FOREWORD

*Vincent Martin Bonventre**

It is not an accident.

In fact, it is deliberately built into our system.

More than that, it is an integral characteristic of our criminal justice.

That criminals go free, that is.

When the Supreme Court imposed the standard of proof beyond-a-reasonable-doubt as a due process mandate for all criminal prosecutions, it knew well what it was doing. In his concurring opinion in *In re Winship*,[1] Justice John Marshall Harlan II made clear the fundamental value inherent in our criminal law that dictated the Court's ruling: "[i]t is far worse to convict an innocent man than to let a guilty man go free."[2] Beyond-a-reasonable-doubt reflects the basic choice to make the latter much easier, in order to make the former less likely.

In another fundamental due process mandate previously imposed, the Court prohibited convictions—regardless of how reliable—if based on evidence obtained through "brutal conduct."[3] Speaking for the Court in *Rochin v. California*, Justice Felix Frankfurter condemned convictions resting on evidence extracted through a method that "shocks the conscience"—even where, as there, the evidence removed any doubt about the defendant's guilt.[4]

Beyond that, even evidence obtained through tactics by no means brutal or shocking may doom a conviction. The exclusionary rule, applicable to every court, state or federal, since the Supreme Court's decision in *Mapp v. Ohio*,[5] renders reversible any conviction secured through evidence obtained through "unreasonable" searches or

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1 *In re* Winship, 397 U.S. 358 (1970).

2 *Id.* at 372.

3 Rochin v. California, 342 U.S. 165, 173 (1952).

4 *Id.* at 175.

5 Mapp v. Ohio, 367 U.S. 643 (1961).

seizures.[6] The reliability of the evidence and the absence of any doubt about the guilt it proved are irrelevant.[7]

Many years earlier, Benjamin Cardozo had expressed his disapproval of the exclusionary rule. In *People v. Defore*,[8] Cardozo, then a Judge on the New York Court of Appeals, the State's highest court, distilled that rule as he viewed it: "[t]he criminal is to go free because the constable has blundered."[9]

Supporters of the rule have objected to Cardozo's formulation. But they do not challenge his assertion that criminals go free. They only insist that it is the Constitution itself that deserves the blame, or the credit.

More than half a century after Cardozo penned his opinion in *Defore*, Justice John Paul Stevens echoed what other vigorous enforcers of the rights of the accused have noted. Dissenting from the Supreme Court's adoption of the "good faith exception" to the exclusionary rule in *United States v. Leon*,[10] Stevens acknowledged that the rule "exerts a high price."[11] But, he added, it is a price "the Fourth Amendment requires us to pay."[12] Quoting then-retired Justice Potter Stewart, Stevens explained that the "extremely relevant evidence" of guilt that would be established under the rule "would not have been obtained had the police officer complied with the commands of the [F]ourth [A]mendment in the first place."[13]

Attribute the consequences to the rule or to the Constitution, it remains the same. Because of an unreasonable search or seizure, perfectly reliable proof of guilt is treated as never obtained, and convictions of the guilty are overturned.

Then there are the convictions based on illegally obtained confessions. Now, it has long been a basic command of constitutional due process that convictions may not be secured

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[6] *See id.* at 660. The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added). The exclusionary rule imposed upon the states in *Mapp* generally bars the prosecution's use of evidence obtained in violation of that guarantee, and it generally invalidates convictions resting on such evidence. *See Mapp*, 367 U.S. at 660.

[7] *Id.* at 656–57.

[8] People v. Defore, 150 N.E. 585 (N.Y. 1926).

[9] *Id.* at 587.

[10] United States v. Leon, 468 U.S. 897, 922–23 (1984); *see also id.* at 956 (Brennan, J., dissenting).

[11] *Id.* at 979 (Stevens, J., concurring in the judgment in part, dissenting in part).

[12] *Id.*

[13] *Id.* (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Further of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM L. REV. 1365, 1392 (1983)).

through physically extorted confessions.[14] Even before the Fifth Amendment's privilege against compulsory self-incrimination was made applicable to the states,[15] that earlier prohibition was extended to convictions that were predicated on confessions obtained through the "mental ordeal"[16] of "unrelenting interrogation."[17] Justice Frankfurter explained why in *Watts v. Indiana*: "[o]urs is the accusatorial, as opposed to the inquisitorial system."[18]

As Justice Robert Jackson protested, however, in his separate opinion criticizing the Court's expanded notion of "involuntary" and, thus, prohibited confessions, "no one suggest[ed] that any course held promise of solution of these murders other than to take the suspect into custody for questioning."[19] "The alternative" he continued, "was to close the books on the crime and forget it, with the suspect at large."[20]

Perhaps even more troubling to Jackson was that the "brutal murders" involved in the three companion cases had been solved, the confessions were confirmed, the accused were convicted, and those indisputably reliable convictions were set aside.[21] Jackson's description vividly paints the cost—the cost of "the accusatory system" that the known guilty sometimes do go free:

> In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him. This extended over varying periods. In each, confessions were made and received in evidence at the trial. Checked with external evidence, they

[14] *See* Brown v. Mississippi, 297 U.S. 278, 286–87 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.").

[15] Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[16] Watts v. Indiana, 338 U.S. 49, 53 (1949).

[17] *Id.* at 54.

[18] *Id.*

[19] *Id.* at 58 (Jackson, J., concurring in the result in part, dissenting in part).

[20] *Id.*

[21] *Id.*

> are inherently believable, and were not shaken as to truth by anything that occurred at the trial. Each confessor was convicted by a jury and state courts affirmed. This Court sets all three convictions aside.[22]

Once the self-incrimination privilege was made assertable against the states through the Fourteenth Amendment,[23] and the Court decided to enforce that right even more vigorously than it did the amendment's more amorphous guarantee of "due process," Jackson's concern—like Cardozo's earlier analogous one—became a more routine reality. Not only truly forced, extorted, or pressured confessions could lead to overturned convictions and the guilty going free, but even entirely voluntary confessions could require that result.

These are the confessions obtained in custody, without the suspect being informed of his "right to remain silent" and right to an attorney.[24] These *Miranda* pre-interrogation warnings were mandated by the Supreme Court to neutralize the "inherent coercion of . . . custodial interrogation[s]"—not to prohibit truly compelled or involuntary confessions.[25] Those sorts of confessions are already condemned by the self-incrimination privilege itself and by basic due process.

No, *Miranda* forbids even entirely willing, intelligent, voluntary confessions, as well as any convictions that rest upon them. As Chief Justice William Rehnquist made clear in upholding the *Miranda* warnings as a constitutional imperative in *Dickerson v. United States*,[26] a determination of voluntariness—as prescribed by the Congressional enactment at issue[27]—is inadequate to render a custodial confession admissible. Regardless of how reliable the confession, or how freely given, the prosecution may not use it to prove guilt, and no conviction based on it may stand.[28]

Neither Rehnquist nor the rest of the Court doubted the ramifications of the *Miranda* mandate. Indeed, he lamented those

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[22] *Id.*

[23] Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[24] Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

[25] Davis v. United States, 512 U.S. 452, 471 (1994) (Souter, J., concurring in the judgment) (citing the majority opinion).

[26] Dickerson v. United States, 530 U.S. 428 (2000).

[27] 18 U.S.C. § 3501 (2006).

[28] *See Dickerson*, 530 U.S. at 432, 438; *Miranda*, 384 U.S. at 444–45.

ramifications even as he upheld what he acknowledged had "become part of our national culture."[29] As he put it: "[t]he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."[30]

To be sure, the foregoing recitation hardly encompasses an exhaustive enumeration of the various features of our criminal justice system that permit the guilty to go free.[31] But even more surely, the foregoing says little or nothing about the wisdom and worth of the competing interests that might well outweigh the cost of criminal wrongdoers going unpunished. That is a topic more than deserving of an entire issue of *Miscarriages of Justice*—perhaps a few. Indeed, next year's issue will examine one slice of that topic: the search for truth versus justice.

For this issue of *Miscarriages of Justice*, we do focus our attention on the guilty going free. It continues our tradition of examining imperfections and the resulting mishaps in American criminal law enforcement, prosecution, and punishment—and, in fact, any aspect of our criminal justice—from interdisciplinary perspectives.

This is our third annual issue. Actually, in a very real sense, it is our fourth issue devoted to *Miscarriages*. In 2010, the *Albany Law Review* hosted a symposium on wrongful convictions as a precursor to this annual enterprise.[32] Moderated by New York's Chief Judge, Jonathan Lippman, and organized with the advice and assistance of the Chief Judge and James Acker, Distinguished Teaching Professor at the University at Albany's School of Criminal Justice, the event was sponsored by the Law Review's *State Constitutional*

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[29] *Dickerson*, 530 U.S. at 443 (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999).

[30] *Id.* at 444.

[31] The constitutional prohibition against double jeopardy is another prominent feature of our criminal justice system which sometimes insures that the guilty go free. *See, e.g.*, People v. Gause, 971 N.E.2d 341, 346 (N.Y. 2012) (Pigott, J., dissenting) ("[W]e have a defendant twice convicted of a homicide he undoubtedly committed and twice having his conviction overturned on grounds that can only be described as technical."); Salvatore R. Martoche & Donald S. Stefanski, *Double Jeopardy*, 76 ALB. L. REV. 1517 (2013) (discussing in great length the New York Court of Appeals's recent double jeopardy decision, *People v. Gause*, and New York State's double jeopardy jurisprudence); Steven V. DeBraccio, Comment, *The Double Jeopardy Clause, Newly Discovered Evidence, and an "Unofficial" Exception to Double Jeopardy: A Comparative International Perspective*, 76 ALB. L. REV. 1821 (2013) (analyzing the United Kingdom's reformation of their double jeopardy rule and contrasting it from the American rule).

[32] Symposium, *Wrongful Convictions: Understanding and Addressing Criminal Justice*, 73 ALB. L. REV. 1207 (2010).

Commentary as that year's *Chief Judge Lawrence H. Cooke Symposium*.[33] The symposium, published within the annual *State Constitutional Commentary* issue, was nothing short of extraordinary, and it served as the veritable pilot for *Miscarriages of Justice*.

Preliminary discussions, followed by planning sessions, with Acker, Catherine Bonventre (Albany Law School, J.D., 2005; Ph.D. student studying under Acker), and Matthew Laroche (*Albany Law Review* Editor-in-Chief at the time, and former Acker student)—together with the enthusiastic support of the Chief Judge—bore fruit. Matt Laroche's leadership at the Law Review quickly made *Miscarriages* a reality.

So here we are, three years later, and *Miscarriages* is an institution. This annual effort, published in collaboration with the School of Criminal Justice at the University at Albany, is a source of pride for the Law Review and Albany Law School, and, we think, quite a notable achievement.

This third issue, like the ones that came before, teems with enlightening and provoking variations—this time, on the "When the Guilty Go Free" theme. Chief Judge Lippman examines the frequent lack of accountability for domestic abuse.[34] Robert Smith, his colleague on New York's highest court, argues that the inadmissibility of a witness's (especially a victim's) prior consistent statement unreasonably protects the guilty.[35]

Appellate Division Justice John Leventhal explores the advisability of a freestanding state constitutional claim for actual innocence.[36] Appellate Division Justice Salvatore Martoche and his law clerk, Donald Stefanski, examine the implications of a recent puzzling double jeopardy decision in which the defendant literally got away with murder.[37] Appellate Division Justice Mark Dillon and New York State Supreme Court Justice Lewis Lubell outline the unintended consequences of the Court of Appeals's controversial

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[33] Vincent Martin Bonventre, *Editor's Foreword*, 73 ALB. L. REV. 1195, 1195 (2010); Symposium, Jonathan Lippman, *Moderator's Introduction*, 73 ALB. L. REV. 1201, 1201 (2010). The Law Review's Executive Editor for *State Constitutional Commentary* that year, Jillian Kasow, deserves much credit for planning the symposium.

[34] Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417 (2013).

[35] Robert S. Smith, *How the Prompt Outcry Rule Protects the Guilty*, 76 ALB. L. REV. 1445 (2013).

[36] John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(g-1)?*, 76 ALB. L. REV. 1453 (2013).

[37] Martoche & Stefanski, *supra* note 31, at 1517.

right to counsel landmarks.[38]

Professor Aya Gruber of the University of Colorado Law School identifies the dangers inherent in political liberals' focus on the perceived leniency in the punishment of crimes against minorities.[39] Professor James Acker of the School of Criminal Justice at the University of Albany posits the commonality of interests when the innocent are spared and the actual perpetrators are brought to justice.[40] Professor Alissa Worden, also of the School of Criminal Justice, Sarah McLean of the John Finn Institute for Public Safety, and Megan Kennedy, an attorney currently studying at the School of Criminal Justice, explore adjournments in contemplation of dismissal (ACDs) that are sometimes employed on legally irrelevant bases.[41]

Professor Christian Sundquist of Albany Law School takes to task the current trend of mainstream scientists and judges to re-embrace biological conceptions of race.[42] Benjamin Levin, law clerk to Federal District Court Judge Lawrence Kahn, urges that we not lose sight of the unintended consequences of using criminal law as a tool for social structuring.[43] Professor Mark Summers of Barry University School of Law argues that out-of-court confessions are in fact "testimonial hearsay," but that they should nevertheless be admissible without cross-examination as a hearsay exception.[44]

Finally, two recent law students round out the issue: Steven DeBraccio, Albany Law School class of 2013, explores potential end-runs-around the double jeopardy prohibition, to permit the re-prosecution of the "wrongfully acquitted."[45] Christopher Fell, Fordham University School of Law class of 2012, proposes a hearsay exception to protect child victims in sex abuse trials.[46]

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[38] Mark C. Dillon & Lewis J. Lubell, *The Rise and Fall of New York's* Rogers-Bartolomeo *Rule*, 76 ALB. L. REV. 1535 (2013).

[39] Aya Gruber, *Leniency as a Miscarriage of Race and Gender Justice*, 76 ALB. L. REV. 1571 (2013).

[40] James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629 (2013).

[41] Alissa Pollitz Worden, Sarah J. McLean & Megan Kennedy, *Sidestepping Justice? Adjournments in Contemplation of Dismissal in Misdemeanor Court*, 76 ALB. L. REV. 1713 (2013).

[42] Christian B. Sundquist, *The Dialectics of Racial Genetics*, 76 ALB. L. REV. 1751 (2013).

[43] Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777 (2013).

[44] Mark A. Summers, *Taking Confrontation Seriously: Does* Crawford *Mean That Confessions Must Be Cross-Examined?*, 76 ALB. L. REV. 1805 (2013).

[45] DeBraccio, *supra* note 31, at 1821.

[46] Christopher T. Fell, *Crying Out for Change: A Call for a New Child Abuse Hearsay Exception in New York State*, 76 ALB. L. REV. 1853 (2013).

Before concluding, let me add a few words of thanks. James Acker was not only vitally instrumental in planning our 2010 "Wrongful Convictions" symposium and in establishing *Miscarriages* as a joint effort of Albany Law School and the School of Criminal Justice, but he has also served as the Chair of the Professional Board of Editors for the first three issues. He is stepping down from that post, but he will remain as an indispensable source of counsel, ideas, scholarship, and encouragement.

Fortunately, Jim's colleague, Alissa Pollitz Worden, has agreed to serve as his successor. She is no stranger to *Miscarriages*, having served on the Board since its inception, and having been a regular contributor.

Then there are the members of the *Albany Law Review* and the Student Editors from the School of Criminal Justice, all of whom dedicated untold hours preparing the manuscripts for publication.

Lastly, special mention should be made of Mary D'Agostino, Albany Law School class of 2013, who served as the Law Review's Editor-in-Chief this past year. She was an absolutely superb Chief who led the Law Review all year with professionalism, devotion, skill, and an infectious smile that made for such a pleasant and cooperative atmosphere all year. And speak about infectious, as they say, look up infectious glee and enthusiasm in the dictionary, and I am sure you will find the face of Elie Salamon. Yes, he has filled the Law Review suite with his laughter and warm camaraderie all year, and he did so despite the responsibility of organizing and overseeing everything about this issue in his capacity as Executive Editor for *Miscarriages of Justice*. What a first-rate job he did! Congratulations, Elie. This is your book.