

What's Wrong With the Criminal Justice System and How We Can Fix It

INTRODUCTION

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Criticizing the criminal justice system is easy, with the list of grievances long and familiar. Criminal cases are often processed on an assembly line, leaving too little time and attention for each matter. The high volume puts enormous pressure on all the players to resolve cases through negotiation, leading at times to either under-punishment of serious criminality, or over-punishment of those who might be innocent or less guilty than charged, but who still plead guilty to avoid a trial. Police have enormous discretion in investigating and arresting, but the quality of the police work is uneven and hard to monitor. Many defendants need appointed counsel, but funding for public defenders is so low that only the bare minimum of an accused's needs are likely to be met. The constitutional requirements of criminal procedure are developed case-by-case by the judiciary, making it very hard to predict where the next turn in the road will be. (Raise your hand if you predicted the *Apprendi* and *Booker* line of cases.) We incarcerate a very high number of citizens, and the burdens of imprisonment do not fall equally on all groups. And so on.

Being critical is not only easy, but important. The impact of a single, serious crime on the victim, the accused, and their families is often profound, and the long-term consequences can stretch beyond our ability to measure. Anything that is this central to the quality of our lives must be constantly monitored, and when the people and institutions fall short, we darn well ought to criticize.

Helpful criticism, on the other hand, is more of a challenge, and arguments for reform that are both helpful and realistic—well, those are in much shorter supply. We probably could alleviate a lot of the problems with the criminal justice system with a massive inflow of money, for example, and we could reduce the overflowing prison population by reducing harsh sentences and shifting our approach to drug crimes. But there are few signs on the horizon that these kinds of dramatic changes are imminent. And so while there is nothing wrong and much to appreciate about bold, thoughtful, and unrealistic reform ideas,¹ in the short term we know they will do little to change the status quo.

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¹ At least I hope there is nothing wrong with it. See, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995) (offering a wildly unrealistic proposal for improving the grand jury screening function).

So this was the challenge to the authors in this issue. Some of the top legal thinkers in the academy were asked to propose a reform of the criminal system that would both attack a specific problem and could be implemented without huge cost, without spending an unrealistic amount of political capital, and without changing the composition of the entire Supreme Court.

Mission accomplished. The authors in this issue have all come up with ideas that strike at a sensitive area of the system, where thoughtful people would agree that serious problems exist. They have all offered reforms that are focused, nuanced, and realistic. If implemented, the system would have fewer wrongful convictions, fewer righteous cases that are lost, and better treatment for a group that not only needs it, but deserves it. Policy makers interested in reforming the criminal system could get their plans off to a running start by spending time reading this volume.

Donald Dripps tackles one of the many issues created by the Supreme Court in *Crawford v. Washington*,² the case that dramatically changed the role of the Confrontation Clause in criminal trials.³ *Crawford* says the Sixth Amendment prevents the use of testimonial hearsay unless the declarant is subjected to cross-examination, either at trial or before.⁴ Whatever the merits of the decision as a historical and interpretive matter, Professor Dripps points out that the result of *Crawford* is a significant loss of evidence from criminal trials. More pointedly, he argues that this loss of testimony is especially troublesome in domestic violence cases where the primary source of evidence is a victim who is now too frightened to testify, thus making her prior accusations inadmissible.

This problem can be solved, says Dripps, without harming the truth seeking function of trials and without discarding *Crawford*. The road to reform, he says, leads through the Federal Rules of Evidence. He calls on the Rules Committee (and ultimately the Supreme Court and Congress) to follow the California model for admitting as substantive evidence the unsworn prior inconsistent statements of a witness. In addition, he urges the adoption of a new subsection to Rule 804(b), which would permit the substantive use of a declarant's statement taken by the police officer in the presence of the accused, as long as the accused had the chance to explain or deny that statement. This type of statement was routinely admitted at the founding of the country, Dripps argues, *Crawford* notwithstanding. Finally (and most cleverly), he urges the amendment of rule 804(b)(6), to create a permissive presumption that a declarant who was previously threatened or harmed by the accused and who now is inexplicably unavailable for trial was pressured by the defendant not to testify, thereby forfeiting the defendant's confrontation rights.

² 541 U.S. 36 (2004).

³ Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521 (2010).

⁴ *Crawford*, 541 U.S. at 54.

Seeking reform through a revision of the federal rules has its pluses and its minuses. The Rules Enabling Act provides that the Rules of Criminal Procedure “shall not abridge, enlarge or modify any substantive right,”⁵ and experience has shown that the Rules Committee takes this mandate seriously. And since all rule changes must be approved by the Supreme Court, it is unclear how these proposals would fare when reviewed by the Court that decided *Crawford*, despite Professor Dripps’ sophisticated arguments in favor of their constitutionality. On the other hand, Rules Committees are exactly the place where nuanced, detailed arguments for reform will get the most thoughtful and educated consideration, and where the practical impact of the lost evidence will be most keenly felt. As a group, they may be quite sympathetic to a claim that we should not throw out the baby with the *Crawford* bathwater.

Professor George Thomas and Professor Sandra Thompson each launch frontal assaults on the problem of wrongful convictions.⁶ This is easily the most prominent issue in criminal law today, and may well be the most important. We don’t know how many innocent people have been convicted, but we know that this number is not trivial, and the evidence strongly suggests it is frighteningly large. What we know for certain is that the results in an individual case of wrongful conviction are catastrophic, and the result of many such convictions for society as a whole is worse. The criminal system as currently constructed simply cannot endure with a huge number of innocent people sitting behind prison walls.

Fortunately, all is not lost. Wrongful convictions have attracted sufficient scholarly research to give some insights into the causes of the errors, and both Professor Thomas and Professor Thompson focus on the problem of unreliable eyewitness identifications. Here the problems are well known to everyone outside of the Supreme Court. People are bad at making identifications. Lineup and show-up procedures are often suggestive, either by accident or design, leading some witnesses to become more certain of their identification with the passage of time. The Supreme Court’s solution—give ‘em a lawyer—is sufficiently limited in scope that often a high-risk identification is made before the right to counsel attaches. And, of course, we worry that juries give disproportionate credence to these identifications, unaware of the full frailties of human memory.

It does not have to be this way. Professor Thomas cogently argues that these difficulties endure, not because we lack workable alternatives to current eyewitness practices, but because we lack the will to implement them. Current practice permits the police to conduct the eyewitness identification without any real oversight, a process, Thomas argues, that is fraught with unnecessary risk. Among other things, he proposes that the identification procedures be carried out under judicial oversight, a move that in a single step could alleviate a huge number

⁵ 28 U.S.C. § 2072(b) (2010).

⁶ George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575 (2010); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603 (2010).

of concerns about the reliability of the process. And while Thomas is not blind to the fact that this kind of change would be politically difficult—turf protection and inertia have doomed many sensible ideas—he persuasively asks: “[i]f we were building a system from scratch, knowing what we know about the problems of eyewitness identification, wouldn’t we assign the task of monitoring those procedures to a judge?”⁷

Improving the mechanics of eyewitness identification is one of Thomas’s two “windows into innocence.” A second reform, he says—one that would also help weed out unreliable identifications—is to broaden the “shamefully narrow” discovery that is permitted to criminal defendants. Giving a defendant greater access to the prosecutor’s case, beginning with the right simply to learn the names of the government’s witnesses, would go a long way to uncovering biased and mistaken witnesses.

The issue of criminal defense discovery is both perennial and topical.⁸ Serious efforts have been made for many years to expand the scope of information afforded to the accused, based primarily on the belief that too many defendants are going to trial (or more typically, pleading guilty) without knowing the strength of the case against them. These efforts have been largely unsuccessful, because pushing back against the fear of defense ignorance is the fear of defense perjury and witness intimidation. Prosecutors have strongly argued that giving the accused access to too much information prior to trial is at best an invitation for the defense to fabricate a story to fit the facts, and at worst an invitation to tampering and coercion. Professor Thomas argues in favor of greater openness, but both sides of the debate will be enriched by his insightful analysis.

Sandra Guerra Thompson joins Professor Thomas in being deeply concerned by the problems of eyewitness identification, and is equally dismayed by the Supreme Court’s hands-off approach. She points out that social science research has taught us a great deal about how people perceive and how much we should trust these perceptions, and is plainly frustrated that many courts don’t seem to be listening.

But some courts clearly are listening, as Professor Thompson shows. She discusses how a few state appellate courts have responded to the problems of unreliable identifications, incorporating both sophisticated research and a best-practices mentality into their approach. These state courts have more tools at their disposal than simply the state constitution: judicial control over state evidentiary rules, and the supervisory power over the lower state courts are additional avenues of reform. And while the number of state courts that have taken these steps is

⁷ Thomas, *supra* note 6, at 586.

⁸ For a report on recent efforts to expand the disclosure provided to criminal defendants, see Carrie Johnson, *Justice Department Looks to Avoid Another Stevens Fiasco*, WASH. POST, Oct. 15, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/14/AR2009101403771.html>.

small, Professor Thompson argues that they can serve as a guide for other states who are similarly troubled by the current state of identification law.

Both Professor Thompson and Professor Thomas shine a bright light on state practice, and properly so. Those brought up in the Warren Court era (or who were taught by people who were) are used to instinctively thinking of federal courts, and in particular the Supreme Court, as the primary source of criminal procedure reform. This problem is compounded by law professors (present company included) who devote their class time and scholarly attention to federal cases, giving little attention to the dynamic and useful developments taking place in the states. Professors Thompson and Thomas remind us that there is much to be learned from the fifty laboratories of criminal procedure, to their credit and to our benefit.

Judge Michael Daly Hawkins of the Ninth Circuit takes a different approach to reform, focusing not on procedures but on the accused.⁹ War veterans from Vietnam, Iraq, and Afghanistan have taken on special responsibilities in our society, and as a result, face distinctive challenges. Returning vets whose lives intersect with the criminal justice system face many issues that are sadly familiar, as well as some that are particular to those who have served. Judge Hawkins provides one of the first analyses of the Veterans' Courts that have begun appearing around the country, focusing on both the benefits they can provide and the hurdles they must overcome. Any jurisdiction that is considering a veterans' court can learn a great deal from this piece, and those states that have not considered such a court owe it to themselves to give Judge Hawkins a chance to convince them that they should.

A critic might claim that veterans' courts are just another manifestation of identity politics, that veterans are a constituency that are easy to support, and that focusing on this group to the exclusion of the non-veterans, whose lives are affected by poverty, poor education, and mental illness, is a misallocation of resources. But while it is surely true that veterans who get enmeshed in the criminal process are not alone in having group-specific problems, this is hardly a reason not to give veterans' courts serious consideration. If these courts show us a way to focus on issues particular to the accused, to account for reasons for anti-social behavior rather than just their consequences, and to look for a better fit between the problem and the remedy, then it would be a step worth taking. The long-term benefits to the system as a whole could be considerable.

Even if all the proposals offered by our authors are implemented, problems will still abound. But we might well have fewer lost convictions, fewer wrongful convictions, and better treatment of at least some of the accused. So I invite all those who are interested in serious, feasible reform of the criminal process to consider what this talented group of authors has to say; I am confident that you will be intrigued, provoked, and more knowledgeable for your efforts.

⁹ Judge Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2010).