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RETURN OF THE REPRESSED: COPING WITH POST-CONVICTION INNOCENCE CLAIMS IN WYOMING

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"Never forget that justice is what love looks like in public." Dr. Cornel West, CALL & RESPONSE (Fair Trade Pictures 2008).

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INTRODUCTION

Nearly thirty years ago, the "Tech Rapist" terrorized students at Texas Tech University.[1] Michele Mallin became the fifth victim when a tall, chain-smoking man with a knife forced himself into Mallin's car, drove her to a vacant field, and raped her.[2] At some point, the Lubbock police department focused its investigation on Timothy Cole, a black Texas Tech student employed at a pizzeria near the location of Mallin's assault, who had allegedly flirted with an undercover police officer.[3] Despite her difficulty seeing her attacker, Mallin identified a color Polaroid of Cole—presented amid a collage of black and white mug shots—as her attacker.[4] She identified Cole again in a physical lineup.[5] Law enforcement provided positive feedback to Mallin for "correct" identifications throughout the process.[6] Every time she viewed a picture of Cole over the next year, her initial uncertainty faded, allowing her to unambiguously identify Cole from the witness stand at trial.[7] Although Cole had several alibi witnesses, no physical evidence linking him to the crime, and an asthmatic condition inconsistent with a chain

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[1] *See* Fred B. McKinley, *The Cole Truth*, TEX. OBSERVER (Nov. 17, 2010), http://www.texasobserver.org/the-cole-truth/.

[2] Wade Goodwyn, *Family of Man Cleared by DNA Still Seeks Justice*, NPR MORNING EDITION (Feb. 5, 2009), http://www.npr.org/templates/story/story.php?storyId=100249923.

[3] *Id.*

[4] Jena Williams, *Cole Case*, TEX. MONTHLY (Feb. 2009), http://www.texasmonthly.com/story/cole-case.

[5] *Featured Exoneration—Timothy Cole*, INNOCENCE PROJECT OF TEX. (2013), http://www.ipoftexas.org/featured-exoneration-timothy-cole.

[6] Williams, *supra* note 4.

[7] Rick Casey, *A Tale of Twin Traumas*, THE HOUS. CHRON., Aug. 5, 2009, at B1. Mallin has used her experience to join exonerees and victims in filing court briefs regarding the problems of suggestive identification procedures. *See generally* Brief for Amici Curiae Wilton Dedge et al. in Support of Petitioner, Perry v. New Hampshire, 132 S. Ct. 716 (2012) (No. 10-8974), 2011 WL 3584756.

smoker, Mallin's eyewitness testimony persuaded a jury to convict Cole of raping two women.[8] He received a sentence of twenty-five years in prison.[9] Years after Cole died in prison from an asthma attack, the actual Tech Rapist confessed to the crimes.[10] DNA testing confirmed the confession. In 2009, Cole received the first posthumous exoneration in Texas history.[11] That exoneration helped spur Texas to take partial ownership of its mistakes, passing the Tim Cole Act, one of the most powerful compensation statutes in the United States.[12]

Many features of Cole's story are unusual, but the circumstances of his wrongful conviction are not. Legal and technological developments reveal a troubling number of innocent prisoners.[13] As of 2014, at least 312 individuals, including one Wyoming resident, have used DNA testing and statutory post-conviction procedures to prove their factual innocence.[14] DNA testing can exclude a person as the source of biological evidence at a crime scene to an unprecedented degree of certainty. If not for the "divine intervention" of DNA testing (or some other form of newly discovered evidence), post-conviction innocence claims would have never received credibility from a justice system that places great weight on finality and the fact finding prowess of juries. Yet the relative rarity of biological evidence conducive to DNA testing suggests a larger, undetected number of innocent prisoners.

Post-conviction innocence claims generate intense, often emotional, debates between lawyers, policymakers, and the public regarding the nature or existence of wrongful convictions.[15] Prisoners, victims, and their respective families have strong feelings about dredging up the details of past traumas. Additionally, innocence claims threaten the faith we place in the criminal justice system to protect us from harm, which can create intense anxiety. This article argues

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[8] Goodwyn, *supra* note 2.

[9] *Id.*

[10] *Id.*

[11] *DNA in 1985 Rape Exonerates Man Who Died Behind Bars*, L.A. TIMES, Feb. 7, 2009, at 12.

[12] TEX. CODE ANN. §§ 103.001–103.154. In addition to health benefits, child support payments, tuition credits, and other services, Texas's statute provides compensation of $80,000 per year of wrongful incarceration, plus $25,000 per year spent on parole or as a registered sex offender. *Id.* § 103.052.

[13] *See generally* Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837 (2011–2012); Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

[14] *DNA Exoneree Case Profiles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Apr. 28, 2014).

[15] *See, e.g.*, Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1157–58 (2010–2011) (describing the innocence revolution and ensuing debates); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552–58 (2008) (describing criticisms of innocence movement); Morris B. Hoffman, *The 'Innocence' Myth*, WALL ST. J., Apr. 26, 2007, at A19 (attacking the "myth of factual innocence").

that Wyoming policymakers, lawyers, and citizens should directly confront this anxiety, rather than continue to use the coping mechanisms of denial and repression, by taking factual innocence claims seriously and instituting policy reforms to rectify and prevent wrongful convictions. In contrast to traditional procedural methods of challenging convictions, post-conviction innocence claims can trigger an innocence event, forcing the criminal justice system's gatekeepers to confront the causes of unjust imprisonment.[16] While this process provokes uncomfortable feelings, we have an ethical duty to work through this anxiety, rather than continue to displace it onto innocent prisoners and exonerees.

This article begins by examining how the criminal justice system attempts to apprehend, convict, and punish criminals, including theoretical justifications for punishment, traditional methods of forensic identification, and procedural safeguards against infringement on individual rights.[17] Second, it discusses the development of DNA testing and how it enabled a revolution in uncovering and correcting wrongful convictions.[18] Third, this article discusses the evolution of post-conviction remedies, which made exoneration a practical reality for hundreds of innocent people.[19] Finally, this article examines what Wyoming lawyers and policymakers can learn from post-conviction innocence claims by discussing (1) the understandable anxiety and resistance spurred by post-conviction innocence claims,[20] (2) the substantial benefits of engaging this anxiety,[21] (3) the mixed effectiveness of Wyoming's post-conviction innocence laws,[22] and (4) the uncertain prospects for future reforms to continue Wyoming's ongoing process of preventing and remedying wrongful convictions.[23]

I. WHO TO PUNISH?

This section examines why standard procedures for determining guilt often fail to protect the innocent. Part A examines the theoretical rationales for ensuring that the criminal justice system punishes only guilty individuals.[24] Part B looks at the shortcomings of traditional forensic identification methods, including

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[16] This article uses "innocence event" to refer to the process in which post-conviction innocence claims, often aided by DNA testing evidence, force lawyers, judges, and the public to reconsider assumptions regarding the accuracy and effectiveness of criminal justice procedures. *See infra* Part IV.B.

[17] *See infra* notes 24–204 and accompanying text.

[18] *See infra* notes 123–91 and accompanying text.

[19] *See infra* notes 198–290 and accompanying text.

[20] *See infra* notes 304–38 and accompanying text.

[21] *See infra* notes 348–87 and accompanying text.

[22] *See infra* notes 389–516 and accompanying text.

[23] *See infra* notes 517–44 and accompanying text.

[24] *See infra* notes 26–49 and accompanying text.

eyewitness testimony and forensic "science," used to ensure that the justice system punishes the guilty.[25]

A. *Theoretical Background*

Scholars offer two dominant justifications for apprehending and punishing criminals.[26] First, it may serve the utilitarian (also known as consequentialist) goal of maximizing happiness for the greatest number of people by reducing crime.[27] From this perspective, punishment is justified if the benefits of reducing crime outweigh the costs of incarceration.[28] Utilitarians offer different theories for why punishment achieves these benefits: (1) rehabilitation, (2) incapacitation, and (3) deterrence:

> Rehabilitation prevents crime by curing the offender of her abnormal criminal propensities, for her own and the community's sake. Incapacitation prevents the abnormally dangerous offender from committing crime, not by curing her, but by making it impossible for her (or at least limiting the circumstances in which she can) act on her tendencies. And deterrence prevents crime by scaring the offender away from future crime (specific deterrence) or by making an example of the offender to others, thus scaring them away from crime (general deterrence).[29]

While rehabilitation continues to provide a potential justification for punishment,[30] its influence in the United States criminal justice system has diminished in recent years.[31]

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[25] *See infra* notes 50–122 and accompanying text.

[26] United States v. Hawkins, 380 F. Supp. 2d 143, 148 (E.D.N.Y. 2005).

[27] Classical utilitarianism prioritizes providing the greatest good for the greatest number of people. *Consequentialism*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 27, 2011), http://plato.stanford.edu/entries/consequentialism/#ClaUti (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN S. MILL, UTILITARIANISM (Roger Crisp ed., 1998); HENRY SIDGWICK, THE METHODS OF ETHICS (7th ed. 1907)). *See, e.g.*, MODEL PENAL CODE § 1.02 & cmt. b(1) (Tentative Draft No. 1 2007).

[28] *Hawkins*, 380 F. Supp. 2d at 148 ("[The utilitarian view] holds that the purpose of the criminal law is to prevent or reduce the incidence of behavior that is viewed as antisocial." (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 11 (1968)) (internal quotation marks omitted)).

[29] *Id.* (quoting MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS 1 (2005)) (internal quotation marks omitted); *accord* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000).

[30] *See* MODEL PENAL CODE, *supra* note 27, § 1.02 & cmt. b(1).

[31] *See* 18 U.S.C. § 3582(a) (2012) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."); Tapia v. United States, 131 S. Ct. 2382, 2391 (2011); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

Second, punishing criminals serves retributive goals by giving "just deserts" to people who violate the law.[32] This perspective views individuals as "responsible moral agent[s] to whom rewards are due when [they] make[] right moral choices and to whom punishment is due when [they] make[] wrong ones."[33] The very act of committing a crime merits punishment as an end in itself.[34] From a retributive stance, we punish not to achieve some greater good, but as a way of showing our respect for the dignity and rights people possess as rational, autonomous human beings.[35]

Convicting innocent people arguably defeats both purposes of criminal punishment. From a retributive perspective, someone who has not broken the law does not deserve punishment.[36] Even worse, imprisoning an innocent person represents a profound disrespect for individual dignity and liberty, the very values that justify retributive punishment in the first place. Imprisoning the innocent may be easier to justify from a pure utilitarian perspective. For example, punishing the wrong person for an actual crime may send a deterrent signal to society.[37] This view is less tenable in light of DNA testing's ability to ferret out wrongful convictions. This can allow utilitarian theorists to argue that publicizing wrongful

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[32] *E.g.*, MODEL PENAL CODE, *supra* note 27, § 1.02 & cmt. b(1); 18 U.S.C. § 3553(a)(2) (2012). There is some doubt as to whether criminal punishment has been tailored to have much deterrent or rehabilitative effect, the largest focus appearing to be on retributive perspectives, notwithstanding many judges' stated preference for utilitarian considerations in imposing sentences. Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135, 142–44 (2003).

[33] *Hawkins*, 380 F. Supp. 2d at 148 (quoting PACKER, *supra* note 28, at 9) (internal quotation marks omitted).

[34] Cotton, *supra* note 29, at 1315. According to Cotton,

> All these terms communicate the idea that punishment is directed at imposing merited harm upon the criminal for his wrong, and not at the achievement of social benefits. Retribution, as distinguished from utilitarian purposes, is conceived as necessary even when social benefit will not be achieved. It is this perspective that led Kant to say that "[e]ven if civil society were to dissolve itself with the consent of all its members . . . the last murderer in prison would first have to be executed in order that each should receive his deserts and that the people should not bear the guilt of a capital crime through failing to insist on its punishment."

Id. at 1315–16 (quoting Immanuel Kant, *The Metaphysics of Morals*, *in* KANT: POL. WRITINGS 131, 156 (H.B. Nisbet trans., Hans Reiss ed., 1991)).

[35] Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 293 (1993) (citing JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 68 (1979)); *see also* R.A. DUFF, TRIALS AND PUNISHMENTS 6–7 (1986); HERBERT MORRIS, ON GUILT AND INNOCENCE 48–49 (1976); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 12 (1989).

[36] DUFF, *supra* note 35, at 154.

[37] *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 862 (2002) (describing this argument); LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 202 (1991) (using this argument to criticize utilitarianism). *See generally* Henrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327 (2006).

convictions undermines punishment's deterrent effect.[38] Moreover, wrongful convictions risk damaging the public's respect for the legitimacy of the criminal justice system—creating the perception that the state engages in the very kinds of lawlessness that the justice system was designed to stop.[39]

Of course, an absolutist utilitarian stance cannot eliminate the possibility that punishing the innocent may be justifiable if it improves society's overall well-being.[40] Yet this approach appears more commonly as a theoretical cudgel wielded by opponents of utilitarianism, rather than a legitimately held approach to crime control.[41] Few utilitarians appear willing to accept wrongful convictions as a positive good. For many utilitarians, wrongful conviction appears, at best, as an unfortunate (but perhaps necessary) consequence of protecting society from crime,[42] and, at worst, an infringement that defeats the purpose for crime control.[43]

Regardless of the punishment rationale one accepts, it seems intuitive, as a foundational matter, that there is something deeply wrong with punishing an innocent person. Wrongful convictions represent a profound assault on our system's foundational principles of individual rights. The U.S. legal system is founded on various values descended from the European enlightenment, which place a high value on individual dignity and liberty.[44] This approach is skeptical of

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[38] Christopher, *supra* note 37, at 872 (citing THOMAS HOBBES, LEVIATHAN 249 (J.M. Dent & Sons 1976) (1651); C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 17–18 (1987); Stanley I. Benn, *Punishment*, *in* 7 THE ENCYCLOPEDIA OF PHIL. 29, 31 (Paul Edwards reprint ed., 1972); Katherine J. Strandburg, *Deterrence and the Conviction of the Innocent*, 35 CONN. L. REV. 1321 (2003)).

[39] 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, 588 (2005). According to Professors Steiker and Steiker,

> [W]hen such errors are discovered, as some but by no means all of them eventually will be, they deeply undermine the legitimacy of the entire criminal justice system. This latter cost, though unquantifiable, is tremendously important. Public fear of unjust violence at the hands of the state, which has a monopoly on the legitimate use of force, is the hallmark of totalitarian regimes, one of the indices that most distinguish them from free and democratic societies.

Id.

[40] MICHAEL MOORE, LAW & PSYCHIATRY 238 (1984).

[41] *See, e.g.*, BRILMAYER, *supra* note 37, at 202. *But see generally* Christopher, *supra* note 37 (arguing that retributivism justifies punishing the innocent).

[42] *See* Risinger, *supra* note 13, at 763–64; *infra* note 313 and accompanying text.

[43] *See* Christopher, *supra* note 37, at 872 (describing this response).

[44] *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*, 92 MICH. L. REV. 862, 895 (1994) (citing THE FEDERALIST NOS. 23, 28 (Alexander Hamilton), NOS. 10, 51, 58, 63 (James Madison)) (arguing the framers of the U.S. Constitution linked structural innovations to individual liberty).

human institutions and therefore places checks and limits on state power.[45] Many of these limits are embodied in the guarantees enumerated by the Bill of Rights of the U.S. Constitution.[46]

A legal system seeking to punish those who offend the social order without harming the innocent therefore must balance competing interests and draw lines regarding what criteria are sufficient to impose punishment. While the proper placement of this line is debatable, our society chooses to err on the side of releasing the guilty, rather than punishing the innocent. This can be seen in both the traditional clichés derived from Lord Blackstone's famous statement that it is better to allow a certain number of guilty people to go free than to convict one innocent person,[47] as well as the requirement that individuals be proven guilty beyond a reasonable doubt.[48] The Wyoming Supreme Court recognized as much in 1986, when it noted early statistics regarding wrongful convictions, contrasted America's traditions of constitutional liberty with criminal justice practices in the Soviet Union, and recognized that the benefits of convicting more criminals may not be worth imprisoning innocent people.[49] With some exceptions, we have a social and legal consensus that punishing an innocent person is anathema to our values. This emphasizes the fundamental need to ensure the factual reliability of our methods of obtaining criminal convictions.

B. Forensic Identification

We live in a world of dishonest criminal actors with strong incentives to avoid detection and punishment. Our system therefore relies on evidence, combined with procedural safeguards, to establish a criminal's guilt before imposing punishment. Relevant evidence should tend to increase or decrease the probability of a fact that is material to whether a person committed a crime.[50] It should do so in a manner

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[45] *See* I.N.S. v. Chadha, 462 U.S. 919, 949–50 (1983) ("These observations [of general skepticism regarding the fallibility of human nature] are consistent with what many of the Framers expressed, none more cogently than Hamilton in pointing up the need to divide and disperse power in order to protect liberty . . . .") (citing J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383–84 (1858); THE FEDERALIST NO. 62 (Alexander Hamilton)); Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990).

[46] *See* U.S. CONST. amends. IV, V, VI, VIII.

[47] WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ABRIDGED 523 (William C. Sprague ed., 9th ed. 1915) ("[T]he law holds that it is better that ten guilty persons escape than one innocent suffer."). For a discussion of Blackstone's ratio, see Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

[48] *See In re* Winship, 397 U.S. 358, 364 (1970).

[49] Chambers v. State, 726 P.2d 1269, 1278 (Wyo. 1986), *receded from on other grounds*, Lancaster v. State, 43 P.3d 80 (Wyo. 2002).

[50] *See* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

that (1) is consistent with reliability norms[51] and (2) does not create an undue risk of unfair prejudice, confusion, delay, etc.[52] Unfortunately, two of the most persuasive forms of evidence, eyewitness identification and forensic science, have contributed to, rather than prevented, the problem of wrongful convictions.

1. Eyewitness Identification

One of the most important types of criminal evidence consists of testimony and identifications made by eyewitnesses. Initially, eyewitnesses must meet the standard of competency and have personal knowledge relevant to a defendant's guilt.[53] Witnesses may then testify that they observed defendants committing or bearing a circumstantial relationship to a crime. Juries place an extraordinary amount of weight on eyewitness evidence, making it a common culprit in wrongful convictions.[54] Appellate courts, in turn, give considerable deference to juries' guilty verdicts and findings of fact.[55] In theory, a jury can then determine witness reliability by observing live demeanor, as opposed to the seemingly less reliable "cold record" viewed by an appellate court.[56]

A growing body of research demonstrates problems with our system's faith in a jury's ability to properly weigh the reliability of eyewitness testimony.[57] Several

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[51] *See* FED. R. EVID. 702 (providing threshold requirements for the admissibility of expert opinion testimony).

[52] *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[53] *See* FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision."); FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."); WYO. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); WYO. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.").

[54] *See* United States v. Wade, 388 U.S. 218, 228 (1967); State v. Cromedy, 727 A.2d 457, 461 (N.J. 1999)

[55] *See, e.g.*, Grimes v. State, 2013 WY 84, ¶ 8, 304 P.3d 972, 975 (Wyo. 2013) (deferring to the jury's determinations regarding witness credibility and the weight of evidence); Hannifan v. Am. Nat'l Bank of Cheyenne, 2008 WY 65, ¶ 9, 185 P.3d 679, 684–85 (Wyo. 2008) ("[The Wyoming Supreme Court] give[s] great deference to a jury verdict: . . . it assumes 'evidence in favor of the successful party to be true, leaving out of consideration entirely the evidence in conflict . . . .'") (quoting Crown Cork & Seal Co. v. Admiral Beverage Corp., 638 P.2d 1272, 1274–75 (Wyo. 1982)); Sanderson v. State, 2007 WY 127, ¶ 31, 165 P.3d 83, 92 (Wyo. 2007) (reviewing constitutional questions de novo, but deferring to the jury's guilty verdict and construing every factual inference in the State's favor).

[56] *See, e.g.*, Williams v. State, 290 S.W.3d 407, 412 (Tex. Crim. App. 2009).

[57] *E.g.*, MICHAEL P. SENG & WILLIAM K. CARROLL, EYEWITNESS TESTIMONY § 1:3 (2d ed. 2003); Rebecca Brown & Steven Saloom, *The Imperative of Eyewitness Identification Reform and the Role of*

factors interfere with a witness's perception and memory, including improper photographic or physical lineups without blind administrators, high stress, a strong desire to choose correctly, subtle cues, and the limits of human memory.[58] Human memory is not an exact record of factual events. Studies indicate that we form memories through a "selective and a constructive process, in which old elements fade and are lost while new elements—subsequent information or suggestions—are unconsciously interwoven into the overall recollection until the subject cannot distinguish one from the other."[59] This can cause witnesses to use unconscious assumptions, stereotypes, and other thought patterns to fill in gaps when constructing memories. The U.S. Court of Appeals for the Sixth Circuit describes the problem:

> Many investigators believe that perception and memory are not purely deductive, but have substantial inductive components. Witnesses focus on gross or salient characteristics of any sensory experience, and fill in the details, not according to the observed facts of the experience, but according to some previously internalized pattern they associate with the perceived gross characteristics. In addition, the construction of memory is greatly influenced by post-experience suggestion. Suggestions compatible with the witness' internalized stereotype are likely to become part of the witness' memory, not because they are in fact similar to the actual experience, but because they fit the preconceived stereotype.

Police Leadership, 42 U. BALT. L. REV. 535, 539 (2013); Steven J. Frenda et al., *Current Issues and Advances in Misinformation in Research*, 1 CURRENT DIRECTIONS IN PSYCHOL. SCI. 20, 20 (2011); Ralph N. Haber & Lyn Haber, *Experiencing, Remembering, and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1097 (2000); Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 LEARNING AND MEMORY 361, 361–66 (2005); Steven Penrod, *How Well are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (2003); Matthew J. Sharps et al., *Eyewitness Memory in Context: Toward a Taxonomy of Eyewitness Error*, 24 J. POLICE CRIM. PSYCHOL. 36, 37 (2009)).

[58] *See generally Report of the Special Master*: State v. Henderson, (June 18, 2011), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).pdf. *See* Thomas v. State, 784 P.2d 237, 241 (Wyo. 1989) (Urbigkit, J., specially concurring) ("This court should not ignore the well-documented frequency of mistake which occurs in eye-witness identification with regard for what should be appropriate in the tough cases.") (citing Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R.4TH 1047 (1986); Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to Reliability of, or Factors to be Considered in Evaluating, Eyewitness Identification Testimony—State Cases*, 23 A.L.R.4TH 1089 (1983)); D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, 35 AM. JUR. PROOF OF FACTS 3D 1, § 1 (1996) ("Eyewitness testimony may be the least reliable, and yet the most compelling.").

[59] *E.g.*, People v. McDonald, 690 P.2d 709, 716 (Cal. 1984), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000).

> Also, unreliability can be compounded by inaccurate perception of even the gross characteristics of the experience. Some studies have shown that even under ideal conditions, height estimates by different witnesses can vary by more than two feet. Even the estimates of experienced police officers can vary by as much as five inches, and their weight and age estimates can vary by as much as twenty pounds and fifteen years.[60]

A witness often becomes more certain of an identification over time. The Timothy Cole case provides a tragic example of how this happens: during the year before trial, as Michele Mallin repeatedly viewed images of Cole and received positive feedback for her identifications, her initial doubts regarding Cole's guilt transformed into absolute certainty.[61] Each confirmatory gesture, including police artist sketches, pretrial identification, indictment, and the availability of other corroborative evidence, strengthens the witness's certainty. This kind of certainty can provide a witness with an undue amount of credibility from a judge or jury. The problem worsens in the context of statistically less reliable cross-racial identifications,[62] contributing to the already pervasive problem of racial bias in the justice system.[63] Standard tools for determining the truth of eyewitness testimony, such as vigorous cross-examination or a jury's observation of nonverbal cues, often fail to uncover mistaken testimony.[64]

Unreliable pretrial identification procedures compound the problem. In pretrial identification, a witness attempts to select a criminal suspect as the

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[60] United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976) (citing R. Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23–24 (1974); WILLIAM RINGEL, IDENTIFICATION AND POLICE LINEUPS 8–11 (1968); PATRICK WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 10–11 (1965)) (internal citations omitted).

[61] *See supra* notes 4–8 and accompanying text.

[62] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 546–48 (2005); William J. Morgan, Jr., *Justice in Foresight: the Past Problems with Eyewitness Identification and Exoneration by DNA Technology*, 3 S. REG. BLACK L. STUDENTS ASSOC. L.J. 60, 69–72 (2009) (citing JUNE E. CHANCE & ALVIN G. GOLDSTEIN, THE OTHER-RACE EFFECT AND EYEWITNESS IDENTIFICATION 176 (1996); Peter Hills & Michael Lewis, *Reducing the Own-Race Bias in Face Recognition by Shifting Attention*, 59 Q. J. EXP. PSYCHOL. 996 (2006); Sherri L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984)); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 230 (2001).

[63] Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 123 (2006); Arthur L. Rizer, III, Comment, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 860 (2003); Louise Radnofsky, *Compensating the Wrongfully Convicted*, AM. PROSPECT (July 24, 2007), http://prospect.org/article/compensating-wrongly-convicted.

[64] *See Report of the Special Master*, *supra* note 58, at 48–50; Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1654–56 (2013) (assessing empirical evidence challenging the ability of jurors to detect witness credibility in light of DNA exonerations).

perpetrator of a crime from a photographic array or in-person lineup. Juries give substantial weight to this kind of testimony, possibly sealing the defendant's fate.[65] Even before trial, identifications can narrow a criminal investigation by eliminating suspects and focusing law enforcement resources on particular theories of the crime. This process often manifests itself in the destructive form of tunnel vision. This occurs when a narrowing investigatory focus combines with systemic and psychological characteristics of criminal justice institutions and witnesses, causing police and prosecutors to invest undue resources in a particular theory, ignoring alternative possibilities and conflicting evidence. The result is undue certainty regarding the accuracy of eyewitness identification and a dangerous failure to consider evidence contrary to the initial identification.[66]

Suggestive identification procedures can reduce the reliability of eyewitness testimony. The *Manson v. Brathwaite* standard governs the admissibility of eyewitness testimony based on pretrial identification procedures.[67] This standard assesses eyewitness reliability under the totality of the circumstances.[68] A court may consider several factors to determine whether an identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[69] For example, a suggestive lineup may involve explicit or implicit cues regarding the "correct" selection, such as providing a different photograph after the witness already selected the "wrong" person.[70] But suggestive identification procedures do not necessarily render an identification unconstitutional. The court weighs suggestive factors against "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[71] Nonetheless, improper identifications contribute to the problem of tunnel vision.

Despite the substantial weight courts and juries give to eyewitness testimony, highly reliable DNA testing evidence shows that such testimony plays a role in

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[65] Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'") (citations omitted); Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting); *Russell*, 532 F.2d at 1067; Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL'Y & L. 726, 728 (1995).

[66] *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Keith A. Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006).

[67] 432 U.S. 98, 114 (1977).

[68] *Id.*

[69] *Russell*, 532 F.2d at 1067 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968) (citing Neil v. Biggers, 409 U.S. 188, 199–200 (1972)) (internal quotation marks omitted).

[70] *See id.* at 1068.

[71] *Id.* (citing *Neil*, 409 U.S. at 199).

the majority of wrongful convictions.[72] Many of these cases involved witnesses who sincerely believed they saw the defendant, rather than cases of outright perjury.[73] Procedural rules governing the admissibility of eyewitness testimony, including the restraints on improper pretrial identification procedures imposed by *Manson*, failed to prevent a large number of wrongful convictions. This suggests caution in continuing to place our faith in a jury's ability to determine the accuracy of eyewitness testimony, as well as the need for reforms to combat the causes of misidentification.[74]

2. *Forensic Science*

Forensic science also contributes to undue faith in the reliability of criminal convictions. These relatively new types of scientific evidence purport to use procedures developed by the scientific method to connect a person to a crime.[75] Before admission, evidence based on such methods should have a base level of reliability demonstrated by experimental data.[76] Yet juries often accord undue reliability to scientific evidence and associated expert witness testimony, often bordering on infallibility.[77] Part of this problem stems from a reverse CSI Effect. Jurors place inordinate trust in scientific evidence, in part, because of inaccurate depictions in television and movies.[78] Despite their claims to certainty, many

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[72] *See* State v. Delgado, 902 A.2d 888, 895 n.6 (N.J. 2006); State v. Dubose, 699 N.W.2d 582, 592 (Wis. 2005); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Dept. of Justice 1996); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78–81 (2008); Gross et al., *supra* note 62, at 542–44; *Causes and Remedies*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/fix/947/Causes-and-Remedies.php (last visited Apr. 28, 2014).

[73] Gross et al., *supra* note 62, at 543 (noting that perjury is less common in wrongful rape convictions than in wrongful murder convictions).

[74] *See generally, e.g.*, Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform*, 90 DENV. U. L. REV. 331 (2012); Jules Epstein, *Irreparable Misidentification and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69 (2013); Brandon L. Garrett, *Eyewitness and Exclusion*, 65 VAND. L. REV. 451 (2012); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595 (2009).

[75] Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 393–95 (2004).

[76] The scientific method is a cyclical process of devising and revising hypotheses and using experiments to test hypotheses for errors. *Id.* at 392.

[77] Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915, 920 (11th Cir. 1998); United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass.1999); Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment*, 17 GEO. MASON U. CIV. RTS. L.J. 299, 365–67 (2007) [hereinafter Cooley, *Forensic Science*]; Craig M. Cooley, *The CSI Effect: Its Impact and Potential Concerns*, 41 NEW ENG. L. REV. 471, 478 (2007) [hereinafter Cooley, *CSI Effect*].

[78] Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 432–36 (2006). Named after the CBS crime drama *CSI: Crime Scene Investigation*, the "CSI Effect" theory claims that media depictions of forensic science make

forensic science methods are based on anecdotal information, rather than experimental data.[79] This allows invalid forensic science to play an important role contributing to wrongful convictions.[80] Even the admission of such testimony into evidence can give jurors the perception of undue reliability.[81] In contrast to the morass of faulty science, DNA testing, while not infallible, continues to provide one of the only reliable forms of forensic science—as demonstrated by extensive proficiency testing.[82]

a. Development and Reliance on Scientific Evidence

Forensic science purports to provide accurate evidence by using techniques developed through the scientific method.[83] Ideally, these methods can demonstrate a connection between a sample provided by a suspect (i.e., an exemplar) and biological or other material bearing some relationship to a crime scene (i.e., a

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prosecutions more difficult by creating unjustified expectations regarding the certainty of scientific evidence. *Id.* Professor Podlas's research found no empirical evidence of a CSI effect. *Id.* at 461; *see also* Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System*, 17 ALB. L.J. SCI. & TECH. 87, 115–16 (2007); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1056 (2006); *see also* Robinson v. State, 84 A.3d 69, 75 (Md. Ct. App. 2014) (stating that evidence of the CSI Effect is inconclusive). If anything, research suggests the possibility of a reverse CSI Effect, making jurors more likely to render guilty verdicts based on the perceived infallibility of forensic science evidence. Podlas, *supra*, at 461–62; Tyler, *supra*, at 1071. *But see* Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 333 (2006) (finding that jurors expected the prosecution to provide stronger forensic science evidence, but that these results were more related to general cultural changes than television).

[79] David L. Faigman, *Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science*, 59 HASTINGS L.J. 979, 981–85 (2008) (describing anecdotal forensic science methods as unfalsifiable pseudoscience).

[80] *E.g.*, House v. Bell, 386 F.3d 668, 708 (6th Cir. 2004) (en banc) (Merritt, J., dissenting) ("High on the list of the causes for mistakes are the kinds of errors we see in this case: [including] the misinterpretation or abuse of scientific evidence . . . ."), *rev'd*, 547 U.S. 518 (2006).

[81] United States v. Hebshie, 754 F. Supp. 2d 89, 113 (D. Mass. 2010) (citing N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect*, 15 PSYCHOL. PUB. POL'Y & L. 1, 12 (2009)).

[82] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 99–101 (2009) [hereinafter NAS REPORT] (describing challenges to the reliability of fingerprint evidence in the wake of the report issued by the National Research Council of the National Academies).

[83] "The scientific method 'is the persistent critique of arguments, in the light of tried canons for judging the reliability of the procedures by which evidential data are obtained, and for assessing the probative force of the evidence on which conclusions are based.'" *Id.* at 392 n.58 (quoting ERNEST NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION 13 (1961)). For detailed discussions of the development of the scientific method and its relationship to the law of evidence, see David Goodstein, *How Science Works*, *in* ANNOTATED REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 67–82 (Michael J. Saks et al. eds., 2d ed. 2005); Michael J. Saks, *Scientific Method: The Logic of Drawing Inferences from Empirical Evidence*, *in* 1 MOD. SCI. EVIDENCE §§ 5:1–5:45 (David L. Faigman et al. eds., 2013).

reference sample). For example, an expert witness may testify on the prosecution's behalf that a cotton fiber found on the shirt of a murder victim matches a shirt owned by the defendant. This arguably increases the probability the defendant and victim were in some kind of violent, physical contact, which can theoretically increase the probability that the defendant assaulted the victim.[84]

Fingerprint evidence, developed during the early twentieth century, provides the classic example of a well-accepted scientific identification method.[85] It relies on the theory that individuals have unique and permanent ridge patterns on the fingers, palms, and soles, which leave latent outlines when touched to objects.[86] A forensic examiner attempts to match patterns left on objects connected with the scene of a crime (e.g. a knife handle) to a suspect. While initially mistrusted,[87] law enforcement agencies and courts now put immense trust in fingerprint evidence.[88] As with many other forms of forensic science, commentators now question the reliability of fingerprinting[89]—although expert testimony based on fingerprint evidence continues to remain largely admissible in U.S. courts.[90]

Since the advent of fingerprinting technology, scientists have developed other new methods of forensic identification. For example, a firearms expert may testify that bullets found at a crime scene match the defendant's pistol.[91] In other examples, an expert may testify that the defendant's blood,[92] bite marks,[93]

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[84] This testimony would be based on the widely accepted Locard Exchange Principle. *General Assumptions and Rationale of Forensic Identification*, *in* 4 MOD. SCI. EVIDENCE, *supra* note 83, § 3 [hereinafter *General Assumptions*].

[85] *Id.* § 30:51 ("Fingerprints are held up as the ultimate yardstick of uniqueness.").

[86] U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, THE SCIENCE OF FINGERPRINTS: CLASSIFICATION AND USES 170 (1985).

[87] Courts began finding that fingerprinting evidence was admissible and highly probative during the first half of the twentieth century. Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings from* Jennings *to* Llera Plaza *and Back Again*, 41 AM. CRIM. L. REV. 1189 (2004) (citing People v. Jennings, 96 N.E. 1077, 1082 (Ill. 1911); Grice v. State, 151 S.W.2d 211, 217, 221 (Tex. Crim. App. 1941)).

[88] *E.g.*, United States v. Baines, 573 F.3d 979, 990 (10th Cir. 2009); United States v. Crisp, 324 F.3d 261, 268–69 (4th Cir. 2003); United States v. Llera Plaza, 188 F. Supp. 2d 549, 572–73 (E.D. Pa. 2002).

[89] *See generally, e.g.*, Simon A. Cole, *Fingerprinting: The First Junk Science?*, 28 OKLA. CITY U. L. REV. 23 (2003); Jacqueline McMurtrie, *Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification after the NAS Report*, 2010 UTAH L. REV. 267 (2010) (citing NAS REPORT, *supra* note 82, at 42) (describing challenges to the reliability of fingerprint evidence in the wake of the report issued by the National Research Council of the National Academies). *But see General Assumptions*, *supra* note 84, § 30:51 (noting that fingerprint misidentifications are rare and usually the result of human error).

[90] *See Baines*, 573 F.3d at 990.

[91] Cooley, *supra* note 75, at 439, 442, 443–44.

[92] *General Assumptions*, *supra* note 84, § 30:46.

[93] Cooley, *supra* note 75, at 437.

footprints,[94] handwriting,[95] or hair[96] match samples from the crime scene. Other common forensic science methods analyze tool marks, bloodstain patterns, paint, narcotics and other chemicals, fluids, fibers, glass, minerals, voiceprints, fire, and explosives.[97] Large numbers of expert witnesses stand ready to provide opinion testimony based on these methods.[98]

b. Forensic Science in Question

Despite widespread expectations of reliability, scientists and advocates strongly question many traditional forms of forensic science. According to a comprehensive report by the National Research Council, courts often rely on faulty science to identify criminal suspects.[99] Prosecutors secure a large number of erroneous convictions with evidence based on invalid forensic science.[100] Many of these errors surfaced due to the one type of forensic evidence that consistently outperforms all others in terms of accuracy: DNA testing. Other errors are uncovered through new experimental scrutiny of traditional forensic science methods. For example, arson investigators frequently use untested theories to persuade juries that burn patterns indicate the existence of an intentional fire.[101] The State of Texas executed Cameron Todd Willingham in 2004 for having murdered his children in a fire based largely on expert char pattern testimony.[102] While the Texas Board of Pardons and Paroles refused to grant Willingham a

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[94] *Id.* at 405.

[95] *See generally* Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1725 (2001).

[96] Cooley, *supra* note 75, at 405, 409–10, 412–13, 427, 435–36.

[97] *See* NAS REPORT, *supra* note 82, at 127–82; *General Assumptions*, *supra* note 84, §§ 30:46–30:58.

[98] *See, e.g.*, *The National Directory of Expert Witnesses: A Guide to Experts & Consultants in Over 400 Fields & Specialties*, CLAIMS PROVIDERS OF AMERICA, http://www.national-experts.com (last visited May 7, 2014).

[99] NAS REPORT, *supra* note 82, at 100. The U.S. Supreme Court appears to have recognized the problem of faulty forensic science, resulting in renewed importance of cross-examination of expert witnesses and protection of rights guaranteed by the Confrontation Clause of the U.S. Constitution. Joëlle Anne Moreno, *C.S.I. Bulls#!t: The National Academy of Sciences,* Melendez-Diaz v. Massachusetts*, and Future Challenges to Forensic Science and Forensic Experts*, 2010 UTAH L. REV. 327, 328–29 (2010) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309–10 (2009)).

[100] *See generally* Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009). *See* Garrett, *supra* note 72, at 81–86.

[101] Cooley, *supra* note 75, at 431 n.309, 437–39; *see also* United States v. Hebshie, 754 F. Supp. 2d 89 (D. Mass. 2010) (vacating arson and mail fraud conviction because defense counsel was deficient in failing to object to faulty arson science testimony).

[102] Debra Cassens Moss, *DNA—The New Fingerprints*, 74 A.B.A. J. 66 (May 1988).

posthumous pardon,[103] his guilt remains in significant doubt because of the outdated arson science used to secure his conviction.[104]

Other wrongful convictions involve faulty testimony based on hair comparison, bite mark, shoeprint, fingerprint, and voice analysis.[105] Many forensic science techniques and theories are based on folk lore or anecdotes, rather than rigorous experimentation.[106] Unfortunately, faulty forensic science disciplines continually resist the process of error detection and falsification.[107] Such resistance eviscerates the unique predictive power provided by the scientific method.[108]

For many years before the widespread availability of DNA testing, blood serology[109] provided one of the most widely used methods for tying a suspect to the scene of the crime. In blood serology, serum protein and red blood cell enzyme typing are used to distinguish individuals as blood sample contributors.[110] This type of testing is useful in sexual assaults cases, which tend to involve suspects leaving behind bodily fluids.[111] These tests can narrow the class of individuals who could have been the source of fluid evidence and, in some cases, exclude certain people.[112] For example, some people secrete their blood type into their bodily fluids (so-called secretors), while others do not (non-secretors).[113] If semen at a crime scene exhibits a blood type, then a non-secretor suspect could not have been

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[103] John Schwartz, *Texas: Posthumous Pardon is Denied for Man Executed in 3 Deaths*, N.Y. TIMES, Apr. 4, 2014, at A15.

[104] TEX. FORENSIC SCI. COMM'N, WILLINGHAM/WILLIS INVESTIGATION (2011), http://www.fsc.state.tx.us/documents/FINAL.pdf; INNOCENCE PROJECT ARSON REVIEW COMM., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF *STATE OF TEXAS V. CAMERON TODD WILLINGHAM* AND *STATE OF TEXAS V. ERNEST RAY WILLIS* (2006), http://www.innocenceproject.org/docs/ArsonReviewReport.pdf; Paul Bieber, *A Burning Question*, CHAMPION, July 2013, at 34.

[105] Garrett & Neufeld, *supra* note 100, at 47–75.

[106] *See* Cooley, *supra* note 75, at 441 (discussing the problematic background of burn pattern analysis); NAS REPORT, *supra* note 82, at 110, 188.

[107] Cooley, *supra* note 75, at 393.

[108] *Id.* at 393; United States v. Hebshie, 754 F. Supp. 2d 89, 125 (D. Mass. 2010) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993); Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 645 (1992); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989)).

[109] Forensic serology involves determining and analyzing the type and features of blood for trial purposes. Stevens, *supra* note 92; *General Assumptions*, *supra* note 84, § 30:46.

[110] Thomas M. Fleming, *Admissibility of DNA Identification Evidence*, 84 A.L.R. 4TH 313, § 2[e] (1991); *General Assumptions*, *supra* note 84, § 30:46.

[111] *General Assumptions*, *supra* note 84, § 30:46.

[112] Stevens, *supra* note 92.

[113] *See, e.g.*, People v. Goree, 349 N.W.2d 220, 224 (Mich. Ct. App. 1984) (affirming murder conviction obtained through relevant and admissible expert testimony that defendant's status as non-secretor placed him within twelve percent of the population).

the source. However, such testing is imprecise.[114] While only a certain percentage of the population may exhibit certain serological characteristics, that percentage still includes a very large number of individuals, making the procedure far less exact than DNA testing.[115] Expert witnesses providing faulty testimony regarding the exaggerated confirmatory power of blood serology testing compound the problem.[116] DNA testing often exonerates individuals convicted, at least in part, through blood serology evidence and testimony, demonstrating the significant potential risks of relying on faulty or outdated forensic science.[117]

Not all scientific disciplines are the same.[118] Any credible approach to forensic science should rely on rigorous experimental testing of its hypotheses.[119] DNA testing provides a superior model for assessing the credibility of forensic science. It is practically alone among forensic science methods in providing objective and reliable standards for matching individuals to biological material associated with a crime scene.[120] As explained in Section II.B, DNA testing (also known as DNA fingerprinting) can connect an individual to a piece of biological material to near certainty.[121] While it is unreasonable to expect all fields to match the precision of DNA testing, they should at least use the scientific method and experimental data to determine their actual predictive power. Until other fields undertake serious steps to match the rigor provided by DNA testing, our certainty in the accuracy of many types of forensic science evidence remains in serious question.[122]

II. THE DNA TESTING REVOLUTION

DNA testing disturbs longstanding assumptions regarding the criminal justice system's ability to use traditional forms of evidence and procedural rules to determine guilt. Gold standards for determining guilt, including eyewitness testimony, forensic science, and due process, failed to ferret out hundreds

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[114] *General Assumptions*, *supra* note 84, § 30:46; Garrett, *supra* note 72, at 81–82.

[115] *General Assumptions*, *supra* note 84, § 30:46; Garrett, *supra* note 72, at 81–82.

[116] *General Assumptions*, *supra* note 84, § 30:46 ("Secretor status testing was one area in particular where laboratories performed poorly and which led to improper determinations of common origin."); Garrett, *supra* note 72, at 82.

[117] *See generally* Garrett & Neufeld, *supra* note 100.

[118] NAS REPORT, *supra* note 82, at 182.

[119] Garrett & Neufeld, *supra* note 100, at 392.

[120] NAS REPORT, *supra* note 82, at 7–8, 42 ("With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.").

[121] *See infra* notes 150–56 and accompanying text.

[122] NAS REPORT, *supra* note 82, at 7–8, 42.

(and perhaps more) of wrongfully convicted individuals.[123] We would remain unaware of the extent of the problem if not for the "divine intervention"[124] of DNA testing, which can exclude a defendant to such an unprecedented degree of certainty that it can singlehandedly invalidate mountains of traditionally persuasive evidence of guilt.[125] Part A explains what DNA is.[126] Part B discusses the discovery and technological development of DNA fingerprinting.[127] Part C discusses the admissibility of DNA testing evidence and related expert witness testimony at trial.[128] Finally, Part D discusses the criminal justice applications of DNA testing.[129]

A. What is DNA?

In the nineteenth century, an Austrian monk named Gregor Mendel discovered genetic inheritance. He did so by observing how hybridized pea plants inherited dominant and recessive traits.[130] This discovery led to the theory that individuals receive certain traits from parents in the form of packages called genes.[131] In 1944, scientists discovered the connection between genes and nucleic acids located within the nucleus of an organism's cells.[132] Nucleic acids (adenine, thymine, guanine, and cytosine) form nucleotide base pairs along a sugar phosphate backbone in a double spiral structure—called a double helix.[133] This material, deoxyribonucleic acid (DNA), provides instructions for the functioning and development of living organisms.[134] Certain sets of nucleotide base pairs, ranging

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[123] *E.g.*, *Innocence Project Case Profiles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Apr. 28, 2014).

[124] James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 543–49 (2002).

[125] Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1647 (2008).

[126] *See infra* notes 130–37 and accompanying text.

[127] *See infra* notes 138–61 and accompanying text.

[128] *See infra* notes 162–81 and accompanying text.

[129] *See infra* notes 182–91 and accompanying text.

[130] JOHN M. BUTLER, FUNDAMENTALS OF FORENSIC DNA TYPING 34 (2010).

[131] *Each Organism's Traits Are Inherited from a Parent through Transmission of DNA*, SCITABLE (2014) http://www.nature.com/scitable/topicpage/each-organism-s-traits-are-inherited-from-6524917.

[132] *Genetics and Genomics Timeline*, GENOME NEWS NETWORK (2004), http://www.genome-newsnetwork.org/resources/timeline/1944_Avery.php.

[133] David H. Kaye & George Sensabaugh, *DNA Typing*, *in* 4 MOD. SCI. EVIDENCE, *supra* note 83, § 31:39 ("The physical structure of DNA is often described as a double helix because the molecule has two spiraling strands connected to each other by weak bonds between the nucleotide bases.").

[134] J. Watson & F. Crick, *Molecular Structure of Nucleic Acids*, 171 SCI. 737 (1953); U.S. NAT'L LIBR. OF MED., NAT'L INSTIT. OF HEALTH, *What is DNA?* (Apr. 28, 2014), http://ghr.nlm.nih.gov/handbook/basics/dna.

from 1,000 to 10,000 base pairs (called genes), provide instructions for cellular activity, such as the production of enzymes.[135] Most human DNA is organized into very long DNA structures containing thousands of genes called chromosomes.[136] When a cell divides, the cell's chromosomes are duplicated, which allows DNA to replicate itself.[137]

B. Technological Development of DNA Fingerprinting

The vast majority of DNA is identical between humans,[138] making it useless for distinguishing between different people. But scientists have discovered individually unique regions.[139] Initially considered useless, these sequences of so-called "junk DNA" appear in repeated patterns that are individual to each person—other than identical twins, who share identical DNA.[140] In 1985, Sir Alec Jeffreys, a United Kingdom geneticist determined these unique repeating patterns could be used as a kind of "genetic fingerprint" to identify specific individuals.[141] These sequences can match or exclude a person from having contributed a piece of biological evidence or determine a person's biological heritage.[142]

At the risk of simplifying technical procedures, DNA testing proceeds in roughly the following manner:

- First, a reference sample is obtained from a known individual. This may be obtained voluntarily or under court order from the person or from a profile previously incorporated into a law enforcement database like the Combined DNA Index System (CODIS). The sample is often a cheek swab (such as a buccal swab), but can also be blood, semen, skin, or hair. As long as the technician extracts a sufficient amount of quality DNA from the sample, the testing can proceed without problems, regardless

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[135] Kaye & Sensabaugh, *supra* note 133, § 31:39.

[136] *Id.*

[137] BRUCE ALBERTS ET AL., MOLECULAR BIOLOGY OF THE CELL ch. 5 (4th ed. 2002), *available at* http://www.ncbi.nlm.nih.gov/books/NBK26850/.

[138] Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 MICH. L. REV. 931, 939–40 (1999).

[139] David N. Cooper et al., *An Estimate of Unique DNA Sequence Heterozygosity in the Human Genome*, 69 HUMAN GENETICS 201 (1985).

[140] THOMAS CURRAN, PARLIAMENTARY RESEARCH BRANCH, BP-443E, FORENSIC DNA ANALYSIS: TECHNOLOGY AND APPLICATION 6 (1997), *available at* http://www.parl.gc.ca/Content/LOP/research-publications/bp443-e.pdf.

[141] Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, BAYLOR U. MED. CTR. PROCEEDINGS (Apr. 2005), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200713/.

[142] A. Jeffreys et al., *Hypervariable "Ministatellite" Regions in Human DNA*, 314 NATURE 67 (1985).

of the source material.[143] A technician then extracts a DNA fingerprint from the sample (often after using a technique to amplify or replicate the sample), producing a DNA profile (a sample genotype) through one of a number of techniques.[144]

- Second, the process is repeated with a piece of biological evidence connected to a crime. This is often biological material left at the scene of the crime, such as semen in a sexual assault kit.[145]

- Finally, the technician compares the genotypes of the two samples to determine if there is a genetic match. If there is a match, the technician determines the likelihood ratio, which is the probability, based on relevant population databases, that a random person could have created the match. This creates an objective probability that a given person was the source of a specific piece of biological evidence to an extremely high degree of confidence.[146]

While the above steps describe a common, simplified approach to testing, there is no single "DNA test." Over time, genetic scientists developed increasingly sophisticated and accurate methods of comparing DNA samples, which can provide more accurate results for smaller and more degraded samples. The first dominant form of DNA testing was Restriction Fragment Length Polymorphism (RFLP).[147] This form of testing was precise but time-consuming and required a large sample of biological material in relatively good condition.[148] Scientists later developed the Polymerase Chain Reaction (PCR) amplification technique, which uses an enzyme called polymerase to duplicate and amplify a sample.[149] This makes it substantially easier to test smaller or more degraded samples—a method very helpful for testing old pieces of biological evidence, such as semen on a shirt that has been sitting in an evidence locker since the 1980s.

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[143] Kaye & Sensabaugh, *supra* note 133, § 31:46 (noting the large variety of sources susceptible to DNA testing, including old blood stains, bite marks, urine, and cigarette butts).

[144] NAT'L INSTIT. OF JUSTICE, *DNA Evidence: Basics of Analyzing* (Aug. 9, 2012), http://nij.gov/topics/forensics/evidence/dna/basics/Pages/analyzing.aspx.

[145] *Id.*

[146] *Id.*

[147] Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus, and Justice*, 12 GEO. MASON U. C.R. L.J. 233, 243–44 (2002); Holly Schaffer, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695 (2002) (citing NAT'L INST. OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 14 (2000), *available at* http://www.ojp.usdoj.gov/nij/dna/pubs.htm).

[148] *General Assumptions*, *supra* note 84, § 30:46; Lugosi, *supra* note 147, at 244–45.

[149] Lugosi, *supra* note 147, at 246–47 (citing Randi B. Weiss et al., *The Use of Genetic Testing in the Courtroom*, 34 WAKE FOREST L. REV. 889, 898–99 (1999)); NAT'L INST. OF JUSTICE, *supra* note 147, at 17.

Most contemporary testing involves Short Tandem Repeats (STR) testing.[150] STR testing applies PCR analysis to short repeating regions of DNA, called loci.[151] It is very sensitive and can generate conclusive results from smaller, degraded samples.[152] A combination of all thirteen STR loci produces a frequency of about 1 in 575 million Caucasians and 1 in 900 trillion African Americans.[153] In other words, there is a 1 in 575 million chance that a random Caucasian person would have produced a positive result from the test. STR testing is the primary method used in the FBI's CODIS database.[154] Another common method, Y-STR testing, is a variation on STR testing that isolates repeating sections on the Y chromosome, found only in males.[155] Y-STR testing is useful for analyzing male samples contaminated with female samples, typical in sexual assault cases.[156]

Other DNA testing methods exist for specialized situations. Low-Copy Number (LCN) typing is used for very small samples.[157] Single-Nucleotide Polymorphism (SNP)[158] testing is used for samples subjected to extreme environmental degradation, such as samples recovered from the World Trade Center attacks.[159] Finally, mitochondrial DNA (mtDNA) analysis, unlike all of the above methods, analyzes a special kind of DNA contained in the organelles

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[150] Lugosi, *supra* note 147, at 246; NAT'L INST. OF JUSTICE, *supra* note 147, at 1; John M. Butler, *Genetics and Genomics of Core Short Tandem Repeat Loci Used in Human Identity Testing*, 51 J. FORENSIC SCI. 253 (2006).

[151] Saad, *supra* note 141.

[152] Butler, *supra* note 150, at 261.

[153] Richard Saferstein, *Criminalistics*, *in* DNA: THE INDISPENSABLE FORENSIC SCIENCE TOOL (9th ed. 2004).

[154] NAT'L INST. OF JUSTICE, *supra* note 147; Butler, *supra* note 150, at 253; *see also* NAT'L INST. OF STANDARDS AND TECH., *FBI Core STR Loci* (Nov. 17, 2011), http://www.cstl.nist.gov/biotech/strbase/fbicore.htm.

[155] Butler, *supra* note 150, at 261.

[156] *Id.*

[157] Bruce Budowle et al., *Validity of Low Copy Number Typing and Applications to Forensic Science*, 50 CROATIAN MED. J. 207 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2702736/.

[158] Peter Gill, *An Assessment of the Utility of Single Nucleotide Polymorphisms (SNPs) for Forensic Purposes*, 114 INT'L J. LEGAL MED. 204 (2001), *available at* http://link.springer.com/article/10.1007/s004149900117#page-1.

[159] Leslie G. Biesecker et al., *Enhanced: DNA Identifications After the 9/11 World Trade Center Attack*, 310 SCI. 1122 (2005); Nanci Ritter, *Identifying Remains: Lessons Learned From 9/11*, 256 NAT'L INST. JUST. J. (Jan. 2007), *available at* http://www.nij.gov/journals/256/Pages/lessons-learned.aspx; U.S. DEPT. OF JUSTICE, LESSONS LEARNED FROM 9/11: DNA IDENTIFICATION IN MASS FATALITY INCIDENTS 7, 18 (2006), *available at* https://www.ncjrs.gov/pdffiles1/nij/214781.pdf. As of 2011, 1,722 of the 8,157 bone fragments requiring DNA testing in the World Trade Center wreckage were linked to known individuals. Russell Goldman, *World Trade Center: 1,630th Victim Identified Since 9/11*, ABC NEWS (May 12, 2011), http://abcnews.go.com/US/world-trade-center-1630th-victim-identified-911/story?id=13591639.

outside the cell's nucleus.[160] While time consuming, costly, and less precise than other methods, mtDNA testing may be useful for analyzing highly degraded samples in which nuclear DNA has not been preserved, such as in bones, teeth, and hair shafts.[161] While STR testing is conducted more often than other methods, the precise method will depend on the nature of evidence in question.

C. Evidentiary Development

The admissibility of DNA evidence depends on the typical standards for admitting scientific evidence. Most jurisdictions, including Wyoming, adopt some version of Federal Rule of Evidence 702.[162] According to that Rule,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[163]

If these elements exist, an expert with specialized knowledge can provide opinion testimony to the finder of fact (usually a jury) regarding DNA testing results.[164]

When determining the admissibility of scientific evidence, U.S. courts view the judge as a gatekeeper who determines not whether an expert witness's conclusions are valid, but whether the expert used sufficiently sound general principles,

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[160] Mark R. Wilson et al., *Validation of Mitochondrial DNA Sequencing for Forensic Casework Analysis*, 108 INT'L J. LEGAL MED. 68 (1995).

[161] NORAH RUDIN & KEITH INMAN, FORENSIC DNA ANALYSIS 59 (2d ed. 2002).

[162] *See* FED. R. EVID. 702; WYO. R. EVID. 702.

[163] FED. R. EVID. 702; *accord* WYO. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

[164] Some DNA testing statutes expressly require that a motion for testing specify a method of testing that uses a scientific method of sufficient reliance and materiality to be admissible under applicable evidentiary rules. *See* WYO. STAT. ANN. § 7-12-303(c)(vi) (2013).

reasoning, and methodology to allow a jury to hear the testimony.[165] Most U.S. courts use the U.S. Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[166] test to determine the admissibility of scientific evidence. The *Daubert* Court held that the Federal Rules of Evidence superseded the former "general acceptance" standard for admissibility of scientific evidence[167] and announced four non-exclusive factors of reliability determining Rule 702 admissibility: "a theory's testability, whether it 'has been a subject of peer review or publication,' the 'known or potential rate of error,' and the 'degree of acceptance . . . within the relevant scientific community.'"[168] Not all factors will be relevant or weighed in the same manner for all types of evidence. The court must determine how to apply the factors based on their relevance to a particular type of evidence.[169] Other possible factors may include: "(1) The experience and specialized expertise of the proffered expert; (2) Whether or not that expert is testifying about matters occurring "naturally and directly" out of research conducted independent of litigation; and (3) Any "non-judicial" utilization of the expert methodology in question."[170]

Despite the fact-intensive nature of admissibility questions, courts widely consider current DNA testing methods admissible.[171] The first and third *Daubert* factors, in particular, strongly support the general admissibility of DNA evidence. This is largely due to the significant amount of proficiency testing and extremely accurate likelihood ratios provided by DNA testing results.[172]

Of course, DNA evidence is not infallible.[173] As argued above, the public's illusions regarding the certainty of any forensic scientific method can result in

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[165] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

[166] 509 U.S. 579; *see also* FED. R. EVID. 702 cmt. notes on 2000 amendment.

[167] *See, e.g.*, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also* Springfield v. State, 860 P.2d 435, 442 (Wyo. 1993) (adopting the *Daubert* rule and rejecting the *Frye* general acceptance test).

[168] *Kumho Tire Co.*, 526 U.S. at 145 (quoting *Daubert*, 509 U.S. at 589–95); *accord* Easum v. Miller, 2004 WY 73, 92 P.3d 794 (Wyo. 2004) (applying *Daubert*'s non-exclusive factors).

[169] *See, e.g.*, Bunting v. Jamieson, 984 P.2d 467, 475 (Wyo. 1999).

[170] *Id.* at 472.

[171] *E.g.*, United States v. Ewell, 252 F. Supp. 2d 104 (D.N.J. 2003); *see also Springfield*, 860 P.2d at 447–48 (holding that the reliability and weight of DNA evidence is a question for the jury and that testimony regarding the statistical probability of a random DNA match is an appropriate and perhaps necessary component of expert witness testimony regarding DNA testing results); Revera v. State, 840 P.2d 933 (Wyo. 1992) (applying Rule 702 and holding RFLP test results were admissible).

[172] *General Assumptions*, *supra* note 84, § 30:46; Garrett & Neufeld, *supra* note 117.

[173] Cooley, *CSI Effect*, *supra* note 77, at 478–80 (citing Adam Liptak, *You Think DNA is Foolproof? Try Again*, N.Y. TIMES, Mar. 16, 2003, at 5; William C. Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. FORENSIC SCI. 48 (2003)) (describing several instances of DNA testing errors and miscalculations).

wrongful convictions.[174] The primary problems regarding the admissibility of DNA evidence tend to involve testing that fails to adhere to applicable field standards[175] and the risk that lawyers, courts, and jurors misunderstand the results.[176] Like any scientific technique, DNA methods must remain subject to criticism and extensive error testing.[177] Laboratories must adhere to quality assurance standards[178] and qualified expert witnesses must correctly explain the results to jurors.[179] Several crime laboratories have been involved in high profile scandals regarding inadequate training and procedures used in DNA and other forms of forensic testing.[180] But if properly conducted and explained, DNA testing continues to provide the most consistently reliable form of forensic science.[181] That is why it has played such an important role in spurring the innocence movement and the exoneration of hundreds of prisoners.

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[174] *See supra* notes 99–122 and accompanying text.

[175] The National Research Council has issued three reports regarding standards for DNA testing and other types of forensic science. Some courts view the second report as an authoritative statement regarding the standards for the field of DNA testing. *See, e.g.*, United States v. Davis, 602 F. Supp. 2d 658 (D. Md. 2009).

[176] *See* Harry Edwards, *Solving the Problems that Plague the Forensic Science Community*, 50 JURIMETRICS 5 (2009); Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. LEGAL STUD. 395, 419–23 (2005); William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorneys' Fallacy*, 11 LAW & HUM. BEHAV. 167 (1987). For an example of an appeal from trial proceedings involving the misunderstanding of DNA testing principles, see McDaniel v. Brown, 558 U.S. 120, 128 (2010) (reversing on largely procedural grounds).

[177] Cooley, *Forensic Science*, *supra* note 77, at 363–64 ("If a purported scientific field, such as forensic science, claims its techniques (i.e., fingerprinting, DNA analysis) or professionals (i.e., fingerprint examiners, DNA analysts) are infallible, then this field is not comprised of scientists and it is not practicing science. If no errors are being committed or detected, there is no growth, and thus no science.") (citing Max Hirschberg, *Wrongful Convictions*, 13 ROCKY MTN. L. REV. 20, 34 (1940)).

[178] NAT'L RES. COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 75–88, 179–80 (1996); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 213–19 (2007); Kaye & Sensabaugh, *supra* note 133, § 31:47.

[179] NAT'L RES. COUNCIL, *supra* note 178, at 169–71; Edwards, *supra* note 176.

[180] David L. Faigman et al., *Current Objections to DNA Admissibility—Preservation of Evidence*, *in* 4 MOD. SCI. EVIDENCE, *supra* note 83, § 31:15. For example, a 2013 report demonstrated improper training at the Colorado Department of Public Health and Environment, throwing several convictions based on blood alcohol testing into doubt. Letter from John W. Suthers, Colo. Att'y Gen., to Tom Raynes, Exec. Dir., Colo. Dist. Att'y's Council et al. (June 7, 2013), *available at* http://www.krdo.com/blob/view/-/20503056/data/2/-/ qsnx10/-/CDPHE-investigation-report.pdf.

[181] NAS REPORT, *supra* note 82, at 99–101.

D. *Criminal Justice Applications of DNA Testing and the Birth of the Innocence Movement*

Initially, criminal lawyers used DNA testing at trial to establish or exclude an individual from having a connection to a crime.[182] If a person leaves biological evidence at the scene, STR and other methods of DNA testing can provide highly accurate means of either determining the probability that defendant left the evidence or entirely excluding that person.[183] Law enforcement agencies, in particular, have sought to use DNA testing as part of criminal investigations. The FBI maintains a database of DNA profiles—mostly STR profiles of convicted offenders—called CODIS,[184] which includes contributions by all fifty state governments, each having its own DNA database.[185]

DNA testing's truly revolutionary application arrived not as trial evidence, but when innocence advocates began using it to collaterally challenge prison sentences. This is often done years or decades after the initial jury verdict. Barry Scheck and Peter Neufeld, former public defenders, founded the Innocence Project at Cardozo Law School in 1992.[186] They organized the Project as a student clinic primarily focused on using post-conviction DNA testing to collaterally attack the convictions of factually innocent persons.[187] The Innocence Project laid the groundwork for a nationwide Innocence Network.[188] Innocence Network member organizations now operate in every U.S. jurisdiction.[189] Member organizations work with law students and lawyers to secure the release of factually innocent

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[182] Mark Hansen, *The Great Detective*, 87 A.B.A. J. 36, 36–43 (2001); U.S. DEPT. OF JUSTICE, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2 (1999), http://www.ncjrs.gov/pdffiles1/nij/177626.pdf.

[183] Alan L. Friedman, *Forensic DNA Profiling in the 21st Century*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 168 (1999).

[184] *Violent Offender DNA Identification Act of 1999, DNA Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing on H.R. 2810, H.R. 3087, and H.R. 3375, Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 89 (2000) (statement of Dwight E. Adams), *available at* http://www.fbi.gov/news/testimony/the-fbis-codis-program; CODIS AND NDIS FACT SHEET, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Apr. 28, 2014); *see also* 42 U.S.C. § 14131(a) (2012) (authorizing creation of CODIS).

[185] DEPT. OF JUSTICE, AUDIT REPORT: THE COMBINED DNA INDEX SYSTEM i (Sept. 2001), http://www.justice.gov/oig/reports/FBI/a0126/final.pdf. For an example of a statute authorizing a state database, see WYO. STAT. ANN. § 7-19-402 (2013).

[186] Barry Scheck et al., *Freeing the Innocent*, CHAMPION, Mar. 2000, at 18.

[187] *Id.* at 22; Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 597–98 (2006).

[188] Barry Scheck & Peter Neufeld, *Building an Innocence Network and an Innocence Agenda*, CHAMPION, Mar. 2000, at 23–33.

[189] *See* INNOCENCE NETWORK MEMBER ORGANIZATIONS (2012), http://www.innocencenetwork.org/members (last visited Apr. 28, 2014).

prisoners—whether through DNA or other newly discovered evidence—and to lobby state legislatures to adopt measures to prevent and correct wrongful convictions, as well as compensate the wrongfully convicted.[190] As of late 2013, at least 311 individuals were exonerated through some form of post-conviction collateral relief.[191] In that year, the Network's member organizations assisted in the exoneration of thirty-one prisoners.[192] These exonerations helped expose the falsity of many of our illusions of certainty in the criminal justice system's results, potentially paving the way for broader reforms.

III. THE EVOLUTION OF POST-CONVICTION RELIEF

This section explains the historical development of post-conviction remedies to protect the rights of factually innocent defendants and prisoners. Part A briefly addresses the standard safeguards provided by trial and direct appellate review.[193] Part B looks at the development of collateral remedies, including freestanding constitutional challenges to a person's continued incarceration.[194] Finally, Part C discusses the evolution of statutes providing post-conviction innocence claims based on newly performed DNA testing.[195]

A. Trial and Direct Appeal

The U.S. justice system provides several safeguards to prevent wrongful convictions. Commentators hail these measures for providing "unparalleled protections against convicting the innocent."[196] Many of these safeguards emerged from the U.S. Supreme Court under Chief Justice Earl Warren, providing multiple assurances that criminal defendants are presumed innocent and may not have their liberty interests infringed upon without due process of law.[197] Ideally, these

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[190] *See* AT THE INNOCENCE NETWORK, http://www.innocencenetwork.org (last visited Apr. 28, 2014).

[191] *Exonerated: Cases by the Numbers*, CNN (Nov. 12, 2013), http://www.cnn.com/2013/12/04/justice/prisoner-exonerations-facts-innocence-project/.

[192] INNOCENCE NETWORK EXONERATIONS 2013 (2014), http://www.innocencenetwork.org/innocence-network-exoneration-report-2013.

[193] *See infra* notes 198–210 and accompanying text.

[194] *See infra* notes 211–75 and accompanying text.

[195] *See infra* notes 276–91 and accompanying text.

[196] Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). Commentators have attempted to use statistics to obscure the rate of wrongful convictions, painting the exonerations as aberrations of a system that nearly always gets the correct result. *See* Kansas v. Marsh, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (quoting Joshua Marquis, *the Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23) ("[E]ven with its distorted concept of what constitutes 'exoneration,' the claims of the Gross article are fairly modest: . . . . 'That would make the error rate .027 percent—or, to put it another way, a success rate of 99.973 percent.'"). *But see* Risinger, *supra* note 13, at 771 n.17 (criticizing this approach).

[197] *Herrera*, 506 U.S. at 398–99 (majority opinion).

protections, combined with the zealous (or, at least, not ineffective) advocacy and proffering of evidence by adversarial lawyers, should allow a neutral jury of one's peers to correctly determine whether the state met its burden of proving guilt beyond a reasonable doubt.

For example, the U.S. Constitution's Due Process Clause protects a person from conviction of a crime unless the prosecution proves every element of an offense beyond a reasonable doubt.[198] Due process requires several guarantees, including the right to a speedy trial before an impartial jury, and other protections recognized by courts over time.[199] These standards apply to the U.S. federal government through the Sixth Amendment of the U.S. Constitution and largely to state governments through the Due Process Clause of the Fourteenth Amendment.[200] The Constitution even guarantees the right to a directed verdict of acquittal if "no rational trier of fact could find guilt beyond a reasonable doubt."[201] After conviction, all U.S. jurisdictions, including the federal government, provide some form of direct appellate review.

The procedural safeguards provided by trial and direct appeals frequently fail to uncover erroneous convictions.[202] These unparalleled protections failed to stop the imprisonment of hundreds, if not more, of innocent people.[203] Belief in the power of due process is a cruel illusion for hundreds of factually innocent individuals who served prison terms or were executed, but later exonerated by DNA evidence.[204] Legal scholars have done considerable work documenting the

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[198] *See* U.S. CONST. amends. VI, XIV.

[199] *See id.*; *Herrera*, 506 U.S. at 398–99. These protections include the presumption of innocence, the state's burden to establish guilt beyond a reasonable doubt, confrontation of adverse witnesses, compulsory process, effective assistance of counsel, jury trials, prosecution disclosure of exculpatory evidence, and fair trials before fair tribunals. *Herrera*, 506 U.S. at 398–99.

[200] *See* U.S. CONST. amends. VI, XIV; *see also* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (incorporating sixth amendment right to counsel in non-felony cases with potential for imprisonment); Benton v. Maryland, 395 U.S. 784, 794 (1969) (incorporating double jeopardy protection); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating jury trial right); Washington v. Texas, 388 U.S. 14, 19 (1967) (incorporating right to present witnesses); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (incorporating right to speedy trial); Pointer v. Texas, 380 U.S. 400, 407–08 (1965) (incorporating confrontation clause rights); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (incorporating right to remain silent); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (incorporating exclusionary rule); *In re* Oliver, 333 U.S. 257, 278 (1947) (incorporating right to public trial).

[201] Jackson v. Virginia, 443 U.S. 307, 317 (1979).

[202] Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 68–69 (2003); Roth, *supra* note 64, at 1646–47 (noting the rarity of directed verdicts of acquittal and reversals due to insufficient evidence); Risinger, *supra* note 13, at 762.

[203] *Exonerated: Cases by the Numbers*, *supra* note 191.

[204] Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1370–71 (1997); Rosen, *supra* note 202, at 67–68; Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 243–44 (2006).

causes of wrongful convictions, including compelling prosecution narratives, institutional norms, resource imbalances, and the tendency for constituents of the legal system to fall prey to tunnel vision.[205] Introduction of faulty eyewitness testimony and forensic science evidence can worsen the problem of an adversarial system that is not dedicated to the discovery of truth, scientific[206] or otherwise. The standard of proof beyond a reasonable doubt arguably guarantees not a defendant's factual guilt, but merely a jury's reasonable and actual belief in guilt.[207] Despite their important role in the U.S. legal system, substantial evidence indicates that juries may be ill equipped to adequately determine questions of factual guilt, particularly when trials depend on problematic eyewitness or scientific testimony.[208]

Appellate review, with its focus on the search for procedural error and substantial deference to juries as finders of fact, appears uniquely ill suited for reviewing factual claims of innocence.[209] Studies demonstrate the frequent inability of factually innocent individuals—who are later exonerated through some form of collateral attack—to use the appellate process to secure new trials.[210] While DNA evidence may provide near certainty of a prisoner's factual innocence, appellate courts lack the procedures and purpose to use that evidence to provide effective factual review.

Evidence of limitations in the trial and appellate processes suggests the need for some form of post-conviction review. This review allows individuals who have fallen through the gaps provided by traditional procedural remedies to use newly discovered evidence to collaterally attack their convictions. Otherwise, factually innocent individuals who lacked access to material, exculpatory evidence at trial may have no way to challenge their imprisonment. The next part discusses the major approaches for collaterally challenging wrongful convictions.

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[205] Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 894–97 (2008) (tunnel vision, doctrinal disparities, and forensic science evidence); Findley & Scott, *supra* note 66, at 343–46 (tunnel vision); Garrett, *supra* note 72, at 60–61 (appeals process); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 847–49 (2002); Rosen, *supra* note 202, at 75–78 (standard appellate and post-conviction remedies); Rosen, *supra* note 204, at 242–44 (procedural protections).

[206] NAS REPORT, *supra* note 82, at 110.

[207] Roth, *supra* note 64, at 1647.

[208] *Id.* at 1654–56.

[209] Rosen, *supra* note 202, at 75–76 (citing Herrera v. Collins, 506 U.S. 390, 402 (1993); Jackson v. Virginia, 443 U.S. 307, 307 (1979); People v. Bolden, 58 P.3d 931, 955 (Cal. 2002); H. RICHARD UVILLER, THE PROCESSES OF CRIMINAL JUSTICE: ADJUDICATION 1264 (2d ed. 1979)).

[210] Garrett, *supra* note 72, at 60; Garrett, *supra* note 125, at 1670–71.

B. Collateral Remedies

After an appellate court issues a mandate affirming a criminal conviction, some form of collateral attack is necessary to challenge a conviction on the grounds of newly discovered evidence demonstrating actual innocence.[211] These measures are extraordinary in nature, largely due to the substantial respect given to jury verdicts and policy interests in securing finality.[212] After a jury renders a guilty verdict, the convicted person no longer enjoys a presumption of innocence.[213] He or she therefore bears a heavy burden of displacing a presumptively correct result.

1. Traditional Approach to Post-conviction Relief

Historically, individuals convicted of crimes had little practical recourse to challenge their convictions, other than through the standard appellate process. Prior to codification of modern procedural rules, courts had authority to grant relief from a judgment—if requested within the same term as the judgment in question—through "a bewildering variety of writs and equitable remedies, 'shrouded in ancient lore and mystery.'"[214] While post-conviction statutes and court rules

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[211] A "collateral" attack refers to an indirect challenge to a proceeding other than a direct appeal:

> An attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding—or a defense in the proceeding—is that the judgment is ineffective. Typically a collateral attack is made against a point of procedure or another matter not necessarily apparent in the record, as opposed to a direct attack on the merits exclusively.

BLACK'S LAW DICTIONARY (9th ed. 2009); *accord* Wall v. Kholi, 131 S. Ct. 1278, 1282 (2011) (defining "collateral review" as used in 28 U.S.C. § 2244(d)(2) as judicial review of a proceeding apart from direct review).

[212] *See, e.g.*, Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 72–73 (2009) ("The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords."); *id.* at 76–77 (Alito, J., concurring) ("We also have long recognized the need to impose sharp limits on state prisoners' efforts to bypass state courts with their discovery requests. For example, we have held that 'concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum' require a state prisoner to show 'cause-and-prejudice' before asking a federal habeas court to hold an evidentiary hearing.") (quoting Keeney v. Tamayo–Reyes, 504 U.S. 1, 8 (1992)) (citations omitted)). For a discussion of the policy value of finality in criminal trials, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

[213] *Herrera*, 506 U.S. at 399 ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."); *see also* Wainright v. Sykes, 433 U.S. 72, 90 (1977) (describing the perception of the outcome of a criminal trial "as a decisive and portentous event").

[214] 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL PROCEDURE § 2851 (West 3d ed. 2013) (citing Zimmern v. United States, 298 U.S. 167, 169–70 (1936) (quoting REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 5 F.R.D. 433, 479 (1946))).

largely supplanted common law writs, courts retain the ability to use common law remedies to fill the gaps in post-conviction law.[215] For example, depending on the jurisdiction, writs of habeas corpus,[216] *coram nobis*, and *audita querela* continue to provide opportunities for collateral relief from criminal convictions.[217]

Federal Rule of Criminal Procedure 33 and its state counterparts allow a court to "vacate any judgment and grant a new trial if the interest of justice so requires."[218] If a defendant requests a new trial on grounds of newly acquired evidence—which is often the case in collateral attacks premised on a defendant's actual innocence—he or she must file the motion within strict time limits.[219] For example, the federal rules require a movant to bring the motion within three years after the verdict or finding of guilt.[220] Wyoming's rule provides an even stricter standard, requiring a movant to make a motion before or within two years after final judgment.[221] While phrased in various manners by different courts, a motion for new trial based on newly discovered evidence is granted only if the defendant shows:

> (1) the evidence was discovered after trial; (2) the failure to learn of the evidence was not caused by lack of diligence; (3) the new evidence is not merely impeaching or cumulative; (4) the new evidence is material to the principal issues involved; and (5) the new evidence would probably produce an acquittal if a new trial were granted.[222]

Courts have substantial discretion in reviewing such motions,[223] often viewing them with disfavor and granting them only with "great caution."[224] To be sure, the deadlines imposed by Rule 33 are not jurisdictional; courts have discretion to extend them in response to excusable neglect.[225] Yet courts rarely grant such

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[215] *See* United States v. Morgan, 346 U.S. 502, 510–11 (1954).

[216] *See infra* notes 231–75 and accompanying text.

[217] *See generally* BRIAN R. MEANS, POSTCONVICTION REMEDIES §§ 1.1–5.11 (West 2013).

[218] FED. R. CRIM. P. 33(a); *accord* WYO. R. CRIM. P. 33(a) ("The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.").

[219] *See* FED. R. CRIM. P. 33(b)(1); WYO. R. CRIM. P. 33(c).

[220] FED. R. CRIM. P. 33(b)(1).

[221] WYO. R. CRIM. P. 33(c).

[222] *Id.*; *accord* Hopkinson v. State, 769 P.2d 1008 (Wyo. 1984); Opie v. State, 422 P.2d 84, 85 (Wyo. 1967) (citing United States v. Johnson, 142 F.2d 588, 592 (7th Cir. 1944)); David DeFoore, *Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH L. REV. 491, 502–14 (2002).

[223] *See, e.g.*, *Opie*, 422 P.2d at 85.

[224] *E.g.*, United States v. Hill, 737 F.3d 683, 687 (10th Cir. 2013).

[225] FED. R. CRIM. P. 33 advisory committee's notes; United States v. Munoz, 605 F.3d 359, 367 (6th Cir. 2010); United States v. Boesen, 499 F.3d 874, 879 (8th Cir. 2010). For the factors considered in determining whether the deadline should be extended for excusable neglect, see Pioneer Inv. Servs. Co. v. Brunswick Assocs., 407 U.S. 380 (1993).

relief.[226] Instead, courts tend to view new trials as extraordinary relief, which, unchecked, would "open the floodgates" for prisoners seeking to relitigate their convictions.[227] This approach gives great weight to the policy goals of finality, procedural consistency, and efficiency.[228] But it provides little recourse to factually innocent prisoners convicted with evidence later determined faulty or superseded by far more precise methods. Before states adopted contemporary new trial statutes,[229] many prisoners eventually exonerated through DNA testing statutes had substantial difficulty contesting their convictions based on traditional new trial motions.[230] The available procedural norms simply did not account for the arrival of new evidence providing the overwhelming materiality and accuracy of DNA testing.

2. *Constitutional Relief, Habeas Corpus, and the Search for a Freestanding Innocence Claim*

Freestanding constitutional claims provide one way to collaterally challenge a criminal conviction after the period for requesting a new trial has passed. These claims argue that continuing to incarcerate a person proven factually innocent violates that person's constitutional rights.[231] This approach involves asking a court to grant a writ of habeas corpus. Prior to the adoption of post-conviction statutes, habeas corpus provided the primary method for mounting collateral challenges that would be time barred under Rule 33.[232] Yet the U.S. Supreme Court has significantly narrowed the viability of these claims.[233]

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[226] Rosen, *supra* note 202, at 484–85.

[227] *See, e.g.*, Dowdell v. State, 854 So. 2d 1195, 1202 (Ala. Crim. App. 2002) (Shaw, J., concurring) (describing the competing interests of finality and justice); State v. Hatton, No 00CA10, 2000 WL 1152236, at *4 (Ohio Ct. App. Aug. 4, 2000).

[228] *See, e.g.*, Paul J. Mishkin, *Foreward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79–80 (1965) ("Even the broadest view of the [habeas corpus] writ's functions would not deny that a proper sentence of a competent court imposed after an unquestionably fair trial is an acceptable justification for continued imprisonment; the mere possibility, however real, that a new trial might produce a different result is not a sufficient basis for habeas corpus. Considerations of substance require at least this much finality even for criminal proceedings resulting in imprisonment. The functions of collateral attack must thus be focused on relieving from confinements whose basis is deficient in more fundamental ways."); *Frontline: The Case for Innocence, Interview with Judge Sharon Keller* (PBS Jan. 11, 2000), http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html ("We can't give new trials to everyone who establishes, after conviction, that they might be innocent. We would have no finality in the criminal justice system, and finality is important.").

[229] *See infra* notes 276–91 and accompanying text.

[230] Garrett, *supra* note 125, at 1671–72.

[231] *See generally* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139 (2012); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 380–88 (1993).

[232] *See infra* notes 239–46 and accompanying text.

[233] *See infra* notes 244–72 and accompanying text.

In the early seventeenth century, English common law judges created the writ of habeas corpus.[234] Originally a tool used by the monarch to ensure proper administration of prisoners, courts began using the writ to exercise supervisory control over the sovereign's authority to imprison its citizens.[235] This allowed English courts to enforce the Magna Carta's requirement that no free person "be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."[236] The framers of the U.S. Constitution, cognizant of this tradition, feared the abusive selective suspension of the writ over certain territories and people.[237] The United States therefore inherited the writ, along with other English common law principles, as a means of challenging a prisoner's physical confinement.[238]

Despite murky origins and a variable history,[239] the writ of habeas corpus remains a fixture of U.S. law. It provides relief to a person imprisoned in violation of the U.S. Constitution.[240] Habeas claims are available to state prisoners demonstrating a violation of the U.S. Constitution, federal law, or a treaty.[241] Federal prisoners can challenge their incarceration on similar grounds using post-conviction statutory procedures that give effect to habeas relief.[242] These claims can be based on a large number of (often-procedural) pre-conviction guarantees of due process recognized by the U.S. Supreme Court as extending from the U.S. Constitution's Due Process Clause.[243]

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[234] PAUL DELANEY HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 9 (2010).

[235] *Id.* at 9–11, 15 (citing RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES 231 (2003)); *see also* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA 74–75 (1966); THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 57–58 (5th ed. 2010).

[236] HALLIDAY, *supra* note 234, at 15 (quoting MAGNA CARTA art. 39 (1215), *reprinted in* TURNER, *supra* note 235, at 231 (internal quotation marks omitted)).

[237] I.N.S. v. St. Cyr, 533 U.S. 289, 337–38 (2001); *see also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[238] MEANS, *supra* note 217, § 4:2.

[239] For more information regarding the evolution of the writ of habeas corpus in the United States, see MEANS, *supra* note 217, §§ 4:1–4:9.

[240] Herrera v. Collins, 506 U.S. 390, 400 (1993).

[241] *E.g.*, 28 U.S.C. §§ 2241(c)(1), 2254(a) (2012); Estelle v. McGuire, 502 U.S. 62 (1991); State *ex rel.* Holm v. Tahash, 139 N.W.2d 161, 163–64 (Minn. 1965) (citing Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1962); Sanders v. United States, 373 U.S. 1 (1963)) ("[These decisions'] unmistakable effect is to make available to any state prisoner a procedure in the Federal courts by which he may collaterally attack a final judgment of conviction by a state court, including those affirmed following appellate review."). *But see* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that violations of state substantive law do not provide a basis for habeas corpus relief).

[242] 28 U.S.C. § 2255 (2012).

[243] *Herrera*, 506 U.S. at 398–99. The *Herrera* Court provided a detailed list of rights stemming from a criminal defendant's right to due process, including:

This raises the issue of whether the U.S. Constitution or federal law provides a freestanding claim to habeas relief premised solely on a prisoner's factual innocence. The U.S. Supreme Court struggled with the issue for years, providing seemingly conflicting answers while never expressly stating that proof of factual innocence creates a constitutional right to habeas relief.[244] For example, in *Herrera v. Collins*, the Court held that habeas corpus provides relief to factually innocent prisoners only to the extent that their imprisonment resulted from an independent constitutional violation.[245] This is because, according to the Court, habeas corpus exists to remedy constitutional violations, not simply errors of fact, even if newly discovered evidence reveals factual errors resulting in incarceration of an innocent person.[246]

The U.S. Supreme Court had another opportunity to address the issue in its 2009 decision, *District Attorney's Office for Third Judicial District v. Osborne*.[247] *Osborne* stemmed from a brutal 1993 sexual assault in Anchorage, Alaska.[248] The State of Alaska prosecuted two men for the crime based on several pieces of evidence, including semen found inside a condom subject to relatively inexact DQ Alpha

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> A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions also have the effect of ensuring against the risk of convicting an innocent person. . . . right to confront adverse witnesses[,] . . . right to compulsory process[,] . . . right to effective assistance of counsel[,] . . . prosecution must prove guilt beyond a reasonable doubt[,] . . . right to jury trial[,] . . . prosecution must disclose exculpatory evidence[,] . . . right to assistance of counsel[, and] . . . right to "fair trial in a fair tribunal". In capital cases, we have required additional protections because of the nature of the penalty at stake.

Id. (internal citations omitted) (citing *In re* Winship, 397 U.S. 358 (1970); Coy v. Iowa, 487 U.S. 1012 (1988); Taylor v. Illinois, 484 U.S. 400 (1988); Strickland v. Washington, 466 U.S. 668 (1984); Duncan v. Louisiana, 391 U.S. 145 (1968); Brady v. Maryland, 373 U.S. 83 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); *In re* Murchison, 349 U.S. 133, 136 (1955); Beck v. Alabama, 447 U.S. 625 (1980)).

[244] *See* Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 71 (2009) ("Whether such a federal right [to release upon proof of actual innocence] exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.").

[245] 506 U.S. at 400.

[246] *See id.*; Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 483 (2009) (discussing the lack of a constitutional claim for release due to factual innocence, regardless of the weight of the evidence, without a showing of procedural error).

[247] 557 U.S. 52.

[248] *Id.* at 57.

DNA testing.[249] A jury found Osborne guilty of kidnapping, assault, and sexual assault.[250] After a series of failed collateral challenges to his conviction,[251] Osborne requested relatively more precise RFLP[252] testing under Alaska's post-conviction statute.[253] The state appellate court denied that request twice.[254] First, the court determined that (1) the statute did not provide access to testing if the testing was available at trial and (2) there was no federal constitutional right to obtain DNA testing of biological evidence.[255] Second, after remand, the court determined that Osborne had no constitutional right to testing, largely due to the weight of evidence against him, including a confession on a parole application and the potential inconclusiveness of RFLP testing.[256] Finally, Osborne filed claims in federal court requesting STR DNA testing[257] based on violations of his constitutional rights under 42 U.S.C. § 1983.[258] After an initial dismissal by the district court and remand from the U.S. Court of Appeals for the Ninth Circuit, the district court determined that a limited constitutional right to DNA testing existed "under the unique and specific fact presented," and granted summary judgment in Osborne's favor.[259] The U.S. Court of Appeals for the Ninth Circuit affirmed, extending the prosecutor's pre-trial duty to disclose exculpatory evidence to post-conviction proceedings and holding that failure to test the evidence created a cognizable § 1983 claim for violation of rights guaranteed by the Due Process Clause.[260]

The U.S. Supreme Court granted a writ of certiorari to determine whether Osborne had a viable § 1983 claim and whether he had a due process right to post-conviction DNA testing of the state's biological evidence. The Court held

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[249] *Id.* DQ Alpha testing "can clear some wrongly accused individuals, but generally cannot narrow the perpetrator down to less than 5% of the population." *Id.* (citing DEPT. OF JUSTICE, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, THE FUTURE OF FORENSIC DNA TESTING 17 (2000); DEPT. OF JUSTICE, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 27 (1999) [hereinafter DOJ RECOMMENDATIONS]).

[250] *Id.* at 58.

[251] Osborne first sought relief because his lawyer's failure to request RFLP testing at trial amounted to constitutionally ineffective assistance of counsel. *Id.* (citing Osborne v. State, 110 P.3d 986, 990 (Alaska Ct. App. 2005)). He lost that appeal largely because his lawyer's decision to not seek testing, based on her belief in her client's guilt, was deemed strategic, rather than ineffective. *Id.* (citing *Osborne*, 110 P.3d at 991–92).

[252] For more information about RFLP testing, see *supra* notes 138–61 and accompanying text.

[253] *Osborne*, 557 U.S. at 59; *see also* ALASKA STAT. §§ 12.72.010–12.72.040 (2014).

[254] *Osborne*, 557 U.S. at 59 (citing *Osborne*, 110 P.3d at 992–93).

[255] *Id.* (citing *Osborne*, 110 P.3d at 992–93).

[256] *Id.* (citing Osborne v. State, 163 P.3d 973, 979–81 (Alaska Ct. App. 2007)).

[257] For more information about STR testing, see *supra* notes 138–61 and accompanying text.

[258] *Osborne*, 557 U.S. at 60.

[259] *Id.* at 60.

[260] *Id.* at 61 (citing Osborne v. State, 521 F.3d 1118, 1128, 1130–31 (9th Cir. 2008)).

that Osborne had no such right and reversed the U.S. Court of Appeals for the Ninth Circuit.[261] The Court's reasoning emphasized the role of states in providing post-conviction remedies and criticized what it viewed as an impermissible call for federal courts to "constitutionalize" the issue by subjecting it to the requirements of the Due Process Clause.[262] While the Court recognized Osborne's liberty interest in obtaining DNA testing, it held that his conviction greatly diminished that interest, justifying greater flexibility on the part of the state to offer post-conviction procedures.[263] To invalidate those procedures, Osborne was required to show they "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[] any recognized principle of fundamental fairness in operation.'"[264] The Court held that Osborne failed to do so.[265] The Court stopped short of deciding the issue of whether Osborne had a federal constitutional right to be released through a writ of habeas corpus on a claim of actual innocence.[266] Finally, the Court held that Osborne had no substantive due process right to obtain DNA testing.[267] In fact, the Court acknowledged the trend of state legislation allowing prisoners to bring claims for post-conviction DNA testing and expressed its discomfort meddling with such policy questions by creating substantive constitutional testing rights.[268]

While the question of whether a freestanding constitutional claim for habeas relief resulting from a prisoner's factual innocence remains unsettled, prior decisions created substantial barriers to obtaining such relief. The U.S. Supreme Court appears to use a largely procedural approach to habeas corpus claims, providing relief not necessarily to those who are factually innocent, but to those who suffered some kind of procedural error.[269] This is consistent with a broader post-conviction focus by federal courts, dating at least to the Warren Court, on process, rather than substance, as the primary grounds for granting relief to the judgment of a trial court.[270] This approach places little emphasis on

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[261] *Id.* at 61–62.

[262] *Id.* at 55–56.

[263] *Id.* at 68–69.

[264] *Id.* at 69 (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)).

[265] *Id.* at 69–70.

[266] *Id.* at 71–72.

[267] *Id.* at 72.

[268] *Id.* at 73–74.

[269] Green & Yaroshefsky, *supra* note 246, at 483 (citing Herrera v. Collins, 506 U.S. 390 (1993); Moeller v. Weber, 689 N.W.2d 1, 7 (S.D. 2004); Bruce v. Smith, 553 S.E.2d 808 (Ga. 2001)). *But see Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) ("[E]xecuting the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event.").

[270] Rosen, *supra* note 204, at 242–44; *see also* Garrett, *supra* note 125, at 1631–32 (noting courts' unwillingness to intervene to enable freestanding constitutional innocence claims and the flurry of state legislative activity authorizing collateral challenges using newly discovered evidence).

whether punishment has been imposed (1) on a person who deserves it and (2) in a manner furthering the interests of society. What matters is not so much whether the person should actually be punished, but whether the proper procedures were used to justify the punishment. As discussed in Section I, this approach may conflict with some of our retributive and utilitarian beliefs grounding the moral legitimacy of punishment.[271]

The future of a freestanding constitutional right to DNA testing of biological evidence in the state's possession remains unclear.[272] Challenges to post-conviction remedy statutes in the wake of *Osborne* have not been particularly successful.[273] Procedural due process will play an important role in determining a prisoner's right to DNA testing, as well as remedying independent constitutional violations. But successful collateral attacks on procedurally "correct," yet factually wrongful, convictions based on new evidence will likely depend on state post-conviction statutes.[274] As explained below, these statutes expose illusions of undue certainty regarding the accuracy of criminal verdicts by identifying the factual causes of wrongful convictions.[275]

C. Post-conviction DNA Testing and New Trial Statutes

Uncertainty regarding the availability of a freestanding constitutional right to post-conviction DNA testing encourages innocence advocates to focus their efforts on state legislatures,[276] which may prove more amenable to lobbying efforts

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[271] *See supra* notes 26–48 and accompanying text.

[272] *See, e.g.*, Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2920–21 (2010) (arguing that many appellate courts and commentators have misinterpreted *Osborne* and that it recognizes a procedural due process right that should pressure state legislatures to provide post-conviction remedies); Christian Van Buskirk, Note, *Guilty until Proven Innocent: Clearing Massachusetts's Uncertain Road to Post-Conviction DNA Testing*, 85 ST. JOHN'S L. REV. 1595, 1596–97 (2011); *The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 222, 232 (2009).

[273] *See* Alvarez v. Att'y Gen. for Fla., 679 F.3d 1257, 1262–65 (11th Cir. 2012) (citing *Osborne*'s holding that there is no freestanding right to post-conviction DNA testing, that petitioner did not show that Florida's procedures were facially unconstitutional, and that the district court lacked jurisdiction to consider petitioner's as-applied challenge because it would require a lower federal court to review a state court judgment in violation of the *Feldman–Rooker* doctrine) (citing Dist. of Colum. Ct. of App. v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)).

[274] *See* Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 55–56, 68–69 (2009) (noting state flexibility in crafting post-conviction remedies); *cf.* DeLoge v. State, 2010 WY 60, ¶ 29–30, 231 P.3d 862, 868 (Wyo. 2010) (citing *Osborne* and holding that defendant lacked a constitutional right to the return of biological evidence from Mississippi law enforcement).

[275] *See infra* notes 292–545 and accompanying text.

[276] *See Osborne*, 557 U.S. at 55–56 (characterizing post-conviction relief as an issue for state legislatures to address).

than the U.S. Supreme Court. Before *Osborne*, state legislatures started adopting statutes permitting collateral challenges to convictions based on newly discovered DNA evidence, even after the traditional time limits imposed by variations of Federal Rule of Criminal Procedure 33 have expired.[277] New York adopted the first statute providing an avenue to request post-conviction DNA testing before requesting a new trial.[278] Illinois adopted a somewhat different statute four years later.[279] While individual statutes exhibit substantial variation, they tend to use language adapted from the New York or Illinois statutes.[280] Under the New York approach, a court may grant a motion for post-conviction DNA testing if the state possesses biological evidence and testing's availability at trial would have created a "reasonable probability" of a more favorable verdict.[281] Illinois's statute permits a court to order post-conviction DNA testing if a movant makes a prima facie showing that (1) the evidence was unavailable at trial, (2) identity was in issue at trial, (3) the evidence exists and has a sufficient chain of custody, (4) testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence," and (5) the testing uses a generally accepted scientific method.[282]

The Innocence Project urges state legislatures to base their statutes on its model legislation.[283] According to the Project, an effective statute should provide a reasonable standard for obtaining post-conviction testing.[284] States should make testing available in all cases in which it could establish factual innocence, regardless of whether the defendant was released from prison, convicted of a noncapital offense, or pled guilty or confessed.[285] Statutes should not provide fixed dates when testing availability will expire. [286] Defendants should be able to obtain an evidentiary hearing to argue the materiality and accuracy of the evidence

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[277] *Id.*

[278] N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2014) (effective Aug. 2. 1994).

[279] 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2014) (effective Jan. 1, 1998).

[280] *See Validity, Construction, and Application of State Statutes and Rules Governing Requests for Postconviction DNA Testing*, 72 A.L.R. 6TH 227 (2012) [hereinafter *State Statutes*]; Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1453 (2004); Karen Christian, Note, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1201 n.20 (2001).

[281] N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2014).

[282] 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2014).

[283] INNOCENCE PROJECT, MODEL LEGISLATION (Oct. 2012), http://www.innocenceproject.org/docs/model/Access_to_Post_Conviction_DNA_Testing_Model_Bill.pdf.

[284] *Access to Post-Conviction DNA Testing*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Apr. 28, 2014).

[285] *Id.*

[286] *Id.*

and testing method, and to appeal adverse decisions to an appellate court.[287] Finally, statutes should create measures to protect evidence from destruction as long as a defendant is imprisoned or otherwise experiences adverse effects of the conviction.[288]

As of 2014, the vast majority of U.S. states, in addition to the U.S. federal government, the District of Columbia, and some U.S. territories, have adopted statutes authorizing motions for DNA testing as a prelude to a motion for a new trial.[289] While variations between each state's statutes are beyond the scope of this article, certain features can improve a statute's effectiveness in identifying unjustified certainty in the legal system and the causes of wrongful convictions. For example, a statute may unnecessarily restrict post-conviction testing to individuals convicted of capital crimes,[290] overlooking the lengthy prison terms and social stigma resulting from noncapital convictions, such as sexual assault. This article discusses these features in the context of Wyoming's statute below.[291]

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[287] *Id.*

[288] *Id.*

[289] *Post-Conviction Relief Through DNA Testing*, 0030 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS: CRIMINAL PROCEDURE 21 (Thomson Reuters/West 2012); *see also* 18 U.S.C. § 3600 (2012); ALA. CODE § 15-18-200 (2012); ALASKA STAT. §§ 12.72.010(4), 12.72.020(b)(2) (2013); ARIZ. REV. STAT. ANN. § 13-4240 (2010); ARK. CODE ANN. § 16-112-202 (2012); CAL. PENAL CODE § 1405 (West 2012); COLO. REV. STAT. § 18-1-413 (2013); CONN. GEN. STAT. § 52-582 (2013); DEL. CODE ANN. tit. 11, § 4504 (2012); D.C. CODE §§ 22-4133 to 22-4135 (2012); FLA. STAT. § 25.11 (2013); GA. CODE ANN. § 5-5-41 (2013); HAW. REV. STAT. § 844D-123 (2013); IDAHO CODE ANN. § 19-4902 (2012); 725 ILL. COMP. STAT. 5/116-3 (2012); IND. CODE § 35-38-7-5 (2013); IOWA CODE § 81.10 (2013); KAN. STAT. ANN. § 21-2512 (2013); KY. REV. STAT. ANN. § 422.285 (West 2012); LA. CODE CRIM. PROC. ANN. art. 926.1 (2013); ME. REV. STAT. ANN. tit. 15, § 2137 (2012); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2013); MASS. GEN. Laws ch. 278A (2012); MICH. COMP. LAWS § 770.16 (2013); MINN. STAT. § 590.01 (2013); MISS. CODE ANN. § 99-39-9 (2013); MO. REV. STAT. § 547.035 (2013); MONT. CODE ANN. § 46-21-110 (2013); NEB. REV. STAT. § 29-4120 (2013); NEV. REV. STAT. § 176.0918 (2013); N.H. REV. STAT. ANN. § 651-D:2 (2013); N.J. STAT. ANN. § 2A:84A-32a (West 2013); N.M. STAT. ANN. § 31-1a-2 (2013); N.Y. CRIM. PROC. LAW § 440.30(1-a) (2012); N.C. GEN. STAT. § 15A-269 (2013); N.D. CENT. CODE § 29-32.1-15 (2012); OHIO REV. CODE ANN. § 953.72 (West 2013); OR. REV. STAT. § 138.690 (2012); 42 PA. CONS. STAT. § 9543.1 (2013); R.I. GEN. LAWS § 10-9.1-11 (2013); S.C. CODE ANN. § 17-28-30 (2012); S.D. CODIFIED LAWS § 23-5B-1 (2013); TENN. CODE ANN. § 40-30-304 (2012); TEX. CODE CRIM. PROC. ANN. arts. 64.01–64.05 (West 2013); UTAH CODE ANN. §§ 78B-9-300-304 (West 2013); VT. STAT. ANN. tit. 13, § 5561 (2013); VA. CODE ANN. § 19.2-327.1 (2013); WASH. REV. CODE § 10.73.170 (2013); W. VA. CODE § 15-2B-14 (2013); WIS. STAT. § 974.07 (2013); WYO. STAT. ANN. § 7-12-303 (2013); Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 73–74 (2009); Green & Yaroshefsky, *supra* note 246, at 484 (describing statutory trends).

Oklahoma appears to be alone in not providing a modern post-conviction DNA testing statute. *State Statutes*, *supra* note 280, § 2. The Massachusetts General Court passed a bill providing post-conviction access to scientific analysis, which became effective on May 17, 2012. *See* S.B. 1987, 187th Gen. Ct., 2012 2d Ann. Sess. (Mass. 2012).

[290] *See* ALA. CODE § 15-18-200 (2012); KY. REV. STAT. ANN. § 422.285 (West 2012).

[291] *See infra* notes 389–497 and accompanying text.

IV. WHAT WYOMING CAN LEARN FROM INNOCENCE

Post-conviction access to DNA testing provides vital relief to wrongfully convicted individuals and their families and friends. Few can comprehend the staggering pain and loss that accompany spending years or even decades of one's life wrongfully incarcerated.[292] Unlike a rescinded contract, there is no *status quo ante* to which an exoneree can return.[293] An exoneree can never regain the years of wrongful imprisonment. But the prisoner's foregone loss does not justify refusing to mitigate the effects of wrongful incarceration. Although we can never make exonerees whole, we can still work to release them from prison and provide financial compensation and other services as important, if incomplete, reparative gestures. The moral dignity and valuable years of freedom following exoneration independently justify the work performed by Innocence Network member organizations, friends and family of the accused, lawyers, law students, journalists, activists, courts, legislatures, and law enforcement to fight wrongful convictions.[294] Each exoneree's claim to freedom has intrinsic worth; yet the hundreds of exonerations are also a symptom of underlying problems with how we determine guilt and punishment. As important as innocence work is, we should look beyond individual cases to get a better sense of *why* the system convicts so many innocent people and what legal changes can prevent the problem in the future.

This section suggests some ways to address those questions. Part A examines why innocence claims, even when supported by powerful DNA evidence, can create intense anxiety, resistance, and denial.[295] Part B examines the innocence event, in which DNA testing and exonerations may force us to question many of our false assumptions about the efficacy and legitimacy of our current model of criminal justice.[296] Part C looks at Wyoming's approach to post-conviction relief, its benefits, and problems.[297] This discussion includes an examination of the limits of post-conviction DNA testing and the need for broader structural reform to address the lurking problem of wrongfully convicted prisoners whose cases do not involve DNA evidence.[298] Finally, Part D discusses the questionable future

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[292] *See Exonerees*, THE HOUS. CHRON., http://www.chron.com/exonerees/ (last visited Apr. 28, 2014); Michael Hall, *The Exonerated*, TEX. MONTHLY (Nov. 2, 2008), http://www.texasmonthly.com/story/exonerated.

[293] *See generally* INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION (2009), http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf.

[294] This is not to understate the substantial difficulties faced by exonerees after release from prison. *See infra* notes 474–91 and accompanying text.

[295] *See infra* notes 304–38 and accompanying text.

[296] *See infra* notes 348–87 and accompanying text.

[297] *See infra* notes 389–516 and accompanying text.

[298] *See infra* notes 499–516 and accompanying text.

of reforms to address wrongful convictions following the Wyoming Legislature's 2014 Budget Session.[299]

A. *Coping with the Anxiety of Wrongful Convictions*

Faith in the legal system's ability to justly prosecute and punish criminals provides one method of coping with the anxiety of living in an uncertain, dangerous world. The notion that we could be victims of a violent crime is frightening. No one wants to be gunned down by a neighboring farmer who takes the law into his own hands over a dispute regarding boundary lines of contiguous tracts of land.[300] While we can protect ourselves with security systems, self-defense classes, and firearms, it is impossible to account for every contingency. At some point, most of us have to leave our doomsday bunkers and attend to our personal and business affairs, letting our guard down against the outside world. According to social contract theory,[301] we agree to accept the intrusion of state sovereignty in our personal lives, often in the form of a constitution, in exchange for the promise that the state will protect us from crime.[302] The fearsome power of the state receives legitimacy because it appears superior to the constant war of all against all characterized by life in the Hobbesian "state of nature."[303] Authoritarian state punishment comforts us by promising to punish the guilty and protect the innocent, easing our terror of illegitimate violence by private actors and helping to stave off thoughts of our own mortality.[304]

Recognizing the legal system's substantial problem with failing to stop wrongful convictions can create cognitive dissonance for people who spent their lives revering that system as the height of human justice. That, in turn, can give way to anxiety if we feel a kind of traumatic helplessness resulting from the dangerous situation posed by the legal system's failure to protect us from each other or the system itself.[305] From a modern medical perspective, anxiety is an

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[299] *See infra* notes 517–44 and accompanying text.

[300] *See* Jones v. Commonwealth, 216 S.W. 607 (Ky. Ct. App. 1919) ("Watch old Joe Eggers run. If one law don't work, I will make me a law of my own that will work.") (quoting defendant) (internal quotation marks omitted).

[301] For a discussion of references to social contract theory in U.S. case law, see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

[302] *See* James Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, *in* 7 THE COLLECTED WORKS OF JAMES M. BUCHANAN (2000) (1975).

[303] Thomas Hobbes contrasted life under mutual submission to public authority against the anarchic state of nature. Sharon A. Lloyd, *Hobbes's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 25, 2014), http://plato.stanford.edu/entries/hobbes-moral/.

[304] *See* Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 164–73 (1999) (analyzing support for capital punishment as an unconscious defense against fear of mortality).

[305] For a brief discussion of Freud's development of the notion of anxiety and later alterations of the concept, see DYLAN EVANS, AN INTRODUCTORY DICTIONARY OF LACANIAN PSYCHOANALYSIS 10–12 (2006).

emotional state marked by tension, worrying, and physical symptoms, such as raised blood pressure.[306] It has its roots in the work of Sigmund Freud, who posited anxiety not as fear regarding a particular object, but as a free-floating sensation of fear and expectation, marked by tight breath and ready to attach itself to specific content.[307] Our current anxiety involves not only the fear that the legal system will be unable to protect us from violent crime, but also the unbearable fear that the system itself will suffocate us.[308] The very thing that once comforted us and protected us from the "nasty, brutish, and short" life in the state of nature[309] changes in a manner difficult to describe with words, like a loving parent who momentarily transforms into a deranged abuser.[310] This experience is profoundly unpleasant, giving rise to different strategies for coping with the trauma, such as repression and denial.[311]

We can better understand why challenging our illusions can be so difficult by taking a trip to the movies. Billy Wilder's classic film *Sunset Boulevard* depicts a woman, Norma Desmond, who cannot cope with the idea that her years as a celebrated silent movie star have long since passed.[312] Forgotten by Hollywood, she spends the late years of her life pursuing the illusion that she remains a famous actor. A small cadre of enablers, including her ex-husband butler (Max) and a young screenwriter (Gillis), help her to cover up the gaps and maintain the fantasy that she is preparing for a role in a Cecil B. DeMille picture.

Gillis eventually learns that DeMille called the mansion to borrow Norma's car for the movie, not to offer her a role. He then tries to expose the lie:

> Gillis: The audience left twenty years ago. Now face it.
>
> Norma: That's a lie! They still want me!
>
> Gillis: No, they don't.
>
> Norma: What about the studio? What about De Mille?
>
> Gillis: He was trying to spare your feelings. The studio wanted to rent your car.

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[306] *Anxiety*, AM. PSYCHOL. ASSOC., http://www.apa.org/topics/anxiety/ (last visited Apr. 28, 2014).

[307] SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 346 (G.S. Hall trans., 14th ed. 1925).

[308] EVANS, *supra* note 305 at 12 ("All desire arises from lack, and anxiety arises when this lack is itself lacking; anxiety is the lack of a lack. Anxiety is not the absence of the breast, but its enveloping presence; it is the possibility of its absence which is, in fact, that which saves us from anxiety.").

[309] Buchanan, *supra* note 302.

[310] EVANS, *supra* note 305, at 12.

[311] *Id.* at 11.

[312] SUNSET BOULEVARD (Paramount Pictures 1950).

> Norma: Wanted what?
>
> Gillis: De Mille didn't have the heart to tell you. None of us has had the heart.
>
> Norma: That's a lie! They want me, they want me! I get letters every day!
>
> Gillis: You tell her, Max. Come on, do her that favor. Tell her there isn't going to be any picture—there aren't any fan letters, except the ones you write yourself.
>
> Norma: That isn't true! Max?
>
> Max: Madame is the greatest star of them all.

Norma cannot cope with this information. She predicated her identity on the idea that she is a movie star. Rather than face reality, she lashes out at the messenger who seeks to destroy her fantasy, murdering the young screenwriter and leaving him face down in the swimming pool. Even the arrival of police fails to disturb her delusion. Max says "Action!" and Norma walks down the grand staircase towards the news cameras, famously declaring, "All right, Mr. DeMille, I'm ready for my close-up."

Wilder's film demonstrates an important truth regarding how difficult, even threatening, it can be to challenge illusory beliefs. This is particularly true when we use those beliefs to structure our ideas about the identity and value of ourselves and the people around us. Norma attached her self-worth to the idea, built up over decades, that she is a famous movie star. She pursues the delusion of her starring role, discounting evidence to the contrary. When confronted by someone who is unafraid to tell her the truth, she experiences a complete break from reality. To maintain the fantasy, she must scapegoat and destroy the intruder who seeks to expose it.

Similarly, the comfort provided by the criminal justice system can make it difficult to challenge the idea that we punish only the guilty. While some commentators expressly defend sacrificing a "small" number of innocent people as the necessary price of having a criminal justice system that keeps us safe,[313] it

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[313] Professor Risinger describes this as the "Paleyite" justification, named after William Paley, who remarked, "[H]e who falls by a mistaken sentence, may be considered as having fallen for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden." Risinger, *supra* note 13, at 763–64 & n.3 (quoting WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 443 (Joshua Belcher 1811) (1785)) (internal quotation marks omitted); *see also* WILLIAM L. TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 98 (1985) (citing JEREMY BENTHAM, A TREATISE

would be a scandal for the public order to officially adopt this position. As argued above, most of us have a basic intuition that it is profoundly wrong to punish an innocent person.[314] Imprisoning the innocent turns the state's role as protector against violent crime on its head and casts the state not as a benevolent protector, but as a totalitarian monster.[315]

Like Norma, we face a choice of how to manage this apparent threat to the system's legitimacy. We can use strategies of repression and denial to maintain the illusion or attempt to work through new information, cope with it, and possibly amend our interpretation of reality. The latter approach is difficult, especially if it requires that we take moral responsibility for unjust imprisonment carried out in our names. Admitting responsibility requires us to take a more nuanced perspective and admit that often we, as a society, may be guilty of perpetrating injustice. In Timothy Cole's case,[316] the system could not take full account of the conflicting evidence, including Cole's status as a severely asthmatic nonsmoker, until after that exculpatory detail killed him.[317] It took that traumatic ending to spur the public scrutiny of the case that would eventually lead to a posthumous exoneration and profound changes in Texas law.[318] Those changes included the most far-reaching post-conviction compensation statute in the United States and an advisory council to uncover wrongful convictions.[319]

Alternatively, one can resist the new information and try to maintain the illusion of the system's reliability. The complex phenomenon of denial has been the subject of significant research since the early explorations of Sigmund Freud and his daughter, Anna Freud.[320] Denial is a coping mechanism in which a person uses a continuum of strategies to protect him or herself from disturbing information provided by external reality.[321] It allows one to consciously acknowledge an unpleasant fact in the guise of rejecting that fact.[322] "The speaker resolves the conflict and dispels the anxiety by 'falsely' getting rid of one of the

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ON EVIDENCE 198 (1825)) (discussing Bentham's warning to guard against the "sentimental exaggerations" of Blackstone's ratio).

[314] *See supra* notes 44–49 and accompanying text.

[315] Steiker & Steiker, *supra* note 39, at 588 (identifying execution of the innocent as a hallmark distinguishing totalitarian from democratic societies).

[316] *See supra* notes 1–12 and accompanying text.

[317] Peter A. Chickris & Mykal J. Fox, *Present Danger: Preventing Wrongful Convictions by Resolving Critical Issues within Texas's Criminal Justice System*, 52 S. TEX. L. REV. 365, 367–68 (2011).

[318] *Id.*

[319] *Id.*

[320] *See* Sigmund Freud, *Negation*, *in* 19 STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD 235 (J. Strachey ed., 1961) (1925); 2 ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENSE: THE WRITINGS OF ANNA FREUD 69–92 (C. Baines trans., 1966) (1937).

[321] Shlomo Breznitz, *The Seven Kinds of Denial*, *in* THE DENIAL OF STRESS 257, 257 (Shlomo Breznitz ed., 1983).

[322] Freud, *supra* note 320, at 235.

two conflicting elements . . . ."[323] Freud provides several examples, including a patient who dreams of a woman who he immediately insists is not his mother.[324] The analyst's response: "So it is his mother!"[325] The denial allows the patient to describe the disturbing phenomenon while maintaining a psychological distance from its meaning. This strategy provides a powerful way to avoid the intense inner turmoil and anxiety posed by a potentially traumatic encounter.[326]

Despite modern skepticism of many of Freud's theories, there continues to be strong empirical evidence that people use denial to cope with difficult situations.[327] Modern studies have shown the remarkable power of denial for maintaining one's prior beliefs, even in the face of powerful contrary evidence.[328] Our reasoning is often driven by emotion, including positive and negative feelings about people, such as criminal convicts, which often register more quickly than conscious thoughts.[329] When we discover new information, we attempt to make it consistent with our prior beliefs, rather than amend our beliefs to match reality.[330] One researcher describes the process in a manner that hearkens back to the legal and procedural sources[331] of wrongful convictions: "We may think we're being scientists, but we're actually being lawyers. Our 'reasoning' is a means to a predetermined end—winning our 'case'—and is shot through with biases."[332] This can make it very difficult to dislodge longstanding assumptions about a variety of difficult topics.

Denial is a prevalent response to post-conviction innocence claims, even in the face of overwhelming DNA evidence. This is one of many instances in which discomforting scientific evidence results in a backlash, rather than reasoned

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[323] Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 806 (1996).

[324] Freud, *supra* note 320, at 235.

[325] *Id.*

[326] SIGMUND FREUD, THE PROBLEM OF ANXIETY 86, 97 (1936); EKKEHARD OTHMER, THE CLINICAL INTERVIEW USING DSM-IV (1994); T. Hackett et al., *The Coronary-Care Unit: An Appraisal of its Psychological Hazards*, 25 NEW ENG. J. OF MED. 1365 (1968); Bruce Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 904 (1998) (citing AM. PSYCHIATRIC GLOSSARY 37 (J.E. Edgerton ed., 7th ed. 1994)).

[327] Roy F. Baumeister et al., *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66 J. OF PERSONALITY 1081, 1082, 1107–1111 (1998).

[328] Chris Mooney, *The Science of Why We Don't Believe Science*, MOTHER JONES (May 2011), http://www.motherjones.com/politics/2011/03/denial-science-chris-mooney.

[329] *Id.*

[330] *Id.*

[331] *See supra* notes 196–210 and accompanying text

[332] Mooney, *supra* note 328.

analysis.[333] Rather than confront the terrifying reality of wrongful conviction, we may reassure ourselves that exonerees deserve their fates, displacing the blame onto innocent people.[334] We may continue to place our faith in discredited forms of faulty eyewitness and forensic science evidence while denying empirically valid DNA testing evidence. This can manifest itself in outright opposition to testing newly discovered DNA evidence or granting freedom to innocent people, regardless of overwhelming evidence of innocence.

Denial can have a positive effect on our ability to cope with difficult facts during times of stress.[335] But, depending on the context, denial can also be destructive, interfering with our ability to properly confront difficult circumstances.[336] In the innocence context, denial strategies are little more than futile attempts to avoid inevitable confrontation with the traumatic idea that the criminal justice system regularly punishes the innocent. While the argument that our system convicts innocent people is not new,[337] the advent of DNA testing and the ensuing trend of exonerations make it more difficult to remain complacent about wrongful convictions. We know of more than 300 wrongfully convicted people and statistical data showing a factual error rate between 3.3% and 5%.[338]

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[333] *Id.* (examining research on the ability of scientific data to change strong beliefs regarding climate change, gun violence, and the death penalty).

[334] Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 432–33 (2011); SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 1 (2004) ("Some hard liners deny that anyone ever gets wrongfully convicted. Those in prison, they say, must be guilty of something—otherwise they wouldn't be imprisoned."). For example, see the comments of Linda Fairstein, the lead prosecutor of the Central Park Jogger case, which came into question when DNA evidence matched another known rapist's DNA profile:

> [F]our of these five men admitted over the years that they attacked others who were assaulted in Central Park that night. It's easy for me to keep a position that I believe is right, so I'm comfortable with the original convictions. Throughout my 30-year career, I've always maintained pride in my integrity. That's why the DA and my colleagues and the court trusted me all those years.

Id. (quoting Danielle Cantor, *Linda Fairstein*, JEWISH WOMAN, http://www.jwi.org/Page.aspx?pid=774 (last visited Apr. 28, 2011)).

[335] Winick, *supra* note 326, at 904–05; Alex Kuczynski, *What, Me Worry?: Market Meltdowns. Global Warming. Confounding Health Studies. Grim News Leads to a Summer of Denial. Relax, Say Experts, It's Good for You*, N.Y. TIMES, July 28, 2002, at 9-1, 9-5.

[336] Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 353–54 (2006).

[337] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 900–04 (2004) (citing EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56–64 (1987)).

[338] Risinger, *supra* note 13, at 762. A more recent statistical study using conservative methods suggests that as many as 4.1% of individuals on death row in the United States may be innocent. Ed Pilkington, *US Death Row Study*, THE GUARDIAN, Apr. 28, 2014, http://www.theguardian.com/world/2014/apr/28/death-penalty-study-4-percent-defendants-innocent.

This has resulted in immense human misery and injustice. Such numbers should alarm anyone who places faith in the system's ability to punish the guilty and protect the innocent. We should critically examine evidence of errors, even if that means challenging traditional assumptions regarding the reliability of procedural norms, due process, eyewitness evidence, and forensic science.

B. The Innocence Event

Before the advent of the innocence movement, the criminal justice system was locked into a routine. From the traditional perspective, police officers tasked with protecting society apprehend criminals. The state then uses an adversarial, rather than an inquisitorial,[339] process in which opposing lawyers for the state and the accused, overseen by neutral trial and appellate judges, use zealous presentation of evidence and witnesses to prove guilt beyond a reasonable doubt to a jury of the defendant's peers. The criminal defendant is entitled to due process guarantees and effective representation by counsel,[340] but is usually guilty of the charged offense. Jaded lawyers involved in the process, including prosecutors, judges, and defense lawyers,[341] work hard to fulfill their respective institutional roles of providing each defendant with due process. Yet most cases follow a standard pattern, with a conviction or, more often, a plea bargain.[342] Other than the occasional uproar over guilty defendants receiving acquittals or new trials due to "technicalities," often in the form of violations of constitutional rights, this is the story of a system that routinely produces the correct result by punishing the guilty and protecting the innocent.

This harmonious picture leaves out important details, including substantial racial[343] and class bias,[344] troubling rates of mass incarceration,[345] and inhumane conditions in U.S. penitentiaries.[346] It also assumes the factual guilt of practically

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[339] *See generally* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009) (assessing the merits of inquisitorial and adversarial approaches to criminal justice).

[340] *See supra* notes 196–209 and accompanying text.

[341] *See* Bandes, *supra* note 336 (examining the denial mechanisms used by defense attorneys to cope with the possibility of client guilt).

[342] *See, e.g.*, U.S. DEPT. OF JUST., FY 2014 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 21–22 (2014), http://www.justice.gov/jmd/2014justification/pdf/usa-justification.pdf (citing and projecting a 90% favorable resolution rate based on target number of convictions and terminations).

[343] *See supra* note 63 and accompanying text.

[344] *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP (2014).

[345] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); *Frontline: Locked Up in America* (PBS Apr. 22, 2014), *available at* http://www.pbs.org/wgbh/pages/frontline/locked-up-in-america/.

[346] *See* Brown v. Plata, 131 S. Ct. 1910, 1933–34 (2011) (holding severe overcrowding in California prisons violated the Eighth Amendment prohibition against cruel and unusual punishment).

all prisoners.[347] Post-conviction DNA testing and innocence claims expose the falsity of this part of the traditional story.[348] Despite traditions of certainty in the results provided by the criminal justice system, we now have clear evidence that the system gets it wrong. Given the large number of exonerations,[349] commentators have moved from arguing about whether wrongful convictions occur to the more difficult question of determining why they occur and how to stop them.[350] What had been a slowly developing movement to uncover piecemeal wrongful convictions exploded into a full-blown movement following the advent of DNA fingerprinting, which made it possible to demonstrate a prisoner's factual innocence to an unprecedented degree of near certainty.[351]

Popular discontent with the legal system is not new. For a few examples, consider the controversial outcome of the O.J. Simpson trial,[352] half-understood stories about lawsuits over hot coffee,[353] anger about the release of rapists and murderers on "technicalities,"[354] and constant outrage over the latest high profile trial on cable news.[355] The second half of the twentieth century was marked by significant popular, political, and judicial questioning of the legal system's legitimacy.[356] Yet general popular discontent with the system rarely resulted in meaningful governmental reforms to protect criminal defendants and prisoners. Individual legislators, if not legislative bodies as a whole, continue to receive popular support on election day.[357] This is so even after Congress and state legislatures have criminalized large segments of American life while continually

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[347] *See* Kansas v. Marsh, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (arguing that the wrongful conviction rate is infinitesimal).

[348] *See* Gross et al., *supra* note 72, at 523–24 (noting how exonerations, once viewed as aberrations, have become common following DNA testing availability); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004).

[349] *DNA Exoneree Case Profiles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Apr. 28, 2014).

[350] Drizin & Leo, *supra* note 337, at 906.

[351] *Id.* at 904–05; Gross et al., *supra* note 72.

[352] Craig M. Bradley & Joseph L. Hoffman, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1285 (1996).

[353] Kimberly Atkins, *Pouring Cold Water on the 'Hot Coffee' Lawsuit Legend*, LAWYERS USA, June 24, 2011.

[354] Rosen, *supra* note 204, at 237.

[355] *See* Lincoln Mitchell, *Zimmerman's Acquittal Shows How Little Has Changed*, HUFFINGTON POST (July 16, 2013), http://www.huffingtonpost.com/lincoln-mitchell/zimmermans-acquittal-show_b_3604053.html; *Casey Anthony Probation Debacle: Is Florida Justice Now Facing a Public Relations Crisis?*, PRNEWSCHANNEL (Aug. 5, 2011), http://www.prnewschannel.com/2011/08/05/casey-anthony-probation-debacle-is-florida-justice-now-facing-a-public-relations-crisis/.

[356] Franklin E. Zimring & David T. Johnson, *Public Opinion and the Governance of Punishment in Democratic Political Systems*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 276 (2006).

[357] *See* Corinna Barret Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 150–51 (2012) (discussing high incumbency reelection rates).

increasing the length of mandatory minimum sentences.[358] The United States now leads the world in terms of mass incarceration and does so to the extraordinarily disproportionate detriment of racial minorities.[359] This trend may be beginning to change.[360] Nonetheless, up until now, it has been possible for policymakers, lawyers, and the public to retain their faith in the system's results, despite being generally dissatisfied with the justice system, by emphasizing that convicts deserve their fates and that their incarceration keeps us safe.

There are controversies over the material causes of mass incarceration.[361] But our perspective on the meaning of guilt and innocence played a role in allowing us to rationalize its occurrence. The justice system and the public can convince themselves that the multiple checks provided by due process at trial and on direct appeal[362] make wrongful convictions an aberration, rather than a systemic problem. This, in turn, eases dismissal of the concerns of any person convicted of a crime. If the system always gets it right, then it is much easier to view prisoners and felons as being wholly different from the rest of us. The prisoner comes to fill the role of an evil "Other," beyond hope of redemption, deserving the direct and collateral consequences of conviction—if not even worse consequences—and undeserving of universal human empathy or love.[363]

Innocence claims can represent the beginning of a transformative event that disturbs these long-held assumptions. This potential comes from the foundational challenge to our long-held beliefs that the system's procedural accuracy allows it to protect us from crime while fairly punishing the guilty. DNA testing and the innocence movement force us to acknowledge the existence and dignity of innocent convicts. No longer erased from society in maximum-security penitentiaries, wrongfully convicted people can step into the sunlight with dignity and educate us about their experiences. The exoneration comes as a complete surprise: the

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[358] *See* Michelle Alexander, *The New Jim Crow*, THE NATION (Mar. 9, 2010), http://www.thenation.com/article/new-jim-crow; Vanita Gupta, *How to Really End Mass Incarceration*, N.Y. TIMES (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/opinion/how-to-really-end-mass-incarceration.html?_r=0; Fareed Zakaria, *Incarceration Nation*, TIME (Apr. 2, 2012), http://content.time.com/time/magazine/article/0,9171,2109777,00.html.

[359] *See generally* ALEXANDER, *supra* note 345; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Darryl Pinckney, *Invisible Black America*, N.Y. REV. OF BOOKS (Mar. 10, 2011), http://www.nybooks.com/articles/archives/2011/mar/10/invisible-black-america/.

[360] *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011).

[361] Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 134 (2011).

[362] *See* Herrera v. Collins, 506 U.S. 390, 398–99 (1993).

[363] Judges, *supra* note 304, at 174–81 (citing JOHN P. KIRSCHT & RONALD C. DILLEHAY, DIMENSIONS OF AUTHORITARIANISM: A REVIEW OF RESEARCH AND THEORY 110 (1967)) (describing dehumanization and out-group hostility as ways that authoritarianism can provide an unconscious defense against anxiety).

prisoner was already found guilty beyond a reasonable doubt by a jury based on apparently overwhelming evidence. The status quo story, including all of the evidence available at trial and on appeal, cannot account for the incredible image of an exonerated person leaving the prison gates, speaking to reporters, and living and working next to us as another member of society.

This process is shocking and unpleasant. We may have spent our lives labeling different people as "good" and "bad" and placing faith in the criminal justice system's ability to protect the former and punish the latter. The very discomfort and aberration from traditional practices posed by innocence claims provides the source of DNA exoneration's potential use as one of many tools for transforming public attitudes towards the criminal justice system.[364] The seemingly impossible appearance of the exonerated prisoner resembles the beginning of an event that represents a break from the routine of the status quo.[365] For a moment, the sharp difference between the innocent ("us") and the guilty ("them") is suspended, allowing each of us to affirm the prisoner's identity as a thinking being.[366] The trauma of this event can then give way to long-term social change if people who experience it find it "impossible . . . to carry on as before"[367] and remain faithful to the original event by carrying it to the inevitable consequences of challenging assumptions of the criminal justice system's accuracy and fairness.

What accounts for the significant power posed by the recent successes of the innocence movement? Using newly discovered evidence to challenge someone's conviction is not novel. The source of the recent movement's power comes from the extraordinary reliability of DNA testing, which is unparalleled by other types of evidence, such as subjective eyewitness testimony:

> [Exculpatory DNA evidence] has an entirely different level of probity. In these cases, the new evidence is usually not competing evidence of the same type and weight as that presented at trial. The degree of certainty of innocence is so high that it is unlikely to be outweighed by any evidence in the record. Evidence that goes beyond the mere suggestion of innocence and demonstrably establishes innocence should form, by itself, a basis for habeas review of convictions and imprisonment. Where the evidence palpably shows actual innocence, the legitimacy of the state is unequivocally and transparently at stake. Continued incarceration cannot be charitably construed

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[364] *See* Liebman, *supra* note 124, at 543–48. *See generally* Medwed, *supra* note 15.

[365] *See* Peter Hallward, *Introduction: Consequences of Abstraction*, *in* THINK AGAIN: ALAIN BADIOU AND THE FUTURE OF PHILOSOPHY 1, 2–3 (P. Hallward ed., 2004).

[366] *Cf. id.* at 7 (describing a situation in which procedures for distinguishing employees and employers break down).

[367] *Id.* at 3.

> as reflecting the difficulties of weighing conflicting new and old evidence or as reflecting a systemic concern to place the burden of timely complaint on the defendant. Blinking at the evidence of innocence may have been understandable in *Herrera*, but it should be unthinkable here.[368]

In this sense, DNA is different.[369] Rather than being one more piece of cumulative evidence weighing against the mountain of evidence that already convinced a jury of someone's guilt beyond a reasonable doubt, DNA testing is often dispositive of innocence. In many cases, despite the appearance of the overwhelming evidence of guilt, DNA testing evidence arrives to resolve the plot at the last minute, like a *deus ex machina* device, setting everything right in the end.[370]

DNA innocence claims often result in public outrage when courts or prosecutors refuse to recognize the overwhelming evidence of innocence.[371] If state actors prove unwilling to seriously consider post-conviction claims in the face of highly accurate DNA testing results, the public may lose confidence in the criminal justice system.[372] Mounting public pressure may force the state to,

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[368] *Development in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1557, 1581–82 (1995).

[369] *E.g.*, Garrett, *supra* note 125, at 1647; *see also* Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 55 (2009) ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.").

[370] "*Deus ex machina*" refers to "(in ancient Greek and Roman drama) a god introduced into a play to resolve the entanglements of the plot. 2. any artificial or improbable device resolving the difficulties of a plot." *Deus Ex Machina Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/deus+ex+machina?s=t (last visited Apr. 28, 2014). For example, when all seems lost in the *War of the Worlds*, the human species is suddenly saved by the aliens' contraction of the flu. H.G. WELLS, THE WAR OF THE WORLDS (1898).

[371] The threshold of discomfort necessary for the public to question the legitimacy of a conviction may be less stringent than that applied by a judge in a typical post-conviction proceeding. Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2350–52 (2007). But many prosecutors cling to the veracity of the original verdict, often in the face of contrary DNA evidence. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 716 (2004).

[372] Jonathan M. Kirshbaum, *Actual Innocence after* Friedman v. Rehal*: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases*, 31 PACE L. REV. 627, 671 (2011) (citing Brandon Segal, Comment, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 238, 249, 250 (2008); Pettys, *supra* note 371, at 2350; Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2136 (2002)); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 248, 323 (1988) ("Although the concept of 'actual innocence' has not explicitly played a part in federal post-conviction jurisprudence until recently, it is obvious that an enlightened system of justice should not tolerate continued incarceration of one who is demonstrably innocent.").

perhaps reluctantly, confront its mistake.[373] It may also impress the significance of the problem on the gatekeepers, including law enforcement, prosecuting and defense attorneys, legislators, and judges, who must play a role in stopping wrongful convictions.[374] That may help pave the way for more systemic legal and attitudinal changes addressing the way we incarcerate people or characteristics that make it more difficult to stop wrongful convictions.[375]

The discomfort of engaging the institutional failures posed by wrongful convictions helps explain the often-intense opposition to actual innocence claims.[376] DNA testing is still a relatively new technology. While its results can provide the closest thing forensic science offers to certainty, it relies on data not immediately perceptible as part of our day-to-day experiences. DNA results can therefore appear almost unreal, especially when clashing with our intuitions about traditional, yet faulty, methods of criminal identification. For example, it may be difficult to reassess a victim's sincere testimony based on an expert's dry testimony regarding invisible strands of DNA described in a cold, passionless lab report. It can also be difficult to dislodge years of tunnel vision regarding a particular prisoner's guilt.[377] Discomfort with confronting the falsity of our beliefs about the criminal justice system can manifest itself in denial, whereby a person unconsciously determines that the unpleasant reality that we punish innocent people is too horrible to be real, thereby giving rise to unconscious strategies of denial in the face of powerful evidence—such as Norma's fantasy that she remains a Hollywood star or a lawyer's denial that a person could be innocent.[378]

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[373] Gross et al., *supra* note 72, at 525.

[374] One commentator has argued that a post-conviction focus, at least in the context of habeas corpus petitions, can be shortsighted for the anti-death penalty movement, creating perverse incentives, lowering standards for trials, and failing to provide effective feedback to the participants in the system who are arguably responsible for the production of death sentences. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2032–33, 2045–46, 2119–20 (2000). Factual innocence claims may address this problem by (1) focusing on the problem of factual innocence and (2) forcing frontend actors, including the very courts and prosecuting attorneys responsible for the conduct of criminal trials, to confront innocence claims. For example, see the experience of Illinois, in which innocence claims helped pave the way for a reassessment capital punishment in the state. Steiker & Steiker, *supra* note 39, at 607–08 (noting the Illinois experience, but also suggesting the possible pitfalls of an innocence focus).

[375] Rosen, *supra* note 204, at 237–39.

[376] Medwed, *supra* note 15, at 1552–58 (summarizing arguments raised against the innocence movement); Karen Christian, Note, *"And the DNA Shall Set You Free": Issues Surrounding Post-conviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1198–99 (2001) (describing the case of Roy Criner, who was denied post-conviction relief based on exclusion by DNA evidence, but was eventually pardoned by Texas Governor George W. Bush).

[377] Findley & Scott, *supra* note 66, at 343–46.

[378] *See* Orenstein, *supra* note 334, at 428 (citing STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 5 (2001); RICHARD S. TEDLOW, DENIAL: WHY BUSINESS LEADERS FAIL TO LOOK FACTS IN THE FACE—AND WHAT TO DO ABOUT IT 33–34 (2010); David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651, 658–59 (1991); Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 910–11 (2005)).

Prosecutors provide a good example of this effect.[379] Prosecutors' offices commonly resist motions for testing or new trials requested based on highly reliable DNA results excluding the prisoner as the source of the biological evidence,[380] only relenting after going through expensive and time-consuming litigation over the matter or in response to intense public pressure. Prosecutors face substantial institutional and psychological pressures to resist innocence and exoneration claims.[381] This makes sense in light of the attorneys' identification with their office and the psychological need to confirm intuitions of guilt solidified by a past conviction:

> If anything, these tendencies have an even greater impact following a conviction, given the psychological difficulty of acknowledging one's possible role in convicting an innocent person. A prosecutor will tend to view a conviction as a confirmation that his initial charging decision was correct and will naturally discount new evidence of innocence. These tendencies will be most pronounced for the particular prosecutors who had responsibility for investigating and trying a case, but it will also inhere in the district attorney or other prosecutor in charge of the office that obtained the conviction, in its supervisory prosecutors, and in others who identify with the office and its work.[382]

We know very little regarding the full rationale for prosecutors' decisions to resist DNA testing and exonerations because of the lack of transparency regarding internal decision-making.[383] But it is unsurprising that internal and external incentives and psychological resistance can cause such opposition.

Despite these pressures, prosecutors have a special duty to ensure that the innocent individuals do not remain behind bars. As recently reiterated by the U.S. Court of Appeals for the Ninth Circuit:

> A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

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[379] Orenstein, *supra* note 334, at 430–31.

[380] Bernhard, *supra* note 371, at 716; Gross et al., *supra* note 72, at 525–26; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138–69 (2004).

[381] Medwed, *supra* note 380, at 138–69.

[382] Green & Yaroshefsky, *supra* note 246, at 489–90.

[383] *Id.* at 481 (citing James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981)). *But see* Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007 (describing a Dallas prosecutor who created a unit to investigate wrongful convictions).

> whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." More succinctly: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules."[384]

That case involved the unusual situation of a prosecutor admitting to having made improper references during closing argument and voluntarily moving for summary reversal of a defendant's conviction and vacation of the sentence.[385] This admission shocked some commentators.[386] But it remains true that, at least in theory, prosecutors have special duties as ministers of justice, rather than as traditional advocates, to ensure that innocent individuals do not experience wrongful punishment.[387] Unfortunately, this duty can have the perverse effect of discouraging critical reassessment of convictions because admitting error means admitting the prosecutor's role in perpetrating an injustice.[388] Nonetheless, there

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[384] United States v. Maloney, No. 11-50311, 2014 WL 801450, at *1 (9th Cir. Feb. 28, 2014) (internal citations omitted) (quoting Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993)).

[385] *Id.*

[386] *See* Andrew Cohen, *When Prosecutors Admit to Cheating*, THE ATLANTIC (Mar. 4, 2014), http://www.theatlantic.com/national/archive/2014/03/when-prosecutors-admit-to-cheating/284180/.

[387] *See* WYO. R. PROF'L CONDUCT 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). The Model Rules go even further in the post-conviction context:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

MODEL R. PROF'L CONDUCT R. 3.8(g), (h). The Wyoming State Bar's Board of Officers and Commissioners recently recommended adopting this language, including commentary, from the Model Rules. REPORT OF AD HOC ADVISORY COMMITTEE TO UPDATE WYOMING RULES OF PROFESSIONAL CONDUCT 99 (Apr. 2014), *available at* http://www.wyomingbar.org/pdf/2014_WRPC_Revisions.pdf.

[388] Orenstein, *supra* note 334, at 431–32 (citing Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006); CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 156 (2007); KATHRYN SCHULZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 233–35 (2010)).

are clearly other considerations at play in prosecutorial decisions, which may not change absent systemic changes in prosecutorial institutions.

C. Assessing Wyoming's Statute

Wyoming adopted one of the more recent post-conviction DNA statutes when it passed the 2008 Post-Conviction DNA Testing Act (the Act).[389] The Joint Interim Judiciary Committee developed the bill in cooperation with the Rocky Mountain Innocence Center, Wyoming district attorneys, and the law enforcement community.[390] Its structure provides useful examples of how post-conviction DNA testing and innocence claims benefit the wrongfully convicted and the justice system as a whole by allowing us to confront our mistakes and to correct and prevent wrongful convictions.

1. Testing Requirements

Wyoming's statute permits a person convicted of a felony offense to move the district court for a post-conviction DNA testing order.[391] The category of potential movants authorized by Wyoming's statute, all felons, is rather broad. Other state statutes restrict certain kinds of defendants (e.g. those convicted of lesser crimes) from requesting post-conviction testing.[392] The movant must assert under oath and provide a "particularized factual basis" for certain facts including:

(i) Why DNA evidence is material to:

(A) The identity of the perpetrator of, or accomplice to, the crime;

(B) A sentence enhancement; or

(C) An aggravating factor alleged in a capital case.

(ii) That evidence is still in existence and is in a condition that allows DNA testing to be conducted;

(iii) That the chain of custody is sufficient to establish that the evidence has not been substituted, contaminated or altered in any material aspect that would prevent reliable DNA testing;

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[389] *See* S.F. No. 65, 59th Leg., Budg. Sess. (Wyo. 2008) (codifying WYO. STAT. ANN. §§ 7-12-302 to -315 (2013)).

[390] *Motion for New Trial Filed for Wyoming Man*, ROCKY MT. INNOCENCE CTR. (Mar. 30, 2013), http://rminnocence.org/2013/03/motion-for-new-trial-filed-for-wyoming-man-recent-dna-testing-likely-to-prove-his-innocence/.

[391] WYO. STAT. ANN. § 7-12-303(c) (2013). A movant may not waive the right to file a motion for post-conviction DNA testing. *Id.* § 7-12-312(a).

[392] Garrett, *supra* note 125, at 1679–80.

(iv) That the specific evidence to be tested can be identified;

(v) That the type of DNA testing to be conducted is specified;

(vi) That the DNA testing employs a scientific method sufficiently reliable and relevant to be admissible under the Wyoming Rules of Evidence;

(vii) That a theory of defense can be presented, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(viii) That the evidence was not previously subjected to DNA testing, or if the evidence was previously tested one (1) of the following would apply:

(A) The result of the testing was inconclusive;

(B) The evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing; or

(C) The requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice.

(ix) That the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the movant's actual innocence.[393]

As in many states, the statute makes the local prosecutor's involvement critical to the ease of post-conviction proceedings.[394] The movant must serve the motion on the district attorney in the county where the conviction occurred and any government agency or laboratory holding evidence for which testing is requested.[395] The district attorney then has sixty days—unless granted an extension—to support or oppose the motion, recommend a particular type of DNA testing, object to the proposed laboratory, or enter other objections, recommendations, or requests.[396] Obtaining testing is much simpler if the

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[393] WYO. STAT. ANN. § 7-12-303(c) (2013).

[394] Medwed, *supra* note 380, at 127–30.

[395] WYO. STAT. ANN. § 7-12-304(a) (2013). The district attorney, in turn, must notify the victim (as defined by Wyo. Stat. § 1-40-202(a)(ii)) of the motion, the time and place for hearing, and the result of the motion. *Id.* § 7-12-311.

[396] *Id.* §§ 7-12-304(b), (c).

district attorney consents to testing, as occurred in Wyoming's sole, successful motion for post-conviction DNA testing before publication of this article.[397] The U.S. Justice Department recommends cooperation between prosecutors, defendants, and courts in cases where DNA testing may conclusively determine a prisoner's innocence.[398]

The prospect of future cooperation by Wyoming prosecutors remains unclear. Prosecutors in other states commonly fight claims for post-conviction DNA testing[399] requiring delays and evidentiary hearings regarding the probative nature of the requested testing. Even after testing excludes the movant, prosecutors often show remarkable resiliency in continuing to oppose motions for new trials, "hypothesizing the existence of 'unindicted co-ejaculators' . . . to explain how the defendant can still be guilty, though another man's semen is found on the rape-murder victim."[400] Alternatively, a prosecutor may deny the full meaning of DNA evidence by recasting the available evidence, perhaps minimizing the importance of biological evidence that was deemed critical at trial or creating new, implausible theories of the crime to match new evidence.[401]

To an outsider, this opposition can seem odd, given the uniquely probative nature of DNA evidence and the state's strong interest in not punishing innocent people. However, as explained above, prosecutors experience strong psychological, social, political, and institutional pressures to obstruct testing claims.[402] There are several explanations for prosecutorial resistance to innocence claims, including political risk, psychological barriers, and institutional incentives.[403] The recent failure by the Wyoming Legislature to pass compensation and non-DNA exoneration bills suggests that Wyoming prosecutors may attempt to obstruct future innocence claims.[404] But as in many other states,[405] prosecutors will continue to play a significant role in determining prisoners' viable access to post-conviction DNA testing under Wyoming's statute.

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[397] Megan Cassidy, *Wyoming's First Post-Conviction DNA Test Will Quell Doubts, One Way or Another*, CASPER STAR TRIB. (Feb. 26, 2013), http://trib.com/news/state-and-regional/wyoming-s-first-post-conviction-dna-test-will-quell-doubts/article_19baf5e5-7e5a-5898-8e89-5ab7582a7e7b.html ("'Nobody, especially prosecutors, wants to see someone in prison who shouldn't be,' [one prosecutor] said. 'That's our main duty as prosecutors. There is no harm in getting this evidence tested.'").

[398] DOJ RECOMMENDATIONS, *supra* note 249, at iii.

[399] *See, e.g.*, Brandon L. Garrett, *Exoneration*, http://www.law.virginia.edu/html/librarysite/garrett_ exoneration.htm (last visited Apr. 28, 2014).

[400] Liebman, *supra* note 124, at 543; *accord* Lugosi, *supra* note 147, at 235.

[401] Orenstein, *supra* note 334, at 430.

[402] *See generally* Medwed, *supra* note 380.

[403] Medwed, *supra* note 380, at 138–69.

[404] *See infra* notes 517–45 and accompanying text.

[405] Medwed, *supra* note 380, at 127–28.

If the DNA motion complies with Wyo. Stat. § 7-12-303(c) and the state has an opportunity to respond, the district court must set a hearing within ninety days of the motion's filing.[406] If possible, the hearing will be before the judge who conducted the initial trial.[407] Whether this is possible depends on how much time has passed since trial, which can be decades for many DNA cases. The movant and state may present evidence through testimony or sworn and notarized affidavits served on opposing parties at least fifteen days before the hearing.[408]

To obtain testing, the movant must present a prima facie case showing that evidence supports findings consistent with those asserted in the DNA testing motion and that, assuming exculpatory results,[409] establishes (i) the movant's actual innocence or (ii) in a capital case, (A) actual innocence of an aggravating circumstance or (B) a mitigating circumstance shown by DNA testing.[410] One potential problem facing movants is the immense difficulty of making a prima facie case that DNA testing results are consistent with factual innocence before the evidence is tested. Unlike under some state statutes, Wyoming's statute assumes testing will provide exculpatory results.[411] This is important for enabling viable innocence claims because, in a post-conviction context, a jury already found evidence establishing the movant's guilt beyond a reasonable doubt. Courts assign an enormous amount of credibility in the accuracy and finality of such verdicts.[412]

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[406] WYO. STAT. ANN. § 7-12-305(a) (2013). If the motion does not comply with those requirements, the court may deny the motion without a hearing. *Id.*

[407] *Id.* § 7-12-305(b). While having the same judge hear the case may interfere with objectivity, this situation does not appear to have arisen under Wyoming's statute.

[408] *Id.* § 7-12-305(c).

[409] The Act does not define "exculpatory results," but this phrase generally refers to evidence tending to establish the movant's innocence. *See* BLACK'S LAW DICTIONARY (9th ed. 2009); United States v. Blackley, 986 F. Supp. 600, 603 (D.D.C. 1997) ("[E]xculpatory [is] defined as that which would tend to show freedom from fault, guilt or blame."); *cf.* Dist. Att'y's Office for Third Jud. Dist. v. Osborne, 557 U.S. 52, 77 (2009) (Alito, J., concurring) (noting the *Brady v. Maryland* definition of exculpatory evidence as that which is favorable to the accused an material to guilt or punishment). In the context of DNA testing, an exculpatory result would likely be a test showing that the movant could be excluded as the source of a sample of biological material left at a crime scene.

[410] WYO. STAT. ANN. § 7-12-305(d) (2013).

[411] *Compare id.* ("DNA testing of the specified evidence would, assuming exculpatory results, establish . . . ."), *and* COLO. REV. STAT. § 18-1-413(1)(a) (2014) (requiring a movant to show that "favorable results" would demonstrate actual innocence), *with* D.C. CODE § 22-4133(d) (2014) (requiring a movant to demonstrate a reasonable probability that testing will produce exculpatory evidence). For a thorough discussion of this issue, see Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 811–20 (2011). *See also* Garrett, *supra* note 270, at 1676 ("Currently, only three states, Kansas, Nebraska, and Wyoming, allow access to testing on a showing that there is a likelihood that DNA could be probative of innocence.").

[412] *See, e.g.*, *Ex parte* Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (en banc) *superseded by statute as recognized by Ex parte* Blue, 230 S.W.3d 151 (Tex. Crim. App. 2007) ("[In a sufficiency of the evidence review,] [w]e view the evidence in a manner favorable to the verdict of

Unless the court assumes exculpatory results, the available evidence—including eyewitness statements and potentially invalid or outdated forensic science methods—may make it impossible to assert a prima facie case of innocence, thus possibly rendering the statute a nullity. Unlike many other types of evidence, it is impossible to know whether genetic evidence is actually exculpatory and probative of innocence until tested.[413] But after testing, the results can completely invalidate most of the other evidence at issue. DNA testing can exclude an individual to a degree of probability bordering on certainty.[414] Failing to assume exculpatory results requires a judge to weigh potentially overwhelming, yet untested evidence, against evidence that is practically conclusive due to prior fact finding by a jury, making it impossible to fairly assess the true potential weight of DNA evidence.

Despite these positive features, Wyoming's statute poses a potential obstacle to individuals seeking post-conviction DNA testing. If the movant establishes a prima facie case for the facts specified by Wyo. Stat. § 7-12-303(c), then the district court *may* order testing.[415] The statute's use of the word "may" suggests the district court has discretion to order testing, creating the possibility of a court denying a testing motion requested by both the movant and the district attorney.[416] The district court need not provide a rationale for its decision. An innocent prisoner would have little practical recourse against the district court's discretion, other than the limited appeal rights provided by the statute.[417] While this situation has not yet occurred, it remains possible under the statute.

Of course, post-conviction DNA claims raise additional expenses associated with both new hearings[418] and DNA testing itself.[419] The claims may also interfere with the value our system places on the policy goal of finality.[420] While

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guilty. In practice, this means we assume that the jury weighed lightly the exculpatory evidence and disbelieved entirely the exculpatory witnesses. We make this assumption no matter how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear.").

[413] Buskirk, *supra* note 272, at 1608.

[414] Garrett, *supra* note 125, at 1647.

[415] WYO. STAT. ANN. § 7-12-305(e) (2013).

[416] Brooks & Simpson, *supra* note 411, at 816; *cf.* Duke v. State, 2009 WY 74, 209 P.3d 563 (Wyo. 2009) (holding the legislature's use of the word "may" in the Addicted Offender Accountability Act gave the district court discretion to impose a sentence of probation or imprisonment).

[417] *See infra* notes 492–97 and accompanying text.

[418] *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 487–88 (1986).

[419] *See* Brooke A. Masters, *DNA Testing in Old Cases Is Disputed; Lack of National Policy Raises Fairness Issue*, WASH. POST, Sept. 10, 2000, at A1. *But see* Garrett, *supra* note 125, at 1708 & n.383 (describing the relatively low cost of DNA testing, which can be a few thousand dollars at the most and is frequently less). While many statutes require the state to pay for DNA testing, they often do so only if the result is favorable to the movant. *See, e.g.*, WYO. STAT. ANN. § 7-12-309 (2013).

[420] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 555–59 (1998); *Murray*, 477 U.S. at 487 ("Those costs . . . include a reduction in the finality of litigation and the frustration of 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional

understandable, those concerns do not outweigh the tremendous affront to individual liberty posed by continuing to imprison factually innocent people.[421] Any threat to the integrity of the system posed by post-conviction review[422] is dwarfed by the threat to the legitimacy of the legal system posed by the public's loss of confidence in a system that turns a blind eye towards factual innocence.[423] To the extent such risks exist, they are strongly mitigated by statutory requirements that the movant provide a good faith claim of actual innocence based on existing DNA evidence.[424] These requirements prevent the feared onslaught of repeated, frivolous claims, completely unmoored from indicia of factual innocence.[425] Finally, arguments about costs fail to take into account other costs of imprisoning the wrong person, including the negative consequences of allowing the freedom of true perpetrators.[426]

2. *Evidence Preservation*

One serious danger facing the factually innocent prisoner is the possibility of evidence being lost, destroyed, or no longer in a condition susceptible to testing.[427] Current DNA testing methods, which can be effective for smaller and

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rights,' are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and 'exacts an extra charge by undercutting the State's ability to enforce its procedural rules.'" (quoting Engle v. Isaac, 456 U.S. 107, 128–29 (1982) (internal citations omitted)); Reed v. Ross, 468 U.S. 1, 10 (1984).

[421] Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1467 (2004) (arguing post-conviction statutes represent a policy judgment that the wrong of wrongful imprisonment outweighs concerns for finality, even in cases of guilty pleas); Nicholas Kristoff, *Is Rape Serious?*, N.Y. TIMES, Apr. 30, 2009, at A27.

[422] *See, e.g.*, McCleskey v. Zant, 499 U.S. 491 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal system."); *Murray*, 477 U.S. at 487; *Reed*, 468 U.S. at 10.

[423] *See supra* notes 349–74 and accompanying text; Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1 ("The failure of prosecutors to obey the demands of justice—and the legal system's failure to hold them accountable for it—leads to wrongful convictions, and retrials and appeals that cost taxpayers millions of dollars. It also fosters a corrosive distrust in a branch of government that America holds up as a standard to the world.").

[424] *See, e.g.*, WYO. STAT. ANN. § 7-12-303(c) (2013).

[425] Garrett, *supra* note 125, at 1708–09.

[426] *Id.* at 1708; Medwed, *supra* note 15, at 1564.

[427] Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241, 245 (Saundra D. Westervelt & John A. Humphrey eds., 2001) ("In 75 percent of Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate's conviction, the relevant biological evidence has either been destroyed or lost."); BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 262 (2000); NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 182, at 46; Teresa N. Chen, *The* Youngblood *Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. VA. L. REV. 421, 422 (2007); David L. Faigman et al., *supra* note 180, § 31:14.

more degraded samples,[428] and increased awareness regarding the importance of preserving biological evidence partially ameliorate the problem. Nonetheless, evidence from long closed cases may not be preserved with care. Police departments and courts occasionally misplace or destroy evidence. Accidents and acts of nature, such as fires and floods, can also eliminate useful evidence. Loss of such evidence destroys any chance to challenge a conviction using DNA evidence.[429]

Under Wyoming's statute, if the motion claims the evidence is in state custody, the court must order the state to preserve it, prepare an inventory, and submit the inventory to the movant and the court.[430] If the evidence is no longer available, the state must notify the court and movant, explain the loss or destruction, and provide chain of custody documentation.[431] That provides little practical recourse for a prisoner who could have been exonerated by evidence that no longer exists.[432] Without testing, near conclusive evidence of guilt, supported by a jury verdict of guilt beyond a reasonable doubt, will remain in place. One possible solution would be to permit courts to impose sanctions for bad faith evidence destruction, possibly including sentence reduction, new trials, or sentence vacation, for the wrongful destruction of evidence.[433] Courts already use a stringent "bad faith" standard to determine whether evidence destruction amounts to a denial of due process.[434] This standard requires not simply negligence, but evidence of police conduct showing awareness that the evidence could form a basis for exoneration.[435] In practice, this standard has been notoriously difficult to meet.[436] It may therefore be prudent to allow courts to pragmatically weigh different factors, including the state's bad faith, the importance of the evidence, and other evidence of guilt.[437] Yet as of 2014, no serious remedy for evidence loss or destruction exists in Wyoming.

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[428] MING W. CHIN ET AL., FORENSIC DNA EVIDENCE: SCIENCE AND THE LAW § 2:3 (2013).

[429] *See* WYO. STAT. ANN. § 7-12-303(c) (2013) (requiring a movant requesting testing to make a prima facie case that the evidence exists in a condition subject to testing).

[430] *Id.* § 7-12-304(d).

[431] *Id.*

[432] Catherine Greene Burnett, *"If Only": Best Practices for Evidence Retention in the Wake of the DNA Revolution*, 52 S. TEX. L. REV. 335, 355–56 (2011); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1257–58 (2005) (describing such statutes as providing a right without a remedy).

[433] Cynthia E. Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2944–53 (2009).

[434] *E.g.*, Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988); Williams v. State, 891 So. 2d 621, 622 (Fla. Dist. Ct. App. 2005).

[435] *Youngblood*, 488 U.S. at 58.

[436] Jones, *supra* note 433, at 2903.

[437] For example, many state courts interpreting state constitutions have rejected the federal approach. *See, e.g.*, State v. Morales, 657 A.2d 585, 593–94 (Conn. 1995) ("Fairness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal

3. *Right to Counsel*

A movant has no constitutional right to assistance of counsel after the first appeal.[438] According to the U.S. Supreme Court,

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.[439]

The Court characterized collateral attacks on criminal convictions as civil in nature and even more removed from the criminal trial than discretionary direct review.[440] States, which need not even provide post-conviction relief in the first place, are not compelled by due process to ensure assistance of counsel in these proceedings.[441]

Like many other states, Wyoming's statute provides counsel to indigent individuals filing motions for post-conviction DNA testing.[442] A needy individual wishing to submit a motion for post-conviction DNA testing has the right to counsel during proceedings under the Act.[443] This increases the probability that the Act will provide meaningful relief to innocent prisoners, most of whom lack the funds to hire their own counsel.

While Innocence Network member organizations like the Rocky Mountain Innocence Center provide pro bono representation to prisoners with plausible

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defendant has received due process of law. Rather, our constitution imposes certain obligations on the state to insure that the criminal trial is 'a search for truth, not an adversary game.'") (quoting United States v. Perry, 471 F.2d 1057, 1063 (D.C. Cir. 1962)).

[438] Pennsylvania v. Finley, 481 U.S. 551, 555 (1990).

[439] *Id.* (internal citations omitted).

[440] *Id.* at 556–57.

[441] *Id.* at 557.

[442] WYO. STAT. ANN. § 7-12-308 (2013).

[443] *Id.* The statute provides for counsel to be appointed in accordance with Wyo. Stat. § 7-6-104(c)(viii), an apparent typographical error, which likely should refer to Wyo. Stat. § 7-6-104(c)(vii): "A needy person who is entitled to be represented by an attorney . . . is entitled: . . . [t]o be represented by the public defender in a motion brought in accordance with the provisions of the Post-Conviction DNA Testing Act."

innocence claims, these organizations have limited resources and rely heavily on volunteers.[444] The Act guarantees access to counsel in the event of insufficient access to pro bono representation. But this may not guarantee effective assistance of counsel. While many statutes provide for the appointment of counsel in these circumstances, whether the movant has a right to effective assistance of counsel in post-conviction proceedings remains unclear.[445] Even so, a limited statutory right to counsel gives prisoners an advantage over their pro se counterparts, who frequently misunderstand procedural and substantive rules, risking denial of substantively valid DNA testing motions.

4. *Effect of Confessions, Guilty Pleas, and Insufficient Diligence*

Wyoming's statute prohibits a court from ordering post-conviction DNA testing if the movant pled guilty or no contest.[446] This appears to apply to both a traditional no contest plea, as well as an *Alford* plea, which courts treat as a guilty plea, with the same preclusive effect in later civil proceedings.[447] The statute also prohibits a testing order for a movant who went to trial after January 1, 2000 and failed to request or use DNA testing at trial because of strategic considerations or insufficient due diligence.[448] There is an exception for insufficient due diligence resulting from ineffective assistance of counsel.[449] No showing of due diligence is required if the movant was convicted before January 1, 2000.[450]

Given what we now know about the incidence of false confessions and guilty pleas by people who were later exonerated by DNA testing, the statute should not prohibit DNA testing orders for individuals who pled guilty or no contest.[451]

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[444] *Request Help*, ROCKY MOUNTAIN INNOCENCE CENTER, http://rminnocence.org/request-help/ (last visited Apr. 28, 2014).

[445] *See* People v. Love, 727 N.E.2d 680 (Ill. App. Ct. 2000).

[446] WYO. STAT. ANN. § 7-12-303(d).

[447] *See* McEwan v. State, 2013, WY 158, ¶ 15, 314 P.3d 1160, 1165 n.4 (Wyo. 2013) (citing North Carolina v. Alford, 400 U.S. 25, 31 (2013)) (distinguishing *Alford* pleas, in which a defendant accepts a plea bargain while denying factual guilt in order to avoid a harsher penalty, from no contest pleas).

[448] WYO. STAT. ANN. § 7-12-303(d).

[449] *Id.*

[450] *Id.* This language suggests that post-conviction testing would be available to a movant who pled guilty or no contest before January 1, 2000. J.H. Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 50 n.18 (2010).

[451] Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 358 (2002) (citing *Alford*, 400 U.S. 25 (recognizing that innocent people may plead guilty)).

For discussions of the substantial research demonstrating the counterintuitive fact that innocent people confess, see GILSI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1996); Drizin & Leo, *supra* note 337, at 918–21; Richard A. Leo & Richard J. Ofshe, *Criminal Law: 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).

Although counterintuitive, innocent people confess and plead guilty to crimes for a variety of reasons, including fear of the death penalty, ineffective assistance of counsel, incompetence, coercion, and economics.[452] Moreover, prohibiting DNA testing for movants who pled guilty or failed to take seek DNA testing does not simply punish negligent movants. It also prevents the criminal justice system from taking the opportunity to expose its own flaws,[453] contributing to the problem of unjustified certainty in the accuracy of criminal verdicts obtained through faulty eyewitness testimony, forensic science, racial bias, and unethical or incompetent lawyers.

5. Testing Procedure

If the district court orders testing, the Wyoming State Crime Laboratory will perform the testing unless the movant demonstrates a conflict of interest or the Crime Laboratory's inability to perform the necessary testing.[454] The statute requires full disclosure of DNA testing results, including underlying data, to all parties, the court, and the attorney general.[455] Movants must pay for the testing unless they are imprisoned and needy and the DNA testing provides exculpatory results.[456] These provisions ensure that prisoners have access to testing and its results, regardless of financial resources.

6. New Trial and Exoneration

If the DNA testing results are inculpatory or inconclusive, the district court must deny any motion for a new trial based on the evidence and provide the results to the parole board.[457] However, if the results of the DNA testing are exculpatory, the movant may request a new trial—even if a different statute or rule, such as Wyoming Rule of Criminal Procedure 33, would bar a new trial motion.[458] The court must set the matter for a hearing on the movant's new trial motion.[459] At the hearing, the court will likely require the movant to establish the traditional elements,[460] articulated by the Wyoming Supreme Court in

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[452] Eunyung Theresa Oh, Note, *Innocence after "Guilt": Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 SYRACUSE L. REV. 161, 166–71 (2004).

[453] *Id.* at 184.

[454] WYO. STAT. ANN. § 7-12-306(a). If testing is conducted by a different laboratory, the statute provides requirements to ensure its integrity and reliability. *Id.* § 7-12-306(b).

[455] *Id.* § 7-12-307.

[456] *Id.* § 7-12-309.

[457] *Id.* § 7-12-310(a).

[458] *Id.* § 7-12-303(b).

[459] *Id.* § 7-12-310(b).

[460] At the time of publication of this article, the only order granting a motion for a new trial based on post-conviction DNA testing relied on the *Opie* test. *See* Hearing on Motion for New Trial, State v. Johnson, No. 19-373 (Wyo. Dist. Ct. Apr. 16, 2013).

Opie v. State, for obtaining a motion for a new trial on the grounds of newly discovered evidence:

> (1) That the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different verdict, if the new trial were granted; and (4) that it is not cumulative, viz., speaking to facts in relation to which there was evidence at the trial.[461]

The district court has discretion to grant a new trial based on these elements.[462]

Wyoming's post-conviction DNA testing statute may abrogate the first two elements of the *Opie* test. While the statute does not expressly address these requirements in the context of a hearing on a motion for a new trial, it does modify the requirements of due diligence and timely discovery in the context of requesting post-conviction DNA testing.[463] For example, the statute requires no showing of due diligence for trials occurring before 2000.[464] It is counterintuitive that the legislature would intend to authorize testing in circumstances that would not normally withstand the diligence and timely discovery requirements of the *Opie* test, yet not allow the results of such testing to provide the basis of a request for a new trial.[465] In contrast to the materiality or cumulative nature of the test results, which cannot be determined until after the testing is complete, these facts should be readily determinable at the initial hearing at which the movant requests DNA testing.

The third and fourth elements of the *Opie* test may be the most important for determining whether DNA testing justifies a new trial. The DNA test results must be both (1) noncumulative and (2) sufficiently material to the perpetrator's identity that they probably would have resulted in a different verdict if they had been available at trial.[466] This raises difficult questions regarding how the court is to determine whether the test results are sufficiently material to produce a different verdict. Unlike the hearing to request DNA testing,[467] the statute does not state

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[461] Opie v. State, 422 P.2d 84, 85 (Wyo. 1967); *accord* Berry v. State, 10 Ga. 511, 527 (1851) (articulating an early version of the test).

[462] *Opie*, 422 P.2d at 85; Cutbirth v. State, 751 P.2d 1257, 1260 (Wyo. 1988).

[463] *See* WYO. STAT. ANN. § 7-12-303(c).

[464] *Id.*

[465] *See* Buckles v. State, 622 P.2d 934, 938 (Wyo. 1981) ("[T]he legislature is presumed to enact legislation that is reasonable and logical and not to intend futile things.").

[466] By "different verdict," the court presumably means a verdict that is more favorable to the Defendant. *Cf.* Davis v. State, 2005 WY 93, ¶ 19,117 P.3d 454, 462 (Wyo. 2005) (describing an error as harmful if, in its absence, the verdict might have been more favorable to the defendant).

[467] *See* WYO. STAT. ANN. § 7-12-305(c).

whether evidence in the form of an affidavit or testimony may be presented at the hearing. This complicates matters if interpretation of DNA testing results, especially in comparison to evidence available to a jury at trial, would benefit from the presentation of opinion testimony by expert witnesses.[468] However, at least one appellate court in another state interpreted a DNA testing statute requiring a hearing on the motion for a new trial as giving the movant the right to an evidentiary hearing.[469]

If the court grants a new trial, there are two possible, immediate results. First, the district attorney can stipulate to or move for dismissal of the original charges, rather than retrying the movant.[470] Second, the district attorney can pursue a new trial, including the charges on which the movant was originally convicted, as well as charges dismissed during the first trial or not charged under the terms of a plea agreement.[471] This latter possibility may pose new risks for movants who avoided charges during the first trial.

If the charges are dismissed or the movant is acquitted on retrial, then the district court must issue orders of actual innocence, exoneration, and expungement.[472] The statute's use of the mandatory term "shall"[473] means that the court lacks discretion regarding whether to enter these orders, even if the district attorney voluntarily drops charges rather than stipulating to the movant's innocence. While this requirement may generate some controversy, it plays a critical role in the innocence event made possible by post-conviction DNA testing statutes, as explained in Section IV.B above. Forcing the state to pursue a new trial or risk an order of actual innocence prevents prosecutors from using quiet dismissals to avoid opportunities for courts, lawyers, and the public to directly confront the causes and consequences of wrongful convictions.

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[468] *See* WYO. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); Hoy v. DRM, Inc., 2005 WY 76, ¶ 22–23, 114 P.3d 1268, 1280 (Wyo. 2005) (describing *Daubert* test of reliability and fitness which must be established before admitting expert testimony into evidence).

[469] *See* Echols v. State, 373 S.W.3d 892, 902 (Ark. 2010) (citing ARK. CODE ANN. § 16-112-205(a) (effective Aug. 13, 2001) (interpreting Arkansas's post-conviction statute, which required a hearing, prompt determination of issues, findings of fact, and conclusions of law, entitled Damien Echols, of the celebrated West Memphis Three, to an evidentiary hearing).

[470] WYO. STAT. ANN. § 7-12-310(c).

[471] *Id.* §§ 7-12-310(c), -312(b).

[472] *Id.* §§ 7-12-310(c), (d). An order of expungement results in the court file being placed under seal and made available for inspection only as authorized by a court order. *See id.* § 7-13-1401(d).

[473] *See, e.g.*, *In re* LaPage, 18 P.3d 1177, 1180 (Wyo. 2001) ("Where a statute uses the mandatory language 'shall,' a court must obey the statute as a court has no right to make the law contrary to what is prescribed by the legislature.").

7. *Compensation*

Wrongful imprisonment is a terrifying ordeal, which can cause profound physical, psychological, and emotional damage:

> "You're dead but you're still alive," [exoneree Vincent Moto] said. The violence of prison was terrifying; the hundreds of new personalities to contend with overwhelming; the lack of control over any aspect of his life dehumanizing. Being innocent only compounded his nightmare.
>
> "It's hard to say how I felt because it was like all of a sudden your life just makes this 180 degree change, from everything being fine to a living hell," said Moto. "I was so angry, so scared, so confused that crying wasn't an option."[474]

An exoneree's problems do not end at the prison gates.[475] Years or even decades in prison can cause intense financial, personal, and psychological harm.[476] During that time, a prisoner cannot accumulate a work or residency history, earn more than nominal income, maintain and develop family and personal relationships, or pay into Social Security or retirement accounts as a free person would. The exoneree may have dissipated assets fighting for post-conviction relief. Unless the exoneree can prove malfeasance by an actor who lacks absolute or qualified immunity,[477] the exoneree may lack a practical civil rights remedy against the state.[478] Unlike a paroled prisoner,[479] the exoneree may not have basic services

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[474] Radnofsky, *supra* note 63.

[475] Daniel S. Kahn, *Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 129–31 (2010).

[476] *See generally* Heather Weigland, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 PUB. INT. L.J. 427 (2009); INNOCENCE PROJECT, *supra* note 293; Jeff Deskovic, *Catch 22: Obstacles the Wrongfully Convicted Face upon Release from Prison*, WESTCHESTER GUARDIAN, July 3, 2008, at 20–21.

[477] *See* Connick v. Thompson, 131 S. Ct. 1350, 1361–65 (2011) (reversing $14 million jury verdict in 42 U.S.C. § 1983 claim brought by exoneree who was wrongfully convicted following district attorneys' failure to train staff regarding disclosure of potentially exculpatory evidence).

[478] The State of Wyoming has settled at least one 42 U.S.C. § 1983 civil rights lawsuit filed by a prisoner who received a new trial based on newly discovered evidence. Ben Neary, *Wyoming Settles Lawsuit over Murder Investigation*, CASPER STAR TRIB. (Oct. 5, 2013), http://trib.com/news/local/crime-and-courts/wyoming-settles-lawsuit-over-murder-investigation/article_9c8b3011-4b23-558f-a123-7e375d068ba7.html. However, that case involved an independent constitutional violation stemming from the state's knowing failure to turn over potentially exculpatory evidence. *See* Willoughby v. Hanson, No. 12CV 210-S (D. Wyo. Sept 17, 2012) (Complaint).

[479] Kahn, *supra* note 475, at 131 (citing CAL. COMM'N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 105 (2008)); *see also Program Aims to Help Wyoming Inmates Transition to Outside*, BILLINGS GAZETTE (Mar. 9, 2013), http://billingsgazette.com/news/state-and-regional/wyoming/program-aims-to-help-wyoming-inmates-transition-to-outside/article_bf7eb963-74af-5d26-9e5f-0baf778b4b24.html (describing reentry programs available to Wyoming inmates).

that might be provided by a probation and parole reentry program to ease the difficult transition to non-prison life.[480] Private charitable resources may be sparse and difficult to locate. This creates a collective action problem where the public arguably benefits from imprisoning dangerous people, but does not bear the costs of wrongful convictions. The innocent exoneree—who may continue to be scapegoated by prosecutors, politicians, and vigilantes who cling to the "vague and inchoate suspicion" of guilt[481]—bears the primary weight of the injustice.

The precarious position of exonerees demands the need for rehabilitative assistance from the state, including financial compensation, medical benefits, education, job training, and counseling.[482] This provides a practical method for sharing at least a small part of the costs of wrongful imprisonment.[483] Yet only twenty-nine states currently offer any kind of post-conviction compensation statute.[484] Many existing statutes fall short of providing adequate financial support and social services to help exonerees get back on their feet.[485] Most exonerees do not receive compensation equivalent to the federal standard of $50,000 per year of incarceration.[486]

Despite legislative efforts during the 2014 Budget Session,[487] the State of Wyoming does not provide statutory compensation, whether monetarily or through social services, to exonerees. The Wyoming Legislature must rectify this shortcoming before it can claim to provide justice to the wrongfully convicted. Other jurisdictions in geographic proximity have adopted favorable compensation statutes, including Texas ($80,000 per year, plus $25,000 per year on death row, with no cap), Utah (nonagricultural wage per year, which in 2010 was $38,808 per year[488] with a 15-year cap), and Colorado ($70,000 per year plus $50,000

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[480] Weigland, *supra* note 476, at 429.

[481] Bernhard, *supra* note 371, at 717.

[482] Weigland, *supra* note 476, at 435–37; INNOCENCE PROJECT, *supra* note 476, at 20–24.

[483] Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999); Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 704 (2002); Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1097 (2007).

[484] INNOCENCE PROJECT, *supra* note 476, at 3–4. Seventeen of the twenty-nine states fix daily or annual award amounts, ten provide variable amounts, one provides a fixed amount based on the years of incarceration, and one provides a fixed amount regardless of the length of incarceration. *Reforms by State*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView1.php (last visited Apr. 28, 2014).

[485] INNOCENCE PROJECT, *supra* note 476, at 3–4.

[486] *Id.* at 5; *see also* 28 U.S.C. § 2513(e) (2012) (providing compensation of $50,000 per year).

[487] *See infra* notes 517–45 and accompanying text.

[488] UTAH DEPT. OF WORKFORCE SERVICES, WORKFORCE RESEARCH & ANALYSIS, *Annual Report of Labor Market Information* (2010).

per year on death row, with no cap).[489] Unlike those states, Wyoming has a much smaller prison population, making it less likely that there will be many claims for compensation.[490] Given the state's strong financial position,[491] it is surprising that it continues to deny full responsibility for wrongful convictions.

8. *Appeals*

Wyoming's statute does not permit a party to directly appeal an order granting or denying a motion for post-conviction DNA testing.[492] However, the movant, district attorney, or attorney general may file a petition for a writ of review within twenty days of the court's order.[493] Additionally, an order granting or denying a motion for a new trial may be appealed to the Wyoming Supreme Court.[494] It is likely such an order would be reviewed under the abuse of discretion standard articulated by the Wyoming Supreme Court in *Opie v. State*[495] and widely applied to motions for new criminal trials.[496] Appellate courts in other states have used the abuse of discretion standard to reverse denials of new trial motions based on DNA evidence.[497] The Wyoming Supreme Court's willingness to find that a district court has abused this discretion remains an open question. At the very least, an appeal may result in an opportunity for oral argument and a written opinion, possibly contributing to public exposure of the problem of wrongful convictions.

9. *Beyond DNA*

For all of the benefits of post-conviction DNA testing and innocence claims, they cannot address all of the problems with the criminal justice system. One lesson to learn from our former reliance on eyewitness identification, discredited forensic science, and procedural safeguards,[498] is the risk that certainty in the

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[489] *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 103.001 (West 2013); UTAH CODE ANN. § 78B-9-405 (West 2013), COLO. REV. STAT. §§ 13-65-101 to -103 (2014).

[490] In fact, the Budget and Fiscal Section of the LSO assumes "that the actual number of individuals affected would be very low." LSO, *2014 Budget Session—Fiscal Note—SF0030*, http://legisweb.state.wy.us/2014/Fiscal/SF0030.htm (last visited Apr. 28, 2014).

[491] WYO. CONSENSUS REVENUE ESTIMATING GROUP, WYO. STATE GOVERNMENT REVENUE FORECAST, FISCAL YEAR 2014–FISCAL YEAR 2018 (2014), http://eadiv.state.wy.us/creg/GreenCREG_Jan14.pdf.

[492] WYO. STAT. ANN. § 7-12-313(a) (2013).

[493] *Id.*

[494] *Id.* § 7-12-313(b).

[495] *See* Opie v. State, 422 P.2d 84, 85 (Wyo. 1967).

[496] *See, e.g.*, Moore v. State, 2013 WY 120, ¶ 13, 309 P.3d 1242, 1245 (Wyo. 2013).

[497] *See, e.g.*, State v. Palmer, 808 N.W.2d 623 (Neb. 2012); *In re* Bradford, 165 P.3d 31, 33–34 (Wash. Ct. App. 2007).

[498] *See supra* notes 50–122, 196–210 and accompanying text.

system's accuracy may be illusory. While DNA testing provides near certain results, particularly in comparison to non-DNA identification methods,[499] it may provide diminishing marginal returns.[500] In the future, a greater number of cases involving biological evidence will be subject to highly accurate DNA testing before trial.[501] There is a real danger that an insular innocence movement centered on DNA testing may replicate the problems of habeas relief, creating "special procedures only for those who can assert the possibility, or probability, of factual innocence rather than the maintenance of far more costly general protections for all defendants," at the expense of enthusiasm for more general reforms.[502]

Concerns about the detrimental effect of an exclusive focus on innocence and DNA testing are well taken. Many problems with the criminal justice system cannot be cured by claims of factual innocence. For example, the system may have serious problems with mass incarceration of the guilty,[503] racial and class bias,[504] inhumane conditions and treatment,[505] and a destructive war on drugs.[506] The dismal record of faith in the reliability of verdicts relying on procedural and evidentiary norms should caution us against viewing a particular technology or legal tool as a panacea for the system's problems. For example, biological evidence is unavailable in the majority of criminal investigations.[507] It therefore makes sense that most DNA exonerations involve murder and sexual assault convictions, which are much more likely to involve an assailant leaving genetic material at the scene of the crime.[508] This suggests that the current wave of exonerations may

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[499] MOENSSENS, INBAU & STARRS, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 358–359 (3d ed. 1986); Garrett, *supra* note 125, at 1647–48.

[500] Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656–61 (2005).

[501] Liebman, *supra* note 124, at 547–48.

[502] Steiker & Steiker, *supra* note 39, at 615; *accord* 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 (2009–2010).

[503] *See supra* notes 358–60 and accompanying text.

[504] DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 4–5 (1999).

[505] Lisa Guenther, *The Living Death of Solitary Confinement*, N.Y. TIMES (Aug. 26, 2012), http://opinionator.blogs.nytimes.com/2012/08/26/the-living-death-of-solitary-confinement/; Brown v. Plata, 131 S. Ct. 1910, 1924 & n.1 (2010) (describing conditions in California's overcrowded prisons).

[506] *See generally, e.g.*, Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs,"* 15 UDC L. REV. 59 (2011).

[507] *Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1 ("DNA exonerations are most common in rape cases. The large majority of felonies do not involve biological evidence."); *Death Penalty Overhaul: Congressional Testimony Before the Comm. on Senate Judiciary*, 107th Cong. (June 18, 2002) (testimony of Barry Scheck).

[508] Gross et al., *supra* note 72, at 528–29.

only address the tip of the iceberg, failing to provide collateral relief for unknown numbers of individuals convicted of crimes for which biological evidence and DNA testing were unavailable.[509] Innocence advocates should be careful to acknowledge that, while DNA can provide near certainty in some situations, it is extremely unlikely we will ever develop an irrefutable scientific means of proving innocence or guilt in every case.[510]

To avoid complacency, advocates would benefit from using the inertia provided by the DNA testing revolution and innocence events to push for further reforms. One way to address the problem is for state legislatures to adopt post-conviction relief statutes expressly addressing newly discovered non-DNA evidence. The Wyoming Legislature's Interim Joint Judiciary Committee introduced such a bill in the 2014 Budget Session: Senate File 28.[511] The bill was similar to the post-conviction DNA testing statute, except it permitted a motion for a new trial on the grounds of non-DNA evidence.[512] In addition to other requirements, the motion would have to:

> (i) Identify with specificity newly discovered material evidence, other than DNA evidence, which if proven would establish by clear and convincing evidence the movant is actually innocent;
>
> (ii) Be supported by affidavit based on personal knowledge of the affiant or similar credible evidence showing that the movant is actually innocent;
>
> (iii) Show there is an absence of available state corrective process to establish the movant is actually innocent; and
>
> (iv) Be supported by evidence other than recantations of testimony or statements or impeachment evidence.[513]

This groundbreaking bill would allow Wyoming to join Utah as one of the few states permitting such motions.[514] But, as explained in more detail in the next subsection, a last minute series of controversial amendments caused it to die at the end of the session.[515]

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[509] Garrett, *supra* note 72, at 60; Gross et al., *supra* note 72, at 528–31; Medwed, *supra* note 380, at 131–32; Rosen, *supra* note 202, at 69–70.

[510] Steiker & Steiker, *supra* note 39, at 618.

[511] S.F. 28, 62d Leg., Budg. Sess. (Wyo. 2014).

[512] *Id.*

[513] *Id.*

[514] Nic Caine, *Factually Innocent without DNA? An Analysis of Utah's Factual Innocence Statute*, 2013 UTAH L. REV. ONLAW 258 (2013) (citing UTAH CODE ANN. § 78B-9-402; VA. CODE ANN. § 19.2-327.10).

[515] *See infra* notes 517–45 and accompanying text.

Even if states adopt non-DNA post-conviction statutes, it is unlikely they will address all wrongfully convicted persons, particularly if evidence is destroyed or unavailable. Hence the need for broader policies to uncover the causes of wrongful conviction—tunnel vision, undue reliance on questionable eyewitness testimony, unreliable jailhouse snitch testimony, inadequate public defender resources, false confessions, systemic racism, etc.—at their source. Such measures should make it easier to identify innocent individuals before they are convicted, reducing the need for collateral remedies. While the details and specifics of such reforms are beyond the scope of this article, some suggestions include:

- Judicial recognition of freestanding innocence claims;
- Innocence commissions that proactively investigate potential wrongful convictions;
- Improved eyewitness identification procedures;
- Videotaping interrogations;
- More transparency regarding criminal prosecutions, including disclosure of evidence falling short of *Brady*'s exculpatory requirement; and
- Rigorous standards for forensic science evidence.[516]

These suggestions are far from exhaustive. Moreover, these particular suggestions may not address more systemic problems, including race and class bias endemic in our society and political institutions. They are merely building blocks for more systemic reforms of the criminal justice and penal systems. Even these suggestions entail massive, difficult efforts, especially given the strong interests and traditions supporting the status quo. Advocates for criminal defendants, prisoners, and exonerees must come to terms with the fact that their work is never finished. Nevertheless, it is important for innocence movement advocates to continue to link their work to broader social and legal goals—forcing individuals and institutions to confront their anxiety over the criminal justice system, rather than simply repressing or denying it. As long as we keep larger goals in mind and are not lulled into a false sense of complacency, small reforms can provide the first steps toward more meaningful change. That can help us to avoid the stagnancy of cynically accepting the inevitability of the status quo.

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[516] For discussions of future legal reforms, see Garrett, *supra* note 125, at 1636–37; Rosen, *supra* note 204, at 256–87.

D. The Uncertain Future of Post-conviction Relief in Wyoming

Prior to 2014, the innocence movement succeeded in cooperating with Wyoming lawmakers and prosecutors to improve the methods for obtaining effective post-conviction innocence relief. Despite the Act's beneficial features, the state lacked statutes providing post-conviction relief based on non-DNA evidence and any kind of statutory compensation for exonerated individuals. In 2008, legislators removed compensation provisions from the Act to ensure its passage, with the hopes of addressing the compensation issue in a later session.[517] Wyoming therefore remained one of the twenty-one states with no form of compensation for exonerated persons.[518]

Before the 2014 Budget Session, the Wyoming Legislature appeared poised to close these gaps. The Joint Interim Judiciary Committee of the Wyoming Legislature, in cooperation with the Rocky Mountain Innocence Center, drafted and introduced two bills that would build on the 2008 Post-Conviction DNA Testing Act. The first bill, Senate File 28 (SF 28), would allow a motion for a new trial on the grounds of newly discovered non-DNA evidence.[519] As discussed above, DNA exonerations may simply be the tip of the iceberg and more must be done to address cases involving new, non-biological evidence.[520] The companion bill, Senate File 30 (SF 30), would allow exonerated persons to obtain financial compensation from the State of Wyoming in the form of an annuity in lieu of filing a civil claim.[521] Both bills would represent important steps towards addressing the causes and consequences of wrongful convictions.

Initial signs were promising. Both bills had powerful committee backing and near total support upon introduction to the Senate Judiciary Committee and the full Senate.[522] The Senate approved a number of amendments to SF 30, including an increase in the total amount of compensation from $75 to $100 per day of incarceration, an increase of maximum compensation from $300,000 to $500,000, and an appropriation.[523] The Senate also made changes requested by Wyoming prosecutors: changing administration of the compensation program from the Department of Administration and Information to the Attorney General's Office

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[517] *House Committee of the Whole*, 62d Legis., Budget Sess. (Wyo. Mar. 4, 2014) (statement of Rep. Keith Gingery), *available at* http://legisweb.state.wy.us/2014/audio/house/h0305am1.mp3.

[518] *See Reforms by State*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView1.php (last visited Apr. 28, 2014).

[519] *Supra* note 511 and accompanying text.

[520] *See supra* notes 498–516 and accompanying text.

[521] S.F. 30, 62d Leg., Budg. Sess. (Wyo. 2014).

[522] *See* S.F. 28, Digest, http://legisweb.state.wy.us/2014/Digest/SF0028.htm (last visited Apr. 28, 2014); S.F. 30, Digest, http://legisweb.state.wy.us/2014/Digest/SF0030.htm (last visited Apr. 28, 2014).

[523] S.F. 30, Digest, *supra* note 522.

and increasing the number of days within which a district attorney must respond to a request for a new trial based on non-DNA evidence.[524]

Despite these early signs of support, both bills died on the last day of the 2014 session.[525] The first warning signs appeared when, at the request of prosecutors, the House Judiciary Committee recommended an apparently small amendment to SF 28's requirement that the district court enter an order of actual innocence and exoneration.[526] The Committee recommended giving the district court judge full discretion to grant or refuse to grant an order of actual innocence and exoneration. A denial would not be subject to appeal.[527] It is difficult to imagine courts entering many actual innocence and exoneration orders under this language. The state has a financial interest in preventing exonerations to avoid lawsuits and compensation claims. Prosecutors could simply drop charges to deprive exonerees of so much as a hearing on the merits of their cases for innocence. At that point, the district court would have nothing other than the new evidence, unaided by expert witness testimony, combined with the district attorney's allusions, to determine a movant's factual innocence. In addition to denying the exoneree a procedure for receiving an order vindicating their innocence, this interferes with the innocence event provided by true post-conviction exonerations.[528]

When the House Judiciary Committee initially reviewed SF 30, it made positive amendments to the statute. It clarified that compensation is available to movants who request it within two years after receiving an order of actual innocence and exoneration, even those who received an order before SF 30's effective date.[529] The Committee also made beneficial financial changes by (1) removing limits on permissible annuity beneficiaries, (2) clarifying interaction with Wyoming's summary probate statute, and (3) protecting the annuity from the movant's creditors.[530]

The supportive atmosphere shifted when the House Judiciary Committee reconvened to recommend amendments to SF 30. Speaker of the House Tom Lubnau, R-Gillette, proposed an amendment requiring movants to request new hearings to prove their own innocence by a preponderance of the evidence before receiving compensation.[531] Representatives then introduced and debated a flurry

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[524] S.F. 30, Digest, *supra* note 522; S.F. 28, http://legisweb.state.wy.us/2014/Digest/SF0028.htm (last visited Apr. 28, 2014).

[525] Kyle Roerink, *Lawmakers Kill Compensation Bill*, CASPER STAR-TRIB., Mar. 7, 2014, at A1; James Chilton, *Payback Denied for Johnson*, WYO. TRIB.-EAGLE, Mar. 7, 2014, at A6.

[526] S.F. 28, Digest, *supra* note 524.

[527] *See* S.F. 28, *supra* note 511.

[528] *See supra* notes 339–88 and accompanying text.

[529] S.F. 30, http://legisweb.state.wy.us/2014/Digest/SF0030.htm (last visited Apr. 28, 2014).

[530] *Id.*

[531] *Id.*

of new amendments to SF 28 and 30 during the second and third readings.[532] Some Representatives identified the oddity of the last minute string of amendments, at least one of which arrived, unread, on Representatives' desks fifteen minutes before the third reading.[533] The final version passed by the House (1) required movants who already received an order of actual innocence and exoneration to return to court to prove their innocence in an unprecedented new kind of fact-finding hearing and (2) stayed expungement of the record until the period for requesting compensation had passed.[534] Recall that, to receive a new trial, a movant must have already met the incredibly high standard of proving that the original trial would have resulted in a different verdict if the evidence was available.[535] That showing results in vacation of the original sentence, a renewed presumption of innocence, and, if the charges or dropped or the movant is acquitted, a finding of factual innocence. Yet this amendment would put the movant in the unusual position of having to return to court to prove his or her own innocence a second time.

As explained above, recent exonerees typically lack even basic financial resources.[536] They often find it difficult to simply survive during the difficult adjustment from prison life and are unprepared to fight new legal battles. Such individuals may have to retain new counsel to obtain compensation, which might demand contingency fees. As a matter of policy, requiring an exoneree to prove his or her innocence a second time is redundant and serves little purpose other than placing new burdens on people already irreparably harmed by the justice system, while possibly lining the pockets of a few defense attorneys otherwise unable to obtain contingency fees for their services.[537] Even worse, this procedure would shift all of the terrible costs of wrongful imprisonment onto an innocent person, presuming that person guilty until proven innocent and washing all of

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[532] "While not constitutionally required, the rules of the House and Senate require that all bills be read three times with each reading on a different day." WYO. LEGISLATURE, WYO. MANUAL OF LEGISLATIVE PROCEDURES (2014), *available at* http://legisweb.state.wy.us/lsoweb/LegRules.aspx.

[533] *House Committee of the Whole*, 62d Legis., Budget Sess. (Wyo. Mar. 4, 2014) (statement of Rep. Cathy Connolly), *available at* http://legisweb.state.wy.us/2014/audio/house/h0305am1.mp3.

[534] The latter requirement appears to be based on a misinterpretation of the term "expungement," which seals records from public access, rather than destroying them. *See* WYO. STAT. ANN. § 7-13-401(j)(i) (2013).

[535] *See* Opie v. State, 422 P.2d 84, 85 (Wyo. 1967).

[536] *See generally* INNOCENCE PROJECT, *supra* note 294.

[537] Rule 3.1(d)(2) prohibits a lawyer from agreeing to, charging, or collecting "a contingent fee for representing a defendant in a criminal case." WYO. R. PROF'L CONDUCT 3.1(d)(2). While it is not completely clear whether this rule would apply to unusual quasi-criminal proceeding contemplated by the amendment, it is possible that such a proceeding would be considered more analogous to a civil claim against the state.

our hands of an injustice perpetrated on our behalf.[538] Shifting the burden to innocent victims is profoundly unjust, especially considering the state's superior access to the evidence—including the rationale for the decision to drop charges, if that is the case—and the procedure's inconsistency with our system's longstanding presumption of innocence.[539] The amendment would also arguably reduce the state's incentive to stop wrongful convictions.[540]

The last minute attempts to interfere with SF 28 and 30 resulted in both bills dying at the close of the 2014 session. Appointees to the Joint Conference Committee could not resolve the differences between the House and Senate versions of the bills.[541] Consequently, as this article is being prepared for publication, Wyoming citizens have no practical access to compensation for wrongful incarceration or options for challenging wrongful convictions with newly discovered non-DNA evidence. Whether this was the intended result of the House's late amendments is unclear. Yet the consequences of the failure are real. The bills' failure not only risks continued suffering by innocent individuals—who lack access to financial resources or even a means of clearing their names—but also undermines public confidence in the Wyoming criminal justice system. This represents another attempt to use denial and repression to ward off the anxiety posed by the image of the innocent prisoner.[542]

This apparent strategy of attempting to erase the fact of innocence is not surprising. No one enjoys confronting the trauma of systemic failings. But it is questionable how long this illusion can be sustained, particularly in the face of growing public perception that the system is broken and that courts, lawyers, and policymakers have a duty to correct the system's mistakes rather than continue the futile task of trying to conceal them. Until the law is changed, exonerated individuals will continue to struggle to survive their newfound freedom and imprisoned individuals lacking an avenue to challenge their convictions with non-DNA evidence will continue to have their requests for relief dismissed by courts as "frivolous."

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[538] Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 240, 255–56 (2008) (citing H. Archibald Kaiser, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, 9 WINDSOR Y.B. ACCESS JUST. 96, 103 (1989)) (arguing that, while reduction may be permissible in some situations, the state should not scapegoat innocent victims to deny responsibility for its errors).

[539] Kahn, *supra* note 475, at 148–55.

[540] *Id.* at 156–57.

[541] *Bill to Compensate Exonerated Inmates Dies*, BILLINGS GAZETTE (Mar. 6, 2014), *available at* http://billingsgazette.com/news/state-and-regional/wyoming/bill-to-compensate-exonerated-inmates-dies/article_d6048714-c6a0-5c42-9551-972119589be1.html.

[542] *See* Bernhard, *supra* note 371, at 705.

Post-conviction innocence claims have the strong potential to use human empathy to challenge unjustified certainty in the criminal justice system and condemnation of convicts. But the Wyoming Legislature's surprising failure to provide meaningful compensation and non-DNA exoneration procedures illustrates the substantial backlash faced by a movement that attempts to expose the system's failing. These events appear to confirm the fears of Professor Adele Bernhard:

> "It's serendipity," said Bernhard. "There is no constituency in favor of this kind of [compensation] legislation because people don't really think it will happen to them." The majority of the wrongfully convicted who have been exonerated are black and poor. Bernhard said their lives, free or behind bars, are simply not valued highly enough.[543]

Professor Bernhard may be incorrect, at least in the State of Wyoming. The Legislature's failure to pass Senate Files 28 and 30 inspired public condemnations by newspaper editorial boards[544] and the public.[545] Yet for now, we remain uncertain of Wyoming policymakers' willingness to take meaningful steps to correct and prevent wrongful convictions.

CONCLUSION

It is difficult to cope with the idea that the very legal procedures and structures we create to protect us from harm can imprison and kill us if we have done nothing wrong. It is clearly an injustice when someone is the victim of a violent crime. But that injustice is only magnified if the criminal justice system apprehends and punishes the wrong person. The harm is compounded when racial minorities and economically disempowered groups suffer a disproportionate weight of wrongful convictions. We know that the rate of such injustice is not insubstantial. The primary reason we know this is not due so much to clever improvements in procedural protections, but because of the disruptive intervention of DNA testing, as well as the dogged work of individuals comprising the innocence movement, and the families and friends of the wrongfully convicted. However comforting our trust in the criminal justice system's results, one can no longer retain absolute faith in that system's accuracy.

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[543] Radnofsky, *supra* note 63.

[544] *See Give Johnson the Money He Deserves*, CASPER STAR-TRIB. (Mar. 18, 2014), *available at* http://trib.com/opinion/editorial/editorial-board-give-johnson-the-money-he-deserves/article_b59a0289-3a7b-553d-a9fa-6697efdb3671.html; Bryon Glathar, *We Should Beg the Forgiveness of Exonerated Prisoners, Not Make Them Jump through Hoops*, UINTA CNTY. HERALD, Mar. 11, 2014, at A3.

[545] *See, e.g.*, Roger McDaniel, *Bob Nicholas is Guilty of Poltroonish Conduct*, WYO. TRIB. EAGLE (Mar. 21, 2014), *available at* http://wyomingnews.com/articles/2014/03/22/opinion/guest_column/01column_03-22-14.txt#.U1FzbvldWVA.

The State of Wyoming has a choice in how to cope with this knowledge. We can insist that nothing is wrong and deny powerful evidence of institutional failure and injustice. Or we can take important steps to confront the source of our anxiety and face reality. That requires us to take ownership of our collective mistakes by acknowledging the once-invisible face of the innocent prisoner, compensating the innocent, and trying to determine and prevent the causes of wrongful convictions. Yet we should resist being lulled into complacency by the successes of the innocence movement and post-conviction DNA testing. The traumatic event of exoneration will remain isolated, rather than truly transformative, unless we attempt to remain faithful to it by continually pursuing new avenues for uncovering and correcting injustice. Exonerations should provide one step in a broader process of reexamining faulty assumptions regarding innocence and guilt, providing one step of many down the road to accomplishing more systemic changes to the criminal justice system.