

SENTENCING LESSONS FROM THE INNOCENCE MOVEMENT

By Andrew E. Taslitz

The innocence movement, about which much has been written in these pages, has had a widespread impact on the way that criminal justice is administered in the United States. That movement has generally focused on one question: How can we maximize the chances of getting the “right guy,” that is, of convicting the guilty while acquitting the innocent? The movement has considered a wide range of reforms designed to improve the accuracy of eyewitness identification procedures, suspect interrogations, forensic laboratory testing, and a host of other criminal justice processes. (See generally AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* (2006).)

The sentencing phase of a criminal case seems at first blush so different from the guilt-determination phase—the phase with which the innocence movement is concerned—as to suggest that efforts to improve the latter have no relevance to bettering the former. After all, when a case reaches the sentencing phase, society has already expressed its judgment that the defendant is guilty. The question, therefore, is no longer who did it, but what punishment does the guilty one deserve? Granted, an injustice will be done at sentencing if we have the wrong person, but that moral wrong can be avoided by getting the guilt-determination phase right in the first place. Sentencing “accuracy” means something very different from the criminal trial’s notion of historical accuracy at reconstructing what really happened.

This first impression is largely wrong, however, and whatever truth it does hold does not logically entail the irrelevance of the innocent movement’s quest for historical accuracy. Both trials and sentencing hearings aim in part at fact-finding. Both involve two sorts of facts—the “raw” facts of who did what to whom, how and when, and the “normative” facts, such as mental-state determination, that at least partly embody a moral judgment about how evil were the offender’s heart and mind. (See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The*

Sluggish Life of Political Factfinding, 94 GEO. L.J. ____, 31-37 (June 2006) (draft manuscript).) If who pulled the trigger, drove the getaway car, or ordered the drug sale are raw, “objective” facts to be proved at trial, so too are what quantity of drugs was sold, how many victims injured, and how much economic injury done “objective” facts to be proven at sentencing. If trial fact finders must make partly moral judgments whether a killer’s heart was “depraved” or the motive was self-defense, so must sentencing fact finders pronounce judgment on whether the convicted acted with “racial bias,” “deliberate cruelty” or “excessive brutality.”

The U.S. Supreme Court has recently recognized, in its decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Booker v. United States*, 125 S. Ct. 738 (2005), that sentencing in mandatory guidelines systems necessarily involves much “fact-finding” akin to that at trial. Indeed, the Court found the similarity so strong as to require at least one crucial similar procedural safeguard: determination of those facts that may raise a defendant’s maximum potential sentence must be made by a jury rather than by a judge. This mandate has raised the question whether additional trial safeguards, such as the defendant’s right to “confront” the witnesses against him or her, apply as well at sentencing, with some commentators answering that question with a resounding “yes.” (See, e.g., Nigel Holder, *Confrontation at Sentencing: The Logical Connection Between Crawford and Blakely*, 49 HOWARD L.J. 179 (2005).) Moreover, although the Court considered “advisory” guidelines and other relatively more discretionary systems not to trigger the same set of constitutional fact-finding protections as do mandatory guidelines systems, all sentencing regimes involve at least informal fact-finding to determine such things as how corrupt is the offender’s character and how likely to reoffend. (See, e.g., MARC MILLER & RONALD WRIGHT, CRIMINAL PROCEDURES:

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Because the trial and sentencing phases both involve fact-finding, therefore, lessons about how to get these facts right in one phase can illuminate how to do so in the other phase, even if each phase ultimately also involves some important differences. Because the innocence movement focused on raw factual accuracy at trial, its lessons would seem most readily transferable to raw fact-finding at sentencing. But, it turns out, the innocence movement also prompted the creation of new ways to improve the deliberative processes of both criminal justice policy makers and fact finders. Such improved deliberative mechanisms may be equally helpful in improving the “accuracy” of normative fact-finding at sentencing as well, a point to be explained shortly. There are, therefore, sentencing lessons to be learned from the innocence movement. In particular, there are four innocence teachings that I will in the pages to come argue are of immediate relevance to both sentencing practitioners and reformers: (1) subconscious cognitive processes matter; (2) data collection, combined with internal and external transparency, corrects errors over time; (3) minor errors cumulate into major ones when compounded at different stages of, and by different actors in, the criminal justice system; and (4) improved deliberation, both by fact finders and systemic reformers, reduces “errors of justice.”

The unconscious matters. Much of the initial resistance to innocence movement reform efforts might have stemmed from the movement’s reliance on social science concerning the operation of the unconscious mind. Many police and prosecutors, because they work hard and are well meaning and properly view most alleged crime victims as acting in good faith, can have a hard time accepting that their energy, experience-informed judgments, and passion can result in exactly the opposite of what they want to achieve. It can be even harder to accept that mysterious, invisible forces like the “unconscious” are working to countermand sincere efforts to convict only the guilty. Yet the social science supporting that conclusion is often overwhelming. (Cf. Andrew E. Taslitz, *Forgetting*

Freud: The Courts' Fear of the Unconscious in Date Rape Cases (2006) (unpublished draft manuscript).)

For example, eyewitnesses believing that they have correctly chosen their assailants from lineups may be unaware that they have instead guessed, choosing the persons in the line who looked “most like” the real wrongdoers. Nor will the officers be aware that their response, “good job,” to the witness selection may change the witnesses’ initially tentative identification at the lineup into one of absolute certainty at the trial. (See ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 37.) Likewise, in the area of confessions, officers may see their deceptions and persistence as simply “breaking down” a lying subject’s resistance to telling the truth, not fully appreciating how such tactics can, under certain circumstances, lead even the innocent—sometimes *particularly the innocent*—to confess falsely. Truth sometimes lies in the things unseen. (See *id.* at 11-14; Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. ___, 11-15 (forthcoming 2006) (draft manuscript).)

Data collection and transparency work. There is a natural human tendency to dismiss as pointless collecting information on questions whose answers we “already know.” Correspondingly, however, those resistant to change might favor endless data collection as a way to stave off reform. Yet there is a middle ground, one combining cautious experimentalism with data collection and transparency. The innocence movement has increasingly come to embrace this center. The ABA’s recent innocence recommendations concerning improving eyewitness identification procedures are an example. There is a dispute in the social scientific community about whether simultaneous (showing all lineup participants at once) or sequential (showing the witness one face at a time, for an up-or-down vote) methods are superior. The overwhelming majority of researchers come down on the side of sequential methods. Nevertheless, a persuasive and increasingly influential group of scholars argue that there are gaps in the research, that more field (as opposed to laboratory) research is needed, and that the costs of implementing the new methods and the risk of increasing nonidentifications of the guilty may not be worth the benefits. Neither side in this debate has argued, however, that current simultaneous methods have been proven better than the newer sequential ones. At most, say the dissenting researchers, we just do not know enough to choose one method over another. (See ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 34-35.)

The ABA, rather than counseling inaction or bowing to simple scientific nose-counting, chose another course: recommending that in certain locations one police department follow sequential methods, another retain simultane-

ous ones, all under the guidance of social scientists who would collect data and consider what lessons flow from them. These data would be openly shared among the law enforcement community and with the public. (*Id.* at 25.) Such transparency opens the interpretation of the new data and their purported lessons to critique. Perhaps even more importantly, however, transparency can create political pressures for change while promoting acceptance of its legitimacy. Thus, should widespread efforts of the sort recommended by the ABA generate data supporting sequential methods, the police are both more likely to adopt them and accept them, all with public approval. Police departments resisting change in the face of such data would face withering criticism by the media, politicians, and the legal community. Should the data point in favor of the status quo, on the other hand, police will find it legitimately politically easier to resist simply jumping onto the reform bandwagon. Fostering an attitude of candid experimentalism to avoid errors of any sort may be the best benefit of all flowing from the ABA approach. (See generally Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL’Y & ETHICS (June 2006).)

See the forest, not just the trees. One major lesson of the innocence movement is that systemic forces can lead to bad results that are invisible to those focusing on each phase or practice of the system in isolation. The best example of this is the cumulative impact of small errors. Unwarranted reliance on a deceptive informant might, for example, lead police to become too quickly wedded to one theory about who committed a particular crime. Convinced of the suspect’s guilt, the police energetically pursue collecting evidence inculcating this suspect while ignoring trails leading to other suspects. (See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 50 HOWARD L.J. ___, (June 2006) (dangers of early theory commitment); ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 53-67 (on informants).) A detective with an abiding conviction of the target’s guilt places the individual in a lineup, not realizing that the detective is subconsciously conveying “minimal cues” to the witness about whom to select. A “minimal cue” is a smile, a change in tone of voice, a widening of the eyes, or other positive physical reaction displaying itself as the witness’s eyes alight on the target. The witness unknowingly picks up on these cues, selecting the target not because of true recognition but because of the detective’s encouragement. (ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 29, 34, 37 (nonverbal cues); Andrew E. Taslitz, *Does the Cold Nose Know?: The Unscientific Myth of the Dog-Scent Lineup*, 42 HASTINGS L.J., 15, 48, 52, 104 (1990) (minimal cues defined).) The detective confronts the defendant with this result, seeking to elicit an admission of guilt. When the target nervously denies guilt, the

detective perceives the target's discomfort as, in fact, evidence of a consciousness of criminality. Accordingly, the detective uses increasingly aggressive interrogation techniques, ultimately resulting in the target's false confession. At trial, the jury, faced with a confident lineup identification and a confession, easily convicts.

No one of these errors may have been sufficient to result in this injustice. (See Taslitz, *Wrongly Accused*, *supra*, at 11-16.) The culmination of all of them, however, does the job just fine. (See John A. Humphrey & Sandra D. Westervelt, *Introduction*, *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 1, 5 (2001 ed.) (cataloguing systemic factors that "alone or in concert with each other" have caused wrongful convictions).)

Improving deliberation reduces errors of justice.

"Deliberation," at its best, involves open-minded discussion among well-informed individuals seeking to reach a judgment in service of the common good. Deliberation, in this sense, comes neither naturally nor easily. Institutions must be designed to promote deliberative processes. Deliberation increases the likelihood of avoiding error while enhancing democratic legitimacy. Deliberation can take place both at the level of crafting criminal justice rules and policies and at the level of case-specific application of those policies. (See Taslitz, *Democratic Deliberation*, *supra*, at 61-63.)

The ABA innocence recommendations seek to improve deliberations at both levels.

At the level of policy making, the ABA has, for example, suggested creating internal police-prosecutor systems to keep track of the evolving social science concerning eyewitness identification accuracy and to periodically deliberate over whether changes in existing procedures are therefore required. (ABA, *AD HOC INNOCENCE COMMITTEE REPORT*, *supra*, at 23.) Even more broadly, the ABA has recommended that each jurisdiction create ongoing processes for monitoring the risks of convicting the innocent or acquitting the guilty. (See *id.* at 1.) The ABA's report on this recommendation includes a number of illustrative mechanisms, all of which involve the widespread involvement of all relevant justice system players (judges, defense counsel, prosecutors, victims, police) in exposing mistakes and working toward solutions. (See *id.* at 1-9; Taslitz, *Democratic Deliberation*, *supra*, at 4-6, 30-64.)

At the case-specific level, the ABA has recommended, for example, greater use of jury instructions and expert testimony on the dynamics of eyewitness identification. The goal of these techniques is to promote more informed jury delibera-

tion about whether the state really got the right person. (Taslitz, *Democratic Deliberation*, *supra*, at 4-6, 61-66.)

Applying innocence lessons to sentencing practices

Now we are in a position to examine the value of these lessons for sentencing policy and practice. In the pages to follow, I offer one primary example of what the innocence movement has to teach us at sentencing rather than any comprehensive assessment. My hope is that this illustration is sufficient to make the point.

My example concerns the role of race in the sentencing process, for race is an ideal example of both the role of the unconscious at sentencing and the dangers of not seeing the sentencing forest through the offender trees.

Although I could have written about race and sentencing entirely as a topic on its own, without having put it in the context of a comparison to the innocence movement, doing so would have obscured the continuities in fact-finding dynamics between the guilt and sentencing phases, with the innocence movement having shed so much light on the former.

Track the
science of
eyewitness
identification.

Racial disparities in sentencing: the data

Nationwide, about 44 percent of the incarcerated are African American, though they constitute but 12 percent of the country's total population. (See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., *PRISONERS In 2003*, at 9 (Nov. 2004), *available at* <http://www.ojp.usdoj.gov/lojs/prisons.htm>; ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 3 tbl. 1* (Mar. 2001); *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.) According to Justice Anthony M. Kennedy, in some cities, more than half of young African-American men are under criminal justice system supervision, while about one out of every 10 African-American men in their mid- to late-20s in this country is behind bars. (Justice Anthony M. Kennedy, *Address to ABA House of Delegates*, August 9, 2003.) Others paint an equally or more dismal picture, finding the percentage of the prison population that is African American to be 50 percent or higher, the lifetime chances of a black male's incarceration being one in three compared to one in six for a Latino male and one in seven for a white male, and the increase in African-American women imprisoned rising 204 percent between 1985 and 1995. (See DAVID COLE, *NO EQUAL JUSTICE* 4 (1999); Marc Mauer and Tracy Huling, *The Sentencing*

