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RELIABILITY, JUSTICE AND CONFESSIONS: THE ESSENTIAL PARADOX

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> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.[1]

INTRODUCTION

"Reliability" is a fundamental and necessary component of a just system of punishment.[2] The absence of reliability divests society of its justification for allowing the government to deprive convicted individuals of their life, liberty or property.[3] In the United States, such reliability has too often been lacking. With the increased use of DNA evidence, more and more defendants have been able to conclusively demonstrate that they were wrongfully convicted.[4] These instances of wrongful conviction have often involved individuals who spent time on death row, awaiting execution, only to be exonerated.[5]

A difficult and troubling question is how our criminal justice system finds itself in this situation. Undoubtedly, there are instances of prosecutorial misconduct that explain some wrongful convictions.[6] For example,

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1. Miranda v. Arizona, 384 U.S. 436, 461 (1966).

2. *See* Portuondo v. Agard, 529 U.S. 61, 76 (2000) (Stevens, J., concurring); *see also* Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131 139 (2006) (noting that miscarriages of justice related to death penalty cases "create the most fundamental doubts about the fairness and reliability of the criminal justice system."); Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 77 (2006) ("Too much inaccuracy and unreliability can undermine the legitimacy of the criminal justice system, real and perceived.").

3. *See* JOHN M. BURKOFF & RUSSELL L. WEAVER, INSIDE CRIMINAL LAW: WHAT MATTERS AND WHY 1–15 (Aspen Publishers 2008).

4. *See* Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227 (2008) (noting that more than 150 individuals have been exonerated based on DNA evidence since 2000).

5. *See* Elizabeth A. Laughton, McKithen v. Brown: *Due Process and Post-Conviction DNA Testing*, 2008 DUKE L. & TECH. REV. 0007, ¶2, http://www.law.duke.edu/journals/dltr/articles/pdf/2008dltr0007.pdf (referring to sixteen death row inmates who have been exonerated based on DNA evidence).

6. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convic-*

prosecutors have withheld evidence,[7] fabricated evidence,[8] or engaged in other forms of unethical conduct.[9] But some wrongful convictions are attributable to systemic failures rather than to prosecutorial wrongdoing.[10]

In a prior article, I discussed systemic issues related to the problems of indigent representation, and how those problems adversely affect poor defendants.[11] While problems with indigent representation are serious and can result in wrongful convictions, they are only one aspect of the problem. In this article, I focus on another problem area in United States criminal procedure: confessions jurisprudence and its relationship to the issue of reliability.

I. CONFESSIONS AND WRONGFUL CONVICTIONS

Instances of wrongful convictions are all too common in the United States. Fueled by DNA evidence, which makes it possible for wrongfully convicted inmates to prove their innocence, most states have seen a rising tide of wrongful conviction claims.[12] Some of these claims are high profile and have been accompanied by significant media publicity.

For example, in 2000 Governor George Ryan imposed a moratorium on the imposition of capital punishment in Illinois.[13] He then appointed a commission to examine whether reforms to the Illinois capital punishment system could make the system more fair and accurate.[14] The commission's report studied thirteen death row inmates who had been released from custody, and concluded that these inmates were either convicted based on insufficient evidence connecting the inmates to their alleged crimes, or their

tions: Shaping Remedies for a Broken System, 2006 WIS. L. REV. 399; *see also* Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J. L. REFORM 547, 551 n.9 (2008).

7. *See* Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 366 (2007).

8. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WISC. L. REV. 645, 723 n.370.

9. *See* Cicchini, *supra* note 7, at 335 ("Prosecutorial misconduct has infected every stage of the criminal process ranging from the initial charging decision through post-conviction proceedings.").

10. *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE, at xv (Yale University Press, 1932); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 436 (2004).

11. Weaver, *supra* note 10.

12. *See* Rachel Steinback, *The Fight for Post-Conviction DNA Testing is Not Yet Over: An Analysis of the Eight Remaining "Holdout States" and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 331–32 (2007). *See generally* Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765 (2008).

13. *See* Report of the Governor's Comm'n on Capital Punishment, State of Illinois, at i (2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf.

14. *Id.*

convictions had been reversed because of procedural or constitutional irregularities.[15]

Illinois is hardly an isolated example. Another study found that since 1973, some one hundred and ten death row inmates had been exonerated of crimes of which they were convicted.[16] It is no accident that a number of law schools have responded by creating innocence projects, and the state of North Carolina has created an Actual Innocence Commission that is authorized to investigate claims of wrongful conviction.[17]

A disproportionate number of wrongful convictions involve homicide.[18] There are a number of reasons why homicide cases produce such a high percentage of wrongful convictions, including the difficulty of investigating homicide cases without the victim's assistance, the fact that the police are frequently under intense public pressure to solve and obtain convictions in homicide cases, and the incentive, especially in capital cases, for the guilty to frame the innocent.[19] The frequency of wrongful convictions in death penalty cases has caused individual members of the United States Supreme Court to raise questions regarding the legitimacy of the capital punishment regime.[20]

Many reasons for wrongful convictions can be offered. In a prior article, I discussed problems with indigent representation, and the difficulties that the poor encounter in obtaining competent representation.[21] Equally disconcerting are instances of false confessions that have led to wrongful convictions.[22] DNA evidence has shown that some suspects who confess to crimes, did not actually commit those crimes.[23] One study found that as many as twenty-one percent of wrongful convictions were based on false

15. *Id.* at 7–9.

16. *See* Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y & L. 577, 593 (2004).

17. *See* Darryl K. Brown, *The Multifarious Politics of Capital Punishment: A Response to Smith*, 94 VA. L. REV. IN BRIEF 57, 60 (2008), http://www.virginialawreview.org/inbrief/2008/09/29/brown.pdf.

18. *See* Kansas v. Marsh, 126 S. Ct. 2516, 2545 (2006) (Souter, J., dissenting).

19. *Id.*

20. *Id.* at 2546 ("In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure.").

21. *See generally* Weaver, *supra* note 10, at 436.

22. *See Marsh*, 126 S. Ct. at 2545 ("Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury."); *see also* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED 92 (Doubleday 2000); Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 5 (2008).

23. *See* DWYER ET AL., *supra* note 22, at 92.

confessions.[24]

Any confession, even a false one, can be particularly problematic for the defense. Both judges and juries are inclined to give a particular weight to confessions and to assume that they are valid.[25] As a result, when the police are able to extract a false confession from a suspect, the chances of conviction increase significantly. However, due to the apparent lack of reliability associated with confessions, some courts have begun to place less weight on confessions.[26]

II. WHY DO SUSPECTS FALSELY CONFESS?

One might speculate about why individuals would confess to crimes that they did not commit. The confessor must realize that there will be consequences, perhaps serious ones, to a false confession. Granted, some confessors may have limited intelligence and little ability to protect themselves against police demands. For others there may be reasons, which seem logical to them at the time, for falsely confessing. For instance, some suspects may have been tricked into false confessions by unethical police officers.[27] In other instances, suspects may have been coerced or intimidated into confessing.

Coerced confessions have been a particular problem in the criminal justice system. *Brown v. State of Mississippi* provides the classic illustration of a coerced confession.[28] In that case, the defendant was initially arrested, hung by a rope from the limb of a tree three times, and whipped.[29] Later, he was re-arrested, whipped again, and told that the whipping would continue until he confessed.[30] In reversing the defendant's conviction, the United States Supreme Court concluded that a trial is a "mere pretense where the state authorities have contrived a conviction resting solely upon

24. *See* Bruce M. Lyons, *New Committee Looks at DNA and the Death Penalty*, 15 CRIM. JUST., Spring 2000, at 1, 1. *See generally* 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 (1998).

25. *See* Stephen A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922–23 (2004).

26. *See, e.g.*, Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1140 (9th Cir. 2008) ("[W]e decline to hold that Osborne's confession . . . trumps the materiality of physical evidence. . . Such a rule would ignore the emerging reality of wrongful convictions based on false confessions and the capability of DNA testing to reveal the objective truth and exonerate the innocent.").

27. *See generally* Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 971–72 (2005).

28. 297 U.S. 278 (1936).

29. *Id.*

30. *Id.*

confessions obtained by violence."[31] The Court went on to hold that the due process clause of the Constitution requires that convictions must be consistent with "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions."[32] As a result, in *Brown*, and subsequent cases, the Court made it clear that convictions could not be premised upon false confessions.[33]

After the Court prohibited coercive police tactics, the nature of police tactics began to change. In the famous *Miranda v. Arizona* case, the police tactics in question were focused more on psychological techniques than physical torture.[34] Rather than beating suspects, the police confronted suspects with hostile and intimidating environments, and attempted to obtain confessions through psychological tactics. They did so by isolating suspects in interrogation rooms, cutting them off from the outside world, and confronting them with a legal system that they might not fully understand. As the Court stated, "an interrogation environment is created for no other purpose than to subjugate the individual to the will of his examiner. The atmosphere carries its own badge of intimidation."[35]

In *Miranda*, the Court attempted to deal with these psychological tactics by requiring police to administer a *Miranda* warning to suspects. That warning calls for that an individual subjected to custodial interrogation be informed of his right to remain silent,[36] that anything he chooses to say can and will be used against him,[37] that he has the right to the presence of counsel during the interrogation,[38] and that counsel will be provided if he cannot afford it.[39] The Court hoped that defendants provided with these warnings, as well as the opportunity to be represented by counsel, would be

31. *Id.* at 286.

32. *Id*; *see also* McMullen, *supra* note 27, at 977; George C. Thomas, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 180–81 (2005).

33. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 302 (1991); Mincey v. Arizona, 437 U.S. 385, 398–401 (1978); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 231–35 (3rd ed. 2008).

34. 384 U.S. 436, 449 (1966).

35. *Id.* at 457.

36. *Id.* at 467–68 ("At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.").

37. *Id.* at 469 ("[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.").

38. *Id.* ("The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.").

39. *Id.* at 472 ("While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.").

able to protect themselves against interrogation techniques that violate due process.

Despite these efforts, *Miranda* has not proven to be a panacea to the problem of false confessions. As noted, an extraordinary number of wrongful convictions involve false confessions despite *Miranda* and related decisions.[40] However, *Miranda* did have a number of beneficial effects.

First and foremost, the *Miranda* warnings limited the ability of the police to capitalize on the ignorance of suspects. In any police-citizen encounter, the police possess a potential advantage because they are more likely to know and understand the rules governing these encounters. Suspects are more likely to suffer from both ignorance and fear. In particular, suspects may believe that they have no choice but to cooperate with the police, and that they cannot refuse police requests.[41]

Prior to *Miranda*, individuals subjected to custodial interrogations may have functioned under similar misperceptions. As a result, the *Miranda* decision performed a major service by requiring the police, before interrogation, to inform suspects of their rights, and give them some sense of the consequences of waiving those rights.

Second, the value of *Miranda* warnings was enhanced by the fact that movies, television shows, books, and a variety of other media began to depict the police administering the warnings. This has helped increase the public's awareness of its rights in interrogation contexts.

While it is difficult to quarrel with *Miranda*'s conclusion that suspects should be informed of their right to remain silent, it was never clear that the *Miranda* warnings are sufficient, in and of themselves, to deal with the difficulties presented by psychologically-based interrogation techniques. More particularly, *Miranda* warnings should be regarded as an initial, positive step towards protecting individual rights. Nonetheless, there are significant reasons why the *Miranda* warnings are insufficient by themselves to prevent false confessions.

At the outset, it is important to distinguish between suspects who have been taken into police custody and those that have not. *Miranda* applies only to "custodial interrogations." When an individual has not yet been taken into custody, such as when an individual is being questioned in a private home without having been arrested, the police are free to question

40. *See* Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIG. 30 (2008) ("[T]he growing number of convicted defendants exonerated by DNA evidence, along with recent social science research, forces us to conclude that a significant minority of suspects falsely confessed to crimes they did not commit, despite the panoply of procedural protections that our criminal justice system provides. . . .").

41. *See* Russell L. Weaver, *The Myth of "Consent,"* 39 TEX. TECH. L. REV. 1195, 1199 (2007).

the suspect without first giving the *Miranda* warning.[42] In addition, *Miranda* warnings need not be administered during a routine traffic stop.[43] Indeed, even if an interrogation takes place at a police station, where the suspect is surrounded by the police, the Court may conclude that there is no custody.[44] Under such circumstances, suspects may be scared, unaware of their rights, and more likely to make incriminating statements. In addition, if police officers are sophisticated in their use of interrogation techniques, they can extract incriminating statements from suspects. Once they obtain an incriminating statement, they are more able to gain additional incriminating statements.

Even when *Miranda* warnings are administered, they do not provide a panacea for the confessions problem. The *Miranda* warning can be administered in a perfunctory manner that undercuts its significance and impact. Even when properly administered, the suspect may still be scared, fearful of the implications of potential charges, and can wander into discussions with police not fully aware of the implications of doing so. Sometimes this happens because the suspect may not fully understand the consequences of his actions.[45] At other times, it happens because the suspect slowly slides into discussions with the police.[46]

When suspects choose to waive their rights and open themselves up for questioning, they are often in peril and may not realize it. Some suspects believe that they can talk their way out of their legal problems, and will agree to speak with the police. But, when they choose to talk to police, suspects can be subjected to all of the coercive psychologically-based techniques discussed in *Miranda*. For example, suspects may be surrounded by the police, isolated in an interrogation room, cut off from the outside world, and not fully aware of their rights or the legal system. When a suspect is scared, the suspect may be more likely to make incriminating statements by mistake.

Moreover, during non-custodial interrogation, the police may not be precluded from using many of the tactics described in the interrogation manuals referenced in the *Miranda* decision. As the Court explained in that case, those tactics are designed to encourage the suspect to confess. The police accomplish that objective through a variety of tactics. For example, as recommended in the interrogation manuals referred to in *Miranda*, the

42. *See* Stansbury v. California, 511 U.S. 318, 322–23 (1994).
43. *See* Berkemer v. McCarty, 468 U.S. 420, 438–40 (1984).
44. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).
45. *See* Connecticut v. Barrett, 479 U.S. 523, 529 (1987).
46. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1056 (1983) (Marshall, J., dissenting).

police may maintain an air of confidence regarding the suspect's guilt.[47] In other words, interrogators should handle the interrogation with "perseverance" and "patience,"[48] and should offer the suspect potential legal excuses for actions to which the police are attempting to have the suspect confess.[49] The interrogator can also employ other tactics designed to negate the suspect's possible defenses.[50]

The interrogation process is aggravated by the fact that the police can inculcate fear into a suspect. For instance, police may say, "Gee, this is a really serious charge. Do you realize that you might end up spending the rest of your life in jail? That you might even get capital punishment?" The police may then offer a deal that will allow the suspect to escape the possibility of these severe threatened penalties.[51] Under such circumstances, it is not surprising that a significant number of suspects, fearful of the system and unable to correctly calculate the likelihood of their conviction of severe punishment, confess even though they are innocent.[52]

Even if a suspect successfully negotiates the system for a while, the suspect may eventually make an incriminating or damaging statement. Part of the problem is that suspects may not be familiar with the rules of evidence, or the law of admissions. As a result, even though the defendant makes what he perceives to be an exculpatory statement, it may in fact be inculpatory. When a suspect makes an incriminating statement, the police are frequently prepared to pounce on the suspect's misstep. When a confession is obtained under such circumstances, a defendant who is charged with crime may face an uphill battle in trying to prove his innocence. Juries tend to place a great deal of emphasis on confessions evidence and incriminating statements by an accused suspect.[53]

As a result, although *Miranda* was a significant and worthwhile decision as far as it went, it is no solution to the confessions dilemma. Even

47. Miranda v. Arizona, 384 U.S. 436, 450 (1966) ("[T]he manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact.").

48. *Id.* at 450–51.

49. *Id.* at 451–52.

50. *Id.* ("Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation.").

51. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008) ("American police interrogators still presume the guilt of the suspects they interrogate; still attempt to overcome their resistance and move them from denial to admission; still try to convince them—if by fraud rather than force—that they have no real choice but to confess; and still exert pressure to shape and manipulate their postadmission narratives.").

52. *Cf.* Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A-1, A-12 (discussing trends in cases of convicts exonerated by DNA evidence).

53. *See* Chojnacki et al., *supra* note 22, at 5.

though it is commendable to require the police to inform criminal suspects of their right to remain silent, such information by itself does not adequately protect criminal suspects against the psychological pressures involved in custodial interrogations. Moreover, *Miranda* is not a panacea for false confessions or wrongful convictions.

CONCLUSION

The greater difficulty is to craft a solution that will deal with the problems of false confessions and wrongful convictions. Despite the grand statements made by the United States Supreme Court in decisions like *Griffin v. Illinois*[54] and *Douglas v. California*[55] regarding the importance of mitigating the impact of wealth on the criminal justice process—for confessions and the right to counsel—wealth matters.[56] If a wealthy suspect realizes that he is under police suspicion, he might place an immediate call to his lawyer for advice about what to say to the police, and how to respond to police requests. Because of that advice, the wealthy suspect might be less likely to make a misstep or an incriminating statement. An indigent defendant is less likely to have the advice of counsel. While he will receive the *Miranda* warning, he is subject to all of the pitfalls of the *Miranda* decision discussed above.

Of course, the Court could address the confessions problem by requiring that all suspects be provided with counsel prior to interrogation. However, such a step seems unlikely. The Warren Court, with its era of expanding criminal rights, is long past. Moreover, it has been quite costly for the government to comply with the Court's holding in *Gideon v. Wainwright*[57] regarding the right for suspects at trial to be represented by counsel. Many states are struggling under the burden. Requiring that all suspects be provided with counsel prior to interrogation would further increase costs. Thus, it is unlikely that the Court is going to impose such a require-

54. 351 U.S. 12, 19 (1956). ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

55. 372 U.S. 353, 357 (1963) (the Court held that the state must provide an indigent defendant with counsel for his one and only appeal as of right, "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

56. *See generally* Weaver, *supra* note 10, at 436. In one of the more famous cases in modern American history, the O. J. Simpson murder case, the outcome may have been quite different had Simpson been poor. Even Simpson's lawyer in that case, Johnnie Cochran, admits that "[i]f [O. J.] Simpson had been poor, he'd be in jail right now, whether he was innocent or guilty. In this country, you are innocent until proven broke." Patricia Phillips, *Meeting Challenges: The Association's History of Accomplishment*, 26 LOS ANGELES LAWYER, Mar. 2003, at 33 (second alteration in original).

57. 372 U.S. 335, 345 (1963).

ment.

One check on wrongful convictions is the use of DNA evidence. Indeed, DNA evidence has provided the basis for a number of findings of wrongful conviction, and has been instrumental in reversing some of these convictions. Of course, DNA evidence is not available or useful in every case. As a result, in at least some cases, courts must find other ways to deal with the confessions problem.

Another possible solution is to require that all interrogations be recorded on video.[58] With modern advances in technology, it is now possible to obtain inexpensive video recording equipment that can be unobtrusively used during interrogations. While video recording is not the precise equivalent of physical presence, it can provide greater insight into what happened during the interrogation process. Another possible solution is to consider the Japanese approach of prohibiting conviction based on an uncorroborated confession.[59] Even though this approach has not been sufficiently studied in the United States, it perhaps deserves greater scrutiny as one way of helping to prevent wrongful convictions.

58. *See* Sullivan et al., *supra* note 40, at 34–35.

59. *See* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 351 n.200 (1992).