change would likely do more to improve the sorry public image of lawyers than for us to acknowledge that we are human beings with an ethical responsibility to try to "do the right thing"—even if it sometimes means something different than we might do under a "pure" adversarial model.<sup>116</sup>

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112. See generally William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29 (critically examining the "Ideology of Advocacy"); Wasserstrom, *supra* note 23, at 5-15 (making the accusation that "the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral").

113. As far as prosecutors are concerned, it is widely accepted that at least some degree of ethical balancing is required: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981).

114. See George Anastaplo, Lecture, *On Crime, Criminal Lawyers, and O.J. Simpson: Plato's Gorgias Revisited*, 26 LOY. U. CHI. L.J. 455, 464-67 (1995).

115. See Tarlton, *supra* note 42: Lawyers should "redefine the profession's standards of behavior based on the understanding of and commitment to critical values rather than adherence to a simple written code."

116. It might even help us to heal ourselves. A recent poll reveals that as many as seven out of ten lawyers in California would change careers if they had the opportunity. A Rand Corporation study found that half of all lawyers would not become lawyers if they had a chance to start over. A Johns Hopkins University study found that lawyers are more likely to be depressed than people in 103 other occupations. And 11% of North Carolina lawyers who were polled admitted considering suicide at least once a month. A loss of professional pride and widespread public disdain have been offered as likely reasons for these dismal statistics. See *Is the Legal Profession on the Trash Heap?*, BUS. & SOC'Y REV., Summer 1995, at 14.

We concede that this change is unlikely to take hold among practicing criminal lawyers—most of whom have been so deeply indoctrinated to think in terms of the “pure” adversary model that they may be incapable of doing otherwise. Rather, this change—if it is ever to occur—would probably have to begin, in the first instance, in the law schools. Law professors should give their students more opportunities to grapple with tough ethical questions, and should insist that the solutions often are to be found within oneself, not in a rule book.

### CONCLUSION

The legal profession and the criminal justice system have a long way to go in order to reclaim the confidence, trust and support of an American public that has come to see both in a decidedly negative light. But if the O.J. Simpson trial has served to shock and shame us lawyers into taking a hard look at ourselves and the convoluted system we have created in order to see whether any part of the public’s disdain is warranted, then the Simpson case may someday prove to be a turning point in modern legal history.

We want to emphasize once again, in concluding, that our primary purpose in this Article is not to answer questions, but to raise them. Our premise is that the public’s voice needs to become a louder and more consistent component of the ongoing dialogue about the administration of criminal trials and the criminal justice system in general. We cannot claim to have a special insight into the public’s point of view—we have not been anointed, or even appointed, as their representatives. We offer herein our thoughts about the direction that public opinion is likely to push us, and about the desirability of traveling down that particular road. We welcome the thoughts of others who wish to participate in the same dialogue. Only by engaging in such a dialogue can we begin to restore the connection between criminal trial procedure and the deeply shared norms and values of American society.