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2011

Improving Criminal Justice: How Can We Make the American Criminal Justice System More Just?

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Recommended Citation

Hoffmann, Joseph L. and King, Nancy J., "Improving Criminal Justice: How Can We Make the American Criminal Justice System More Just?" (2011). *Articles by Maurer Faculty*. 2654.

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Improving criminal justice

How can we make the American criminal justice system more just?

Justice means, first and foremost, ensuring that defendants are not convicted of crimes they did not commit. The criminal justice system's worst nightmare is the wrongful conviction of an innocent person. It's an equal-opportunity nightmare that leaves the true criminal unpunished, and torments all—police, prosecutors, defense attorneys, judges, jurors, defendants, and victims—who care about justice.

Since 1989 DNA testing has helped exonerate at least 269 people, according to the Innocence Project. Hundreds more have been exonerated even without DNA evidence. We can no longer pretend that guilty verdicts are infallible.

In several states, important steps already have been taken to reduce the risk of wrongful convictions. In Illinois, for example, shocking revelations about innocent men on death row led first to a moratorium on executions, and eventually to the abolition of capital punishment altogether. Along the way, the Illinois legislature adopted procedural reforms to help prevent wrongful convictions, including the exclusion of unreliable “snitch” testimony in capital cases and mandatory recording of all homicide confessions.

Yet the criminal justice system, in Illinois and elsewhere, remains vulnerable to wrongful convictions. And this vulnerability will persist until America finally lives up to the noble ideals of justice expressed in



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the landmark 1963 Supreme Court case of *Gideon v. Wainwright*. As we approach the 50th anniversary of *Gideon*, the unfortunate reality is that too many criminal defendants are represented by lawyers who are inexperienced and overworked, and who lack the resources to investigate innocence claims.

The unfulfilled promise of *Gideon* also undermines the cause of justice in a broader sense, by making it much less likely that the constitutional and civil rights of *all* criminal defendants—whether guilty or not guilty—will be respected.

State and federal courts routinely review criminal cases, after the fact, in an attempt to determine whether the constitutional standard of effective counsel has been satisfied. But this effort comes too little, too

late. Even if the quality of defense representation is suspect or worse, a reviewing court cannot set aside a guilty verdict unless it is reasonably probable that effective lawyering would have succeeded in producing a different outcome. Such a conclusion is often impossible to reach, either because the defendant was probably guilty, or because the relevant evidence of innocence was never developed below.

That is why the problem of inadequate defense representation must be attacked at the front end of the criminal justice system, not at the back end. There is much we can do as a society to ensure that all defendants receive the effective assistance of counsel guaranteed to them by the U.S. Constitution.

The most important step would be to create a new Federal Center for Public Defense Services to encourage the states to reform defense representation through incentive grants, research, training, and “best practices” standards. The American Bar Association began advocating for such a Federal Center back in 1979. In today's recession economy, finding the money to start up a new federal program will be difficult. It might be necessary to start small and build momentum gradually. Nevertheless, it is high time to implement this key initiative.

Even with better defense representation, however, mistakes will still be made, and we must also develop better ways to find and fix injustices after conviction. Here's what else we need to do:

(1) *Preserve and allow reasonable post-conviction access to biological evidence.* All

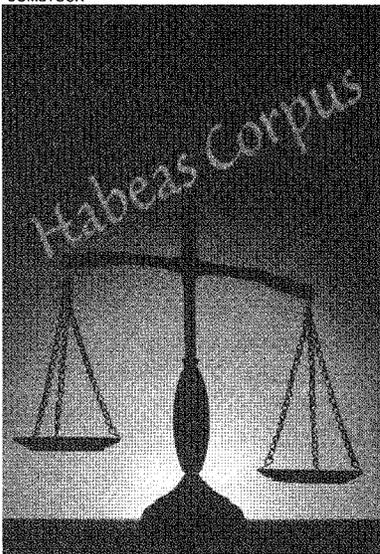
states should require the preservation of evidence that could contain biological markers like DNA in anticipation of future scientific advances. And convicts should be provided a reasonable opportunity to test such evidence, if it might prove their innocence.

(2) *Create better state remedies for post-conviction innocence claims.* Existing judicial remedies in most states weren't designed to handle innocence claims. North Carolina has created an Innocence Inquiry Commission to identify cases of wrongful conviction and refer them to a court for review. Other states should too.

(3) *Recognize that punishing a person who is probably innocent violates the Constitution.* The Supreme Court has refused to decide whether such a constitutional right exists. The Court should finally do so, and then should proceed to define the proper legal standards for proving such a claim.

(4) *Refocus federal habeas corpus litigation toward innocence.* Most

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federal habeas litigation today is a waste. Save for the rarified world of capital cases—where almost every prisoner has a good habeas lawyer, almost every case gets careful judicial review, and many petitions are granted—there's almost nothing left

to preserve. In our new book, we present the results of a recent study showing that less than 0.4% of all non-capital habeas petitions succeed in the federal district courts. And in most habeas cases, innocence isn't even relevant. Congress should fix this by limiting non-capital habeas review to prisoners with persuasive new evidence of innocence. This would concentrate habeas litigation where it could do the most good.

* * *

When we wrote our book, we hoped that our analysis of the structural deficiencies of federal habeas corpus review would generate a dialogue about the future of the criminal justice system in general—a dialogue that could lead to a more effective use of society's resources and thereby further the ends of justice.

In our view, the best way to make the American criminal justice system more just would be to improve the quality of defense representation in the states, and reform federal habeas corpus so that the federal courts are more likely to find and fix wrongful convictions. These measures would help to end nightmares like the one endured by Ronald Kitchen, who was sent to Illinois' death row for a murder he did not commit. Society can never replace the 21 years of freedom wrongly taken from him. But we can—and must—do whatever we can to learn from such mistakes, so that they do not happen again. ❧

Professors King & Hoffmann are the co-authors of "Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ," recently published by the University of Chicago Press. The book is reviewed on page 90 of this issue of Judicature.

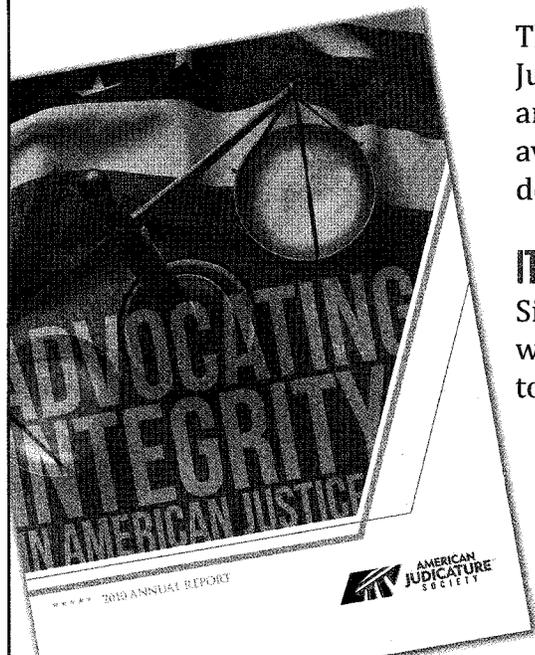
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