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JUDGES, RACISM, AND THE PROBLEM OF ACTUAL INNOCENCE

Honorable Stephen J. Fortunato, Jr.

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MAINE LAW REVIEW

JUDGES, RACISM, AND THE PROBLEM OF ACTUAL INNOCENCE

Honorable Stephen J. Fortunato, Jr.*

"That Justice is a blind goddess
Is a thing to which we black are wise
Her bandage hides two festering sores
That once perhaps were eyes."
L. A. H U G H E S, Justice
in THE COLLECTED POEMS OF
L. A. H U G H E S

"The most difficult and urgent challenge
today is that of creatively exploring new
terrains of justice, where the prison no
longer serves as our anchor."
A. Y. D A V I S, ARE PRISONS OBSOLETE?

I. INTRODUCTION

The facts and data are in and the conclusion they compel is bleak: the American criminal justice system and its showpiece, the criminal trial, harbor at their core a systemic racism. For decades, criminologists, law professors, sociologists, government statisticians, and others have been collecting and collating data on crime, punishment, and incarceration in the United States. These intrepid scholars have looked at crime, criminals, and the justice system from all angles—the race of defendants and victims; the relationship of poverty to criminality; severity of crime; severity of punishment; incarceration rates for different racial groups; sentencing and sentence disparities; and so on. When this information, reflecting

* Associate Justice, Rhode Island Superior Court. I am grateful to my colleagues on the Rhode Island Superior Court, Edward C. Clifton, Stephen P. Nugent, and O. Rogeriee Thompson, for reading early drafts of this essay. Marshall Clement and Felicia Delgado also provided helpful comments, for which I am thankful. Writing is a solitary endeavor, but research is often a collective effort: I am in the debt of Kara Hoopis, Kara Thorvaldsen, Sam Karn, and McCall S. Robertson for their research assistance. This essay develops remarks I presented at the Racial Justice Colloquium of the Roger Williams University School of Law on May 11, 2004, and I thank Dean David Logan and Liz Tobin Tyler, Associate Director of the Feinstein Institute for Legal Service, for including me in the program. Naturally, observations about the criminal justice system, as well as any errors, are mine alone.

thoughtful examinations of crime and incarceration statistics over forty years, is combined with the results of recent investigations into the tragic phenomena of the erroneous convictions of actually innocent people, it becomes apparent that something is drastically broken—especially relative to race—within our criminal justice system.

My purpose is not to marshal facts to prove that racism infects the criminal justice system. However, for the interested reader, I will reference studies and conclusions of writers and critics whose involvement with this topic has led them to question, criticize, and—in some instances—reject the premises that legislators, policy makers, and judges act upon when dealing with crime and putative criminals.

Among the reams of data collected and collated by researchers, one figure is regularly cited but never impeached or dismissed: "46 percent of prison inmates nationally are African-American, compared to their 12 percent share of the overall population." Connected with disproportionate incarceration rates for African-Americans is the racial breakdown for probation and parole. "Nearly one in three (32%) black males in the age group 20-29 is under some form of criminal justice supervision on any given day—either in prison or jail, or on probation or parole." The chance that a black male will avoid prison during his lifetime is slim; unlike the generous odds a white male enjoys to dodge incarceration, a black male born in 1991 has a 29% chance of spending time in prison at some time in his life. The figure for white males is 4%, and for Hispanics 16%. Young people of color fair no better than their adult brothers and sisters. The United States Department of Justice reported that in 1999, for example, "more than 6 in 10 juvenile offenders in


4. There are now more than 6.6 million people in the United States under "correctional control." Richard D. Vogel, Capitalism and Incarceration Revisited, 55 MONTHLY REV. 38, 43 (2003). Vogel culled this figure from the Bureau of Justice Statistics, United States Department of Justice, the principal source of statistical information for most researchers looking at the crime and punishment problem nationally. Id. at 44. Vogel was also able to determine that "only 35 percent of the probationers are black in contrast to prison populations where they makeup almost 50 percent of all inmates." Id. at 45.


6. Vogel, supra note 4, at 45.
residential placement were minority youth.”

A few more of the many statistical comparisons available will suffice to chronicle the disproportionate harshness that the criminal justice system visits on people of color compared to whites. Figures regarding incarceration rates—that is, the number of persons sentenced per 100,000 residents in the group being studied—show that this problem will not abate any time soon. For example, in 1996, for every 100,000 members of the black male population, 3,098 black men were sent to jail, while for every 100,000 white males only 370 were locked up. For Hispanics, the number of men incarcerated out of 100,000 was 1,278. With a disparity in incarceration rates between blacks and whites of nearly ten to one, it is unlikely that the disproportionate racial breakdown of the prison population and parolees on the street will shrink unless significant changes in the criminal justice system are implemented. A related figure is also telling: of the adults on probation in the United States, 35% are black, a significant drop-off from the nearly 50% that blacks represent in the imprisoned population. This has led one student of the problem to conclude: “These statistics indicate that it is almost as difficult for white men to get into prison as it is for black men to stay out.”

The skeptic might say these figures simply reflect a benign and racially neutral justice system going about its business, it being a fact of life that blacks commit more crime and are therefore arrested and prosecuted more often. Some statistical cohorts bolster this position, but it is a gross oversimplification. I will contend in this essay that the criminal justice system—and especially the criminal trial—is structured to foredoom disproportionately large numbers of minority men to incarceration at one or more times in their lives. I submit that at a number of junctures in the criminal justice system, official conduct that is racist in consequence, if not by design, enhances the likelihood of black men ending up behind bars at a rate that is far disproportionate to that of whites.

The official posture of the bench and bar is that racism is not endemic to the administration of criminal justice; and when isolated instances of racism occur, the

7. MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILES IN CORRECTIONS 9 (June 2004), at http://www.ncjrs.org/pdffiles1/ojjdp/202885.pdf. Though the document contains this statistic and many others equally distressing, Ms. Sickmund’s superiors, for undisclosed reasons, thought it necessary to conclude her report with a disclaimer: “Points of view or opinions expressed in this document are those of the author and do not necessarily represent the official position or policies of OJJDP [Office of Juvenile Justice and Delinquency Prevention] or the U.S. Department of Justice.” Ms. Sickmund holds the title of Senior Research Associate at the National Center for Juvenile Justice.

8. Vogel, supra note 4, at 44, tbl. 1.

9. Id.

10. Id. at 45.

11. Id.

12. For extended and thoughtful discussions that acknowledge the sad reality of crime within the black community, especially black-on-black crimes of violence, but which also criticize a criminal justice system marred by racism, see generally, KENNEDY, supra note 1 and RUSSELL, supra note 1. See also Arthur H. Garrison, Disproportionate Minority Arrest: A Note on What Has Been Said and How it Fits Together, 23 NEW ENG. J. ON CRIM. & CIVIL CONFINEMENT 29 (1997). For a lucid examination of why some members of the underclass turn their feelings of worthlessness and impotence vis à vis the dominant class into violent outbursts against each other, see the famous polemic of the Algerian psychiatrist, FRANTZ FANON, THE WRETCHED OF THE EARTH (Presence Africaine 1963) (1961).
system is well-equipped to root them out. So far as I know, there are no national studies commissioned by bench or bar professional organizations that conclude that the system has racist components, though some national and state studies reflect the not surprising fact that minorities have a more jaundiced view of the possibility of obtaining justice then do whites.13

Against this sanguine official line that all is well, racially-speaking, and that when racism surfaces it is not a systemic phenomenon but rather the aberrational behavior of a rogue judge, prosecutor, or other participant in the process, stand stark figures demonstrating incontrovertibly that minorities are disproportionately represented in police precinct lockups, criminal trials, and prisons. These baleful statistics are not the product of chance. And only if one believes that the black or Hispanic child lying in his maternity ward crib has congenital proclivities toward crime and substance abuse not shared by the Caucasian baby in the next crib could one conclude that the present state of affairs is not the result of systemic failures.

In this essay, I am not suggesting that the federal and state benches in this country are stacked with racists, though I have no doubt such people are scattered throughout the judiciary. Judges, after all, manifest many traits of their communities, and not all of these are healthy. Similarly, I am not arguing that most persons accused of crimes are actually innocent or that blacks are less capable than whites of committing heinous crimes. But this is not the point. The personal integrity and good intentions of judges, attorneys, and jurors, forced as they are to operate in an environment that compels deference to unfair and illogical practices, cannot ensure fair trials with just outcomes. It is some of these long-standing foundational rules of criminal procedure and evidence that must be changed or nullified if society’s assault on minority communities through the vehicle of the justice system is to be halted.14

13. See NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 8 (1999) (noting that “[t]wo-thirds of African-Americans feel that ‘people like them’ are treated somewhat or far worse than other people [by the judicial system]” and “[a]lmost 70% of African-American respondents think that African-Americans, as a group, get ‘Some-what Worse’ or ‘Far Worse’ treatment from the courts . . .”); Terry Carter, Divided Justice, A.B.A. J., Feb. 1999, at 42, 42 (concluding that black lawyers perceive the justice system as possessing more racial bias than white lawyers do; for instance, 52.4% of black lawyers surveyed, as compared to 6.5% white lawyers, answered “very much” racial bias currently exists in the judicial system); David B. Rottman & Alan J. Tomkins, Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges, Cr. Rev., Fall 1999, at 24, 27 (stating “[s]tudies in sentencing and other criminal justice decision points do suggest African-Americans are treated worse than other Americans. It is reasonable for African-Americans to presume they are not being treated as well as others and to be inclined to extend that perception to the treatment of minority groups generally.”) (citations omitted); American Bar Association, Perceptions of the U.S. Justice System, available at http://www.abanet.org/media/perception/perception6.html (“It should be noted, however, that while overall confidence in the justice system shows no consistent patterns based on race/ethnicity, specific attitudes toward the system do vary between whites and non-whites, with whites holding more positive attitudes in many areas, particularly those that relate to equality of treatment.”) (emphasis in original omitted); David B. Rottman & Randall M. Hansen, How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos, available at http://www.ncsconline.org/D_Research/publications.html (“Generally African-Americans are the most critical and least satisfied [with state courts].”).

14. People involved in the judicial enterprise would do well to regularly reflect on an aphorism of Justice Holmes: “It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.” Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).
We learn much about systemic racism from an examination of outcomes, those final figures pertaining to arrests, sentencing, prison populations, and the racial breakdowns under these rubrics. The figures, of course, are the result of the slow unfolding of a protracted process, but informative as they are, they do not plainly or completely disclose the “smoking gun” of racism within the courts. Numbers cannot fully depict the systemic reality, but when they are analyzed within a common sense critique of the structural dynamic of the criminal trial, we can reach conclusions about which we can be confident.15

Draped like a cold, mildewed sheet over the raw figures of prison populations and incarceration rates are the statistics and stories pertaining to exonerations of actually innocent people, that is, people who were convicted of crimes for which later evidence demonstrated they had no responsibility whatsoever. On April 19, 2004, Professor Samuel R. Gross of the University of Michigan Law School and his team of researchers released a study titled Exonerations in the United States: 1989 through 2003,16 which collated data of 328 exonerations across the United States during that period of time, “145 of them [having been] cleared by DNA, 183 by other sorts of evidence.”17 Professor Gross and his team reported on only individual cases and labeled their figures “conservative” because they did not consider mass exonerations such as those that occurred “in 1999-2000 in Los Angeles, in the aftermath of the discovery of the Rampart area police scandal; and in 2003 in Tulia, Texas, when a single dishonest undercover officer was shown to have framed 39 innocent drug defendants.”18

15. A leading commentator on the issue of race and crime, Jerome G. Miller, with long experience as professor, researcher, political staffer, and correctional official, emphasizes that as helpful as statistics are in describing institutional phenomena, they are not as important as the narratives or “life-records” behind the numbers. For Miller, one cannot “lose sight of the complex human tragedies that weave their way through the mundane labeling and processing we call criminal justice.” MILLER, supra note 1, at 145. A similar sentiment was expressed by Mr. Justice Brennan in a bristling dissent directed at the five-justice majority. See McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting). The majority ignored statistical evidence of race bias in a capital case even though they themselves found the statistics and conclusions to be valid. See id. at 291 n.7. In words applicable to any examination of the impact of race on the functioning of the criminal justice system, Mr. Justice Brennan wrote, “the evaluation of evidence suggesting such a correlation [between skin color and a decision to impose the death penalty] must be informed not merely by statistics, but by history and experience.” Id. at 341 (Brennan, J., dissenting). To this I would add that we cannot lose sight of the narrative observations uttered by judges, legislators, and policy makers in their often flawed and illogical responses to the human tragedies importuning them for justice.


17. Id. at 1.

18. Id. Gross did not make any reference to the race of the individuals victimized by these mass miscarriages, but newspaper accounts provide the not surprising information that they were virtually all people of color. For example, in the Rampart scandal, after a pattern of police perjury and frame-up was uncovered, 100 prisoners were released; the overwhelming majority of these were Hispanic. Lou Cannon, One Bad Cop, N.Y. Times, Oct. 1, 2000, § 6 (Magazine) at 632. In Tulia, a small town in northwest Texas, the fabrications of one police officer led to the arrest on cocaine charges of “46 people, nearly all of them black”; some of them were serving sentences up to twenty years at the time their wrongful conviction was revealed. CBSnews.com, Targeted in Tulia, Texas? at http://www.cbsnews.com/stories/2003/09/26/60minutes/main575291.shtml (July 4, 2004). Beginning on July 29, 2002, Bob Herbert wrote a series of
Among the tasks Gross set for the study was the identification of causes for these egregious miscarriages of justice. The researchers determined that the principal flaw leading to wrongful convictions was eye-witness misidentification. Following misidentification was perjury, sometimes by victims or confederates, other times by police officers or government forensic scientists: "[o]verall, in 44% of all exonerations (145/328) at least one sort of perjury is reported . . . ."

The Gross study is replete with information that should alarm even casual observers of the criminal justice system, especially those with faith that the system invariably reaches just results through fair procedures. But the findings and conclusions regarding the connection of race with false convictions demonstrate that something more malevolent than chance is at work when a person of color confronts an accusation of crime.

The study of rape and juvenile exonerees is especially revealing. By way of background, Gross and his colleagues point out that in 2002, of all prisoners serving time for rape, 58% were white, "only 29% were black; and 13% were Hispanic;" yet, an examination of the cases revealed that "for rape exonerations the proportions are reversed: almost two-thirds of the defendants are black, 65%; only 27% are white; and 8% are Hispanic." Most of the rape exonerations studied by Gross resulted from DNA comparisons. In answering the question of why blacks were "so greatly over-represented among those defendants who were falsely convicted of rape and then exonerated," the study concluded: "[t]he key is probably the race of the victims." In explaining how they reached this conclusion, the researchers wrote:

We know the race of the victim for 75% of the 69 rape exonerations with black defendants, and in 75% of those cases the victim was white. . . . Of all the problems that plague the American system of criminal justice, few are as incendiary as the relationship between race and rape. Nobody would be surprised to find that bias and discrimination continue to play a role in rape prosecutions. Still, the most obvious explanation for this racial disparity is probably also the most powerful: the perils of cross-racial identification. Virtually all of the interracial rape convictions in our data were based, at least in part, on eyewitness misidentifications, and one of the strongest findings of systematic studies of eyewitness evidence is that white Americans are much more likely to mistake one black person for another than to do the same for members of their own race.

columns in the New York Times documenting the Tulia scandal and exposing the flaws in the criminal justice system that allowed it. See, e.g., Bob Herbert, Kafka in Tulia, N.Y. TIMES, July 29, 2002, at A19; Bob Herbert, 'Lawman of the Year,' N.Y. TIMES, Aug. 1, 2002, at A25; Bob Herbert, Tulia's Shattered Lives, Aug. 5, 2002, at A15. On January 19, 2005, the New York Times ran a squib announcing that Tom Coleman, the drug agent convicted of multiple counts of perjury directed against the Tulia defendants, received a sentence of ten years on probation. Steve Barnes, Texas: Ex-Narcotics Agent Gets Ten Years' Probation, N.Y. TIMES, Jan. 19, 2005, at A14. To the extent that any judicial punishment sends a message, the one here is that official misconduct of the most serious nature directed at minority defendants is a trifle not warranting incarceration, much like lynching in the days of Jim Crow.

20. Id.
21. Id.
22. Id. at 22.
23. Id.
24. Id.
25. Id. at 22-23 (emphasis added) (citations omitted).
Although confirming in so many words the observation of philosopher and social critic Cornel West that “Americans are obsessed with sex and fearful of black sexuality,” an empirical background fact that buttresses Gross’ observation that racism is a factor in white-victim-black-assailant rape cases is that “[i]nterracial rape is uncommon, and rapes of white women by black men in particular account for well under 10% of all rapes.”

Though these statistics pertaining to rape exonerees reveal a skewed situation when racial comparisons are made, the study’s observations about juvenile exonerees present a situation even more disturbing. After reviewing their 328 cases, the researchers were confronted with a stark fact: “[n]inety percent of exonerated defendants who were under 18 at the time of arrest were black or Hispanic. There are virtually no non-Hispanic white juveniles among the defendants we have studied—3 out of 328, less than 1% of the total.” Why is there such an extreme gap in the figures based on race? The researchers submitted a conclusion:

In part, this disparity reflects general racial patterns in juvenile justice in America. Many juveniles who are arrested are not prosecuted at all but returned to the custody of their parents or guardians for less formal discipline; among those who are prosecuted, only a small fraction are treated as adults and punished accordingly. The juvenile exonerees in our data are all drawn from the small group of juvenile suspects who are prosecuted as adults and sentenced to long terms in prison—or, in 3 cases, to death. Race plays a major role at each stage of the sorting process that produces this rarified group.

To support its observations about race and the “sorting process,” the researchers turned to FBI crime statistics:

[Although only 27% of all juveniles arrested in the United States in 1990, 1992, and 1994 were black, a Department of Justice study found that 41% of defendants in juvenile courts in those three years were black, and 67% of juveniles prosecuted as adults were black. In other words, white teenagers who are arrested by the police are less likely than blacks to be prosecuted in juvenile court, and much less likely to be prosecuted in felony court as adults.]

Other figures further bolster the proposition that race is an insidious factor in the juvenile justice system. Conceding that chance could play a role because their sample was small, the researchers had sufficient salient data to opt for an explanation that focuses on racial disparity. Clearly, they observe, black juvenile rape defendants “face a special danger of cross-racial misidentification”; and as to false confessions resulting in erroneous convictions, “85% of the juvenile exonerees who falsely confessed were African-Americans.”

The researchers were not prepared to assert that their figures proved that police officers were “more likely to use coercive interrogation tactics on black juveniles.”

27. Gross, supra note 16, at 22-23. Gross notes that the figure is actually about “5 to 6%,” according to his extrapolation from the BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 11 (1997). Id. at 23, n.50.
28. Id. at 23.
29. Id. at 24 (emphasis added).
30. Id. at 24-25.
31. Id. at 25.
niles then on white juveniles,"32 and for this we can admire their scrupulosity as empiricists. However, if we allow ourselves a bit of discursiveness and intuition to reflect on the history of race relations in this country and the continuing de facto segregation in housing, schools, segments of the work force, and TV ads (have you ever seen an integrated couple pushing a product on a major network?), we can conclude that a time in the police interrogation room for the black juvenile may be more "instinct with coercion"33 than for a white one. Yet, despite their caution, Professor Gross and his colleagues do not hedge on their ultimate conclusion:

The broad picture, however, is no mystery. We have a dual system of juvenile justice in this country, one track for white adolescents, a separate and unequal one for black adolescents. The sharp racial differences in exonerations of falsely convicted juvenile defendants are just one manifestation of that racial divide.34

There are several, incontrovertible facts to be drawn from meshing the data about prison populations and incarceration rates generally with information about exonerations in particular.

First, the criminal trial is not an infallible institution; and as a result of its failings, "thousands, perhaps tens of thousands,"35 of actually innocent people suffer behind bars. Second, a number of factors, none of them benign, coalesce to put men of color at greater risk of serving jail time than white males, even in circumstances where they are actually innocent. And lastly, with the exception of the diligent lawyers, law students, journalists, and investigators who champion the cause of the wrongfully convicted (and, of course, the thoughtful and honorable judges who have heeded their petitions and acknowledged the system's grievous mistakes), there are no system-wide attempts underway to implement substantive reforms in the criminal trial in order to eradicate—or at least minimize—the problem of outcomes unduly influenced by considerations of race.36

The figures I have cited thus far relate primarily to prisoners convicted and incarcerated for so-called street crimes, principally drug offenses and larceny, as well as crimes of violence. They do not reflect that other dimension of the criminal justice system that sheds additional light on the issue of race and justice, namely the widespread existence of corporate crime, a species of white-collar crime that symbolically reflects—albeit unintentionally—in its appellation the color of the overwhelming majority of its practitioners. The gentle and genteel treatment by prosecutors (with occasional notable exceptions) of corporate thieves, swindlers,

33. Gross, supra note 16, at 25. Even Congress, hardly a citadel of enlightenment regarding race, crime, and incarceration, has noted the racial divide in the nation's juvenile justice system, and accordingly has ordained that each year the Administrator of the Office of Juvenile Justice and Delinquency Prevention submit a comprehensive report to Congress relative to the "rate at which juveniles are taken into custody" and other pertinent factors such as "the race and gender of the juveniles." 42 U.S.C. § 5617(1)(B) (2003).
35. There have been some legislative enactments that have tentatively addressed the issue of race as well as the problem of wrongful convictions. See, e.g., The Federal Juvenile and Delinquency Prevention Act, 42 U.S.C. § 5617(1)(B) (2003) (requiring custodial officials to keep statistics regarding the race of juvenile detainees); see also The Innocence Protection Act of 2004, 18 U.S.C. § 3600 (2004) (representing a congressional attempt to allow convicts with colorable claims of innocence grounded on DNA analysis to pursue them).
polluters, tax evaders, and hustlers is proof positive that there are two separate and distinct criminal justice systems operating in this country. If one reads the Wall Street Journal, the Financial Times, and the business section of the New York Times as police blotters and docket sheets, the daily accounts of corporate transgressions are staggering both in the scope of their predations on stockholders, consumers, the environment, and public health as well as the comparatively mild sentences and fines—sometimes civil and sometimes criminal—that are meted out.37 In a meticulously researched study of corporate and street crime, and the diverse responses to each by politicians and law enforcement officials, George Winslow estimates that “corporate crime now costs the economy $1 to $2 trillion a year . . . ."38 Not only do corporate criminals regularly avoid doing any hard time

37. I urge the reader to select at random any edition of these newspapers and read it with the objective I recommend. For example, knowing that on the evening of November 16, 2004, I would be a participant in a panel discussion on the reentry of prisoners into the community sponsored by the Rhode Island Family Life Center and the Annie E. Casey Foundation, I brought along a copy of the business section of that day’s New York Times. A leading story focused on the Boeing-Pentagon scandal and the criminal conduct of at least two officials, one an Air Force employee and another the Chief Financial Officer of Boeing, who were charged with exchanging cases of health fraud (which cost consumers $100 billion in inflated fees each year)."

38. GEORGE WINSLOW, CAPITAL CRIMES 7 (1999). Winslow reaches this figure by extrapolating from data compiled by reputable groups. He references a 1974 estimate by the United States Chamber of Commerce that put the economic cost of white-collar crime at $41 billion annually. Id. Winslow observes that for the decades following 1974, “many law-and-order conservatives worked to limit spending to fight corporate crime, which is generally committed by large campaign contributors, as they were beefing up spending to fight street crime, which is typically committed by poor people.” Id. He then factors in the accomplishments of the F.B.I. “In 1996, for example, F.B.I. investigations produced convictions in only two anti-trust cases, one case involving workplace safety, thirty-five environmental cases, and just 148 cases of health fraud (which cost consumers $100 billion in inflated fees each year).” Id.
behind prison walls, their corporate employers and their colleagues in the executive suite are never prohibited from lobbying or making campaign contributions, though the criminal justice system visits mass disenfranchisement on felons. Any dispassionate examination of the disparate treatment of white-collar crimes—even an abbreviated one—reveals the entanglement of race and class. Everything I have encountered in both the scholarly and general literature shows that people locked in our nation’s jails and penitentiaries are disproportionately men of color sent there for street crimes, while corporate criminals are overwhelming white and rarely hear the prison door slam shut behind them. Clarence Darrow put it well in words as pertinent today as when he offered them to the Cook County jail inmates in 1902: "There is no very great danger of a rich man going to jail"; and "few people comparatively go to jail except when they are hard up."

The volumes of data accumulated by government agencies, advocacy groups, and individual scholars should penetrate the fog of official smugness to expose a systemic racism that is a potentially lethal influence—if not the determining factor—in criminal trials involving minority defendants. This state of affairs is morally and constitutionally repugnant, but it need not exist. Some of the forces that create this problem are external to the criminal justice system, and the criminal justice system can offer few, if any, direct solutions. However, some of the problems that spawn racist outcomes are imbedded within the criminal justice system itself and lend themselves to resolution by judges and other decision-makers within the system. Still other problems manifest the intertwined relationship between some sectors of the criminal justice system with the larger society’s attitudes and public policies. As a result, the nature of a particular problem determines the

39. Scanning the Wall Street Journal, the Financial Times, and the business section of the New York Times suggests that white corporate criminals are able to stay out of jail by the payment of large fines, be they criminal or civil; and needless to say, these dispositions are initiated by prosecutors and approved by judges. As two careful students of the problem have observed: "[p]olice do not typically initiate independent investigations of white-collar crime. In addition, political pressures—at least before the business scandals of 2002—did not typically affect white-collar sentences. For example, mandatory minimums are not generally attached to white-collar crimes. Also, fines have an unusually prominent place in white-collar sentencing, and judges have a good deal of discretion at the bottom of the fine table." Symposium, Disparities in Sentencing—Race and Gender, 15 FED. SENTENCING REP. 160, 161 (2003) [hereinafter Disparities in Sentencing] (summarizing research by Max M. Schanzenbach and Michael L. Yaeager (the Schanzenbach-Yaeager study), titled Prison Time and Fines: Explaining Racial Disparities in Sentencing for White-Collar Criminals (an unpublished manuscript in possession of author of this essay)). The researchers reached one other conclusion that evidences another dimension of bias: "they found that black offenders must pay larger fines in comparison to white offenders to receive the same reduction in prison time." Id.

40. In 2002, I conducted library and internet research but could not locate any federal or state statutes proscribing lobbying or campaign contributions by corporations as a result of the corporation or its officers being criminally convicted; and so far as I am aware, these circumstances have not changed over the past two years. See Stephen J. Fortunato, Jr., Corporate Crime and Voting Rights, DISSERT, Summer 2002, at 56.


42. For example, many corporations and government bureaucracies have a monetary stake in the continued existence of a large imprisoned population serving lengthy sentences, and they have been able to enlist the support of politicians to create a growth industry for prison construction and management. Marc Mauer, one of the country’s most astute students of incarceration, has chronicled the problem:
feasibility of a judicial response to effectively eradicate it as a factor sustaining the system's racism.

For example, a judge is strategically positioned in a criminal trial to exclude prior convictions or evidence of prior uncharged bad acts, to allow expert testimony on the pitfalls of cross-racial misidentification, and to instruct the jury that proof beyond a reasonable doubt means proof to a mere certainty. More problematic is the resolution of conflicting testimony regarding the seizure of evidence, but a judge who is mindful of realities on the street—meaning everything from joblessness and educational deficiencies to aggressive policing and racial profiling—will be better able to see through some of the smoke screens that blow into the courtroom. If a resolution of the conflicting stories does not clearly present itself, the judge can remind himself or herself—as too few do—that, for example, the burden of proof in a warrantless search situation rests with the prosecution trying to justify the search.43

The entanglement of class and race with the criminal justice system cannot be overstated nor can it be erased by judicial fiat. Grinding poverty and shattered support systems mark the lives of the overwhelming majority of criminal defendants and are the contributing causes of much of their behavior in the first place. Minorities make up disproportionate numbers of the impoverished underclass, and their plight has been widely documented,44 albeit with few palliative responses from the major political and corporate actors. Much of the data and analysis pertaining to crime and prisons in this country would still be valid if we deleted references to minorities and substituted the words "poor people" or "the impoverished underclass." Class divides are manifested in the criminal justice system—and, indeed, inhere in the way we criminalize some behavior while permitting other activities that are not *mala in se.* But in this essay my principal points of reference are official actions and policies that disparately burden racial and ethnic

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The more than 600,000 prison and jail guards, administrators, service workers, and other personnel represent a potentially powerful political opposition to any scaling-down of the system. . . . Prisons as sources of economic growth have also become vital to the development strategy of many small rural communities that have lost jobs in recent years but hold the lure of cheap land and a ready workforce. . . . Add to this the rapidly expanding prison privatization movement focused on the "bottom line" of profiting from imprisonment.

MAUER, supra note 1, at 10. See also, DAVIS, supra note 1, at 84-104; Brent Staples, Why Some Politicians Need Their Prisons to Stay Full, N.Y. TIMES, Dec. 27, 2004, at A20.

43. See, e.g., Welch v. Wisconsin, 466 U.S. 740, 750 (1984) ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."); see also Chambers v. Maroney, 399 U.S. 42, 61 (1970) (Harlan, J., concurring in part and dissenting in part) ("The 'general requirement that a search warrant be obtained' is basic to the Amendment's protection of privacy, and 'the burden is on those seeking [an] exemption . . . to show the need for it.'") (alteration in original) (citations omitted); Katz v. United States, 389 U.S. 347, 356-58 (1967); Warden v. Hayden, 387 U.S. 294, 299 (1967); Preston v. United States, 376 U.S. 364, 367-68 (1964); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Agnello v. United States, 269 U.S. 20, 33 (1925).

minorities so as to dis-equilibrate the criminal trial: racial profiling, cross-racial misidentification, aggressive policing in minority communities, higher arrest rates for minority juveniles and their youthful acquisition of criminal records, etc. Judges, of course, should not need any academic studies of poverty and class to tell them about the complexion and status of the defendants who parade through their courtrooms every day. Even in communities where the percentage of minorities is less than the national average, the majority of the defendants will be poor, functionally illiterate, and non-white.45

Judges may have theories and political philosophies about everything from the maldistribution of wealth and resources in this country and the ludicrously low poverty line defined by the government ($18,600 for a family of four), but we are powerless as judges to do anything about it. We can, however, bring an awareness of these problems into the courtroom. So with practical limitations in mind, it is worth exploring what an alert judge with an informed conscience can do to confront racism in the criminal trial. I hasten to add that I am mindful that more than 90% of the criminal accusations lodged in this country are resolved by plea bargains, but the fact that most prisoners end up behind bars without a trial does not vitiate my criticisms. I submit that seasoned defense attorneys—whether members of the private bar or public defenders' offices—and their clients are either consciously aware of or intuit the problems and defects of the criminal trial I discuss in this essay, and they make their decisions within the shadows of these problematic realities.

II. BEGINNING WITH BATSON

Batson v. Kentucky46 gave minority criminal defendants a tool to use in thwarting prosecutors' efforts to use peremptory challenges in eliminating from the jury people of a race or ethnicity similar to the defendants.47 This decision was grounded in equal protection principles and sought not only to afford the defendant an opportunity to try by a cross-section of the community containing members of his own race, but also to ensure that racial minorities were afforded a full opportunity to serve on juries.48 The Batson rationale was later extended to gender,49 civil cases,50 and white defendants.51

Batson’s purpose was laudable, but it is unlikely that in any voir dire either the prosecution or the defense will be able to forecast the inclinations of black jurors.

45. See Doris J. James, U.S. Depot't. of Justice, Bureau of Justice Statistics, Profile of Jail Inmates, 2002 (2004). For example, of the convicted inmates serving time in 2002, only 26.1% had a high school diploma, while nearly 12% had not matriculated beyond the eighth grade. Id. at 2, tbl.1. Of those inmates who reported some employment prior to their arrest, approximately 60% were wallowing in poverty making less than $1,000 per month. Id. at 9, tbl.14. And needless to say, “more than 6 in 10 persons in local jails in 2002 were racial or ethnic minorities, unchanged from 1996.” Id. at 1.

47. Id. at 84.
48. Id. at 99.
51. See, e.g., Georgia v. McCollum, 505 U.S. 42 (1992) (holding Batson applies to defendants where the prosecutor made a Batson challenge to restrict white defendants from using their peremptory challenges to strike potential black jurors).
any more than they can of white. Nonetheless, *Batson*’s principles serve as a prophylactic to increase the odds that a defendant of color will encounter people on his or her jury that may have similar cultural backgrounds and a familiarity with the community from which the defendant comes.

But *Batson* also arrived with a built-in problem of implementation. In so many words, the Supreme Court said that a prosecutor, upon being challenged that he or she is exercising a peremptory challenge to eliminate a person of color from the potential jury on the sole ground of race, must give the judge “a neutral explanation” for the challenge.52 At the same time, the Court also emphasized “that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause.”53 It may be fairly asked where the domain lies between the arbitrariness of a peremptory race-based challenge and a “for cause” challenge grounded on the demonstrable basis of a juror’s inability to be neutral and impartial. The Supreme Court entrusted the answer to this question to the sound discretion of the trial judge: “We decline, however, to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.”54 Appellate courts reviewing a trial record revealing “purposeful discrimination” and devoid of an adequate “neutral explanation” for striking a minority juror must reverse the conviction.55

By allowing a “neutral explanation” that need not rise to the level of a “for cause” challenge, the Supreme Court unwittingly sabotaged its stated concerns. Nine years after *Batson*, in *Purkett v. Elem*,56 the Court sided with a federal trial judge, and overturned the Court of Appeals for the Eighth Circuit, by approving a prosecutor’s “‘race-neutral reason’ for striking a black from prospective jury service on the basis that the juror’s long, unkempt hair, mustache and beard ‘look suspicious to me.’”57 In one of its more daring flights from reason, the United States Supreme Court said: “What it means by a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection.”58 The Court went on to supply ammunition to those prosecutors and judges who have no serious commitment to eliminate racism from the criminal trial or to welcome all members of the wider community into the governmental function of jury service: “The prosecutor’s proferred explanation in this case—that he struck juror number 22 because he had long, unkempt hair, a mustache and a beard—is race neutral and satisfied the prosecution’s step two... burden of articulating a nondiscriminatory reason for the strike.”59

53. *Id.* In his concurring opinion in *Batson*, Mr. Justice Marshall signaled that intuitions or hunches advanced by the prosecutor about a prospective minority juror’s bias could mask proscribed motives: “‘seat-of-the-pants instincts’ may often be just another term for racial prejudice,” *Id.* at 106 (Marshall, J., concurring). Justice Marshall went on to note that “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” *Id.* See also Joshua E. Swift, Note, *Batson’s Invidious Legacy: Discriminatory Juror Exclusion and the “Intuitive” Preemptory Challenge*, 78 CORNELL L. REV. 336 (1993).
55. *Id.* at 100.
57. *Id.* at 767.
58. *Id.* at 769 (citation omitted).
59. *Id.*
In dissent, Justice Stevens chided the majority for rendering the opinion *per curiam* and pointed out with tart delicacy that the Court had eviscerated *Batson*: “Today the Court holds that it did not mean what it said in *Batson*.” Justice Stevens offered further criticism: “Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how ‘implausible or fantastic,’ even if it is ‘silly or superstitious,’ is sufficient to rebut a prima facie case of discrimination.”

Even without the imprimatur of *Purkett v. Elem*, some trial courts have allowed, with the later approval of appellate courts, explanations as patently frivolous as a prosecutor’s representation that hostility toward the state on the part of a juror can be discerned from “body motion and eye contact.” Using the rationale (such as it is) of *Purkett v. Elem*, but without any specific reference to that decision, the Supreme Court of Illinois in *People v. Easley* declared that “[d]emeanor constitutes a legitimate race-neutral reason for exercising a peremptory challenge,” while acknowledging that such “explanations must be closely scrutinized.” The same court found no problem in allowing prosecutors to exclude a black person from jury service on the basis of a revelation that his “neighborhood had experienced street gang activity.” The court stated that “Illinois courts have allowed the State to exclude a venireperson if he or she lives in an area that has experienced gang activity.” The Supreme Court of Illinois was unmoved by the differing view of the United States Court of Appeals for the Seventh Circuit which had opined that “[a]llowing the exclusion of black venirepersons simply because their home or place of work is in a gang area has an enormous potential to disproportionately exclude black jurors in most cases involving black gang members.”

The *Easley* court subscribes to the prevailing notion that only a showing of an actual intent to discriminate on the part of the prosecutor is sufficient to place the State’s attorney outside the strictures of *Batson*. The demand that this burden be satisfied by the defense in the few minutes allotted for a *Batson* hearing during the voir dire forecasts inevitable failure.

Apart from these excursions into the twilight zone where a glance or a grimace can signal a disqualifying lack of impartiality, there are structural problems in our system of jury selection that could—and should—be adjusted to further the

60. Id. at 771 (Stevens, J., dissenting).
61. Id. at 775 (Stevens, J., dissenting) (internal citations omitted).
62. See, e.g., State v. Holley, 604 A.2d 772, 778 (R.I. 1992). In *Holley*, a prosecutor was able to satisfy the *Batson* “neutral explanation” requirement by articulating his concern to the trial judge about “[the prospective juror’s] demeanor and his ability to follow ... instructions regarding the standard of proof.” Id. (citations omitted). The Rhode Island Supreme Court sustained the removal of the minority juror, reasoning that it was appropriate for the prosecutor to rely on “body motion and eye contact.” Id.
63. People v. Easley, 736 N.E.2d 975, 990 (Ill. 2000).
64. Id. at 989.
65. Id.
66. Id. (quoting Williams v. Chrans, 957 F.2d 487, 489-90 (7th Cir. 1992)).
goals of *Batson*. For instance, alternates are regularly designated at the same
time the entire jury is being selected; and of course, the alternates will not be
called upon to serve as jurors unless one of the jury slots is vacated because of
sickness or other indisposition. The problem arises if the so-called luck of the
draw results in a person of color being chosen as an alternate while the jurors
selected to serve are white. Absent any later developments resulting in the excusal
of a juror, this scenario must be labeled a lost opportunity to place a person of color
on the jury.

The problem could be eliminated if we abandon the practice of designating
jurors as alternates at the beginning of the trial. For example, if out of the general
panel of fifty people, fourteen are put in the box and two of these are persons of
color, the alternates could be designated after final arguments but immediately
prior to deliberations. In selecting the final twelve, the two minority names could
be put aside by the clerk and not exposed to the random spin of a barrel or any
other lottery mechanism employed to determine which two will become alternates.
This may appear to be a form of affirmative action when viewed from the point of
view of prospective jurors hoping to be part of the deliberating process, but from
the point of view of the defendant—and one would hope from the point of view of
those working to eliminate racism from the criminal trial—a multi-hued jury should

67. Under Federal Rule of Criminal Procedure 24(c), alternates are selected immediately
after the seating of the jurors who will actually deliberate. The alternates have no authority
unless and until one of the original jurors is excused. Rule 24(c)(2)(B) provides: "Alternate
jurors replace jurors in the same sequence in which the alternates were selected." *Fed. R. Crim.
P. 24(c)(2)(B)*.

Rule 24 appears neutral and fair on its face, but when scrutinized more closely we see a
façade allowing for racial injustice through the luck of the draw. Let us say twelve jurors were
selected to hear the criminal indictment and that ten of these jurors were white and two were
black. Let us also suppose that four alternates were selected, the first three being white and the
fourth one black. If one of the original two black jurors becomes sick and is excused, under Rule
24 the juror selected as the replacement will necessarily be white. While this has the patina of
racial neutrality surrounding it, it represents a failure on the part of the justice system to be more
vigorous in assuring that the defendant, particularly one of color, has other people of color
judging his fate.

Maine replicates the federal procedure by designating alternates before the trial begins, and
when necessary, a replacement juror is chosen from among the "alternate jurors in the order in

My state of Rhode Island presents a variation on the theme. Pursuant to Rule 24 of the Rhode
Island Rules of Criminal Procedure, there is no requirement that the alternates be designated as
such prior to the trial getting under way. At the end of the trial and prior to the commencement
of deliberations if more than twelve jurors remain seated, "the clerk in the presence of the court
and the parties shall put the names of the remaining jurors in a box and from it shall draw 12
names, or such other number stipulated to by the parties, to determine the issues." *R.I. Super.
Ct. R. Crim. P. 24(c)*. The names not drawn from the box, meaning the surplus names above
twelve, are then discharged. Again, we see the problem from the viewpoint of a defendant of
color, as well as that of a system trying to address the problem of racial marginalization gener-
ally. Assuming all the participants in the jury selection process—the judge, the prosecution and
the defense—have worked in good faith to conform to the *Batson* ideal, and further assuming
that from the general panel two of the fourteen jurors selected are people of color, we now all
repair to a roulette wheel to vindicate a constitutional right. This is a bizarre situation unknown
to any other area of the law. We do not spin a barrel or cut cards to see whether Miranda
warnings should be given in a custodial interrogation, nor do we roll dice to determine whether
not ultimately rest on the roll of the dice. 68

As the problem of racism and racist outcomes in the American criminal trial are multi-faceted and systemic, only an incorrigible Pollyanna would have welcomed Batson as a panacea. There can be no doubt, however, that a minority defendant increases his odds of receiving a fair trial by having on his jury people with ears attuned to the narrative he recites, especially if the case is not a slam-dunk for the prosecution.

Moreover, no one could have expected from Batson the elimination of the problems of race from criminal trials, any more than one should expect that a new day dawns for criminal justice and civil rights because the presence of African-Americans, women, and other minorities is increasing on the bench. Indeed, some research in the field supports the proposition that black judges impose tougher sentences on blacks than white judges do. 69 In one study, researchers examined decisions by the appointments to the federal bench that President George W. Bush ended during his first term and concluded that in 65% of their decisions involving criminal law and civil liberties, the outcomes were “conservative.” 70 What is telling is that President Bush made more appointments of women and minorities than some of his predecessors, yet these judges voted conservatively at about the same rate as their white colleagues. 71

a warrant was validly issued or not. The simple solution to the jury selection process is to have the judge, in the presence of counsel for both sides, but outside the presence of the jurors, withdraw from the barrel the names of the minority jurors and designate them as part of the final twelve to deliberate. Following this, the clerk, under supervision of the judge, would proceed to select the remaining jurors until the total of twelve is reached.


69. See, e.g., DAVID B. MULHAUSEN, THE DETERMINANTS OF SENTENCING IN PENNSYLVANIA: DO THE CHARACTERISTICS OF JUDGES REALLY MATTER? (Center for Data Analysis Report No. 04-02, 2004), at http://www.heritage.org/Research/Crime/cda04-02.cfm (Feb. 18, 2004). The author’s analysis of data leads him to conclude that “black judges in this study were involved in cases where the incarceration lengths were harsher than sentences administered by white judges” and that “[w]hile disparities in sentencing of black offenders sentenced by white judges were not found, the sentences of black offenders by black judges were longer than the sentences of white offenders by white judges.” Id. at 23, 24. As to why this is so, Mr. Muhlhausen, a Senior Policy Analyst in the Center for Data Analysis at the Heritage Foundation, speculates that “black judges may be more concerned for the plight of minority victims than for the rights of minority criminals.” Id. at 24.


71. Id. at 22. The author concluded: “the evidence suggests that conservative ideology rather than ‘affirmative action’ is the predominant motivating force behind the Bush judicial appointments.” Id. But see Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 WASH. & LEE L. REV. 405 (2000) (positing that more black judges on the bench will enhance the dispensing of justice so long as the judges represent “outsider” communities; and Professor Ifill also advocates the support of “white judges who are capable of bringing outsider voices to judicial decision-making.”). Id. at 495.
Crucial evidence in many criminal trials is the testimony of an eyewitness pointing to the defendant as the perpetrator of the crime. Sometimes the eyewitness is the victim and sometimes an observer who may or may not have previously known the principals in the incident. In any event, jurors are generally impressed by it.

The conventional admonition to jurors by trial judges comes to the courtroom via *Neil v. Biggers* and *Manson v. Brathwaite*, which acknowledged that there are more difficulties with in-court identification by eyewitnesses than simply the possibility of tainting through an unduly suggestive show-up or line-up conducted prior to the trial. Instructions to jurors drawn from the *Manson* analysis alert them to problems with eyewitness identification such as the stress of the observer, the duration of the observation, lighting conditions, previous familiarity with the defendant, and so on. Into this mix, we must factor race, and in particular, the problem of cross-racial identification.

Even a nodding acquaintance with the history of this country reveals the special problems associated with cross-racial crime, especially in the South. Even putting this aside, the risks of cross-racial misidentification remain. Scholarship over the past three decades in both the social sciences and the law indicates a pervasive problem when members of one race are called upon to give identification testimony regarding a defendant of another race.

Twenty years ago in a seminal article, Professor Sheri Lynn Johnson accurately described judicial predilections regarding cross-racial misidentification that still obtain today. She wrote that “[m]ost courts will not allow defense counsel to introduce expert testimony on the own-race effect on the ground that cross-examination is the proper way to elicit information on a witness’s credibility.” Professor Johnson was writing, of course, before *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, in which the Supreme Court offered a guide for trial judges considering the admission of expert testimony; significantly, she wrote without the benefit

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72. "They all look alike" has long been a stereotypical observation shared among members of one racial group when discussing the appearances of racial groups other than their own. As will be discussed in this section, the social sciences have confirmed that there exists a problem of cross-racial misidentification that undergirds the stereotype; indeed, one commentator on the problem inserted the stereotypical epigram into his title. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207 (2000-01).

73. 409 U.S. 188 (1972).


76. Manson v. Brathwaite, 432 U.S. at 114. (“These [factors] include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”). This case involved a pre-trial identification, but the analysis can be tailored to any situation involving identification testimony. Cf. United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (applying factors to trial identification).


of the exoneration data and its revelations about erroneous convictions of minority
defendants due to mistaken identification by white witnesses.

The Gross study, *Exonerations in the United States*,79 concluded that eyewitness
misidentification is a principal cause of wrongful convictions, regardless of
the race of the defendant, but cross-racial identification exacerbates the problem.
Of the 199 murder exonerations that Gross and his colleagues studied, 49% of
these convictions were attributable to eyewitness misidentification; and regarding
the 120 rape exonerations in the study, 88% of the convictions resulted from
misidentification.80

Race emerges as a potent factor when the rape figures are examined closely.
The Gross researchers indicated that their data contained “the race of the victim
for 75% of the 69 rape exonerations with black defendants, and in 75% of those
cases the victim was white,”81 though the larger picture is that rapes of white
women by black men account for only 5-6% of all reported rapes.82 The shaky
reliability of an identification by any victim of a horrific and traumatic event is
understandable; but in no way am I suggesting that the victim can never get it
right. I am urging, however, that judges rely on the available data regarding the
problem of cross-racial identification and then act fairly to ensure that jurors are
alerted to this reality in a thoughtful manner.

Expert testimony, we know from federal and state codes as well as the com-
mon law—like all evidence—is admissible upon an initial determination by the
trial judge that it is relevant. This determination is not made in a vacuum, nor is it
to be made according to caprice or whimsy, but rather it is to rest on a principled
justification.83 At present, we possess sufficient facts that coalesce to militate in
favor of exercising judicial discretion to allow expert testimony in situations in-
volving an identification that crosses racial lines. These facts are: (1) the expert
consensus of social scientists that it is more difficult in a stress-filled situation for
people to identify an actor who is a member of a race other than their own; (2) the
information and statistics regarding eye-witness identification gathered both by
social scientists and legal experts has passed peer review scrutiny and can satisfy
the Daubert requirements; (3) some courts have admitted such testimony without
any injury to the trial process; (4) the information recently developed about exon-
erations shows that wrongful convictions are often attributable to cross-racial
misidentification.

The use of an eyewitness identification expert will not eliminate the possibil-
ity of a faulty conviction based on cross-racial misidentification, any more than
moving toward a greater utilization of such experts should be construed as an ac-
knowledgment that valid convictions of actually guilty people never resulted when
the eyewitness and the defendant were of different races. But the use of the expert
will do what experts in any context are suppose to do—assist the fact finders by
providing them with information normally not possessed by lay people—and thereby

79. See supra notes 16-36 and accompanying text for a detailed discussion of this study.
80. Gross, supra note 16, at 19, tbl. 3.
81. Id. at 22.
82. Id. at 23 n.50.
83. For a thoughtful discourse on the ethical obligation of judges to articulate reasons for
their rulings and decisions, see Richard A. Wasserstrom, The Judicial Decision: Toward a
reduce the possibility of an erroneous conviction. Those of us without impaired vision are aware of the inherent difficulty in identifying persons or objects from a distance, and/or suddenly, and/or in poor lighting, etc., and therefore should endorse the opportunity to use an expert. As one federal judge observed:

A court should not dismiss scientific knowledge about every day subjects. Science investigates the mundane as well as the exotic. That a subject is within daily experience does not mean that jurors know it correctly. A major conclusion of the social sciences is that many beliefs based on personal experience are mistaken . . . .

IV. THE BURDEN OF PROOF: CONSTITUTIONAL “LITE” MEANS MORE CONVICTIONS

A pervasive problem of our criminal justice system is that judges regularly instruct juries in criminal cases regarding the burden of proof in ways that deny to a defendant, black or white, the protection against conviction on insufficient evidence. The historic burden the prosecution must meet if a jury is to render a verdict of guilty is, of course, proof beyond a reasonable doubt; but this phrase is not always defined in the judge’s instructions to the jury, and when it is, it is often in a confusing way that effectively dilutes the government’s obligation so that convictions are regularly obtained with a less rigorous standard.

As a practical matter, simple logic tells us that there are several consequences of the failure of state and federal trial judges to give an appropriate instruction on the government’s burden of proof. First, a lowered burden of proof inevitably increases the number of convictions; and while it would be fair to argue that many of the persons convicted on a lesser standard are actually guilty, it is just as reasonable to conclude that many actually innocent people are also being convicted. As the Supreme Court has made clear, a conviction on a standard less than proof beyond a reasonable doubt is never a harmless error; but in today’s legal universe, there are in our prisons and jails many inmates, both black and white, convicted on a constitutionally deficient standard. Many of these people may well be actually guilty, but they languish in prison as the result of an unfair trial, something that the Constitution does not contemplate or countenance. More troubling, there are also many actually innocent people who have been victimized by this state of affairs. And we know from the figures reflecting the inequitable racial makeup of the prison populations that minorities undoubtedly suffer at a greater rate than whites.

What should jurors be told about the government’s burden of proof—and how can I assert that this is not being done? It is easy to lift from the Supreme Court’s jurisprudence a simple and succinct definition of the government’s burden in criminal cases. In 1895, the United States Supreme Court turned to an English case decided almost eighty years earlier to explain the prosecution’s obligation: “[The presumption of innocence] is a maxim which ought to be inscribed in indelible characters in the heart of every judge and jurymen . . . . To overturn this, there

84. United States v. Hall, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring).
must be legal evidence of guilt, carrying home a *deecree of conviction short only of absolute certainty*."\(^{86}\)

Seventy-five years later, the Supreme Court refined its language when it insisted again that, for there to be a conviction, the collective state of the jurors' minds must be in the domain of near certainty. In *In re Winship*, the Court held that the government's proof must leave the fact finder's mind in a "subjective state of certitude," and that proof beyond a reasonable doubt was the equivalent of proof to an "utmost certainty."\(^{87}\) A short while later, the Court used nearly identical language, declaring that, for a valid conviction to result, the jurors' minds must be in a "subjective state of near certitude."\(^{88}\)

As the Supreme Court has clearly defined proof beyond a reasonable doubt in terms of a subjective state of near certainty on the part of jurors, why aren't judges regularly employing this language? A cynic might answer that many judges are happy to extend to the prosecution an easier device for conviction than the one required by due process, but each observer of the American criminal trial and the criminal justice system will have to reach his or her own conclusions about this. What is a fact of jurisprudential history, however, is that the United States Supreme Court has not mandated that either lower federal courts or state courts employ a definition reciting language reflective of its "near certitude" or "utmost certainty" language. On the contrary, when the Court in 1994 was called upon to review murky and confusing criminal burden of proof instructions, it had an opportunity to require state judges to make reference to its *Winship* and *Jackson* pronouncements for the sake of clarity and uniformity, but it declined, asserting that "we have no supervisory power over the state courts."\(^{89}\)

The Supreme Court's long-standing refusal to provide guidance in this crucial area of criminal law is mystifying when one considers the Court's zeal in creating a jurisprudence for the Fourth, Fifth, and Eighth Amendments. More importantly, however, some lower federal appellate courts and state appeals courts have been emboldened to command trial judges in their jurisdictions not to offer jurors any definition of proof beyond a reasonable doubt. The United States Court of Appeals for the Fourth Circuit has spoken categorically: "This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof."\(^{90}\) And Chief Justice Richard Posner of the Seventh Circuit has opined: "[D]eeply entrenched in the popular culture as it is, the term 'beyond a reasonable doubt' may be the single legal term that jurors understand best."\(^{91}\) This notion was rejected by Justice Ginsburg in her

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86. Coffin v. United States, 156 U.S. 432, 456 (1895) (quoting McKinley's case (1817), 33 St. Tr. 275, 506 (emphasis supplied)).
91. United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring). *See also* Thompson v. Lynaugh, 821 F.2d 1054, 1060-61 (5th Cir. 1987) (stating that the Fifth Circuit disfavors attempts by district courts to define reasonable doubt). A student comment recommending that no explanation of the term based its position on federal cases as well as decisions of the highest courts of Illinois, Mississippi, Texas, and Wyoming which prohibited jury instructions that attempted to define the standard. Henry A. Diamond, Comment, *Reasonable Doubt: To Define or Not to Define*, 90 COLUM. L. REV. 1716, 1719-20 (1990).
concurring opinion in *Victor v. Nebraska*: “the words ‘beyond a reasonable doubt’ are not self-defining for jurors.” 92

Thoughtful observers of the trial as an institution have always maintained that precision and clarity on the part of the judge when instructing the jury is crucial to the enterprise of doing justice. Justice Felix Frankfurter put it well in *Bollenbach v. United States*, when he wrote that a jury can draw appropriate conclusions only when the judge assumes the responsibility of providing a declaration of relevant legal criteria with “concrete accuracy.” 93 Justice Frankfurter emphasized that “a conviction ought not to rest on an equivocal direction to the jury on a basic issue.” 94

Professor Edmund M. Morgan was blunt in his criticism of appellate decisions and the adverse impact they have when trial judges feel impelled to enunciate the law in terms employed by reviewing tribunals:

[T]here can be little doubt that some appellate courts adopt a totally unrealistic attitude in construing instructions to the jury, and assume that jurors get not only the general impression which the words convey, but that they make a microscopic examination of each instruction in the light of the strict rules of grammar and rhetoric, with the result that trial judges in self-defense are compelled to formulate charges so complex that no ordinary body of men could hope to understand them. 95

Though all jury instructions are important, nothing can be more devastating to the criminal defendant’s right to a constitutionally correct trial than to have the judge’s charge dilute the government’s burden of proof. Chief Judge Jon O. Newman of the Second Circuit signaled the problem as a national one in a speech to professors and students at New York University Law School, which he later developed in a 1993 article in that school’s law review. Chief Judge Newman castigated his fellow federal judges for having “failed to take the [reasonable doubt] standard seriously as a rule of law against which the validity of convictions is to be judged.” 96 The judge went on to say that American courts generally refuse “to take this standard seriously and apply it conscientiously as a rule of law.” 97 Summing up, he said: “[W]e have insisted that juries be instructed that they must be persuaded beyond a reasonable doubt, but we have not insisted on meaningful observance of this standard as a rule of law for testing the sufficiency of the evidence.” 98

92. 511 U.S. at 26 (Ginsburg, J., concurring).
94. Id. at 613.
97. Id. at 990.
98. Id. at 989. See also Stephen J. Fortunato, Jr., *Instrucing on Reasonable Doubt After Victor v. Nebraska*: *A Trial Judge’s Certain Thoughts on Certainty*, 41 Vill. L. Rev. 365 (1996), in which I argued for an instruction that expressly references the Supreme Court’s doctrinal pronouncements about certainty rather than abstruse metaphysical discussions on the nature of a reasonable doubt (e.g., “A doubt that is not fanciful,” “reasonable doubt is a doubt based on reason,” etc.). My proposed instruction is:

The government must prove each and every element of the crime beyond a reasonable doubt. This is a very high burden of proof. It means that you may find the defendant guilty only if, after reviewing all the evidence and discussing the evidence with your fellow jurors, you are convinced in your mind that it is just about certain—or nearly
One of the more important decisions to confront a defendant during the course of a criminal trial is whether to take the stand in his own defense or not. Apart from any strategic decisions based on an evaluation of the strength of the state's case, the defendant must examine the possibility of being confronted with his prior convictions.99 Federal Rule 609 confers on judges the discretion to measure the probative value of admitting evidence of a prior conviction against prejudicial effect; and this discretion may be used in all circumstances except when the condition goes directly to a crime “involving dishonesty or false statement . . . .”100 State rules regarding the admissibility of prior convictions follow this approach generally, or else have other devices for a judge to utilize in balancing probative value against prejudicial effect,101 as they regularly do with all relevancy ques-

certain—that the defendant committed the crime. If after reviewing the evidence, your mind is in such a state that you are not just about certain—or nearly certain—that the defendant committed the crime, you must return a verdict of not guilty. 

Id. at 427. Defendants have been both convicted and acquitted with this charge, but no one found guilty could complain that the charge was confusing or that it permitted the government to obtain a guilty verdict using a diluted burden of persuasion. Anecdotally, I can report that after some trials resulting in acquittals, jurors told me that they "sensed" or "had a hunch" that the defendant was guilty, but in light of the charge—and their oath—felt obliged to return with a "not guilty verdict." For an observation that jurors can act in a converse fashion, see Hans Sherrer, The Complicity of Judges in the Generation of Wrongful Convictions, 30 N. Ky. L. Rev. 539, 577 (2003):

[99. See Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction, 42 VILL. L. REV. 1 (1997) [hereinafter Hornstein] (exploring the development of a defendant's right to testify to keep the jury from learning of his prior convictions, culminating in Rock v. Arkansas, 483 U.S. 44 (1987)).

100. FED. R. EVID. 609, Impeachment by Evidence of Conviction of Crime, provides, in part, as follows:

(a) General rule. For the purpose of attacking the credibility of a witness, 

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and 

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

101. See also, e.g., CAL. EVID. CODE § 788 (Deering 2004) (providing that by examination of the witness or by recorded judgment of felony conviction may be shown unless:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted. 
(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.
(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
(d) The conviction was under the laws of another jurisdiction and the witness has
tions under the mantle of Rule 104. But what is of concern here is the supposed logic—or inherent illogic—of the rule as well as the accumulated data that inexorably leads to the conclusion that the use of Rule 609, while hard on any criminal defendant who takes the stand, is more likely to present problems for minority defendants. The assumption of the rule, of course, is two-pronged: (1) that a past criminal conviction or convictions furnishes probative evidence that a defendant is not a credible witness; and (2) the jury will be able to follow a judge's instruction that prior convictions may be used only to demonstrate a lack of credibility but not as evidence of the crime for which the defendant is on trial. That a prior conviction, dating back two or three years prior to the trial, leads irresistibly and inevitably to the conclusion that the defendant will necessarily lie is not supported by common sense or a serious commitment to the presumption, or assumption, of innocence.

The criminal trial, after all, endeavors to recreate an historical event for the jurors, but the principal question they must resolve is whether the government has met its burden of proof. The defendant, in effect, challenges the government to produce evidence of his guilt regarding criminal activity that occurred at a particular time and place. Whether he engaged in criminal acts at some other times and places is in no way germane to the jury's considerations. Moreover, there is no reason to conclude that someone who in 1998 and 1999 received cocaine convictions and in 2000 was convicted of simple assault, is necessarily the person who robbed the convenience store in 2003, or that he will probably lie about his whereabouts at the time the robbery was committed.

If trials consisted of offering juries a choice to convict one out of two possible candidates for committing a specific crime, and one of the candidates had four convictions while the other was a model-citizen with no criminal record, then perhaps the odds game Rule 609 foists on juries would make sense. But trials do not offer juries that stark an option, and the vaunted strength of our system is that the conviction or acquittal will be based on the strength or weaknesses of the state's case and not on the past and unrelated transgressions of the accused. One other twist regarding the illogic of the situation was addressed by a commentator on this problem: given the fact most convictions result from plea bargains, the prior guilty plea of a defendant—presumably a true admission of a criminal act—could lead to an inference of prior truthfulness.

If the defendant elects to take the stand and if a record of a prior conviction or convictions is admitted, the judge will tell the jury that the prior convictions can—

been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

Me. R. Evid. 609(a) (2004) (providing, in part, that “admissibility shall depend upon a determination by the court that the probative value of this evidence upon witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.”); Texas R. Evid. 609 (West 2004) (providing, in part, that “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party”).

102. Taylor v. Kentucky, 436 U.S. 478, 484 n.12 (1978) (stating that the “presumption of innocence” was actually an “assumption” rather than a “presumption” (citing Carr v. State, 192 Miss. 152, 156, 4 So.2d 887, 888 (1941))).

not be used as evidence directly supporting the prosecution's allegations regarding the crime giving rise to the trial, but that the jurors, as fact finders and evaluators of the believability of all the witnesses, may factor the prior conviction(s) into their credibility determination. The widely respected treatise, McCormick on Evidence, suggests that jurors will often disregard this distinction despite the judge's instruction and will look upon a conviction as another evidentiary arrow in the prosecution's quiver. Common sense should tell us that this is a reasonable assessment because the distinction is nuanced and is delivered to lay people along with numerous other legal principles that they must grasp in a relatively short period of time.

An equally distressing appraisal of the misuse of prior conviction evidence is found in the classic study by Harry Kalven and Hans Zeisel, The American Jury, where they compared cases with similar probabilities of acquittal and concluded that, on average, when a jury had knowledge of a defendant's prior criminal record the probability of acquittal decreased from 42% to 25%. Obviously, if getting a defendant's criminal record before the jury did not have a significant impact favorable to the prosecution, prosecutors would not fight so vigorously to have it admitted and defense attorneys would not fight just as vigorously to keep it out.

While the admission of a prior record hurts a defendant, whatever his color, blacks wishing to testify in their own defense in a criminal trial are more disadvantaged as a group than whites. This proposition is supported by statistical data collected and analyzed by scholars studying arrest, conviction and incarceration rates regarding different racial groups, and disparate educational and income levels. Researchers Becky Pettit and Bruce Western drew on other studies, government statistics, and their own analysis to paint a painful picture:

(1) "By 1999, more than 40 percent of black male high school dropouts, aged 22 to 30, were in prison or jail," and this figure takes on added significance when one considers that the "overall national rate of incarceration [was] .69 of 1 percent in 1999"; (2) "The cumulative risk of imprisonment is 3 to 4 times higher for high school dropouts than for high school graduates. About 1 out of 9 white male high school dropouts, born in the late 1960s would serve prison time before age 35 compared to 1 out of 25 high school graduates. The cumulative risk of incarceration is about 5 times higher for black men. Incredibly, a black male dropout born 1965-69 had nearly a 60 percent chance of serving time in prison by the end of the 1990s"; (3) "The estimated lifetime risk of imprisonment for black men is 28.5 percent compared to 4.4 percent for white men"; (4) "Among all men, whites in their early thirties are more than twice as likely to hold a bachelor's degree than blacks. Blacks are about 50 percent more likely to have

106. Lewis Mayers, Shall We Amend the Fifth Amendment? 21 (1959) (stating that 71% of poll respondents inferred guilt from a defendant's refusal to testify).
107. Becky Pettit & Bruce Western, Inequality in Lifetime Risks of Imprisonment 1 (Mar. 2003) (citation to study omitted). This thoughtful monograph is in the possession of the author; drafts were presented in 2001 at the annual meetings of the Population Association of America and the American Sociological Association.
109. Id. at 156.
served in the military. However, black men are about 7 times more likely [than whites] to have a prison record.\textsuperscript{110}

From these and other depressing facts, Pettit and Western concluded somberly: "This evidence suggests that by 1999 imprisonment had become a common life event for black men that sharply distinguished their transition to adulthood from that of white men."\textsuperscript{111}

There are several underlying causes for the phenomena represented by these figures. Full discussion of these topics is beyond the scope of this essay but thoughtful expositions are available elsewhere. Among the oft referenced causes are: the portrayal in public policy declarations and the mass media of young black males as predators;\textsuperscript{112} the so-called, and not very successful, war on drugs, with blacks being hammered for criminal involvement with crack while whites are treated more benignly respecting the powdered variety of the drug;\textsuperscript{113} aggressive tactics by the police in poor, predominantly black urban neighborhoods;\textsuperscript{114} racial profiling; and "driving while black."\textsuperscript{115} The disproportionate representation in the prison population and hence, a disproportionate population on the street of black males, mostly young, with prison records presents a dire picture; but as bad as it is, it becomes even worse when placed alongside the findings of racial disparities in Professor Gross' exoneration study.\textsuperscript{116}

Additionally, probation and parole place the offender on a tightrope without a net—or a flimsy one—to catch his fall. Not only do persons on probation and parolees return in large numbers to communities ill equipped to meet their eco-

\textsuperscript{110} Id. at 164 (emphasis added).

\textsuperscript{111} Id. at 164.

\textsuperscript{112} See MAUER, supra note 1, at 171-77; MILLER, supra note 1, at 37-47; RUSSELL, supra note 1, at 8-11.


\textsuperscript{116} Gross, supra note 16; see also supra notes 16-36 and accompanying text.
nomic, educational, and mental health needs, officialdom burdens them additionally with a criminal record to be revealed to potential employers and with disenfranchisement that excludes them from any voice in community governance.

My State, Rhode Island, has a statute typical of many in force around the country regarding the expungement—or more accurately, the sealing of criminal records. The statute presents problems on its face and as applied. Though the person recently released to the streets needs a job immediately, and preferably one that pays a living wage, there is a five-year waiting period to expunge a misdemeanor conviction and a ten-year wait to remove a felony conviction from public view. Judicial discretion is restricted, and the statute provides for the removal of only one conviction; in other words, if someone has two or three convictions on her record which are separated in time by a few months or a few years, she is ineligible for expungement even if she has turned her life around through completing educational or vocational programs, benefiting from a drug rehabilitation program, participating in wholesome community activities, demonstrating responsible motherhood, and so on.

The black ex-convict faces still more problems. The lack of reasonable and rational expungement statutes gives cover to racist employers to refuse to hire people of color on the guise that the job is being denied solely because the applicant has a conviction or convictions. Because a large percentage of African-American males have criminal records, the effect of being rejected for a decent job has disastrous economic consequences for minority communities as well as the individual job seeker.

A harmful effect on the community is also seen with disenfranchisement. Forty-eight of the fifty states prohibit convicted felons from voting, either permanently or temporarily; Maine and Vermont are the two enlightened exceptions. Using figures available in 2004, The Sentencing Project of Human Rights Watch concluded that 4.7 million citizens were disenfranchised as a result of a felony conviction, including over 1.7 million who have fully completed their sentences. Regarding the impact of disenfranchisement laws in black communities, The Sentencing Project noted that “1.4 million African American men, or 13% of black men, are disenfranchised.” The study warned ominously: “Given current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime. In states that disenfranchise ex-offenders, as many as 40% of black men may permanently lose their right to vote.” Naturally, where the concentration of black people is highest, the harm-

117. See R.I. GEN. LAWS § 12-1.3-3. The proper word is “sealing” because the records are not permanently destroyed but rather made inaccessible to prospective employers and others who might claim a need to learn of their existence. At some future point in time, if the beneficiary of the “expungement” is accused of criminal activity, law enforcement officials have ready access to the records to determine if the accused has a background of criminal convictions.


120. Id.

121. Id.
ful effects on the community will be greatest. According to a Newsweek cover story published in 2000, in at least nine states, more than 20% of black males are temporarily or permanently banned from voting due to a felony conviction.\footnote{Fellner, supra note 119, at 8. It should be noted that felony disenfranchisement leads, ipso facto, to exclusion from jury duty. For the minority defendant, this obviously decreases the pool of available jurors, especially young males, from which the jury will be selected. This presents one more obstacle in the way of achieving the goals of *Batson v. Kentucky*. See supra notes 46-71 and accompanying text.}

The argument that allowing convicted felons presently at liberty to vote would somehow dilute the purity of the electoral process is absurd. Every non-felon who votes is hardly a paragon of moral rectitude or well-informed about current events. But perhaps the most damning criticism that can be levied against the disenfranchisement practices is that it perpetuates the legacy of racism, not only because of the statistics just noted, but because as a matter of historical fact, felon disenfranchisement laws became a key weapon of racists to keep blacks away from polling places after the Civil War and during reconstruction: "Today, scholars widely acknowledge the historically racist motives underlying criminal disenfranchisement in the South. The Supreme Court has also recognized this history."\footnote{Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L. J. 537, 542 (1993) (referencing Hunter v. Underwood, 471 U.S. 222 (1985)) (citations omitted).} Professor Andrew Shapiro documented the efforts of state constitutional conventions in targeting blacks through their disenfranchisement statutes.\footnote{Id. at 537-42.} He wrote of the crippling effects of this strategy on black communities:

> The effort was remarkably successful: blacks made up 44% of the electorate in Louisiana after the Civil War, but less than 1% in 1920. Almost 70% of eligible blacks were registered to vote in Mississippi in 1867; less than 6% were registered two years after that state’s 1890 disenfranchising convention.\footnote{Id. at 538 (citations omitted).}

Attacks have recently been mounted against state disenfranchisement legislation under the Voting Rights Act, but these efforts ran into the Supreme Court’s stonewall of certiorari denial.\footnote{See generally Locke v. Farrakhan, 125 S. Ct. 477, _ U.S._ (2004).} If there is to be any reform in the foreseeable future, it will probably come through legislative rather then judicial action. This type of endeavor would be aided greatly by judges speaking before public interest groups and legislative committees to bring about decent and humane changes in the areas of expungement and disenfranchisement.\footnote{Model Code of Judicial Conduct Canon 4B (1998) provides: "Avocational Activities: A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code."} The arguments to be made are simple. Regarding expungement, it is beyond dispute that a criminal record impedes one’s rise out of poverty, which is, after all, one of the preconditions of most criminal activity in the first place. Moreover, legislators should be made aware that so-called white collar and corporate transgressions, many of which have calamitous consequences financially, environmentally, and healthwise for thousands of people, result in no similar personal and political burdens for the usually white and usually educated offender. In these matters, there is rarely any jail time,
but even when a few miscreants serve time, the corporation obviously does not go to jail; but more important, the corporation is not forestalled by any state or federal laws from continuing to lobby legislators or from making contributions to political candidates.\textsuperscript{128}

With these realities in mind, I submit that the assumptions underlying Rule 609 and its state imitators should be reversed; instead of approaching the problem of the admissibility of prior convictions with the notion that they should be placed before the jury unless an exceptionally prejudicial circumstance is determined to exist by the judge, a defendant’s criminal record should be excluded unless the defendant puts his character directly in issue. In a thoughtful and comprehensive essay published in 1999, South Carolina attorney Robert D. Dodson advocated that “a per se rule disallowing prior conviction evidence should be adopted.”\textsuperscript{129} To bolster his position, Dodson pointed to the English practice of excluding prior conviction evidence pursuant to the Criminal Evidence Act of 1898.\textsuperscript{130} Not surprisingly, there are a few exceptions to the application of this Rule, the most notable being the allowance of “impeachment through prior conviction evidence when a defendant puts his character in issue.”\textsuperscript{131} “In effect, the rule’s exception still affords a criminal defendant protection as long as he does not actively attempt to mislead the jury into believing that he has a spotless record.”\textsuperscript{132} Dodson noted that the English practice has been adopted in at least five states: Hawaii, Pennsylvania, Kansas, Georgia, and Montana.\textsuperscript{133}

In Maine, the legislature has not gone as far as its five sister states, but the Supreme Judicial Court has moved in the direction of curtailing the use of prior convictions. Interpreting that provision of Rule 609 of the Maine Rules of Evidence, as amended in 1990, which provides that the “admissibility [of a prior conviction] shall depend upon a determination by the court that the probative value of this evidence upon witness credibility outweighs any unfair prejudice to a criminal defendant,”\textsuperscript{134} the Supreme Judicial Court held that the defendant was under no obligation to show that “unfair prejudice ‘substantially’ outweigh[s] the probative

\textsuperscript{128} See supra text accompanying note 39.


\textsuperscript{130} Id. at 28 (citing Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(f) (Eng.). The Criminal Evidence Act provided that:

[a] person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or convicted of or been charged with any offence other than that where-with he is then charged . . . .

Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 29.

\textsuperscript{133} Id. at 22; see also HAW. REV. STAT. § 626-1 (1993); MONT. R. REV. RULE 609 (West 2004); PA. R. EVID. 609 (2004); GA. CODE ANN. § 24-9-20 (2004); KAN. STAT. ANN. §§ 60-420, 60-421 (2003). Rule 609 of the Montana Rules of Evidence is the most stark prohibition on the use of prior convictions: “For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.” MONT. R. REV. RULE 609. The Georgia statute is an exemplar of the English rule: “No evidence of general bad character or prior convictions shall be admissible unless and until the defendant shall have first put his character in issue.” GA. STAT. ANN. 24-9-20(b).

\textsuperscript{134} ME. R. EVID. 609(a).
value of the evidence on witness credibility," but that exclusion of the criminal record was warranted by the defendant showing "that the unfair prejudice simply outweigh the probative value on credibility." 135

The problems engendered by the admission into evidence of prior convictions, like many of the rules or practices found in the American criminal trial, visit unfair difficulties on all defendants—regardless of their color and regardless of whether they are actually innocent; but because the average black male accused of crime is more likely to have acquired a criminal record, men of color as a group suffer the most under the prevailing scheme. 136

VI. PROBATION AND PAROLE: GREASING THE PRISON GATE

Parole and probation are commonly viewed as alternatives to incarceration, the former always following some period of time behind bars, and the latter being imposed as a sentence either in lieu of incarceration or a status of supervision to follow time in prison. The benign explanation for the use of these modes of official supervision over a convict is to monitor and assist the parolee or probationer as he or she resumes a life in the community after conviction and/or incarceration. But what these statuses also do is facilitate any governmental desire to return a probationer or parolee to confinement without the expense, burden, and constitutional protections of a full criminal trial.

According to the Bureau of Justice Statistics, of the 565,000 reported state prison admissions in 1998, 206,000 lost their liberty as either parole or probation violators. 137 Other statistics develop the picture further. Approximately 42% of all persons released from prison or jail into parole or probation supervision eventually are returned to confinement; 138 indeed, 62% of released state prisoners are rearrested within three years, and 41% of this group of discharges are put back into prison or jail. 139 One should not expect the problem to abate as approximately 40% of all state prisoners are expected to be released in any twelve-month period, 140 and most of these will be under some form of official supervision, as are nearly 80% of those who annually re-enter the prison apparatus as parole or probation violators. 141

We know that people of color will constitute a disproportionate amount of the parolees and probationers, 142 but the question remains: What are we to make of these figures and the legal categories of probation and parole respecting systemic racism? These figures, either standing alone or viewed in conjunction with other data, indicate that far too many people are being sent to jail for non-violent offenses, primarily substance abuse, and that efforts at rehabilitation and retraining,

135. State v. Braley, 2003 ME 152, ¶ 5, 834 A.2d 140, 142 (citing Me. R. Evid. 609(a) and contrasting it with Me. R. EVID. 403).
136. See supra notes 4-12 and accompanying text.
138. Id.
139. Id.
140. Id. at 3.
141. Id.
142. See supra note 4 and accompanying text.
especially in the areas of drug addiction, literacy development, and job skills are not succeeding, despite the noble efforts of many therapists and caseworkers in the field who struggle with a lack of funds to service a large population of needy individuals. In a report prepared at the request of the Hon. Charles B. Rangel (D-NY) by the United States General Accounting Office, we learn that “[i]n 1997, 56 percent of state inmates and 46 percent of federal inmates reported that they had participated in alcohol/drug treatment programs,” and these percentages were the same according to data reflecting 1991. It is impossible to tell from the GAO report whether the prisoners were referencing participation in programs inside or outside the prison walls, or whether they participated voluntarily. In any event, one can assume that they learned they had a serious problem, and this is consistent with the conclusion of the report submitted to Congressmen Rangel:

[D]rug and alcohol use were common among both nondrug offenders and drug offenders. For example, the percentages of property offenders in state prison who reported that they had used crack or powder cocaine in the month before their current arrest, and who reported that they had been under the influence of crack or powder cocaine at the time of their arrest, were very similar to the percentages of drug offenders.

And lastly, perhaps the most salient conclusion of the GAO report: “In both federal and state prisons in 1997, minority inmates were more likely to be incarcerated for drug crimes.”

When a prisoner is released into the community, the police, prosecuting officials, and probation and parole officers are well aware of the location of the neighborhood where the releasee resides. They also know that even non-criminal transgressions of regulations imposed by the status, such as drinking a beer in a bar or failure to attend a therapy session, could result in liberty being revoked and the individual returning to prison. Considerable discretion rests with parole and probation officials, not to mention prosecuting authorities, to charge someone as a parole or probation violator; and when they elect to go this route, the officials know the standard of proof they must meet is an easy one.

In the leading case of Morrissey v. Brewer, the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution required that government officials afford a hearing to a person facing parole revocation. Saying that it had no intention “to equate... parole revocation to a criminal prosecution in any sense,” and that “the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial,” the Supreme Court sketched the outline of a permissible proceeding:
This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. 149

A year after *Morrissey*, the United States Supreme Court held that probationers were entitled to the same rights as parolees when facing revocation; 150 but in 1985, the Court diluted what lower courts believed *Morrissey* and *Gagnon* required, namely that "a sentencing court . . . state explicitly why it has rejected alternatives to incarceration." 151 The Supreme Court decided that it had not earlier required any such thing and that the revoking authority did not have to state any reasons "explaining why alternatives to incarceration were not selected"; 152 moreover, the Court went on to say that there was no due process requirement mandating appellate review of the "factfinder’s discretionary decision as to the appropriate sanction." 153 Of equal importance, the Court emphasized that revocation hearings "need not be composed of judges or lawyers." 154 In some states, of course, probation revocation is a proceeding conducted by a judge in open court. 155

The revocation system—with few procedural guarantees, official discretion at every turn, relaxed rules of evidence, a low burden of proof, and a high tolerance for unarticulated decisions—invites abuse. When a prisoner is released into the community, he or she has little money and no job, but more than likely is burdened with much of the baggage that got him or her into jail in the first place: a problem with drug or alcohol abuse, or both; functional illiteracy and/or limited marketable skills; family and friends, such as they are, in an impoverished and high-crime neighborhood; and the memories of a prison experience more degrading than uplifting. 156 This vulnerable individual, confined now to the margins of society, must walk a tightrope stretched across the chasm of more prison time and fastened to only the good will (or lack thereof) of the cop on the street, the probation and parole officials, and in some cases, the judge. The racist official—and there are surely some at every level of the process—can shoot fish in the barrel, as can the simply malicious or mean-spirited. The judges and others in the revocation hierarchy who shut their eyes to systemic racism will function as unconscious ticket-stampers at the prison’s revolving doors.

Let us not be victims of our own naiveté. Not only does the released inmate reenter the community under the scrutiny of a host of government officials, his tenuous status is also known to his friends, acquaintances, enemies, and significant others. It takes little imagination to see how easily a false accusation can be made to the probation officer or the precinct police by a rival or spurned lover: "he

149. Id. at 488.
152. Id. at 612-13.
153. Id. at 613.
154. Id. at 612.
156. The barriers and hurdles facing the ex-convict seeking reentry into the community have been comprehensively chronicled in JOAN PETERSILIA, WHEN PRISONERS COME HOME (2003).
pushed me,” “he’s been coming home drunk,” “he’s selling and using,” etc.—easy to claim, difficult to disprove, and often a ticket back to jail.157 Surely, one small—and money-saving way—for judges to abate this problem is to impose shorter terms of probation after prison time has been served. Probation clearly does not stop the rescidivist, and those who do commit crimes after a shortened term of probation has expired still will face criminal prosecution.

VII. STORMING THE IVORY TOWER

Regrettably, there are some key players in the criminal justice system who are unmoved by any demonstration—philosophical or empirical—that an innocent person can be wrongfully prosecuted and convicted. While the popular slur is that otherwise competent adults who are out of touch with reality most often reside in ivory towers located in the Elysian fields of academe, when it comes to contemporary problems of racial injustice, the practitioners of the fanciful are more apt to be found in our courthouses. Nearly all the studies cited in this article come from academicians; and sadly, some of the most obtuse and illogical—not to mention unethical—observations about race, justice, and actual innocence are attributable to people operating in the “real world.” One especially outrageous example of such an immoral mindset was the subject of a New York Times front page story in February of 2003. A few lines are worth repeating:

Judge Laura Denvir Stith seemed not to believe what she was hearing. A prosecutor was trying to block a death row inmate from having his conviction reopened on the basis of new evidence, and Judge Stith, of the Missouri Supreme Court, was getting exasperated. “Are you suggesting,” she asked the prosecutor, that “even if we find Mr. Amrine is actually innocent, he should be executed?” Frank A. Jung, an assistant state attorney general, replied, “That’s correct, your honor.”

That exchange was, legal experts say, unusual only for its frankness.

After a trial and appeal, many prosecutors say, new evidence of claimed innocence should generally not be considered by the courts.158

The position taken by the Missouri assistant attorney general was a replication of the one advanced several years earlier by the Virginia Attorney General. In

157. See Gross, supra note 16, at 18. The University of Michigan researchers noted the frequent occurrence of perjury in the exoneration cases they studied. Conceding the difficulty of unearthing an intentional falsehood, the authors of the study indicated that the perjury problem is probably more widespread than their figures show; but nevertheless, they were able to reach a conclusion that is dispiriting and should prompt caution on the part of all people of good faith who are entrusted with determining outcomes in a criminal trial: “Overall, in 44% of all exoneration (145/328) at least one sort of perjury is reported—including 57% of murder exonerations (114/199), and 24% of rape exonerations (29/120).” Id. It should be noted that the researchers encountered perjury by putative victims, actual perpetrators pointing accusing fingers at innocents, complaining witnesses, police officers, and forensic experts. Regarding the long-standing problem of police perjury, see Gabriel J. Chin & Scott C. Wells, The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. PITT. L. REV. 233 (1998); Christopher Slobogin, Testifying: Police Perjury and What to Do About It, 67 U. COLO. L. REV. 1037 (1996); and Comment, Police Perjury in Narcotics “Dropsy” Cases: A New Credibility Gap, 60 GEO. L.J. 507 (1971).

arguing successfully that a death row inmate, Joseph O'Dell, was time-barred from having DNA tests submitted to demonstrate his erroneous conviction, Attorney General Mary Sue Terry, in a widely reported statement, was chillingly succinct: "Evidence of innocence is irrelevant."159

Happily for him, Mr. Amrine fared better than Mr. O'Dell. Two months after hearing argument, the Missouri Supreme Court granted Amrine's habeas corpus petition, holding that while the evidence on which Amrine was initially convicted was "constitutionally sufficient," though "not overwhelming," the recanting of three fellow inmates whose testimony had designated him as the perpetrator of a murder caused "confidence in his conviction and sentence [to be] so undermined that they cannot stand and must be set aside."160

Though no mention is made of it in the opinion, Mr. Amrine, like so many others whose life is viewed by officialdom as cheap and expendable, was black.161 In Texas, the nation's execution capital, high ranking government officials, including Governor Rick Perry, carried out the death sentences of two men whose convictions were thought to have been compromised by intentional deception and the suppression of evidence, despite Police Chief Harold Hurtt's call for a halt to all executions until the forensic evidence scandal could be fully investigated.162

Unbridled and unscrupulous prosecutorial zeal countenanced by indifferent or somnolent judges wrecks lives and causes havoc in the justice system. In 1999, two investigative journalists for the Chicago Tribune documented the problem:

With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases.

They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.163

In the first study of its kind, the Chicago Tribune analysis of thousands of court records, appellate rulings, and lawyer disciplinary records from across the United States found "[among other things, since 1963,] at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false."164 "Of the 381 defendants, 67 have been sentenced to death."165

159. A Google search brings up many sites connecting Attorney General Terry with this statement, though none was located that contained the exact document or date. For the purpose of this essay, my reference is to Charles Wilton, "Innocence is Irrelevant," PEACEWORK, April 1999, available at www.AFSC.org/pwork/0499/049906.


161. Telephone interview by Kara Hoopis, Research Assistant, with James Fletcher, Public Interest Litigation Clinic, Kansas City, Mo. (Jan. 27, 2005). The Public Interest Litigation Clinic is the organization that provided legal representation to Mr. Amrine.


164. Id.

165. Id.
The "evidence-of-innocence-is-irrelevant" school of thought unfortunately draws some support from decisions of the United States Supreme Court, principally *Herrera v. Collins*,166 and *Dretke v. Haley*.167 Writing the opinion of the Court in *Herrera*, Chief Justice Rehnquist elevated the art of circumlocution as he weaved his view that federal habeas corpus is a limited vehicle for state prisoner claims into a paen celebrating the efficacy and fairness of state criminal trials and the principal of finality.168 Along the way, the Chief Justice observed that newly discovered evidence, unearthed beyond the thirty days after sentence allowed by Texas procedure for submitting such evidence in support of a new trial motion, is universally without value.169 The Chief Justice, like all his colleagues on the present Supreme Court, never in his days of law practice defended a person accused of a felony,170 but had this to say about the utility of exculpatory evidence discovered months or even years after a claimed erroneous conviction: "[T]here is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications."171

The efforts of Barry Sheck, Professor Gross, and others expose the fatuity of this remark. Whether the newly discovered evidence is a DNA comparison, a recanting by a perjurious witness, the confession of the true perpetrator, or anything else, fact finders—whether judges or jurors—can evaluate the evidence regardless of the passage of time. Whatever the difficulties involved in such an undertaking, they are worth the effort for those who think there is neither justice nor societal benefit in the continued incarceration of an innocent person.

As if circumlocution was not enough, the Chief Justice urged the abandonment of common sense, finding that Texas was not engaged in conduct offensive to any constitutional strictures by its refusal to "entertain petitioner's newly discovered evidence eight years after his conviction."172 He tosses the bone of possible executive clemency to Herrera, but it is one on which the petitioner surely will choke. Said Rehnquist: "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where

168. 506 U.S. at 401-10.
169. Id. at 403-04.
170. Stephen J. Fortunato, Jr., *The Supreme Court's Experience Gap*, 82 JUDICATURE 251, 251 (1999). The problem is not simply that the Chief Justice has no background as a criminal defense attorney, or that a handful of the other justices lack such career experience; rather, the problem is that none of them has any such background (although Justice Souter prosecuted for a short period of time), even though on an annual basis twenty-five percent of the approximately ninety cases that go to full decision involve criminal law. Apart from their familiarity with the dynamic of the criminal trial, the justices' dirth of experience in this field also necessarily means that they have no contact with the poor, illiterate, disturbed, and addicted individuals who constitute the majority of people accused of crime in the U.S.
171. *Herrera v. Collins*, 506 U.S. at 403 (citing McCleskey v. Zant, 499 U.S. 467, 491 (1999)). This view notwithstanding, the law everywhere allows capital prosecutions that are never proscribed by a statute of limitations.
172. Id. at 411.
judicial process has been exhausted." 173 Dretke v. Haley 174 presented an even starker example of the majority of the United States Supreme Court meandering timorously across the terrain of actual innocence. Unlike the case of Mr. Herrera, there were no ambiguities whatsoever relative to Michael Wayne Haley’s claim that he was actually innocent of the crime for which he was sentenced. 175 Haley had received an enhanced sentence of $16^{1/2}$ years, having been deemed a habitual offender; but by the time his appeal reached the United States Supreme Court, everyone agreed that he did not fit properly under that rubric because at the time of trial and during the course of his appeal, neither the judge, defense counsel, the prosecutor, the jury, nor appellate counsel noted that controlling time frames had been miscalculated to Mr. Haley’s detriment. 176 Haley sought immediate release from his clearly unjust incarceration, but the Supreme Court determined he would have to languish in his Texas jail cell while an ineffective counsel claim was litigated in the state court. 177

The majority decision provoked a stinging dissent by Mr. Justice Stevens. After noting that a “congeries of mistakes” was made by the trial judge, the prosecutor, and Haley’s attorney, 178 Justice Stevens faulted the state for “[opposing] the grant of habeas relief in this case, even as it concedes that respondent has already served more time in prison then the law authorized . . . .” 179 He concluded with an observation that should function as a guide in all such cases: “Habeas corpus is, and has for centuries been, a ‘bulwark against convictions that violate fundamental fairness.’ Fundamental fairness should dictate the outcome of this unusually simple case.” 180 Those working to make our criminal justice system fair for anyone accused of a crime, regardless of color, must note the obvious obstacles in the persons of lawyers and judges, presumably well-educated in the liberal arts tradition, who through sophistry and linguistic legerdemain can keep innocent people in jail or abruptly rebuff claims of those seeking redress based on newly discovered evidence.

VIII. CONCLUSION

The findings and conclusions of scholars over the past decades regarding crime, punishment, and rehabilitation, when combined with the recent examination of wrongful convictions and the resulting exonerations, demonstrate that people of color are disproportionately harmed by the criminal justice system. Statistics collected and collated by scholars, both within and without the legal profession, prove that something malevolent rather than random is at work. This is not to suggest


175. Id. at 666-67.

176. Id.

177. Id. at 670-71 (Stevens, J., dissenting).

178. Id. at 671 (Stevens, J., dissenting).

179. Id. at 672 (Stevens, J., dissenting).

180. Id. (Stevens, J., dissenting) (citations omitted).
that a large number of law enforcement officials, prosecutors, and judges are engaged in a conspiracy to intentionally railroad individual blacks or to sabotage black communities, but rather to suggest that the American criminal trial has evolved over time in such a way that many of its fundamental rules, procedures, and practices visit fatal disadvantages on all persons facing criminal charges, especially on people of color.

In this sad picture, a trial judge occupies a crucial position that, when used effectively and fairly, can ameliorate, if not eliminate, some of the problems that lead to unjust and racist consequences. Judges can—and in my view, must—take the leading role in jettisoning the myths, fictions, and misperceptions that infuse the criminal trial. For example, during the voir dire, judges should be alert to governmental challenges to minority jurors that have no foundation other than the prosecutor’s hunch or intuition. Judges can also show some fortitude and logic by excluding evidence of prior convictions unless the defendant who takes the stand puts his own character in issue by claiming an unblemished record or a disposition that he would never engage in the kind of activity with which he is accused. Judges should also adopt the language the United States Supreme Court has used to define the government’s burden of proof in their instructions to juries that a conviction can be returned only if the evidence has persuaded them to a near certainty that the defendant committed the crime. Thoughtful and creative judges can do these things and much more to bring about fairer trials for all defendants and to eliminate the scourge of racism from the trials of minority defendants.

These are hardly utopian proposals. And they are made at a time in our legal history when there is no cause to be smug that the Anglo-Saxon criminal trial as we know it unerringly reaches the correct result. On the contrary, as the exoneration studies show, the outcome of the American criminal trial is often fatally wrong. Where necessary, judges—either sua sponte or assisted and prodded by attorneys—must scrap, modify, or recast rules and practices that individually or jointly foreordain outcomes that are either unfair, or racist, or both. This should comport with any judge’s perception of his or her role, which is, after all, to preside over a constitutionally fair trial that acquits the defendant when the government fails to meet its burden of proof and convicts when it does, and then to impose a sentence that fits the crime, the criminal, and basic notions of justice and mercy— an old and honorable idea not to be forgotten.181

181. “[D]o justly, [but] . . . love mercy” Micah 6:8 (King James).