

## DEFINING INNOCENCE

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### I. INTRODUCTION

The discovery of hundreds of wrongful convictions in the past twenty years has reshaped the debate about criminal justice in this country, spawning what has become known as the “Innocence Movement,”<sup>1</sup> an “Innocence Revolution,”<sup>2</sup> or even the new “civil rights movement.”<sup>3</sup> The innocence cases have exposed as self-

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<sup>1</sup> See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008) [hereinafter *Toward a New Paradigm of Criminal Justice*]; Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1219 (2005); see also Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084 n.1 (2011) (“[The] ‘Innocence Movement’ . . . describe[s] the group action of various people throughout the United States, including legal scholars, attorneys, and advocates working in various Innocence Projects, whose primary goals are to raise awareness of wrongfully incarcerated individuals and advocate for their release.”); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2011) (“The innocence movement refers to a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States.”). Zalman tracks the rise of the innocence movement, pegging 2000 as the year in which the movement matured to create the “Age of Innocence.” *Id.* at 1499. The Innocence Movement is now an international movement. The Innocence Network, an affiliation of independent innocence projects, has sixty-five member organizations, including fifty-five in the United States and ten projects spread among Canada, the United Kingdom, Ireland, Australia, and New Zealand. See INNOCENCE NETWORK (2008), <http://www.innocencenetwork.org> (follow “members” hyperlink).

<sup>2</sup> Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573–74 (2004); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188 (2010); see also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005) (“[The first DNA exoneration in 1989] [w]as the beginning of a revolution in the American criminal justice system.”).

<sup>3</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1550 (2008); Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1302 (2005); see also Keith A. Findley, *The Pedagogy of Innocence:*

deception our longstanding belief that the criminal justice system does all it can to guard against convicting the innocent, and that mistakes, rarely if ever made, are anomalous rather than systemic. The exonerations have moved us beyond an abstract understanding that there must, of course, be an occasional unknown innocent in prison, to “knowing their names and faces and learning how their lives were destroyed.”<sup>4</sup> In fits and starts, the Innocence Movement has generated a measure of new receptiveness to the reality of error in the criminal justice system, and hence to the possibility of post-conviction relief.<sup>5</sup> And the Innocence Movement has generated a host of recommendations for reforms that promise to improve the reliability of the criminal justice system in its core function: sorting the guilty from the innocent.<sup>6</sup>

As with any “movement,” though, the Innocence Movement has evolved through phases, including the inevitable push back from defenders of the status quo. That push back comes in two forms: (1) resistance at the macro level to the notion that wrongful convictions really present much of a problem, that is, that there is any systemic problem that requires remedy; and (2) resistance to claims of innocence in individual cases by prosecutors and judges at the micro level. At both levels, the debate inevitably raises a fundamental definitional question: what counts as an “exoneration,” or when is a convicted offender counted as an “innocent”?<sup>7</sup>

The question is not trivial. It has serious real world implications.

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*Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 278 (2006) (attributing the appellation of “the new civil rights movement” to Innocence Project co-founder Barry Scheck).

<sup>4</sup> Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 174 (2008).

<sup>5</sup> See, e.g., *House v. Bell*, 547 U.S. 518 (2006). That increased receptiveness, however, is far from universal and, as discussed more below, is often countered by push back against claims of innocence, or even the notion of “innocence.” See, e.g., Morris B. Hoffman, *The Myth of Actual Innocence*, 82 CHI.-KENT L. REV. 663 *passim* (2007); Joshua Marquis, *The Myth of Innocence*, 95 J. OF CRIM. L. & CRIMINOLOGY 501 *passim* (2005); Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL’Y 523 (1999).

<sup>6</sup> Those reforms typically focus on eyewitness identification procedures, electronic recording of interrogations to reduce false confessions, improved reliability and oversight of the forensic sciences, limitations on the reliance on unreliable jailhouse “snitch” testimony, and improved indigent defense services, among others. See, e.g., *Toward a New Paradigm of Criminal Justice*, *supra* note 1, at 147–72 (discussing the primary innocence-based reforms and the ways in which they simultaneously serve to enhance reliability in convicting the guilty and protecting the innocent).

<sup>7</sup> “Exoneration” and “innocent” are not always synonymous. There are indeed many individuals who are factually innocent who are never exonerated, and conversely there are individuals who are exonerated who are not factually innocent. This essay, however, uses the terms synonymously, because it argues that, given our imperfect access to truth, innocence for most purposes depends on exoneration.

At the policy level, defining what we mean by “exoneration” and “innocence” is important for two reasons. First, it defines the scope of the problem; it tells us which and how many cases can be counted as wrongful convictions.<sup>8</sup> To determine whether the problem of wrongful convictions is episodic or systemic, and hence whether it occurs with sufficient regularity to warrant concern on a policy level, we have to know what instances count. Second, studying wrongful convictions to draw lessons about causes and remedies requires that we identify which cases we are going to examine. The data set has to be properly determined to include only (or as close as possible) cases of actual innocence.

At the individual case level, defining “exoneration” and “innocence” has implications for both the procedures and the substance that will govern post-conviction litigation based in whole or in part on claims of innocence. And for those who are successful at challenging their convictions, the definitions can determine the degree to which a freed individual is entitled or permitted to make a moral claim to rehabilitate his or her name—a matter not insignificant to anyone whose life has been shattered by a wrongful conviction.

The debate about the definition of “innocence” largely treats the question as identical for both policy and case litigation purposes, subsuming both under a general category of “wrongful conviction.” Typically, the definition runs something like, “the innocence movement focuses on wrongful convictions in the factual sense, where the wrong person is convicted for a crime, or is convicted for a crime that did not occur.”<sup>9</sup>

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<sup>8</sup> “Wrongful conviction” can mean either that an innocent person was wrongly convicted, or that, regardless of guilt or innocence, the conviction was unfair or obtained in violation of the rules or of the defendant’s rights. See Hughes, *supra* note 1, at 3–6; Zalman, *supra* note 1, at 1470. In discussions about the innocence movement, the phrase typically refers only to the former category—the wrongful conviction of a person who was factually innocent.

<sup>9</sup> Zalman, *supra* note 1, at 1470; see also EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932) (discussing and analyzing, in depth, sixty-five specific cases of wrongful convictions); Barry Scheck et al., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 8 (2000) (incorporating the factual innocence theme into a nonfiction work based on interviews, court documents, and anecdotes); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 45–46 (1987) (using the term “miscarriage of justice” to describe cases where factually innocent people are convicted); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 5 & n.13 (2002) (distinguishing between factual and legal innocence and adopting the factual innocence definition of innocent); Medwed, *supra* note 3, at 1551, 1555 (addressing the critiques of scholars who are skeptical of the innocence movement and factual innocence discourse); D. Michael Risinger, *Innocents Convicted: An Empirically*

While such a definition is appropriate and accepted, it is deceptively oversimplified. It masks the reality that deciding who counts as “the wrong person” can be difficult and unclear, and that there are multiple standards for determining innocence that are context dependent.

Some scholars break “innocence” into several separately defined categories. Margaret Raymond, for example, identifies what she calls “burden of proof innocence,” “legal innocence,” and “factual innocence.”<sup>10</sup> Cathleen Burnett also distinguishes three types of innocence, which she calls “actual innocence,” “factual innocence,” and “legal innocence.”<sup>11</sup> In a slightly different way, William Laufer recognizes three categories of innocence—again, legal innocence, actual innocence, and factual innocence—which he distinguishes by varying requisite degrees of proof.<sup>12</sup> I argue that these distinctions are largely meaningless in our system of justice and that there is really only one functional category of “innocence,” although how innocence is determined can vary depending on context.<sup>13</sup>

In some ways, the DNA exonerations, while clarifying the extent and nature of the problem of wrongful convictions, have simultaneously muddled the picture by creating a category of cases in which there is little, if any, doubt that the accused was wrongly convicted and was in fact innocent in a system that generally has no corresponding legal category for clear innocence. The innocence movement got its initial momentum from using new evidence—primarily DNA evidence—to prove factual, as opposed to “legal,” innocence. The concept of “innocence,” however, has no real legal meaning in most jurisdictions. In a legal system that presumes innocence unless and until guilt is established beyond a reasonable doubt, and generally permits or requires no corresponding finding or judgment of “innocent,”<sup>14</sup> it can be a vexing problem to determine

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*Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762–63 & n.2 (2007) (discussing the differences between factual innocence—whether no crime was committed at all or the wrong person is convicted—and legal innocence); Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 482 (2004) (“[F]actual innocence’ [is] roughly synonymous for did not commit the act that one is accused of having committed.”). Michael Risinger refers to these as cases involving “brute fact innocence” where “the defendant was not the perpetrator of the crime, and someone else was.” D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1298 (2004).

<sup>10</sup> Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001).

<sup>11</sup> Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975–79 (2002).

<sup>12</sup> William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995).

<sup>13</sup> See *infra* Part III.

<sup>14</sup> Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit*

when a person previously found “guilty” is entitled to relief from an unsound conviction as opposed to when a person may justifiably claim to be “innocent” and to have been “exonerated.” The DNA cases raised the expectation, for some, that “exoneration” and “innocence” are findings that can—and must—be established to levels of virtual certainty. But it turns out that even DNA cases come in varying shades of gray. There is no such thing as absolute proof of innocence, just as there is no such thing as absolute proof of guilt.

Claims of innocence in non-DNA cases can be even more tinged with gray tones, in part because of the inherent difficulty and ambiguity in trying to prove a negative. Claims of innocence based upon challenges to convictions resting upon recantations, or resting upon inherently unreliable forensic “science” evidence, are especially complicated and increasingly common examples of such gray-shaded innocence cases. For example, if a defendant was convicted of an arson offense or a child homicide based upon a theory of shaken baby syndrome, and new scientific evidence undermines or seriously challenges the scientific evidence underlying the state’s case, can the defendant who successfully obtains a reversal and dismissal of the charges claim to be “innocent”?<sup>15</sup> After all, while the new evidence may provide new grounds for challenging the prosecution’s proof of guilt,<sup>16</sup> it does not

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*the Innocent?*, 49 RUTGERS L. REV. 1317, 1322–23 (1997).

<sup>15</sup> For discussions of new scientific challenges to shaken baby syndrome and arson cases, see generally Molly Gena, Comment, *Shaken Baby Syndrome: Medical Uncertainty Casts Doubt on Convictions*, 2007 WIS. L. REV. 701 (2007) (exploring the affect medical disagreement over shaken baby syndrome has on wrongful homicide convictions); Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (And Non-Scientific) Experts*, 46 CRIM. L. BULL. 156, 177–80 (2010) (discussing the scientific experiments that support the position that violent shaking, alone, cannot cause shaken baby syndrome and the experiments which support the opposite); Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 12–15 (2009) (explaining the flawed science of shaken baby syndrome studies prior to 1999); JOHN J. LENTINI, SCIENTIFIC PROTOCOLS FOR FIRE INVESTIGATION 471–541 (2006) (discussing general common errors that occur in fire investigations because investigators do not apply the scientific method); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man*, NEW YORKER, (Sept. 7, 2009), [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann) (describing the possible wrongful conviction and execution of Cameron Todd Willingham in Texas in an arson case).

<sup>16</sup> In *State v. Edmunds*, for example, the court granted a new trial in a shaken baby syndrome case based on new evidence that:

[A] significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome.

necessarily conclusively prove the opposite: that the defendant did not commit the crime charged.<sup>17</sup>

This essay argues that—while the notion of “innocence” does indeed mean factual innocence, in the sense that the defendant committed no crime—to demand certainty is to demand the impossible, and that, in the end, the best we can or *should* do is rely on the legal standards that define guilt and, absent proof of guilt, presume innocence. Anything less than that invites endless controversy about subjective assessments of guilt and innocence,<sup>18</sup> unwarranted insult and injury to the innocent who are forced to live under a continuing cloud of suspicion, and erosion of some of our most fundamental constitutional principles. The standard definition of “exoneration” in the scholarly literature usually includes all cases in which a conviction was vacated based, in part, on evidence of innocence, by a court or executive, followed by no new trial or an acquittal at retrial.<sup>19</sup> Because that definition does not perfectly define who is factually innocent, (it can be both under-inclusive and over-inclusive), that definition is often considered different than the definition of “innocence.” This essay argues, however, that because our access to truth is imperfect, that definition is the only workable one we have for both “exoneration” and “innocence.” And because of variability between differing contexts and jurisdictions, this essay observes that there are multiple standards governing how much proof of innocence is required for exoneration, and hence for determining who is factually

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State v. Edmunds, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008). Prosecutors subsequently dismissed all charges against Edmunds, but nonetheless continued to insist publicly that Edmunds was guilty. See Melanie Radzicki McManus, *Oh, Baby: Audrey Edmunds is Rebuilding Her Life After Her Murder Conviction was Overturned*, MADISON MAGAZINE (July 2009), <http://www.madisonmagazine.com/Madison-Magazine/July-2009/Oh-Baby/>.

<sup>17</sup> [A] defendant who is convicted of a crime that never occurred faces the nearly impossible task of proving a negative in a context in which very strong proof is required. There is, for example, no way to prove that a fire was *not* caused by arson. At best, an arson defendant might convince the authorities that there was no evidence of specific telltale signs that the fire was deliberately set: multiple points of origin, the use of accelerants, etc.

Gross, *supra* note 4, at 183 (emphasis in original).

<sup>18</sup> Indeed, some of the leading innocence skeptics have recognized the difficulty with relying on subjective assessments of guilt or innocence, untethered to official findings. See, e.g., Cassell, *supra* note 5, at 571–73 (discussing the difficulty and impossibility of determining accurate numbers of wrongful convictions). Responding to critics like Cassell, Richard Leo has observed that “the claims of [pre-DNA innocence scholars] can always be disputed and impugned as the subjective interpretation of the scholar, no matter how flimsy the criticism.” Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 206 (2005).

<sup>19</sup> See Gross et al., *supra* note 2, at 524.

innocent.

This is not to say that innocent individuals in prison who have not been exonerated cannot be permitted to continue to claim innocence. Rather, this is an argument that, while objective truth is always important, it is ultimately always ambiguous in a world with imperfect knowledge. Thus, when we “officially” label people as “innocent” we have to use the legal definition; that legal definition is both necessary and sufficient. Convicted but factually innocent people can continue to claim to be innocent, and they should do so if they are in fact innocent. Their advocates can assert innocence on their behalf, in an effort to overturn their convictions. But until a court or executive makes a determination, that assertion is largely meaningless and unverifiable. By the same token, once a court or executive does vacate a conviction based on evidence of innocence, unless and until the person is convicted again, claims that the person is actually guilty are also meaningless, and indeed inappropriate from prosecutors who, having failed to prove guilt, have a duty to respect the constitutional presumption of innocence.

## II. DEFINING INNOCENCE FOR POLICY ANALYSIS

### A. *Counting Exonerations in the Era of DNA*

Defining “innocence” and “exoneration” is essential to an informed policy discussion. At its most basic level, coming to some understanding about what we mean by those terms is necessary to determine whether the criminal justice system does indeed produce such injustices at a rate of any significance, and whether we can, or should, do anything to prevent them. Until the DNA revolution that emerged at the close of the 1980s, most participants in and observers of the American criminal justice system rather smugly believed that the system was as foolproof as one could hope, and that wrongful convictions, while theoretically possible, were so unlikely as to be unworthy of any concern. As Sam Gross has put it: “We are not a modest nation. We frequently insist that the American criminal justice system (or in other contexts, the American medical system) is ‘the best in the world.’”<sup>20</sup> Amplified by this hubris, prior to the first DNA exoneration in 1989, “exonerations of falsely convicted defendants were seen as

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<sup>20</sup> Gross, *supra* note 4, at 174.

aberrational.”<sup>21</sup>

Now that the DNA exonerations have exploded the myth of virtual infallibility, defenders of the status quo, in a revisionist accounting, insist that the world has not really changed. They claim that there is no real need for innocence-based reforms because we have always known that any criminal justice system is fallible and inevitably creates some errors, but that the rate is so small as to be inconsequential. For example, Colorado District Judge Morris Hoffman, one of the more strident critics of the Innocence Movement,<sup>22</sup> while railing against what he calls the “myth of factual innocence,” reluctantly concedes that, “[o]f course, factually innocent people *are* wrongly arrested and wrongly convicted, as many innocence projects have demonstrated, and as humans have known since the dawn of time.”<sup>23</sup>

But, contrary to Judge Hoffman’s suggestion, the world has changed in terms of its recognition of the reality of wrongful convictions.<sup>24</sup> There was indeed a time not long ago when the notion of virtually any false convictions was rejected as fantasy. That sentiment was expressed perhaps most famously and colorfully by Judge Learned Hand, who wrote in 1923,

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.<sup>25</sup>

The first in-depth scholarly inquiry into the possibility of wrongful convictions, by Yale Professor Edwin Borchard in 1932,

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<sup>21</sup> Gross et al., *supra* note 2, at 523.

<sup>22</sup> See, e.g., Hoffman, *supra* note 5, at 664 (“It is my respect for the jurors and the jury system that puts me at odds with the Chicken Littles of Innocence who think wrongful conviction is, if not the rule, then at least a very common exception.”); see also Morris B. Hoffman, Op-Ed., *The ‘Innocence’ Myth*, WALL ST. J., Apr. 26, 2007 (“Exaggerations about the unreliability of the criminal justice system are not just matters of scholastic impurity and pedagogical extremism; they threaten to become self-fulfilling.”).

<sup>23</sup> Hoffman, *supra* note 5, at 668 (emphasis in original).

<sup>24</sup> Even while criticizing much about the innocence movement (from an entirely different perspective than Hoffman), Abbe Smith acknowledges that the innocence cases “have ushered in ‘an exciting new period of American criminal justice,’ a ‘transformation,’ that is truly ‘groundbreaking.’” Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 317 (2009–2010) (citing Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237; Medwed, *supra* note 3, at 1549; Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004), respectively).

<sup>25</sup> United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

was prompted by a bold assertion by a prosecutor in Worcester County, Massachusetts, who declared: “Innocent men are never convicted. Don’t worry about it . . . . It is a physical impossibility.”<sup>26</sup> More recently, former Attorney General Edwin Meese reflected that sentiment when he quipped: “But the thing is, you don’t have many suspects who are innocent of a crime. That’s contradictory. If a person is innocent of crime, then he is not a suspect.”<sup>27</sup> Accordingly, as Daniel Givelber has observed, “[i]n judicial opinions, the specter [of an innocent person convicted] is typically treated as being just that—a phantom, a straw man.”<sup>28</sup> Thus, Marvin Zalman has aptly concluded that, “In 1990 very few Americans thought of wrongful convictions as a problem. Most would have said that criminal justice was deficient in not catching, convicting, imprisoning, and executing enough criminals.”<sup>29</sup>

Even as evidence of wrongful convictions began to emerge in the years prior to the advent of DNA testing, critics dismissed the seriousness of the problem and the need for reform to prevent miscarriages of justice.<sup>30</sup> Stephen Markman and Paul Cassell, for example, wrote in 1988 that the risk of executing an innocent person “is too small to be a significant factor in the debate over the death penalty.”<sup>31</sup> And some members of the Supreme Court have continued to express profound confidence in the system’s ability to almost flawlessly sort out the innocent. As Justice O’Connor put it in 1993 in her concurring opinion in *Herrera v. Collins*, “[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections

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<sup>26</sup> EDWIN M. BORCHARD WITH E. RUSSELL LUTZ, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* vii (1970).

<sup>27</sup> Givelber, *supra* note 14, at 1328 & n.34 (quoting *Reagan Seeks Judges with “Traditional Approach,”* U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67 (interview with Edwin Meese, Attorney General)).

<sup>28</sup> *Id.* at 1317. See, e.g., *Schlup v. Delo*, 513 U.S. 298, 321 (1995) (“[H]abeas corpus petitions that advance a substantial claim of actual innocence are extremely rare.”).

<sup>29</sup> Zalman, *supra* note 1, at 1479–80; see also *id.* at 1482–83 (discussing public perception of the criminal justice system throughout history); Givelber, *supra* note 14, at 1331 (“The prevailing view is that the acquittals and dismissals that occur reflect an overly benign criminal justice system that releases the guilty in order to guarantee that no person is ever convicted.”); May & Viner, *supra* note 9, at 481 (“To the person on the street, the assumption is that those who are executed are those who are clearly guilty.”).

<sup>30</sup> See Siegel, *supra* note 1, at 1221 (“Prosecutors and law enforcement officials have shown substantial resistance to both the picture of the criminal justice system painted by the innocence movement and to many of the reforms the innocence movement has proposed.”).

<sup>31</sup> Stephen J. Markman & Paul G. Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988).

against convicting the innocent.”<sup>32</sup>

More recently, Justice Scalia has taken up the mantle of the innocence skeptics. Relying on an analysis by Joshua Marquis, among the most vocal of the innocence cynics,<sup>33</sup> Justice Scalia contended in 2006 in his concurring opinion in *Kansas v. Marsh*<sup>34</sup> that the available empirical data suggests an error rate in felony convictions of “.027 percent—or to put it another way, a success rate of 99.973 percent.”<sup>35</sup> Colorado District Judge Morris Hoffman, not to be outdone, in 2007 utilized a similar method of analysis to conclude that the wrongful conviction rate is in the neighborhood of .033 percent down to a floor of .0016 percent.<sup>36</sup>

These analyses of the scope of the problem are either embarrassingly simplistic or troublingly disingenuous—or both. These analyses rely upon a simple equation, putting *known* exonerations in the numerator and *all* felony convictions during the same time period in the denominator. The Scalia/Marquis analysis takes, as its starting point, a study by Samuel R. Gross and his colleagues that attempted to identify as many wrongful convictions as could be found, primarily through media searches, for the period of 1989–2003.<sup>37</sup> Scalia and Marquis then take that total—340 cases—and multiply it by a factor of more than ten (to be “conservative”), and assume 4000 wrongful convictions during that time period.<sup>38</sup> With 4000 in the numerator, Scalia and Marquis then put the total number of felony convictions for that time period—more than 15 million nationwide—in the denominator, to arrive at the astoundingly low error rate of .023 percent.<sup>39</sup>

Similarly, Hoffman begins with the Gross study and its count of 340 known wrongful convictions between 1989 and 2003.<sup>40</sup> Hoffman then “conservatively” assumes that the total might be 500 false

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<sup>32</sup> *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O’Connor, J., concurring); *see also* Risinger, *supra* note 9, at 767 n.9 (“In fairness to Justice O’Connor, it must be said that she invoked the near-perfection theme in order to anticipate a floodgates argument against her plea to keep the door open to actual innocence as a Constitutional ground for relief from a criminal conviction.”).

<sup>33</sup> *See generally* Marquis, *supra* note 5 (criticizing the innocence movement for portraying wrongful convictions as an “epidemic” and arguing that wrongful convictions are rare).

<sup>34</sup> *Kansas v. Marsh*, 548 U.S. 163 (2006).

<sup>35</sup> *Id.* at 198 (Scalia, J., concurring) (quoting Joshua Marquis, Op-Ed., *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23).

<sup>36</sup> Hoffman, *supra* note 5, at 673.

<sup>37</sup> *See* Gross et al., *supra* note 2.

<sup>38</sup> *See Marsh*, 548 U.S. at 197–98 (Scalia, J., concurring) (quoting Marquis, *supra* note 35).

<sup>39</sup> *Id.*

<sup>40</sup> Hoffman, *supra* note 5, at 671 & n.35.

convictions over the last two decades (inexplicably 3500 fewer than the Scalia/Marquis “conservative” estimate).<sup>41</sup> Hoffman then notes that, “[i]n the twenty years in which innocence projects have identified roughly 500 people wrongfully convicted after trial, there were roughly two million trials”<sup>42</sup> (barely recognizing that the Gross study actually tried to find wrongful convictions for a fifteen-year period, not the twenty-year period used by Hoffman in his denominator).<sup>43</sup> Hoffman then concludes that 500 trial errors out of two million trials produces “a wrongful trial conviction rate of only 0.033%.”<sup>44</sup> Taking it one step further, he notes that more than ninety-five percent of cases are not tried but are resolved by plea and, assuming a nearly non-existent error rate in plea cases, he concludes “that yields a lower bound for the overall error rate of the system at around 0.0016%.”<sup>45</sup>

As Gross has put it, “[g]iven what we knew by 2006, the charitable explanation for such assertion[s] is self-deception.”<sup>46</sup> To begin, we know that the error rate in guilty plea cases is far from de minimis; twenty-two of the first 265 DNA exoneration cases were guilty plea cases.<sup>47</sup> Moreover, it is quite likely that a huge proportion of false convictions arise in cases with charges other than rape and murder—and therefore not represented among the DNA exonerations, which are almost entirely rapes and murders—where the defendant accepts a plea offer to cut his or her losses or to just get the ordeal over with.<sup>48</sup> We know, for example, that in mass

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 673.

<sup>43</sup> Gross et al., *supra* note 2, at 523. Hoffman also ignores that Gross and his colleagues never sought to conduct or claimed to have conducted an exhaustive count of wrongful convictions for that period, because such a count is not possible. *See id.* at 526. Rather, their purpose was to identify as many wrongful convictions as they could, not to make a definitive count but rather so that they could have a sufficiently sizable data sample to permit analysis of the nature of wrongful conviction cases in America. *See id.* at 526–27.

<sup>44</sup> Hoffman, *supra* note 5, at 673.

<sup>45</sup> *See id.* Hoffman notes, however, that, if 1 in 100 guilty pleas is false—which he cannot fathom—that would produce an overall wrongful conviction rate of “just 1.95%.” *Id.*

<sup>46</sup> Gross, *supra* note 4, at 174.

<sup>47</sup> *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited May 24, 2011).

<sup>48</sup> “It is well known, for example, that many defendants who can’t afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted . . . . Some defendants who accept these deals are innocent, possibly in numbers that dwarf false convictions in the less common but more serious violent felonies, but they are almost never exonerated—at least not in individual cases.” Gross et al., *supra* note 2, at 536.

exonerations, such as those in Los Angeles, Dallas, and Tulia, Texas, *most* of the 135 innocent defendants who had been framed for illegal drug or gun possession pled guilty to the crimes they did not commit.<sup>49</sup> Because cases involving these types of crimes often produce comparatively short sentences that no one looks into on a systematic basis,<sup>50</sup> and because those cases almost never have DNA evidence, we simply do not know the magnitude of the error in such cases—but it surely far exceeds insignificant levels.

More fundamentally, the numerators and denominators chosen by both Scalia/Marquis and Hoffman are incorrect. Gross's list of 340 known wrongful convictions between 1989 and 2003 does not purport to be a full count.<sup>51</sup> It is not an accurate numerator; it is rather merely a sample drawn from happenstance—cases in which fortuitously the defendant was successful in overcoming the overwhelming obstacles to overturning a conviction, and fortuitously sufficient information was published about the case in the press or the case law to permit Gross and his researchers to find it. Hence, Gross cautions that “the true number of wrongful convictions is unknown and frustratingly unknowable.”<sup>52</sup> We know that Gross's list of 340 exonerations does not come anywhere close to covering all wrongful convictions in felony cases because it includes almost entirely rape and murder cases. Offenders convicted of rape make up less than ten percent of state prisoners and offenders convicted of murder or non-negligent homicide compose only thirteen percent of state prisoners. And these are overlapping categories; some offenders committed both a rape and a

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<sup>49</sup> Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD., 927, 931–32 (2008).

<sup>50</sup> See Gross et al., *supra* note 2, at 536 (“[N]obody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies—auto thefts or run-of-the-mill burglaries—and sentenced to probation, a \$2000 fine, six months in the county jail, or even eighteen months in state prison.”). Many innocence projects, for example, as a matter of policy only accept cases involving substantial un-served prison sentences. See, e.g., *How We Select Cases*, WIS. INNOCENCE PROJECT, <http://www.law.wisc.edu/fjr/clinical/ip/representation.html> (last visited May 24, 2011) (stating that one criteria for selecting cases requires that the person still have a minimum of seven years remaining in his/her sentence).

<sup>51</sup> See Gross et al., *supra*, note 2, at 525 (noting that the list of 340 known exonerations over the fifteen-year period they studied “is not exhaustive,” and that “[t]here is no national registry of exonerations, or any simple way to tell from official records which dismissals, pardons, etc., are based on innocence”).

<sup>52</sup> Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006).

murder.<sup>53</sup>

The denominator too is wrong—and by an enormous magnitude. The denominator includes *all* felony convictions, even though almost no wrongful convictions are counted for most categories of felony convictions. Gross has aptly described the fundamental flaw in the Scalia/Marquis (and equally the Hoffman) analysis in this way:

[It] ignore[s] the fact that almost all of these exonerations occurred in a few narrow categories of crime (primarily murder and rape) and that even within those categories many false convictions remain unknown, perhaps the great majority. By this logic we could estimate the proportion of baseball players who have used steroids by dividing the number of major league players who have been caught by the total of all baseball players at all levels: major league, minor leagues, semipro, college, and Little League—and maybe throwing in football and basketball players as well.<sup>54</sup>

More serious analyses of the scope of the problem of wrongful convictions paint a very different picture. The most rigorous attempt to date to identify appropriate numerators and denominators in the wrongful conviction equation was conducted by Michael Risinger, who examined the rate of wrongful convictions in capital rape-murder cases.<sup>55</sup> Risinger selected capital rape-murder cases because they comprise a knowable and accessible body of cases, serious enough to have received scrutiny in almost every instance, including almost always ultimately DNA testing.<sup>56</sup> Based on his analysis, Risinger found a wrongful conviction rate in this

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<sup>53</sup> See Gross et al., *supra* note 2, at 529, 531. Gross and his colleagues observe that “many defendants who are not on this list, no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated.” *Id.* at 527. They note that these totals do not include mass exonerations, such as the Rampart scandal in Los Angeles (in which 100–150 people were wrongly convicted by corrupt police) and the scandal in Tulia, Texas (in which a rogue police officer framed thirty-five innocent people), among numerous others. *Id.* at 533–34. The authors note that their totals also do not include people serving relatively short sentences—ninety-three percent of their cases involved sentences of more than ten years in prison. *Id.* at 535. And their total includes almost no guilty-plea cases; only twenty of the 340 exonerates in their database pled guilty, despite compelling evidence that innocent people plead guilty at alarming rates: “thirty-one of the thirty-nine Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles,” none of whom were counted in the Gross study. *Id.* at 535–36; see also Gross, *supra* note 4, at 181 (noting that six percent of the 360 exonerations cases studied were convictions based upon the entrance of a guilty plea).

<sup>54</sup> Gross, *supra* note 4, at 176.

<sup>55</sup> See Risinger, *supra* note 9.

<sup>56</sup> See *id.* at 761–62.

most serious type of case as falling somewhere between 3.3 and five percent.<sup>57</sup> Risinger also cautioned that we cannot know if that error rate applies to other categories of crimes as well; we simply cannot know whether the wrongful conviction rate is the same, higher or lower in other types of cases, because there is likely considerable “substructuring” within categories of cases.<sup>58</sup>

Samuel R. Gross and Barbara O’Brien have more broadly calculated a *minimum* wrongful conviction rate in capital cases in general. Gross and O’Brien calculated the exoneration rate for inmates who had been on death row at least fifteen years as of 2004, and for those who had been on death row at least twenty years.<sup>59</sup> They calculated the error rate by dividing the number of confirmed exonerations by the number of inmates sentenced to death during those time periods—a very conservative approach that determines an absolute minimum *known* error rate, with no attempt to assess an upper-limit error rate.<sup>60</sup> They nonetheless found an error rate of 2.3%.<sup>61</sup> Again, we cannot know if that error rate is applicable across the board to other categories of offenses, but Gross and O’Brien have noted that, “if the capital exoneration rate applied to all prison sentences, there would have been approximately 87,000 non-death-row exonerations from 1989 through 2003, more than 300 times the number reported.”<sup>62</sup>

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<sup>57</sup> *Id.* at 778–79.

<sup>58</sup> *Id.* at 782–88. Ronald Allen and Larry Laudan have questioned whether Risinger’s analysis tells us much about the error rate in most criminal cases because “Risinger’s entire sample involved trials, yet most criminal charges are resolved by pleas.” Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 69 (2008). Assuming a minuscule error rate in plea cases (because Allen and Laudan count only 9 guilty plea cases among the first 200 DNA exonerations), Allen and Laudan suggest that the error rate for all cases, including those resolved by plea, might be 0.84%. *Id.* at 71. Allen and Laudan, however, overlook that the first 200 DNA exonerations were drawn almost entirely from the most serious categories of cases—rapes and murders—in which, given the consequences of a conviction, one would expect a comparatively high trial rate and low rate of false pleas. *See* Gross & O’Brien, *supra* note 49, at 930 (observing that “it’s entirely possible that most wrongful convictions—like 90% or more of all criminal convictions—are based on negotiated guilty pleas to comparatively light charges”) (footnote omitted). It also ignores that even among serious offenses like sexual assaults and homicides, negotiated pleas will reduce the severity of the charges, the severity of the penalty, the incentives to challenge the conviction (given the risks of upsetting the plea bargain), and the lack of attention provided to plea cases in postconviction and appellate proceedings. Assuming a minuscule rate of false guilty pleas renders Allen and Laudan’s error rate estimate virtually meaningless, and certainly unreliably low.

<sup>59</sup> Gross & O’Brien, *supra* note 49, at 945–47.

<sup>60</sup> *Id.* at 945.

<sup>61</sup> *Id.*; *see also* Gross, *supra* note 4, at 177 (discussing the analysis undertaken by Gross and O’Brien).

<sup>62</sup> Gross, *supra* note 4, at 178 (citing Gross & O’Brien, *supra* note 49, at 945–47).

More impressionistic studies also consistently suggest error rates far higher than the minuscule rates postulated by Scalia/Marquis and Hoffman. Kalven and Zeisel's study of more than 3,500 criminal cases found significant disagreement between judge and jury about the verdict, suggesting the potential for substantial error.<sup>63</sup> In that study, judges would have convicted where the jury acquitted in almost twenty percent of the cases, and judges would have been more lenient than the jury in another three percent.<sup>64</sup> An English study by John Baldwin and Michael McConville compared the jury's verdict in 288 trials in Birmingham, England, between February 1975 and September 1976, "with the observations of . . . the judge, the police officer in charge of the case, the defense solicitor, and the prosecution solicitor."<sup>65</sup> The study "found that two or more officials . . . doubted the validity of a conviction in more than 5% (15) of the cases in the sample."<sup>66</sup> "[T]he police officer in charge of the case questioned the conviction in thirteen out of the fifteen cases, defense solicitors in twelve of the cases, the judge in eight of the [fifteen] cases, and the prosecuting solicitor in seven."<sup>67</sup> Others have surveyed criminal justice officials prior to the enlightenment ushered in by the DNA exonerations to obtain their estimates of error, with the results averaging between 0.5 percent and two percent.<sup>68</sup> With approximately one million felony convictions each year, those assessments would mean the criminal justice system generates between 5000 and 10,000 wrongful convictions each year.<sup>69</sup> And with an imprisonment rate in those cases of about forty percent, that means approximately 2000 to 8000 wrongful prison sentences each year.<sup>70</sup>

Pre-trial DNA testing also suggests that the system creates far

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<sup>63</sup> See HARRY KALVEN, JR. & HANS ZEISEL WITH THOMAS CALLAHAN & PHILIP ENNIS, *THE AMERICAN JURY* 66–67 (Phoenix ed., Univ. of Chicago 1971) (1966).

<sup>64</sup> *Id.* at 68; see also Givelber, *supra* note 14, at 1339 (analyzing the Kalven and Ziesel study).

<sup>65</sup> Givelber, *supra* note 14, at 1339 & n.68 (citing JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 26–27 (1979)).

<sup>66</sup> *Id.* at 1340 (citing BALDWIN & MCCONVILLE, *supra* note 65, at 68–87).

<sup>67</sup> *Id.*

<sup>68</sup> See C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 *CRIME & DELINQ.* 518, 522–23 (1986); Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 *CRIME & DELINQ.* 436, 452–54 (2007); see also Zalman, *supra* note 1, at 1472 ("A few studies based on actual cases, however, have estimated wrongful *death sentence* rates at between 1.5 and five percent." (emphasis in original)).

<sup>69</sup> Zalman, *supra* note 1, at 1472; see also Givelber, *supra* note 14, at 1343.

<sup>70</sup> See Givelber, *supra* note 14, at 1343.

more than a minuscule number of wrongful convictions. Consistently, pretrial DNA testing by the FBI and other laboratories in sexual assault cases has revealed that the primary suspect—identified by other traditional sorts of evidence—was innocent in more than twenty-five percent of the cases.<sup>71</sup> We can only guess how many of those innocent individuals would have been convicted—and are still being convicted in non-DNA cases—if the DNA testing had not cleared them.

A small data set study of rape convictions also suggests an alarmingly high rate of error in that category of case as well. In 2004, Virginia discovered that a lab analyst had preserved biological samples from every rape case she handled from 1973 through 1988.<sup>72</sup> Seizing on this fortuity, the governor ordered analysis of the DNA in a randomly drawn sample of those cases.<sup>73</sup> Thirty-one cases were selected at random and twenty-two yielded useful DNA profiles.<sup>74</sup> Of those twenty-two rape convictions, the DNA proved that two were erroneous—a wrongful conviction rate of nine percent.<sup>75</sup>

### *B. The Emergence of Innocence Consciousness*

Because of this impressive evidence of a disturbing number of wrongful convictions, real change has occurred in our perspective of the criminal justice system. That change has come despite our inability to pinpoint with any precision the total number of wrongful convictions or a definitive error rate for the system. In part, that change has come because we have realized that once the rate of wrongful convictions rises above the trivial level—and the evidence convincingly tells us that is now so—then we need not identify a precise rate of error to recognize the need for action. The

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<sup>71</sup> *Id.* at 1357. Former FBI Director William Sessions reports that, when the FBI created its DNA lab under his direction and began doing DNA testing in pending rape cases, “[t]he results of the first 100 tests in 1988 astonished me. In three out of 10 cases, not only did we have the wrong person, but the guilty person was still at large.” William S. Sessions, *Obama’s Testing Test: Why is the Justice Department on the Wrong Side of a Supreme Court Case About DNA Evidence?*, SLATE (Feb. 27, 2009), <http://www.slate.com/id/2212474/>. “Fifteen years later, this rate remains virtually the same. Approximately 25 percent of DNA tests do not produce a match.” William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASH. POST, Sept. 21, 2003, at B02, available at <http://www.washingtonpost.com/ac2/wp-dyn/A37776-2003Sep19?>

<sup>72</sup> See Gross, *supra* note 4, at 177.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 177 & n.3.

<sup>75</sup> See *id.* at 177.

question then becomes not so much how many wrongful convictions there are, but whether we can do anything to reduce the rate of error. *Any* wrongful convictions are too many if they can be avoided without imposing too much strain on the system. In this sense, as one prosecutor at a conference on preventing wrongful convictions asserted, the question is not one of how many innocents are wrongly convicted, but simply whether we can do better. Are there best practices that can be implemented to reduce that number, whatever it is?

In this sense, the issue can be analogized to public transportation disasters, such as airplane crashes. The rate of airline crashes is minuscule; in 2007, the airline industry experienced only one fatal accident in about every 4.5 million departures.<sup>76</sup> Nonetheless, we continue to take airline crashes very seriously, and do all we can to reduce the accident rate as much as possible.

The rate of wrongful conviction is clearly much higher than that of airline crashes. And, like airline safety, there is much we can do to improve the reliability of the criminal justice system. The imperative is there, then, to learn about and implement the best practices that can make the system function more reliably.<sup>77</sup> And that process has begun.

Virtually all commentators agree that recognition of the reality of wrongful convictions and the imperative to respond to the problem occurred around 1990, coinciding with the beginning of the parade of DNA exonerations.<sup>78</sup> Since then, “[i]nnocence consciousness [has]

<sup>76</sup> Matthew L. Wald, *Fatal Airplane Crashes Drop 65%*, N.Y. TIMES, Oct. 1, 2007, at C1, available at <http://www.nytimes.com/2007/10/01/business/01safety.html>.

<sup>77</sup> Previously, I have argued that many, if not most, of the reforms suggested by the innocence cases can be implemented with little or no cost to our interest in obtaining convictions of the guilty; they are, in that sense, truly “best practices.” See *Toward a New Paradigm of Criminal Justice*, *supra* note 1.

<sup>78</sup> Zalman, *supra* note 1, at 1479, 1487–89. In 2004, Lawrence Marshall wrote: Only ten years ago some very reasonable people believed that the frequency of wrongful convictions was so low that the issue was not worth a place in the public policy debate. Only ten years ago, some very reasonable people believed that our system was so committed to accuracy, so replete with procedural protection, that it was virtually unthinkable that innocent defendants would be convicted in any criminal case, much less a capital case. Today, we understand that this confidence was misplaced. Marshall, *supra* note 2, at 575. Similarly, Richard Leo and Jon Gould have observed, [p]rior to 1989, the first year that post-conviction DNA testing was used to establish innocence, virtually all observers assumed that the innocent were rarely convicted, if at all, especially in capital cases. Since 1989, however, there has been a growing recognition in popular culture and among criminal justice professionals that wrongful convictions occur regularly in the American criminal justice system. Richard A. Leo and Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 8 (2009) (footnote omitted).

replace[d] a belief that the justice system almost never convicts an innocen[t] person.”<sup>79</sup>

In recent years, innocence consciousness has begun to make its way into the perspectives and decisions of judges, up to the highest levels. In his dissenting opinion in *Kansas v. Marsh* in 2006—the dissenting opinion that provoked Justice Scalia’s embarrassing analysis of the scope of the wrongful conviction problem—Justice Souter wrote that, “[t]oday, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.”<sup>80</sup> Applying that concern in 2008, the Court held in *Kennedy v. Louisiana* that the Eighth Amendment prohibits “the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.”<sup>81</sup> Citing Gross’s research on wrongful convictions, among others, as well as an *amicus* brief filed by the National Association of Criminal Defense Lawyers and twelve Innocence Projects, the Court reasoned, in part, that “[t]he problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution’ in some child rape cases.”<sup>82</sup> Similarly, in 2002 the Court in *Atkins v. Virginia* ruled that executing the mentally retarded is unconstitutional, in part because the reduced capacity of mentally retarded defendants increases the risk of wrongful conviction.<sup>83</sup> The Court stated that it “cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.”<sup>84</sup>

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<sup>79</sup> Zalman, *supra* note 1, at 1468; see also Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 205–06 (2005) (“DNA testing has established factual innocence—as opposed merely to procedural innocence—with certainty in numerous post-conviction cases. As a result of DNA, it has now become widely accepted in the space of just a few years that wrongful convictions occur with regular and troubling frequency in the American criminal justice system, despite our high-minded ideals and numerous constitutional rights.” (citations omitted)).

<sup>80</sup> *Kansas v. Marsh*, 548 U.S. 163, 207–08 (2006) (Souter, J., dissenting).

<sup>81</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008).

<sup>82</sup> *Id.* at 443 (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). Justice Breyer also relied upon the newly recognized risk of wrongful conviction as part of his rationale for concurring in the Court’s ruling in *Ring v. Arizona*. There the Court held that the Constitution requires the decision whether sufficient aggravating circumstances exist to permit imposition of the death penalty is one that must be made by juries, rather than judges. *Ring v. Arizona*, 536 U.S. 584, 616–17, 618–19 (2002) (Breyer, J., concurring).

<sup>83</sup> *Atkins*, 536 U.S. at 320–21.

<sup>84</sup> *Id.* at 320 n.25.

Other justices have echoed these concerns about wrongful convictions. In a speech in Minneapolis in 2001, Justice O'Connor stated, "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed."<sup>85</sup> And Justice Stevens, in a speech in Columbus, Ohio, in 2010 asserted that modern pressures on the judicial system have increased the chances that an innocent person could be wrongly convicted and sentenced to death; with the advent of DNA testing, he said, "we're more aware of the risk than we might have been before."<sup>86</sup>

In *House v. Bell*,<sup>87</sup> in 2006, the Court exhibited real sensitivity to the possibility of innocence when it applied the *Schlup v. Delo* "gateway" exception to habeas corpus procedural default rules<sup>88</sup> and found that the possibility of actual innocence was sufficiently great to permit House to proceed on his otherwise defaulted claims.<sup>89</sup> In 2009, in *Corley v. United States*,<sup>90</sup> the Court relied in part on the "mounting empirical evidence that [police interrogation] pressures can induce a frighteningly high percentage of people to confess to crimes they never committed"<sup>91</sup> to preserve a portion of the *McNabb-Mallory* rule rendering some confessions inadmissible when obtained during periods of detention that violate the prompt presentment requirement of Federal Rule of Criminal Procedure 5(a).<sup>92</sup> In *Melendez-Diaz v. Massachusetts*, the Court observed that "discredited forensics" have contributed to a significant proportion of the known wrongful convictions.<sup>93</sup> Relying in part on an *amicus*

<sup>85</sup> O'Connor Questions Death Penalty Fairness: Suggests Post-Conviction DNA Testing, *Defense Counsel Standards*, ABC NEWS (July 3, 2001), <http://abcnews.go.com/US/story?id=92961&page=1>.

<sup>86</sup> Joan Biskupic, *Stevens: Risk of Wrongful Sentences Higher*, USA TODAY, [http://www.usatoday.com/news/washington/judicial/2010-05-05-stevens\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-05-05-stevens_N.htm) (last updated May 11, 2010).

<sup>87</sup> *House v. Bell*, 547 U.S. 518 (2006). In the course of its decision, the Court referenced an *amicus* brief filed by the Innocence Project, Inc. on a forensic science issue. *Id.* at 529.

<sup>88</sup> *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

<sup>89</sup> *House*, 547 U.S., at 554–55.

<sup>90</sup> *Corley v. United States*, 129 S. Ct. 1558 (2009).

<sup>91</sup> *Id.* at 1570 (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906–07 (2004)).

<sup>92</sup> *Id.* (referencing *Mallory v. United States*, 354 U.S. 449, 455–56 (1957); *McNabb v. United States*, 318 U.S. 332, 343–44 (1943)).

<sup>93</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009) (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006)) (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009)); COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD XX (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter STRENGTHENING FORENSIC SCIENCE].

brief filed by the Innocence Network “discussing cases of documented ‘drylabbing’ where forensic analysts report results of tests that were never performed,” the Court held that the Confrontation Clause prohibits the introduction of forensic science evidence by certified report rather than through live testimony subject to cross-examination.<sup>94</sup> The Court’s response to the evidence of wrongful convictions has by no means been consistent,<sup>95</sup> but at least in some significant decisions such as these, innocence consciousness is clearly permeating the High Court.

Growing innocence consciousness has played a dramatic role in policy discussions in other domains as well. For example, significant reforms involving preservation of and post-conviction access to DNA evidence,<sup>96</sup> eyewitness identification procedures,<sup>97</sup> prosecutorial ethics,<sup>98</sup> and requirements for electronic recording of custodial interrogations of suspects;<sup>99</sup> new attention to the

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<sup>94</sup> *Id.* at 2536–37.

<sup>95</sup> In other cases the Court has remained stubbornly resistant to the potential for error in the criminal justice system. In *Herrera v. Collins*, for example, the Court infamously declared that in most cases, a showing of “actual innocence” does not state a freestanding due process claim. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). More recently, in *District Attorney’s Office for the Third Judicial District v. Osborne*, the Court found no due process violation in Alaska’s refusal to provide post-conviction DNA testing, even though the state conceded that the testing in that case had the potential to conclusively prove actual innocence. *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2322 (2009). *Osborne*, however, does not turn its back entirely on the plight of the innocent, and does not—contrary to popular misunderstanding—hold that the Due Process Clause provides no right to post-conviction DNA testing under any circumstances. To the contrary, *Osborne* holds that state law can create a due process liberty interest in post-conviction access to biological evidence of innocence. *Id.* at 2319. And *Osborne* recognizes that “DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” *Id.* at 2312. *Osborne* merely holds that *Osborne* had not proven a due process violation because he had not shown that Alaska had entirely denied him a procedure for accessing the evidence for DNA testing. *Id.* at 2320–21.

<sup>96</sup> See, e.g., Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004); Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2001).

<sup>97</sup> The literature on eyewitness identification reforms is much too voluminous to be fully cited here. Examples of the literature *supra* note 1, at 148–60; Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); U.S. DEPT OF JUSTICE, NCJ 178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>; N.C. ACTUAL INNOCENCE COMM’N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION, available at [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Identification.html](http://www.innocenceproject.org/docs/NC_Innocence_Commission_Identification.html).

<sup>98</sup> The American Bar Association, for example, has recently adopted a new model ethics rule requiring prosecutors to take appropriate remedial steps when they learn about evidence of a convicted individual’s innocence. MODEL RULES OF PROF’L CONDUCT R. 3.8 (2007).

<sup>99</sup> A growing number of jurisdictions now require, by judicial decision or statute, the electronic recording of custodial interrogations. An even larger number of police departments voluntarily record interrogations as a means of preventing false confessions and helping the

unreliability of jailhouse informant testimony;<sup>100</sup> and, most recently, serious concern about forensic science evidence<sup>101</sup> can all be traced to the lessons learned from the innocence cases.<sup>102</sup>

### C. Defining Innocence So We Can Count Innocents

All of this, of course, begs the question of what counts as a wrongful conviction for purposes of examining the scope and nature of the problem. While we do not need a specific count of wrongful convictions to understand that they occur and that they must be addressed,<sup>103</sup> researching and understanding their causes and remedies nonetheless still requires an appropriate definition of

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system obtain reliable information. For a partial list of these jurisdictions and rules, see D.C. CODE, § 5-116.01 (2001); 725 ILL. COMP. STAT. 5/103-2.1(c) (2010); ME. REV. STAT. ANN. tit. 25, § 2803-B(K)(1)(K) (2009); N.M. STAT. ANN. § 29-1-16 (West 2011); N.C. GEN. STAT. § 15A-211(d) (2009); TEX. CRIM. PROC. CODE ANN. § 38.22 (Vernon 2011); WIS. STAT. §§ 968.073, 938.195 (2011); *Stephan v. Alaska*, 711 P.2d 1156, 1158 (1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *In re Jerrell*, 699 N.W.2d 110, 123 (Wis. 2005); *Toward a New Paradigm of Criminal Justice*, *supra* note 1, at 161–65; Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005).

<sup>100</sup> See, e.g., 725 ILL. COMP. STAT. 5/115-21(c) (2003) (requiring pretrial reliability hearings for informant testimony); *Dodd v. State*, 993 P.2d 778, 784 (Oka. Crim. App. 2000) (requiring “complete disclosure” of all information about an informant needed to evaluate his or her credibility); see also Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006) (suggesting a “pre-trial reliability hearing” for informant testimony and providing “a sample motion” for such a hearing, after discussing the relationship between informants and wrongful convictions); *Toward a New Paradigm of Criminal Justice*, *supra* note 1, at 169–71 (discussing ways to “neutralize” informant witness testimony).

<sup>101</sup> See, e.g., STRENGTHENING FORENSIC SCIENCE, *supra* note 93 (discussing the use of forensic science in crime scene investigation, admission in litigation, method and science behind its use, and suggested improvements); Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL’Y REV. 381 (2004) (cautioning that forensic science evidence should be more closely monitored in criminal cases, as faulty forensic science evidence contributes to wrongful convictions); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for the Truth*, 38 SETON HALL L. REV. 893, 929–72 (2008) (noting the disadvantage that criminal defendants have in challenging prosecutorial forensic science experts); *Toward a New Paradigm of Criminal Justice*, *supra* note 1, at 166–68 (providing a brief overview of the use of forensic science evidence in criminal cases); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL’Y & L. 439 (1996) (describing specific exonerations and the part DNA and forensic evidence played in their convictions).

<sup>102</sup> See *Toward a New Paradigm of Criminal Justice*, *supra* note 1, at 147–71; see also Smith, *supra* note 24, at 317 (“[T]he publicity attending exonerations . . . [led] to important legislative changes and some new police practices.”).

<sup>103</sup> See Leo & Gould, *supra* note 78, at 29 (“[I]t is not necessary to know the incidence or prevalence of a phenomenon to study it empirically or scientifically . . . . Scholars need not exaggerate the significance of the ‘dark figure’ of wrongful conviction or the implications of imperfect knowledge or the absence of pristine pre-existing data sets.”).

what counts as an exoneration and hence what counts as innocence.

### 1. Beyond Subjective Assessments of Innocence

Critics of some of the early (mostly pre-DNA) wrongful conviction literature questioned the methodology used by researchers such as Bedau and Radelet, and Leo and Ofshe—who had put together some of the pre-DNA compilations of possible or likely wrongful convictions.<sup>104</sup> Bedau and Radelet counted cases in which they “believe[d] a majority of neutral observers, given the evidence at [their] disposal, would judge the defendant in question to be innocent.”<sup>105</sup> Leo and Ofshe reviewed case materials and secondary sources to categorize their cases as “highly probable” or “probabl[y]” innocent, and “proven” innocent.<sup>106</sup> Paul Cassell, for example, criticized “the subjective determination of ‘innocence’ in the Leo-Ofshe collection,”<sup>107</sup> and went to great lengths to dispute the conclusion of innocence in a selected number of the Leo and Ofshe cases. Cassell and his colleague Stephen Markman employed a similar approach to challenge what they deemed were Bedau and Radelet’s “subjective” assessments of probable innocence in their work.<sup>108</sup> Cassell has argued that a more “sensible” approach to identifying wrongful convictions is to restrict “research to cases of ‘undisputed’ misidentifications—those in which there was a clear determination of innocence, preferably from the prosecuting authority that originally charged the defendant.”<sup>109</sup>

Cassell’s formulation, however, is itself flawed by the same defect that he attaches to the work of researchers like Bedau and Radelet, and Leo and Ofshe. His formulation also turns on a subjective assessment of guilt or innocence, this time by the prosecutor. But prosecutors, especially in an adversarial process, have no more

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<sup>104</sup> Bedau & Radelet, *supra* note 9; 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). Leo and Ofshe’s list was actually a list of false confessions. Some of those confessions, but not all, led to wrongful convictions. *See id.* at 435–36.

<sup>105</sup> Bedau & Radelet, *supra* note 9, at 47.

<sup>106</sup> Leo & Ofshe, *supra* note 104, at 436.

<sup>107</sup> Cassell, *supra* note 5, at 571.

<sup>108</sup> Markman & Cassell, *supra* note 31, at 122–23. Bedau and Radelet responded with a spirited defense of their methodology and judgments. *See* Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

<sup>109</sup> Cassell, *supra* note 5, at 581.

legitimate claim to objective truth than independent researchers.<sup>110</sup> Prosecutors, in many—if not most—cases, have greater access to case information than researchers, but not always more reliable evidence than the defense, which claims innocence, or more relevant and reliable information than the court, which might at least find a failure of proof of guilt. Moreover, innate cognitive biases and institutional pressures make it very difficult for prosecutors, who have invested so much in proving guilt, to step back and objectively consider the possibility that they were wrong.<sup>111</sup> Prosecutors in our system are charged with the duty of being “ministers of justice.”<sup>112</sup> But, in a role that often conflicts with that ideal, they are also expected to be zealous advocates. Especially given those conflicting roles, prosecutors have no unique moral or legal claim of access to the truth.

Indeed, the factual record in the DNA era shows that prosecutors have been far from objective or reliable in their assessments of guilt and innocence, even in the face of compelling proof of innocence. “Prosecutors and law enforcement officials have shown substantial resistance to both the picture of the criminal justice system painted by the innocence movement and to many of the reforms the innocence movement has proposed.”<sup>113</sup> In individual cases, prosecutors often go to remarkable lengths to protect their convictions, even to the point of taking “bizarre positions”<sup>114</sup> that “often pass[ ] the bounds of rationality.”<sup>115</sup> Michael Risinger

<sup>110</sup> Cassell notes that “police and prosecutors would seem to have ethical obligations to reverse genuine cases of wrongful conviction and, in a number of cases, have in fact done so.” Cassell, *supra* note 5, at 581. While that is true, those ethical duties often conflict with their roles as adversarial advocates in the criminal justice system, and prosecutors frequently refuse to acknowledge innocence, even when confronted with overwhelming proof of innocence. See *infra* notes 112–50 and accompanying text.

<sup>111</sup> See, Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140–44 (2004); Amy Bach, *Extraordinary Wrongful Convictions—Why Measurement Matters*, 73 ALB. L. REV. 1219, 1221 (2010).

<sup>112</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39–40 (2009); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301–02 (1996); Medwed, *supra* note 111, at 132.

<sup>113</sup> Siegel, *supra* note 1, at 1221.

<sup>114</sup> Scheck et al., *supra* note 9, at 248.

<sup>115</sup> Risinger, *supra* note 9, at 765.

observes that “[o]ne can apparently hypothesize ‘bad fiction’ scenarios in regard to almost any case—usually, I might add, inconsistent with the theory underlying the original conviction . . . . The tenacity with which prosecutors undertake such flights of fancy has been variously noted.”<sup>116</sup> Many observers have noted that it is not unusual for prosecutors, when confronted with such compelling evidence as DNA from semen in a rape case that excludes the suspect, to hypothesize what Barry Scheck and Peter Neufeld have called the presence of an “unindicted co-ejaculator”<sup>117</sup>—even when such a phantom co-perpetrator was never part of the prosecution’s theory of the case.<sup>118</sup>

A few examples illustrate this point. In the course of articulating his challenge to the subjective determinations of innocence made by Leo and Ofshe in their study of false confessions, Paul Cassell himself noted in 1999 that “[p]rosecutors continue to believe that Earl Washington was guilty of rape and murder.”<sup>119</sup> Washington had been convicted of a 1982 rape and murder in Virginia, for which he was sentenced to death.<sup>120</sup> In 1993, DNA tests on a semen stain excluded Washington.<sup>121</sup> Nonetheless, then-Governor Wilder refused to grant a pardon—Washington was time barred by then from seeking relief in court—and instead commuted his sentence to life imprisonment, reasoning that Washington could have been guilty if he had an accomplice who left the semen.<sup>122</sup> In 2000, a year after Cassell wrote that “[p]rosecutors continue to believe that Earl Washington was guilty,”<sup>123</sup> new DNA tests not only excluded Washington but also “implicated a convicted serial rapist, Kenneth Tinsley.”<sup>124</sup> In light of this new evidence, in October 2000, newly elected Governor Gilmore granted Washington an absolute

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<sup>116</sup> *Id.* at 769 n.12.

<sup>117</sup> Scheck et al., *supra* note 9, at 248; *see also* Hillary S. Ritter, Note, *It’s the Prosecution’s Story, but They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 *FORDHAM L. REV.* 825, 844 (2005) (noting that in Earl Washington’s case the prosecutors used the “unindicted co-ejaculator theory”).

<sup>118</sup> *See* Risinger, *supra* note 9, at 769 n.12; Ritter, *supra* note 117, at 844; Scheck et al., *supra* note 9, at 248; Smith, *supra* note 24, at 323 n.60.

<sup>119</sup> Cassell, *supra* note 5, at 582.

<sup>120</sup> *Know the Cases: Earl Washington*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Earl\\_Washington.php](http://www.innocenceproject.org/Content/Earl_Washington.php) (last visited May 24, 2011) [hereinafter *Know the Cases: Earl Washington*].

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*; Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 *NEW ENG. L. REV.* 639, 643–44 (2001).

<sup>123</sup> Cassell, *supra* note 5, at 582.

<sup>124</sup> Gross et al., *supra* note 2, at 526 n.8.

pardon.<sup>125</sup> Four years later “new DNA tests, commissioned by Washington’s attorneys over the state’s objections conclusively confirmed Tinsley’s guilt and reconfirmed Washington’s innocence.”<sup>126</sup> In 2006, “a federal jury awarded . . . [Washington] \$2.25 million . . . ruling that his confession to a rape and murder he did not commit was deliberately fabricated by a state police investigator.”<sup>127</sup>

In Texas, after Roy Criner was convicted of a 1986 rape and murder of a young girl, post-conviction DNA testing on semen from the victim’s body excluded Criner.<sup>128</sup> Nonetheless, prosecutors resisted Criner’s claim of innocence and convinced the Texas Court of Criminal Appeals that the DNA evidence was insufficient to prove innocence because Criner could have been wearing a condom, failed to ejaculate, or the semen could have been from a prior consensual sexual encounter—although those theories had never been presented in the case previously.<sup>129</sup> Criner then obtained DNA testing on a cigarette found next to the victim’s body.<sup>130</sup> That testing revealed the presence of DNA from both the victim and the same male—not Criner—who was the source of the semen, establishing that the same man who smoked the cigarette with the victim just before her death deposited the semen.<sup>131</sup> In 2000, based on this evidence, Criner was finally exonerated and freed.<sup>132</sup>

Chaunte Ott was convicted in Wisconsin for the murder of a sixteen-year-old runaway in 1995.<sup>133</sup> After Ott was convicted, DNA testing excluded Ott as the source of semen in the victim’s body.<sup>134</sup> Prosecutors insisted that the DNA was unrelated to the crime and refused to agree to his release.<sup>135</sup> In 2007, prosecutors notified Ott’s counsel that the DNA from the semen matched DNA taken from the

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<sup>125</sup> *Id.*; Neufeld, *supra* note 122, at 644; *Know the Cases: Earl Washington*, *supra* note 120.

<sup>126</sup> Gross et al., *supra* note 2, at 526 n.8 (citations omitted).

<sup>127</sup> Zinie Chen Sampson, *Exonerated Ex-inmate Awarded Millions Jury Finds Police Detective Fabricated Confession in Rape, Murder*, CHARLESTON GAZETTE, May 6, 2006, at 9A, available at 2006 WLNR 7893536.

<sup>128</sup> *Know the Cases: Roy Criner*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Roy\\_Criner.php](http://www.innocenceproject.org/Content/Roy_Criner.php) (last visited May 24, 2011).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Know the Cases: Chaunte Ott*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Chaunte\\_Ott.php](http://www.innocenceproject.org/Content/Chaunte_Ott.php) (last visited May 24, 2011) [hereinafter *Know the Cases: Chaunte Ott*].

<sup>134</sup> *Id.* Ott was represented by attorneys of the Wisconsin Innocence Project at the University of Wisconsin Law School. *Id.* I am co-director of the Wisconsin Innocence Project.

<sup>135</sup> *Id.*

bodies of two other women, who had also been murdered in the same neighborhood as the victim in Ott's case.<sup>136</sup> Prosecutors continued to insist, however, that the DNA evidence was irrelevant and that Ott was still guilty.<sup>137</sup> They contended that the DNA of the apparent serial killer just happened to be found on the victim's body coincidentally, and did not "cast any doubt on [Ott's] guilt."<sup>138</sup> Accepting that argument, the trial court judge ruled that the DNA did not undermine Ott's conviction.<sup>139</sup> Finally, though prosecutors continued to fight Ott's exoneration, an appellate court reversed Ott's conviction because of the DNA link to an apparent serial killer,<sup>140</sup> and prosecutors eventually dismissed the charges, never conceding Ott's innocence.<sup>141</sup> The DNA from the victim's body was eventually linked to a man named Walter Ellis, Milwaukee's now infamous "North Side Strangler," who has been implicated by DNA testing in at least nine rape-murders in the same area in Milwaukee.<sup>142</sup> In May 2010, the Wisconsin State Claims Board found by clear and convincing evidence that Ott is actually innocent, and awarded him the maximum compensation allowed under state law.<sup>143</sup> Prosecutors declined to make a recommendation on compensation.<sup>144</sup>

In Maryland, Kirk Bloodsworth was the first inmate sentenced to death to be exonerated by DNA evidence when testing showed that the semen from the nine-year-old rape and murder victim's body was not Bloodsworth's.<sup>145</sup> Nine years after Bloodsworth's exoneration, the chief prosecutor "said police still believe [Bloodsworth] did it" and that she herself was "not sure."<sup>146</sup>

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<sup>136</sup> See *State v. Ott*, No. 2008AP34, 2008 WL 5337081, at \*2 (Wis. Ct. App. Dec. 23, 2008).

<sup>137</sup> *Id.* at \*2-3.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*2.

<sup>140</sup> *Id.* at \*5.

<sup>141</sup> See *Know the Cases: Chaunte Ott*, *supra* note 133.

<sup>142</sup> Pete Kotz, *Milwaukee Serial Killer: Police Have Now Linked Walter Ellis to 9 Murders... and Counting*, TRUE CRIME REPORT (Sept. 8, 2009), [http://www.truecrimereport.com/2009/09/milwaukee\\_serial\\_killer\\_police.php](http://www.truecrimereport.com/2009/09/milwaukee_serial_killer_police.php); *The Winding Road of Homicides*, SPINGOLA FILES (May 27, 2010), <http://www.badgerwordsmith.com/spingolafiles/2010/05/27/the-winding-road-of-homicide/>.

<sup>143</sup> Dee J. Hall, *State Will Pay \$25,000 to Man Wrongfully Imprisoned for 13 Years*, WIS. ST. J. (May 18, 2010), <http://host.madison.com/> (search "state will pay \$25,000"; then follow hyperlink). Wisconsin's compensation statute provides the lowest compensation amount in the nation, \$5000 per year of wrongful imprisonment, capped at \$25,000, payable only upon proof of actual innocence by clear and convincing evidence. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 255-58 (2004).

<sup>146</sup> Lori Montgomery, *Eliminating Questions of Life or Death; Prosecutor's Policy Raises*

Another year later—ten years after Bloodsworth’s release from prison—the police finally, at Bloodsworth’s urging, ran the crime scene DNA through the database of convicted offenders and matched it to the true killer, a Maryland prisoner serving “a 45-year sentence for burglary, attempted rape, and assault with intent to murder.”<sup>147</sup>

Some prosecutors even cling to a technical notion of “legal guilt”: the proposition that even if a defendant is factually innocent he should not be exonerated if procedural barriers prevent him from seeking relief in court. In Missouri, Joseph Amrine produced compelling evidence of his actual innocence after he had been convicted of murder and sentenced to death.<sup>148</sup> The evidence of his innocence, for technical reasons, did not provide a basis for relief under Missouri law.<sup>149</sup> At oral argument in the Missouri Supreme Court, Judge Laura Denvir Stith asked Frank A. Jung, Assistant State Attorney General: “Are you suggesting that even if we find Mr. Amrine is actually innocent, he should be executed?”<sup>150</sup> Jung responded, “[t]hat’s correct, your honor.”<sup>151</sup>

And prosecutors are frequently so protective of their convictions that they refuse even to agree to permit post-conviction DNA testing in cases where the evidence could prove innocence, and could even help them identify the actual perpetrator if the conviction turned out to be mistaken.<sup>152</sup> Peter Neufeld, co-director of the Innocence Project in New York, has reported that prosecutors consent to DNA testing half the time, but in the other half of the cases they force the Innocence Project to litigate the requests for DNA testing.<sup>153</sup>

Accordingly, for purposes of evaluating and studying the problem of wrongful convictions, determinations of “innocence” and “guilt”

*Questions in Md.*, WASH. POST, May 20, 2002, at B1.

<sup>147</sup> Susan Levin, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASH. POST, Sept. 6, 2003, at A1.

<sup>148</sup> State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 548–49 (Mo. 2003) (en banc).

<sup>149</sup> *Id.* at 545.

<sup>150</sup> May & Viner, *supra* note 9, at 481 (quoting Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1).

<sup>151</sup> *Id.* As discussed later in this essay, the Missouri Supreme Court ruled that Amrine was entitled to relief to correct “a manifest injustice,” because he was able to establish by clear and convincing evidence that he was actually innocent. *Amrine*, 102 S.W.3d at 546–48 & n.3.

<sup>152</sup> See, e.g., District Attorney’s Office for the Third Judicial District v. Osborne, 129 S.Ct. 2308, 2308 (2009); Steven W. Becker, *Erring on the Side of Justice: A Call for an End to Prosecutorial Arrogance in Opposing DNA Testing for Evidence Untested at Trial—Lessons of Innocence and Humility from the Case of Dean Cage*, 2 DEPAUL J. SOC. JUST. 191, 212–215 (2008).

<sup>153</sup> Neufeld, *supra* note 122, at 640 & n\*.

cannot be left to the subjective judgments or accusations of prosecutors,<sup>154</sup> just as they cannot be left to the subjective judgments of defendants or defense attorneys. Nor, for truly robust scholarly evaluations, should the determinations of who counts as “innocent” or “exonerated,” in most cases, be left any longer to the independent but subjective judgments of researchers. For, in the end, all this tells us is what we have always known—that objective truth is quite elusive, perhaps unknowable, and no one has a unique claim of access to such truth.<sup>155</sup>

That is not to say that we cannot count the innocent, or create datasets of wrongful convictions for scholarly and policy analysis. Rather, it means that, recognizing the inherent fallibility of all assessments of such questions, the best we can do is adopt the only workable proxy we have for such determinations: the rules established by our legal system for determining who counts as guilty and who counts as innocent.

## 2. Innocence Under the Rule of Law

When Borchard, Bedau, and Radelet, and Leo and Ofshe, among others, first compiled their lists of possible wrongful convictions, they supplemented the official rulings of courts by making independent judgments about innocence in some instances. They did so because there had been no DNA exonerations yet, and the DNA cases had not yet broken the dam of denial holding back the flood of non-DNA exonerations that has followed. There simply were very few, if any, acknowledged or documented wrongful convictions to deal with. But that has changed. Today, most researchers and policy analysts approach the problem in a way that sensibly eschews subjective assessments of guilt or innocence, relying instead on the only objective measure we have: the judgments of the legal system itself.

Thus, the typical definition of an “exoneration”—and hence of an “innocent” person wrongly convicted—in the scholarly literature, is the one articulated by, among others, Gross and his colleagues: “As

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<sup>154</sup> As the Supreme Court expressed it over one hundred years ago, “[i]f it suffices to accuse, what will become of the innocent?” *Coffin v. United States*, 156 U.S. 432, 455 (1895).

<sup>155</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 217–18 (1990) (observing that objective truth at trial is unknowable). Paul Cassell, as well, has acknowledged that “[o]ne could easily take the position that ‘objective’ truth is unknowable and therefore such determinations lie beyond human capacity.” Cassell, *supra* note 5, at 537. Cassell, however, rejects that approach and applauds the attempt to make some determinations in the scholarship about who is “innocent.” *Id.* at 537–38.

we use the term, ‘exoneration’ is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”<sup>156</sup> This generally includes cases in which the defendant was convicted, and the conviction was permanently “undone” by way of: (1) executive “pardons based on evidence of the defendant’s innocence”; (2) “dismiss[als] by courts after new evidence of innocence emerged, such as DNA”; (3) acquittal after a retrial, where the reversal of the original conviction or the acquittal was based in part on evidence of innocence not previously presented; or (4) posthumous official acknowledgments of innocence by the state after an inmate had died in prison.<sup>157</sup>

Note that this definition includes one important caveat to the notion that “innocence” and “exoneration” should be based solely upon official outcomes of cases. This definition excludes individuals whose convictions were overturned and dismissed based on procedural errors unrelated to innocence, such as Fourth Amendment violations, or based on evidence that the defendant played some role in the crime, albeit a lesser role than would support the original conviction.<sup>158</sup> To preserve the notion of factual innocence, researchers generally exclude those cases; “exonerations” include only those whose convictions were erased after the introduction of new evidence of innocence.

This is not in any way to suggest that convictions rendered wrongful by errors unrelated to innocence are less important, or that they can or should be discounted as based on “technicalities.” Such errors and violations of rights are tremendously significant and legitimate for different reasons.<sup>159</sup> But they are not counted in analyses of wrong-person factual errors because they can make no special claim to that type of error. Therefore, their inclusion would

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<sup>156</sup> Gross et al., *supra* note 2, at 524.

<sup>157</sup> *Id.* This definition could be read to exclude individuals who are acquitted on appeal by an appellate court finding that the evidence at trial was legally insufficient to convict, since those cases involve no “new” evidence of innocence. Excluding such cases from the definition of “exoneration” can perhaps be justified on the basis that the appellate court “acquittal” was not based on *new* evidence of innocence. Exclusion of such cases is problematic, however, because individuals acquitted on appeal under the constitutional sufficiency-of-the-evidence standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), are, under the law, fully entitled to the presumption of innocence. They are indeed innocent under the law, although once they had been found legally guilty. *Jackson*, 443 U.S. at 314–15. Moreover, because the *Jackson* sufficiency-of-the-evidence standard is so difficult to meet and so deferential to the jury’s finding of guilt, such appellate acquittals rarely occur except in the strongest cases of complete failure of the state’s proof on at least one element of the crime. *Id.*

<sup>158</sup> See Gross et al., *supra* note 2, at 524 n.4.

<sup>159</sup> See Smith, *supra* note 24, at 319–20, 324.

skew the analysis of the errors that contribute to such wrong-person mistakes. However, the definition does not reject all cases in which the case was overturned on “procedural” grounds. Many “procedural” claims, such as claims of ineffective assistance of counsel, or claims that the prosecution withheld exculpatory information in violation of *Brady v. Maryland*,<sup>160</sup> produce reversals that count as “exonerations” under this definition, to the extent the claims include new evidence of innocence never presented before due to defense counsel’s inadequacy, or the prosecutor’s illegal suppression of the evidence.

Innocence skeptics may still challenge some exonerees included in this group on the basis that, as Joshua Marquis has put it, they were factually guilty but somehow managed to “wriggle through some procedural cracks in the justice system.”<sup>161</sup> Surely some small number of these “exonerees” are indeed factually guilty. But, given the enormous barriers to overturning a criminal conviction, especially in a serious case, the number who successfully game the system in this way must be truly *de minimis*.<sup>162</sup> Much more likely is that this definition excludes the vast majority of actually innocent people, who cannot marshal the evidence or negotiate the procedural barriers necessary to be officially cleared after they were initially convicted.<sup>163</sup> This is especially so when one considers that this definition does not include whole categories of convicted innocents, such as those involved in the relevant acts but “lacking the appropriate *mens rea*, those [guilty of some misconduct but not the crime of conviction], and those erroneously convicted in error-free trials.”<sup>164</sup>

More fundamentally, criticism of any individual exonerees’ claim to innocence ignores a core epistemic problem: if the legal system’s conclusion that an individual can no longer be deemed guilty—and hence is counted among the legally innocent—is not sufficient to exonerate, then how do we know who is innocent? Who gets to make that call, and by what standard? As discussed above, to ignore official legal determinations of guilt and innocence is to devolve into hopelessly disputed subjective assessments of guilt. The legal determinations are all that we really have.

Nonetheless, there are instances in the policy arena when even

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<sup>160</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>161</sup> Marquis, *supra* note 5, at 508.

<sup>162</sup> See Gross, *supra* note 4, at 175; Gross et al., *supra* note 2, at 525.

<sup>163</sup> See Raymond, *supra* note 10, at 452–53.

<sup>164</sup> See Givelber, *supra* note 14, at 1327–28 (emphasis in original).

innocence advocates impose on themselves a higher burden of establishing actual innocence. And they do it precisely to make sure that at least some of their compilations of wrongful convictions are virtually immune to attacks from even the most cynical of the innocence doubters.<sup>165</sup> In particular, the Innocence Project's list of DNA exonerees is a carefully guarded list that does not admit everyone whose conviction has been erased, even if the case includes favorable DNA evidence.<sup>166</sup> Rather that list, which to date includes more than 270 names, admits only those whose convictions have been overturned *primarily* on the basis of DNA evidence, and where the DNA *conclusively* proves innocence.<sup>167</sup> That is indeed a subjective standard, but it is one built first upon the legal judgment of the system that the conviction is invalid or cannot be sustained. And that list does not purport to be a full count, not even of all innocent people who have been aided by post-conviction DNA testing in gaining their freedom. Rather, it has a very specific and limited purpose: to list all those individuals who have been proven innocent by post-conviction DNA testing.<sup>168</sup>

Thus, in the end, for policy and research purposes, the only really useful definition of both "exoneration" and "innocence" is one that attempts no subjective assessment of guilt or innocence beyond looking to determine whether a conviction has been erased—by vacatur and dismissal, acquittal, or pardon—and whether the basis for that erasure included evidence supporting the defendant's claim of actual innocence.

### III. DEFINING INNOCENCE IN INDIVIDUAL CASES

Beyond the research and policy arenas, a workable definition of innocence also matters at the individual case level for litigation purposes. A definition is needed to guide judgments about who is entitled to relief from a conviction based in part on a claim of innocence and who, among those whose cases are overturned, can make a legitimate moral claim to be "innocent." Here, again, there

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<sup>165</sup> See Gross et al., *supra* note 2, at 525–27.

<sup>166</sup> See *Know the Cases: Browse Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited May 24, 2011).

<sup>167</sup> Telephone Interview with Maddy deLone, Executive Dir., Innocence Project (Jan. 27, 2010).

<sup>168</sup> Innocence Project co-founder and co-director, Peter Neufeld, explained ten years ago that, "[w]hat we have been trying to do, with the advent of forensic DNA testing, is replace . . . speculation, supposition, and subjectivity with hard science." Neufeld, *supra* note 122, at 639.

is not one standard, but rather multiple standards that are context dependent. And, like the definition for research and policy purposes, the various meanings of innocence in the end turn on the legal standards that define the categories, rather than subjective assessments of who is actually innocent and who is not.<sup>169</sup> In this sense, the distinction some make between “legal innocence” and “factual innocence”<sup>170</sup> is not a meaningful or useful distinction in most circumstances.

#### A. DNA: Raising the Bar to Exoneration

It is in the context of litigating individual claims of innocence that the definition can become trickiest. DNA has set the stage by creating an awareness of wrongful convictions, and a new acknowledgement of the fallibility of the process. Anecdotal evidence suggests that innocence consciousness may be having an effect not only on policy and doctrinal debates, but also on litigation in individual cases, both at the trial and the post-conviction and appellate stages. The recognition of the reality of error in criminal cases appears to be creating some new receptivity to claims of innocence in individual cases involving post-conviction challenges to conviction. That might explain at least some of the sharp rise in exonerations, even in the absence of DNA evidence, in the last two decades, when exonerations were virtually unheard of or at least unnoticed before that.<sup>171</sup> Even critics of the innocence movement from the defense perspective note, with some hopefulness, that “the [innocence] narrative may be trickling down to jurors. Armed with these stories, jurors might view questionable evidence with greater skepticism, and in so doing, ensure that the prosecution meets its burden of proof.”<sup>172</sup>

But DNA also threatens to mislead courts and litigants into thinking that only *conclusive* evidence of innocence, analogous to

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<sup>169</sup> See John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 827 (2001) (providing a list and brief explanation of categories).

<sup>170</sup> *Id.* at 827–31.

<sup>171</sup> The apparent upsurge in exonerations may, in large part, also be attributable to an increase in media and scholarly attention to the exonerations that do occur, and to the fact that increasing numbers of innocence projects are now scouring the legal landscape in search of wrongful convictions. But, it is also the sense of many in the innocence movement that at least *some* courts take claims of innocence more seriously than they did before the DNA era and the age of innocence. See *Innocence Project Case Profiles*, INNOCENCE PROJECT, [www.innocenceproject.org/know/](http://www.innocenceproject.org/know/) (last visited May 24, 2011) [hereinafter *Innocence Project Case Profiles*] (displaying the rise in exonerations in the last two decades).

<sup>172</sup> Smith, *supra* note 24, at 317.

that in the cleanest DNA cases, counts as a legitimate claim of innocence. That misconception, in turn, threatens to undermine the established legal bases for granting relief from unjust convictions. The DNA exonerations have been so powerful in part because they permit a simple and compelling story of clear innocence. As Susan Bandes has observed, the simplicity of the DNA-based innocence story works because people generally prefer simple ideas to complex ones:

Simple categories and clear dichotomies are reassuring in their promise of stability and verity; they absolve us of the difficult job of sifting facts, evaluating competing perspectives, and making value judgments. A notion like innocence that boils down to either he did it or he didn't is attractive for its apparent lack of factual or moral ambiguity.<sup>173</sup>

The DNA exonerations fit that story well, and accordingly have been a powerful tool for creating innocence consciousness.

But DNA evidence also runs the risk of proving too much (that is, more than is legally required), and thereby feeding the appetite for unrealistic simplicity in criminal cases.<sup>174</sup> It is not unusual, in a non-DNA innocence case, no matter how compelling the evidence of innocence, for the state to respond to a motion for a new trial by arguing that no relief should be granted because the proffered new evidence is not like DNA.<sup>175</sup> Courts too, sometimes reject new trial motions based on claims of innocence by comparing the new evidence to DNA and finding it lacking.<sup>176</sup> To the extent the false promise of simplicity in assessing guilt and innocence takes root in the criminal justice system, it thereby threatens to undermine fundamental principles of our justice system—such as the presumption of innocence.<sup>177</sup>

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<sup>173</sup> Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 9–10 (2008).

<sup>174</sup> Bandes puts it this way: “If DNA becomes the gold standard, challenging wrongful convictions in the vast majority of cases with no DNA evidence will be problematic.” *Id.* at 11.

<sup>175</sup> *E.g.*, Brief and Appendix of Plaintiff-Respondent, *State v. Avery*, No. 2008AP500 (Wis. Ct. App. June 18, 2008) (arguing that a new trial should not be granted on the basis of several types of new evidence of innocence because “[t]he proffered new photogrammetry evidence and laywitness testimony are not like the immutable DNA evidence that warranted [relief in previous cases]”).

<sup>176</sup> *E.g.*, Transcript of Record at 91, *State v. Avery*, (Milwaukee C.C.C. 2010) (No. 94-CF-942514) (rejecting new trial based on new evidence of innocence because the proffered evidence is “not like D.N.A. evidence where somebody can get in and they can say, yeah, I looked at this and the person that dropped this D.N.A. is one in 52 quintillion, which is more than the people on the planet”).

<sup>177</sup> *See* Smith, *supra* note 24, at 324. Margaret Raymond argues that all of the innocence

The demand for clear proof of innocence is a misfit in our system of justice. DNA promises clear and readily ascertainable distinctions between the innocent and the guilty in a few cases, but the distinction is far from clear in most. Even with DNA, the truth can be obscure.<sup>178</sup> Does an exclusion from crime scene DNA always and with certainty mean the defendant is innocent? Does the presence of the defendant's DNA always and with certainty mean the defendant is guilty? The answer is, of course, no. While DNA results can be powerful, and in some cases can lead to conclusions about guilt and innocence that are beyond reasonable dispute, they are not always dispositive or ever truly without *any* doubt. And *without* DNA, the picture is almost always even murkier.

More significantly, expecting certainty is a mistake because our system does not demand a finding of certainty, either for finding guilt or innocence. Nor, in most jurisdictions, does the justice system permit, let alone demand, any legal conclusion of "innocence" at all. Courts almost never rule on the question of actual innocence.<sup>179</sup> The simple story of clear innocence is not a story the criminal justice system is designed to accommodate.<sup>180</sup>

### B. *Reinvigorating the Presumption of Innocence*

The criminal justice system traditionally has had no place for a finding of "innocence" because the system recognizes the near-impossibility of consistently determining innocence with any certainty and the unsustainability of such a category. Prior to the advent of the jury trial in Europe, medieval criminal justice systems did indeed demand *proof* of innocence, as revealed by God himself.<sup>181</sup> Proof of innocence was revealed by torture, through "trials by battle and the ordeals of hot iron, boiling water, cold water, and cursed morsel."<sup>182</sup> An accused who succeeded in a trial

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cases, not just the DNA cases, pose a similar risk of "burden-shifting." Raymond, *supra* note 10, at 453. "The fact that wrongfully convicted persons can and have proven their innocence of the crimes of which they have been convicted may tend to suggest that charged persons can, and perhaps should, come forward with proof of innocence in order to avoid conviction." *Id.*

<sup>178</sup> See Bandes, *supra* note 173, at 11 ("DNA evidence cannot, by itself, measure guilt or innocence.").

<sup>179</sup> See Givelber, *supra* note 14, at 1323.

<sup>180</sup> Indeed, Daniel Givelber notes that, because the system requires findings of guilt, but almost never produces findings of innocence, the system has a built-in "adjudicatory asymmetry." *Id.*

<sup>181</sup> Laufer, *supra* note 12, at 330 n.3.

<sup>182</sup> *Id.* at 330 & n.3 (citing MELVILLE MADISON BIGELOW, HISTORY OF PROCEDURE IN

by battle, or who emerged from carrying hot irons or touching hot stones in an ordeal without burns established his virtue and blamelessness “by the direct interposition of the Almighty.”<sup>183</sup> William Laufer reminds us that, with the development of the jury trial in England and the inquisition on the Continent, trial by ordeal diminished, modern legal standards emerged, the burden of proof shifted from the defendant to the accuser, and “factual innocence became increasingly irrelevant.”<sup>184</sup> As the system began to accept that God could not directly reveal guilt and innocence, “[l]egal standards and burdens of proof acknowledged what ancient fact finders and jurists could not: Definitive proof of factual innocence was too much of a burden for mortals to bear.”<sup>185</sup>

Thus, in place of a legal finding of factual innocence, the system *presumes* innocence and permits a finding of guilt only when that presumption is overcome by proof beyond a reasonable doubt. In almost all jurisdictions today, all we have is either guilty or not guilty. If the evidence is insufficient to prove guilt beyond a reasonable doubt, then the defendant is presumed innocent. This is the only real legal status recognizing innocence in most jurisdictions. By the same token, if a once-convicted defendant succeeds in overturning her conviction by meeting the legal standards for a new trial, she is once again restored to the status of presumed innocent, unless and until she is convicted again. Absent that, she has every right, just as any other member of the community, to be counted among the innocent. She is innocent by the only legitimate measuring stick we have.

Faithfulness to the presumption of innocence requires that conclusion. The presumption of innocence, although not always applied rigorously in practice,<sup>186</sup> is almost universally recognized as a foundational principle in our justice system; it is, indeed, deemed a “general principle of our political morality.”<sup>187</sup> As Justice Stewart once noted, “[n]o principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial.”<sup>188</sup>

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ENGLAND FROM THE NORMAN CONQUEST 322 (1880)).

<sup>183</sup> *Id.* (quoting MELVILLE MADISON BIGELOW, HISTORY OF PROCEDURE IN ENGLAND: FROM THE NORMAN CONQUEST 322 (1880)).

<sup>184</sup> *Id.* at 331.

<sup>185</sup> *Id.* at 332 (citations omitted).

<sup>186</sup> See Findley, *supra* note 101, at 908.

<sup>187</sup> Laufer, *supra* note 12, at 338 (citing WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 208 (1990)).

<sup>188</sup> *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting).

Scholars debate the precise meaning of the presumption of innocence. To some, it is merely a burden allocation device, a proxy for the rule that imposes the burden on the prosecution to prove guilt beyond a reasonable doubt.<sup>189</sup> To others, it is more than that; it represents a true assumption that, absent proof to the contrary, the defendant is innocent. Among these latter scholars, Lawrence Tribe suggests that the presumption of innocence “represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community.”<sup>190</sup> According to Tribe, the presumption of innocence reflects an unwillingness to accept prosecutorial omniscience when the defendant claims innocence.<sup>191</sup> It is in this respect that the presumption of innocence, once restored to a criminal defendant, entitles that person to claim to be innocent and to be counted among the exonerated.<sup>192</sup>

Recognizing this meaning of “innocence” suggests that the Innocence Movement is at a crossroads. The Movement has arrived at a point where it must overtly push the definition of “innocence” beyond the narrow band of indisputably established DNA exonerations. While the DNA exonerations have changed the legal landscape and popular understandings about our justice system, innocence fatigue is beginning to emerge. The public is no longer shocked and fascinated by each new DNA exoneration. Most DNA exonerations have become almost routine.<sup>193</sup> Tired of being exposed as wrong, prosecutors are exhibiting renewed resistance to claims of

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<sup>189</sup> See Laufer, *supra* note 12, at 340.

<sup>190</sup> Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970). See also Laufer, *supra* note 12, at 338 & n.43 (describing Tribe’s discussion of the presumption of innocence as eloquent).

<sup>191</sup> Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1370 (1971). As argued above, that distrust of prosecutorial omniscience is repeatedly validated by the DNA exonerations in which prosecutors continue to cling to wholly discredited theories of guilt. *Id.*; see also *DNA Evidence*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/d/dna\\_evidence/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/d/dna_evidence/index.html) (updated June 18, 2009) (noting that prosecutors are resisting the use of DNA by inmates to challenge their convictions).

<sup>192</sup> William Laufer argues that this must be the meaning of the presumption of innocence: “Presumption of innocence rhetoric may be given meaning only by moving away from the notion that this assumption is a burden allocation device, and toward the view that factual innocence of the accused must be assumed. After all, the presumption of innocence is not held out as a fundamental right because it amplifies the burden of proof or conveys intangible messages to criminal justice functionaries.” Laufer, *supra* note 12, at 403.

<sup>193</sup> See Bandes, *supra* note 173, at 7 (“Exonerations based on DNA evidence are beginning to decline, and the public’s attention is beginning to stray.”).

innocence, frequently demanding virtual certainty before acquiescing to relief. At the same time, the rate of DNA exonerations has leveled off, and may even drop in the near future as we start to run out of old cases with untested DNA evidence.<sup>194</sup> Indeed, the number of exonerations based on non-DNA evidence is now approaching the number of exonerations based on DNA evidence.<sup>195</sup> The purity of the DNA exonerations retains considerable value, but it no longer defines the Innocence Movement. Our duty to innocent individuals without the luck of having DNA evidence requires zealous advocacy for a broader notion of innocence. As Daniel Medwed has argued, “[i]nnocentric arguments should be reconfigured, as a matter of public relations and case strategy, away from DNA cases and toward those cases bereft of the magic bullet of science.”<sup>196</sup>

Some may argue that this approach dilutes the moral purchase of the innocence cases, and maybe it does for some skeptics. But for those who are content only with indisputable innocence, lists of such cases still exist, most notably the Innocence Project’s list of DNA exonerations.<sup>197</sup> Such cases continue to show undeniable error in the criminal justice system. But this more expansive understanding of innocence takes the movement to the next level; it reflects renewed and appropriate appreciation for the value of the presumption of innocence. It both concedes the inability to more

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<sup>194</sup> A number of observers, including myself, have long predicted an eventual end to cases with untested DNA evidence. See, e.g., Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 337 (2002) (“This is a window of opportunity, however, that will not remain open forever.”). Contrary to those predictions, the decline in DNA exonerations has not yet materialized. With more innocence projects looking for DNA cases every year, and with continual improvements in DNA technology that increase the ability to obtain DNA results from small and degraded biological samples, the rate of DNA exonerations has held steady since about 2000. *Innocence Project Case Profiles*, supra note 171. Nonetheless, the likelihood remains that, at some point, the number of cases in which new testing can prove innocence will diminish, although that number will probably never shrink to zero.

<sup>195</sup> For each of the past two years—the first two years in which the Innocence Network has published data on the number of exonerations obtained by Network member organizations—non-DNA exonerations have roughly equaled DNA exonerations. INNOCENCE NETWORK, INNOCENCE NETWORK EXONERATIONS 2009 4–13 (2009), available at [http://www.innocenceproject.org/docs/Innocence\\_Network\\_Exonerations\\_2009.pdf](http://www.innocenceproject.org/docs/Innocence_Network_Exonerations_2009.pdf). In 2009, Network members exonerated 27 individuals, 15 with DNA and 12 with other types of evidence. *Id.* In 2010, Network members exonerated 29 individuals, 13 with DNA, and 16 with other evidence. INNOCENCE NETWORK, INNOCENCE NETWORK EXONERATIONS 2010 3–13 (2010), available at <http://www.innocencenetwork.org/docs/innocence-network-exonerations-2010-pdf>.

<sup>196</sup> Medwed, *Innocentricism*, supra note 3, at 1571.

<sup>197</sup> *Wrongful Convictions and Exonerations in Wisconsin*, WIS. INNOCENCE PROJECT, [http://www.law.wisc.edu/fjr/clinicals/ip/client\\_profiles.html](http://www.law.wisc.edu/fjr/clinicals/ip/client_profiles.html) (last visited May 24, 2011).

effectively divine innocence and restores real meaning to the presumption of innocence.

Once again, therefore, we must turn to legal standards and procedures to determine who is entitled to relief based upon new evidence of innocence, rather than to some elusive standard of clear innocence. It turns out, under the law, there are numerous and different standards for assessing entitlement to relief based upon evidence of innocence.

### C. *Substantive Innocence*

The law addresses substantive claims of innocence in various ways. Sometimes, claims of innocence are premised on constitutional errors that prevented the discovery or presentation of significant evidence of innocence. Most frequently, these claims arise in the context of claims of ineffective assistance of counsel<sup>198</sup> or *Brady* violations.<sup>199</sup> In the ineffective assistance of counsel context, innocence claims most often center on defense counsel's failure to investigate or present evidence that would have supported the defendant's claim of innocence.<sup>200</sup> In the *Brady* context, the claim is that the prosecution withheld evidence that would have supported the defense. Under either claim, the defense bears the burden of establishing that the missing or withheld evidence might have made a difference (i.e., was "prejudicial" for an ineffective assistance claim, or "material" for a *Brady* claim). That showing is met if the presentation of the erroneously overlooked or suppressed evidence at a new trial would create a "reasonable probability that . . . the result of the proceeding would have been different."<sup>201</sup> The Supreme Court has made it clear that this test does not require proof to any degree of certainty that the defendant would have been acquitted absent the error, or even that the likelihood of acquittal is more likely than not. Rather, the standard requires a lesser showing: that the error "undermine[s] confidence in the outcome."<sup>202</sup>

These standards have been the subjects of significant scholarly criticism, especially on the basis that the "ex post 'reasonable

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<sup>198</sup> *E.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>199</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>200</sup> *E.g.*, *State v. Zimmerman*, 669 N.W.2d 762 (2003); *Adams v. Bertrand*, 453 F.3d 428 (7th Cir. 2006).

<sup>201</sup> *Strickland*, 466 U.S. at 694. *Accord* *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

<sup>202</sup> *Strickland*, 466 U.S. at 694.

probability' of acquittal standard"<sup>203</sup> is both doctrinally and practically flawed and prohibitively onerous.<sup>204</sup> Moreover, while these constitutional doctrines give substantive voice to post-conviction claims of innocence, their prejudice and materiality components act as constraints on, rather than paths to, vindication. They are examples of how innocence is sometimes used as a "limiting criterion."<sup>205</sup>

But unless and until they are modified, they define one's entitlement to relief for these particular types of errors. Once a defendant clears these hurdles and a conviction is vacated, the prosecution is of course free to retry the defendant. If it chooses not to, or if the retrial ends in an acquittal, the defendant is fully entitled to rejoin the ranks of the "innocent." By the only valid measurement tool we have, such individuals are "exonerated." No doubt, some prosecutors will continue to believe that some of these individuals are guilty and got away with their crimes. But those subjective opinions have no place in legal discourse. They are nothing more than that—subjective opinions, individually held.

Under these circumstances, the presumption of innocence demands that ethical prosecutors accept the outcomes of the cases, and refrain from publicly questioning the legitimacy of the defendants' claim to be "innocent." Yet, as we have seen, prosecutors routinely continue to publicly insist that a legally exonerated person is nonetheless, in their judgment, guilty.<sup>206</sup> To do so betrays the humility that should be one of the lessons of the wrongful conviction cases—that is, the humility to recognize that, whatever one may believe, that judgment may be wrong. After all,

<sup>203</sup> Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 613 (2005).

<sup>204</sup> See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward The Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 129–30 (Carol Steiker ed., 2006) (arguing that the adversarial nature of the justice system undermines *Brady's* significance); Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 214 (2005–06) (arguing that *Brady* fails to effectively compel pre-trial disclosure and actually discourages it); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1554 (2010) (arguing that the materiality assessment of *Brady* is flawed); Rosen, *supra* note 24, at 253 ("[T]he Court [has] interpreted 'effective' in a way that placed as light a burden as possible on the states."); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 647 (2002) ("*Brady* became more of a post-trial remedy than a pre-trial discovery right.").

<sup>205</sup> See Steiker & Steiker, *supra* note 203, at 610 (describing how the centrality of innocence in legal analysis can be used to defeat other claims to fair treatment).

<sup>206</sup> See *supra* notes 27–28 and accompanying text.

presumably every one of the prosecutors in the 270 plus DNA exonerations at one time believed, and convinced a fact finder beyond a reasonable doubt, that the defendant was guilty; and in every one of those cases those prosecutors were wrong. Worse, to continue to publicly insist on a defendant's guilt or to question the bona fides of his claim of innocence, without proving guilt beyond a reasonable doubt in court, abuses the authority of the prosecutor's public position and adds insult to injury. It fails to accord the individual the legal process and the full measure of freedom and respect demanded by the constitutional imperative implicit in the presumption of innocence.

Innocence considerations also, more broadly, play a role in another doctrine: harmless error. As with the prejudice and materiality components of ineffective assistance of counsel and *Brady* claims, innocence here acts as a limiting criterion, a rationale for denying relief. Increasingly, the harmless error doctrine enables and encourages appellate courts to overlook trial error when they are satisfied that the defendant was in fact guilty.<sup>207</sup> The harmless error doctrine has long posed challenges of definition and application for courts. Increasingly, harmless error analysis is applied in a way that turns on an appellate court's assessment of a defendant's guilt, as opposed to whether the error might have had an effect on the verdict.<sup>208</sup> Under some current formulations and typical applications of the doctrine, courts look not "to whether an error actually 'contributed' to the jury's actual verdict[, but rather,] courts broadly search the record by asking whether independent evidence of guilt taken alone *could* support the conviction."<sup>209</sup> Under this doctrine, cognitive biases can contribute in powerful

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<sup>207</sup> See Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1169–70 (1995); see also Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 595–96 (2009) [hereinafter *Innocence Protection in the Appellate Process*] (observing that appellate courts often focus on a defendant's perceived guilt or innocence in determining whether an error was harmless); Findley & Scott, *supra* note 111, at 320–21, 349–50 (arguing that harmless error analysis tends to focus on the defendant's actual guilt, as opposed to the error's effect on the verdict); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 61 (2005) (arguing that, in practice, the harmless error doctrine fails to protect constitutional rights and instead tolerates constitutional violations so long as there is evidence of guilt).

<sup>208</sup> See Edwards, *supra* note 207, at 1171 (noting that courts increasingly rely on a "guilt-based approach" to harmless error, rather than an "effect-on-the-verdict approach"); see also Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61 (2008) (observing that the defendant's guilt or innocence is often weighed in determining whether an error was harmless).

<sup>209</sup> Garrett, *supra* note 207, at 59 (emphasis in original).

ways to a conclusion that the defendant was indeed guilty, and that the error was therefore harmless. The DNA exonerations confirm that those judgments are indeed prone to error. In approximately thirty-two percent of DNA exoneration cases that produced a written appellate opinion—all of which were cases where DNA has established that the person was actually innocent—appellate courts found legal error in the proceedings that led to the conviction, but affirmed the conviction nonetheless because they were convinced that the error was “harmless,” suggesting that they erroneously believed the defendant was guilty.<sup>210</sup>

Harmless error analysis and related limiting criteria play an even more draconian role in federal habeas corpus jurisprudence, especially after Congress enacted the very restrictive Antiterrorism and Effective Death Penalty Act of 1996.<sup>211</sup>

[F]or the increasingly few habeas claims that both meet the Court’s heightened procedural requirements and fall within its narrowed scope of review, the Court has relaxed the standard for deeming constitutional errors harmless on habeas review, once again on grounds that only truly grievous constitutional wrongs—conviction of the innocent being the paramount case—should be corrected on habeas.<sup>212</sup>

In other cases, claims of innocence are raised through presentation of newly discovered evidence, without any underlying procedural or constitutional error in the trial that produced the conviction.<sup>213</sup> The precise standards for granting relief based on newly discovered evidence vary from jurisdiction to jurisdiction, but usually involve some combination of showings that the new evidence could not have been discovered prior to trial with the exercise of reasonable diligence; that the evidence is relevant and not cumulative or merely impeaching; and that the new evidence creates a sufficient probability of a different result at a new trial.<sup>214</sup>

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<sup>210</sup> *Innocence Protection in the Appellate Process*, *supra* note 107, at 595; Garrett, *supra* note 209, at 107–08.

<sup>211</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified as amended in scattered sections of 28 U.S.C.).

<sup>212</sup> Steiker & Steiker, *supra* note 203, at 610.

<sup>213</sup> See generally Daniel S. Medwed, *California Dreaming? The Golden State’s Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437 (2007) (discussing situations where new evidence is uncovered after trial).

<sup>214</sup> See, e.g., FED. R. CRIM. P. 33(b) (permitting a motion for new trial based on “newly discovered evidence” if timely filed); *United States v. Lopeztegui*, 230 F.3d 1000, 1002 (7th Cir. 2000) (“Rule 33 of the Federal Rules of Criminal Procedure provides that a defendant may be awarded a new trial on the basis of newly discovered evidence when that evidence (1) came to his knowledge after trial, (2) could not have been discovered sooner with due

The standard of proof on this final element is often, although not always, understood to require more proof of innocence than is required for an ineffective assistance or *Brady* claim.<sup>215</sup> While some courts have suggested that this standard incorporates the less demanding “undermines confidence” standard,<sup>216</sup> others require a showing that it is more likely than not that the new evidence would produce a different outcome.<sup>217</sup> In some states, most notably California, the standard is even more onerous. In collateral proceedings new evidence must “thoroughly undermine[] the entire structure of the prosecution’s case, and such evidence undermines the prosecution’s case only if it is conclusive and ‘points unerringly to innocence.’”<sup>218</sup> This standard has been criticized in the literature for imposing an inappropriately restrictive limitation on the system’s ability to correct injustices.<sup>219</sup>

Some states have recently begun to add another ground for relief reserved for those who can affirmatively prove their innocence. These measures have been adopted in part to remedy gaps in state post-conviction remedies that otherwise permitted no possibility of

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diligence, (3) is material and not merely impeaching or cumulative, and (4) would probably lead to acquittal in the event of a retrial.”); ARIZ. REV. STAT. ANN. § 32.1(e) (1998) (“Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if: (1) The newly discovered material facts were discovered after the trial. (2) The defendant exercised due diligence in securing the newly discovered material facts. (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.”); N.Y. CRIM. P. LAW § 440.10(1)(g) (2005) (“The court . . . may . . . vacate such judgment upon the ground that: New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence”); *State v. Coogan*, 453 N.W.2d 186, 188 (Wis. Ct. App. 1990) (“Due Process requires a new trial if . . . (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial.”).

<sup>215</sup> See *United States v. Bagley*, 473 U.S. 667, 680–81 (1985).

<sup>216</sup> The Wisconsin Supreme Court, for example, has reserved judgment on whether its requirement of a “reasonable probability” of a different result means the higher outcome-determinative standard, or the lesser “undermines confidence” standard. *State v. Love*, 700 N.W.2d 62, 77–78 (Wis. 2005).

<sup>217</sup> See Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction when Newly Discovered Evidence Establishes “Actual Innocence,”* 22 U. ARK. LITTLE ROCK L. REV. 629, 632 (2000).

<sup>218</sup> Medwed, *supra* note 214, at 1454.

<sup>219</sup> *Id.* at 1469–70.

relief based on new evidence of innocence, and in part to permit innocent individuals to fully clear their names with an official declaration of innocence. Traditionally, the law has not provided any mechanism for a judicial finding of “innocent.” Because of this “adjudicatory asymmetry,” in which “guilt is regularly determined but innocence is virtually never determined,”<sup>220</sup> actually innocent individuals often find their exonerations less than wholly redemptive. Many are the cases in which individuals, fully exonerated under the law, nonetheless struggle under a cloud of suspicion.<sup>221</sup> To the general public, innocence skeptics, and prosecutors who cling to their judgments about guilt, an acquittal or dismissal more often merely “reflect[s] an overly benign criminal justice system”<sup>222</sup> than an affirmative restoration of innocence.

Accordingly, some states have recently created new judicial findings of actual innocence. Utah statutes, for example, now provide that, if DNA proves “by clear and convincing evidence that the person is factually innocent,” then the court shall vacate the conviction and expunge it from the person’s record.<sup>223</sup> In non-DNA cases, Utah law also provides a mechanism for a convicted individual to petition the court for a finding that “newly discovered evidence demonstrates that the petitioner is factually innocent.”<sup>224</sup> Illinois law now authorizes an exonerated person to seek, and courts to grant, a “certificate of innocence.”<sup>225</sup> In adopting this provision, the Illinois General Assembly expressly declared that a finding of “innocence” is necessary to permit wrongly convicted individuals to overcome barriers to obtaining compensation in the Court of Claims.<sup>226</sup> To obtain a certificate of innocence, the petitioner must establish that her felony conviction was reversed or vacated, and the indictment or information was dismissed or she was retried and

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<sup>220</sup> Givelber, *supra* note 14, at 1323.

<sup>221</sup> See Kevin Davis, *The Real World: After Years, Even Decades, the Exonerated Leave Prison Walls Behind—Only to Find New Barriers*, 97 A.B.A. J., Jan. 2011, at 50, 52–53; Jim Dwyer, *In the Face of Great Loss, Embracing Innocence*, N.Y. TIMES, May 10, 2008, <http://www.nytimes.com/2008/05/10/nyregion/10about.html>.

<sup>222</sup> Givelber, *supra* note 14, at 1331.

<sup>223</sup> UTAH CODE ANN. § 78B-9-303(2)(b) (2008).

<sup>224</sup> UTAH CODE ANN. § 78B-9-402(2)(A)(v) (2008 & Supp. 2010). This law was enacted primarily to identify individuals who might be eligible for compensation for their wrongful conviction, rather than to capture and categorize all individuals who might be considered exonerated. E-mail from Daniel Medwed, Professor, S.J. Quinney College of Law, to Keith Findley, Professor, University of Wisconsin Law School (January 21, 2011) (on file with author).

<sup>225</sup> 735 ILL. COMP. STAT. 5/2-702(b) (Supp. 2010).

<sup>226</sup> *Id.* at § 2-702(a).

acquitted.<sup>227</sup> In addition, the petitioner must prove by the preponderance of the evidence that she “is innocent of the offenses charged.”<sup>228</sup>

In North Carolina, the legislature has created the North Carolina Innocence Inquiry Review Commission,<sup>229</sup> charged with investigating and referring likely cases of innocence to a three-judge panel for final determination.<sup>230</sup> The three-judge panel then decides whether the convicted person has proven innocence by clear and convincing evidence.<sup>231</sup> North Carolina defines a “[c]laim of factual innocence” as a claim asserting complete innocence of the crime and any related lesser crimes, “and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.”<sup>232</sup>

These new “innocence” findings promise significant clarity and relief for those fortunate individuals who can satisfy their rather strict criteria. But these new innocence judgments pose problems as well. They are undoubtedly grossly under-inclusive, because of the high burden of proof they impose, especially given how difficult it can be to affirmatively prove a negative. No doubt many factually innocent individuals will lack the resources and evidence to prove their innocence to a clear and convincing level, especially years after the crime, at a time when they no longer have a right to appointed counsel.

It is far from clear why exonerees should have to meet this heightened burden. Our system allocates burdens of proof based on how we want to assign the risk of error. In criminal law, the requirement of proof beyond a reasonable doubt purports to impose almost all of the risk of error on the state.<sup>233</sup> In civil cases, the

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<sup>227</sup> *Id.* at § 2-702(g). Alternatively, a certificate of innocence may issue if the petitioner shows that “the statute, or application thereof, on which the indictment or information was based violated the Constitution of the United States or the State of Illinois.” *Id.* at § 2-702(g)(2)(B).

<sup>228</sup> *Id.* at § 2-702(g)(3).

<sup>229</sup> N.C. GEN. STAT. § 15A-1462 (2009).

<sup>230</sup> *Id.* at 15A-1469(h). The Commission is modeled generally after the British Criminal Cases Review Commission (“CCRC”). For a discussion about some of the implications of such a commission, see Schehr, *supra* note 3, at 1296 (opining that the CCRC may be functioning to diffuse momentum for reform from the innocence movement, essentially acting “as a state strategic selection mechanism to enhance systemic stability”).

<sup>231</sup> N.C. GEN. STAT. § 15A-1462 (2009).

<sup>232</sup> N.C. GEN. STAT. § 15A-1460(1).

<sup>233</sup> *In re Winship*, 397 U.S. 358 (1970). See Findley, *supra* note 101, at 895. The Supreme Court has observed: “a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of

burden, usually to prove liability by a preponderance of the evidence, almost always recognizes that the risk of error should be apportioned nearly equally between the parties. It is not at all clear why the risk of bearing the costs of a wrongful conviction should fall more heavily on the individual than the accuser: the state. Most fundamentally, then, these categories of super innocence threaten to diminish the validity of other exonerees' claims to innocence, to create two classes of innocents. And along the way they threaten to undermine, rather than enhance, the fundamental presumption of innocence.

Daniel Medwed tells the story of Bruce Dallas Goodman, a client of the Rocky Mountain Innocence Center, which illustrates the complications that can be introduced by procedures that draw distinctions between exonerees.<sup>234</sup> Goodman was convicted of a 1984 murder in Utah.<sup>235</sup> The evidence at trial included serological testing showing that a partially smoked cigarette at the crime scene had been smoked by a "type 'A' secretor, that is, a person who secretes type "A" antigens into his bodily fluids."<sup>236</sup> "Tests performed on the rape kit [additionally] revealed that [the victim] had engaged in sexual intercourse with a type "A" secretor during the previous twenty-four to thirty-six hours," and that Goodman, along with thirty-two percent of the population, was a type "A" secretor.<sup>237</sup>

Years later, post-conviction DNA testing established that Goodman was not the source of any of the biological evidence; two other unidentified individuals matched the DNA.<sup>238</sup> True to form, the prosecution amended its theory of the case, theorizing for the first time "that Goodman was but one of several perpetrators who participated in the . . . murder . . . and that the DNA evidence [therefore] did not conclusively [exonerate] him."<sup>239</sup>

The existence of two competing avenues for relief, each producing a different claim to innocence, presented Goodman with a dilemma. Medwed explains:

Pursuing relief through the DNA statute would allow a judge

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factual conclusions for a particular type of adjudication." *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (quoting *In re Winship*, 397 U.S. at 370).

<sup>234</sup> Medwed, *supra* note 3, at 1560–63.

<sup>235</sup> *Id.* at 1560–61.

<sup>236</sup> *Id.* at 1561.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1562.

<sup>239</sup> *Id.*

to dismiss the conviction with prejudice if Goodman could prove his actual innocence by clear and convincing DNA evidence. The state habeas corpus procedure, in turn, gives courts the power to set aside convictions when presented with evidence of previously unknown constitutional violations or newly discovered evidence that undermines confidence in the propriety of the verdict. Unlike the Post-Conviction DNA Testing Statute, the state habeas corpus procedure permits a subsequent retrial on the charges.<sup>240</sup>

In Goodman's case, the prosecutor would agree to vacate the conviction in a habeas proceeding, but not to a full declaration of innocence under the DNA statute.<sup>241</sup> In the end, facing an uncertain outcome if he sought to litigate his claim of innocence under the more onerous but more rewarding standard, Goodman chose the safer route and accepted the agreement to vacate the conviction in habeas proceedings.<sup>242</sup> Goodman's conviction was vacated and he was freed, but he was "not completely cleared of the crime through any official declaration of innocence."<sup>243</sup>

Although Medwed does not say so, in an odd way the existence of the "innocence" procedure arguably diminished the value of Goodman's exoneration. No longer was dismissal good enough. In Utah he still wasn't found innocent, even though he was entitled again to be presumed innocent. And in the end, the distinction between these two categories in Goodman's case turned on the prosecutor's subjective judgment about whether Goodman was actually innocent or not. While intended to benefit the innocent, innocence statutes that impose a burden of proving actual innocence on the accused threaten to undermine innocence for the vast majority of exonerees.

Compensation statutes already do this, to some extent, but perhaps unavoidably so. A growing number of states now provide a statutory mechanism for compensating wrongly convicted individuals.<sup>244</sup> Such statutory schemes are necessary because the wrongly convicted are generally precluded from recovering in law suits for damages, primarily by various immunity doctrines that

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1563.

<sup>242</sup> *See id.*

<sup>243</sup> *Id.*

<sup>244</sup> As of 2009, 25 states, Washington, D.C., and the federal system had adopted such statutes. Adele Bernhard, *A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why*, 18 B.U. PUB. INT. L.J. 403, 409 (2009).

protect governments, prosecutors, and police, and by the high hurdles imposed in legal malpractice suits against defense counsel.<sup>245</sup> These statutory compensation schemes impose a burden on the individual to prove innocence, usually by clear and convincing evidence, but sometimes by a preponderance of the evidence.<sup>246</sup> Again, it is not clear why some statutes impose a heightened clear and convincing standard, when almost all other civil litigants claiming to have been wronged are required to meet only a preponderance standard. Fidelity to the presumption of innocence and basic respect for those whom the state has itself directly harmed ought to at least require no more than proof of innocence by the preponderance of the evidence.

Even that standard runs the risk of creating two classes of innocents: the deserving (those who can prove their innocence), and the undeserving (all others who cannot muster that proof). These schemes, thus, also threaten to erode the presumption of innocence. But at least these schemes can be justified on the basis that we really have no choice; compensation requires some quantum of proof of innocence and the preponderance standard typically defines that quantum in personal injury actions.

Beyond the compensation arena, however, the risk of undermining the presumption of innocence and inflicting additional harm on innocent individuals counsels against separating the innocent into categories. Instead, as the Innocence Movement moves into its next phase, the challenge is to expand our appreciation and respect for the presumption of innocence to which all individuals who are freed of a criminal conviction are entitled.

A final word about substantive standards of innocence is warranted. Some individuals with compelling new evidence of innocence find themselves with no forum in which to present their claim of innocence. Technical or procedural barriers to post-conviction relief, and the absence of a valid claim of constitutional error at trial, can leave these possibly innocent individuals with no remedy. In such cases, the question arises as to whether the Due Process Clause recognizes a freestanding claim of actual innocence. In *Herrera v. Collins*, the Supreme Court answered that question in the negative. The Court declared that in an otherwise error-free

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<sup>245</sup> *Id.* at 403. See generally, Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86–92 (1999) (explaining exonerees' inability to pursue tort, civil rights, and ineffective counsel claims, as well as the immunity given to victims, witnesses, police, prosecutors, and possibly defense counsel).

<sup>246</sup> See Bernhard, *supra* note 244, tbl. at 417–25.

trial, the Due Process Clause is largely unconcerned about the accuracy of the outcome.<sup>247</sup> *Herrera* was decided in 1993, in the days before innocence consciousness had fully bloomed. Chief Justice Rehnquist's majority opinion reflected a consuming concern about process over actual innocence, in a decision that sounds discordant in the age of innocence.<sup>248</sup> But even at the time, the Court was unwilling to foreclose the possibility of constitutional relief for the innocent. Chief Justice Rehnquist wrote that

[w]e may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.<sup>249</sup>

The disquieting holding in *Herrera* can be justified, if it can be justified at all, only as a statement about the limited role of the federal courts in interceding in the state court business of determining guilt and innocence at trial. The holding is premised largely on the notion that "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."<sup>250</sup> It does not purport to define innocence in any way other than for this very limited purpose.

States need not feel similarly constrained. The Missouri Supreme Court, for example, in 2003 held in *State ex rel. Amrine v. Roper* that a freestanding claim of actual innocence was cognizable in state habeas proceedings to correct a manifest injustice, as long as innocence could be proven by clear and convincing evidence.<sup>251</sup> In that case, Amrine could not present his new evidence of innocence in a newly discovered evidence claim because he could not meet the technical requirements for such a claim.<sup>252</sup> Because the innocence claim was untethered to any claim of trial error, the Missouri Supreme Court emphasized, "a freestanding claim of actual innocence is evaluated on the assumption that the trial was constitutionally adequate."<sup>253</sup> The Court nonetheless held that relief was warranted because, considering the trial record and non-

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<sup>247</sup> *Herrera v. Collins*, 506 U.S. 390, 404–05 (1993).

<sup>248</sup> *Id.* at 390.

<sup>249</sup> *Id.* at 417.

<sup>250</sup> *Id.* at 400.

<sup>251</sup> *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547–48 (Mo. 2003) (en banc).

<sup>252</sup> See May & Viner, *supra* note 9, at 483–84.

<sup>253</sup> *Amrine*, 102 S.W.3d at 547.

record evidence, Amrine had met his burden of producing clear and convincing evidence of his actual innocence.<sup>254</sup>

As a substantive matter, therefore, innocence has various definitions, depending on the context and the jurisdiction. In the end, however, the definition that most comports with our constitutional values is to recognize an individual as fully deserving to be considered innocent whenever she has met the burden—whatever it may be—required to vacate her conviction with evidence of innocence, and has subsequently obtained a dismissal, acquittal, or pardon.

#### *D. Procedural Innocence*

Innocence arises in at least one other context in the law as well. Various standards define when innocence can be used as a procedural, as opposed to a substantive claim. Here, again, the meaning of innocence is context dependent; in this context the meaning is very narrow.

Judge Henry Friendly foretold the ascendancy of innocence as a guiding principle in his 1970 article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*.<sup>255</sup> In that article, Judge Friendly reacted to what he saw as the abuse of habeas corpus and other collateral challenges to convictions by prisoners with no legitimate claims for relief. His remedy was to require, as a prerequisite to relief in collateral proceedings, a showing of

a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.<sup>256</sup>

By 1995, the Supreme Court was on board, at least for habeas claims that were otherwise procedurally barred. In *Schlup v. Delo*,<sup>257</sup> the Court held that otherwise procedurally defaulted claims could be raised in habeas proceedings if the petitioner made a “gateway” showing of actual innocence.<sup>258</sup> To excuse procedural

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<sup>254</sup> *Id.* at 548–49.

<sup>255</sup> Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970–1971).

<sup>256</sup> *Id.* at 160.

<sup>257</sup> *Schlup v. Delo*, 513 U.S. 298 (1995).

<sup>258</sup> *Id.* at 327–28.

defaults, the habeas petitioner must show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.”<sup>259</sup> This requires the petitioner to “show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>260</sup> This standard is thus analogous to a preponderance of the evidence standard, higher than the “undermines confidence” standard for prejudice, but lower than the “clear and convincing evidence” standard.<sup>261</sup> In addition, drawing directly on Judge Friendly’s prescription, the Court made clear that the assessment of innocence must be made on the basis of *all* of the evidence, including “the probative force of relevant evidence that was either excluded or unavailable at trial.”<sup>262</sup> Unlike Friendly’s proposal, however, innocence under *Schlup* is employed to open opportunities for relief, rather than to limit them.

Congress then amended the federal habeas statute in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>263</sup> In several ways, Congress borrowed from the court’s innocence-as-gateway doctrine, except in a more restrictive way. In particular, Congress banned consideration of new claims raised in a second or successive habeas petition, but crafted an innocence exception.<sup>264</sup> But, among other things, AEDPA requires that the petitioner prove factual innocence by the higher “clear and convincing evidence” standard.<sup>265</sup>

*Schlup* and AEDPA thereby set up a potential scenario that is both interesting and disturbing. Suppose a defendant with only defaulted claims seeks habeas relief. Suppose he presents sufficient evidence of actual innocence to pass through the *Schlup* or AEDPA actual innocence gateway. Under this scenario, the habeas court must have found that he is probably, or clearly, actually innocent. Put another way, the petitioner must have established by a

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<sup>259</sup> *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

<sup>260</sup> *Id.*

<sup>261</sup> *See id.* In the death penalty context, for a gateway showing of actual innocence (*i.e.*, guilt of the crime but ineligibility for execution), the higher “clear and convincing evidence” standard is applied. In *Sawyer v. Whitley*, the court required a showing by “clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” *Sawyer v. Whitley*, 503 U.S. 333, 336 (1992).

<sup>262</sup> *Schlup*, 513 U.S. at 327–28 (discussing Friendly, *supra* note 255, at 160.)

<sup>263</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

<sup>264</sup> *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (2006).

<sup>265</sup> *Id.*; *see generally* Steiker & Steiker, *supra* note 203, at 611 (containing a useful discussion of AEDPA’s use of the innocence exception).

preponderance of the evidence (for procedurally defaulted claims under *Schlup*) or by clear and convincing evidence (for successive petitions under AEDPA) that he is actually innocent. That, however, does not lead to his release. Rather, it only permits the habeas court to consider his otherwise barred constitutional claims.<sup>266</sup> But suppose that upon consideration of those claims the court were to find that they are legally meritless, that there were no reversible procedural errors at trial. For example, if the claimed constitutional error were an alleged *Brady* violation, the court would then be obliged to consider whether the state withheld material exculpatory information. But suppose the court could not find that the government possessed or withheld the exculpatory evidence.<sup>267</sup> The court would then be legally bound to deny habeas relief. Thus, a factually innocent defendant—so determined by a preponderance of the evidence, or even by clear and convincing evidence—would remain confined, or even subject to execution.<sup>268</sup> *Schlup* and AEDPA, like *Herrera*, accept the possibility of continued incarceration or execution of an actually innocent person. The age of innocence may have arrived, but it has not yet been fully embraced.

#### IV. CONCLUSION

Innocence, it turns out, is a complex concept. Yet the Innocence Movement has drawn power from the simplicity of the wrong-person story of innocence, as told most effectively by the DNA cases. The purity of that story continues to have power, but that story alone cannot sustain the Innocence Movement. It is too narrow. It fails to accommodate the vast majority of innocent people in our justice system. It fails to embrace innocence in its full complexity.

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<sup>266</sup> This highlights the difference between *Schlup* actual innocence and potential *Herrera* actual innocence. *Herrera* claimed actual innocence despite the absence of any claimed error at trial; it was a freestanding substantive claim. See *Herrera v. Collins*, 506 U.S. 390, 390 (1993). *Schlup*'s claim of innocence, on the other hand, was procedural, not substantive. See *Schlup*, 513 U.S. at 314. Once actual innocence is established under *Schlup*, the defendant is not entitled to relief from the conviction, but more process—full consideration of his constitutional claims and, if he prevails, a new trial. See *id.* at 315.

<sup>267</sup> Recall that under *Herrera* newly discovered evidence of innocence, standing alone, does not present a federal constitutional claim for relief. See *Herrera*, 506 U.S. at 418–19.

<sup>268</sup> In some cases, the error in this scenario could be assigned to defense counsel, thereby stating a constitutional claim of ineffective assistance of counsel, but not always; counsel may not have been deficient in her failure to find or present the evidence. See *generally id.* at 398–99 (“Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person.”).

Now that DNA has shattered the myth of infallibility and replaced it with innocence consciousness, it is time to rejuvenate the presumption of innocence. As we have seen, there are many standards of innocence, varying with whether innocence is being identified for research or litigation purposes and depending on the jurisdiction and nature of the proceedings. But in the end, for virtually all purposes, innocence must be understood under the objective rules that have long governed the criminal justice system. Under those rules, courts or the executive in clemency proceedings—not individual prosecutors or researchers—decide who is guilty, and conversely who is entitled to claim innocence in the absence of proof of guilt. Without proof of guilt determined by a court, the presumption of innocence defines innocence. The Innocence Movement can now sustain this broader understanding of innocence. The progress of the Innocence Movement and fidelity to constitutional principles might even depend on it.<sup>269</sup>

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<sup>269</sup> See Zalman, *supra* note 1, at 1506 (arguing that the Innocence Movement is at “a point of departure” at which its “reform project” requires moving beyond the simple story of innocence); Bandes, *supra* note 173, at 20 (arguing that the reform agenda addressing “systemic governmental misconduct” requires moving beyond the simple narrative of the DNA exonerations).