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INSTITUTING INNOCENCE REFORM: WISCONSIN'S NEW GOVERNANCE EXPERIMENT

KATHERINE R. KRUSE*

INTRODUCTION

The DNA exoneration cases of the past two decades have given us a window into what has not been working in the criminal justice system.¹ Each exoneration demonstrates a discrete malfunction of the criminal justice system that convicts an innocent person, leaves a crime unsolved, and allows a guilty person to remain free. The growing collection of DNA exonerations has also revealed deeper patterns of dysfunction in the investigation and prosecution of crimes: false confessions, mistaken eyewitness identifications, invalid forensic science, police and prosecutorial misconduct, and inadequate representation by criminal defense attorneys.² Building on the lessons

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1. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 333 (2002).

2. The Innocence Project at the Benjamin N. Cardozo School of Law has been the leading force in cataloguing and identifying the causes of wrongful convictions. The Innocence Project was founded in 1992 by professors Barry Scheck and Peter Neufeld. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, at xiii (2000). In 1999, Scheck and Neufeld analyzed sixty-two of the first sixty-seven DNA exonerations that their project had gained and published a book that laid out and illustrated nine distinct factors leading to wrongful convictions with journalist Jim Dwyer. *Id.* at 246, 257, 258 (listing as the nine factors: mistaken eyewitness identification, false confession, fraudulent science, jailhouse snitches, invalid forensic science, prosecutorial misconduct, inadequate defense representation, race, and the death penalty). In 1996, the U.S. Department of Justice conducted a

learned from the DNA exonerations, innocence advocates have devised a detailed agenda for criminal justice reform, drawing on social scientific research to endorse “best practices” for avoiding wrongful convictions in a variety of problem areas.³

The challenge currently facing innocence advocates—and the subject of this Article—is how to embed proposed innocence reforms within institutional structures that will sustain them over time. As innocence advocates have pointed out, the window into the criminal justice system that DNA exonerations currently provide “will not remain open forever.”⁴ It was created by a sudden surge in the advancement of technology that allowed new and more definitive analyses of biological specimens languishing in crime labs or police vaults.⁵ However, technology has caught up and DNA testing is now being conducted as part of the initial investigation of crimes.⁶ As a result, the era of postconviction DNA exonerations—the dramatic and public reopening of cases based on clear evidence of actual innocence—will eventually pass. Before the window closes, innocence reformers urge criminal justice system reforms based on lessons taught by DNA exonerations.

In 2005, Wisconsin underwent a breathtaking course of reform in two of the problem areas that have plagued wrongful convictions: mistaken eyewitness identification and false confession. In July 2005,

study of twenty-eight wrongful convictions. EDWARD CONNORS ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevd.pdf>. The most comprehensive study, conducted by lead investigator Samuel Gross, a professor at the University of Michigan Law School, compiles data and analyzes the causes of wrongful convictions in 340 exoneration cases from 1989 to 2003. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

3. DWYER ET AL., *supra* note 2, at 255-60 (providing an appendix with a “short list of reforms to protect the innocent”). More detailed information about reforms, including model state legislation in areas identified as leading to wrongful convictions, is widely shared through innocence project Web sites. See, e.g., Innocence Project: Policy, <http://www.innocenceproject.org/policy/> (last visited Mar. 3, 2006).

4. Findley, *supra* note 1, at 337; see also DWYER ET AL., *supra* note 2, at 250 (noting that because of the growing use of DNA before trial, “[i]n a few years, the era of DNA exonerations will come to an end”); James S. Liebman, *The New Death Penalty Debate: What’s DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 547 (2002) (noting that as DNA testing becomes more widespread, the unsettling effect of exonerations on the sense of fairness in the criminal justice system may dissipate without motivating reform to address the underlying causes of wrongful convictions).

5. Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, WIS. LAW., May 2002, at 20, 21.

6. See DWYER ET AL., *supra* note 2, at 250; Findley, *supra* note 1, at 337.

the Wisconsin Supreme Court handed down a pair of decisions that responded explicitly to the risk of wrongful conviction by reaching outside the boundaries of federal constitutional law to create new standards for excluding identification and confession evidence.⁷ In December 2005, the Wisconsin State Legislature enacted a criminal justice reform bill that mandates local law enforcement agencies to develop written policies for eyewitness identification procedures. The bill is designed to minimize the risk of mistaken identification, mandates the electronic recording of all juvenile custodial interrogations, and declares a state policy that all custodial interrogations of adults in felony cases should be electronically recorded.⁸

As a result of these changes to the law governing police investigatory practices, Wisconsin has launched itself onto the cutting edge of innocence reform. The Wisconsin reforms to police identification and interrogation procedures share a similar structure: although social scientific understanding of best investigatory practices forms the backdrop for reform, the content of police practice was neither legislatively nor judicially dictated to local law enforcement

7. In *State v. Dubose*, the court departed from the federal due process standard that allows an impermissibly suggestive identification to be introduced into evidence if the court finds that it is nonetheless reliable, and interpreted its state constitutional due process provision to require a more exacting inquiry based on whether it was necessary for police to rely on the identification procedure they deployed. 2005 WI 126, ¶¶ 24, 25, 33, 285 Wis. 2d 143, ¶¶ 24, 25, 33, 699 N.W.2d 582, ¶¶ 24, 25, 33. In *In re Jerrell C.J.*, the court invoked its supervisory authority over the lower courts to require the electronic recording of custodial interrogations in juvenile cases as a precondition to the admissibility of any confession arising from police interrogation. 2005 WI 105, ¶ 3, 283 Wis. 2d 145, ¶ 3, 699 N.W.2d 110, ¶ 3.

8. Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005). The reform bill is now codified in several sections of the Wisconsin Statutes. WIS. STAT. § 175.50 (2005-2006) (outlining eyewitness identification procedures); WIS. STAT. § 938.195 (2005-2006) (providing for mandatory recording of juvenile interrogations); WIS. STAT. § 938.31 (2005-2006) (rendering inadmissible juvenile statements derived from unrecorded custodial interrogation); WIS. STAT. § 968.073 (2005-2006) (declaring a state policy that custodial interrogations of adults in felony cases should be recorded); WIS. STAT. § 972.115 (2005-2006) (providing for a mandatory jury instruction when the statement of an adult in a felony case is introduced into evidence in the absence of a recorded custodial interrogation).

In addition to addressing eyewitness identification and custodial interrogation procedures, the criminal justice reform bill included measures regulating the retention of and testing of biological crime scene evidence, and extending the statute of limitations for bringing sexual assault charges when DNA testing excludes the person initially identified as the perpetrator. Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005).

agencies.⁹ Rather, the Wisconsin reforms in both areas allow—and in the area of eyewitness identification require—local agencies to develop and periodically revisit the policies that govern their own practices in light of social scientific theory and in light of models developed in other jurisdictions.¹⁰

Because of an institutional structure that delegates rulemaking authority to local police agencies, Wisconsin's innocence reforms fit well within a new paradigm of regulatory jurisprudence called "democratic experimentalism" or "new governance."¹¹ Democratic experimentalism eschews top-down "command-and-control" regulation in favor of allowing practices to be developed from the bottom-up through provisional and localized problem solving, and embeds these local problem-solving efforts within larger structures of transparency that promote accountability and cross-jurisdictional learning.¹² A

9. See *infra* Part II.C.

10. Law enforcement agencies are required to adopt written eyewitness identification policies that "shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases." WIS. STAT. § 175.50(2) (2005-2006). Agencies are required to review these policies biannually. *Id.* In developing and revising their policies, agencies are mandated to "consider model policies and policies adopted in other jurisdictions" and must also consider "practices to enhance the objectivity and reliability of eyewitness identification and to minimize the possibility of mistaken identification." WIS. STAT. § 175.50(4)-(5). With respect to custodial interrogation practices, the mandates for learning about investigative practices are less specific. However, the legislation declares a state policy that all custodial interrogations in felony cases should be electronically recorded and mandates that juvenile interrogations must be recorded. The resulting record of interrogation practices developed by interrogation tapes can be used in Wisconsin as they have been used in other jurisdictions to study and improve interrogation techniques. See THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 16-17 (2004), available at www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm (noting the benefit of using recorded interrogations to enhance police training about interrogation techniques).

11. For articles that theorize experimentalism or "new governance" broadly as a new or emerging paradigm, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004). Brandon Garrett has already begun the process of analyzing innocence reforms in light of the experimentalist paradigm by examining the reformist potential of suits brought under 42 U.S.C. § 1983 by the wrongfully convicted as part of a larger project analyzing innocence commissions and legislative and administrative reform. See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 39 n.16.

12. See *infra* Part II.A.

growing body of scholarship studies the emergence of experimentalist regulatory methods—to one degree or another—in sectors as diverse as environmental law,¹³ health and safety regulation,¹⁴ employment discrimination,¹⁵ community organizing,¹⁶ public school reform,¹⁷ and community policing.¹⁸

This Article considers the Wisconsin innocence reforms as a case study in emerging experimentalist governance, illustrating both its promise and the challenge of experimentalist reform. Part I lays the background and context for Wisconsin's reforms by showing how social scientists understand the problems of mistaken eyewitness identification and false confession, and how this understanding has shaped the direction of proposed innocence reforms. It also examines how the constitutional doctrine governing eyewitness identification and confession evidence has evolved in ways that mute the concern for truth-finding and disregard what social science teaches about the effects of investigatory practices on juries' ability to accurately determine guilt. Part II offers a different way of looking at the possibilities of using law to stimulate reform in the investigatory practices of law enforcement agencies by examining the Wisconsin reforms within the democratic experimentalist governance paradigm. Part II explains the paradigm and demonstrates how the legislative and judicial reforms in Wisconsin—particularly to eyewitness identification procedures—could work together to create an institutional architecture of pressure and incentive for local law enforcement agencies to engage in the kind of continuous reform of their practices that experimentalist governance envisions.

However, the potential for an experimentalist regulatory regime to emerge from the Wisconsin reforms does not ensure that such a regime will become a reality. Reform under the democratic experimentalist paradigm faces two practical challenges: (1) the challenge of gaining

13. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001).

14. Freeman, *supra* note 13.

15. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

16. Julissa Reynoso, *Putting Out Fires Before They Begin*, 24 LAW & INEQ. (forthcoming 2006).

17. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

18. Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001).

genuine buy-in to a problem-solving process of systemic reform by diverse stakeholders; and (2) the challenge of creating institutional structures that will sustain reform as a continuous process into the future. The remaining parts of this Article explore the implications of those challenges in the specific context of the Wisconsin reforms. Part III analyzes how Wisconsin was able to make significant progress toward meeting the first challenge—gaining genuine buy-in to systemic reform—by explaining the specific interactions between national networks, local pilot projects, and political processes that created the conditions for major judicial and legislative changes to the criminal procedural law governing law enforcement investigations in Wisconsin.

Part IV concludes that although Wisconsin's innocence reforms are promising, they lack an adequate institutional structure to sustain a process of continuous reform. The only mechanism that the reforms provide for holding local law enforcement agencies accountable to the experimentalist goals of cross-jurisdictional learning and public accountability is the exclusionary rule in individual criminal cases. I argue that the exclusionary rule will be inadequate to serve these experimentalist purposes. I argue that if the experimentalist potential of the Wisconsin reforms is to come to fruition, administrative agencies—specifically the Wisconsin Department of Justice—will need to take a more active role in creating structures of information coordination. However, if it embarks on this task, Wisconsin faces challenges that point to deeper tensions within the democratic experimentalist paradigm itself.

I. CAUSES OF WRONGFUL CONVICTION AND CONSTITUTIONAL REGULATION OF POLICE INVESTIGATIONS

Wisconsin's innocence reforms address two of the known causes of wrongful conviction that have emerged from the study of DNA exonerations: mistaken identifications and false confessions. With regard to mistaken identifications, the Wisconsin reforms make two significant changes to the law governing eyewitness identification. First, the Wisconsin Supreme Court announced a new state constitutional standard for excluding suggestive eyewitness identification evidence.¹⁹ This new standard rejects the flawed federal due process standard, which allows courts to admit identification evidence if it is deemed reliable based on factors that have been criticized by social scientists as insensitive to the dangers of mistaken

19. *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (2005).

identification.²⁰ The new Wisconsin state constitutional standard focuses instead on whether the police's use of a suggestive identification procedure was necessary under the circumstances.²¹ Second, criminal justice reform legislation mandates local law enforcement agencies to develop written policies regarding eyewitness identification in light of social-scientific sound practices, model policies, policies adopted in other jurisdictions, and to review these policies biannually.²² With respect to custodial interrogations, the criminal justice reform legislation declared a state policy that custodial interrogations should be recorded.²³ In juvenile cases, it codified a Wisconsin Supreme Court case holding that statements arising from unrecorded custodial interrogations are inadmissible;²⁴ in adult cases, it required that juries be instructed that they "may consider the absence" of recording in evaluating the evidence.²⁵

These Wisconsin reforms to the law governing police identification and interrogation practices respond to lessons that social science teaches about the causes and cures of wrongful convictions, and confront the failure of constitutional doctrine to engage courts and law enforcement in what should be a shared truth-seeking mission. The next section lays the background and context for understanding the significance of the Wisconsin reforms by examining what social scientists understand about how flawed investigatory practices can lead to mistaken eyewitness identifications and false confessions, and how these practices can be changed to lower the risk that they will result in wrongful convictions. It also examines the constitutional doctrine that governs the admissibility of identification and confession evidence, showing how the Warren Court understood the potential for police practices to contaminate evidence presented at trial, and both half-heartedly tried and ultimately failed to respond by regulating police investigations with constitutional doctrine.

20. See *infra* notes 113-18 and accompanying text.

21. *Dubose*, 285 Wis.2d, ¶ 33, 699 N.W.2d, ¶ 33.

22. Wis. STAT. § 175.50 (2005-2006).

23. Wis. STAT. § 968.073(2) (2005-2006).

24. Wis. STAT. § 938.31(3) (2005-2006). This requirement codified the ruling in *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110.

25. Wis. STAT. § 972.115(2) (2005-2006).

A. Causes of Wrongful Conviction and Proposed Innocence Reforms

1. MISTAKEN IDENTIFICATION

Mistaken eyewitness identification has emerged as the most prevalent cause of wrongful convictions.²⁶ Social scientific research helps explain why. Beginning in the 1970s, psychologists began to study the malleability of eyewitness memory, showing that eyewitnesses' accounts of past events could be manipulated by suggestive questioning.²⁷ Psychologists have applied these insights to specific police procedures that lead to the mistaken eyewitness identification of an innocent suspect.²⁸

Laboratory studies have shown that it is surprisingly easy to induce a mistaken identification from a lineup procedure when the real perpetrator is not present as long as people in the lineup match the general description of the perpetrator and the lineup administrator instructs the eyewitness that the suspect might be present.²⁹ Under such

26. Gross et al., *supra* note 2, at 542 (reporting that 64 percent of the 340 exonerated cases in their study involved mistaken identifications); CONNORS ET AL., *supra* note 2 (reporting that twenty-four out of twenty-eight cases involved mistaken eyewitness testimony presented at trial).

27. Elizabeth F. Loftus et al., *Effects of Questioning Upon a Witness' Later Recollections*, 3 J. POLICE SCI. & ADMIN. 162, 165 (1975); Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974); Elizabeth F. Loftus et al., *Semantic Integration of Verbal Information Into a Visual Memory*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 19 (1978).

28. One of the leading researchers in this field is Gary Wells, who in 1978 published a paper that distinguished between "estimator variables" and "system variables." Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978). Estimator variables are conditions that affect eyewitness memory, but over which law enforcement has no control, such as the length of time that the witness had to view the perpetrator, the lighting conditions, or whether a gun was present. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 582 (2000) [hereinafter Wells et al., *Lab to Police Station*]. System variables are conditions relating to the conduct of identification procedures that affect eyewitness memory, such as the selection of "fillers" in a lineup or the suggestiveness of instruction or feedback to an eyewitness. *Id.* at 582, 584-85. Because system variables are within the control of law enforcement, understanding their effect on eyewitness memory can lead to reform of investigatory practices in ways that minimize mistaken identifications. *Id.* at 582.

29. Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 363 (1998) (reporting a 100 percent false identification rate

conditions, eyewitnesses tend to base identifications on relative judgments, comparing lineup members to one another to determine which one most closely resembles the perpetrator.³⁰ Confirming feedback from the administrator after the identification, which indicates that the eyewitness has chosen the “right” suspect from a lineup or photo array, has the further distorting effect of raising the witness’s confidence level in the mistaken identification.³¹ Confirming feedback not only inflates eyewitnesses’ levels of confidence in their mistaken identifications, it also distorts their reports of the witnessing experience itself, inflating their estimates of how good a view they had of the culprit, how attentive they were to the culprit’s face, and how well they were able to discern specific facial features.³²

Building on the momentum generated by DNA exonerations, innocence reformers have coalesced around a set of reforms to eyewitness identification procedures based on existing psychological research.³³ To ensure that administrators do not unintentionally signal to the eyewitness which person in a lineup or photo array is the suspect, researchers suggest *double-blind procedures*, in which the administrator does not know which person the police suspect.³⁴ To guard against the danger of eyewitnesses’ tendency to rely on relative judgments and pick the person who looks most like the culprit—whether or not the culprit is present—researchers recommend that eyewitnesses be given *neutral instructions* that inform them that the suspect “might or might not” be included in a lineup or photo array.³⁵ To combat the inflationary effects of confirming feedback on eyewitness confidence levels, social

using this method in a study that involved 172 participants, and referring to a previous study that obtained a 97 percent false identification rate when these three factors were present).

30. Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89 (1984).

31. Carolyn Semmler et al., *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334 (2004); Wells & Bradfield, *supra* note 29.

32. Wells & Bradfield, *supra* note 29, at 366-68.

33. A set of four recommendations was published in a “white paper” prepared by a subcommittee of leading researchers in the area of eyewitness identification appointed by the Executive Committee of the American Psychology and Law Society. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 627-29 (1998) [hereinafter Wells et al., *Eyewitness Identification Procedures*]. For a discussion of seven suggested reforms, see Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 [hereinafter Wells, *Systemic Reforms*].

34. Wells et al., *Eyewitness Identification Procedures*, *supra* note 33, at 617-19, 627-29.

35. *Id.* at 615, 629-30.

scientists suggest that police *record witness confidence levels immediately* after the identification occurs.³⁶ This practice provides a tool for combating the distortions in the level of confidence that an eyewitness may naturally experience by the time he or she is asked to testify at trial, simply by virtue of the fact that the decision by police and prosecutors to institute criminal proceedings against a suspect will inevitably provide feedback that confirms the identification.³⁷

One of the more controversial suggested reforms has been the recommendation by researchers that subjects be presented to an eyewitness *sequentially rather than simultaneously*.³⁸ The settled practice in most law enforcement identification procedures is to present the suspect in a lineup or photo array simultaneously with known-innocent fillers.³⁹ When the actual culprit is not present in the lineup, this simultaneous style of presentation can lead to mistaken identifications by facilitating the eyewitness's reliance on relative judgments, leading the eyewitness to pick the person in the lineup or photo array who most closely matches his or her memory of the culprit.⁴⁰ Sequential procedures, in which the suspect and fillers are presented one at a time, have been shown in multiple studies to reduce the rates of mistaken identifications.⁴¹ However, when the culprit is present in the lineup, the sequential procedure has led to some loss of

36. *Id.* at 624-27, 635-36.

37. In real world prosecutions, the confirming feedback may not be immediate, as it may take days or even months for an eyewitness to find out charges have been brought against the suspect. However, laboratory study has shown that delays of forty-eight hours between identification and confirming feedback do not diminish its effects. Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. EXPERIMENTAL PSYCHOL. 42 (2003). The process of preparing an eyewitness to respond to questioning at trial has also been shown to distort the confidence level that a witness expresses during testimony. Wells et al., *Eyewitness Identification Procedures*, *supra* note 33, at 624-25.

38. The psychologists whose consensus paper provided the basis for many of the reforms did not include sequential lineup and photo arrays as one of their procedural recommendations, though they included a discussion of it. Wells et al., *Eyewitness Identification Procedures*, *supra* note 33, at 639-40. The U.S. Department of Justice stopped short of endorsing sequential methods of presentation as a preferred procedure. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 9 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. Gary Wells, whose research with Amy Bradfield has provided the impetus for sequential identification procedures, continues to recommend them. *See* Wells, *Systemic Reforms*, *supra* note 33.

39. Wells et al., *Eyewitness Identification Procedures*, *supra* note 33, at 640.

40. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 35 LAW & HUM. BEHAV. 459, 468 (2001).

41. *Id.* at 460.

correct identifications because eyewitnesses are more hesitant to make any choice at all using the sequential procedure.⁴² The hesitancy to make an identification choice aids accuracy if the police have arrested the wrong person, but may inhibit accuracy if the police have arrested the right person.⁴³ Because sequential presentation procedures represent a significant departure from current police practices and raise questions about implementation and the loss of correct identifications, they have been slower to gain support.⁴⁴

2. FALSE CONFESSION

The idea that someone would confess to a crime that he or she did not commit is “counterintuitive and startling.”⁴⁵ Yet wrongful conviction studies demonstrate that it happens with some frequency,⁴⁶ and that when it does, the effect on juries is powerful.⁴⁷ Social scientific studies have shown that evidence that a defendant has confessed, perhaps more than any other kind of evidence, is “likely to

42. *Id.* at 463. Among those who do make a choice, the accuracy between simultaneous and sequential procedures is not significant. *Id.* at 464.

43. However, researchers have noted that in real-world conditions, the loss of correct identifications was less likely to be a problem than it has been in laboratory settings because one of the factors that minimizes the loss—asking the eyewitness to provide a description of the suspect prior to the identification procedure—is likely to occur in the course of an actual investigation. *Id.* at 468-69.

44. See, e.g., Wells et al., *Eyewitness Identification Procedures*, *supra* note 33, at 640 (declining to recommend sequential procedures in part because their adoption without also adopting double-blind procedures might increase the problem of mistaken identification); Wells et al., *Lab to Police Station*, *supra* note 28, at 595 (speculating on the reasons for resistance within the DOJ's working group to declaring a sequential procedure superior).

45. Keith Findley, *Taping Would Help Prevent Wrongful Convictions*, MILWAUKEE J. SENTINEL, Feb. 13, 2005, at 1J.

46. Studies of wrongful convictions demonstrate that false confessions occur in anywhere from 14 to 25 percent of the total number of wrongful convictions identified in the study. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 907 (2004) (summarizing the results of four studies). Drizin & Leo's own study examined 125 cases of proven wrongful convictions that included a false confession by the defendant. *Id.* at 924-25; see also Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 432-34 (1998) (analyzing sixty false confessions that occurred in wrongful conviction cases).

47. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479.

dominate all other case evidence and lead a trier of fact to convict the defendant.”⁴⁸

Unlike mistaken identifications, which are fairly simple to simulate in a laboratory setting, it is difficult to artificially create a situation with the unique psychological pressures and incentives that attend police interrogation.⁴⁹ However, social psychological analyses of the interrogation techniques that police regularly employ,⁵⁰ as well as studies of confessions later conclusively proven to be false,⁵¹ have shown how psychologically coercive techniques by police interact with personality factors of suspects to result in the phenomenon of false confession.⁵²

The decision to confess falsely can best be understood within the context of techniques that police employ to manipulate a suspect’s assessment of the situation so that he or she concludes—contrary to the suspect’s actual interests—that confessing is the most rational option.⁵³ Psychologically based interrogation techniques follow a multistage process that first convinces the suspect that the interrogator already has overwhelming evidence of guilt and that continued denial is pointless. The process then seeks “to motivate a now resigned and despairing suspect to admit guilt” by focusing on the incentives attendant to

48. Leo & Ofshe, *supra* note 46, at 429 (citing studies by Saul M. Kassin and Lawrence S. Wrightsman).

49. See Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 67, 90 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (stating that “[t]o date . . . the uncorroborated anecdote is our only source of data,” and suggesting the need for a “creative experimental paradigm” to test the risk of false confessions from the use of psychological interrogation techniques).

50. See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997). Psychologists Saul Kassin and Lawrence Wrightsman provided an important early typology of false confessions, dividing them into voluntary, coerced-compliant, and coerced-internalized. Kassin & Wrightsman, *supra* note 49, at 76-78; see also GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* 173-216 (2003) (surveying the psychological literature broadly and refining the typologies of false confessions).

51. Drizin & Leo, *supra* note 46; Leo & Ofshe, *supra* note 46.

52. Leo et al, *supra* note 47.

53. Ofshe & Leo, *supra* note 50, at 985. Getting the suspect to that point is the explicit premise on which leading police interrogation manuals are based. See, e.g., FRED E. INBAU ET AL., *INTERROGATION AND CONFESSIONS* 332 (3d ed. 1986) (“The goal of interrogation . . . is to decrease the suspect’s perception of the consequences of confessing, while at the same time increasing the suspect’s internal anxiety associated with his deception . . .”).

confession.⁵⁴ These incentives can range from weak incentives, such as an assuaged conscience or the investigator's respect, to stronger incentives, such as predictions or threats of punishment if the suspect continues to maintain innocence and predictions or promises of leniency if the suspect confesses.⁵⁵ This process of breaking down a suspect's resistance to admitting guilt and then building up the motivation to confess can—and in taped interrogation sessions does—involve a range of heavy-handed tactics that include yelling, swearing, and other dominating behavior;⁵⁶ exaggeration or outright fabrication of evidence that investigators have against the suspect;⁵⁷ and exaggerated threats, predictions, or promises regarding how the suspect will be treated in the criminal justice system.⁵⁸

Although good evidence of what actually occurred inside the interrogation room in proven wrongful conviction cases is sometimes lacking,⁵⁹ social psychologists have identified some recurring patterns that result in false confessions. One recurring scenario involves high-profile cases where the pressure on police to find the perpetrator pushes

54. Ofshe & Leo, *supra* note 50, at 989-90; see GUDJONSSON, *supra* note 50, at 12-21 (describing the nine steps of the Reid Method of interrogation).

55. Ofshe & Leo, *supra* note 50, at 990. Ofshe & Leo note that because using explicit threats or promises is more likely to result in successful suppression motions, police have become more sophisticated about using "more subtle and camouflaged threats and promises to elicit confessions of guilt." *Id.* at 999 n.71.

56. *Id.* at 1004-08.

57. *Id.* at 1008-41 (detailing and illustrating, with examples drawn from actual interrogation tapes, ploys such as untruthfully suggesting that eyewitnesses have identified the suspect, that co-perpetrators have confessed and implicated the suspect, that polygraph examiners can read the suspect's mind, that police can lift and match prints off of a variety of surfaces, or that fictitious new technology can otherwise identify the suspect). For a general discussion of deceptive police tactics in reported cases, see Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

58. Ofshe & Leo, *supra* note 50, at 1072-88. As previously noted, explicit threats are no longer as common as they perhaps once were, and are generally not favored techniques. However, Ofshe and Leo use transcripts of police interrogations to demonstrate how police gradually move from less direct to more explicit threats and promises to induce admissions of guilt. Ofshe & Leo, *supra* note 50, at 1060-1106 (describing and illustrating indirect threats and promises, more or less explicit threats and promises, high-end threats and promises, and the use of the "accident scenario technique" to suggest that if the suspect confesses others will understand that it was just an accident, but if the suspect maintains denial the system will mete out the harshest possible punishment).

59. The failure to collect statistical data on the number of interrogations and confessions nationally, the failure to record what actually occurs in most police interrogations, and the failure to agree on the "ground truth" of what really happened in a particular case, all lead to difficulty in assessing the extent of the false confession problem. Leo & Ofshe, *supra* note 46, at 431-32.

interrogators to invoke high-end strategies to elicit a confession from a suspect in custody, even in the face of scant evidence indicating guilt.⁶⁰ Another trend in false confession cases is the “multiplying effect,” where the real or fabricated cooperation of one suspect is used to induce admissions from other suspected co-perpetrators.⁶¹ In some false confession cases, suspects simply give in to the pressures of the interrogation process, producing what researchers call “stress-compliant” confessions.⁶² Children, juveniles, mentally retarded, and mentally ill suspects appear to be disproportionately vulnerable to giving this kind of false confession, even if it is induced through normal or low-end interrogation techniques.⁶³ In other cases, especially when the police have claimed that irrefutable physical evidence ties the suspect to the crime, the suspect confesses because of a belief that he or she must have committed the crime, though the suspect cannot remember doing so.⁶⁴

Legal scholars disagree about what types of reform would best protect against the danger of an innocent person falsely confessing without hampering law enforcement’s ability to elicit true confessions from the guilty. Some advocate the creation of bright-line rules that would use the exclusionary rule to bar the use of confessions gained through specific psychological interrogation techniques known to

60. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 133 (1997) (hypothesizing that “false confessions are most likely to occur in a small but significant category of cases—high-profile cases in which the police have no suspects other than the one who is subjected to interrogation”); see also Ofshe & Leo, *supra* note 50, at 1060 (speculating from a social-psychological perspective that low-end incentives such as “reducing guilt, doing the right thing, showing empathy for the victim’s family, straightening things out with God, and appearing honorable” are not likely to work with an innocent person).

61. Drizin & Leo, *supra* note 46, at 974-76. Other aspects of the multiplying effect include the inculcation of other innocent suspects as co-perpetrators and false confessions to additional unsolved crimes. *Id.* at 981-95.

62. Kassir & Wrightsman, *supra* note 49, at 77-78; see also Ofshe & Leo, *supra* note 50, at 997-98.

63. See Drizin & Leo, *supra* note 46, at 963-74; White, *supra* note 57, at 131.

64. Kassir and Wrightsman call these type of confessions “coerced-internalized” false confessions. Kassir & Wrightsman, *supra* note 49, at 78. Ofshe and Leo de-emphasize the aspect of police coercion and call these “persuaded false confessions.” Ofshe & Leo, *supra* note 50, at 1107. Believing that they must have committed the crime in a blackout or that they are blocking out the traumatic memory of committing it, suspects who give this type of confession rely on objective details about the crime fed to them by police to reconstruct how the crime must have been committed. *Id.* at 1107-10.

correlate with false confessions.⁶⁵ Such rules might include forbidding police from using deceptive tactics like fabricating or misrepresenting the strength of evidence against a suspect,⁶⁶ reducing the psychological pressure of interrogation by requiring police to announce at the outset how long the interrogation will last.⁶⁷ Others favor broad rules excluding any statement gained through police interrogation, preferring a regime in which statements could be compelled, but only in the context of pretrial judicial proceedings.⁶⁸

The social science researchers, on whose work these proposed legal remedies are often based, tend to favor better training for police investigators in the methods they already employ. For example, Professors Richard Ofshe and Richard Leo suggest that police officers can learn to treat a suspect's admission that "I did it"—coming after the deployment of psychological interrogation techniques—as an indication merely that the suspect's resistance has been overcome, not as conclusive evidence of guilt.⁶⁹ They argue that police should go on to test its validity by analyzing the "fit" between the details in the suspect's ensuing narrative while confessing to the crime and corroborating facts from other sources.⁷⁰

Despite some divergence, legal scholars from all camps have reached overwhelming consensus with social scientists regarding one

65. Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997).

66. *Id.* at 974. Welsh White would also support a due process standard prohibiting police from "[d]eceiving the suspect into believing that forensic evidence establishes his guilt," and encouraging courts to "closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him." White, *supra* note 57, at 149. Like Alschuler, he would prohibit the use of promises of leniency, and would have courts closely scrutinize less direct "[i]nducements that suggest the possibility of substantial leniency." *Id.* at 153.

67. *Id.* at 143-45. White would also limit police to nonleading questions with particularly vulnerable suspects. *Id.* at 142-43.

68. See, e.g., Donald A. Dripps, *Foreward: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 731 (1988).

69. Ofshe & Leo, *supra* note 50, at 991.

70. *Id.* at 990-93. In response, some have argued that courts should determine the reliability of statements as a condition of admissibility based on whether a suspect's postadmission narrative fits the facts of the case, includes facts that were not made public or otherwise divulged to the suspect by interrogators, or led police to evidence that the police did not already know. Leo et al., *supra* note 47. It is also possible to make such arguments about corroboration and fit directly to a jury. See Leo & Ofshe, *supra* note 46, at 495 (suggesting that, in addition to police officers, judges and juries can be trained to assess the reliability of a confession according to the criterion of fit between the postadmission narrative and the facts of the case not otherwise known to the suspect).

particular reform: the mandatory electronic recording of police interrogations.⁷¹ The benefits of mandatory recording appeal to diverse constituents for different reasons. Researchers like recording because it promises rich data for testing more accurately how and why police interrogation sometimes leads to false confessions, which can be incorporated into better police training.⁷² Courts like the recording of interrogations because it alleviates the frustration of deciding “swearing contests” in suppression hearings between police officers and criminal defendants about what happened in the interrogation room.⁷³ Although less enthusiastic about the practice because it often does not help their clients,⁷⁴ criminal defense attorneys suggest that exposing interrogation tactics to judges and juries may deter police from engaging in the more egregious forms of misconduct that would otherwise occur in secret.⁷⁵ Perhaps most importantly, law enforcement agencies—at least those that have tried it—voice “virtually unanimous support” for the practice of recording custodial interrogations.⁷⁶ Law enforcement agents employing the practice like to record interrogations because it protects

71. See, e.g., JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 221 (1993) (describing mandatory recording as “[o]ne reform that deserves consideration”); Alschuler, *supra* note 65, at 977 (noting consensus among legal scholars on videotaping police interrogations and calling it the “first step in implementing these rules (or any others)”); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1475 (1985) (“A rule mandating recording would confine extensive questioning to those cases in which it mattered most and would provide an accurate record by which the judiciary could evaluate the police pressure on the suspect.”); Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486-97 (1996) (advocating replacing *Miranda* with a more limited regime of warnings and videotaping); Drizin & Leo, *supra* note 46, at 997-98 (advocating for mandatory electronic recording of the entirety of all custodial interrogations to help decide “swearing contests” between police and criminal defendants, deter police from using improper tactics, and assist both internal and external monitoring of the quality of interrogation and the reliability of confession statements); Ofshe & Leo, *supra* note 50, at 1120-22 (recommending mandatory taping of interrogations to help courts assess their reliability and whether more subtle psychological tactics had the effect of coercing a statement); White, *supra* note 57, at 153-55 (advocating videotaping of interrogations along with other reforms to specific police procedures).

72. Ofshe & Leo, *supra* note 50, at 1120.

73. See *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

74. WILLIAM A. GELLER, U.S. DEP’T OF JUSTICE, *VIDEOTAPING INTERROGATIONS AND CONFESSIONS* 12 (1993).

75. Interview with Keith Findley, Co-Director of the Wisconsin Innocence Project, in Madison, Wis. (Dec. 29, 2005).

76. See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132-33 (2004). Sullivan undertook an informal study that surveyed more than 260 local police agencies that had already implemented recording of custodial interrogation. *Id.* at 133. For Sullivan’s report, see SULLIVAN, *supra* note 10.

them against spurious claims of coercion, reduces the number of suppression motions that defense attorneys file, enhances their investigatory power by creating a permanent record of all the details a suspect has provided, and provides a useful training tool to help improve interrogation methods.⁷⁷

As a result of the recent wave of DNA exonerations, states are beginning to turn their attention to reforms that respond to the problems identified in the social scientific literature. Commissions studying the causes of wrongful convictions increasingly recommend reforms to eyewitness identification procedures that incorporate social scientifically recognized methods,⁷⁸ and such reforms are being implemented in some police departments.⁷⁹ In addition, a growing number of states mandate electronic recording of custodial interrogation in at least some types of cases,⁸⁰ and the practice has gained widespread

77. Sullivan, *supra* note 76, at 132-33. However, as the experience of Wisconsin legislative reform demonstrates, it is sometimes difficult to sell the idea of mandatory electronic recording on law enforcement agencies that have not tried it. See *infra* notes 343-47 and accompanying text (discussing how electronic recording was at first rejected and then gained acceptance in the Avery Task Force).

78. In October 1999, the U.S. Department of Justice issued national recommendations for collecting eyewitness evidence that grew out of a working group composed of geographically diverse representatives of law enforcement, prosecutors, defense attorneys, and researchers. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 6 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. The report of Illinois Governor George Ryan's Commission on Capital Punishment specifically relies on psychological literature as the basis for recommending double-blind and sequential lineup and photo array procedures in homicide cases, and requiring neutral instructions. COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 32-34 (2002), available at <http://www.state.il.us/Defender/report.pdf>. In March 2005, the Innocence Commission of Virginia issued a set of recommendations that include double-blind procedures, neutral instructions, avoidance of feedback, and sequential presentation. THE INNOCENCE COMM'N FOR VA., A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA 8-9 (2005), available at <http://www.nicic.org/Library/020531>.

79. See COMM'N ON CAPITAL PUNISHMENT, *supra* note 78, at 33; see also Wells, *Systemic Reforms*, *supra* note 33, at 641-43 (detailing eyewitness identification reforms in a variety of jurisdictions).

80. In 1996, only two states mandated electronic recording, each by judicial rule. *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). In the past two years, five other states in addition to Wisconsin have legislatively mandated recording in some cases. D.C. CODE § 5-116.01 (2005) (mandating electronic recording of the entire custodial interrogation of suspects in crimes of violence, unless the suspect makes a voluntary consent expressly conditioned on ceasing electronic recording); D.C. CODE § 5-116.03 (2005) (establishing a rebuttable presumption that a statement is involuntary when the statement is not acquired according to § 5-116.01); ME. REV. STAT. ANN. tit. 25, §

use in many police departments that are not mandated to do it.⁸¹ Unfortunately, as we will see in the following section, the constitutional doctrine within which these reforms are occurring does little to support the social scientific understanding of how mistaken identification and false confessions come about and how they affect trial processes. The reforms are happening despite—and in some instances in opposition to—legal standards designed to protect the integrity of trial processes.

B. Criminal Procedural Rights and the Shared Truth-Seeking Mission of Police and Courts

The sharpest critics of the Warren Court's criminal justice procedure revolution decry its deployment of the exclusionary rule to regulate the way police interact with citizens in a zero-sum game that sacrifices convictions by excluding otherwise reliable evidence from use at trial.⁸² Critics object to the Warren Court's intrusion into state criminal procedure through what they view as the unprincipled interpretation of the Fourteenth Amendment to invoke individual rights as barriers against effective law enforcement, checking the power of states to investigate crime by methods that encroach upon the privacy,

2803-B(1)(K) (2004) (mandating law enforcement agencies to adopt written policies "to deal with" electronic recording "of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases"); 725 ILL. COMP. STAT. ANN. 5/103-2.1(b) (West 2004) (mandating that an adult suspect's statement made in a custodial interrogation is presumed inadmissible unless it is electronically recorded and "substantially accurate and not intentionally altered"); 725 ILL. COMP. STAT. ANN. 405/5-401.5(b) (West 2004) (making a minor suspect's unrecorded statement inadmissible); TEX. CRIM. PROC. CODE ANN. art. 38.22(3) (Vernon 2005) (mandating that a statement is inadmissible unless it is recorded in its entirety); N.M. STAT. ANN. § 29-14-4.5 (LexisNexis 2005) (requiring law enforcement to electronically record the entire custodial interrogation in felony investigations "when reasonably able to do so" unless the officer has "good cause" not to record).

Courts have also used their supervisory authority to regulate the recording of custodial interrogation. The Massachusetts Supreme Court has mandated a cautionary jury instruction when the prosecution introduces evidence of a defendant's unrecorded custodial confession or statement. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (2004). The Supreme Court of New Jersey recently enacted a supreme court rule declaring the failure to record a custodial interrogation in cases involving several serious felonies to be a factor for consideration by trial courts in determining the admissibility of the statement and as the basis for a cautionary jury instruction. N.J. SUP. CT. R. 3:17 (adopted Oct. 14, 2005).

81. See GELLER, *supra* note 74, at 1; Sullivan, *supra* note 76, at 133.

82. See generally Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591 (1990) (describing the two premises of the conservative critique as insufficient attention to the truth-finding function of criminal trials and disregard of principled constitutional interpretation).

autonomy, or dignity of citizens.⁸³ The common understanding of this Warren Court jurisprudence puts the role of courts as protectors of the rights of citizens in opposition to the role of law enforcement agencies as the protectors of public safety.

However, another thread relating more specifically to the shared interest of police and courts in accurate fact-finding wove its way in and around the Warren Court criminal procedure reforms. Rather than pitting the courts against law enforcement interests, the concern for truth-seeking points to the criminal justice system as a shared enterprise involving both the police and the courts in the common task of finding and punishing the true perpetrators of crime and exonerating the wrongfully accused. The role of the courts in this truth-seeking thread of Warren Court jurisprudence is not primarily to regulate the way police interact with citizens, but to keep police from contaminating evidence that will eventually be presented at trial. The exclusionary rule functions in this regard as a guarantor rather than an inhibitor of truth-seeking by excluding evidence that has been rendered unreliable by the actions of the police.

The next section follows the truth-seeking thread as it traveled through the Court's constitutional regulation of police eyewitness identification and custodial interrogation practices. It first examines the importance of truth-seeking to the Warren Court as it attempted to regulate the integrity of police investigations by extending one of the protections of trial—the presence of counsel—to lineups and custodial interrogations. It then turns to the Court's due process jurisprudence, which addressed concerns of both the reliability and fairness of police investigatory practices under “totality of circumstances” tests. Finally, it turns to the Warren Court's own experimentalist impulse to use criminal procedural rules to encourage local and experimental reform of police investigatory practices.

1. TRUTH-SEEKING AND THE RIGHT TO COUNSEL AT INVESTIGATORY STAGES

It would in some ways be comforting to think that the social scientific evidence on which the currently proposed innocence reforms are based represents a new advancement that was unknown to the Court

83. See *id.* at 592-93; see also George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) (discussing the historical illegitimacy of the view that the Fourteenth Amendment incorporates provisions of the Bill of Rights by making them directly applicable to the states).

as it developed constitutional standards that have ultimately frustrated the ability to protect against wrongful convictions. However, in both the areas of eyewitness identification and custodial interrogation, the Court demonstrated full awareness of the dangers that police investigatory practices posed for the truth-seeking mission of courts. It was simply unable to craft legal standards that could sustain meaningful attention to the problem of wrongful convictions.

In the area of eyewitness identification, the Warren Court's commitment to engaging police in a common truth-seeking mission was expressed clearly and directly. Its decision in the seminal case of *Wade v. United States*—where it held that postindictment lineups are a critical stage at which counsel must be present—was based on the view that identification procedures are “peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”⁸⁴ The Court viewed its rule extending the Sixth Amendment right to counsel as a way to assist, rather than impede, legitimate law enforcement by helping to prevent “the infiltration of taint in the prosecution's identification evidence,” which “cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.”⁸⁵

With regard to custodial interrogation, the Court's protection of the common truth-seeking mission is less evident because the Court concerned itself primarily with issues of fairness and dignity at the heart of the privilege against self-incrimination. Nevertheless, the Court's Fifth and Sixth Amendment jurisprudence governing police interrogations evinces a muted concern for whether a suspect's confession is reliable, and whether trial procedures could adequately test a false confession. The well-known *Miranda* rule prescribes a specific procedure that police must employ to protect a defendant's Fifth and Sixth Amendment rights: informing suspects in custody of their constitutional rights to remain silent and to have an attorney present during interrogation, and ceasing questioning if a suspect

84. *United States v. Wade*, 388 U.S. 218, 228 (1967). The Court noted that the “vagaries of eyewitness identification are well-known,” that the “identification of strangers is proverbially untrustworthy,” and that there is “suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” *Id.* On the same day, the Court decided *Gilbert v. California*, 388 U.S. 263 (1967). In *Wade*, the Court had vacated the conviction and remanded it to the district court to determine whether the witnesses' in-court identification testimony originated independent of the lineup, or whether the introduction of the evidence was harmless error. *Wade*, 388 U.S. at 242. In *Gilbert*, the Court applied the independent-source rule to the witnesses' in-court identifications, but announced a per se exclusionary rule for their testimony about the lineup. *Gilbert*, 388 U.S. at 272-73.

85. *Wade*, 388 U.S. at 238.

invokes those rights.⁸⁶ The *Miranda* decision was primarily based on the Court's concern that coercing someone to confess is an affront to the basic dignity and integrity of citizens,⁸⁷ and referred only incidentally to the unreliability of coerced confessions.⁸⁸

Nonetheless, at least part of the Warren Court's reasoning in developing its regulation of custodial interrogations addressed the concern that coerced confessions were unreliable. The *Miranda* warnings were intended to enforce the Court's Sixth Amendment ruling in *Escobedo v. Illinois* that custodial interrogation is a critical stage of the criminal adversarial process at which defendants are entitled to counsel.⁸⁹ The Court's reasoning in *Escobedo* was based in part on a concern that investigatory techniques that depend on confessions are unreliable and subject to abuse because they create incentives for police to extract confessions from suspects, rather than develop "extrinsic evidence independently secured through skillful investigation."⁹⁰ As it had in *Wade*, the *Miranda* Court recognized the dangers that flawed police interrogation practices pose for the integrity of trials. Specifically, juries may hear compelling confession evidence gathered outside the protections that the adversary system affords.⁹¹ In later cases, the Court continued to decry the powerful downstream effects of unreliable confessions on truth-finding at trial, noting that when it

86. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

87. *See id.* at 460 (discussing the fundamental importance, in an accusatory system of justice, that the government gain evidence "by its own independent labors, rather than by the cruel, simple expedient of compelling it from [a suspect's] own mouth").

88. In *Miranda* the Court mentioned in only one footnote that the psychological interrogations employed by police "may even give rise to a false confession." *Id.* at 455 n.24. Although the Court mentioned that the presence of an attorney at interrogation would enhance the "integrity of the fact-finding processes in court," it did not otherwise draw a connection between the compulsion of self-incriminating statements and the *accuracy* of the fact-finding process. *Id.* at 466 (emphasis added).

89. *Escobedo v. Illinois*, 378 U.S. 478, 486, 490-91 (1964).

90. *Id.* at 488-89.

91. The Court expressed a concern about the inability of the adversarial process during a trial to combat the powerful effect of a false confession on the jury. It noted that "all the careful safeguards erected around the giving of testimony . . . would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Miranda*, 384 U.S. at 466 (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

comes to its effect on a jury, “[a] confession is like no other evidence.”⁹²

In both the areas of eyewitness identification and custodial interrogation, the Warren Court expressed anxiety over what it deemed to be essential trial rights that were threatened by investigatory procedures going on in secrecy behind the closed doors of the station house.⁹³ Its answer in each case was to offer the presence of counsel to make the stationhouse more like a courthouse. In lineups, counsel was offered as a set of eyes and ears to record potentially suggestive procedures for later use during cross-examination at trial.⁹⁴ In custodial interrogations, counsel was offered ostensibly—though implausibly—to allow the accused to gain the ability, as at trial, “to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.”⁹⁵ It was assumed that the presence of counsel would bring procedural regularity to an investigative process that the Court understood to be critically important to the fairness of later proceedings, but over which it felt little control.⁹⁶

However, as critics have noted, announcing a right to counsel has done little to actually protect against the effects of flawed police procedures.⁹⁷ With regard to eyewitness identification, the Court’s ruling in *Wade* requires the presence of counsel only after a suspect has been indicted, and then only at lineup procedures.⁹⁸ This limited right has left police free to dispense with the right to counsel by conducting lineups prior to indictment and does not regulate other methods of identification such as photo arrays or “show-up” procedures, in which the suspect is displayed alone to the eyewitness for identification.⁹⁹

92. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The Court went on to elaborate: “[T]he defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.” *Id.* at 296 (second alteration in original) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)).

93. *See, e.g., Miranda*, 384 U.S. at 448 (“Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”); *United States v. Wade*, 388 U.S. 218, 230 (1967) (“[A]s is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations.”).

94. *Wade*, 388 U.S. at 236-38.

95. *Miranda*, 384 U.S. at 466.

96. *See id.*

97. *See Donald A. Dripps, Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 656-57 (1999).

98. *Wade*, 388 U.S. at 237.

99. Dripps, *supra* note 97, at 657.

With regard to custodial interrogation, *Miranda* excludes only those statements gained while a suspect was in custody, and then only as the result of noncompliance with the formalities of its procedural requirements.¹⁰⁰ As a result, it does not protect defendants when police have adhered strictly to the *Miranda* requirements and then gone on to use interrogation methods that coerced an unreliable confession.¹⁰¹ Moreover, police interrogation studies show that in the wake of *Miranda*, interrogators have worked their techniques around its requirements by developing psychological methods to induce *Miranda* waivers at a preliminary stage of interrogation—a stage at which innocent suspects have little incentive to invoke their rights.¹⁰²

2. DUE PROCESS, RELIABILITY, AND THE LOST LESSONS OF SOCIAL SCIENCE

Because the due process clause focuses on the reliability and fairness of procedures, it is a natural source of constitutional authority to protect against the taint that police investigations may put on the truth-seeking function of the courts.¹⁰³ However, with regard to protecting against the problem of wrongful conviction, the Court's due process jurisprudence in both the areas of false confession and eyewitness identification is disappointing.

In the case of false confession, the Court's concern for the reliability of coerced confessions—though promising—has been eclipsed

100. See Richard A. Leo, *Miranda and the Problem of False Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 271, 275 (Richard A. Leo & George C. Thomas III eds., 1998). As later cases have clarified, *Miranda* is a prophylactic rule that requires compliance only with its warnings and procedures, and not the underlying Fifth and Sixth Amendment rights that those warnings and procedures were designed to protect. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (holding that because the *Miranda* warnings are prophylactic in nature, police need not follow their language with precision); *Withrow v. Williams*, 507 U.S. 680, 690-92 (1993) (acknowledging the *Miranda* warnings as prophylactic, but extending habeas review to their violation on the ground that they nonetheless protect important trial rights).

101. Cassell, *supra* note 71, at 477-78.

102. See Ofshe & Leo, *supra* note 50, at 1001-03 (discussing techniques that include treating the warning as a mere technicality or clarifying to the suspect that he or she is free to leave at any time as a technique for later claiming that the interrogation was not custodial).

103. See, e.g., Dripps, *supra* note 97, at 647-48 (noting that “[f]rom the standpoint of protecting the innocent,” the Warren Court’s incorporation of the Bill of Rights into the Fourteenth Amendment is “disappointing” and that “[t]o go beyond the important but inadequate safeguards in the Bill of Rights, an innocent defendant must look . . . to the Due Process Clause”).

by its concern for preventing police misconduct. The Court's due process analysis of confessions prohibits the use at trial of statements that have been gained involuntarily when the defendant's "will has been overborne."¹⁰⁴ To judge the voluntariness of a defendant's statements, the Court relies on a "totality of the circumstances" test that looks broadly at both the circumstances of the interrogation and the characteristics of the defendant.¹⁰⁵ The flexibility of this test creates the potential for courts to use it in response to social scientific findings about the kinds of psychological interrogation techniques and personality factors that have been found to lead to false confessions. Moreover, the due process test has historic roots in concerns about the reliability of involuntary confessions,¹⁰⁶ and the Court has repeatedly paid lip service to a concern about admitting coerced confessions into evidence based on "the risk that the confession is unreliable, coupled with the profound impact" that confession evidence has on the jury.¹⁰⁷

However, the Court's due process jurisprudence in the area of confessions has developed away from questions of reliability and focused on a half-hearted commitment to deterring police overreaching. Early on in the development of its due process jurisprudence, the Court leaned away from reliability, cautioning that the voluntariness test was designed "not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."¹⁰⁸ Reliability took a backseat to fairness when the Court decided *Colorado v. Connelly*, which required a showing of police overreaching as a necessary prerequisite for suppressing a statement on due process grounds.¹⁰⁹ However, despite this concern for police overreaching, the Court has been unwilling or unable to craft bright-line rules that limit

104. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973) (citing *Culombe v. Colorado*, 367 U.S. 568, 602 (1961)). The involuntariness test was first articulated as an aspect of due process in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

105. *Schneckloth*, 412 U.S. at 226.

106. Leo et al., *supra* note 47; see also Caplan, *supra* note 71, at 1427-32 (reviewing the history of the voluntariness test and how it evolved from being a proxy for the reliability of a statement to encompassing concerns for fair treatment of suspects, whether their statements were true or false).

107. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (making this statement in the context of announcing that harmless error analysis will apply to the introduction of coerced confessions); see also *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) ("Because the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession's reliability.").

108. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

109. 479 U.S. 157, 167 (1986).

what it perceives as law enforcement's need to deploy manipulative and even deceitful interrogation tactics in some cases.¹¹⁰

In the area of eyewitness identification, the Court's due process jurisprudence is perhaps even more disappointing. The problem is not that the Court has disregarded concerns for reliability, but that its tests for reliability disregard the social science lessons that demonstrate how a suggestive eyewitness identification procedure will contaminate the reliability of eyewitness identification evidence at trial. In *Stovall v. Denno*, the Court declared an independent due process violation for using identification evidence gained by a procedure that is "unnecessarily suggestive and conducive to irreparable mistaken identification."¹¹¹ According to *Stovall*, whether a particular procedure is "unnecessarily suggestive" is determined by a "totality of the circumstances" test that looks both at the suggestiveness of the procedure and the necessity of using it.¹¹²

In two later cases, *Neil v. Biggers*¹¹³ and *Manson v. Brathwaite*,¹¹⁴ the Court narrowed its due process standard in the area of eyewitness identification to focus more centrally on reliability, allowing a judicial determination of "reliability" to trump a finding that the eyewitness identification procedures employed by police were impermissibly suggestive.¹¹⁵ In both cases, the Court set out five factors for courts to consider in determining whether an eyewitness's statement is reliable: (1) "the opportunity of the witness to view the criminal at the time of the crime;" (2) "the witness' degree of attention;" (3) "the accuracy of

110. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25 (1973) (describing the voluntariness test as "an accommodation of the complex of values implicated in police questioning of a suspect" including "the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws" on one end of the spectrum, and "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness" on the other end of the spectrum); see also *Culombe v. Colorado*, 367 U.S. 568, 601 (1961).

[I]n light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, . . . [i]t is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions.

Id.

111. 388 U.S. 293, 301-02 (1967).

112. *Id.* at 302.

113. 409 U.S. 188 (1972).

114. 432 U.S. 98 (1977).

115. *Biggers*, 409 U.S. at 199; *Brathwaite*, 432 U.S. at 106.

the witness' prior description of the criminal;" (4) "the level of certainty demonstrated by the witness at the confrontation;" and (5) "the length of time between the crime and the confrontation."¹¹⁶

The problem with the *Brathwaite/Biggers* reliability standard is that most of its factors bootstrap the court's determination of the reliability of eyewitness identification evidence with the suggestiveness of the identification itself. For example, relying on the level of certainty that the witness demonstrates in the identification is flatly refuted by social scientific evidence, which shows that eyewitness confidence levels are inflated by suggestive procedures.¹¹⁷ Not only do eyewitnesses become more confident in their identifications of a suspect, their memories of the conditions under which they identified the suspect can become distorted by confirming feedback that solidifies their confidence.¹¹⁸ A suggestive identification procedure thus becomes the source of the very factors that are used by a judge to test its reliability in the post hoc setting of a completed investigation, effectively insulating an unduly suggestive eyewitness identification from legal challenge.

C. *The Warren Court's Experimentalist Impulse*

When viewed from the vantage point of protecting against the risk of wrongful conviction, the Court's constitutional jurisprudence governing police investigatory practices is a disappointment, if not a failure.¹¹⁹ The Court's early impulse to provide counsel to protect against procedural irregularities in police investigations was an ineffectual remedy. Similarly, its due process jurisprudence pays lip service to concerns about reliability but does little to incorporate social scientific findings into its standards for excluding unreliable evidence at trial.

Moreover, protecting the integrity of the trial process is only part of the problem. Once the police have gained a mistaken identification or false confession—however inadvertently—the game is virtually over.

116. *Biggers*, 409 U.S. at 199; see also *Brathwaite*, 432 U.S. at 114.

117. Gary L. Wells et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 151, 151-53 (2002).

118. For example, confirming feedback can lead an eyewitness to believe he or she must have had a good view of, or paid close attention to, the perpetrator's face. Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 PSYCHOL. SCI. 138, 140-42 (1999).

119. See GRANO, *supra* note 71.

Either a positive eyewitness identification of a suspect or a suspect's own confession tends to solidify the criminal investigation around the suspect. The search for other suspects dampens, and investigatory efforts are directed toward finding evidence that corroborates the guilt of the suspect who has confessed or been identified.¹²⁰ Should the eyewitness or confessing suspect seek to correct a mistaken identification or false confession, the specter of cross-examination at trial looms large. The evidentiary strength of any later identification of a different suspect is weakened by the existence of the prior mistaken identification, and any recantation is open to impeachment by the prior confession. Because it is difficult to build a case that rebuts the inferences created by a false confession or mistaken identification, defense lawyers assessing the prospects of success at trial are likely to pressure their clients simply to plead guilty.¹²¹

Thus, the stakes for reforming the police practices themselves are quite high. The Warren Court's jurisprudence demonstrates that the Court understood this from the start. Even as it interpreted the Sixth Amendment to extend trial protections to lineups and custodial interrogations, the Court voiced a caution that the presence of counsel was a pale substitute for improving the police procedures themselves.¹²² The Court announced its rules in both *Miranda* and *Wade* with the explicitly stated goal of encouraging legislatures and law enforcement agencies to take their own steps to improve police investigatory practices.¹²³ The *Miranda* Court wrote, "It is impossible for us to foresee the potential alternatives for protecting the privilege which

120. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

121. Leo, *supra* note 100, at 274.

122. *United States v. Wade*, 388 U.S. 218, 235 (1967).

123. *Id.* at 239 (encouraging "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings"). Likewise, in *Miranda*, although the holding was directed at the concern for compelled self-incrimination rather than accurate fact-finding, the Court encouraged Congress and the states to "develop their own safeguards for the privilege, so long as they are fully as effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it." *Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

Id. at 467.

might be devised by Congress or the States in the exercise of their creative rule-making capacities.”¹²⁴ The Court suggested in *Wade* that other regulatory bodies taking up the challenge of improving eyewitness identification procedures might “remove the basis for regarding the stage as ‘critical,’” causing the Court to withdraw its constitutional regulation entirely.¹²⁵

In these intimations, the Warren Court sent local law enforcement agencies what might be deemed an experimentalist message: show us that you have developed procedures that do a better job of producing reliable evidence and treating suspects in accord with constitutional norms, and we will cut your investigations loose from the bonds of our constitutional scrutiny.¹²⁶ However, in what Professor Paul Cassell has called “*Miranda’s* greatest cost,” localities never took the Court up on its invitation.¹²⁷ Instead, police agencies begrudgingly learned to live with and work around the threshold standards set in the Court’s Fifth Amendment jurisprudence, rather than seeking to improve upon them.¹²⁸

Attention to the problem of wrongful conviction certainly calls on innocence reformers to question how the Court’s constitutional doctrine could or should be amended to create exclusionary rules more responsive to truth-seeking concerns. However, if we view the Warren Court’s attempts to regulate police investigatory procedures as experimental in spirit—though not ultimately in effect—the failure of constitutional doctrine poses another kind of question as well. It asks innocence reformers to consider why the Warren Court’s attempts to stimulate experimental reform of police procedures failed, and how

124. *Id.*

125. *Wade*, 388 U.S. at 239 (suggesting that effective “[l]egislative or other regulations” of lineups might vitiate the need for counsel and “remove the basis for regarding the stage as ‘critical’”).

126. Professors Dorf and Sabel discuss *Miranda* in just such experimentalist terms. Dorf & Sabel, *supra* note 11, at 453. Dorf and Sabel find in *Miranda* a viable experimentalist model for a more general approach to rights articulation. *Id.* at 459. According to Dorf and Sabel, the Warren Court’s use of prophylactic rules in both the Fourth and Fifth Amendment can be seen as the Court’s use of provisional threshold standards designed to stimulate more specific local articulation of the general norms that the prophylactic rules protect, but do not attempt to define with precision. *Id.* at 453-59.

127. Cassell, *supra* note 71, at 498.

128. Perhaps the Court’s jurisprudence simply lacked the institutional structure to give local agencies incentives to risk further reform. Dorf & Sabel, *supra* note 11, at 453; see also Cassell, *supra* note 71, at 498 (stating that “the undeniable tragedy of the *Miranda* decision is that it has blocked the search for superior approaches to custodial interrogation” by the Court’s failure to “specify what alternatives would be deemed acceptable”).

legal institutions might be structured to engage and support local police agencies in the process of reforming their own investigatory practices to comport with the truth-seeking goals they share with courts. Part II examines what has been identified as a new or emerging paradigm in regulatory jurisprudence that attempts to answer this question about how to institute systemic change as a continuous and participatory process of reform and it assesses the Wisconsin reforms within this paradigm.

II. DEMOCRATIC EXPERIMENTALISM AND THE WISCONSIN REFORMS

Democratic experimentalism, and the larger body of “new governance” scholarship of which it is a part, theorize what many view as a sea change in regulatory methods and approaches.¹²⁹ The sea change is a turn away from the methods of “command and control style” regulation, in which experts decide and then dictate rules from the top down, and a turn toward decentralized, flexible, and pragmatic approaches that seek participation from regulated industries or agencies in formulating the rules that govern them.¹³⁰ The most ambitious rendering of the democratic experimentalist paradigm would reformulate all governmental institutions—legislative, judicial and administrative—in what Professors Michael Dorf and Charles Sabel have called a “constitution of democratic experimentalism” designed to reinvigorate the ideals of Madisonian democracy in the conditions of the post-New Deal regulatory state.¹³¹ Less ambitious but more detailed case studies map the emergence of democratic experimentalist regulatory regimes, to one degree or another, in diverse sectors.¹³²

This Article joins this growing body of literature by analyzing the Wisconsin innocence reforms as a case study in democratic experimentalist reform. The purpose of viewing the Wisconsin reforms through the lens of democratic experimentalism is twofold. The first purpose exploits the visionary aspects of democratic experimentalism by revealing the possibilities of thinking about reform and regulation of police investigatory practices in a new way. As Part I suggests, thinking about using legal institutions to stimulate local reform in police investigatory practices is not entirely new; there are intimations even in

129. Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 484-85 (2004).

130. *Id.* at 473-75.

131. See Dorf & Sabel, *supra* note 11, at 283.

132. See sources cited *supra* notes 13-18.

the early Warren Court cases toward such an approach. However, as I argue, repeating the old way—relying entirely on the exclusionary rule to enforce police conformity to constitutional truth-seeking norms—threatens to undermine rather than advance systemic reform, at least with regard to protecting against wrongful convictions. The democratic experimentalist paradigm provides a theoretical framework for thinking hopefully about how a different approach to reform that is built on problem solving and mutual gain might be implemented to enhance the truth-seeking mission in the criminal justice system.

The second purpose of viewing the Wisconsin reforms through a democratic experimentalist lens is cautionary: to confront some of the tensions within the democratic experimentalist paradigm generally by looking at the challenges and obstacles to its full implementation in the specific context of the Wisconsin innocence reforms. There is a tendency in some of the democratic experimentalist case studies to see the world in terms of the paradigm of democratic experimentalist governance spelled out by Dorf and Sabel,¹³³ even while acknowledging that a full-blown experimentalist regulatory regime has not fully emerged in the world.¹³⁴ This tendency invites a critique that experimentalist governance exists primarily in the eyes of its beholders, rather than in the world itself.¹³⁵ This critique is perhaps bolstered by

133. See, e.g., James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1713-15 (2003); Liebman & Sabel, *supra* note 17, at 279 (describing the new accountability movement in school reform in terms of the democratic experimentalist ideals of new civic government); see also Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Governance*, 53 VAND. L. REV. 831, 832-34 (2000) (differentiating drug treatment courts from other courts of specialized jurisdiction and stylizing them as a kind of administrative body performing an experimentalist regulatory function over treatment service providers).

134. See Karkkainen, *supra* note 13, at 476 (“Innovations occur here and there, discernible within a number of disparate policy domains but dominant in few, and the outcomes of these scattered policy experiments remain ambiguous and contested.”); Sabel & Simon, *supra* note 11, at 1067 (“None of the cases we have examined fully expresses all these features, but some come close, and the model systematically connects the distinctive and promising aspects of all of them.”); Simon, *supra* note 11, at 206 (describing the democratic experimentalist scholarship as consisting of “a set of theoretical intuitions . . . [that] are explicitly tentative and incomplete,” and a “series of case studies . . . [that] are necessarily ambiguous”).

135. See, e.g., Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357 (2003) (decrying the tendency in Liebman and Sabel’s school reform analysis to “see the world in a grain of sand” by abstracting general characteristics that do not exist in the case studies themselves); Martha Minow, *School Reform Outside Laboratory Conditions*, 29 N.Y.U. REV. L. & SOC. CHANGE 333, 334 (2003) (arguing that framing school reform within the democratic experimentalism paradigm “obscures large practical problems and also understates the

the tendency of some democratic experimentalists to err on the side of optimistic overstatement.¹³⁶ However, the sheer diversity of sectors in which similar patterns of governance are appearing supports the claim that deeper change is afoot, and it seems difficult even for the critics to avoid getting a little bit excited about the possibilities that these patterns portend.¹³⁷

The tendency to view the world in terms of the paradigm is of greater concern because it blurs the distinction between descriptive claims that purport to document the emergence of new forms of governance in practice and normative claims that these new forms of governance possess the democratic legitimacy spelled out by Dorf and Sabel in their rendering of the theoretical paradigm. With the lines between descriptive and normative claims blurred, it becomes difficult to differentiate legitimate reform efforts from those that lack legitimacy because they do not measure up to the democratic ideals expressed in the paradigm.¹³⁸ Blurred lines also make it difficult to examine the question of whether the practical obstacles to achieving a full-blown experimentalist governance regime in particular contexts are problems in the world or problems with the theoretical paradigm.¹³⁹

complexity of competing goals”). *But see* James S. Liebman & Charles F. Sabel, *The Fragile Promise of Provisionality*, 29 N.Y.U. REV. L. & SOC. CHANGE 369, 378 (2003) (responding to the “lawyers’ gloom” that these critiques represent).

136. *See, e.g.*, Liebman & Sabel, *supra* note 133, at 1714-15 (acknowledging that the “stylization” of specific reforms within the democratic experimentalist paradigm “reeks of utopianism”); Richard F. Elnore, *Details, Details, Details*, 29 N.Y.U. REV. L. & SOC. CHANGE 315, 315 (2003) (taking “friendly exception” to the optimistic tone of Liebman and Sabel’s account of the promise of school reform).

137. Tushnet, *supra* note 135, at 357 (“Experimental constitutionalism has precisely the forward-looking vision that liberal constitutional theory needs.”); Minow, *supra* note 135, at 334 (characterizing democratic experimentalism as reflecting “the most promising new ideas in public law”).

138. *See, e.g.*, Liebman & Sabel, *supra* note 17, at 262-63 (acknowledging that their case study of the Kentucky school reforms admits of competing normative interpretations of legitimacy within the paradigm); *id.* at 250 (advancing an “optimistic reading” of their case study of school reform in Texas, but also noting that if early signs of success do not continue, “the Texas system and the general accountability regime of which it is a leading example will have failed by their own standards, and ours”). *But see* Freeman, *supra* note 13, at 82 (clearly delineating how the studied cases of negotiated rulemaking fail to embody a collaborative governance ideal).

139. The democratic experimentalist case studies provide a rich analysis of the barriers, obstacles, and challenges to implementing experimentalist regulatory methods. *See, e.g.*, Freeman, *supra* note 13, at 66-82 (discussing the obstacles to the collaborative governance ideal presented in case studies of negotiated rulemaking); Karkkainen, *supra* note 13, at 331-45 (discussing problems with using plant emissions as a metric for environmental performance rulemaking); Sturm, *supra* note 15, at 537-53 (detailing some “countertendencies” to the emergence of the structural approach to workplace regulation that she advocates and illustrates with three case studies).

This Article does not claim that the Wisconsin reforms exemplify a fully developed democratic experimentalist regulatory regime. Like the reforms discussed in other case studies, the Wisconsin reforms show promise and potential rather than the actualization of such a regulatory regime. However, the obstacles to full-blown realization of the ideal in Wisconsin, though particular to the context of police investigatory practices, are not unique. They arise out of and point to deeper tensions in the experimentalist paradigm, discernible in other case studies as well. If the proponents of democratic experimentalism can be held to their aspiration to apply their methodology to their own model—viewing the paradigm itself as provisional and revisable in light of how well it performs in the world—careful examination of the obstacles to implementing experimentalist reform in specific contexts will assist the goals of democratic experimentalist scholarship.

A. Explaining the Ideal: The Democratic Experimentalist Paradigm

The primary goal of democratic experimentalist governance is to set into motion and then sustain a style of governance that promotes continuous learning and improvement in a middle ground between top-down command-and-control methods of traditional regulation and the undisciplined free-for-all of deregulation.¹⁴⁰ The “core architectural principle” of democratic experimentalist governance is the grant by governing authorities to regulated agencies of the autonomy to experiment with methods of achieving broadly stated goals in ways that will best fit local circumstances.¹⁴¹ In return for this autonomy, local agencies give the governing authorities detailed information about their specific goals, the methods they are employing to meet those goals, and

However, there has been little analysis of whether the barriers, obstacles, and challenges that the world reveals might reflect back on the efficacy of the paradigm itself. For a limited exception, see Simon, *supra* note 11, at 206-11 (generalizing some of the “ambiguities and limitations” of implementing the paradigm). To avoid a similar blurring between theory and implementation, I use the phrase “democratic experimentalist paradigm” to refer to a theoretical construct that explains how democratic experimentalist governance is supposed to work and why it has democratic legitimacy. When discussing an example of governance that puts this theoretical construct fully into operation, I refer to it as a democratic experimentalist “regime” or “regulatory regime.”

140. Liebman & Sabel, *supra* note 133, at 1714 (describing democratic experimentalism as a “‘continuous improvement’ approach to governing institutions”); Sturm, *supra* note 15, at 567 (describing the “structured approach” to employment discrimination law that the author advocates as a “third way” between court control and deregulation).

141. Liebman & Sabel, *supra* note 17, at 184 (describing the tenets of the basic paradigm within the context of school reform).

their performance.¹⁴² The feedback of information serves two purposes in the democratic experimentalist paradigm. First, it allows the broadly stated goals to be more specifically articulated and continuously revised in light of experience.¹⁴³ Second, it allows information to be pooled and disseminated in ways that compare the performance of similarly situated agencies or entities against each other.¹⁴⁴ This comparative performance data both enhances cross-jurisdictional learning and allows for public accountability.¹⁴⁵

Several elements give structure to the vision of this “continuous improvement” model of governance, combining to create what I call the democratic experimentalist paradigm: local experimentation, provisional rules, benchmarking of best practices, and structures of accountability based on transparency. These elements work together to create a model of governance with both pragmatic and democratic benefits over the command-and-control model of regulation it is said to supplant.

1. LOCAL EXPERIMENTATION

The ideal of democratic experimentalism is based on the belief that the openness of decentralization and experimentation will ultimately lead to the advancement of knowledge.¹⁴⁶ It builds on Brandeis’s optimism that states can contribute to the evolution of the law by becoming “laboratories of experimentation” via testing reforms and learning, not only from their own experience, but from the experiences of other local jurisdictions.¹⁴⁷ Rather than seeing experimentation as “a temporary strategy before choosing the superior solution,” however, the experimentalist paradigm is built on a vision of “continuous change and improvement.”¹⁴⁸ Indeed, the ideal of setting into motion a cycle

142. *Id.*

143. *Id.*

144. Dorf & Sabel, *supra* note 11, at 345-46.

145. Sabel & Simon, *supra* note 11, at 1071-73.

146. *See id.* at 381.

147. *Id.* at 382. Brandeis wrote:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. . . . If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

148. Lobel, *supra* note 11, at 380; *see also* Dorf & Sabel, *supra* note 11, at 315 (“A central lesson of the limitations of New Deal institutions is that effective

of “permanent innovation” is said to mark democratic experimentalism as a paradigm shift and not just as a pendulum swing between the poles of governmental control and deregulation.¹⁴⁹

The decentralization of local experimentation serves the additional pragmatic goal of multidisciplinary problem solving.¹⁵⁰ The problems addressed through regulation are seen as complex and variable, involving localized interactions between multiple and interconnected systems.¹⁵¹ The remoteness of top-down regulation makes it unresponsive to the variability and complexity with which systems interact at the local level.¹⁵² Moreover, a top-down regulatory model fragments problems into doctrinal or disciplinary categories,¹⁵³ while local experimentation promotes the integration of multiple disciplines around the local sites in which they come into play in interconnected ways.¹⁵⁴ Local experimentation allows for innovation in solving local problems through face-to-face coordination among local agents who combine expertise from different areas of specialization and bring this combined expertise to bear in solving a local problem.¹⁵⁵

The local nature of experimentation has the additional democratic feature of providing maximum opportunity for community stakeholder participation in setting and revising policies that affect them directly.¹⁵⁶ The traditional top-down regulatory model tends to prefer regulators who are independent of local interests because of the concern that close relationships between the regulator and the regulated will subject regulators to capture by the very industries whose behavior they are

government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions”).

149. Lobel, *supra* note 11, at 354.

150. *Id.* at 385.

151. Dorf & Sabel, *supra* note 11, at 315 (“[E]ffective government is first and foremost local government; local government itself is a complex service product composed of discrete programs so mutually dependent that difficulties or successes in one may suggest or require changes in the others”).

152. *Id.* at 315.

153. Lobel, *supra* note 11, at 385; *see also* Dorf & Sabel, *supra* note 11, at 292-97 (analogizing regulatory fragmentation to the division of labor in systems of mass production).

154. Lobel, *supra* note 11, at 385; *see also* Dorf & Sabel, *supra* note 11, at 286 (drawing on the pragmatic idea that “through problem solving by collaborative, continuous reevaluation of means and ends, . . . advances in accommodating change in one area often have extensive implications for problem solving in others”).

155. Dorf & Sabel, *supra* note 11, at 317.

156. *Id.*

supposed to be monitoring.¹⁵⁷ By contrast, democratic experimentalism views stakeholder participation as integral to effective regulation by providing necessary local knowledge, and engaging local agents in the process of creating and sustaining meaningful reform of local practice through self-reflection, collaboration, and deliberative participation in problem solving.¹⁵⁸

2. PROVISIONAL RULES

In contrast to command-and-control regulation, where detailed rules are formulated through expertise and dictated from the top down, in the experimentalist paradigm, rules are developed collaboratively with those subject to them and are understood as provisional in nature. A provisional rule regime strikes a middle ground between the rigidity of top-down command and the informality of deference to the discretion of local officials.¹⁵⁹ Provisional rulemaking allows local actors to develop their own standards, but requires them to specify the practices they intend to employ to achieve their stated goals, as well as the measures by which their performance is to be judged, in as much detail as possible. Although they are stated with specificity, there is an understanding that both practices and measures of performance will need to be revised in light of experience.¹⁶⁰

Like other features of the democratic experimentalist paradigm, provisional rulemaking is supported by both pragmatic and democratic considerations. Its pragmatic appeal is based in part on a distrust of the ability of experts to generalize the measures that are necessary to respond effectively to local conditions.¹⁶¹ The more detailed and routinized the directives from the top are, the less efficient they are in addressing the problems faced by street-level service providers.¹⁶² Provisional rules also provide the flexibility needed for change over time.¹⁶³ The process of provisional rule creation adds to the democratic

157. Lobel, *supra* note 11, at 373. Or, more subtly, the problem is captured by a limited group of stakeholders with more concentrated power, at the expense of a more dispersed constituency. Sabel & Simon, *supra* note 11, at 1065.

158. Sabel & Simon, *supra* note 11, at 1077-80.

159. *Id.* at 1070.

160. *Id.* at 1070-71.

161. Lobel, *supra* note 11, at 382 (discussing the pragmatic ideal of "subsidiarity, including the localness and partiality of human knowledge, and the difficulty of translation between localities").

162. *Id.* ("Central authorities should leave the widest scope possible for local discretion to fill in the details of broadly defined policies.").

163. Sabel & Simon, *supra* note 11, at 1069.

legitimacy of the rules by committing local agents to the project of self-regulation and reform of their own practices.¹⁶⁴ Articulating specific practices forces local agents to reflect on what they are doing and why they are doing it, providing the opportunity for genuine buy-in to occur.¹⁶⁵ At the same time, it allows others to understand and assess the behavior of local agents and to hold them accountable to their articulated goals.¹⁶⁶

3. BENCHMARKING BEST PRACTICES

Although democratic experimentalism derives much of its pragmatic force from the proposition that different localities require different approaches, its methods also rely crucially on the idea that the problems faced in different locations are comparable.¹⁶⁷ In particular, it relies on the idea that local jurisdictions, each engaged in its own experimental problem solving, can learn from other jurisdictions through the process of benchmarking. In its simplest form, local decision-makers engage in benchmarking by identifying promising reform models from other jurisdictions that are similarly situated and conforming those models or practices to local conditions.¹⁶⁸ In the absence of a fully institutionalized system for coordinating and disseminating pooled information, informal benchmarking occurs when jurisdictions analogize and replicate successful practices that are being tried elsewhere.¹⁶⁹

In its more ambitious form, benchmarking occurs when cross-jurisdictional, or even national, coordinating agencies gather information about different localized problem-solving practices and evaluate their efforts according to a common metric.¹⁷⁰ This common metric is usually directed toward outcomes such that the relative effectiveness of different practices can be accurately assessed against one another.¹⁷¹ Again, outcome or performance measures strike a middle ground—described as “disciplined comparison” or “measured

164. *Id.* at 1071.

165. *Id.* at 1076-77.

166. *Id.* at 1071 (stating that provisional rules are designed “not so much to coerce obedience as to induce internal deliberation and external transparency”).

167. Dorf & Sabel, *supra* note 11, at 315-16.

168. *Id.* at 322 (“Although benchmarking is formalized in a fully fledged system of democratic experimentalism, it can begin informally as a rough comparison of competing models and alternative performance measures.”).

169. *Id.* at 336-37.

170. *Id.* at 345-48.

171. *Id.*; Sabel & Simon, *supra* note 11, at 1072.

accountability”—between top-down dictation of specific practices and complete deference and delegation of authority to local actors.¹⁷² By focusing on achieving outcomes, localities are free to experiment with a variety of different practices that may be effective in achieving comparable outcomes, but that are sensitive to the challenges posed by differing local conditions.¹⁷³

The ultimate goal of benchmarking is to improve learning about effective practices by setting up systems of monitoring to detect practices that lag in performance as demonstrated by comparatively inferior outcomes, and by “rolling” the benchmarked standards higher as local jurisdictions learn from each other about what practices are most effective.¹⁷⁴ Regulatory standards “require regulated entities to use processes that are at least as effective in achieving the regulatory objective as the best practice identified . . . at any given time.”¹⁷⁵ Rather than setting minimum standards for acceptable performance, these rolling-rule regimes direct localities to continue to define and improve practices based on their own experience and the experiences in other jurisdictions.¹⁷⁶

4. TRANSPARENCY AND ACCOUNTABILITY

Democratic experimentalist regulation places a high premium on systems of transparency, information sharing, and information pooling. As Dorf and Sabel note, “the price communities must and should want to pay in this world for the right to experiment is to provide individuals in their own and other jurisdictions with information to judge their performance.”¹⁷⁷ Transparency plays a dual role in the experimentalist regime. In addition to facilitating the process of benchmarking and cross-jurisdictional learning,¹⁷⁸ transparency also serves the goal of accountability by making the measured success or failure of particular institutions available to both institutional monitors and community stakeholders.¹⁷⁹

However, the importance of information sharing in an experimentalist governance regime raises problems for enforcement,

172. *Id.* at 1019.

173. Simon, *supra* note 11, at 189-91.

174. See Dorf & Sabel, *supra* note 11, at 350.

175. *Id.*

176. Sabel & Simon, *supra* note 11, at 1069-70.

177. Dorf & Sabel, *supra* note 11, at 288.

178. Sabel & Simon, *supra* note 11, at 1072.

179. *Id.* (“Transparency is both an accountability norm and a learning device.”)

particularly with regard to responses to entities that perform poorly in comparison with their peers. Experimentalists recognize the delicate balance between sanction and support that is needed to maintain the transparency on which experimentalism so critically depends. They have noted that “commitment to transparency implies a corresponding disposition against harsh punitive sanctioning.”¹⁸⁰ This is because the prospect of sanctions based on comparatively poor performance may create incentives to hide or obfuscate practices or their outcomes.¹⁸¹ Rather than favoring high-stakes sanctioning, experimentalism tends to “pin[] its hopes largely on the effects of transparency” to create informal pressure for participation through publicity and accountability.¹⁸²

Because of its perceived regulatory “softness,” democratic experimentalism can be seen as an informal system of governance that trades rights-enforcement for more organic systems of accountability that depend on a level of cooperation and civic engagement that may never fully materialize.¹⁸³ However, it is perhaps more fair—and probably more accurate—to compare the dream of collaborative governance in an experimentalist regime with the illusion of control in a traditional regulatory regime.¹⁸⁴ In a regime of top-down directives, rules may be ignored or avoided by street-level actors “operating in a cloudy zone of informality equally inaccessible to organizational reform, judicial oversight, and public scrutiny.”¹⁸⁵ When compared with this de facto deregulation that flourishes in the gaps between the law on the books and the law in action, accountability that depends primarily on the effects of transparency rather than sanction may be better understood as an attempt to “formalize[] the informal” by

180. Simon, *supra* note 11, at 194.

181. *Id.* at 195-96; see also Dorf & Sabel, *supra* note 11, at 348.

182. Sabel & Simon, *supra* note 11, at 1073. Dorf and Sabel have noted that if even a few jurisdictions become genuinely committed to experimental problem solving, it can have the effect of engaging recalcitrant jurisdictions through “the pressures of competition for influence and place,” which are seen as ultimately more effective than legal sanctions for noncompliance. Dorf & Sabel, *supra* note 11, at 349.

183. See generally Lobel, *supra* note 11, at 458-61 (discussing the dangers of a regime built around decentralization and informality that does not account for differences in power); Simon, *supra* note 11, at 212 (“It would be reckless to ignore [legal liberalism’s] warning that the search for collective gain risks coercing the most vulnerable or underappreciating their interests”); Sturm, *supra* note 15, at 553 (flagging the dangers of “incomplete implementation” of experimentalist governance that “threatens both to dilute the law’s normative impact and to interfere with employers’ economically motivated initiatives to address second-generation bias”).

184. See Lobel, *supra* note 11, at 388.

185. Dorf & Sabel, *supra* note 11, at 321 (commenting specifically about police officers).

bringing greater structure to what currently amounts to ungoverned spheres of public life.¹⁸⁶

B. Democratic Experimentalism as a Jurisprudence of Hope

It is true in both a top-down or an experimentalist regulatory regime that compliance depends to some degree—and in an experimentalist regime perhaps to a large degree—on the good faith commitment of governed entities to the norms that underlie the rules with which they are asked to comply. The experimentalist governance paradigm promises that by being more closely involved in a collaborative and ongoing process of creating and revising the rules that govern their behavior, local actors will be more invested in complying with them.¹⁸⁷ This investment is achieved partially as a result of the process of formulating provisional rules, a process during which local actors are forced to confront and interpret the underlying norms that the rules are intended to institutionalize.¹⁸⁸ The investment is also achieved because the norms in an experimentalist governance regime are being articulated in the context of their application, and are thus made more responsive to the experience and needs of the entities subject to regulation.¹⁸⁹

The vision at the heart of the democratic experimentalist paradigm—of systemic reform as a continuous process of improvement based on ongoing local experimentation—is based largely in a jurisprudence of hope. It hopes that local industries or agencies will take up the challenge of participating in experimental governance, rather than using delegated authority as an opportunity for self-interested gaming.¹⁹⁰ It hopes that governed entities will feed information transparently into systems designed to permit cross-jurisdictional learning and public monitoring, rather than obstructing or

186. *See id.*

187. Freeman, *supra* note 13, at 23-24.

188. *Id.* at 28-29.

189. *Id.* at 29.

190. *Id.* at 69-72 (discussing the potential—though not the guarantee—that negotiated rulemaking can transform what begins as interest bargaining into problem-solving deliberation); Simon, *supra* note 11, at 208-09 (discussing generally the challenge that the incomplete subordination of distributive bargaining poses for deliberation in the democratic experimentalist model); Sturm, *supra* note 15, at 543 (noting that “[e]mployers vary widely in their capacity and motivation” to take a problem-solving rather than a “command-and-compliance” approach to addressing issues of sexual harassment and inclusion).

manipulating the facts.¹⁹¹ It hopes that citizens will be able to access and utilize that information to hold local industries and authorities accountable to concerns from a wide range of affected community members.¹⁹² It hopes that the machinery set in motion by experimentalist reform will continue to churn upward in the process of continuous learning, instead of stagnating into the stasis of retrenched interests.¹⁹³

Each of these hopes is subject to question by clearheaded realists, and the case studies tracking experimentalist reform in various sectors demonstrate the fragility and contingency of nascent experiments as much as they demonstrate the promise that those experiments might evolve into widespread systemic reform.¹⁹⁴ Like the tentative experimentalism evident in other sectors of governance, Wisconsin's recent innocence reforms hold out the hope of providing space for law enforcement agents to internalize the truth-seeking norms that animated the Warren Court's regulation of police investigation, building a set of practices around these norms, and doing so within a framework of flexibility and accountability that can help sustain ongoing criminal justice reform as understandings of best practices evolve. Whether this hope will become a reality remains to be seen. However, the next section explores the promise and potential of the specific reforms enacted in Wisconsin to create an institutional structure that could support experimental governance.

191. See Garrett, *supra* note 18, at 86-87 (describing the data on police stops collected pursuant to laws designed to address racial profiling as a "sham" that degenerates into squabbling between law enforcement and civil rights groups over the meaning of statistics); Karkkainen, *supra* note 13, at 332 (describing the possibilities of "gaming" in plant emission reporting requirements by exploiting the limitations of the data that must be reported).

192. See Freeman, *supra* note 13, at 77-82 (discussing the structural problems that lead to underinclusion of stakeholders in negotiated rulemaking); Liebman & Sabel, *supra* note 17, at 258-59 (noting initially low rates of overall participation, low minority parent participation, and the inability to engage in substantive policy work in local stakeholder groups mandated through the Kentucky school reforms); Reynoso, *supra* note 16 (documenting the important intermediary role that community organizers can play in ensuring stakeholder involvement in the regulatory efforts that affect them).

193. Liebman & Sabel, *supra* note 17, at 272 (assessing the dangers of reasserting centralized control over reform by legislatures or courts, or reasserting technocratic control by professional insiders who may come to dominate decentralized governance in school reform); see also Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 Wis. L. Rev. 479, 503-04 (offering "cautionary notes" about the problems of reversion to old patterns in the wake of grass-roots reform efforts that are not continually renewed).

194. See examples cited *supra* notes 191-94.

C. The Experimentalist Potential of Wisconsin's Innocence Reforms

The specific reforms enacted in Wisconsin are promising from the perspective of democratic experimentalism because they create a potentially effective infrastructure for experimentalist governance of police investigatory practices to emerge. Wisconsin legislation enacted in 2005 delegates rulemaking to local law enforcement agencies regarding mistaken identification practices and promotes transparency in custodial interrogation practices. Judicial opinions in each area have supported this legislation by creating newly formulated exclusionary rules. I later argue that even with these experimental institutional structures in place, there are significant obstacles facing the full realization of an experimentalist regulatory regime under the Wisconsin reforms. However, this section explores their experimentalist potential by showing how legislative, administrative, and judicial reforms to the law governing eyewitness identification and custodial interrogation could work together to support a system of experimentalist governance.

1. EYEWITNESS IDENTIFICATION REFORMS

The Wisconsin reforms to the law governing eyewitness identification procedures create a clearly defined structure of interlocking legislative, administrative, and judicial support for local provisional rulemaking. Legislatively, the Wisconsin reforms mandate local law enforcement agencies to develop written policies for eyewitness identification in light of evolving best practices from social science. Administratively, they provide model guidelines that serve as an initial benchmark. Judicially, they institutionalize the practice of continuous improvement by amending the exclusionary rule for eyewitness identification evidence to focus courts on comparative judgments between the practice employed by a law enforcement official in an individual case and less suggestive practices that the agent could have used.

The cornerstone of the Wisconsin eyewitness identification reforms is legislation requiring each local law enforcement agency to adopt its own written policy for eyewitness identification.¹⁹⁵ Although the legislation does not dictate what the content of local agency policies should be, it requires that they “shall be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal

195. WIS. STAT. § 175.50(2) (2005-2006). The act, 2005 Wis. Act 60, created section 175.50 and was signed into law on December 16, 2005. *Id.*

cases.”¹⁹⁶ Moreover, the legislation mandates local agencies to “consider model policies and policies adopted by other jurisdictions” as well as “practices to enhance the objectivity and reliability of eyewitness identifications.”¹⁹⁷ Finally, the legislation requires biennial evaluation of such procedures, providing the opportunity for agencies to revise their policies according to evolving experience in their jurisdiction and elsewhere.¹⁹⁸ In experimentalist terms, this reform decentralizes rulemaking authority and invites localities to create provisional rules that are revisable in light of practices benchmarked through social scientific research or experience in other jurisdictions.

Assisting the experimental efforts of this legislation, the Wisconsin Department of Justice’s (“DOJ”) Bureau of Training and Standards for Criminal Justice unveiled a new Model Policy and Procedure for Eyewitness Identification for statewide dissemination in March 2005.¹⁹⁹ The DOJ based its policy on its assessment of the available social scientific research about reliable eyewitness identification procedures.²⁰⁰ Consistent with reforms endorsed by the innocence advocates, the model policy recommends “double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of confidence immediately after identifications.”²⁰¹ Each component of this model policy is separately explained and defended on the basis of its social scientific rationale.²⁰² Local agencies are not required to adopt the DOJ policy, but it has been circulated to local law enforcement agencies in

196. *Id.*

197. WIS. STAT. § 175.50(4), (5). These include, if feasible, double-blind identification procedures, sequential rather than simultaneous presentation of possible suspects, and minimized verbal and nonverbal reactions by the person administering the procedure. WIS. STAT. § 175.50(5).

198. WIS. STAT. § 175.50(3).

199. WIS. DEP’T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005), available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>; see also Wis. Innocence Project, New Policy on Eyewitness Identification, http://www.law.wisc.edu/fjr/innocence/attorney_general_eyewitness.htm (last visited Mar. 14, 2006).

200. Citing Gary Wells, the leading psychological researcher on eyewitness identification procedures, the policy noted that “eyewitness evidence is much like trace evidence left at a crime scene,” which can be contaminated “if not handled properly.” WIS. DEP’T OF JUSTICE, *supra* note 199, at 2 (citing Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 286-89 (2003)).

201. *Id.* at 1; see also Wis. Innocence Project, *supra* note 199 (describing the new policy as “spring[ing] from a partnership between the Remington Center and the Training and Standards Bureau of the Wisconsin Department of Justice”).

202. WIS. DEP’T OF JUSTICE, *supra* note 199, at 3-6.

the state and become the basis for law enforcement training.²⁰³ In experimentalist terms, the policy benchmarks a particular set of practices using social science to supply the initial measure of their efficacy. Because these practices are articulated in the context of an agency training policy rather than ensconced in a legislative mandate, they are more easily revisable in light of developing social science and the experience of local law enforcement agencies.

The decision to delegate the responsibility for adopting eyewitness identification policies to local law enforcement agencies, rather than simply mandating known “best practices” such as double-blind and sequential administration of eyewitness identification from the top down, may seem unnecessarily deferential. After all, the justifications for decentralized and localized decision-making that animate experimentalist regulation are strongest where the effectiveness of particular procedures is likely to vary with local conditions and to require interdisciplinary expertise to address the complexity of that local variation. If the psychological evidence clearly points to certain practices as optimal, one might wonder why they would vary according to local circumstances.

However, this view overlooks the points of ambiguity and disagreement contained within the package of reforms recommended by the leading social scientists that make eyewitness identification policies well-suited to an experimentalist model. First, what works well in laboratory settings may not translate well into police investigatory practices. For example, because double-blind identification procedures require additional personnel, law enforcement agencies in smaller counties may find them infeasible.²⁰⁴ Moreover, while psychological research can provide information about what enhances or reduces the risk of mistaken identification, it cannot determine what judgment calls to make when procedures that protect against mistaken identifications also risk the loss of accurate identifications.²⁰⁵

The legislation invites local law enforcement agencies to conform those questions as they engage in the process of developing and evaluating their own practices for eyewitness identification. To the extent that they take-up this invitation, law enforcement agencies can develop their own understanding of the principles of social science as they relate to the preservation of evidence in human memory. They

203. Interview with Keith Findley, *supra* note 75.

204. See, e.g., U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 9 (1999)(declining to recommend blind procedures because they may be “impractical for some jurisdictions to implement”).

205. See *supra* notes 38-44 and accompanying text.

can also move the innovative methods for handling eyewitness memory out of the carefully controlled psychology laboratory environment and into the conditions of real-world police investigation. Delegating policymaking also provides the opportunity for law enforcement agencies to deliberate with other criminal justice stakeholders about the normative questions inherent in the trade-offs between losing accurate identifications and preventing mistaken identifications.²⁰⁶ An agency that takes advantage of these opportunities would be exercising a high level of engagement in experimentalist reform, and there is nothing in the legislation that mandates agencies to engage in such serious reflective study. Yet, even prior to the legislative mandate, at least one local law enforcement agency was pursuing this level of engagement regarding its eyewitness investigation practices.²⁰⁷ The new legislation creates opportunities for other agencies to follow suit.

In July 2005, the Wisconsin Supreme Court decided *State v. Dubose*, which can be seen as providing the final piece in the institutional architecture that promotes experimental reform in eyewitness identification.²⁰⁸ *Dubose* replaced the flawed reliability test in the federal due process standard for excluding out-of-court identification evidence with a state constitutional due process test that bars from evidence any out-of-court identification arising from an “unnecessarily suggestive” procedure.²⁰⁹ As we have already seen, the federal standard, as articulated in *Neil v. Biggers* and *Manson v. Brathwaite*, allows courts to admit identification evidence even if police used a suggestive identification procedure, as long as the court determines for itself that the identification was nonetheless reliable.²¹⁰ However, the factors used to judge reliability under the

206. As Andrew Taslitz points out in a forthcoming article, there are normative questions embedded within the articulation of eyewitness identification standards arising from the need to strike a balance between protecting against wrongful convictions and losing accurate identifications. Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, CARDOZO PUB. L. POL’Y & ETHICS J. (forthcoming 2006) (on file with author).

207. See discussion of the Madison Police Department pilot project *infra* notes 262-68 and accompanying text.

208. 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

209. *Id.* ¶ 36. In so doing, the Wisconsin Supreme Court followed the lead of New York and Massachusetts in applying the state constitutional due process provision to provide different and greater protection against suggestive identification procedures. *Id.* ¶ 42; see *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981). The Wisconsin Supreme Court explicitly based its standard on the U.S. Supreme Court’s older Warren Court ruling in *Stovall v. Denno*, 388 U.S. 293 (1967). *Dubose*, 285 Wis. 2d, ¶ 33, 699 N.W.2d, ¶ 33. For further discussion of *Stovall*, see *supra* notes 106-11 and accompanying text.

210. See *supra* notes 113-16 and accompanying text.

Brathwaite/Biggers standard depend on testimony, such as the witness's level of confidence in the identification and his or her memory of the conditions under which the identification occurred, which have likely been altered by a suggestive procedure.²¹¹

By adopting the "unnecessarily suggestive" standard, the Wisconsin Supreme Court interpreted the state constitutional right to due process to eliminate the escape-hatch that the *Brathwaite/Biggers* reliability standard provides for admitting identifications gained by suggestive procedures. Instead, courts compare the identification procedure that police employed in a particular case with other less suggestive procedures that were available to police under the circumstances.²¹² This test takes away courts' authority to judge whether a particular identification is reliable and directs them to enforce the police's use of the least suggestive procedure for eyewitness identification available to them under the circumstances.²¹³

The new state constitutional due process standard announced in *Dubose* can be seen as reinforcing the experimentalist structure of the legislation. By jettisoning the federal *Brathwaite/Biggers* standard, which relied on flawed assessments of reliability, the *Dubose* standard responded to the social scientific literature that the legislation directed local agencies to consider.²¹⁴ By focusing lower courts on the choice made by law enforcement agents about what identification procedure to employ, the *Dubose* test is well-designed to promote compliance with

211. See *supra* notes 117-18 and accompanying text.

212. *Dubose*, 285 Wis. 2d, ¶ 33, 699 N.W.2d, ¶ 33. The extent to which the court's ruling extends beyond "show-up" identification procedures is unclear. *Id.* ¶¶ 33-37. The defendant in *Dubose* was apprehended by police in the vicinity of an armed robbery, and was identified by the robbery victim in a show-up procedure, in which Dubose was placed alone in the backseat of a squad car with the dome light turned on. *Id.* ¶ 9. About ten to fifteen minutes later, he was identified again by the victim, this time at the police station. *Id.* ¶ 10. The second identification was also a show-up procedure in which Dubose was placed alone in a room, and the victim viewed him through a two-way mirror. *Id.* Following this identification, the victim was shown a mug shot of Dubose, and identified him for a third time. *Id.* The test articulated by the Wisconsin Supreme Court referred specifically to show-up identification procedures, ruling that evidence of any out-of-court show-up identification procedure is inadmissible, unless it can be shown to have been necessitated by the circumstances of the case. *Id.* ¶ 33. However, in applying the rule, the court also referred to the photo identification of Dubose, suggesting a broadly comparative standard applicable to all forms of eyewitness identification. *Id.* ¶ 37 ("While our focus is on the two show-ups that occurred here, the photo identification by showing [the witness] a mug shot of Dubose, was also unnecessarily suggestive and that out-of-court identification should have been suppressed.").

213. See *id.* ¶¶ 35-36.

214. See *id.* ¶¶ 29-32.

the internal written policies of local agencies. In fact, the local agency's written policy on eyewitness identification would be the first natural place for a court to look in ruling whether a police officer's use of a particular procedure had been "unnecessarily suggestive."

If courts look to local agency policies as the source for evaluating whether the procedures used by an individual officer were the least suggestive procedures available under the circumstances, it would give agency policies the force of rules backed by sanctions. In this case, the sanction would be excluding out-of-court identification evidence. More expansively, the *Dubose* standard could be used to promote the experimental goals of cross-jurisdictional learning and continuous improvement by encouraging comparisons between eyewitness identification policies from different agencies. To the extent that a local agency had a substandard policy, and a comparable jurisdiction had a policy that better comported with social scientific evidence, the "unnecessarily suggestive" standard could potentially be deployed to hold that the substandard agency's eyewitness identification policy was itself "unnecessarily suggestive."

Taken together, the Wisconsin reforms to the law governing eyewitness identification can be seen as creating an architecture of legislative, administrative, and judicial support for an experimentalist governance regime. The legislation delegated policymaking authority to local agencies, with the requirement that they continue to examine and revise the policies they create.²¹⁵ The DOJ supplied an initial benchmark through its model policy, which tied eyewitness procedures to their measured success in social scientific studies.²¹⁶ The courts arguably supplied the final piece of the puzzle by reconfiguring the exclusionary rule to promote both the compliance of individual law enforcement agents with local agency policies and possible cross-jurisdictional comparisons between agency policies.

2. CUSTODIAL INTERROGATION

In the area of custodial interrogation, the experimentalist potential of Wisconsin's recording requirements is less clear, but still present. In its 2005 criminal justice reform legislation, Wisconsin declared a statewide policy in favor of recording all custodial interrogation procedures in felony cases.²¹⁷ This statewide policy is enforced by a

215. WIS. STAT. § 175.50(2) (2005-2006).

216. WIS. DEP'T OF JUSTICE, *supra* note 199, at 3-6.

217. Assemb. B. 648, 2004-2005 Leg., Reg. Sess. § 31 (Wis. 2005) (to be codified at WIS. STAT. § 968.073(2)) ("It is the policy of this state to make an audio or

rule requiring courts to instruct juries, in any felony case in which an unrecorded custodial statement is admitted into evidence, that the jury may consider the absence of a recording in evaluating the evidence of the case.²¹⁸ In addition, the legislation requires recording of any interrogation of a juvenile in a detention center.²¹⁹ It also mandates, with limited exceptions, that any statement made by a juvenile during an unrecorded custodial interrogation will be inadmissible.²²⁰ For both juveniles and adults, the legislation specifies that the subject of the interrogation need not be informed that the statement is being recorded,²²¹ and need not consent to having a recording made as a prerequisite to admissibility.²²²

This Wisconsin legislation codified and extended a 2005 Wisconsin Supreme Court decision, *In re Jerrell C.J.*, which required that custodial interrogations of juveniles be recorded when feasible.²²³ In *Jerrell*, a fourteen-year-old eighth-grader had been arrested as an accomplice in an armed robbery at a Milwaukee McDonald's restaurant.²²⁴ He had been left alone and handcuffed to a wall for approximately two hours in the Milwaukee police station before being

audio and visual recording of a custodial interrogation of a person suspected of committing a felony.”).

218. *Id.* § 40 (to be codified at WIS. STAT. § 972.115(2)(a)). The jury need not be so instructed if the State asserts and the court finds good cause for not providing the instruction, or if one among a limited set of conditions exists. *Id.* The conditions are: the person refused to cooperate in the interrogation if it was recorded, the statement was made spontaneously or in response to a routine booking question, the recording equipment either malfunctioned or was inadvertently not operated, exigent public safety circumstances existed that made recording infeasible, or the law enforcement officer conducting the interrogation or responsible for observing it reasonably believed that the crime was not a felony. *Id.* (to be codified at WIS. STAT. § 972.115(2)(a)(1)-(6)).

219. *Id.* § 27 (to be codified at WIS. STAT. § 938.195(2)(a)). It also requires audio or audio visual recording, if feasible, if the custodial interrogation is conducted elsewhere. *Id.* (to be codified at WIS. STAT. § 938.195(2)(b)).

220. *Id.* § 28 (to be codified at WIS. STAT. § 938.31(3)(b)-(c)). The exceptions include when the juvenile would only cooperate if no recording was made, if the statement was made spontaneously or during the routine processing of the juvenile, if the recording equipment malfunctioned or the officer inadvertently failed to use it, or if exigent public safety circumstances rendered recording infeasible. *Id.* (to be codified at WIS. STAT. § 938.31(3)(c)).

221. *Id.* § 27 (to be codified at WIS. STAT. § 938.195(3)); *id.* § 31 (to be codified at WIS. STAT. § 968.073(3)).

222. *Id.* § 28 (to be codified at WIS. STAT. § 938.31(3)(d)); *Id.* § 40 (to be codified at WIS. STAT. § 972.115(4)).

223. *In re Jerrell C.J.*, 2005 WI 105, ¶ 59, 283 Wis. 2d 145, ¶ 59, 699 N.W.2d 110, ¶ 59; see Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005) (“This bill codifies the *Jerrell* recording requirement.”).

224. *Jerrell*, 283 Wis. 2d, ¶¶ 4-6, 699 N.W.2d, ¶¶ 4-6.

interrogated for 5.5 hours. His repeated requests that his parents be present were deliberately ignored by the police.²²⁵ Under the existing due process “totality of the circumstances” test, the Wisconsin Supreme Court unanimously held that the written confession resulting from Jerrell’s interrogation was involuntary and that it should have been suppressed.²²⁶

The court’s unanimous holding that Jerrell’s confession was involuntary, and therefore a due process violation, disposed of the case.²²⁷ However, a slim majority of the court went on to adopt a per se rule requiring the electronic recording of all custodial interrogations of juveniles as a prerequisite to the admission of statements gained from an interrogation.²²⁸ In announcing this rule, the court invoked its supervisory power over lower courts by “regulat[ing] the flow of evidence in state courts.”²²⁹

Although the Wisconsin reforms to the law governing custodial interrogation procedures do not mandate that law enforcement agencies consider any particular changes in interrogation techniques, the pressure they put on local agencies to record custodial interrogations holds the promise of assisting localized and experimental reform. In experimentalist terms, recording requirements mandate nothing except

225. *Id.* ¶¶ 6-11. One of the officers testified that in his twelve years as a police officer he never allowed juveniles to contact their parents during interrogation because “it could stop the flow or jeopardize it altogether.” *Id.* ¶ 10.

226. *Id.* ¶ 36.

227. *Id.* ¶ 59.

228. *Id.* ¶¶ 44-58. The court also considered whether it should adopt a per se rule excluding any admissions resulting from custodial interrogations of a child under sixteen who had not been afforded the opportunity to consult with a parent or other appropriate adult. *Id.* ¶¶ 37-43. The court previously rejected a per se rule requiring that a juvenile’s parents be present during interrogations, and admonished instead that the lack of parental presence would be considered as “strong evidence that coercive tactics were used to elicit the incriminating statements” for suppression purposes. *Id.* ¶ 30 (citing *Therault v. State*, 66 Wis. 2d 33, 48, 223 N.W.2d 850, 857 (1974)). Despite evidence that the police conducting Jerrell’s interrogation had deliberately flouted both this earlier admonition and a statutory requirement that parents be promptly notified, the court declined to enact a per se rule that police provide an opportunity for the presence of an adult during custodial interrogations of juveniles. *Id.* ¶ 43.

229. *Id.* ¶ 49. In support of its mandatory recording rule, the court cited Minnesota and Alaska, each of which mandate recording, and the numerous benefits reported in jurisdictions that routinely record custodial interrogations. *Id.* ¶ 50. Among the benefits cited by recording jurisdictions were the reduction in disputes over suppressing motions based on due process or Fifth Amendment violations, the more accurate record created for judicial review when suppression issues arose, and the protection of both the constitutional rights of the accused and the individual interests of police officers wrongfully accused of improper tactics. *Id.* ¶¶ 51-53, 55.

transparency. However, because transparency plays a critical role in both internal learning and external monitoring in an experimentalist governance regime, transparency alone may serve experimentalist goals.²³⁰ It may spur voluntary experimental reform by facilitating internal learning about the effectiveness of psychological interrogation techniques and by exposing police interrogations to public scrutiny in ways that hold them accountable to shared norms of fair treatment.²³¹

3. THE LARGER EXPERIMENTAL POTENTIAL OF THE WISCONSIN REFORMS

In addition to their role within an institutional structure supporting experimentalist reform of law enforcement practices, the Wisconsin reforms can be seen as experimental in the larger sense because they are a state-level experiment in criminal procedural regulation. For example, in each of the Wisconsin Supreme Court cases that enacted reforms, the court stepped out of the bounds prescribed by federal constitutional standards and looked to other authority to address what it perceived as the pressing problem of wrongful conviction.²³² By stepping away from the federal standards, Wisconsin positioned itself as a laboratory for criminal procedural reform in a way long advocated by its Chief Justice, Shirley Abrahamson.²³³ To the extent that it is successful in improving the criminal investigatory apparatus in the state, Wisconsin's experimentation stands as a positive example for other jurisdictions to follow in a broader national framework in which states contemplate how they can tailor legislative and judicial rules in

230. See generally Karkkainen, *supra* note 13 (examining how the federal law requiring only that plants report their emission of certain hazardous substances creates possibilities for spurring an experimentalist response). But see Garrett, *supra* note 18, at 83-92 (describing the limitations of legislation that addresses the problem of racial profiling by requiring only that police keep statistics regarding traffic stops without specifying the nature of the data to be gathered or requiring that the data be made publicly available).

231. See GELLER, *supra* note 74, at 5-6 (describing the effect of recording on police methods); see also Sullivan, *supra* note 76, at 133-35 (listing the benefits of recording to police departments).

232. In *Dubose*, the court took note that recent studies of wrongful convictions "strongly support[] the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States." *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, ¶ 30, 699 N.W.2d 582, ¶ 30. In *Jerrell*, the court endorsed a call from the lower appellate court decision that "it is time for Wisconsin to tackle the false confession issue" and explicitly stated that its electronic recording rule was "a means to that end." *Jerrell*, 283 Wis. 2d, ¶ 57, 699 N.W.2d, ¶ 57.

233. See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

ways that more carefully respond to concerns about wrongful convictions.²³⁴

Understanding the Wisconsin judicial reforms within the context of an experimentalist governance structure also sheds a different light on their legitimacy. Both cases were decided by the same slim majority of the Wisconsin Supreme Court, with three of the seven justices dissenting.²³⁵ The dissenters in each case chastised the majority for abandoning its proper judicial role and legislating from the bench.²³⁶

234. The Wisconsin Supreme Court noted that it gained encouragement for its reform efforts from the existence of other states willing to engage in these experiments. *Dubose*, 285 Wis. 2d, ¶ 42, 699 N.W.2d, ¶ 42. Both New York and Massachusetts state courts have interpreted their state constitutions to deviate from the *Brathwaitel Biggers* reliability test for eyewitness identification procedures. *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981). Both Alaska and Minnesota have judicially mandated recording of custodial interrogations. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). Massachusetts recently adopted a jury instruction for cases with unrecorded confessions that provided the blueprint for the Wisconsin legislation. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).

235. *Dubose*, 285 Wis. 2d, ¶¶ 54, 68, 79, 699 N.W.2d, ¶¶ 54, 68, 79 (Wilcox, J., Prosser, J., and Roggensack, J., dissenting); *Jerrell*, 283 Wis. 2d, ¶¶ 132, 160, 177, 699 N.W.2d, ¶¶ 132, 160, 177 (Prosser, J., Roggensack, J., and Wilcox, J., dissenting). It should be noted that Justices Prosser, Roggensack, and Wilcox concurred with the majority in *Jerrell* that *Jerrell's* confession was involuntary. *Jerrell*, 283 Wis. 2d, ¶¶ 132, 160, 177, 699 N.W.2d, ¶¶ 132, 160, 177 (Prosser, J., Roggensack, J., and Wilcox, J., dissenting).

236. All three dissenters in *Dubose* criticized the majority for invoking the state constitution to deviate from well-established federal due process jurisprudence on eyewitness identification on the basis of contested social scientific evidence. *Dubose*, 285 Wis. 2d, ¶¶ 61-66, 699 N.W.2d, ¶¶ 61-66 (Wilcox, J., dissenting); *id.* ¶ 75 (Prosser, J., dissenting); *id.* ¶ 79 (Roggensack, J., dissenting). In doing so, one dissenter argued that the court was invading the province of the legislature by substituting its own notion of “good social policy based on data from social science ‘studies.’” *Id.* ¶ 66 (Wilcox, J., dissenting). The dissent also pointed out that the social science on which the court relied was itself disputed, and was “presented by advocacy groups,” thus making it a questionable source for constitutional doctrine. *Id.* ¶ 65 (Wilcox, J., dissenting). Finally, in abandoning the federal due process standard for eyewitness identification procedures, the court was criticized for striking out on its own, creating uncertainty in the meaning of constitutional rights, and being unjustifiably “confident in the wisdom and superiority of its analysis,” rather than following the “substantial experience” developed by the Supreme Court in interpreting constitutional requirements. *Id.* ¶¶ 76-77 (Prosser, J., dissenting).

As in *Dubose*, the three dissenters in *Jerrell* accused the majority of overstepping the bounds of judicial restraint and legislating from the bench. See *Jerrell*, 283 Wis. 2d, ¶ 155, 699 N.W.2d, ¶ 155 (Prosser, J., concurring in part and dissenting in part); *id.* ¶¶ 160-76 (Roggensack, J., concurring in part and dissenting in part). The dissenters cited the uncertainties inherent in working out the details of recording practices and the danger of making decisions on grounds that circumvent the “checks

However, the democratic experimentalist paradigm would recognize the court's reforms as legitimate under a different kind of analysis. In the view of democratic experimentalism, courts as well as legislatures play the role of background institutions in both motivating participation and ensuring compliance with local experimentalist efforts. Consistent with the locus of authority and significant autonomy delegated to localities, background institutions like legislatures, courts, and administrative agencies play less prominent, less directive, and more facilitative roles in ensuring that experimentalist processes work.²³⁷ Rather than adhering to traditional notions of separation of powers, the legitimacy of these efforts depends on their efficacy in finding the right balance between flexibility and accountability necessary to motivate and sustain local experimentation without clearly differentiated institutional roles between legislatures and courts.²³⁸

To the extent that the Wisconsin innocence reforms provide an exemplar of the potential for experimental governance, they also face two challenges of experimentalist reform: (1) the challenge of gaining genuine engagement in reform as a problem-solving endeavor among diverse stakeholders; and (2) the challenge of instituting systems that will sustain reform as a continuous process into the future. Parts III and IV examine both the achievements gained and the obstacles facing Wisconsin in meeting these challenges.

and balances" of legislative accountability. *Id.* ¶ 159 (Prosser, J., concurring in part and dissenting in part); *id.* ¶ 176 (Roggensack, J., concurring in part and dissenting in part).

237. For example, in Dorf and Sabel's more fully articulated democratic experimentalism ideal, they envision legislatures as authorizing and funding local experimentalism, and envision administrative agencies as "provid[ing] the infrastructure of coordination" needed to facilitate experimental reform. Dorf & Sabel, *supra* note 11, at 340. "[C]ourts in this system," they write, "are charged with the familiar tasks of policing government and safeguarding rights." *Id.* In more specific contexts, legislative and judicial encouragement has been able to spark arguably successful examples of experimentalist reform. For example, Congress's authorization for industries to negotiate the rules that govern them has provided opportunities for localized problem solving to address environmental and workplace safety issues. See generally Freeinan, *supra* note 13 (discussing two examples of successful problem solving under the federal Negotiated Rulemaking Act of 1996). In employment discrimination, the Court's recognition of internal systems for addressing workplace harassment as an affirmative defense to Title VII liability has spawned private efforts to address workplace harassment. See generally Sturm, *supra* note 15 (discussing the efforts of some private employers to institute anti-harassment policies).

238. See Liebman & Sabel, *supra* note 17, at 279-81 (discussing "non-court-centric judicial review" as a new model of judicial oversight of institutional reform).

III. LESSONS FROM THE WISCONSIN EXPERIENCE: GAINING INNOCENCE REFORM

The Wisconsin innocence reforms of 2005 represent a significant advance in the first challenge of experimentalist reform, that of gaining genuine engagement in addressing the problem of wrongful convictions by diverse stakeholders by enacting legislation that significantly changed the law governing police investigatory practices. This Part examines the process through which those legislative reforms came about.

A. *National Infrastructure Supporting Local Innocence Reform*

The innocence reform in Wisconsin was not a sudden or isolated event. It occurred within the context of two larger national networks, each of which tied together localized reform efforts within a national infrastructure designed to share information about how different jurisdictions were addressing the problem of wrongful convictions. The national network of innocence projects, housed primarily at law schools, combines legal representation of wrongfully convicted persons with academic study of the criminal justice system. The other national infrastructure, created by two national workshops hosted by the American Judicature Society and the Justice Management Institute, brought together multidisciplinary teams of criminal justice participants—judges, law enforcement officers, prosecutors, defense attorneys, and legislators—from scattered local jurisdictions to learn about criminal justice reform from national experts and from one another.²³⁹

1. THE INNOCENCE PROJECT NETWORK AS A PARTNERSHIP BETWEEN ACADEMICS, PRACTITIONERS, AND POLICYMAKERS

The idea promoted by innocence advocates—that DNA exonerations point to systemic flaws in the criminal justice system that

239. It should also be noted that other national organizations have taken an interest in addressing the problem of wrongful convictions. In particular, under the leadership of former Attorney General Janet Reno, the U.S. Department of Justice studied twenty-eight DNA exonerations. CONNORS ET AL., *supra* note 2. It also published a research report on eyewitness identification. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, *supra* note 38. The American Bar Association has also studied the issues, publishing recommendations relating to eyewitness identification. AM. BAR ASS'N, STATEMENT OF BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES (2004).

can be studied and addressed with specific reform measures—is the product of a partnership between academics, policymakers, and criminal justice practitioners, created largely in law schools through a national innocence project network. This network was the result of a vision promoted by Barry Scheck and Peter Neufeld, who founded the first Innocence Project at the Benjamin N. Cardozo School of Law in 1992.²⁴⁰ After gaining exonerations in a number of cases at the original Innocence Project, Scheck and Neufeld sought to expand their ability to respond to the overwhelming demand for service by calling on other law schools to develop similar innocence projects.²⁴¹

Established in 1998, the Wisconsin Innocence Project was among the first formed in response to this call.²⁴² The Wisconsin Innocence Project was created within a long-established law school clinical program devoted to serving the legal needs of prison inmates.²⁴³ Because of its location within a clinical program that had pedagogical as well as service objectives, its founders couched their representation of clients claiming to have been wrongfully convicted within a broader academic study of the criminal justice system.²⁴⁴ This dual mission to both represent clients and teach students created a natural impulse

240. The creation of an “innocence network at law schools” was among many recommendations for reform published in Scheck and Neufeld’s book entitled *Actual Innocence*, which was the first comprehensive attempt to illustrate the causes of wrongful convictions and set out a concrete agenda for criminal justice reform in light of DNA exonerations. See DWYER ET AL., *supra* note 2, at 255-60.

241. See *id.* at xiii-xiv.

242. See Dianne Molvig, *DNA Evidence: Freeing the Innocent*, WIS. LAW., Apr. 2001, at 14, 16. At the time the Wisconsin Innocence Project was established, the only other established projects were the Innocence Project at the Benjamin N. Cardozo School of Law and the Innocence Project Northwest, housed at the University of Washington. Interview with Keith Findley, *supra* note 75. However, individual professors at other schools, such as Larry Marshall at Northwestern University School of Law and Richard Rosen at the University of North Carolina School of Law, had been involved in exoneration work, representing individuals in high-profile cases. *Id.*

243. In this program, students are encouraged to study the criminal justice system from the perspective of incarcerated offenders. See Walter Dickey, *The Lawyer and the Quality of Legal Services to the Poor and Disadvantaged Client: Legal Services to the Institutionalized*, 27 DEPAUL L. REV. 407, 409 (1977). Representing incarcerated individuals on a variety of legal issues that affect their lives—child support debts, outstanding warrants, wrongly calculated jail credit, and new factors affecting their sentences—is used as a springboard for discussing the practical and human effects of criminal justice system policies. *Id.* at 411-18; see also Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Case Representation*, 8 CLINICAL L. REV. 405, 411-12 (2002).

244. Keith A. Findley, *The Pedagogy of Innocence: Reflection on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. (forthcoming 2006) (unpublished manuscript on file with author).

toward identifying systemic problems that arise in innocence cases and using theory in the service of specific and practical reform.²⁴⁵

Also in 1998, Northwestern Law School hosted the first of what have become annual national innocence conferences that bring the members of the innocence project network together.²⁴⁶ In addition to providing legal representation to individual clients claiming wrongful conviction, Scheck and Neufeld's innocence network has focused attention on how the criminal justice system can be reformed to address the causes of wrongful convictions. In 2000, Scheck and Neufeld published a book analyzing and illustrating a series of factors that contributed to wrongful convictions in the first sixty-two DNA exoneration cases handled by their program, which has become a blueprint for innocence reform.²⁴⁷ The national innocence conferences have served as a clearinghouse for information about the substance of these reforms and the progress occurring in different states.

Because of their drive to combine theory, practice, and policy reform, innocence projects have provided a welcoming audience for academics engaged in applied research in the area of criminal justice. The most widely recommended reforms in the areas of eyewitness identification and custodial interrogation have drawn concretely from the scholarly research of psychologists and sociologists on police practices. For example, many of the eyewitness identification reforms have grown directly from the work of University of Iowa psychologist

245. As part of its reform efforts, the Wisconsin Innocence Project filed amicus briefs in both Wisconsin Supreme Court cases discussed in the previous section, *Dubose and Jerrell*. Nonparty Brief of the Wis. Innocence Project of the Frank J. Remington Ctr., Univ. of Wis. Law Sch., *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (No. 03-1690-CR), 2005 WL 1534559; Nonparty Brief of the Wis. Innocence Project of the Frank J. Remington Ctr., Univ. of Wis. Law Sch. et al., *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (No. 02-3423), 2004 WL 3248504. Wisconsin Innocence Project codirector Keith Findley was a member of the jurisdictional team that Wisconsin sent to the national American Judicature Society conference in Alexandria, Virginia, in January 2003, discussed *infra* Part III.A.2. He was also a member of the Avery Task Force that proposed the eyewitness identification and custodial interrogation legislation that was enacted in 2005. *News Briefs: Task Force Looks at Ways to Reduce Wrongful Convictions*, WIS. DEFENDER, Winter 2004, at 10, 10. The work of this task force arose in response to the exoneration of Steven Avery, a client who had been represented by the Wisconsin Innocence Project for the purpose of investigating and reopening his case. See *infra* Part III.C.

246. Liebman marks the Northwestern conference as one of the seminal events in the DNA exoneration movement. See Liebman, *supra* note 4, at 537; see also Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux): A History of Clinical Education at Northwestern*, 100 Nw. U. L. REV. 231, 253 (2006).

247. DWYER ET AL., *supra* note 2.

Gary Wells.²⁴⁸ While endorsed by a broad consensus of academics, recording custodial interrogations has benefited specifically from the social psychological studies of interrogation techniques conducted by sociologists Richard Leo and Richard Ofshe.²⁴⁹

The uniquely experimental character of the Wisconsin eyewitness identification reforms is also directly traceable to the Wisconsin Innocence Project's location within the legal academy. The template for that reform—delegating authority to local law enforcement agencies to write their own policies—was suggested to Wisconsin Innocence Project codirector Keith Findley, then a member of the legislative task force working on reform, by University of Wisconsin Law School Professor Emeritus Herman Goldstein, the leading academic in the field of problem-oriented policing.²⁵⁰ Goldstein's work in problem-oriented policing is only part of the University of Wisconsin Law School's longstanding tradition in the study of criminal justice institutions, which is in turn part of a more general commitment to law-in-action research.²⁵¹ This commitment to supporting research about the way law interacts with real-world institutions, though not unique, is certainly prominent as an institutional value at Wisconsin, and allows meaningful partnerships between academics and policymakers to flourish in the state.²⁵²

248. See *supra* notes 28-32 and accompanying text.

249. See *supra* notes 46-64 and accompanying text.

250. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 573-75 (1997) (providing an overview of problem-oriented policing and Goldstein's work); see also HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990). Problem-oriented policing emphasizes many of the aspects of experimentalist governance. It focuses police on engaging in partnerships to identify public safety issues in terms of problem solving rather than law enforcement. GOLDSTEIN, *supra*, at 44-45. It has developed through the methodology of experimentation and information sharing about local problem-solving experiments. *Id.* at 50-64. The creation of written policies by police agencies is promoted within problem-oriented policing as a mechanism by which police agencies can be held accountable for the exercise of their discretion by articulating the reasons for their policies. *Id.* at 47-48. Problem-oriented partnerships between the police and community members are suggested as a model for experimentalist reform in the area of racial profiling. Garrett, *supra* note 18, at 115-40.

251. Kenneth B. Davis, *Law in Action: The Dean's View*, <http://www.law.wisc.edu/Davislawinactionessay.htm> (last visited Mar. 1, 2006).

252. See generally Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297, 315-16 (1997) (recounting the history of the Wisconsin Idea, that the "boundaries of the campus simply extend to the boundaries of the state," and its creation of an institutional value of academic research in service to public policy advancement).

2. NATIONAL WORKSHOPS AS A SPRINGBOARD FOR LOCAL REFORM

Although the innocence network provides a well-developed clearinghouse for information and resources, it is comprised primarily of programs devoted to representing wrongfully convicted persons. As such, its recommendations for reform do not necessarily have credibility with local law enforcement agents, prosecutors, and legislators who may be inclined to treat the reform proposals of attorneys for criminal defendants with suspicion. Other national organizations have played an important role in reaching these other constituencies through national conferences that bring together participants from various states in jurisdictional teams to learn from one another.

In January 2003, the American Judicature Society (“AJS”), a nonprofit agency devoted to nonpartisan measures to preserve and build trust in the integrity of the justice system, hosted a national criminal justice conference in Alexandria, Virginia. The society invited interdisciplinary teams composed of diverse criminal justice stakeholders from eleven states to “consider the lessons that can be learned from examining cases that have been determined to involve the wrongful conviction of an innocent person.”²⁵³ The articulated purpose of this first conference was to create an atmosphere of problem solving in which participants could “explore reform in a cooperative fashion, setting aside the traditional barriers imposed by the adversarial process.”²⁵⁴ Jurisdictional teams were deliberately constituted to represent a cross-section of criminal justice system stakeholders: law enforcement officers, defense attorneys, prosecutors, judges, victims’ rights advocates, forensic and crime lab investigators, and legislators.²⁵⁵

In December 2004, the Justice Management Institute (“JMI”), in collaboration with the AJS and other organizations, sponsored a follow-up workshop for jurisdictional teams from eight states to promote peer learning and “expand the beachhead already established” in states that had made significant progress in undertaking potentially controversial

253. Allan D. Sobel, *At the Very Core of Why AJS Exists*, 86 JUDICATURE 65, 65 (2002).

254. John A. Stookey, *A Cooperative Model for Preventing Wrongful Convictions*, 87 JUDICATURE 159, 160 (2004). The AJS conference was built around a “cooperative model” of problem-solving reform, based on the idea that the pursuit of truth was a common goal of diverse stakeholders in the criminal justice system. *Id.* at 159.

255. *Id.* at 159-60 (“The unique character of the conference . . . was not the geographic diversity of the teams; rather it was the diversity within the teams.”).

reforms.²⁵⁶ The conference organizers hoped to bring together jurisdictions engaged in successful reform efforts to serve as “embryonic models” for jurisdictions in which the situation was ripe for reform.²⁵⁷

The methodology of both of these national workshops was deliberately designed to engage participating jurisdictions in local problem solving. Over the course of several days, participants heard from a mix of national experts on the causes of wrongful convictions, as well as criminal justice officials from jurisdictions engaged in reform who touted the efficacy of the specific reform measures with which they were experimenting.²⁵⁸ Each jurisdictional team was required to internalize and locally apply the lessons it learned by developing an action plan of concrete steps that it would carry out in its home jurisdiction.²⁵⁹

Wisconsin sent jurisdictional teams to each of these national conferences. The AJS team that attended the first conference, in January 2003, formulated three goals in their action plan: (1) create a demonstration project in the Madison Police Department to implement the social scientific studies on effective eyewitness identification techniques, and use that model to help guide other law enforcement agencies around the state; (2) “[r]aise consciousness among criminal justice system participant[s]” about the “risks and causes of wrongful convictions;” and (3) “[s]upport efforts to create a criminal justice

256. BARRY MAHONEY, JUSTICE MGMT. INST., ENSURING A RELIABLE AND EFFECTIVE CRIMINAL JUSTICE SYSTEM: REPORT ON A WORKSHOP FOR TEAMS FROM EIGHT STATES 7 (2005).

257. *Id.* at 7. Organizers of the follow-up conference in North Carolina sought to focus their efforts narrowly on “getting states and local jurisdictions to address issues [relating to wrongful convictions that] can help lead to broader system change,” and to choose teams from jurisdictions “where there is a real prospect of significant change.”

Id. The conference organizers deliberately chose teams composed of a “range of perspectives needed to address the problems” as well as “key leaders whose buy-in will be necessary to achieve significant changes in policy and practice.” *Id.* at 8. In addition, they looked for states with “established mechanisms for collaboration in criminal justice system improvement” or a “recent history of collaborative criminal justice system problem-solving,” leadership, and staff support. *Id.*

258. *Id.* at 160-61; see also MAHONEY, *supra* note 256, app. A.

259. Stookey, *supra* note 254, at 161-62. To facilitate this process, the conferences provided a variety of sessions, including plenary and concurrent sessions that addressed specific topics in a broad way, peer-group sessions in which practitioners who held similar positions in their own criminal justice system met in cross-jurisdictional groups, and jurisdictional team sessions with structured exercises to facilitate problem identification, goal setting, identification of obstacles, and the preparation of action plans that each team would bring home with them. MAHONEY, *supra* note 256, at 6.

study commission . . . to study errors in the criminal justice system and recommend reforms.”²⁶⁰

The team’s follow-up on their action plan helped to lay the foundation for the later and more widespread law reform in the state.²⁶¹ For example, the Madison Police Department eventually developed an eyewitness identification policy with some novel elements, such as special procedures for child eyewitnesses and an innovative “folder system” to allow double-blind administration of photo arrays to be conducted by an investigating officer familiar with the details of the case.²⁶²

Gaining support for the Madison Police Department policy was neither simple nor automatic, and involved a process of convincing multiple and diverse stakeholders of the benefits of change. The effort was led by AJS team member Cheri Maples, who was then the Director of Training and Personnel for the Madison Police Department.²⁶³ Maples worked internally to gain the support of Madison Police Department detectives for changing their eyewitness identification procedures to comport more closely with social scientific evidence.²⁶⁴ Local district attorneys initially balked at the idea of city and county law enforcement officials using substantially different procedures to identify witnesses, and Maples worked collaboratively with Dane County Sheriff Gary Hamblin to encourage the county agency to develop similar and consistent eyewitness identification policies.²⁶⁵ She brought a proposal to craft social scientifically based eyewitness

260. See Keith A. Findley, *Re-Imagining Justice*, WIS. DEFENDER, Winter 2004, at 11, 13 (reporting on the Wisconsin AJS team and its three goals). It was because of the “significant progress” Wisconsin had achieved in meeting its goals from 2003 that Wisconsin was the “unanimous choice” of the organizers of the December 2004 conference to be the one team invited back to assist in catalyzing change in other jurisdictions that had not participated in the first conference. MAHONEY, *supra* note 256, at 8.

261. In addition to creating the Madison Police Department eyewitness identification policy, team member Keith Findley’s follow-up work on creating a Wisconsin Criminal Justice Study Commission helped shape the character and mission of the legislative task force that eventually proposed Wisconsin’s legislative reforms. See *infra* notes 314-19 and accompanying text. Team member Judge Frederic Fleishauer put together a half-day program in May 2003 on the causes of wrongful conviction as part of the annual state judicial education conference, which helped to raise judicial awareness of the problem. Findley, *supra* note 260, at 13.

262. Interview with Keith Findley, *supra* note 75.

263. Findley, *supra* note 260, at 13. Telephone Interview with Cheri Maples, former Director of Training and Personnel for the Madison Police Department (Mar. 8, 2006).

264. Interview with Cheri Maples, *supra* note 263.

265. *Id.*

identification protocols to the ongoing discussions of the Dane County Criminal Justice Group, a group of key city and county officials who had convened to address public safety and justice concerns.²⁶⁶ The group did not immediately embrace Maples's enthusiasm, engaging instead in its own review of the social scientific literature, and making an independent assessment of the strengths and drawbacks of commonly touted features, such as sequential and double-blind administration.²⁶⁷ Maples also worked statewide to raise awareness of the relationship between eyewitness identification and wrongful conviction by hosting a conference that brought leading researcher Gary Wells to Wisconsin to train law enforcement agents, district attorneys, and defense attorneys on the issues.²⁶⁸

In establishing the Madison Police Department eyewitness identification pilot project as one of its goals, the Wisconsin AJS team had hoped that it would spark an incremental process of reform in the state.²⁶⁹ By demonstrating that social scientifically based identification procedures were both desirable and feasible, the hope was that other local law enforcement jurisdictions would follow the lead of the Madison Police Department and consider the ways in which methods shown in the laboratory to reduce the risk of mistaken identification might be translated into station house practices.²⁷⁰ The work of the Madison Police Department on its eyewitness identification policies exemplifies the slow-growing process of overcoming initial skepticism and gradually gaining the buy-in of local law enforcement participants through a combination of internal persuasion and public dialogue.

However, the process of slow-growing incremental reform envisioned by the AJS team was suddenly accelerated by the September

266. The Dane County Criminal Justice Group was formed in May 2002 by Dane County Sheriff Gary Hamblin and Dane County Chief Circuit Court Judge Michael Nowakowski. Minutes of the Criminal Justice Planning Committee, May 24, 2002 (on file with the author). The Group was convened without an agenda to address any particular public safety or justice issue for the purpose of facilitating open-ended discussion of cross-cutting problems. Telephone Interview with Michael Smith, Professor of Law, Univ. of Wis. Law Sch. (Feb. 10, 2006).

267. Memorandum from Michael Smith, Univ. of Wis. Law Sch., and Lt. Jeff Hook, Dane County Sheriff's Dep't, to the Dane County Criminal Justice Group: Effects of Eyewitness Identification Procedures on the Accuracy of Identifications (Mar. 17, 2003) (on file with author).

268. Telephone Interview with Cheri Maples, *supra* note 263. Maples reported that the decision to include defense attorneys in this statewide training was controversial because of the fear that they would use the knowledge gained in the training to challenge the introduction into evidence of eyewitness identification testimony not gained through the best methods that social science would recommend. *Id.*

269. Findley, *supra* note 260, at 13.

270. *Id.*

11, 2003 DNA exoneration of Wisconsin native Steven Avery.²⁷¹ The Avery exoneration put a public spotlight on the problem of wrongful convictions and gained a new and powerful ally for innocence reform in State Assembly Representative Mark Gundrum.²⁷² With Gundrum's involvement, Wisconsin moved beyond a strategy of incremental reform based in pilot projects and onto a statewide legislative reform project. As we have seen, this statewide reform resulted in legislation mandating local law enforcement agencies to develop written eyewitness identification polices and pressuring them to electronically record custodial interrogations through the exclusionary rule and jury instructions.

B. The Steven Avery Exoneration as a Destabilizing Event

Public attention to innocence reform in many states begins with a local exoneration that raises public awareness of deeper flaws in the criminal justice system.²⁷³ Although Avery was not the first Wisconsin Innocence Project exoneration, his case painted a clear and compelling picture of criminal investigatory dysfunction.²⁷⁴ Avery was convicted of the 1985 assault and rape of a Manitowoc woman, Penny Beersten, who had been attacked while jogging along a Lake Michigan beach one afternoon.²⁷⁵ Although Avery presented sixteen alibi witnesses who testified that he had spent the afternoon of Beersten's attack helping his father pour concrete for a sheep barn, he was convicted based largely on the victim's mistaken identification of him in a photo array and subsequent lineup.²⁷⁶ Eighteen years later, DNA testing of hair samples pressed by law students in the Wisconsin Innocence Project

271. Wisconsin Innocence Project, Case Profiles: Steven Avery, http://www.law.wisc.edu/fjr/innocence/avery_Summary2.htm (last visited Mar. 28, 2006).

272. See Brenda Ingersoll, *Rape Victim Criticizes Officials in Avery Case*, WIS. STATE J., Feb. 18, 2004, at A1.

273. See COMM'N ON CAPITAL PUNISHMENT, *supra* note 78, at 1; THE INNOCENCE COMM'N FOR VA., *supra* note 78, at 13-24.

274. Previously, the Wisconsin Innocence Project had been involved in the 2001 exoneration of Chris Ochoa, a Texas man wrongfully convicted in a rape and murder case. Keith A. Findley & John Pray, *Innocence Project: Lessons from the Innocent*, WIS. ACAD. REV., Fall 2001, at 33, 33-34. After being exonerated, Ochoa eventually pursued an interest in law and enrolled at the University of Wisconsin Law School. Dianne Molvig, *Chris Ochoa, 1L*, WIS. LAW., May, 2004, at 12, 12-13.

275. Tom Kertscher, *UW Professor Calls for Probe of 1985 Sheriff's Investigation*, MILWAUKEE J. SENTINEL, Sept. 12, 2003, at 1A.

276. Tom Kertscher & Jesse Garza, *DNA Clears Prisoner 17 Years Into His Term*, MILWAUKEE J. SENTINEL, Sept. 11, 2003, at 1A.

excluded Avery and matched another man in Wisconsin's felony DNA database.²⁷⁷ This other suspect, Gregory Allen, had a history of sexual offenses. By the time Avery was exonerated, Allen had gone on to commit another sexual assault of a Green Bay woman, for which he was serving sixty years in prison.²⁷⁸

The Avery case was a classic illustration of how flawed police procedures can distort the search for truth in both a police investigation and a later trial. Avery was awakened and arrested on the night of Beersten's assault when the description she gave of her attacker was thought to match Avery by at least one Manitowoc Sheriff's Department employee.²⁷⁹ He was taken to the police station for a lineup, which he thought would be "a good thing . . . [he] would be out in a minute."²⁸⁰ What he did not know was that he had been previously identified by the victim in a photo array, and that he was the only person in the lineup whose picture had also been included in the photo array.²⁸¹ Both the photo array and the lineup contained additional suggestive features.²⁸²

Once Avery was arrested and identified, the search for other suspects came to a grinding halt. For two weeks prior to the assault, Manitowoc city police had Allen, the man whose DNA eventually matched hair samples from the crime scene, under surveillance for sex-related crimes.²⁸³ However, efforts by Manitowoc city police to get the county sheriff's department to consider Allen as a suspect were to no avail.²⁸⁴ With the victim's identification of Avery in hand, the

277. Associated Press, *Cops Had Eye on Man Linked by DNA to Rape: But Avery Was Nabbed Instead*, CAP. TIMES (Madison, Wis.), Oct. 20, 2003, at 1C [hereinafter *Cops Had Eye on Man*].

278. *Id.*

279. Kertscher, *supra* note 275. Six months before the attack, Avery had been charged with harassing the wife of a Manitowoc sheriff's deputy, perhaps drawing the attention of police to him. *Cops Had Eye on Man, supra* note 277.

280. Anita Weier, *Wrongly Accused Man Tells His Story*, CAP. TIMES (Madison, Wis.), Dec. 22, 2003, at 3A.

281. *Id.*

282. The victim had been told prior to the photo array that the man suspected by the sheriff's department of being her attacker might be in the collection of images shown to her. Nonparty Brief of the Wis. Innocence Project of the Frank J. Remington Ctr., Univ. of Wis. Law Sch., *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (No. 03-1690-CR). At the lineup, Avery was the "youngest, fairest and shortest person in the lineup and the only one with straight hair; other participants in the lineup were well-dressed; and one participant turned toward [Avery] during most of the lineup." *Id.*

283. *Cops Had Eye on Man, supra* note 277.

284. Because the attack occurred just outside the city limits, the Manitowoc county sheriff had jurisdiction over the investigation. *Id.* After Avery's arrest,

investigation had focused on proving Avery guilty, not on figuring out who else could have assaulted Beernsten on the beach.

Like many eyewitnesses, Beernsten became certain not only that her identification of Avery was correct, but that it was based on her independent and unaffected memory of the attack itself.²⁸⁵ Recounting the rape later, she said she had “made a special effort to look at her attacker’s face.”²⁸⁶ She testified, “It’s as if [she had] a photograph in [her] mind.”²⁸⁷ These expressions of certainty, and their attribution by the victim to her original opportunity to view her perpetrator during the attack, would shield even a concededly unduly suggestive identification procedure from exclusion under the *Brathwaite/Biggers* reliability test.²⁸⁸ In fact, the Wisconsin Court of Appeals rejected a challenge to the identification procedures in Avery’s case, ruling that “the photo array constitutes one of the fairest ones this court has seen.”²⁸⁹

Like many DNA exonerations, the Avery case rocked Wisconsin residents’ belief in the fairness of their criminal justice system.²⁹⁰ The clarity of the verdict that Avery’s exoneration delivered had what might be described in democratic experimentalist terms as a “destabilizing effect” on the state criminal justice system.²⁹¹ The Avery exoneration stigmatized the status quo, brought public scrutiny to the problem of wrongful convictions, and shifted the power dynamics between criminal justice stakeholders in a way that delegitimized law enforcement

Manitowoc city police approached the sheriff’s department to see if it was considering Allen as a suspect, but city police were rebuffed. *Id.* A few weeks after the assault, city police approached the victim directly and told her that they had another suspect in mind who matched the description she had given of her assailant. Ingersoll, *supra* note 272. However, when the victim approached the county sheriff’s department with this information, she was told not to talk to city police because they did not have jurisdiction over the investigation and it “would only confuse [her].” *Id.* She was later told that the sheriff’s department had looked at other suspects and ruled them out. *Id.*

285. See *supra* note 32 and accompanying text.

286. Kertscher & Garza, *supra* note 276.

287. *Id.*

288. See *supra* notes 113-16 and accompanying text.

289. State v. Avery, No. 86-1831-CR, 1987 WL 267394, at *5 (Wis. Ct. App. Aug. 5, 1987).

290. See Liebman, *supra* note 4, at 543 (describing the effect of DNA exonerations as “divine intervention” that undermines faith in the system to correct its own errors procedurally).

291. See Sabel & Simon, *supra* note 11, at 1062-67. Studying the remedies pursued in public law litigation over a number of years, Sabel and Simon have noted a trend away from top-down court oversight through detailed consent decrees toward a more experimentalist approach. *Id.* at 1067-73.

concerns in favor of criminal defense interests.²⁹² As analysis of the experimentalist potential of public law litigation has shown, such destabilizing effects can create conditions of uncertainty about both past practices and future positions that motivate deliberation and problem solving between parties with previously entrenched and antagonistic positions.²⁹³

However, the step from viewing a DNA exoneration as an individual wrong to viewing it as a collective problem that needs to be solved does not happen on its own.²⁹⁴ Institutional actors who bear some responsibility for a wrongful conviction may be reluctant, rather than eager, to have their actions subjected to further scrutiny.²⁹⁵ Public officials sometimes respond that the fact of an exoneration proves that “the system works” to correct its own mistakes, obviating the need to address deeper systemic issues.²⁹⁶ The next section explores how Wisconsin reformers were able to use the destabilizing event of the Avery exoneration to engage a problem-solving approach resulting in legislative reform to eyewitness identification and custodial interrogation law.

C. Building Problem Solving in the Wake of the Avery Exoneration

Wisconsin reformers were able to use the Avery exoneration as a catalyst for change by focusing the public debate on systemic problems

292. See *id.* at 1075-78 (describing the destabilizing effects of a liability determination in a lawsuit against a chronically underperforming public institution that has become immune to political and market pressures).

293. *Id.* at 1073-74.

294. As innocence reformers Barry Scheck and Peter Neufeld have persistently noted, in contrast to well-established systems for undertaking diagnostic studies of tragedies like plane or train accidents, “[t]he American criminal justice system . . . has no institutional mechanism to evaluate . . . the conviction of an innocent person.” Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 98 (2002). The American system also stands in contrast to two models from other countries: the Canadian Royal Commissions that have been used to investigate the causes of two postconviction DNA exonerations, and the British Criminal Case Review Commission established in 1997 to investigate claims of false conviction. *Id.* at 100. These models are discussed in more detail in Findley, *supra* note 1, at 342-48.

295. Ronald Earle & Carl Bryan Case, Jr., *The Prosecutorial Mandate: See that Justice is Done*, 86 JUDICATURE 69, 73 (2002).

296. Lawrence C. Marshall, *Do Exonerations Prove that “the System Works”?*, 86 JUDICATURE 83, 84 (2002) (noting that after thirteen Illinois exonerations in death penalty cases, some death penalty supporters “respond[ed] that, far from exposing a system that is broken, these exonerations prove that the current system works exceedingly well at uncovering errors prior to executing innocent defendants”); Scheck & Neufeld, *supra* note 294, at 99.

within the criminal justice system and focusing attention on forward-looking problem solving, rather than backward-looking condemnation and blame. When the opportunity for legislative change arose, the groundwork already laid for the creation of a criminal justice study commission transferred to the newly formed Avery Task Force, and the consensus-building and problem-solving methods utilized in the national AJS and JMI conferences—which rely on face-to-face meetings between credible criminal justice insiders—were imported into the deliberations of that task force.

1. A PUBLIC RHETORIC OF COLLECTIVE RESPONSIBILITY AND INCLUSION

Aware of each exoneration's potential to be a "learning moment,"²⁹⁷ the Wisconsin Innocence Project used the publicity of the Avery exoneration to help begin a public dialogue about systemic problems in the criminal justice system. The first step in the Wisconsin Innocence Project's public relations campaign was to dispel the notion that the Avery exoneration exemplified systemic triumph over individual wrongdoing. "Do not take Mr. Avery's release today as an indication that the system does work," Wisconsin Innocence Project codirector Keith Findley said to the press on the day of Avery's release. "It does not work."²⁹⁸ Findley went on to call for the formation of a commission to study wrongful convictions,²⁹⁹ a measure he had long advocated,³⁰⁰ and a request he continued to repeat in subsequent press appearances associated with the Avery exoneration.³⁰¹

The public rhetoric employed by Findley and the Wisconsin Innocence Project drew diverse constituents into the problem-solving effort by detailing the multiple harms caused by Avery's wrongful conviction, and referring to it as a tragedy in which victims,

297. Scheck & Neufeld, *supra* note 294, at 101.

298. Kertscher, *supra* note 275.

299. *Id.*

300. Findley, *supra* note 1, at 351.

301. David Callender, *DNA Test Frees Imprisoned Man*, CAP. TIMES (Madison, Wis.), Sept. 11, 2003, at 1A ("Findley said he will push for an official inquiry to review the mistakes made in Avery's case as well as the creation of a new study committee for the use of DNA evidence in criminal cases"); Robert Imrie, *Avery Attorney Pleased with Attention Case Is Getting*, WIS. STATE J., Sept. 23, 2003, at B3 ("Findley said he hopes Avery's plight will be the impetus for a criminal justice study commission to more broadly examine flaws in the justice system and reform them."); Kertscher & Garza, *supra* note 276 ("Findley, who directs the Wisconsin Innocence Project with fellow UW law professor John Pray, called for an independent probe of the investigation of the attack.").

prosecutors, and the public all had a stake. The victim, Findley pointed out to the press, “has had to come to grips with the fact that she identified the wrong man.”³⁰² Describing the victim as “sincere and well-respected,” Findley told the press, “I have no doubt that this was absolutely an honest mistake on her part.”³⁰³ Findley pointed out the tragic consequences for Steven Avery who “lost 18 years of his life that he will never be able to recover.”³⁰⁴ Findley also pointed out the law enforcement consequences of convicting the wrong person, emphasizing that the actual perpetrator had gone on to victimize others.³⁰⁵

Although it was clear in Avery’s case that most of the fault lay with police investigators, Findley’s public statements on the day Avery was released from prison minimized blame and focused on the collective responsibility to learn from mistakes. He described the problem and its solution in collective terms, saying, “*We’ve* made a mistake here. . . . Surely *we* can learn from this tragedy.”³⁰⁶ “My sense is that Wisconsin has a pretty good justice system, but we have our share of mistakes,” he opined in another interview.³⁰⁷ “I hope [the Avery case] reminds us that we need to seize the opportunity to learn what caused *the system* to misfire in such a serious way and to minimize the risk of such errors in the future.”³⁰⁸

Although the Avery exoneration was not the first time the Wisconsin Innocence Project had deployed the rhetoric of systemic problems and collective responsibility,³⁰⁹ it was followed by a concrete opportunity for action when State Assembly Representative Gundrum took up the cause. Gundrum initially proposed legislative hearings to investigate Avery’s wrongful conviction³¹⁰ and challenged the State’s \$25,000 cap on compensation for those who were wrongfully

302. Kertscher & Garza, *supra* note 276.

303. *Id.* The Wisconsin Innocence Project had also apparently educated its client about the systemic rather than personal causes of his wrongful conviction. An early article reporting on the day of Avery’s release states, “Avery expressed no anger toward the victim, who had repeatedly identified him as her attacker. ‘It ain’t her fault,’ he stated simply. . . . They put it mostly in her head.” Kertscher, *supra* note 275.

304. Anita Clark, *DNA Tests Overturn Man’s Conviction: He Served 18 Years for Crime He Didn’t Commit*, WIS. STATE J., Sept. 11, 2003, at B3.

305. Kertscher, *supra* note 275.

306. *Id.* (emphasis added).

307. Callender, *supra* note 301.

308. *Id.* (emphasis added).

309. See Findley & Pray, *supra* note 274, at 34-35 (urging collective learning about mistakes in the criminal justice system in the context of the exoneration of Texas inmate Chris Ochoa).

310. Imrie, *supra* note 301.

convicted.³¹¹ In a meeting with Gundrum, Wisconsin Innocence Project codirectors Keith Findley and John Pray pressed this new ally to move beyond an assessment of past wrongdoing and toward a more comprehensive examination of the underlying criminal justice procedures that lead to wrongful convictions.³¹² Gundrum responded by forming the Avery Task Force, not to assign blame, but to use the Avery case as a starting point from which to tackle the underlying systemic problems implicated by his wrongful conviction.³¹³

2. THE AVERY TASK FORCE AS A FORUM FOR STAKEHOLDER DELIBERATION

Although they differ somewhat in makeup and focus, the coordinated efforts at innocence reform in most states have grown out of the creation of a commission or task force comprised of diverse criminal justice stakeholders and devoted to studying systemic flaws in the criminal justice system, the most famous of which is Governor Ryan's Task Force on Capital Punishment.³¹⁴ Findley had advocated a

311. Gundrum's concerns initially focused on compensating Avery for the wrong that was done to him, challenging the State's \$25,000 cap on compensation for those who are wrongfully convicted, and suggesting that "the unit of government that pursued a prosecution leading to a wrongful incarceration be required to cover compensation costs." Editorial, *Gundrum Steps Up*, CAP. TIMES (Madison, Wis.), Sept. 23, 2003, at 8A.

312. Interview with Keith Findley, *supra* note 75; Telephone Interview with Wis. State Assembly Representative Mark Gundrum (Feb. 6, 2006).

313. *New Task Force to Look at State's Justice System*, WIS. STATE J., Dec. 11, 2003, at B4 (describing the task force as a diverse group of "judges, criminal defense attorneys, prosecutors, law enforcement officials and lawmakers" created "to study advancements in law enforcement technology and techniques on the use of things like eyewitness identifications to see if they should be implemented here").

314. In Illinois, the George C. Ryan Governor's Task Force on Capital Punishment was created by executive order following Governor Ryan's moratorium on the death penalty to "study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people." Executive Order by Governor George Ryan Creating the Commission on Capital Punishment, Exec. Order No. 4 (Ill. 2000), available at http://www.idoc.state.il.us/ccp/ccp/executive_order.html. It issued its report, *Report of the Governor's Commission on Capital Punishment*, on April 15, 2002, making eighty-five specific recommendations for reform based on a study of thirteen exonerated death row inmates in Illinois. COMM'N ON CAPITAL PUNISHMENT, *supra* note 78, at 7-9, 20-192.

The Innocence Commission of Virginia was a "nonprofit, nonpartisan organization dedicated to improving the administration of justice in Virginia" formed in 2003 by a collaboration between three projects: the Mid-Atlantic Innocence Project, housed at American University's Washington College of Law; the Administration of Justice Program at George Mason University; and the Constitution Project, based at

local criminal justice study commission with the “official sanction [and] involvement of players with a direct stake in the system” as the optimal vehicle for reform.³¹⁵ Findley suggested that each state should form such a commission and “need not await . . . a high-profile exoneration within their borders to begin the study.”³¹⁶ Consistent with this view, plans for a Criminal Justice Study Commission in Wisconsin were already under way prior to the Avery exoneration, and support for those efforts had been identified as one of the AJS team’s three goals. By the time of the Avery exoneration, Findley had gained the sponsorship of the Criminal Law Section of the Wisconsin State Bar as well as the support of each of the two law schools in the state.³¹⁷

The creation of the Avery Task Force did not substitute for the Criminal Justice Study Commission. Instead, the Avery Task Force served as an interim study commission with limited legislative goals,

Georgetown University’s Public Policy Institute. THE INNOCENCE COMM’N FOR VA., *supra* note 78, at vii. It was made up of a five-member steering committee comprised primarily of innocence project directors and was supported by a seven-member advisory board that included representatives of law enforcement, criminal defense, and prosecution interests. *Id.* at ix, xv. In 2005, the Innocence Commission of Virginia issued its report, *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia*, which included specific reform recommendations in several areas, such as eyewitness identifications, interrogation procedures, discovery practices, the problem of “tunnel vision,” the quality of defense counsel, scientific practices, and postconviction remedies. *Id.* at xviii-xxii. Because it was a nonprofit entity, the Virginia commission lacked some of the investigatory power of a legislative or gubernatorial task force. Jon B. Gould, *After Further Review: A New Wave of Innocence Commissions*, 88 JUDICATURE 126, 130 (2004) (reporting on the Innocence Commission’s work).

In North Carolina, State Supreme Court Chief Justice I. Beverly Lake, Jr. created the North Carolina Actual Innocence Commission. Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648-49 (2004).

315. See Findley, *supra* note 1, at 351. Consistent with his public rhetoric of inclusion, Findley’s vision of the ideal local criminal justice study commission was an inclusive and deliberative body of diverse stakeholders, which would include “prosecution and defense attorneys, members of the judiciary, representatives of police groups, victims rights groups, academics, and, importantly, nonlawyers and individuals outside the criminal justice system” to “bring a fresh perspective and common sense” to deliberations among experts and insiders. *Id.* at 353. And in line with his careful choice of language, Findley recommended that these commissions be called Criminal Justice Study Commissions, rather than Innocence Commissions, because “[p]rosecutors and victims rights advocates . . . are more likely to feel they have a stake in the enterprise if the language used does not carry implicit judgments hostile to their interest in punishing the guilty.” *Id.* at 353 n.101.

316. *Id.* at 351.

317. At the time his article was published in Spring 2002, efforts were already under way in Wisconsin to form a committee through the Wisconsin State Bar and the deans of the two Wisconsin law schools. *Id.* at 353; Findley, *supra* note 260, at 13.

while plans for a more expansive study commission continued.³¹⁸ However, the Avery Task Force benefited from Findley's nascent efforts because the constituents Findley had assembled temporarily turned their attention and resources to the work of the Avery Task Force. In particular, the Wisconsin State Bar funded the expenses of many of the out-of-state experts and practitioners from other jurisdictions who came to testify for the task force.³¹⁹

The Avery Task Force combined the characteristics of an innocence commission with a mission to deliberate and gain consensus from diverse stakeholders and a legislative task force with the power and resources to effectuate immediate statewide legal reform.³²⁰ Because it was created within the auspices of the legislature, the work product of the Avery Task Force was not a report to be considered by lawmakers at their leisure, but concrete legislation sponsored by Gundrum and other legislative members of the Avery Task Force that was submitted for action and decision.³²¹ The question was whether the

318. *Id.* at 14. The Wisconsin Criminal Justice Study Commission has now been formed as a partnership between the Wisconsin State Bar Association, the Wisconsin Department of Justice, and the two Wisconsin law schools. Wisconsin Criminal Justice Study Commission: Charter Statement, *available at* http://www.law.wisc.edu/webshare/02i0/commission_charter_statement.pdf. It has a more expansive mission to "examine cases nationwide with the goal of identifying problems and developing policies for application in Wisconsin," and a preliminary list of nine initial topics for study: eyewitness identification procedures, false confessions resulting from police interrogation techniques, indigent defense, forensic science, jailhouse informants, the role of race and ethnicity, police investigation techniques, the role of the prosecutor, and appellate review and postconviction remedies. Findley, *supra* note 260, at 14-15.

319. Interview with Keith Findley, *supra* note 75.

320. In addition to Keith Findley of the Wisconsin Innocence Project, the Avery Task Force consisted of four district attorneys, one victim witness coordinator, one public defender, three trial judges, three law enforcement officers, and two attorneys. *Task Force to Look at Ways to Reduce Wrongful Convictions*, WIS. DEFENDER, Winter 2004, at 10, 10. In addition to Representative Gundrum, it also included two Democratic and two Republican legislators. *Id.* Although all members of the task force were ground-level criminal justice system actors (prosecutors, trial judges, law enforcement agents, etc.) with a direct stake in the system, the task force did not contain any community members from outside the criminal justice system. *See id.* Interestingly, one judicial member of the Avery Task Force, Milwaukee Circuit Court Judge Louis Butler, went on to be appointed to the Wisconsin Supreme Court mid-way through the work of the task force. Although he resigned from the task force after his appointment, he became a voice in favor of reform on the Wisconsin Supreme Court, joining the four-three majority that ruled in favor of innocence reforms in both *Jerrell* and *Dubose*. *See In re Jerrell* C.J., 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110; *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

321. *New Task Force to Look at State's Justice System*, *supra* note 313 ("The task force will meet for the first time Dec. 22. Gundrum said he hoped it would meet

Avery Task Force could build not only the consensus of its members, but also the political will to enact the reform measures it proposed. In this effort, Gundrum's political savvy, combined with national strategies of face-to-face meetings between criminal justice insiders, proved to be a powerful combination.

3. PROBLEM-SOLVING METHODS IN THE POLITICAL PROCESS

Although its goal was broad systemic reform, the methodology in the Avery Task Force was built around humanizing both the problems that lead to wrongful convictions and the solutions proposed to address them. It relied on methods such as those used in the national AJS and JMI conferences: face-to-face encounters designed to win personal investment in problem solving, across ideological division and institutional entrenchment, one person at a time.³²² The initial collaboration between Gundrum and Findley was itself a microcosm of this approach. Gundrum is well-known for his conservative views,³²³ and is a self-described "law and order" person.³²⁴ Findley, on the other hand, came to his work in the Wisconsin Innocence Project from a career in criminal defense animated by liberal social justice values and a leftist activist upbringing.³²⁵

Gundrum knew from the beginning that the methodology of the task force was going to be "defense people bringing forward ideas and law enforcement reining them in."³²⁶ He also knew that gaining the buy-in of hard-line law enforcement was going to be the key to political success for any proposed legislative reforms.³²⁷ Gundrum thus approached the work of the Avery Task Force with an attitude of open-minded skepticism toward defense-oriented reform proposals, which set

five or six times over the next year before forwarding its recommendations to the Legislature and law enforcement officials.").

322. See *supra* notes 260-61 and accompanying text.

323. Editorial, *Gundrum Steps Up*, *supra* note 311 ("Assembly Judiciary Committee Chair Mark Gundrum does not always win praise from this column. But the conservative Republican from New Berlin has earned it with his wise response to a clear case of injustice.").

324. Interview with Mark Gundrum, Wis. State Assembly Representative (Feb. 6, 2006).

325. Erik Christianson, Prison Work Fuels Professors' Passion for Justice, <http://www.news.wisc.edu/story.php?get=5734> (describing the legal work of both Findley and Wisconsin Innocence Project codirector John Pray as rooted in the social justice values of their upbringing by activist parents) (last visited Mar. 23, 2006).

326. Interview with Mark Gundrum, *supra* note 312.

327. *Id.*

the tone for the task force's deliberations.³²⁸ As a result, it was up to the Wisconsin Innocence Project to persuade the law enforcement stakeholders, including Gundrum, that what they proposed would benefit the goals of criminal investigation and could feasibly work.³²⁹

The very first meeting of the Avery Task Force began with testimony from Avery about the human consequences of wrongful conviction,³³⁰ which naturally focused the task force on the problem of mistaken identification that had played such an important role in his conviction.³³¹ Transformed by her experience into an outspoken advocate for innocence reforms, Penny Beersten, the rape victim who had mistakenly identified Avery, gave a particularly powerful testimonial to the Avery Task Force and later testified before the Wisconsin State Legislature.³³² Her firsthand account put a human face on the social scientific findings about the malleability of eyewitness memory and confidence. She recounted how sure she had been that she had gotten a good look at her attacker, and how through successive identification procedures, she had grown to be "'100 percent' certain Avery was the assailant by the time she testified."³³³ She was also able to articulate the personal burdens of conscience she bore as a result of having identified the wrong man, building the sense of collective harm by reminding reformers that it is not only the wrongfully convicted person who is victimized when police employ a suggestive identification procedure.³³⁴

The task force continued its study of mistaken identification through meetings with experts, affected individuals, and officials from jurisdictions that had implemented reforms under consideration by the

328. *Id.*

329. *Id.*

330. Weier, *supra* note 280 ("Avery choked up with tears today as he told the task force that the hardest thing was the effect on his family relationships.").

331. Findley, *supra* note 260, at 14.

332. Phil Brinkman, "*I Wanted the Earth to Swallow Me*": Rape Victim Upset She Helped Convict Wrong Man, WIS. STATE J., Sept. 8, 2005, at B1; Ingersoll, *supra* note 272.

333. Brinkman, *supra* note 332.

334. "Not a day goes by that I don't think about Mr. Avery, his family and the suffering they endured," she told the Avery Task Force. "My heart aches equally for the Green Bay woman who was brutally attacked in 1995 by . . . my actual assailant." Ingersoll, *supra* note 272. She later testified in the legislature, "The day [my attorney] told me [that DNA had excluded Avery as her assailant] was much worse than the day I was assaulted. I just wanted the earth to swallow me." Brinkman, *supra* note 332. At the conclusion of her "sometimes tearful" testimony in favor of the legislation proposed by the Avery Task Force, the joint session of the Senate and Assembly judiciary committees gave Beersten "a rare standing ovation." *Id.*

task force.³³⁵ In its second meeting, Dr. Gary Wells spoke to the task force regarding his research into eyewitness identification procedures that has formed the basis for many of the proposed innocence reforms.³³⁶ New Jersey Assistant Attorney General Lori Linskey also spoke to the task force about what it was like to actually implement eyewitness identification procedures based on cutting-edge social scientific research.³³⁷ Closer to home, representatives from the Madison Police Department testified about the implementation of their pilot project on eyewitness identification.³³⁸

These face-to-face meetings with a variety of stakeholders and affected individuals may have helped to overcome some of the traditional distrust that exists between law enforcement, prosecution, and criminal defense advocates that is bred by their experience of seeing criminal justice procedures used for adversarial rather than mutual gain.³³⁹ Reassurance from criminal justice insiders that the innocence reforms are not just another “defense tactic” being imposed on law enforcement and prosecution may have been especially important in reframing this traditionally adversarial stance and building the foundation for a spirit of mutually advantageous problem solving to take hold.³⁴⁰

335. *Task Force to Look at Ways to Reduce Wrongful Convictions*, *supra* note 245.

336. *Id.*

337. *Id.*

338. Interview with Keith Findley, *supra* note 75.

339. Jody Freeman makes a similar point about the effect of face-to-face deliberations between environmentalists and industry representatives in negotiated rulemaking over plant emissions. Freeman, *supra* note 13, at 44, 48-49.

340. For example, in his work on the committee formulating the U.S. Department of Justice Guidelines for Eyewitness Identification, eyewitness identification researcher Dr. Gary Wells reported that he was surprised at the resistance of prosecutors to embrace social scientifically based eyewitness identification reforms. Wells et al., *Lab to Police Station*, *supra* note 28, at 591. As Wells speculated, prosecutors' distrust of social scientific findings about mistaken identification may be due in part to the fact that prosecutors typically encounter psychologists when they testify as expert witnesses for the defense, and prosecutors typically oppose their testimony on the ground that it is unnecessary to assist the jury. *Id.* at 592. Moreover, prosecutors' litigation perspective on the implications of police guidelines may lead them to view guidelines less in terms of how they would help police improve their practices, and more in terms of how they would hurt prosecutorial arguments in suppression hearings in the event that police failed to follow the guidelines. *Id.* at 591. In light of the animosity and distrust engendered by experience within the adversarial context of suppression hearings, the ability to ask questions directly of someone with a prosecutor's perspective on how eyewitness identification standards have been working in practice would predictably be more helpful than testimony by the experts themselves.

The power of face-to-face meetings with credible law enforcement insiders from other jurisdictions is perhaps best illustrated by the process through which the Avery Task Force reached an agreement on reforms regarding electronic recording of custodial interrogations. By early January 2005, the Avery Task Force had reached a consensus on a package of reforms to address the problem of mistaken identifications and the preservation and testing of biological crime-scene evidence.³⁴¹ However, the task force had failed to reach a similar consensus on reforms to custodial interrogation practices.³⁴² After deliberating for a little over a year, discussions in the Avery Task Force about measures to combat false confessions had stalled over whether legislation proposed by the task force should recommend or require law enforcement agencies to record all custodial interrogations, or whether it should address custodial interrogation at all.³⁴³ Although some members of the task force advocated for mandatory electronic recording of all custodial interrogations, other task force members disagreed about the importance and effectiveness of recording or were concerned about its cost.³⁴⁴ Gundrum had all but concluded that mandatory recording was simply not going to fly because it was an unfunded mandate on local law enforcement agencies that was so unpopular it threatened to drive law enforcement away from the table and kill the entire bill.³⁴⁵

In the face of this resistance, the task force moved on to another topic that was more central to Avery's conviction: the problem of "tunnel vision," or confirmatory bias, in police investigation.³⁴⁶ To address the problem of tunnel vision, the task force invited Thomas Sullivan, who had been the Co-chair of Illinois Governor Ryan's Task Force on the Death Penalty, to testify.³⁴⁷ However, Sullivan's

341. Despite the Avery Task Force's mandate to study broader causes of wrongful convictions, the first package of reforms that came out of the task force focused on proposing legislative changes that were "clearly connected to the Avery case," thus initially passing on reforms directed at the problem of false confessions. Anita Weier, *Task Force Backs Shifts to Deter False Convictions*, CAP. TIMES (Madison, Wis.), Jan. 7, 2005, at 3A (quoting task force member State Representative Pedro Colón).

342. *Id.*

343. *Id.*

344. *Id.*

345. Interview with Mark Gundrum, *supra* note 312.

346. Findley & Scott, *supra* note 120.

347. Sullivan had been advocating nationally for the adoption of reforms in line with the recommendations of the Ryan Task Force, including measures to combat tunnel vision. See Thomas P. Sullivan, *Preventing Wrongful Convictions*, 86 JUDICATURE 106, 108 (2002). Sullivan was not the only one to testify about tunnel

testimony quickly turned to the issue of electronic recording, another subject on which he had become an outspoken advocate.³⁴⁸ Sullivan had previously prepared a report based on an extensive survey of agents from 238 law enforcement agencies in thirty-eight states that record custodial interviews of suspects in felony investigations.³⁴⁹ Although not a scientific study, the report gives a voice to the overwhelming consensus of the surveyed agents that recording is a beneficial law enforcement tool, that it does not impede their ability to obtain confessions from suspects, and that it is neither prohibitively expensive nor logistically difficult to employ.³⁵⁰ Task force members pressed Sullivan with so many questions about electronic recording that he never got around to discussing the problem of tunnel vision.³⁵¹

After Sullivan's testimony, electronic recording was back on the table and the task force heard from law enforcement agents in other jurisdictions that utilized it. One particularly effective presentation came from John Priest, of the Denver Police Department, who brought examples of videotaped interrogations to demonstrate how taping had assisted some specific police investigations by capturing both factual information and details of a suspect's demeanor that would have been lost if the interrogation had not been recorded.³⁵² However, the task force also wanted to hear from law enforcement representatives in neighboring Minnesota, who had been living under a court-ordered mandate to record custodial interrogations since 1994.³⁵³ Minnesota Sergeant Neil Nelson answered this call, reassuring skeptical task force members that mandatory recording was "the most powerful law enforcement tool ever forced down [their] throats."³⁵⁴

A 2004 case from Massachusetts gave the Avery Task Force the solution it needed to move forward on the mandatory recording issue. In *Commonwealth v. DiGiambattista*, the Massachusetts Supreme Court examined at length the problem of false confession and the remedy of mandatory recording.³⁵⁵ While it stopped short of requiring the

vision. The Avery Task Force had also hosted a visit from former U.S. Attorney General Janet Reno. Tom Sheehan, *Reno Has Living Proof in Audience: It's About Not Convicting the Innocent*, WIS. STATE J., Apr. 23, 2004, at B1.

348. Interview with Keith Findley, *supra* note 75; Interview with Mark Gundrum, *supra* note 312.

349. Sullivan, *supra* note 76, at 4.

350. *Id.* at 14-15, 23-24.

351. Interview with Keith Findley, *supra* note 75.

352. Interview with Mark Gundrum, *supra* note 312.

353. *Id.*

354. Findley, *supra* note 45.

355. 813 N.E.2d 516, 518 (2004).

recording of custodial interrogation, it ruled that when an unrecorded custodial interrogation was introduced into evidence, a defendant had the right to request that the jury be instructed to weigh the confession evidence with “great caution and care.”³⁵⁶ The idea of instructing the jury to discount the weight of an unrecorded confession, rather than outright excluding it from evidence, provided the Avery Task Force with a compromise position that it could endorse. Moreover, after the Wisconsin Supreme Court decided *Jerrell*, which mandated recording of police interrogations of juveniles in custody,³⁵⁷ the logistical questions about recording became less of a barrier because local agencies were going to have to address them anyway.³⁵⁸

The Wisconsin legislative reforms to eyewitness identification and custodial interrogation represent a significant achievement in the direction of the first challenge of experimentalist reform: gaining genuine buy-in by a diverse group of stakeholders who come to perceive the reforms to be to their mutual advantage. The reform effort in Wisconsin relied on loosely organized national networks that coordinated information about ongoing reform in other jurisdictions and facilitated face-to-face encounters that both humanized the problem and helped criminal justice stakeholders envision workable solutions. As previously discussed, the institutional infrastructure created by the Wisconsin innocence reforms is also promising from a democratic experimentalist perspective.³⁵⁹

However, the potential for experimentalist governance is not the same thing as its realization. Like other case studies documenting the emergence of democratic experimentalist governance, the Wisconsin innocence reforms do not exemplify a fully functioning experimentalist governance regime characterized by a process of continuous localized improvement within larger structures of information-sharing and accountability. Part IV discusses the obstacles facing a full realization of that ideal.

356. *Id.* at 533-34.

357. *In re Jerrell* C.J., 2005 WI 105, ¶ 3, 283 Wis. 2d 145, ¶ 3, 699 N.W.2d 110, ¶ 3.

358. The legislation also enabled local law enforcement agencies to apply for grants “for the purchase, installation or maintenance of digital recording equipment for making audio or audio and visual recordings of custodial interrogations or for training personnel to use such equipment.” Assenb. B. 648, 2004-2005 Leg., Reg. Sess. § 1 (Wis. 2005) (codified at Wis. Stat. § 16.964(10)(2005-2006)).

359. *See supra* Part II.C.

IV. THE CHALLENGES OF SUSTAINING INNOCENCE REFORM

The Wisconsin innocence reforms of 2005 created an institutional architecture conducive to democratic experimentalist governance. The reforms decentralized and localized the development of investigatory practices, legislatively encouraging local law enforcement agencies to learn through experimentation what procedures work best to gather reliable eyewitness identification and confession evidence. The Madison Police Department's development of a pilot project on eyewitness identification procedures exemplifies the kind of local experimentation that the democratic experimentalist paradigm hopes to spark.³⁶⁰

However, the promise of the Madison Police Department's process is matched by an equally plausible tendency in a non-experimentalist direction. For example, it is just as possible under the Wisconsin reforms for a local agency to decline the invitation to engage in careful reflective study and unreflectively adopt the model policy on eyewitness identification promulgated by the Wisconsin Department of Justice. Such a response might still be said to improve the quality of criminal justice in the state by promoting the widespread promulgation of eyewitness identification procedures that are based in sound social science, even if they are unreflectively adopted by local agencies. However, such a result would differ little from a traditional regulatory regime in which experts dictate known best practices from the top down. The problem with such a non-experimentalist response is that it does not promise the legitimacy gained through genuine buy-in by local agencies embracing reform on their own initiative. Without genuine buy-in, the policies adopted by local agencies may simply sit on the shelf, rather than being incorporated into the actual investigatory practices of law enforcement agencies.

In this regard, the Wisconsin reform effort may fall victim to its own success. The slower-moving incremental reform process that was underway prior to the Avery exoneration relied on reform to percolate from the bottom up, as local officials became personally invested in reforming their procedures to prevent wrongful convictions. With the process overtaken by faster-paced statewide legislative and judicial reforms, it becomes perhaps too easy for local agencies to formally comply with the legislative mandates for written policies and electronic recording without engaging the experimentalist goals of continuous innovation and cross-jurisdictional learning.

360. See *supra* notes 262-68 and accompanying text.

Of course, fast-paced and slow-growth reform processes do not present mutually exclusive options. The legislative mandates for local law enforcement agencies to create internal written policies can be symbiotic with, and supportive of, local engagement in reform directed toward preventing wrongful convictions. The question is whether the structures of accountability that the Wisconsin reforms set up can be used to promote not only formal compliance with mandates, but also engagement on the part of local agencies with the experimentalist goal of continuous and cross-jurisdictional learning about criminal investigatory practices. Unfortunately, the only institutional mechanism that the Wisconsin reforms currently provide is the exclusionary rule in individual criminal cases. For reasons spelled out in the next section, the exclusionary rule is an inadequate mechanism to achieve experimentalist goals and may tend to undermine the forces that promote experimental reform.

A. The Challenge of Experimentalist Reform in an Adversarial System

The new requirements in Wisconsin that law enforcement agencies develop and comply with sound eyewitness identification procedures and that they record custodial interrogations are enforced with a single remedy: the suppression of evidence.³⁶¹ Hence, it is in individual criminal cases, in rulings on defense motions to suppress evidence of guilt, that law enforcement agencies will be held accountable for their engagement in the continuing process of reform. Two characteristics of contested suppression hearings, each of which is the mirror opposite of the conditions that have made DNA exonerations effective rallying points for criminal justice system reform, undermine their ability to motivate the experimentalist goals of continuous improvement and cross-jurisdictional learning. First, because actual guilt or innocence is

361. Following *State v. Dubose*, courts may now suppress evidence of an identification that was “unnecessarily suggestive.” 2005 WI 126, ¶ 33, 285 Wis. 2d 143, ¶ 33, 699 N.W.2d 582, ¶ 33. As previously discussed, the experimentalist potential of this remedy is that an identification may be considered “unnecessarily” suggestive if: (1) it fails to comply with a local law enforcement agency’s written policy; or (2) the written policy itself creates protocols that are unnecessarily suggestive when compared with the protocols in other jurisdictions. See discussion *supra* Part II.C.1. Following *State v. Jerrell* and the Avery Task Force legislation under which it was codified, courts must suppress statements gained as a result of custodial interrogations of juveniles that were not recorded. See *supra* notes 217-22. The remedy in adult felony cases is not suppression, but an instruction to the jury that it may take into account the failure of law enforcement to record the interrogation, in derogation of state policy. WIS. STAT. § 972.115 (2005-2006).

most often unclear, success in a suppression hearing is an ambiguous result. It is difficult to tell whether suppressing questionable identification evidence in a particular case will actually prevent a wrongful conviction or contribute to a wrongful exoneration. The clarity that DNA brings to questions of innocence and guilt, which has served as a rallying point for buy-in to the innocence reforms, is absent in a contested suppression hearing in an individual criminal case. Second, criminal justice participants—law enforcement officers, defense attorneys, and prosecutors—are pursuing divergent goals in suppression hearings, which are only incompletely committed to truth-seeking. Hence, the sense of mutual gain achieved among criminal justice system participants in their problem-solving reform efforts is likely to devolve in suppression hearings into obfuscation and procedural gaming.

1. LACK OF CLARITY ON INNOCENCE AND GUILT

The DNA exonerations of the past decade-and-a-half have provided the opportunity for systemic soul-searching because of the clarity with which they deliver a verdict on the workings of the criminal justice system in a particular case.³⁶² A DNA exoneration is currently the “gold standard” of proof that a miscarriage of justice has occurred, allowing the opportunity to examine what went wrong in specific cases of wrongful convictions and the implications that diagnosis might have for larger systemic reform.³⁶³ In the context of a suppression motion in a contested criminal case, however, guilt and innocence are unclear. This lack of clarity about whether the suppression of evidence in a particular case will advance or undermine the truth-seeking goals of the criminal justice system turns the incentives that have motivated innocence reform on their heads.

Taking the example of mistaken eyewitness identification, the power of face-to-face confrontation—such as testimony by victims like Penny Beersten about their experiences identifying the wrong man—helped to build consensus for innocence reform. However, the power of such personal experiences is equally likely to undermine courts’ willingness to deploy the exclusionary rule in individual criminal cases.³⁶⁴ An individual victim who wants to identify the defendant—who the victim is confident is the perpetrator of a crime—will get little comfort from being told that because police could have employed a

362. Findley, *supra* note 1, at 337; Liebman, *supra* note 4, at 543, 547-48.

363. Findley, *supra* note 1, at 335-36.

364. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237.

better identification procedure; such testimony is now the equivalent of contaminated evidence that the jury should not hear.³⁶⁵ Without the clarity of a DNA test excluding the defendant as the perpetrator, denying a victim the opportunity to voice his or her identification will seem like a miscarriage of justice.

In the context of individual cases, courts will be tempted to admit the eyewitness identification evidence and allow the jury to decide the question of its reliability, and the newly articulated Wisconsin due process standard allows courts two options for accomplishing this end. Courts can admit evidence of a concededly suggestive out-of-court identification under the new standard by finding that the use of the suggestive procedure was necessary under the circumstances.³⁶⁶ A court can also allow an in-court identification if it finds that the in-court identification was independent of the suggestive out-of-court procedure that police employed.³⁶⁷ The deployment of these options over time is likely to create a body of case law, like the various doctrines that the U.S. Supreme Court has developed to avoid the harshness of the exclusionary rule, that will undermine and erode the effectiveness of the “unnecessarily suggestive” standard as a meaningful sanction when police fail to comply with their own written policies on eyewitness identification. When police have complied with their own policies, but the policies themselves come under attack as unnecessarily suggestive, the likelihood of the court using the exclusionary rule is even more remote.

Likewise, the ability to exclude or instruct a jury that it may discount the evidentiary weight of confessions gained in unrecorded custodial interrogations promotes compliance with the practice of

365. See WIS. DEP'T OF JUSTICE, *supra* note 199, at 6, 22, 26.

366. State v. Dubose, 2005 WI 126, ¶ 33, 285 Wis. 2d 143, ¶ 33, 699 N.W.2d 582, ¶ 33.

367. Though the *Brathwaite/Biggers* reliability determination is no longer a part of the Wisconsin due process test for whether an *out-of-court* identification is admissible, the court ruled that an *in-court* identification could still proceed as long as the state could prove by clear and convincing evidence that that witness's in-court identification was based on an independent source. *Id.* ¶ 33. The use of the independent-source doctrine runs the risk of reintroducing the *Brathwaite/Biggers* reliability factors. Indeed, it was a criticism of *Brathwaite* that by incorporating considerations of “reliability” into the test for admissibility of out-of-court identifications, it conflated that test with the independent-source rule for in-court identification. *Manson v. Brathwaite*, 431 U.S. 98, 121-23 (1977) (Marshall, J., dissenting). If the social science on which the court's *Dubose* rule is based is taken seriously, it would be quite unlikely that an in-court identification could truly be independent, and it would be a rare occasion in which the state could meet its burden of showing that a witness's in-court identification was untainted by suggestive out-of-court procedures.

electronic recording, and that practice creates transparency about what occurs in the interrogation room. However, transparency does not in itself ensure that cross-jurisdictional learning about the effectiveness of particular interrogation techniques will occur. Even with a videotaped record, it may be difficult, without the clarity provided by a DNA exclusion, to assess police practices against their outcomes because it will be difficult to know whether the practices employed in any particular case have resulted in a false confession or a true one.

2. INCOMPLETE COMMITMENT TO THE GOAL OF TRUTH-SEEKING

In addition to providing clarity about outcomes, DNA exonerations have served as a rallying point for problem-solving approaches to criminal justice reform because they remind diverse stakeholders, whose interests and viewpoints are most often at odds in the highly adversarial context of the criminal justice system, of their common interest in ensuring accurate convictions.³⁶⁸ The wrongful conviction of an innocent person is not only an affront to that individual, but a concomitant failure to capture and convict the guilty party.³⁶⁹ It thus implicates a common concern between law enforcement, criminal defense, and prosecution interests.

However, this point of mutual agreement masks a deeper divergence in the perspectives of law enforcement, criminal defense, and prosecution on the basic goals and legitimacy of the criminal justice system. Although each is committed in some degree to accurate fact-finding, the commitments arise from different sources. The truth-seeking mission of the criminal justice system can be—and sometimes is—undermined by influences such as corruption, ambition, and unethical behavior.³⁷⁰ However, it is also threatened by the pursuit of the more noble goals and professional commitments of law enforcement agents, criminal defense attorneys, and prosecutors, whose professional commitments leave them only partially committed to seeking the truth in each case.

Law enforcement's primary professional commitment is to public safety, which may lead to the desire to get dangerous criminals off the

368. Stookey, *supra* note 254, at 159.

369. See Findley, *supra* note 1, at 337-38.

370. Wrongful convictions have also resulted from fraudulent behavior, such as fabrication of forensic evidence, DWYER, *supra* note 2, at 119-25, and prosecutorial misconduct, such as withholding exculpatory evidence from the defense, *id.* at 172-82. Fabricated evidence claims, such as those concerning the use of false lab results and known perjury, are increasingly common in constitutional tort cases arising from wrongful convictions. Garrett, *supra* note 11, at 93-97.

street by any means possible. In the law enforcement worldview, society tends to be divided between law-abiders and lawbreakers, with clear moral imperatives to punish lawbreakers.³⁷¹ Studies of police interrogation techniques have shown that commitments to truth-telling give way to the expedience of protecting public safety when it comes to gaining a confession from a suspect in custody.³⁷² It is simply not a moral imperative to be truthful during interrogation. The moral imperative to protect public safety also works to override respect for the exclusionary rule. Even though the exclusionary rule is sometimes at least partially based on the global correlation of investigatory practices with truth-seeking,³⁷³ it may be perceived as a “loophole” in the context of an individual case.³⁷⁴ Thus, the law enforcement commitment to truth-seeking in individual suppression hearings may be particularly precarious.

The primary commitment of criminal defense lawyers is to the individual client, whether innocent or guilty.³⁷⁵ This includes a concern for preventing the wrongful conviction of innocent clients, but it extends further to include a concern for helping guilty clients avoid punishment. While helping guilty clients avoid punishment may not seem like a strong moral imperative, criminal defense work is often based in a worldview that sees moral complexity in situations of criminal behavior, viewing lawbreaking within the broader contexts of societal ills, understandable human weakness, and tragic cycles of harm.³⁷⁶ The worldview of criminal defense thus tends to minimize the connection between lawbreaking and the need for punishment and does not equate justice with criminal conviction. The humanitarian impulse to get the client out of trouble, coupled with a normative vision that weakens the link between punishment and justice, works to sanction criminal defense attorneys’ deployment of procedural advantage in any way possible to gain a dismissal or acquittal. This tendency toward procedural formalism is endorsed by the conceptual role of the defense

371. See, e.g., Robert K. Olson, *Miscarriage of Justice: A Cop’s View*, 86 JUDICATURE 74 (2002).

372. See Ofshe & Leo, *supra* note 50, at 1108-41.

373. See *supra* Part I.B.

374. Olson, *supra* note 371, at 74.

375. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1246-48 (1993); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999) (describing the roots of indigent criminal defense in Jewish and Catholic values of compassion for the poor and oppressed).

376. See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983-1984) (describing the connections between the motivations of criminal defense work and both political activism and social work).

attorney within an accusatorial system: a defense attorney forces the prosecution to meet its burden of proof beyond a reasonable doubt even in cases where the defense attorney may be personally convinced that the client is factually guilty.

Prosecutors, like criminal defense attorneys, are professionally committed to compliance with procedure, but bear the additional professional commitment to advancing substantive justice.³⁷⁷ This dual commitment to procedural formality and substantive justice would seem to make prosecutors a natural arbiter between law enforcement and criminal defense interests. In reality, it makes them allies of neither, isolating them within a realm of virtually unreviewable prosecutorial discretion that they must ultimately exercise based on sometimes difficult personal judgment calls.³⁷⁸

The prosecutor's responsibility to exercise discretion creates two kinds of fissures within the goals of truth-seeking. First, because of the commitment to procedural justice, the exercise of a prosecutor's discretion to drop or reduce criminal charges is sometimes based—despite a personal assessment of guilt—on a professional assessment of the weakness of the admissible evidence against the defendant.³⁷⁹ This puts the prosecutor at odds with the law enforcement interest in protecting public safety by any means possible, and creates incentives for police to shield prosecutors from information that may undermine prosecutorial confidence in the admissibility or strength of the evidence against a suspect.

On the other hand, in making the choice to move forward to trial, a prosecutor is compelled by the responsibilities inherent in the exercise of discretion to invest professionally in what he or she personally

377. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004).

378. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM L. & CRIMINOLOGY 717 (1996) (discussing at length the forces leading to the broad discretion that prosecutors increasingly exercise in deciding which crimes to prosecute); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Make Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) (canvassing the various sources and general ineffectiveness of the laws governing the decisions and behavior of federal prosecutors).

379. See ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) (discussing prosecutors' duties to ensure that the adversary system works according to its internal logic, including duties to rebalance the scales when defense advocacy is inadequate and to rely only on admissible evidence).

believes to be true.³⁸⁰ The ability to drop charges at any time differentiates prosecutors from defense attorneys, who can play their professional role while remaining personally agnostic about what might have “really happened.”³⁸¹ In contrast, by moving forward with a prosecution in light of the discretionary power to dismiss charges, prosecutors signal their personal conviction that a defendant is truly guilty.³⁸² When this personal conviction is carried forward into the adversarial context of a criminal trial, in which a defense attorney is deploying any procedural advantage available to gain an acquittal, the strong temptation is for the prosecutor to fight back by any means possible to ensure a conviction.³⁸³

In this rough-and-tumble context of contested suppression motions and criminal trials, the fragile consensus gained for the importance of truth-seeking is likely to unravel into obfuscation and procedural gaming as criminal justice participants pursue their divergent agendas.³⁸⁴ More ominously, the adversarial nature of contested suppression hearings threatens to undermine the consensus between law

380. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 681-82 (1992) (arguing that prosecutors’ duty to do justice requires them to base discretionary decisions on personal assessments of guilt and innocence); Zacharias, *supra* note 379, at 50 (“[T]he heart of the codes’ mandate to do justice seems clear: the prosecutor should exercise discretion to prosecute only persons she truly considers guilty, and then only in a manner that fits the crime.”).

381. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 509-12 (2000) (describing the “liberating” relationship that not having to worry about “the truth” has on criminal defense work, and the difficult—even desperate—quality of defending a client you believe to be actually innocent).

382. As noted in reflecting on three DNA exonerations in Travis County, Texas, “Prosecutors had thought that the sun would come up in the West before an innocent person would have been convicted of a crime in their jurisdiction. They were wrong.” Earle & Case, *supra* note 295, at 73.

383. See generally Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (detailing a trend of aggressive adversarial tactics in criminal prosecution); Melilli, *supra* note 380, at 686-92 (discussing the myriad factors and pressures that lead prosecutors to develop a “conviction psychology,” including distance from criminal defendants, closeness to victims and police, and incentives toward victory in adversarial litigation).

384. The Wisconsin reforms to the legal standards governing eyewitness identification and custodial interrogation go some distance in reducing the range of obfuscation and procedural gaming that can occur. Police agents, for example, may have a harder time explaining why they failed to use a less suggestive eyewitness identification procedure when it would have been appropriate under the circumstances according to their own written policies. And, an electronic recording of an interrogation session eliminates the ability of both police and criminal defendants to obfuscate what actually occurred for purposes of winning a suppression motion. Reducing the opportunities for obfuscation and gaming, however, does not change the underlying character of the proceedings or the incentives of the participants.

enforcement, criminal defense, and prosecution that gives the innocence reforms their legitimacy, and thus threatens the incentives for continuous learning outside the courtroom as well.

B. The Challenges of Accountability by Keeping Count

If the exclusionary rule is inadequate to stimulate and support the experimentalist goals of continuous improvement and cross-jurisdictional learning, and if it may actually undermine the spirit of experimentalist reform, it is fair to ask what kind of institutional structure might provide better support. The democratic experimentalists have an answer to this question: create structures that coordinate information. In the age of computers and digital recording, a vast amount of information has become readily accessible, and powerful research tools have been developed for organizing and analyzing it. Regulation within the democratic experimentalist paradigm exploits the possibilities of the information age by proposing structures of compliance and accountability that pool and disseminate information about what localities are doing, coupled with systems of assessment that permit the relative effectiveness of different practices to be measured and compared according to their outcomes.³⁸⁵

The Wisconsin innocence reforms have created new duties for local law enforcement agencies to gather information about their practices by requiring local agencies to adopt written policies on eyewitness identification procedures and by strongly encouraging—and in the case of juveniles requiring—electronic recording of custodial interrogations.³⁸⁶ This new body of information provides rich opportunities for Wisconsin to pursue the experimentalist goals of continuous improvement, public accountability, and cross-jurisdictional learning. However, under the reforms as they currently stand, this information will remain scattered among various local jurisdictions.

385. Information is used in different ways in different experimentalist case studies. See Sturm, *supra* note 15 (describing through three case studies how firms addressed structural employment discrimination problems by instituting data collection systems); Garrett, *supra* note 18 (describing the potential for using the vast amount of data gathered about police stops to set up systems for remedying racial profiling); Karkainen, *supra* note 13 (describing the potential of public reporting laws on plant emissions to spur experimentalist regulation of environmental safety).

386. Assemb. B. 648, 2004-2005 Leg., Reg. Sess. (Wis. 2005).

A state agency, like the Wisconsin DOJ, is the most logical institution to take the role of information coordination.³⁸⁷ If the Wisconsin DOJ saw its role as coordinating and promoting cross-jurisdictional learning by local law enforcement agencies, it could set up systems to collect and disseminate information among local agencies about what each is doing and how well it is working. However, if an agency like the Wisconsin DOJ is to play the role of pooling and disseminating information about evolving local law enforcement investigatory practices and assessing their effectiveness, it will face additional challenges presented by unresolved tensions within the democratic experimentalist paradigm itself. These challenges surround two tasks: (1) finding a common metric by which outcomes can be measured; and (2) determining who will have access to information that is gathered and for what purposes.

1. THE CHALLENGE OF FINDING A COMMON METRIC

A fully developed experimental governance regime promotes the goals of continuous improvement and cross-jurisdictional learning through comparing the performance of different localities on the basis of a common metric that measures the success of their efforts based on the outcomes of those efforts.³⁸⁸ Outcome-based metrics serve the goal of continuous improvement by allowing “leaders and laggards” to be identified, spurring a “race to the top” by competing jurisdictions, and providing information by which poorly performing jurisdictions can be held accountable.³⁸⁹

However, the task of finding an outcome-based metric for measuring the success of local experimentation with police eyewitness identification and interrogation practices is elusive. As previously noted, contested criminal cases produce ambiguous results regarding actual innocence, and it is difficult to envision an effective measure against which the accuracy of verdicts in criminal cases can be tested. DNA exonerations have provided clarity on the question of actual innocence in a collection of high-profile postconviction victories. As DNA testing moves from the postconviction to the pretrial stage of criminal investigations, less public pretrial exonerations will still occur

387. See Dorf & Sabel, *supra* note 11, at 340 (describing the role of administrative agencies in a democratic experimentalist regime as “provid[ing] the infrastructure of coordination” needed to support localized reform).

388. See Dorf & Sabel, *supra* note 11, at 345-48.

389. Liebman & Sabel, *supra* note 17, at 294; Karkainen, *supra* note 13, at 328-31.

when DNA samples are sent to crime labs for testing. The data generated in these pretrial DNA exonerations are within the hands of the state and hold some potential for checking the outcomes of law enforcement investigatory practices. For example, crime lab testing could identify cases in which a suspect is cleared by pretrial DNA testing even though the suspect had been identified by an eyewitness or had made a confession as the result of a police interrogation.

However, the experimentalist potential of pretrial DNA testing as a common metric is limited. Postconviction DNA exonerations have always been more powerful in their emotional appeal than in their scientific value, in part because they occur in the limited kinds of cases likely to leave biological trace evidence behind.³⁹⁰ Moreover, although pretrial DNA exonerations might create a pool of cases in which it is clear that the wrong suspect was initially targeted for investigation, they are unlikely to generate enough data from each local law enforcement agency to allow for statistically significant comparisons of the effectiveness of different agencies' policies. Pretrial DNA exoneration evidence may promise clarity as to guilt or innocence in an area rife with ambiguity, but it provides only limited potential for cross-jurisdictional comparison, at least in a manner robust enough to serve experimentalist goals.

Although finding a common metric presents unique difficulties in criminal cases, other case studies in democratic experimentalism demonstrate that finding a common metric is never an easy task. Choosing a metric inevitably involves a trade-off between rich and detailed information that paints a nuanced picture of what is occurring in local jurisdictions and less nuanced information that can be more easily measured and compared. For example, in a case study of Kentucky school reforms, the desire to measure the outcome of educational methods by the common metric of test scores has arguably led to conformity rather than experimentation as more nuanced portfolio-based assessment techniques have given way to less nuanced, but more easily comparable, multiple-choice tests.³⁹¹ As another case study shows, even something as simple and easily measured as plant emissions can result in ambiguities and trade-offs when used as an outcome-based measure of environmental safety.³⁹²

390. For example, DNA is more likely to exonerate a suspect charged with rape or murder, than it is to exonerate a robbery suspect. *See, e.g.*, Gross et al., *supra* note 2, at 529-33 (analyzing the prevalence of exonerations in rape and murder cases).

391. Liebman & Sabel, *supra* note 17, at 261-65.

392. *See* Karkkainen, *supra* note 13, at 331-32 (describing the flaws of using plant emissions reported under the Toxics Release Industry requirements that make it a "potentially misleading and possibly counterproductive" measure of environmental

Moreover, the challenges of finding a common metric indicate a deeper tension in experimentalist governance between the drive toward uniformity and the maintenance of flexibility that is necessary for fully experimental practices to flourish. A common metric provides the definition of success or failure in experimental efforts, and provides impetus for ratcheting the benchmarked standards of success upward. However, as experimentalists point out, systemic reform is also promoted by defining problems fluidly so that local decision-makers can respond as the process of solving one problem reveals the need to solve different but related problems.³⁹³ Supporting this fluid problem-solving process requires flexibility in the institutional structures that mandate and support local reform.³⁹⁴ The focus on results in an experimentalist governance regime provides some of the needed flexibility. Rather than dictating specific practices from the top down based on assumptions about what will work best, the focus on results allows governed entities to experiment with divergent practices as long as those practices can be shown to be effective. However, the drive toward a common metric to measure results for the purpose of cross-jurisdictional comparison has a tendency to focus governed entities narrowly on the standard of success that the metric defines. These narrowing effects of common measurement threaten to stultify rather than support the fluid problem-solving process that experimentalism envisions.³⁹⁵

performance “if it is not matched and counterbalanced by a set of equally powerful metrics”).

393. As democratic experimentalists point out, “problems have a tendency to expand” from one area to another. Simon, *supra* note 11, at 184 (citing as an example how “discussion of police responses to street crime . . . may implicate a landlord’s toleration of drug dealing or the housing code agency’s failure to cite the landlord for code violations, or the park department’s failure to light a neighboring public facility at night”); see also Sabel & Simon, *supra* note 11, at 1080-82 (discussing the “web effect” created by public law litigation).

394. See Freeman, *supra* note 13, at 67-69 (discussing how the delegation of negotiated rulemaking authority limits the ability of stakeholders to respond when deliberations reveal that the “real” problem is something other than they anticipated).

395. Proponents of experimentalist governance argue that achieving a balance between nuanced and measurable information is important but difficult to strike; it is best to proceed in experimental fashion—provisionally and incrementally—to devise the most appropriate metrics. Karkainen, *supra* note 13, at 369; Liebman & Sabel, *supra* note 17, at 264-65 (noting that while the Kentucky school reform example may better support the “pessimistic interpretation” that the change in metrics is evidence of top-down control, the efforts also demonstrated that the system may still be in development and shows signs of self-correction). This is a fair response, and I do not argue that the tension between uniformity and flexibility is a definitive or show-stopping concern that proves experimentalist governance can never work. However, it does define a challenge and an obstacle to the practical implementation of experimentalist governance

2. THE TENSION BETWEEN TRANSPARENCY AND ACCOUNTABILITY

Another tension already noted in the democratic experimentalist paradigm is that between the competing needs for transparency and accountability. For continuous improvement and cross-jurisdictional learning to take place, governed entities must feed information about their practices transparently back to the central governing authority. Obfuscation and self-interested gaming of the data used to measure performance threaten the systems of internal learning and external monitoring upon which the democratic experimentalist paradigm depends. However, accountability and sanction of poorly performing entities are also needed even though they are necessarily at odds with the need for transparency. As previously noted, this tension is acknowledged in the democratic experimentalist literature, with a bias toward transparency and against sanction except in the most egregious cases of noncompliance or substandard performance.

The tension between promoting transparency and the need for accountability becomes particularly acute in deciding who will have access to the information pooled for the purpose of cross-jurisdictional learning, and for what purposes that information can be used. Networks of information-pooling—especially if available to the public—can create systems of accountability and public pressure to support and supplement institutional motivation for continuous improvement.³⁹⁶ However, knowing that the information will be available to the public for this purpose may provide incentives to “game” the data in ways that defeat genuine engagement in cross-jurisdictional learning, especially if the public is going to use the data as fodder for lawsuits against poorly performing local agencies.³⁹⁷

on a large scale. Given that most examples of experimentalism to date are tentative, local, incomplete, or voluntary, the practical obstacles revealed by experimentalist case studies are worthy of attention.

396. See Liebman & Sabel, *supra* note 17, at 276-77 (describing the emergence of citizen groups that analyze publicly available statistics on school performance to assist local advocacy); Karkainen, *supra* note 13, at 309-10 (describing the potential for citizen groups to advocate for changes in environmental standards).

397. For example, Liebman and Sabel discuss the potential for data reported in school reforms to be used in establishing proof of discrimination under either a disparate impact or disparate treatment claim. See Liebman & Sabel, *supra* note 17, at 297-98. However, as Susan Sturm points out, the fear of the use of information about internal operations in civil litigation can create incentives against gathering information needed for innovative problem solving. Sturm, *supra* note 15, at 521-22. One solution would be to make information about the performance of localities only selectively available to central coordinating authorities for internal evaluation. Sturm, *supra* note 15, at 560-61 (discussing the possibility of privileging information gathered for the purpose of self-evaluation). Andrew Taslitz recommends a two-stage process in which

In the context of criminal cases, the tension between transparency and accountability collides with another tension between the efficiency of law enforcement practices and the protection of individual rights. As previously discussed, the exclusionary rule operates in ways that tend to unravel the consensus over the value of truth-seeking in the criminal justice system, making it a poor institutional mechanism for engaging local law enforcement agencies in a process of continuous experimentalist reform. Yet the exclusionary rule provides more than just a sanction directed at underperforming local police agencies. It is also the best protection of the rights of individuals who are affected by a poorly performing local law enforcement experiment. If protecting the rights of individuals against state interference is a legitimate goal of the criminal justice system—which few would dispute—then criminal defense lawyers have a strong claim for access to any information that has been collected and analyzed bearing on the effectiveness of local agency policies.

If innocence reform is to proceed as an experimentalist venture of continuous improvement and cross-jurisdictional learning, it must do so in tandem—but to some extent at cross-purposes—with the traditional protections of criminal procedural rules.³⁹⁸ It proceeds in tandem because, as we have seen, the shared truth-seeking mission of police and the courts provides a powerful justification for excluding evidence from trial that has been tainted by flawed law enforcement practices. However, it proceeds at cross-purposes because to protect their clients from poorly performing systems, criminal defense lawyers must have access to the information necessary to judge the effectiveness of local agency policies. And knowing that the information they report can and will be available for use by criminal defense attorneys in contested suppression hearings will provide a powerful disincentive for local law enforcement agencies to provide information in ways that are truly transparent rather than strategic.³⁹⁹

police and prosecutors can engage in internal deliberation about eyewitness identification policies before opening the process to other stakeholders like defense attorneys. Taslitz, *supra* note 206. However, while selective disclosure might promote the goals of cross-jurisdictional learning by increasing the reliability of the data, it would undermine the goal of public accountability. Sturm, *supra* note 15, at 561.

398. See generally Simon, *supra* note 11 (discussing several tensions between focusing on individual rights and the pragmatism of democratic experimentalism).

399. Andrew Taslitz recounts that prosecutors in Brooklyn were considering conducting an experiment in which some police districts would use simultaneous and others sequential eyewitness identification procedures, but were concerned by the prospect of the defense suppression motions that might result. Taslitz, *supra* note 206.

C. The Efficacy of Experimentalist Innocence Reform

As stated at the outset, the purpose of exploring the Wisconsin innocence reforms through a democratic experimentalist lens was to reveal both the promise of experimental governance and the obstacles to achieving experimental reform. The promise is that experimentalism might provide a new way of pursuing criminal procedural reform—a way that builds on the common truth-seeking mission of law enforcement and courts and responds more effectively to the problems that lead to wrongful convictions. The progress toward systemic reform in Wisconsin demonstrates that this promise can bear the fruit of genuine buy-in by both local agencies and state-level policymakers. It also demonstrates, through the methodology of these reforms, the potential that deliberation among diverse stakeholders holds for reaching consensus, the importance of interaction between local experimentation and networks of national coordination, and the power of face-to-face meetings with those who have experimented with something different and can speak from their experience about how it works.

Just as the promise of Wisconsin's experimental reform reveals the power of personal connection, the obstacles that Wisconsin faces to full-blown democratic experimentalist governance reveal the problems that distance creates. Elaborate infrastructures of accountability with common metrics and clearinghouses of information provide a model for how a continuous improvement regime could operate. Yet their very grandiosity abstracts from the forces that stimulated engagement in problem solving and created genuine buy-in at the local level in Wisconsin. As the experiences in the Madison Police Department and the Avery Task Force teach, reform proposals were met initially with skepticism. This skepticism evolved into buy-in only through a gradual process of careful study and face-to-face testimonials from criminal justice insiders whose credibility was grounded in their personal experience.

If the promise and the obstacles of experimentalist reform point to a challenge for continued innocence reform in Wisconsin, it is the challenge to keep the process of incremental reform alive within the larger experimental structures that the Avery Task Force legislation has created. Democratic experimentalism brings two important insights to continued reform efforts. First, it teaches that reform should be viewed as a continuous process, and that current understandings of best practices should be viewed as provisional and revisable in light of experience. Regulation should be viewed as a project of supporting and encouraging local experimentation to continue. Second, it teaches

about the power and potential of information coordination to assist in continuous reform.

The lessons of democratic experimentalism may be best implemented in the Wisconsin innocence reforms, not by attempting to build an elaborate institutional apparatus for measuring the performance of local law enforcement agencies based on the outcomes of their practices, but by marshaling information to serve the purposes of slower-growth incremental reform already in process prior to the Avery exoneration. For example, Wisconsin could build on the welcoming environment it already provides for partnerships between academics and policymakers by allowing social science researchers access to information about police investigatory practices that the new legislation creates.⁴⁰⁰ It could also build on the engagement and investment of local law enforcement agencies that have tried something new—like the Madison Police Department—to help stimulate similar engagement and dialogue in other jurisdictions. Movement in either of these directions would help to sustain the process of building knowledge and gaining buy-in by local law enforcement agencies without succumbing to either the narrowing effects that a common metric creates or the defensive posturing of anticipated litigation.

EPILOGUE

The unfolding story of innocence reform in Wisconsin would be incomplete if it did not include recent developments that make the task of attaining genuine local buy-in both more difficult and more important to continued reform efforts. On the very day that the Avery Task Force legislation was being voted into law, the story of Steven Avery—whose wrongful rape conviction was so closely intertwined with the Wisconsin reforms—was unfolding in a disastrous new direction that has shaken the state once again.

On October 31, 2005, the day before the legislation passed the Wisconsin legislature, a photographer named Theresa Halbach disappeared.⁴⁰¹ In the course of the next week, efforts to locate Halbach led to the salvage yard where Avery worked and lived.⁴⁰²

400. One possibility that is already being explored is the use of interrogation tapes from local agencies that are implementing electronic recording for the first time to study whether and how the presence of recording equipment changes the nature of interrogation over time. Interview with Keith Findley, *supra* note 75.

401. Carrie Antfinger, *Photographer Is Feared Slain; ID Sought for Bones Found on Avery Land*, CAP. TIMES (Madison, Wis.), Nov. 11, 2005, at 1A.

402. On the day she disappeared, Halbach had three scheduled appointments to photograph cars for *Auto Trade* magazine, one of which was at the Avery salvage yard.

Halbach's blood-spattered car was found hidden by branches on the salvage yard grounds, burned clothes were found in a barrel outside Avery's trailer, and Halbach's car key was found in Avery's bedroom.⁴⁰³ Remains of what appeared to be a dismembered adult female body were found burned in a fire pit behind Avery's garage.⁴⁰⁴ DNA, which had previously been Avery's salvation, now condemned him as genetic testing linked him to blood spatters in Halbach's car and genetic material on her car key.⁴⁰⁵ On November 15, 2005, Avery was charged with homicide and mutilation of a corpse.⁴⁰⁶

Previously portrayed in the press as a family man who had been snatched from an ordinary life by a wrongful conviction, Avery was now suddenly portrayed as a dangerous and deviant felon. At the time he was exonerated, Avery had been touted in the media as a married father of five, with twin sons born only six days before his arrest.⁴⁰⁷ News stories painted the picture of his return to loving family members who had always believed in his innocence, complete with details of homemade signs on the garage door, sheet cakes, watery eyes, and bear hugs.⁴⁰⁸ After his homicide arrest, stories of prior misdeeds surfaced in the press: Avery was a convicted felon with a spotty record dating back to 1981,⁴⁰⁹ he had been convicted of cruelty to animals for pouring

Carrie Antlfinger, *Missing Woman's Family Hopeful; No News . . . Is Good News*, CAP. TIMES (Madison, Wis.), Nov. 8, 2003, at 3A; Antlfinger, *supra* note 401.

403. Carrie Antlfinger, *Avery Is Charged in Halbach Killing*, CAP. TIMES (Madison, Wis.), Nov. 16, 2005, at 3A.

404. *Id.*

405. Carrie Antlfinger, *Murder Charge for Avery; DNA Is Alleged Link in Woman's Death*, CAP. TIMES (Madison, Wis.), Nov. 12, 2003, at 1A.

406. Antlfinger, *supra* note 403. Avery has since been charged with first-degree sexual assault, kidnapping, and false imprisonment after his 16-year-old nephew, Brendan Dassey, gave a statement to investigators claiming to have witnessed and participated with Avery in Halbach's sexual assault and murder. *More Charges for Steven Avery*, WIS. STATE J., Mar. 9, 2006, at B5. In accord with the new Wisconsin legislation, Dassey's four-hour custodial interrogation was videotaped. Carrie Antlfinger, *Avery Says Nephew Was Forced to Confess*, CAP. TIMES, (Madison, Wis.) Apr. 1, 2006, at A4.

407. Robert Imrie, *Sprung! After 18 Years in Prison, Man Is Released Due to DNA Evidence*, WIS. S. J., Sept. 12, 2003, at C1.

408. *Id.*; see also Associated Press, *Freed by DNA Proof, Man Savors His New Life*, CAP. TIMES (Madison, Wis.), Sept. 12, 2003, at 3A.

409. Carrie Antlfinger, *Avery Gives DNA in Disappearance*, CAP. TIMES (Madison, Wis.), Nov. 10, 2005, at 3A (reporting burglary convictions in 1981 and 1982, cruelty to animals in 1982, and endangering safety and being a felon in possession of a weapon in 1985); see also Doug Erickson, *Mishicot Area Residents Upset by Grisly News*, WIS. S. J., Nov. 13, 2005, at A1 (detailing the timeline of Avery's convictions and reporting on neighbors' reactions).

gasoline on a cat and throwing it into a bonfire in 1982;⁴¹⁰ he had been accused of running a deputy sheriff's wife off the road at gunpoint in 1985;⁴¹¹ and his brothers had been "in and out of trouble with the law" for years on charges of sexual assault and domestic violence.⁴¹²

But for biological evidence that had survived seventeen years to be tested with new DNA technology, Avery would have remained in prison for a crime he did not commit. At the time of his exoneration, that thought had shaken Wisconsin public confidence in the fairness of its criminal justice system and galvanized a consensus around reform. After Avery was arrested for homicide, the same thought—that Avery might still be in prison—splintered public consensus. The police, whose investigation of the Manitowoc rape had narrowed in on Avery so quickly, albeit wrongly, now appeared prescient rather than hapless or vindictive. For some observers, getting Avery out of prison seemed a more tragic mistake than sending him to prison for a crime he did not commit.

The poster child for innocence reform in Wisconsin suddenly split the public's moral view of the criminal justice system in ways that mirror the split moral viewpoints of law enforcement and criminal defense advocates in the criminal justice system. Those who see the world as divided into lawbreakers and law-abiders saw Avery as someone who had always been dangerous and was better off behind bars; the niceties of finding him guilty of something before sending him to prison diminished in face of the grisly facts of a brutal murder. Those who see criminal behavior as arising from a complex interplay of personal weakness and societal failure questioned how eighteen years of wrongful imprisonment might contribute to antisocial violence. The fragile coalition between law enforcement and defenders of the accused, and the public consensus over the importance of accurate convictions on which it is based, suddenly seemed under siege. Avery, whose exoneration had been a destabilizing event in the Wisconsin public's view of the criminal justice system, now appeared poised to destabilize public consensus around the value of innocence reform.

410. Todd Richmond & Carrie Antlfinger, *Averys No Strangers to Law*, WIS. STATE J., Nov. 13, 2005, at A10.

411. Antlfinger, *supra* note 409.

412. Richmond & Antlfinger, *supra* note 410. According to this report, Steven Avery's older brother Chuck had been accused but acquitted of sexual assault in 1988, had pleaded guilty to disorderly conduct in 1998, and had been accused by his former wife of sexually assaulting her and wrapping a phone cord around her neck. *Id.* His younger brother Earl had pleaded no contest to battery and sexual assault in 1996, and in 1992 he had been convicted of battery for attacking his wife. *Id.*

In the midst of this upheaval, Wisconsin innocence reform continues. The newly formed Wisconsin Criminal Justice Study Commission has begun meeting to address additional systemic issues leading to wrongful convictions. The commission will pursue its work in a changed political environment informed by a new appreciation for the fragility of consensus around the problem of wrongful conviction. Though the Avery arrest may seem a liability, in the long run it may prove to be a benefit. It may force Wisconsin to face the challenges of sustaining reform efforts through slower and more incremental methods that do not depend on the existence of a widespread political consensus that could have been predicted to unravel over time in the context of contested individual criminal cases. As a partner in the creation of the Wisconsin Criminal Justice Study Commission, the Wisconsin DOJ should be well-positioned to take up the challenge of utilizing the information created by the legislative reforms to further stimulate a reform process through less politicized but perhaps more effective channels. What Wisconsin does to further reform its criminal justice system in light of the reality check that the Avery arrest provided may help teach us all new lessons not only about how innocence reform can be achieved through building political consensus around mutual gain, but also about how reform can be structured in a way that will sustain it meaningfully over time.

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