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## Four Reforms for the Twenty-First Century

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### Summary

This article presents the author's top four suggestions for judicial action and advocacy that can result in urgently needed and readily achievable reforms. As the American Judicature Society (AJS) and its members consider its agenda and mission for the coming years, each of these issues deserves support. Strong indigent defense doesn't just provide assurance the innocent are protected and abuses by the state are exposed, but holds families together, helps addicts stay sober, keeps young offenders in school, facilitates re-entry from prison, and supports public safety in communities. Viewed from this perspective, indigent defense reform is a cause that should garner bipartisan political support and appeal across class and racial divides. He would ask AJS to consider advocating for the simple proposal he has put forward with the Hon. Nancy Gertner. They call it the "ethical rule" order, given its simplicity, they hope judges will come to view it as an Occams razor for the disclosure of exculpatory information.

### Text

It is a considerable challenge, a distinct privilege, and no doubt a fool's errand to survey the past one hundred years in the field of criminal justice with the purpose of identifying trends and key issues that will critically challenge jurists who are concerned with reforming the system. I cannot pretend to possess a legal historian's breadth of knowledge and remain a prisoner of my own professional and personal experience. That experience instructs, above all else, to be wary of observer bias. So it's best to make important aspects of that experience manifest from the beginning and warn that the views expressed here are entirely my own and should not be taken as the official position of any organization with which I am associated.

I began practicing criminal law in 1975 as a Legal Aid lawyer (public defender) in the South Bronx, inspired by the civil rights movement and the landmark criminal justice rulings of the Warren Court. At that time, New York City was experiencing a financial crisis: The Association of Legal Aid Attorneys had formed a union and was striking to assure that lawyers had access to telephones, office space, vertical representation (the right to represent clients from arrest to

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disposition), and that some limitations were put on caseloads, which were spiraling out of control. The process of "early case assessment" had just begun—screening by a bureau of district attorneys of the initial statements from officers and witnesses, case severity (breaking down nonviolent felonies to misdemeanors), and case strength. This was just the first salvo in a trend over the next three decades that shifted initial access to information and assessment of cases for purposes of early plea bargaining and setting of bail away from judges and into a domain more exclusively supervised by prosecutors. The crack cocaine epidemic was nascent and the movement towards determinant sentencing and mandatory minimums was taking hold, again signaling the coming shift in the power over sentencing away from judges to prosecutors. Charles E. Silberman's sweeping and insightful overview of the system in 1980, *Criminal Violence, Criminal Justice*,<sup>1</sup> perfectly captured the era and holds up to this day.

By the time I began teaching law, practicing in federal courts, and helping construct in-house clinical programs that trained both prosecutors and defense attorneys (1979), I was inhabiting a world without federal sentencing guidelines, cell phones, personal computers, or the internet, much less DNA technology, sophisticated neuroimaging, or the crunching of "big data." I have been fortunate to have a diverse practice and participated in heavily publicized proceedings including civil rights suits against both police departments and prosecutors. I have defended clients, in state and federal court, at trials and on appeal, who were accused of a myriad of crimes.<sup>2</sup> Perhaps most important of all, for the past 24 years, I have been lucky enough to be part of the "innocence movement" and to work intimately with a collection of lawyers (defense and prosecution), judges, scholars, and scientists who have litigated, adjudicated, and studied an unprecedented wave of "exonerations" based on DNA tests and other new evidence of innocence.

So having quickly summarized my experience and potential observational bias, what follows are my top four suggestions for judicial action and advocacy that can result in urgently needed and readily achievable reforms. As the American Judicature Society and its members consider its agenda and mission for the coming years, each of these issues deserves support.

### Lead on Indigent Defense Reform

In this 50th anniversary year of the *Gideon*<sup>3</sup> decision, there is no area of criminal justice reform that has made less progress over the last century or is more significant for improving the system than the right to counsel. Without adequate counsel for the poor one cannot even begin to effectuate meaningful solutions to the debilitating problems posed by mass incarceration, over-criminalization, and racial bias. "Problemsolving courts," whether targeting drugs, juveniles, family violence, or communities, work best when there are quality defense teams (not just lawyers, but investigators, paralegals, and social workers) who can counsel clients and their families "holistically." Strong indigent defense does not just provide assurance the innocent are protected and abuses by the state are exposed, but holds families together, helps addicts stay sober, keeps young offenders in school, facilitates re-entry from prison, and supports public safety in communities.<sup>4</sup> Viewed from this perspective, indigent defense reform is a cause that should, and still can, garner bipartisan political support and appeal across class and racial divides.

But indigent defense remains the neglected stepchild of the criminal justice system.<sup>5</sup> It lacks a

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natural base, a core constituency with legislative influence-poor people charged with crimes, often disenfranchised by criminal convictions, and disproportionately from racial minorities, have limited political power in the first place. And there is a vicious cycle at work as well-the worse the representation of institutional defenders and court-appointed counsel, the less the community wants to rally for a larger defender budget or higher counsel fees. Nothing erodes respect for our criminal justice system more than the widespread conventional wisdom that one is better off being rich, white, and guilty than poor, black or brown, and innocent.

As David Cole has pointed out, "[a]t least every five years since Gideon was decided, a major study has been released finding that indigent defense is inadequate."<sup>6</sup> There are good reasons, however, on this 50th anniversary of Gideon to see this ongoing crisis in funding adequate indigent defense as reaching a qualitatively different breaking point. One reason is the phenomenon of "mass incarceration" in the United States. As we approach a million new felony convictions per year, it must be emphasized that without anything close to a corresponding allocation of resources to the indigent defense function, there has been a six-fold increase in incarceration rates over the past 30 years, going from 100 to almost 700 incarcerated persons per 100,000 people, "a percentage unprecedented in American history and among industrialized nations."<sup>7</sup>

A second reason is growing recognition that while innocent people do plead guilty to felonies, the innocent confess in much greater numbers to misdemeanors<sup>8</sup> without the benefit of counsel who are funded to conduct independent investigations, if they get counsel.<sup>9</sup> There has always been a tendency toward "the process being the punishment" in misdemeanor courts<sup>10</sup>-pleas of time served for those who cannot make bail or who come back to court numerous times to get a trial on the merits-but with the advent of "broken windows" policing policies the number of misdemeanor prosecutions has dramatically risen.<sup>11</sup> "It is time," Gerald Kogan, former Chief Justice of the Florida Supreme Court recently observed, "to end the wasteful and harmful practices that have turned our misdemeanor courts into mindless conviction mills."<sup>12</sup>

Steve Hanlon, for many years a partner at Holland & Knight and current chair of the ABA's Defense Advisory Group to the Standing Committee on Indigent Defense and Legal Aid, summarizes the situation with empathy for all, but with unvarnished realism:

Despite the heroic, indeed Sisyphean efforts of individual public defenders, the harsh truth is that every day in thousands of courtrooms across this nation, public defenders "meet 'em and plead 'em," spending precious few minutes with their clients, as their offices triage cases by shifting resources to higher-risk cases (e.g., homicides and sex offenses). And every day in thousands of courtrooms throughout this nation, prosecutors secure uncounseled waivers of counsel and uncounseled guilty pleas from criminal defendants with little education or understanding about the criminal justice system, especially the devastating collateral effects of those very guilty pleas.

Indeed, a compelling argument could be made that the principal function of all of the players in the criminal justice system with respect to the invariably poor and largely black and brown population appearing before them is to serve as a facilitator for the mass over-incarceration of a nation that now incarcerates a greater proportion of its population than any other nation in the world.

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This sad state of affairs is or should be well known to all of our courts, especially our state supreme courts, most of them charged under their state constitutions with a power of general superintendence or equivalent responsibility over the entire justice system in their states.

This is the legacy of our generation of judges, lawyers, governors, and legislators, like it or not. This happened on our watch. Our grandchildren will undoubtedly ask us how and why this happened.<sup>13</sup>

The judiciary has a special responsibility to ensure indigent defense systems are truly functional. That responsibility can no longer be deferred or abdicated on separation-of-powers grounds, as has so often happened over the past two decades, in adjudicating "systemic ineffectiveness" litigation. On the contrary, as Martin Guggenheim has recently argued, the crisis has reached a point where separation-of-powers considerations compel the opposite result.<sup>14</sup> When indigent defense funding is so inadequate that lawyers cannot even conduct investigations of cases on a regular basis, the executive branch accumulates too much unchecked power to prosecute and to influence the outcomes on grounds other than the merits, and, as a consequence, the judicial branch is denied its duty to decide cases independently. This argument views the Sixth Amendment's right to counsel as a "structural protection" for everyone's rights, including those never prosecuted or arrested.<sup>15</sup>

This formulation resonates with lessons learned from the "innocence movement" and wrongful conviction cases. Take, for example, crime laboratory scandals. A series of large-scale audits have now documented that for decades forensic analysts such as Fred Zain (West Virginia), Joyce Gilchrist (Oklahoma), and Jim Bolding (Houston, Texas) got away with either 'dry labbing' (not doing the tests at all-just giving results) or making repeated and obvious errors because the defender system simply lacked the capacity to investigate and expose these problems.<sup>16</sup> Prosecutors, of course, must take some responsibility for uncritically accepting "structural" dysfunction at crime laboratories despite the fact that it helped "make" their cases against defendants they believed were guilty. The adversary system, however, quite correctly assumes the defense counsel ought to be the first line of protection in exposing forensic error and misconduct so that the judiciary can do something about it. This breakdown in the adversary system did not just lead to many convictions of the innocent and failure to apprehend the guilty, but rendered the courts incapable of knowing there was not a valid factual basis for innumerable guilty pleas and convictions after trial. The same analysis applies to police and prosecutorial misconduct-unchecked abuses of the executive branch the defense function is primarily responsible for detecting.

Expect, along these same lines, a new surge of "systemic ineffectiveness" lawsuits that will begin with individual defense lawyers and/or institutional defenders declaring themselves "unavailable" to take additional assignments because of excessive caseloads or lack of investigative resources. As opposed to previous large, affirmative class actions that sought to invalidate entire systems, litigation that begins in this fashion can directly and immediately rely on defenses firmly grounded in state ethical rules as well as "structural" state and federal constitutional arguments.<sup>17</sup> Dean Norm Lefstein, probably our leading authority on the indigent defense issues in the United States, has just written an Executive Summary and Recommendations to accompany his book, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, where he lays out a roadmap detailing exactly how and why these lawsuits can

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be brought successfully.<sup>18</sup> Former FBI Director and Federal Judge William Sessions describes it as a "wake up call for all of us, particularly for lawyers and judges who have taken an oath that we will never reject or ignore the causes of the oppressed or defenseless." "For too long," Judge Sessions acknowledges, "we have tolerated, through ignorance or design, systems of indigent defense that violate the Constitution, our own Rules of Professional Conduct, and common standards of human decency."<sup>19</sup>

The way the Florida Supreme Court just dealt with this issue in *Public Defender of the Eleventh Judicial District, et. al. v. Florida*<sup>20</sup> is instructive, if not exemplary. The public defender in the 11th Judicial District filed motions in 21 cases certifying a conflict of interest in each case, claiming that excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to the defendants. Florida Supreme Court, before reaching the merits, had to contend with a new Florida statute where the legislature made clear that "[i]n no case shall the court approve a withdrawal by the public defender based solely upon the inadequacy of funding or excess workload."<sup>21</sup> Citing prior cases where it granted compensation to counsel in excess of statutory fee schedules under extraordinary circumstances, the Court explicitly embraced a separation-of-powers argument as the basis for reaching the systemic ineffectiveness issue: "This doctrine of inherent judicial power 'exists because it is crucial to the survival of the judiciary as an independent, functioning, and coequal branch of government."<sup>22</sup> It also rejected the argument that courts should address the problem on a piecemeal case-by-case basis as "wasteful," "redundant," and "tantamount to applying a Band-Aid to an open head wound."<sup>23</sup> Ultimately, the Court held that, notwithstanding a clear legislative enactment to the contrary, the public defender's declaration of unavailability due to excessive caseload would be upheld upon a showing of "a substantial risk that representation of [one] or more clients will be materially limited by the lawyer's responsibilities to another client."<sup>24</sup>

Leaders of the judiciary should not wait for systemic ineffectiveness cases to be brought to address the indigent crisis if they exercise, directly or indirectly, pursuant to state or local statutes, supervisory authority over court-appointed lawyer systems. Court-appointed lawyer systems often serve more of the indigent in a jurisdiction than institutional defenders, but usually lack a supervisory infrastructure that does much more than ensure attorneys are not improperly billing. There are rarely, if ever, systematic audits of other cases after court-appointed lawyers are found to be ineffective in one matter; and there are rarely, if ever, systematic audits of lawyers who chronically fail to seek appointment of experts, investigators, or visit incarcerated clients to assess the quality of whatever representation was provided. This is simply unacceptable in a digital age where the practical and financial barriers to gathering and tracking this kind of information have fallen dramatically.

Before briefly commenting on what the judges can do about court-appointed lawyer systems they administer, it is important to emphasize, as AJS has long acknowledged, that judges should not be in charge of court-appointed lawyer systems at all. The ABA's Ten Principles of Public Defense Delivery Systems makes clear that the public defense function, including the selection, funding, and payment of defense counsel, be independent of the judiciary (Principle 1); that indigent-defense counsel should have a parity of resources with the prosecution (Principle 8); and defense counsel should be supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards (Principle 10).<sup>25</sup> AJS co-sponsored the ABA Eight Guidelines of Public Defense Related to Excessive Workloads, which was approved

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by the ABA House of Delegates in 2009, including the commentary to Guideline 2 which reads, "[t]he ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel or their supervision."<sup>26</sup> Nonetheless, chief administrative judges who are responsible court-appointed lawyer systems should use their supervisory powers to create independent structures consistent with the Ten Principles to oversee how the system functions. The appointment of special masters or commissioners would be one mechanism; outreach to law schools, independent committees of state bar associations, or appropriate nonprofits could be another.

In terms of securing funding and resources, judges should not only support indigent defense reform within their states but also assist the defense community in getting its fair share of federal funding. The Department of Justice (DOJ) is actively soliciting proposals to assist states and localities improve the quality of indigent defense services including innovative data collection to assess the quality of court-appointed counsel.<sup>27</sup> Most importantly, DOJ wants the defense community to have a seat at the table and be a beneficiary of "block" grants through the Edward Byrne Memorial Justice Assistance Grant Program, its largest grant program; it allocated nearly \$300 million to states and localities in 2012.<sup>28</sup> Judges should use their influence to make that a reality, not an empty promise.

In short, judges simply have to lead and be proactive, even forcing the defense community to change its culture and take steps it resists, like keeping timesheets, so that it can get a fair share of resources.<sup>29</sup> The enhancement of indigent defense is the linchpin reform that makes all other improvements in the criminal justice system achievable. It should be the judiciary's highest priority and certainly an area that would benefit from the support of AJS.

### Issue "Ethical Rule" Orders and Enforce Them Through Contempt Citations

On this 100th anniversary of AJS and the 50th anniversary of *Brady v. Maryland*,<sup>30</sup> I would ask AJS to consider advocating for the simple proposal I have put forward with the Hon. Nancy Gertner.<sup>31</sup> We call it the "ethical rule" order, and, given its simplicity, we hope judges will come to view it as an Occam's razor for the disclosure of exculpatory information. Every state and federal judge in the United States has the authority to issue an "ethical rule" order now. It is founded upon state ethical rules binding state prosecutors and forms the basis of local federal court rules governing federal prosecutors. Judges do not have to wait for a new statute to be passed, a new regulation to be promulgated, or even a motion from defense counsel—it can and, I would argue, should be a standing order. Ethical prosecutors ought be receptive because it provides clarity to a disclosure obligation that has remained unnecessarily murky for decades.

Forty-nine states, Guam, the United States Virgin Islands, and the District of Columbia, all have adopted a version of ABA Model Rules of Professional Conduct Rule 3.8 (Special Responsibilities of a Prosecutor)<sup>32</sup> that requires prosecutors to disclose, pre-trial, all evidence that "tends to negate the guilt of the accused or mitigates the offense."<sup>33</sup> The ABA has made it plain that this disclosure obligation is "separate from and broader than the Brady constitutional standards."<sup>34</sup> Viewed from a pre-trial perspective, the Brady constitutional standard covers a) information that a prosecutor knows or should know about (including information in law enforcement files that the prosecutor doesn't personally possess),<sup>35</sup> and b) information that an appellate court, post conviction, would regard as so important ("material") that failure to disclose

it requires a reversal and a new trial.<sup>36</sup> Plainly, as many have observed, this "constitutional" obligation is not particularly helpful to anyone trying to comply pre-trial- be it the prosecutor, defense counsel, or the court wondering whether something is 'Brady.' It was for this very reason the ABA devised Rule 3.8(d) to be unambiguously broad: Rule 3.8(d) requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."<sup>37</sup> At the same time, it provides an escape clause for in camera production when timely disclosure could endanger a witness or otherwise unfairly prejudice the prosecution before trial.<sup>38</sup> Accordingly, an "ethical order" should be very straightforward: It should track the relevant ethical rule of the jurisdiction and direct a prosecutor to search her file and verify that she has disclosed all information that "tends to negate the guilt of the accused or mitigates the offense." If there is a relevant police file, the order could also direct a search of it and a similar disclosure. The order could also request the prosecutor to disclose, on the record or reduce to writing, all favorable oral statements she discovers when interviewing witnesses. Again, tracking the ethical rule, the order should include a safe-harbor provision that allows the prosecutor to delay disclosure by making an in camera ex parte production of the information and a showing of "good cause," such as real evidence that witnesses are at risk or perjury will be suborned. The order should also provide for in camera ex parte production of information when the prosecutor is uncertain about whether it tends to negate guilt or mitigate punishment.

When the ethical rule order should be issued is a question that may turn, to some extent, on the practices of a jurisdiction and local statutes. If there is, by custom or statute, "open file" discovery or disclosure of prior statements by witnesses before they testify at trial, then it will be easier to issue the order early in the process with a caveat that disclosure of favorable evidence is a continuing obligation. There may be resistance to issuance of the order very early in the processing of a case, particularly before an early guilty plea, on the grounds that the prosecutor may not be familiar at that point with everything in her file or the relevant police files, and there is no constitutional requirement to disclose mere impeachment material to a grand jury or before a guilty plea.<sup>39</sup>

Finally, the order should clearly state that "willful and deliberate failure to comply" is punishable by contempt. This provision is very important and carefully worded. It means that negligent, inexperienced, stupid, even reckless prosecutors will not be held in contempt. But frankly, given the mens rea requirements in most jurisdictions and the realities of criminal practice, the only prosecutors who should be held in contempt for violating the ethical rule order are those who do so willfully and deliberately. Based on discussions with leaders in the prosecutorial community and the judiciary, we think there is widespread agreement that the handful of prosecutors who deliberately and willfully suppress favorable evidence, even in "harmless error" cases, should be sanctioned for purposes of deterrence alone. It is the repeat offender, the prosecutor who routinely makes untimely disclosure of Brady material in the middle of trial, or is caught more than once hiding evidence that is plainly exculpatory, who is most at risk of being sanctioned.

Prosecutors may be startled at first upon seeing the ethical rule motion as opposed to the usual, general directive to turn over all Brady/Kyles material, but upon reflection, they should come to accept and perhaps even welcome it as a salutary measure that helps train new prosecutors and identifies the 'bad apples' who bring discredit to the profession. Moreover, what can they credibly

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say in opposition? The State doesn't recognize the ethical rule, invariably a state statutory obligation, as binding? The State doesn't believe it is right or fair to be ordered to obey an ethical rule that is clear and broad as opposed to the "constitutional" Brady obligation that is ambiguous and narrow? Or, the State doesn't want to be ordered to follow the ethical rule because a violation later deemed to be knowing, deliberate, and malicious could result in a contempt proceeding, civil or criminal, and possibly bar discipline?

A more likely and politick response would be: Trust us; when following our constitutional obligation to turn over all Brady/Kyles material, the State will meet its ethical obligation to disclose all information that "negates guilt or mitigates punishment." The problem with that argument, however, is that it concedes that the ethical rule should be followed. Judges should explain that an order mandating the enforcement of the State's ethical rule is not a personal accusation against a particular prosecutor or office, but a principled position to address what we now know to have happened too often. Brady/Kyles violations do happen; scores of innocent people have been convicted by those violations. This is not to say the prosecutorial misconduct is epidemic, but it seems fair to characterize it as more than episodic. The following footnote contains just some of the recent cases, press reports, and law review articles highlighting the Brady abuses that have influenced public discourse.<sup>40</sup> And even if one were to assume prosecutorial misconduct and the suppression of Brady material is just episodic, exaggerated by media exposes, or limited to just a few outlier jurisdictions, that's all the more reason to applaud ethical rule orders as a way to bolster public confidence in the integrity of the process.

Some readers may be wondering at this point where the idea for the ethical rule order came from and whether there is any evidence it will work. Two high-profile Brady cases provide an answer—the collapse of the prosecution of Senator Ted Stevens in Washington, D.C., and the Michael Morton exoneration in Texas.

Former Alaskan Senator Ted Stevens was indicted and found guilty of receiving benefits and other things of value from VECO Corporation, Bill Allen, the VECO CEO, and two other individuals; concealing receipt of such benefits; and failing to disclose receipt of such benefits on annual Financial Disclosure Forms.<sup>41</sup> The Department of Justice moved to set aside the verdict and to dismiss the indictment with prejudice when DOJ attorneys discovered during post-trial litigation "significant, undisclosed Brady/Giglio information in prosecutors' notes of statements by the government's principal witness, Bill Allen."<sup>42</sup> The presiding U.S. District Judge Emmet G. Sullivan granted the DOJ's motion and dismissed the indictment with prejudice, and, on the same day, appointed Henry F. Schuelke III "to investigate and prosecute such criminal contempt proceedings as may be appropriate" against the six prosecutors who conducted the investigation and trial of Senator Stevens.<sup>43</sup> Schuelke found "evidence that compels the conclusion, and would prove beyond a reasonable doubt," that Joseph Bottini and James Goeke, both assistant U.S. attorneys in the Alaska U.S. Attorney's Office, "intentionally withheld...Brady information from the attorneys for Senator Stevens."<sup>44</sup> However, Schuelke did not recommend prosecution of Bottini and Goeke for criminal contempt because

[a]lthough the evidence establishes that this misconduct was intentional, the evidence is insufficient to establish beyond a reasonable doubt that Mr. Bottini and Mr. Goeke violated the criminal contempt statute, 18 U.S.C. § 401, which requires the intentional violation of a clear and unambiguous order. Although a reading of the transcripts of numerous hearings and proceedings

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before and during the trial establish that Judge Sullivan intended that all Brady and Giglio material be produced, none of the orders issued by Judge Sullivan, before or during the trial, specifically directed the prosecutors to disclose all Brady/Giglio information in their possession. In large part, this was because of representations made by prosecutors to the Court that such an order was unnecessary.<sup>45</sup>

When the issue was raised, Judge Sullivan indicated that he would just "issue an order as a general reminder to the government of its daily ongoing obligation to produce [Brady] material" and state that he was "convinced that the government in its team of prosecutors is thoroughly familiar with the decisions from our Circuit and from my colleagues on this Court, and that they, in good faith, know that they have an obligation, on an ongoing basis to provide the relevant, appropriate information to defense counsel to be utilized in a usable format as that information becomes known or in possession of the government."<sup>46</sup>

In stark contrast to the Stevens case, Michael Morton's 1987 wrongful conviction for murdering his wife also involved numerous Brady violations, but it was preceded by a specific motion and direct court order to turn over all reports and notes of the lead investigator, Sgt. Don Wood, for in camera Brady review.<sup>47</sup> Ken Anderson, then Williamson County District Attorney and now a Williamson County Superior Court Judge, was asked point blank by the trial court before the trial if he had "any information favorable to the accused," and he replied, "No, sir."

In fact, more than two decades after the trial, when post-conviction DNA tests on a bloody bandana left near the point of exit exonerated Morton and identified the real perpetrator, undisclosed exculpatory evidence was discovered in Sgt. Wood's files through an open record act request. These exculpatory documents included a transcript of a taped interview between Wood and Morton's mother-in-law, Rita Kirkpatrick, where she described Morton's three-and-a-half-year-old son Eric saying he had witnessed the murder. Eric provided a detailed, chilling account of how a "monster" with "red gloves" beat his mother, and he offered a number of detailed observations that precisely corroborate the crime scene and the manner of the victim's death. When Kirkpatrick advised Sgt. Wood to stop looking at her son-in-law as the murderer and to go after the "monster," Sgt. Wood speculated that Eric didn't recognize his own father because Morton was disguised. He then asked Kirkpatrick to keep what she had heard confidential.

There was also a report recounting statements made by a neighbor of Morton right after the murder noting that the neighbor had observed, on several occasions, "a male park a green van on the street behind [the Mortons's] address, then the subject would get out and walk into the wooded area off the road" as if he were casing the place for a home invasion. This "green van" report clearly supported Morton's theory of defense that someone had entered the house to commit a burglary from the wooded area after Morton left for work in the morning and then murdered Christine Morton, who was sleeping.<sup>48</sup>

Notwithstanding the order for in camera Brady inspection of Sgt. Wood's file and a direct inquiry by the court about the existence of exculpatory evidence, neither the "Kirkpatrick" statement nor the "green van" report were submitted to the trial judge or disclosed to defense counsel, even though versions of those documents were in both Sgt. Wood's file and Anderson's trial file.

Taking advantage of an unusual Texas procedure, the Court of Inquiry,<sup>49</sup> Morton's defense team

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produced sworn testimony and evidence obtained in Morton's post-conviction habeas proceeding to make a probable cause showing that Ken Anderson had violated the laws of Texas by suppressing exculpatory in the Morton prosecution. Judge Sid Harle made the first probable cause finding under the Court of Inquiry procedure. The chief judge accepted the finding and appointed Judge Lewis Sturm to review the evidence and determine whether Judge Anderson should be arrested and tried.

After a five-day evidentiary hearing, on April 19, 2013, 27 years after Morton was convicted, Judge Ken Anderson was arrested in the Williamson County Courthouse and charged with Criminal Contempt, Texas Government Code § 21.002(a), Tampering With or Fabricating Physical Evidence, Texas Penal Code § 37.09; and Tampering with Government Records, Texas Penal Code § 37.10.50

Whatever the outcome of criminal or the state bar charges against Judge Anderson, the impact of the Morton Court of Inquiry in Texas has been significant. John Bradley, Ken Anderson's protégé and successor as Williamson County District Attorney, was not re-elected. The "Michael Morton" discovery reform law was passed by the Republican controlled Texas legislature on May 13, 2013, on the 50th anniversary of Brady, with support from District Attorney's Association and the Texas Criminal Defense Lawyers Association. The Morton law expands discovery disclosure generally, and, most importantly, it adopts the ethical rule standard-prosecutors must timely disclose all information that "tends to negate guilt or mitigate punishment"-an obligation that can easily be converted into an ethical rule order by state trial judges.<sup>51</sup> Another law passed as a result of the Morton case, the Prosecutor Accountability Act, requires at least a public censure if a prosecutor violates the ethics rule requiring disclosure of exculpatory evidence.<sup>52</sup> And many district attorneys in Texas are instituting "open file" discovery policies, claiming it's the best way to avoid Brady problems and to reassure the public they are playing fairly. The take-home message is that simply exposing a 'bad-apple' prosecutor for willful and deliberate misconduct is not enough; rather, a serious and rapid sanction for even one 'bad apple' is what gets the criminal justice community, and the political elites, to pay attention.

In the same fashion, the ethical rule order will both generally and specifically deter 'bad-apple' prosecutors because it is not subject to many of the practical and procedural hurdles that have obstructed punishment even for deliberate, intentional, and malicious Brady violations.

Ordinarily, the remedy for a Brady violation is the reversal of the conviction because the suppressed exculpatory evidence was "material." After looking at the record, an appellate court decides that the suppressed evidence created a reasonable probability of a different outcome such that confidence in the integrity of the verdict is undermined. While Brady was not about deterrence,<sup>53</sup> some believe that district attorneys, embarrassed when a conviction is reversed for withholding exculpatory evidence, will take ameliorative steps. They will punish the offending prosecutor or, when no one was at fault, fix the systemic breakdown that caused the failure to disclose in the first place. Indeed, the Supreme Court has relied on this justification in *Imbler v. Pachtman*<sup>54</sup> when it established absolute immunity for prosecutors from civil suits, insofar as the prosecutor is functioning in an adversarial, not investigative capacity.<sup>55</sup> In a recent brief to the Supreme Court, urging the further narrowing of section 1983 liability for prosecutorial misconduct, the National District Attorneys Association and the Association of State Attorneys General have underscored the deterrent value of the very threat of bar discipline, criminal prosecution, and

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## political embarrassment.<sup>56</sup>

But even if some district attorneys are taking such action when convictions are vacated, this approach does nothing to identify district attorneys or individual prosecutors who deliberately suppress exculpatory evidence in "harmless error" cases. Cases involving obviously-guilty defendants are not likely to engender much public outrage or impetus for action. Those prosecutors will escape public scrutiny and public punishment. In contrast, the ethical rule order offers a remedy through which the defense bar can take direct action against individual prosecutors who deserve to be sanctioned, in front of the judge whose order was violated.

Like the Morton case, and unlike the Ted Stevens matter, violations of an ethical rule order are more likely to result in contempt citations, bar discipline, or even criminal prosecution. It allows the judge who issued the order to enforce it directly through a contempt citation without having to wait for the prosecutor's office to take action. At the same time, since contempt has to be knowing and deliberate, inexperienced, negligent, or ill-trained prosecutors will not be sanctioned, thereby assuring the legal community this remedy is reserved for those who truly deserve punishment. Moreover, a contempt citation can be immediately appealed and will surely generate some useful precedent quickly. And, perhaps most significantly, since contempt is a continuing offense, the statute of limitations in most states will not bar prosecution or will run from the time of discovery.

The Innocence Project will continually publish an online list of all judges who grant ethical rule orders so that they are immediately available to all. Please inform us of any orders or problems with this approach at [ethicalruleorder@innocenceproject.org](mailto:ethicalruleorder@innocenceproject.org). And AJS could be instrumental in persuading judges to adopt this practice. A model Ethical Rule Standing Order, drafted by Judge Gertner, can be found on page 335 of this issue of *Judicature*.

## Renovate Manson

Eyewitness identification remains the leading cause of wrongful conviction of the innocent in the United States. In the 307 post-conviction DNA exonerations that have occurred in the United States since 1989," inaccurate eyewitness testimony contributed to wrongful convictions in over 75 percent of those cases. The Registry of Wrongful Convictions, which reviews "nonDNA exonerations" as well as DNA exonerations, and differentiates between "mistaken" eyewitnesses and eyewitnesses who are lying, still lists misidentification as the leading cause.<sup>58</sup>

In 2005-2006, a field study conducted in Illinois tested double-blind sequential procedures versus traditional simultaneous lineup procedures. The methodology of the Illinois study was widely criticized and the validity of its results questioned. However, it still raised questions for some in law enforcement about the effectiveness of procedural reforms that no scientist was seriously questioning, including sequential lineups. As a consequence, AJS, the Innocence Project, the John Jay School of Criminal Justice, and the Police Foundation did a field study in four cities to resolve, among other issues, the comparative utility of sequential blind versus simultaneous blind presentations.<sup>59</sup> This AJS field study accelerated momentum among law enforcement and state policy makers to adopt eyewitness reforms generally. In particular, the International Association of Chiefs of Police (IACP) made "Wrongful Convictions" its primary policy last year, culminating in a summit and issuance of an exemplary set of policy recommendations on eyewitness identification procedures as well as commitment to training

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The AJS field study is not the only support for reforming procedures. Since the mid-1970s, experimental psychologists have studied the psychological processes and reliability of eyewitness memory and identification. Derived from laboratory experiments, recommended procedural reforms for conducting identification to improve the accuracy of eyewitness identification include:

- \* Double-blind administration: The person administering the lineup does not know which individual is the suspect;
- \* Cautionary instructions: Prior to viewing the lineup, the witness is instructed that the perpetrator may or may not be in the lineup, that the witness need not make an identification, and that the administrator does not know which individual is the suspect;
- \* Lineup composition and filler selection: Persons, other than the suspect, participating in the lineup fit the general descriptions of the perpetrator, and the suspect does not unduly stand out from the non-suspect fillers;
- \* Immediately after identification, the witness is asked to describe his/ her certainty in making the identification.
- \* Sequential lineup presentation: Lineup photographs are shown one at a time, rather than all at once.

Whatever the pace of eyewitness reforms-either implemented by state and local law enforcement, voluntarily or legislatively required- eyewitness identifications come to courts for pre-trial assessment and, if the case proceeds to trial, evaluation by juries. For this reason alone, making sure courts appraise this evidence with sophistication and in accordance with good and established scientific findings is critical. The aim is not simply in spreading awareness of the extraordinary scientific advances in experimental psychology over the last 30 years, it is even more important to develop a framework that makes sure the courts do not lag too far behind the science again, while also not getting too far ahead of the data. Moreover, there are good reasons to believe that establishing a legal framework in the area of eyewitness identification testimony can be an influential example of how similar issues intersecting law and science can be adjudicated.

Two recent landmark decisions in the area of eyewitness identification evidence, *State v. Henderson* in New Jersey<sup>61</sup> and *State v. Lawson* in Oregon,<sup>62</sup> have provided a blueprint for state courts to re-evaluate and revise their legal architecture for the assessment and regulation of eyewitness testimony based on a comprehensive and in-depth assessment of the findings from experimental psychology that have occurred since *Manson v. Braithwaite*<sup>63</sup> was decided by the U.S. Supreme Court.

In *Henderson*, the New Jersey Supreme Court undertook an exemplary procedure that greatly enhanced its adjudicative process. It appointed a distinguished retired judge, the Hon. Geoffrey Gaulkin, to serve as a special master and conduct an extensive hearing about the eyewitness

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identification science and whether the Manson legal architecture was still "appropriate."<sup>64</sup> Judge Gaulkin's comprehensive "science" findings about the effect of "system" and "estimator" variables" on eyewitness identification were adopted almost without exception by the Henderson Court and remain an extremely valuable resource for researchers and courts reviewing these issues.

Relying on its supervisory powers and on state constitutional grounds, the Henderson Court rejected the Manson balancing test (the balance of "suggestive procedures" against five "reliability factors") as scientifically confounded for failing to take into account how suggestive procedures themselves and confirming feedback can falsely inflate "reliability factors" based on witness self-reports (opportunity to observe, certainty, and attention). The Court also faulted the Manson test for ignoring the effect of relevant estimator variables like stress, lighting, and race, which can and do affect reliability, unless an identification procedure was found to be impermissibly suggestive.<sup>66</sup> As remedies, the Henderson Court proposed more extensive pre-trial hearings, jury instructions reflecting generally accepted scientific findings about probable effects, motions in limine, and use of experts. Of special interest and importance are the postHenderson jury instructions that were produced by a jury instruction committee and ultimately approved by the court.<sup>67</sup>

The Lawson decision adopted Henderson's science findings and rejection of Manson, but grounded its new legal architecture on the state evidence code that, in turn, tracks the Federal Rules of Evidence (FRE). This aspect of Lawson is significant and will be helpful analytically for both state and federal judges. An evidence code framework is generally understood in state and federal courts, and "evidentiary principles" should not be conflated with "due process concerns." Last term, in *Perry v. New Hampshire*, the Supreme Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessary suggestive circumstances arranged by law enforcement." (Emphasis added.)<sup>68</sup> But the Lawson Court appropriately stresses, as a matter of state evidence law, "there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability."<sup>69</sup>

Under Lawson, following a traditional evidence code model, once a criminal defendant files a pre-trial motion to exclude eyewitness identification evidence, the state, as the proponent of the evidence, must establish all preliminary facts necessary to establish the admissibility of the eyewitness evidence under the equivalent of FRE 104.<sup>70</sup> When an issue raised in a pre-trial challenge to the eyewitness evidence specifically implicates issues under the equivalent of FRE 602 and 701, the state's preliminary showing must include, at a minimum, proof that the proffered eyewitness has personal knowledge of the matters to which the witness will testify (FRE 602), and that any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact (FRE 701).<sup>71</sup> If the state makes this showing, then the burden shifts to the defendant to establish under the equivalent of FRE 403<sup>72</sup> that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The court can either suppress the identification on that basis or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. These "intermediate remedies" would include motions in limine that have

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frequently been granted in identification cases." The decision whether to admit, exclude, or fashion an appropriate intermediate remedy short of exclusion is committed to the sound exercise of the trial court's discretion.

This Lawson evidentiary code approach makes eminent sense for at least three reasons. First, as a purely practical matter, the prosecution has the best access to information as to how identification procedures were conducted and the circumstances surrounding the observations of the witness. The "due process" approach that puts the burden on the defense to prove suggestion without the ability to depose the eyewitness or those who administered the identification procedure is problematic and results in unproductive sparring and ill-informed motions.

Second, the evidence code approach allows trial courts to identify factors that scientific research shows substantially undermine the reliability of eyewitness evidence that can arise, even if unnecessarily suggestive actions by state actors never occur. This has the added advantage of being logical: "A trial court tasked with determining a constitutional claim must necessarily assume that the evidence is otherwise admissible; were it inadmissible on evidentiary grounds, the court would never reach the constitutional question. However, a trial court tasked with considering a question of evidentiary admissibility clearly cannot begin by assuming admissibility."<sup>74</sup> And finally, the Lawson evidence code approach treats eyewitness memory like malleable "trace evidence" that can be contaminated by improper handling and degraded by environmental insults and extended storage time. This is not only a good legal analogy, but fits the biological and cognitive findings of neuroscientists as well as experimental psychologists.

To be sure, more work needs to be done, but the Henderson and Lawson Courts have taken major steps forward toward the development of a robust judicial framework for the assessment of eyewitness evidence based on sound science. These decisions reflect judging at its best and should be emulated. AJS's work in this area should continue apace, providing the necessary data and potential reforms for judges, legislators, and law enforcement to use.

### Encourage Videotaping of Interrogations, and Adopt an Evidence Code Approach to the Reliability of Confessions

The trace evidence analogy applies with equal force to the issue of false confessions—a leading cause of the conviction of the innocent. Interrogations must be properly preserved to prevent the "contamination" (the inadvertent or deliberate feeding of facts that only the real perpetrator or the police would know) and the "formatting" (suggestions by police about narrative and motivation) of a confession. Recent research from wrongful conviction cases has demonstrated both the prevalence and persuasive power of contaminated and formatted false confession.<sup>75</sup> The full electronic recording of an interrogation is essential to accurate fact-finding about a confession's reliability. In the absence of a full recording of the entire interrogation from start to finish, there is simply no way for prosecutors, judges, juries, and appellate courts to detect whether police interrogators have contaminated/formatted the suspect's false confession. Eighteen states and the District of Columbia now mandate videotaping of interrogations, and a number of states initiated this practice because the judiciary directly suggested it by either setting up an advisory commission or issuing jury instructions that an adverse inference should be drawn if an interrogation were not videotaped.<sup>76</sup>

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But just as the adoption of best practices in the eyewitness identification area must be married to a new framework for evaluating evidence in light of new scientific findings, the same is true in the area of false confessions. Scholars and scientific experts have long urged the that "constitutional" rule announced in *Colorado v. Connelly*,<sup>77</sup> focusing just on whether a confession is "voluntary," must be supplemented by a pre-trial examination that examines the "reliability" of a confession.<sup>78</sup> Although the best solution here would be statutory fixes that mandate pretrial reliability hearings and suppression on that ground, advocates and courts would be wise to undertake a reliability inquiry using an evidence code approach similar to the one adopted by the Oregon Supreme Court in *Lawson*.<sup>79</sup> This suggestion has been made before, but new work by leading scholars in the field is sure to build momentum along these lines.<sup>80</sup> AJS and Judicature could support these scholarly efforts to bolster the case for the adoption of mandatory video recording of all confessions.

These four reforms top my list of priorities for the criminal justice system. Of course, there are many other reforms that would alleviate case backlogs, create a more fair and equitable justice system, and increase public support for the courts and the administration of justice. However, adoption of these four—a supported and effective public defense system; routine issuance of ethical rule orders; and new procedures to enhance reliability of both eyewitness testimony and confessions—would go a long way toward those overall goals. ?

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