

# Protecting the Innocent as the Primary Value of the Criminal Justice System

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GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (Ann Arbor: University of Michigan Press 2008)

Wrongful convictions in the United States are no “unreal dream.”<sup>1</sup> As Justice Souter observed, there is now proof that innocent people have been convicted and sentenced to death “in numbers never imagined before the development of DNA tests.”<sup>2</sup> On one level, the scholarly literature and the reports of numerous study commissions reflect significant consensus about the factors common to wrongful conviction cases,<sup>3</sup> which include faulty eyewitness identification, false confessions, jailhouse informant testimony, failures of forensic science, prosecutorial misconduct, perjury, and ineffective defense counsel.<sup>4</sup> But the deeper, more systemic causes of wrongful conviction—causes imbedded in institutional structure and culture—are harder to isolate, and certainly harder to tackle.<sup>5</sup>

In his learned, engaging and provocative new book, George Thomas argues that a major cause of wrongful convictions in the United States is the adversary

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<sup>1</sup> From Learned Hand’s oft-quoted phrase that “[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.” *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

<sup>2</sup> *Kansas v. Marsh*, 548 U.S. 163, 208 (2006) (Souter, J., dissenting). *But see id.* at 193–96 (Scalia, J., concurring).

<sup>3</sup> As Sam Gross emphasizes, most of the current information about wrongful convictions is specific to murder and rape cases. We know very little about wrongful convictions in other categories. *See* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008).

<sup>4</sup> *See id.* (calling this the “canonical list of factors”).

<sup>5</sup> *See, e.g.,* Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1222 (2005); *see also* Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005) (arguing for focus on institutional design in light of overarching purposes of the system); Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 21 (discussing deeply imbedded incentive structures that lead to wrongful convictions).

system. In his view, the primary goal of the criminal justice system is protecting the innocent,<sup>6</sup> and the adversary system is not designed to achieve that goal. Thomas explores the connection between adversarial process and wrongful convictions from several angles: a historical overview of the development of the criminal jury system; an analysis of the Supreme Court's role in safeguarding the reliability of criminal verdicts; and a comparison of the American adversary system with Continental inquisitorial systems and the American military justice system.

First, Thomas offers a captivating historical account of mankind's ongoing struggle to separate the guilty from the innocent, from ancient Greece through the present day. There are several possible lessons to be drawn from this history. Our system may be in its current sorry state because the adversarial system at its core is incompatible with protecting the innocent, or because we have strayed from core adversarial principles, or because the adversary system has, for various reasons, become outdated and inadequate to its task. Thomas raises all of these possibilities. He suggests that the system we inherited from England was poorly suited to the task, but also that the Supreme Court's focus on procedural regularity has exacerbated the worst traits of the English model, and that the resulting framework has proved inadequate to meet emerging criminal justice challenges.

Thomas also evaluates the adversary system's role in wrongful convictions by considering the relative merits of inquisitorial systems—particularly the French system. This is a sensible and highly promising approach. If the adversary system is ill-suited to protecting the innocent, comparison with inquisitorial systems should be illuminating. Yet, surprisingly few studies have bridged the gap between the study of wrongful convictions and the comparative study of trial systems.<sup>7</sup>

Given the scope and focus of the book, Thomas can undertake this comparative task only on a small scale. His argument for adopting significant elements of French procedure places a number of questions in sharp relief. As with any comparative endeavor, it raises the questions of what aspects of the systems are being compared, and of whether attributes of one system are translatable to another. The comparative analysis, however, also raises deeper questions that demonstrate why it is such a useful line of inquiry for wrongful convictions scholars: how much of the problem is attributable to deeply imbedded cultural factors that may resist institutional reform? And are some of these factors cross-cultural, and resistant to reform in ways that transcend national boundaries?

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<sup>6</sup> As he notes, this principle is narrower than ensuring reliable convictions. Thomas distinguishes the broader goal of both “vindicating the innocent *and* convicting the guilty,” which William Pizzi espouses, from his narrower goal of providing “reasonable protections against the detention, prosecution, and conviction of innocent persons.” (P. 2.)

<sup>7</sup> Marvin Zalman, *The Adversary System and Wrongful Conviction*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 79 (C. Ronald Huff & Martin Killias eds., 2008).

As Thomas illustrates with passion and erudition, such historical and comparative explorations promote a deeper understanding of the systemic problems we face and how to address them. In the discussion that follows, I will provide an overview of Thomas's analysis, and then turn to some of the thorny questions raised by his constitutional, historical and comparative arguments, and by his claim that innocence protection is the central goal of the criminal justice system.

### I. OVERVIEW

For Thomas, the essential divide between the American and European systems is epistemological. The Continental system assumes the true facts of a crime are accessible to the fact-finder, whereas the American system regards truth as elusive. The adversary system is premised on the notion of partial perspective: the battle between the advocates advancing their own versions of the truth; the deliberation among jurors representing a cross section of the community. "If truth is elusive, who can say the jury was wrong?" (P. 1.)

Thomas argues that actual innocence is an increasingly accessible fact in the universe, and that the shortfall between actual innocence and the system's ability to identify it is becoming increasingly obvious. The first chapter provides a deeply disturbing (albeit increasingly familiar) account of several wrongful conviction cases. It ascribes the failures largely to a prosecutorial culture that emphasizes conviction rates, overburdened public defenders, hard-to-detect perjury, false confessions, failed science, jurors ill-equipped to discern all the aforementioned problems, and other factors endemic to the adversary system. Although the system certainly did not work flawlessly in these cases, generally the requisite procedures were followed, and nobody acted with malice or bad faith. For Thomas, the central problem these miscarriages of justice showcase is the lack of any institution whose specific purpose is to seek the truth.

The second chapter argues for the primacy of innocence protection. It argues, first, that protecting the innocent is a more fundamental goal—and, on a pragmatic level, a more achievable goal—than accuracy more broadly stated. Second, it argues that innocence protection is more fundamental than autonomy, privacy and protection against the abuse of official power. In the main, autonomy and privacy are second-order values that we provide to all defendants because we "lack the epistemology" (p. 50) that permits us to know in advance which defendants are innocent. The adversary system is based on the assumption that aiming for these second-order values is the best we can do. Since we cannot know the truth, we can ensure only that the parties are afforded fair treatment and a fair forum for making their claims. Thomas suggests that DNA evidence at least brings us a little closer to epistemological access to truth about innocence. Even without such access, he argues, we can surely do more to protect the innocent.

Chapters Three through Five provide a history of the truth-seeking process in criminal cases from the birth of the jury in ancient Greece to the end of the

founding era in the United States. It is a compelling read, brimming with well-told stories. Some, like the stories of Sir Walter Raleigh and Thomas Becket, will be familiar to readers with historical or legal background, and the accounts of the colonial-era trials of John Peter Zenger, William Penn, and Aaron Burr will be widely familiar. Yet Thomas makes even these familiar accounts worth revisiting. The accounts of medieval modes of proof in Britain, which explore somewhat less familiar ground, are particularly riveting.

These chapters trace the changing meaning of “knowing the truth.” The creation of the jury in Greece marked the beginning of the movement to allow men, rather than the gods, to ascertain truth. As Thomas chronicles, the evolution from truth as the property of the gods, to truth as the property of the monarch, to truth as knowable by man, was by no means linear. And the evolution to the present day jury is particularly tortuous. In the tenth, eleventh and most of the twelfth centuries, in both Britain and Continental Europe, guilt was either self-evident to man or revealed by God. (P. 63.) Where guilt was hidden, the trial did not function as a means of sorting the factually guilty from the factually innocent. Trials by ordeal, battle or oath were themselves forms of proof, meant to discern “which party was innocent before God . . . . [I]nnocence was a holistic state rather than a crude question of whether X did act Y.” (P. 67.)

As juries began to replace medieval modes of proof, the distinction between crimes in which guilt was evident and other crimes remained important. If the accused was caught red-handed or confessed, he “would be summarily convicted without the need for formal proof.” (P. 71.) As for crimes in which guilt was not self-evident, it was not until the mid-twelfth century that the English system moved toward allowing Englishmen to judge criminal guilt for themselves. (P. 80.) At this point the European system moved in the opposite direction: toward relying upon judges to ascertain guilt, permitting them to conduct searching examinations of the accused and witnesses. Thomas argues that the English system valued juries because of the local knowledge they brought to property disputes. (P. 82.) They functioned as “witnesses and not as finders of fact.” (P. 85.) It was not until the watershed *Bushel’s Case* of 1670 that the English jury became “the ultimate source of the truth about guilt and innocence.” (P. 92.)

Thomas identifies two major influences on the jury at the start of the founding era: [Matthew] “Hale’s conception of the trial as a contest seeking the truth and the Whig conception of rights against the sovereign . . . .” (P. 92.) In Chapter Five’s treatment of American juries before the twentieth century, he emphasizes the continuing importance of the concern with controlling prosecutors and judges, and of the jury’s pre-existing knowledge of the character of the parties and witnesses.

Chapter Six probes the dark underbelly of community knowledge—community prejudice. It focuses on the powerful assumptions and biases that cloud the system’s ability to present the “truth” and the jury’s ability to discern it. This chapter describes three miscarriages of justice fueled by racial or religious prejudice: the Scottsboro Boys cases, the Leo Frank case, and the rape prosecution of Ed Johnson, a black man accused of raping a white woman in Chattanooga,

Tennessee at the beginning of the twentieth century.<sup>8</sup> The Frank and Johnson cases ended with lynchings, and the threat of lynching was ever-present in the Scottsboro Boys cases as well. As Frank Zimring has observed about the vigilante values underlying lynching, “In the vigilante world view, the need for a fact-finding process may be displaced by personal knowledge and community agreement. The same citizens who might distrust punishment power in the hands of a distant governmental authority trust themselves and their neighbors.”<sup>9</sup> Indeed the community was so certain of the truth and the requisite outcome in these cases that local law enforcement officials often seemed surprised that federal courts and other unwelcome interlopers were not more appreciative that trials—even trials that were hollow shells—had been held at all.<sup>10</sup>

At this historical juncture, says Thomas, the truth manifested by the jury verdict was no longer “the only truth that mattered.” Lawyers and judges “recognized that there is an empirical truth about guilt . . . [that] may be beyond our ability to identify, but . . . can be used to criticize, and ultimately reject, jury verdicts.” (P. 132.) Yet the Court in *Powell v. Alabama*<sup>11</sup> did not take the opportunity to review the Scottsboro defendants’ claim that they had been denied a fair and impartial trial. Instead, it “went with a procedural solution,” (p. 145) vacating the verdict based on the court’s failure to provide counsel. In a subsequent Scottsboro case, *Norris v. Alabama*, the Court vacated the conviction based on the exclusion of blacks from the jury pool.<sup>12</sup> As Thomas succinctly notes, “[t]he Scottsboro defendants, in the end, received formal due process . . . even as substantive justice eluded them.” (P. 146.)

Thomas reviews the likely barriers to a searching Supreme Court inquiry into the substantive question of innocence in these cases: the respect for state sovereignty, the threat of Southern unrest and insurrection, and the difficulty of addressing the foundational problem of racism in the criminal justice system. But he deplores the road taken, and views it as a fairly direct path to, or at least a harbinger of, the mistaken criminal justice jurisprudence of the Warren Court. His verdict on the Warren Court is that “its gains were mostly cosmetic or formal, without much substance.” (P. 156.) “The right to warnings, the right to have

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<sup>8</sup> One fascinating story Thomas recounts involves the only criminal trial conducted by the United States Supreme Court—a trial of the sheriff on whose watch Ed Johnson was lynched. (Pp. 140–43.)

<sup>9</sup> FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 109 (2003).

<sup>10</sup> For example, Thomas quotes Michael Klarman’s observation that “[s]everal southern newspapers warned in connection with Scottsboro that if outsiders continued to assail Alabama after juries had returned guilty verdicts, then there would be little incentive to resist a lynching on future occasions.” (P. 146.) (citing Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 57 (2000)).

<sup>11</sup> 287 U.S. 45 (1932).

<sup>12</sup> 294 U.S. 587 (1935).

evidence suppressed, and the right to a jury do little to protect innocence.” (P. 159.)

The development of the right to counsel illustrates his point handily. It is almost entirely focused on form. We know “*who* is entitled to counsel and *when* defendants are entitled to counsel” (p. 162), but we are given little guidance about what kind of representation counsel must provide. For Thomas, the Warren Court traded substantive fairness for an intricate and incoherent set of procedural protections. Later Courts with no love for these expansions of rights compounded both the intricacy and the incoherence of the jurisprudence.<sup>13</sup>

The final two chapters turn to proposed solutions. Thomas argues that systems whose goal is to ascertain truth, such as the French system and the American military system, are the most likely to protect the innocent. He identifies significant ways in which, in his view, our system ought to emulate the French. Foremost, there is the central role of magistrates. For Thomas, the battle of adversaries puts a premium on obfuscation. Judges in the French system, by contrast, “run the show.” (P. 172.) They receive special training and rigorous screening before taking the bench. Investigative judges visit crime scenes, interview witnesses before trial, act as the main supervisors of the police investigation, serve with laypeople on juries, and determine the charges. (P. 174.) The explicit function of French judges is to search for the truth, a role that has no parallel in the adversary system.

Three other characteristics of the French system, as Thomas describes it,<sup>14</sup> bear particular mention. First, it builds in protections against tunnel vision. For example, the prosecutor who appears before the investigative magistrate is not the same prosecutor who appears in the indicting chamber. Second, it engages in early and frequent substantive screening of criminal cases. Finally, if the case proceeds to trial, there is no plea bargaining available. Witnesses are “encouraged to tell what they know in a narrative style.” (P. 175.) The trial is regarded not as a dispute between parties, but as a way to determine guilt or innocence. (Pp. 174–75.)

To reform the United States system, Thomas recommends a larger role for judges, more frequent and timely opportunities for substantive review and dismissal of charges where appropriate, and more focus on truth-seeking at trial. He would also address the tunnel vision problem by adding a feature of the English system: the use of advocates who serve stints as both prosecutors and defense attorneys.

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<sup>13</sup> Thomas cites Carol Steiker for this point. *See generally* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

<sup>14</sup> *See infra* text accompanying notes 43–54 (raising possibility of gap between theory and practice).

## II. SHOULD WE WELCOME THE (FRENCH) INQUISITION?

The former chief justice of the Supreme Court of Canada, in a report on three Canadian wrongful conviction cases, observes that “the responsibility to prevent wrongful convictions falls on all participants in the criminal justice system. Police officers, prosecutors, forensic scientists, judges, and defense counsel all have roles to play in ensuring that innocent people are not convicted of crimes they did not commit.”<sup>15</sup> Yet “many of the individuals and the institutions they represented often saw only the narrowest of issues for which they were specifically responsible. They did not recognize that their contributions were only meaningful in the context of the criminal justice ‘system.’”<sup>16</sup> This statement cuts to the intractable heart of the problem: how to reshape institutional and cultural norms to encourage individual and collective responsibility for preventing injustice.

Tunnel vision, which is an oft-cited cause of wrongful convictions, is part of a larger problem. Institutions (and the individuals who comprise them) parcel out responsibilities, deflect blame, and encourage a focus on narrow roles without regard to the integrity of the whole. They are territorial, risk averse, prone to inaction rather than action, and more likely to deflect and deny scandal than to seek to fix its causes.<sup>17</sup> Addressing the problem posed by these embedded characteristics calls for two complementary approaches: impressing upon each actor or institution its own ultimate responsibility for achieving justice, and ensuring ample checks on decision-making to avoid allowing erroneous assumptions to metastasize. In addition, effective checks on decision-making require access to information and transparency.<sup>18</sup>

It is often said that because the adversary system parcels out the truth function and prizes process over outcome, its very structure discourages individual and shared responsibility for ensuring just results. As Thomas puts it, our adversarial, contest-based system encourages advocates to hawk “*their version of the truth*,” (p. 11), and to suppress conflicting versions. It rewards obfuscation. Its commitment to the truth is entirely instrumental. Thomas agrees with John Langbein that the adversary system’s central problem is its “failure to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.” (P. 11.)

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<sup>15</sup> Donald J. Sorochnan, *Wrongful Convictions: Preventing Miscarriages of Justice: Some Case Studies*, 41 TEX. TECH L. REV. 93, 101 (2008) (citing ANTONIO LAMER, THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF: RONALD DALTON, GREGORY PARSONS, RANDY DRUKEN (2006), available at <http://www.justice.gov.nl.ca/just/lamer/LamerReport.pdf>).

<sup>16</sup> *Id.* at 100.

<sup>17</sup> Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1286–88 (1999).

<sup>18</sup> Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 494 (2006).

This critique raises the vexing question of what constitutes the core of our adversarial process. As Martin Zalman observes, “[t]o advance feasible reforms, it is necessary to ‘unpack’ the adversary system and trial, and to be clear about what these terms encompass.”<sup>19</sup> Is it the reliance on adversary stake-holders to investigate and frame the evidence? Is it the nature of the decision-maker as well? For example, to what extent is the problem the passive judicial decision-maker with no investigative powers and limited control over the proceedings? To what extent is it the jury, which is also entirely dependent on the adversaries to find and present evidence, but which has attributes that set it apart from the judge? And to what extent is the problem not only passivity but a lack of training in the evaluation of forensics and other expert testimony?<sup>20</sup>

Perhaps there is an inherent problem with the partisan investigation and presentation of evidence, regardless of the identity of the fact-finder. There is support for this view in the findings of cognitive neuroscience. The adversaries are engaging in a paradigmatic form of motivated reasoning,<sup>21</sup> in which they are likely to overlook or screen out evidence unfavorable to their chosen result, or at least to subject that evidence to a lower standard of scrutiny. This problem exacerbates a previous one: that the investigations on which prosecutors are relying may themselves be infected by the unwillingness of the police to consider alternative scenarios (i.e. tunnel vision).<sup>22</sup> Coupled with the lack of early judicial screening discussed above, this set-up can lead to disaster. Tunnel vision is often identified as the leading cause of wrongful convictions.<sup>23</sup>

Nevertheless, our system—in its ideal form—builds in some safeguards against motivated reason, attitude polarization, and tunnel vision. One of these is inherent in the adversary presentation of evidence itself—the assumption that adversaries are motivated not only to discover and present the strongest arguments for their own side, but to unmask the weaknesses in their opponents’ arguments. As I will discuss below, for example, critiques of the French system suggest that when the investigative judge proves too reliant on the police and prosecutorial

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<sup>19</sup> Zalman, *supra* note 7, at 82.

<sup>20</sup> In at least one inquisitorial system, the Dutch system, witness testimony is rarely used at all. Documents are considered much more trustworthy and less subject to erroneous interpretation. Peter J. van Koppen, *Miscarriages of Justice in Inquisitorial and Accusatorial Legal Systems*, 7 J. INST. JUST. & INT’L STUD. 50, 52 (2007).

<sup>21</sup> See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

<sup>22</sup> See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 327–31 (discussing cognitive biases leading to tunnel vision); Bandes, *supra* note 18.

<sup>23</sup> See, e.g., Soroohan, *supra* note 15, at 103.

version of events, the weak and relatively marginalized defense attorney is unable to provide a meaningful check on the process.<sup>24</sup>

Another safeguard is the jury, which promotes the exchange of ideas among people with diverse perspectives. Psychologist Jonathan Haidt argues that people are not very good at identifying and correcting their own assumptions and biases.<sup>25</sup> Contrary to popular belief, judges are not exempt from the cognitive problems that beset other humans. They too make erroneous assumptions and, left to their own devices, fail to correct them.<sup>26</sup> The best check against partiality and bias is debate with others. As Thomas recognizes (p. 213), jury deliberation forces each decision-maker to articulate and examine his own assumptions.<sup>27</sup>

Thomas expresses mixed feelings toward the jury. He acknowledges its centrality for the framers and its importance as a bulwark against the abuse of executive power in colonial times. (Pp. 100–01.) However, he argues that our concerns have evolved. We are no longer concerned so much with the abuse of official power to harass critics of the government. “Today, the threat to innocence is systemic and benign, caused by system failures” (p. 54), and not by intentional persecution.<sup>28</sup> He also argues that the jury has ceased to perform some of its early functions. Juries are no longer repositories of local knowledge, and in fact, specific local knowledge of the circumstances or parties has evolved from a rationale to a disqualifying characteristic.<sup>29</sup> In his accounts of the Scottsboro and Leo Frank cases, among others, Thomas demonstrates that local knowledge (or at least local folk knowledge) in a heterogeneous society can play a pernicious role. Jurors “are no better than the communities in which they exist” (p. 117), and may give in to prejudice rather than rise above it. He asserts that the “right to a jury [does] little to protect innocence.” (P. 159.) His proposals call for a greater role for judges, reflecting his assumption that judges will “by nature, be more objective,

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<sup>24</sup> See Jacqueline Ross, Book Review, 55 AM. J. COMP. L. 370, 373–76 (2007) (reviewing JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005)).

<sup>25</sup> See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

<sup>26</sup> See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

<sup>27</sup> See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 597 (2006).

<sup>28</sup> As I have argued elsewhere, one curious aspect of this argument is that the concept of “innocence” very poorly captures what was at stake in the Colonial cases, in which “[t]he colonists whose victimization led to the Revolution were, for the most part, *guilty as charged*. They did smuggle molasses for the manufacture of rum as well as other contraband, and they did violate the seditious libel laws.” Susan Bandes, “*We the People*” and *Our Enduring Values*, 96 MICH. L. REV. 1376, 1386 (1998).

<sup>29</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 37 (1994).

more skeptical, and more aware of the weaknesses in the state's case" than juries will. (P. 201.)

If indeed guilt and innocence are empirical facts in the world, then it is possible as an abstract proposition that judges are more *accurate* in their assessments of factual guilt and innocence than juries. But that claim is untestable. As Sam Gross succinctly put it, "[t]here is no general test for the accuracy of criminal convictions. If there were, we would use it at trial."<sup>30</sup> It is at least as plausible to suggest, as Gross does, that "judges may have a harder time than juries sticking to the requirement of proof beyond a reasonable doubt, given their professional awareness that the great majority of criminal defendants are in fact guilty . . . ."<sup>31</sup> Gross cites Kalven and Zeisel's classic jury study in support of this theory. Kalven and Zeisel, in their survey of over 3,500 American criminal jury trials, "found that the trial judges thought the defendants should be acquitted only half as often as the juries did . . . and that at least a portion of this difference was attributable to 'the jury's more stringent view of proof beyond a reasonable doubt.'"<sup>32</sup>

As Gross points out, these data "do not prove that fewer innocent defendants are convicted by juries than by judges—juries may simply convict fewer guilty ones—but they certainly suggest that in a case with questionable evidence the risk of an erroneous conviction is lower before a jury than before a judge, *in America*."<sup>33</sup>

Juries can decide to show mercy, and in the American system, their decision to do so requires no explanation and cannot be reviewed. Juries decide mixed questions of fact and law that call on their diverse perspectives about how the world works.<sup>34</sup> Juries in the Bronx, for example, may construe the facts of a police-citizen encounter very differently than a judge might, just as an all-white jury in the Simi Valley likely construed the facts of the Rodney King beating very differently than a Los Angeles jury would have. Whether the jury is nullifying, overprotecting, or "getting it right," is a question that often has no definitive answer. But all three possibilities are consistent with the desire to protect the innocent, even at the risk of freeing the guilty.<sup>35</sup>

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<sup>30</sup> Gross, *supra* note 3, at 175. As Gross points out, the accuracy of a legal proceeding is "almost always unknown since we rarely have any external evidence by which to judge it." He notes that "[t]here are some experimental studies that attempt to compare adversarial and nonadversarial adjudication of simulated cases . . . but these studies are not very helpful." Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 (1987) [hereinafter Gross, *American Advantage*].

<sup>31</sup> Gross, *American Advantage*, *supra* note 30, at 744.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> ABRAMSON, *supra* note 29, at 90–95.

<sup>35</sup> Moreover, people regard juries as fairer than judges. MacCoun and Tyler found that most of their poll participants strongly favored the jury over the judge. By a two-to-one margin, people saw the jury as fairer, more accurate, better at representing minorities, and more likely to minimize

Ultimately Thomas is pragmatic about the jury system, and does not advocate radical changes such as turning to mixed lay-judicial juries or blue ribbon panels, or abolishing juries entirely. Instead he makes some excellent proposals for jury reform. He is particularly critical of the high barriers to the introduction of newly discovered evidence relevant to innocence. As I have also argued, this crucial reform ought to be quite uncontroversial.<sup>36</sup> *Herrera v. Collins*,<sup>37</sup> which erects high barriers to introducing such evidence unless tethered to a claim of procedural error, is the poster child for Thomas's argument that the Court wrongly exalts form over substance.<sup>38</sup>

Thomas also advocates more effective provision of information to the jury, through reforms such as permitting narrative testimony, educating jurors about the limitations of jailhouse informants, and instructing on reasonable doubt at the outset of the proceedings. Perhaps most important is his suggested jury instruction, which directs each juror to consult her own conscience and determine whether she is "inwardly convinced beyond a reasonable doubt."<sup>39</sup> (P. 213.) And Thomas's ingenious proposal to require only a nine-three vote for acquittal while maintaining a unanimity requirement for conviction would, as he says, give concrete meaning to the presumption of innocence (p. 213), and would be consistent with Lord Devlin's observation that "[t]rial by jury is not an instrument for getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted."<sup>40</sup>

### III. THE SYSTEM WE HAVE AND THE SYSTEM WE WISH WE HAD

As David Sklansky argues, one barrier to the study of comparative criminal law is "[a] lengthy tradition in American law [that] looks to the Continental,

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bias. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 (1988).

<sup>36</sup> See Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996); Susan Bandes, *A Reply to Daniel Polsby*, 44 BUFF. L. REV. 537 (1996) [hereinafter Bandes, *Reply to Daniel Polsby*].

<sup>37</sup> 506 U.S. 390 (1993).

<sup>38</sup> See also *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009), in which the Court held, 5-4, that an individual whose criminal conviction has become final does not have a constitutional right to gain access to evidence so that it can be subjected to DNA testing to try to prove innocence.

<sup>39</sup> This reminder of the individual juror's moral obligation calls to mind James Q. Whitman's argument that the original concern of the requirement for proof beyond a reasonable doubt was theological. Jurors who convicted an innocent defendant were guilty of a mortal sin, and the rule reassured jurors that their souls were safe so long as their doubts were reasonable. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008).

<sup>40</sup> Gross, *American Advantage*, *supra* note 30, at 744 (quoting Lord Devlin, *The Criminal Trial and Appeal in England*, address delivered at the University of Chicago for the Third Dedicatory Conference (Jan. 1960)).

inquisitorial system of criminal adjudication for negative guidance about our own ideals.”<sup>41</sup> In this tradition, “inquisitorial” becomes a term of opprobrium and signals the end of discussion. Sklansky argues that we should stop treating our own system’s difference from the inquisitorial model as a good in itself. A better approach would be to articulate the goals of our system and then evaluate possible “inquisitorial-style” reforms on their merits.

Thomas does precisely this. He identifies innocence protection as the primary goal of our justice system and demonstrates that we have failed at this goal rather spectacularly. He looks abroad to determine whether other systems can help us identify—and perhaps correct—the flaws in our own. He concludes that in many respects we should emulate the French (and to a lesser extent German and British) systems. The comparison helps clarify some essential differences between the systems. It raises fascinating questions about the nature of these differences. It also illustrates some of the challenges of comparative analysis.

The first challenge is to identify what versions of the inquisitorial and adversary systems are being compared. It is difficult to identify a fixed and commensurate point of comparison between two disparate, complex and evolving systems,<sup>42</sup> each of which may protect innocence through a variety of measures and at a number of stages in the process.<sup>43</sup>

Thomas, commendably, does not treat the inquisitorial model as a unitary European phenomenon. He explores differences between the French and German systems, for example. However, he does paint the French system itself with a broad brush. Thomas’s portrayal of the French criminal justice system is consistently rosy. Yet the French system has generated its share of controversy and critique,<sup>44</sup> some of it quite relevant to the book’s proposals.

For example, the role of the investigative magistrate is central to Thomas’s favorable description of the French system, and to his proposals for reforming the United States system. Yet comparative scholars like Jacqueline Hodgson and Jacqueline Ross describe a structure in which the investigative magistrate, at best, plays a role in only five percent of all cases, and in addition is becoming

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<sup>41</sup> David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009).

<sup>42</sup> See C. Ronald Huff & Martin Killias, *Introduction* to WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 6 (C. Ronald Huff & Martin Killias eds., 2008) (discussing need to determine the “unit of analysis” for purposes of comparison).

<sup>43</sup> See, e.g., Gross, *American Advantage*, *supra* note 30, at 740 (expressing doubt that it is possible to compare the error rate of a system based primarily on plea bargaining with that of a system based exclusively on investigatory fact-finding). Frequency of exoneration is by itself an inadequate or ambiguous measure. For example, one scholar infers from the fact that relatively few decisions are overturned on appeal in France not that the lower courts are getting it right but that “many judicial errors go undetected or, at least, uncorrected, under the French system . . . .” Nathalie Dongois, *Wrongful Convictions in France: The Limits of “Porvoi en Révision”*, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 249, 258 (C. Ronald Huff & Martin Killias eds., 2008). She relies in part on the extremely narrow scope of review on appeal.

<sup>44</sup> See JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005).

increasingly marginalized.<sup>45</sup> Moreover, Hodgson's extensive observation of the French system in action<sup>46</sup> led her to conclude that prosecutors rarely question the case constructed by the police, investigative magistrates have close relationships with police and prosecutors that effectively undermine their neutrality, and trial judges tend to defer to the findings of investigative magistrates.<sup>47</sup> According to Ross, "the attitudes of investigative judges are not very different from the partisan stance of prosecutors . . . ."<sup>48</sup> But because the system is premised on the assumption that investigative magistrates will effectively supervise the investigation and screen the evidence, French trial judges "subject such evidence to little critical examination."<sup>49</sup> And because the system is premised on the assumption that judges, not defense attorneys, will protect the rights of the accused, the defense attorney has little power to intercede when judges fail to perform their function.<sup>50</sup> Hodgson also contends that the system provides few opportunities to correct pretrial investigative errors (including false confessions that have been repudiated). She describes several high profile wrongful conviction cases to illustrate "the gaping holes in the protection of the suspect and the inadequacy of judicial supervision in controlling the investigation and, particularly, the interrogation activities of the police."<sup>51</sup> France's exceptionally high rate of lengthy pretrial detention,<sup>52</sup> and its restrictive rules on access to counsel for those in pretrial custody<sup>53</sup> are also features of the system that negatively impact the innocent.

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<sup>45</sup> *Id.* at 118, 143–56. *See also* Ross, *supra* note 24, at 376–77.

<sup>46</sup> The data were based on "eighteen months of direct observation" in the offices of the relevant legal actors, supplemented by semi-structured interviews and questionnaires, and by cross checks against the observations of French colleagues. *See* Ross, *supra* note 24, at 370–71, describing Hodgson's "extraordinary degree of access" and variety of data collection methods, leading to "an extremely rich, detailed, and often startling portrait . . . ." *But see* Sophie Turenne, Book Review, 26 *LEGAL STUD.* 605 (2006) (reviewing JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005)) (noting that rapid changes in the system may not be fully captured).

<sup>47</sup> Ross, *supra* note 24, at 371–78 (summarizing HODGSON, *supra* note 44).

<sup>48</sup> *Id.* at 375.

<sup>49</sup> *Id.* She notes that "it would be difficult for trial judges to do otherwise, since French trials rarely feature live testimony."

<sup>50</sup> HODGSON, *supra* note 44, at 116.

<sup>51</sup> *Id.* at 181–85. She states that the French courts have overturned only eight convictions between 1945 and 2001. *Id.* at 181 n.2.

<sup>52</sup> It is seventy percent, one of the highest in Western Europe. One study showed that in 1999 the average period of pretrial detention was four months, while the average prison sentence upon conviction was eight months. Thus pretrial detention functioned as a major aspect of punishment, "despite the fact that it is imposed prior to the pronouncement of guilt." Devah Pager, *The Republican Ideal? National Minorities and the Criminal Justice System in Contemporary France*, 10 *PUNISHMENT & SOC'Y* 375, 384 (2008).

<sup>53</sup> Ross, *supra* note 24, at 374–75.

French law is not the focus of the Thomas book, and capturing the system's full complexity is beyond its scope. Nevertheless, a greater sense that significant tensions in the system exist, and that theory does not always dictate practice, would have been welcome. As Jacqueline Ross observed, "the gap between the law on the books and the law in action can reveal problems in the design, or ways in which it sets up troubling incentives that legal actors should consider before adopting the seemingly superior model."<sup>54</sup> In addition, although a detailed chronology would be well beyond the scope of the book, a greater sense that the system is in a state of flux would have been welcome. For example, in response to caseload pressures, France has recently introduced plea bargaining,<sup>55</sup> a development that is highly relevant to Thomas's argument. (Pp. 204–07.)

Turning to the other side of the equation, against what version of the American adversarial system is the French approach being measured? As Thomas properly emphasizes, the idealized portrait of the adversary system bears little resemblance to the current state court criminal justice system in the United States. Our current adversary system first must be understood as a contest between underfunded (and, too often, ineffective) defense attorneys and prosecutors who tend to believe that their duty to win supersedes their duty to do justice. (Pp. 170–71.) As Zalman puts it, "the imbalance is so pervasive in the United States that it might be treated as a structural error."<sup>56</sup> Moreover, Thomas joins numerous other commentators in pointing to increasingly arcane scientific and other expert evidence and juries' inability to evaluate it—a significant problem in wrongful conviction cases. (P. 37.)

But these deviations from the ideal pale in comparison to the largest deviation of all—the fact that trials rarely occur. Our system looks increasingly administrative rather than adversarial.<sup>57</sup> By many estimates, 90–95% of state felony cases are resolved by plea bargain.<sup>58</sup> Thus, we have, as Thomas argues, the worst of both worlds—neither true adversarial combat nor a well-considered alternative. We have a system that is so overloaded that in order to operate at all it must discourage people from—or even penalize people for—invoking their right to a trial.<sup>59</sup> We have a system that lauds the trial as the appropriate forum for

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<sup>54</sup> E-mail from Jacqueline Ross, Professor of Law, University of Illinois College of Law, to Susan Bandes (Feb. 15, 2009, 15:30 CST) (on file with author).

<sup>55</sup> Fifty percent of French criminal cases are now eligible to be dealt with by guilty plea. See Ross, *supra* note 24, at 376. I do not suggest that Thomas should necessarily have included this particular development, which may have occurred subsequent to his book. My point is simply that the system was portrayed as static rather than evolving.

<sup>56</sup> Zalman, *supra* note 7, at 80.

<sup>57</sup> Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 145 (2008).

<sup>58</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 83 (2001); Gross, *supra* note 3, at 181.

<sup>59</sup> STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 127 (2005) (discussing the "trial tax").

resolving the issue of guilt versus innocence—and then erects daunting barriers to obtaining a trial. And yet our system continues to operate as if the trial is the main event, providing little opportunity for meaningful pretrial examination of the evidence.

The book's most powerful critique and its most important suggestions for reform center on the breakdown of our system of legal representation and the pretrial shortcomings that prevent effective screening of weak cases. The centerpiece of Thomas's suite of reforms is his bold and elegant proposal for a pool of criminal law specialists who would both prosecute and defend. (Pp. 190–92.) This proposal attacks the problem of tunnel vision head-on, forcing advocates to acknowledge and engage alternative views, and giving them a fuller sense of the stakes not only for “the other side,” but for all those affected by the system, including victims, victims' families, and defendants' families. It also neatly addresses the problem of the disparity of resources between defense and prosecution, and may help shake up some of the ingrained loyalties binding police, prosecutors, and judges.

The proposals for increasing scrutiny of weak cases in the early stages of the process are also important. Appointment of counsel at the initial appearance, a more active role for a screening magistrate in supervising investigation, broader discovery, and substantive pretrial judicial review—these are reforms that address the realities of the current system, in which justice can be derailed early in the process. One especially attractive feature of these proposals is that they incorporate numerous checks on tunnel vision and attitude polarization, including the creation of a screening magistrate who would supervise police and prosecutors, and whose own work would be subject to review by the judge.

To assess these proposals, it is necessary to ask what features of the current American legal landscape should be held constant. Even if certain attributes of the inquisitorial system seem attractive, to what extent can they be implemented in our own system without wiping the slate clean entirely?<sup>60</sup> Thomas's proposals to emulate the French model rely heavily on the provision of non-partisan and competent magistrates. The hurdles to accomplishing this goal go to the heart of the inquisitorial/adversarial divide.

In Mirjan Damaška's well-known typology, the French model is hierarchical and ours is coordinate.<sup>61</sup> In France, a centralized bureaucracy recruits, trains and

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<sup>60</sup> Sklansky describes the “orthodox view” among comparative law scholars that the systems are “different procedural cultures” and that “procedural features cannot ‘simply be ‘cut and pasted’ between legal systems.” Sklansky, *supra* note 41, at 1679 (quoting Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 5 (2004)). See also David Nelken, *Beyond Compare? Criticising “The American Way of Law”*, 28 LAW & SOC. INQUIRY 799, 817 (2003) (book review) (remarking that the previous generation of comparative scholars of criminal justice “fought a fierce battle over how far we are able to understand other jurisdictions in relation to problems defined in terms of ‘starting points’ that make sense only in a scholar's country of origin.” (citation omitted)).

<sup>61</sup> MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 69 (1986).

assigns prosecutors and judges.<sup>62</sup> Our model is animated by federalism and deference to local control.<sup>63</sup> Our system includes no central appointing authority, no centralized power to create judicial standards, and no evident political will to move toward centralization. The vast majority of our judges are elected. At the risk of oversimplifying, inquisitorial systems are based on a willingness to trust judges, and our system is premised on a mistrust of judges.

In short, in order to assess these proposals in the context of current day realities, we need to take a cold, hard look at the judicial system we have. Eighty-nine percent of all state judges “face the voters in some type of election.”<sup>64</sup> This is not encouraging news for those who wish to protect innocence. The effect of judicial electoral politics on death penalty cases has been documented. Stephen Bright and Patrick Keenan cite evidence that, where judges had the option of imposing the death penalty by overriding a jury recommendation, elected judges were far more likely to do so than judges who did not face reelection.<sup>65</sup> Jim Liebman and his coauthors found that “[t]he more political pressure imposed on judges by a state’s method of selecting—which usually means *electing*—judges, the higher is the risk that capital trial verdicts imposed in the state will be seriously flawed.”<sup>66</sup> The flaws tend to run in one direction: toward a death sentence.<sup>67</sup>

This problem is not limited to capital cases. As Justice O’Connor noted, judges are aware that if the public “is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”<sup>68</sup> The case in which she expressed her concerns involved a judge who was defeated after the circulation of flyers accusing her of releasing a brutal criminal. Anecdotally, the cases that lead judges to lose their seats are usually hot-button cases, i.e., criminal cases in which the judge issued a pro-defense ruling or verdict.<sup>69</sup>

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<sup>62</sup> Pager, *supra* note 52, at 378.

<sup>63</sup> See, e.g., ZIMRING, *supra* note 9, at 67–88.

<sup>64</sup> Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 626 (2009).

<sup>65</sup> Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995).

<sup>66</sup> James S. Liebman et al., *A Broken System*, Part II: Why There is so Much Error in Capital Cases, and What Can Be Done About It at 383 (Feb. 11, 2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> (emphasis added).

<sup>67</sup> Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 951 (2006).

<sup>68</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring).

<sup>69</sup> See Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 13–16 (1997) (giving examples of judges subject to pressure because of unpopular decisions protecting criminal defendants). As I have noted elsewhere, in 1986, Cook County Circuit Judge Lawrence Passarella became one of the few judges in Illinois ever to lose a retention vote, after he rendered a widely reported and hugely unpopular not-guilty verdict against a defendant who had severely beaten a female police officer. See Mike Royko, *Cops’ Verdict on Judge Already In*, CHI. TRIB., Oct. 24, 1986, at 3 (influential columnist Mike Royko noting his approval of movement,

As an empirical matter, Joanna Shepherd has just published a study of “virtually all state supreme court decisions from 1995 to 1998,” in which she found “a strong relationship between campaign contributions and judges’ rulings.”<sup>70</sup> For example, judges facing partisan elections in Republican districts are more likely to rule against defendants in criminal appeals than judges who are not engaged in such elections.<sup>71</sup>

To implement Thomas’s proposals we would need to radically change the way we select, train, and retain judges. Thomas is well aware that the sort of change he advocates cannot be implemented solely by the courts. (P. 185.) Meaningful national change in the training and quality of magistrates would require, at a minimum, a hard-fought and massive shift in institutional arrangements.<sup>72</sup>

#### IV. NATIONAL AND INSTITUTIONAL CULTURE

In addition to these radical shifts in selection, training, and retention of judges, change would also require a shift in institutional culture and the broader social and political culture in which it takes shape. For example, Thomas suggests assigning investigators to work for judges, not prosecutors. Often, however, there are deep cultural alignments between prosecutors and judges.<sup>73</sup> In Illinois, as elsewhere, many judges are former prosecutors.<sup>74</sup> Many judges and prosecutors share ethnic, racial, and cultural backgrounds, and tend toward similar worldviews.<sup>75</sup>

A disturbing but plausible possibility is that these sorts of alignments are resilient across cultures. As discussed above, some of the formal divisions of labor and layers of review in the French system may fall prey to these same ingrained institutional mentalities. According to Hodgson, although the formal rules provide for judicial review of the police decision to detain a suspect, in practice the police

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organized by police, to “dump Passarella”). “The best known example of this dynamic is the defeat of several anti-death penalty members of the California Supreme Court in 1986.” Bandes, *supra* note 67, at 953 n.30.

<sup>70</sup> Shepherd, *supra* note 64, at 623.

<sup>71</sup> *Id.*

<sup>72</sup> Those of us who have worked for merit selection of judges in Illinois for decades can attest that an endless stream of bar association recommendations, blue ribbon commission reports and major corruption scandals has done nothing to lessen the futility of the endeavor.

<sup>73</sup> Likewise, there are alignments between police and prosecutors and between police and judges. *See, e.g.*, Bandes, *supra* note 17, at 1321 & n.289.

<sup>74</sup> In a recent report on the Cook County, Illinois criminal justice system, it was determined that three quarters of the judges in Chicago’s felony courts had been prosecutors and one quarter had served as public defenders. Only one judge had worked for neither office. *See* Chicago Appleseed Fund for Justice, A Report on Chicago’s Felony Courts, at 27, <http://www.chicagoappleseed.org/publications> (I was an on the board of advisors to this project).

<sup>75</sup> Bandes, *supra* note 17, at 1321 & n.289.

decision is typically reinforced by prosecutors and judges.<sup>76</sup> Prosecutors remain dependent on police to build their cases. Police and magistrates “trust[] each other to the detriment of a closer scrutiny of each other’s actions.”<sup>77</sup> Hodgson’s observation about these dynamics is worth highlighting: “The centrality of trust was emphasised to us over and over again by [police, investigating magistrates and trial judges]. A model of supervision based on challenging and verifying the investigative work of the police would create antagonism and undermine this trust.”<sup>78</sup> As she concludes, “it cannot be assumed that legal change alone is sufficient to transform the practices of legal actors . . . . There needs also to be a more profound shift in the occupational cultures of these players.”<sup>79</sup>

The point is not to dismiss the power of institutional reform to influence assumptions, incentives, and alignments. It is to suggest that reform may be difficult to implement, that cultural context will influence institutional arrangements, and that some alignments may transcend particular cultures.<sup>80</sup> And, of course, that there is no substitute for constant vigilance.

The need for more cross-cultural and cross-national studies is evident. Sadly, wrongful convictions are an international phenomenon, in both inquisitorial and adversarial systems. The fascinating questions Thomas raises deserve more study—what ties these convictions together, and what cultural and institutional conditions can decrease their occurrence? As Thomas notes, one huge impediment to reform in the United States, at least until recently,<sup>81</sup> has been the lack of outrage over wrongful convictions. He says that “[t]he British and Canadians have long been much more concerned about their justice failures.” (P. 3.) But why is this so? Britain and Canada both have adversary systems, a fact which counsels against placing too much of the blame for our complacency on the adversarial model itself.<sup>82</sup> I suspect Thomas is right that our own failure to care more deeply about wrongful convictions has had much to do with “the racial and class makeup of the men and women in our prisons.” (P. 4.) Outsider or minority group status has been identified as a predisposing condition for wrongful convictions.<sup>83</sup> One important subject for inquiry is the extent to which increasing heterogeneity in various nations has affected the quality of justice.

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<sup>76</sup> See Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 INT’L & COMP. L.Q. 781, 786 (2002).

<sup>77</sup> Turenne, *supra* note 46, at 607.

<sup>78</sup> HODGSON, *supra* note 44, at 156.

<sup>79</sup> *Id.* at 185.

<sup>80</sup> See, e.g., Nelken, *supra* note 60, at 820–29 (discussing concept of comparative legal cultures).

<sup>81</sup> See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (describing recent sea change in the attitude toward wrongful convictions). See also Bandes, *supra* note 5, at 9.

<sup>82</sup> For an in-depth comparison of the English and U.S. criminal justice systems as they impact wrongful convictions, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241 (2001).

<sup>83</sup> Sorochnan, *supra* note 15, at 98.

With the influx to France of North Africans and other immigrants over the last few decades, researchers are devoting increasing attention to the effect of increasing heterogeneity on the French criminal justice system, although the inquiry is complicated by the French government's prohibition on the collection of statistics on the race, religion, or ethnicity of individuals.<sup>84</sup> Aggregate data show significant disparities in detention rates based on race and ethnicity, but leave many questions unanswered about what causes these disparities.<sup>85</sup> Hodgson's observational and ethnographic studies provide evidence that at times attitudes toward the race and ethnicity of suspects are the central determinant in detention decisions,<sup>86</sup> but clearly there is more work to be done regarding these and other disparities.<sup>87</sup>

One point about the importance of further study deserves highlighting. As Thomas observes, many of the patterns of behavior that lead to wrongful convictions are not the result of conscious bad faith. Andrew Taslitz emphasizes that because of our lack of access to subconscious motives and our general unwillingness to accept that good faith behavior can lead to unjust practices, it is all the more important to collect data revealing behavioral patterns associated with erroneous convictions.<sup>88</sup> One possible difference among systems lies in their relative willingness to collect and review such data. Lissa Griffin made this point about the differences between the English and United States criminal justice systems: "the English have studied their criminal justice system extensively and maintain substantial data based on those studies," data that are an essential predicate to the recommendations of wrongful conviction commissions.<sup>89</sup>

#### V. FORMS, MEASURED FORMS ARE EVERYTHING<sup>90</sup>

Thomas makes a persuasive case that in our criminal justice system, protection of the innocent is a "deeper value than truth" (p. 2), and that our system

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<sup>84</sup> Pager, *supra* note 52, at 379–80.

<sup>85</sup> See Pierre Tournier, *Nationality, Crime, and Criminal Justice in France*, 21 CRIME & JUST. 523 (1997) (raising questions and noting that little research has been done on the issue). Tournier notes that looking at the raw data, "[d]isparities [between foreigners and nationals] are greatest among pretrial detainees whose cases are dealt with summarily," but that these disparities lessen once immigration violations are removed from the data. *Id.* at 523.

<sup>86</sup> See Jacqueline Hodgson, *Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations*, 29 J.L. & SOC'Y 227, 250–52 (2002). *But see* Turenne, *supra* note 46, at 608 (raising concern about whether these interviews will be accepted as a "primary comparative technique").

<sup>87</sup> For example, a disparity in conviction rates. See Pager, *supra* note 52, at 390.

<sup>88</sup> Andrew E. Taslitz, *Sentencing Lessons from the Innocence Movement*, CRIM. JUST. MAG., Summer 2006, at 7–8.

<sup>89</sup> Griffin, *supra* note 82, at 1247 n.12.

<sup>90</sup> HERMAN MELVILLE, BILLY BUDD: FORETOPMAN 86 (Frederic Barron Freeman ed., Popular Library Edition 1962) (1924).

properly values vindicating the innocent over convicting the guilty. He makes a powerful argument for the need to institute certain reforms that are especially important to protecting innocence. Better investigative procedures, more substantive and more frequent screening at the pretrial stage, and broader opportunities to raise evidence at the post-trial stage all fall into this category. Recall the classic scene in *My Cousin Vinny*,<sup>91</sup> in which the defendants were charged with murder after what they thought was a confession to the accidental theft of a can of tuna:

**Vinny Gambini**: My clients were caught completely by surprise. They thought they were getting arrested for shoplifting a can of tuna.

**Judge Chamberlain Haller**: What are you telling me? That they plead not guilty?

**Vinny Gambini**: No. I'm just trying to explain.

**Judge Chamberlain Haller**: I don't want to hear explanations. The state of Alabama has a procedure. And that procedure is to have an arraignment. Are we clear on this?

**Vinny Gambini**: Yes, but there seems to be a great deal of confusion here. You see, my clients—

**Judge Chamberlain Haller**: Uh, Mr. Gambini? [*Motions for him to approach the bench*]

**Judge Chamberlain Haller**: All I ask from you is a very simple answer to a very simple question. There are only two ways to answer it: guilty or not guilty.

**Vinny Gambini**: But your honor, my clients didn't do anything.

**Judge Chamberlain Haller**: Once again, the communication process has broken down. It appears to me that you want to skip the arraignment process, go directly to trial, skip that, and get a dismissal. Well, I'm not about to revamp the entire judicial process just because you find yourself in the unique position of defending clients who say they didn't do it.

Of course the intended message of the scene appears to be that Gambini needs to learn the procedural rules, but nevertheless, the exchange captures the frustration of being funneled through the system with no opportunity to explain. Layers of process are of little value without the ability to be heard.

Thomas rightly emphasizes that the procedure itself is not the ultimate value protected by due process, and that due process without concern for content is not a

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<sup>91</sup> MY COUSIN VINNY (Palo Vista Production 1992), dialogue available at <http://www.imdb.com/title/tt0104952/quotes> (last visited Aug. 25, 2009)).

*sufficient* safeguard. The right to a lawyer is insufficient, even if the lawyer is free, appointed in a timely manner, and present at all crucial stages, if the lawyer is not competent. An appellate process that won't consider a claim of actual innocence unless it is yoked to a procedural irregularity has lost sight of a crucial aspect of its role. An unreliable confession preceded by *Miranda* warnings is still unacceptable.

#### VI. THE END OF THE WARREN COURT ROMANCE?

Thomas argues not merely that protecting innocence is a more important goal than accuracy, but that our focus on due process has detracted from our ability to protect the innocent. Specifically, Thomas critiques the “romantic notion that protecting innocence is somehow less important than protecting privacy and autonomy.” (P. 52.) He is amenable to adding “other values to the meaning of ‘due process of law’” (p. 55), but within a framework in which innocence protection is recognized as the primary value.

The strongest argument, and the one least vulnerable to misinterpretation or misuse by those less concerned with innocence than Thomas, is that results matter, and that procedural regularity should be a floor rather than a ceiling. This argument can be made without placing due process in opposition to innocence protection. The opposition is worrisome.

Many of the doctrinal developments Thomas critiques underscore the point that innocence protection is not in tension with due process. Consider three examples: providing a vehicle for presenting newly discovered evidence; strengthening the right to counsel; and safeguarding against false confessions. A broader right to present newly discovered evidence can be added to the existing panoply of procedural protections.<sup>92</sup> It is not a zero sum game. Raising the standard for effective assistance of counsel would aid all defendants, and strengthening the right across the board would have no negative impact on innocent defendants.

As for the failure to weed out false confessions, it is not clear that the procedural *Miranda* protections deserve the blame. *Miranda* was meant to supplement, rather than replace, fundamental fairness analysis.<sup>93</sup> Fundamental fairness analysis alone had proved unworkable. The Supreme Court plausibly found it both more efficient and less intrusive on state autonomy to provide guidelines for the conduct of interrogations than to attempt to review the reliability of interrogations on a case by case basis. Much of the doctrinal blame for today's weak judicial safeguards on interrogation belongs to later courts that both weakened *Miranda* and narrowed the scope of review of the reliability of confessions.

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<sup>92</sup> Bandes, *Reply to Daniel Polsby*, *supra* note 36, at 537.

<sup>93</sup> See, e.g., *Withrow v. Williams*, 507 U.S. 680, 703–04 (1993) (noting that even where *Miranda* claims are precluded on habeas, voluntariness arguments can still be advanced).

*Colorado v. Connelly*,<sup>94</sup> the case that narrowed reliability review, is a nice illustration of Thomas's point that reliability should not be shunted aside. The Court's focus on police misconduct to the exclusion of reliability is misguided. But, unlike Thomas, I would argue that the wrong turn in *Connelly* was not its failure to make the reliability of confessions the overriding concern, but its failure to reaffirm the rule of *Spano v. New York*,<sup>95</sup> namely, that reliability, voluntariness and police misconduct are all important values.

As Carol Steiker and Jordan Steiker remind us, the last time the Supreme Court turned to "innocence-protection" as the primary value guiding criminal procedure, the result was a net loss for criminal defendants across the board.<sup>96</sup> This may well have occurred because the Court was more concerned with accuracy—or guilt—than with protecting innocence, and Thomas would strenuously object to that hierarchy of values. But the argument that process matters *only* or even *primarily* as a means to an end is one that easily backfires. For example, Fourth Amendment law was not the only casualty of the Court's focus on innocence. It also led to harmless error tests for ineffective assistance of counsel and failure to turn over exculpatory evidence—both of which negatively impact the innocent.<sup>97</sup> *Strickland v. Washington*<sup>98</sup> illustrates the pitfalls of subjugating process to outcome. If a court finds that a defendant's representation did not affect the outcome of his trial, it need not reach the question of whether the representation was ineffective. In essence, this decision grants all defense counsel a margin of acceptable incompetence.

Sometimes it will be necessary to prioritize. As I mentioned above, Thomas makes a strong argument that strengthening pretrial screening and post-verdict review should be criminal justice reform priorities. These reforms would mainly benefit the innocent, but would have no adverse effect on due process protection more generally. Some of the pragmatic arguments for prioritizing innocence protection, however, cannot be separated from the normative premise that due process should be reserved for the innocent. For example, Thomas mentions approvingly a proposal that would allocate scarce defense resources based, in part, on likelihood of innocence. (P. 187.) Such arrangements risk confirming the public's long-held suspicion that defense lawyers should not defend "those people" unless they are pretty sure they did not commit the crime charged. The impact of

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<sup>94</sup> 479 U.S. 157, 159 (1986).

<sup>95</sup> 360 U.S. 315, 323–24 (1959).

<sup>96</sup> Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 610 (2005).

<sup>97</sup> *See id.*

<sup>98</sup> *Strickland v. Washington*, 466 U.S. 668, 680–81 (1984) (setting out the Sixth Amendment standards for determining competency of defense counsel).

such a triage system on the attorney-client relationship and the attorney's own ability to do her work is also a serious concern.<sup>99</sup>

#### VII. WHAT WORK DOES "INNOCENCE" DO?

Should protecting the innocent be the primary goal of the criminal justice system? Thomas does not go so far as to say that privacy, fairness and autonomy should play no independent role in the criminal justice system. Like many jurists and scholars, he considers Fourth Amendment protections irrelevant to protecting the innocent.<sup>100</sup> And, as I mentioned above, he considers reliability to be the overriding value governing interrogation techniques, though he believes fairness and autonomy play a role at the extremes. He says of the Sixth Amendment that

[i]f we knew *ex ante* that the defendant was guilty, he would still have the right to counsel. But once we satisfy the innocence value by providing effective assistance of counsel, fairness and autonomy have little work to do. . . . Fairness and autonomy simply recede once we pay sufficient attention to the innocence parameter. Indeed, why would we want to give a guilty suspect a level playing field or robust autonomy? (P. 51.)

Of course, as Thomas acknowledges, we generally do not have the epistemology to determine guilt *ex ante*. Moreover, as he is also well aware (p. 209), innocence is not an empirical fact in the world in many instances. It is not always about whodunit. Sometimes it is a question of state of mind, for example.<sup>101</sup> But, even if these objections could be put to one side, there is a deeper objection to Thomas's premise that the guilty do not deserve a level playing field.

Thomas's subject is innocence protection, and he would like to bracket the issue of crime control. (P. 193.) It is difficult, however, to evaluate his diagnosis of the problem with the criminal justice system without viewing the system as a whole. If the criminal justice system is viewed not merely as a forum for resolving discrete disputes, but as a cultural institution, or a coercive apparatus,<sup>102</sup> or, in the words of Kent Roach, "an activist state which attempts to 'manage the lives of

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<sup>99</sup> See, e.g., Steiker & Steiker, *supra* note 96, at 619–22; Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. (forthcoming 2009) (manuscript at 34–38 available at <http://ssrn.com/abstract=1381003>).

<sup>100</sup> But see Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

<sup>101</sup> See Bandes, *supra* note 28, at 1383–86; Bandes, *supra* note 5, at 8–15; see also Taslitz, *supra* note 88, at 7 (arguing for an expanded definition of innocence that includes injustice in sentencing).

<sup>102</sup> Gross, *American Advantage*, *supra* note 30, at 757.

people and steer society,’”<sup>103</sup> the importance of a level playing field becomes clearer. Sam Gross says that “[e]very legal system leaves some ‘zone of immunity’ around individuals, a sphere of actions that . . . are not as a practical matter subject to government control.”<sup>104</sup> The question of how much privacy individuals are allowed is closely related to whether they will remain in the ranks of the innocent.

The impact of a zone of privacy is vividly illustrated in David Feige’s account of representing indigent defendants in the Bronx. He says, “[r]eality, as many poor people eventually understand it, is that between the rules about truancy, trespass, loitering, disorderly conduct, and dog walking, most any adventure can wind up getting you a summons. And that’s if you’re lucky.”<sup>105</sup> Residents of one housing project visiting friends in another are picked up for trespassing.<sup>106</sup> Police search every apartment in a public housing project based on implied consent.<sup>107</sup> Drivers are pulled over for minor traffic infractions and, with the blessing of *Whren*,<sup>108</sup> *Atwater*,<sup>109</sup> and *Robinson*,<sup>110</sup> may be subject to custodial arrest and its attendant intrusions.<sup>111</sup>

As Thomas’s history of the search for truth reflects, most regimes have some version of a “hue and cry”: a crime committed so flagrantly that guilt is obvious without the need for process. But the less private space we accord people, the more likely they will transgress some boundary in a public way. The more closely people are scrutinized, the more likely they are to be thrown into the system, especially if they have no attorney to help them keep their record clean. When Thomas argues that the guilty do not deserve privacy, he is likely thinking of those guilty of serious felonies rather than the misdemeanors I discuss in the preceding paragraph. However, a culture of police and prosecutorial shortcuts for the investigation of those who are “obviously guilty” of murder or rape is bad news for the innocent as well, as Thomas’s horror stories reflect.

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<sup>103</sup> Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 692 (1999) (quoting MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 11 (1986)).

<sup>104</sup> Gross, *American Advantage*, *supra* note 30, at 753.

<sup>105</sup> DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER’S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 127 (2006).

<sup>106</sup> *Id.* at 261.

<sup>107</sup> See, e.g., Corey Roush, *Warrantless Public Housing Searches: Individual Violations or Community Solutions*, 34 AM. CRIM. L. REV. 261 (1996).

<sup>108</sup> *Whren v. United States*, 517 U.S. 806, 818–19 (1996) (pretextual searches do not violate the Fourth Amendment).

<sup>109</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 318 (2001) (custodial arrest for a traffic violation, if permitted by state law, does not violate the Fourth Amendment).

<sup>110</sup> *United States v. Robinson*, 414 U.S. 218, 218 (1973) (a warrantless search of a person, incident to a lawful custodial arrest in a public place, is constitutional, even if the officer has no reason to believe the individual is in possession of a weapon or evidence of a crime).

<sup>111</sup> Bandes, *supra* note 28, at 1384.

Herbert Packer believed that unless police and prosecutors are required to respect due process norms irrespective of a suspect's guilt or innocence, the result will be a culture of misconduct that will impact both the guilty and the innocent. He argued that unless the illegal shortcuts of police and prosecutors were penalized at trial, police would continue to abuse "the poor, the ignorant, the illiterate, the unpopular" in encounters that never reached the stage of a criminal trial.<sup>112</sup>

He was correct in describing the problem. Perhaps the nature of governmental abuse of power has changed since Colonial times, but the fact of it remains. Failure to address misconduct creates an incentive toward more misconduct—toward "play[ing] the odds."<sup>113</sup> Changing systemic culture requires an insistence on respecting the privacy and dignity of all suspects. As Keith Findley recently observed, "crime control and defendants' due process rights . . . are, in many ways, two sides of the same coin."<sup>114</sup>

The hard question is how to reform the culture. Despite the title of his book, it is not really the Supreme Court that Thomas puts on trial. The Court could have done a better job protecting the innocent, but as Thomas acknowledges, it is questionable that the Court is the proper institution to implement and enforce nationwide substantive guidelines. (P. 166.) More likely, "[c]reating a coherent criminal procedure doctrine is [largely] a task for the various legislatures" (p. 166), for administrative agencies,<sup>115</sup> and even for local law enforcement agencies.<sup>116</sup>

Thus, Thomas joins a number of other eminent scholars who study wrongful convictions in recommending the adoption of best practices at the early investigative stages.<sup>117</sup> At the pretrial and trial stages, he recommends bold structural changes designed to move beyond adversary battle and toward a more open-minded search for truth. He argues for an administrative process akin to the English Criminal Cases Review Commission to entertain claims of innocence based on newly discovered evidence. These are among the many ambitious and creative proposals for reform Thomas offers, and with few exceptions, they cannot be implemented by the courts.

## VIII. CONCLUSION

*The Supreme Court on Trial* poses a powerful challenge to some deeply held articles of faith, including the superiority of the adversary system and the adequacy of process values to safeguard criminal justice. Its arguments will not persuade all

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<sup>112</sup> Roach, *supra* note 103, at 681 (quoting HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION PART II* 168, 180 (1968)).

<sup>113</sup> Steiker & Steiker, *supra* note 96, at 614 (citing Marshall, J., dissenting in *United States v. Bagley*, 473 U.S. 667, 701 (1985)).

<sup>114</sup> Findley, *supra* note 57, at 141.

<sup>115</sup> *Id.* at 144–47.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

readers, but the measure of the book's success lies in its ability both to convey the sweep and urgency of the problem of wrongful convictions, and to provoke re-examination of the reassuring verities that stand in the way of systemic reform. Implementing lasting change will take persuasion, perseverance, and political will, and Thomas's passionate argument for reform is a valuable addition to the persuasive arsenal.