

THE PROBLEM WITH INNOCENCE

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Recent years have brought a torrent of public attention to the phenomenon of wrongful conviction.² From the *New York Times*³ to *Good Morning America*,⁴ from *People*⁵ to *Primetime*,⁶ we have repeatedly been moved and inspired by the vision of an individual, fully exonerated of the heinous crime of which he was wrongfully convicted, stepping out of the confines of unjust imprisonment and into the sunshine of freedom. Outside waiting for the former inmate, if he is lucky, are the family

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²See, e.g., BARRY SCHECK, PETER NEUFELD, & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); EDWARD CONNORS ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH EVIDENCE AFTER TRIAL* (1996) [hereinafter *CONVICTED BY JURIES*] (discussing twenty-eight cases of postconviction DNA exoneration); *DNA Evidence Leads to Release of Inmate*, N.Y. TIMES, Jan. 17, 2001, at A16 (documenting release of Christopher Ochoa, wrongfully convicted of murder, on the basis of DNA evidence); Kay Lazar, *Nation's Bogus Convictions May Number in the Thousands*, BOSTON HERALD, May 9, 1999, at 024 (discussing two cases in Massachusetts where convicted defendants were found to be innocent of their crimes); Julian Berger, *Trial and Error*, THE GUARDIAN, Feb. 15, 2000, at 2 (documenting exoneration of eight convicts by Medill journalism students and noting that since 1977, thirteen inmates on death row in Illinois have been proved innocent); Carolyn Tuft, *In the Past 10 Years, 8 in Illinois Were Sentenced to Die, Later Found Innocent*, ST. LOUIS POST-DISPATCH, April 12, 1998, at A7 (listing and briefly describing the cases of eight men sentenced to death in Illinois and later found innocent); Sydney P. Freedberg, *Freed From Death Row*, ST. PETERSBURG TIMES, July 4, 1999, at 8A (listing thirteen individuals freed from death row between 1975 and 1998 because they were able to show innocence).

The perception that these numbers seem to be increasing over the last decade may be accurate. According to the Death Penalty Information Center, an average of two persons per year were released from death rows between 1973 and 1993 after offering evidence of their innocence. Since 1993, that number has increased to four per year. Malcolm Garcia, *Fighting to Right Courts' Wrongs*, KANSAS CITY STAR, July 31, 1999, at B3.

³See Bob Herbert, *Death Row Survivor*, N.Y. TIMES, Apr. 12, 2001, at A29.

⁴*Good Morning America* (ABC television broadcast, Feb. 25, 1997) (transcript available on LEXIS) (discussion of the wrongful conviction of Ronald Cotton for rape based on mistaken eyewitness identification).

⁵Claudia Glenn Dowling, *Mistaken Identity*, PEOPLE, Aug. 14, 2000, at 50.

⁶*Primetime Thursday* (ABC television broadcast, Apr. 12, 2001) (transcript available on LEXIS).

members who stayed true, the prayerful mother eager to embrace her child, and the circle of friends and supporters who helped overturn the wrongful conviction.

There, too, is the freed man's lawyer. The media vision of the wrongfully convicted inmate includes the lawyer as a critical player in the drama. Standing at the gate, waiting to embrace the freed inmate, the lawyer, whose tireless efforts have finally pressed the law to produce the just outcome, is an honored guest at the family's celebration, and a welcome member of the joyous inner circle. The story needs a hero, and the lawyer is it; while the wronged victim protested his innocence and struggled to survive, the lawyer fought the law and won.

Of course this role is appealing, and the desire to be involved in such worthwhile activity has spread. Numerous law schools have established "innocence projects,"⁷ and propose to redress, one at a time, those cases in which our criminal process has convicted a person who is innocent of the crime with which he was charged.⁸

Enthusiastic participation in the undoubtedly heroic process of righting a miscarriage of justice is commendable. Yet the intense focus of resources and attention on the movement suggests that it bears further study. It is appropriate to stop and consider the implications of the movement for the rest of the system: for the clients, lawyers, jurors, and policymakers who are still struggling to produce fair

⁷SHECK, *supra* note 2, at 250; *see also* Brooke Vance, *U. Missouri-KC Law School Plans Fight for Inmates*, UNIVERSITY WIRE, Feb. 6, 2001 (discussing plan to institute an Innocence Project at UMKC); *Project Takes Aim at Wrongful Convictions*, THE RECORDER, Feb. 16, 2001, at 11 (discussing Santa Clara University School of Law's launch of the Northern California Innocence Project); Chris Dettro, *UIS Eyes Project to Probe Possible Wrongful Convictions*, STATE JOURNAL-REGISTER, Feb. 28, 2001, at 11 (discussing plan to organize Innocence Project at the University of Illinois at Springfield); Anna Gould, *Freed Inmate Thanks U. Wisconsin Project*, DAILY CARDINAL, March 2, 2001 (discussing Wisconsin Innocence Project's assistance to Christopher Ochoa, whose conviction was overturned with the help of the project); Jennifer Sikes, *Innocent But Condemned*, HERALD-SUN, JUNE 27, 2001, at A12 (editorial discussing the Innocence Project at Duke Law School); *Michigan Briefs*, SOUTH BEND TRIBUNE, July 17, 2001, at D4 (discussing Cooley Law School Innocence Project); Valerie Richardson, *Falsely Accused Pair Wins Judgment*, WASHINGTON TIMES, August 4, 2001, at A1 (discussing case that led to the creation of Innocence Project Northwest, a pro bono organization begun by lawyers and students at the University of Washington Law School); Denise T. Ward, *Course Teaches Future Attorneys to 'Dig Deep'*, SAN DIEGO BUSINESS JOURNAL, Sept. 24, 2001, at 5 (discussing California Western School of Law's California Innocence Project); Ginnie Graham, *Prisoner is Set Free by Science*, TULSA WORLD, Oct. 16, 2001 (discussing DNA Project operated by the Oklahoma Indigent Defense System); *Drifter Might Not Be Killer*, OTTAWA SUN, Nov. 9, 2001, at 20 (discussing case being handled by the Innocence Project at Canada's York University's law school).

⁸Nor is wrongful conviction exclusively an American problem. *See, e.g.*, Kirk Makin, *When a Guilty Finding Raises a Reasonable Doubt*, GLOBE AND MAIL, Dec. 18, 1998, at A15 (noting that Britain's Criminal Cases review commission, created in mid-1997 to ferret out wrongful convictions, was swamped with over 2000 applications for review, and that 34 cases had been referred for rehearings, six of which had resulted in exoneration, one of a man hanged forty-five years before); Colin Nickerson, *Jail-cell Nightmare Comes to a Close in Canada*, BOSTON GLOBE, May 20, 1999, at A2 (describing case of David Milgaard, awarded \$7 million in reparations for his wrongful conviction and lengthy imprisonment for a rape and murder after DNA testing showed that semen found on victim could not have been his).

outcomes in ordinary cases.⁹ It is important to consider that system, because that is where most determinations about criminal responsibility are definitively made. The developing network of innocence projects can take on only a very limited number of cases, and can secure exoneration in still fewer. And exonerations, while valuable, come after years of struggle and, often, after many years of unjust incarceration. For innocent criminal defendants, the best hope is not a postconviction exoneration, but a just outcome in the initial phase, the “preconviction” phase, if you will, of a criminal proceeding. Accordingly, we need to consider the consequences of the innocence movement for the ones left behind: the lawyers, defendants, and jurors trying to secure just outcomes in criminal cases.

The first concern is that, far from suggesting that the system is irreparably broken, the innocence movement suggests, instead, that the system works.¹⁰ The fact that persons wrongfully convicted of crimes they did not commit have been able to secure relief through the system, it could be argued, belies the need for reform. Proved cases of wrongful conviction prove too much, for the very existence of these cases suggests that wrongful convictions can be overturned, that injustices can be righted, and that even the staggering burdens of demonstrating innocence in the postconviction environment can easily be overcome.

Such a conclusion would be wrong, however, because if the existing system were functioning effectively to identify all—or even most—cases of wrongful conviction, it would be identifying many more than it does. Far from being surprising, so-called “wrongful convictions” are not “wrongful” at all, except in the moral sense; under our system, convictions of innocent people can and should be anticipated. This becomes apparent if we quantify, for the sake of argument, the standard of proof we routinely apply in criminal cases. If requiring that the state prove the guilt of the defendant “beyond a reasonable doubt” means that the jury must be 99% sure of the defendant’s guilt—surely a high standard—then there are likely to be convictions in which there is a residual possibility that the defendant is in fact innocent.¹¹ To say that jurors are 99% certain is the same as saying that they are 1% unsure; to the extent that their certainty level is consistent with the facts, that 99% sure jury will be wrong 1% of the time.¹² Since that is the case, we should be surprised, perhaps, not by the fact that there are so many exonerations of wrongfully convicted individuals, but that there are so few. Since each exoneration reflects a failure to apprehend and

⁹This can include guilty pleas as well as trials. Postconviction DNA exonerations have been secured in cases in which the defendant originally pled guilty. See, e.g., Peter Neufeld, *The Legal, Ethical, and Practical Issues of Post-Conviction DNA Testing*, 35 NEW ENG. L. REV. 639, 640 (2001) (citing case of Chris Ochoa, who confessed to a rape, robbery and murder he did not commit and pled guilty to the charges to avoid a death sentence); *COVICTED BY JURIES*, *supra* note 2, at 12 (discussing the case of David Vasquez, who pled guilty to a rape and murder but was later exonerated).

¹⁰See Statement of Senator Russ Feingold, Hearing on *Post-Conviction DNA Testing: When is Justice Served?*, Sen. Judiciary Comm., June 13, 2000, (“Now, some could argue that this high rate of reversal [in capital cases] shows that the system works”).

¹¹We cannot say that there is precisely a 1% chance that the defendant is innocent because jurors may be more convinced of the defendant’s guilt than the burden of proof demands.

¹²To the extent that jurors are influenced by impermissible factors, such as bias, their accuracy is likely to be even lower.

convict the right person, the fact that we fail to detect so many should be of concern not just because an innocent person has been wrongly convicted, but because society is still vulnerable to the actual but undetected culprit.¹³

The reason we see comparatively few exonerations is partly a function of the nature of the proof required to demonstrate innocence. An exoneration based on innocence requires, in the ordinary course, overwhelming proof, which is necessary to overcome the substantial procedural barriers to relitigation of outcomes in criminal cases. The most visible type of such proof is DNA evidence, which has the joint advantages of being highly accurate and, in most cases, having been unavailable—at least in its current more sophisticated incarnation—at the time of the initial conviction. Many wrongfully convicted individuals are unlikely to have such proof to offer.

The factors that give rise to wrongful convictions have been described with some clarity, and include mistaken eyewitness identification, erroneous forensic science, coerced confessions, police or prosecutorial misconduct, use of untruthful informants or other witnesses, and inadequate or incompetent legal assistance.¹⁴ But the presence of these factors, even if demonstrable, is not, standing alone, sufficient to supply proof of innocence.¹⁵ Whether an innocent person is able to muster the kind of evidence that constitutes conclusive proof of innocence is more or less a matter of chance.¹⁶ Because we can identify with precision a number of cases where wrongful

¹³See CONVICTED BY JURIES, *supra* note 2, at xxvii (“In the future we must reduce the likelihood of innocent persons being wrongly convicted, just as we must *increase* the chances of guilty parties being identified and held responsible for the crimes they commit.”).

¹⁴These categories are set out in SCHECK, *supra* note 2, at 246 (noting that of the cases in which the Innocence Project secured DNA exonerations, 84% of wrongful convictions were based in part on mistaken identifications; 21% were based in part on testimony of jailhouse informants; 24% were based in part on false confessions; 27% of the defendants had inadequate legal help; there was prosecutorial misconduct in 42% of the cases and police misconduct in 50%, and 1/3 involved tainted or junk science). The conclusions of this recent study are strikingly similar to the findings of Edwin Borchard, whose 1932 volume, CONVICTING THE INNOCENT, profiled sixty-five cases in which innocent persons had been wrongly convicted of crimes. While Prof. Borchard chose the profiled cases “somewhat at random,” *id.* at viii, he noted in the introductory chapter of the book that “these mistakes in the administration of justice” could be grouped into particular categories of error, and that “it seems permissible to draw certain inferences from them in order that their repetition may be minimized and, if possible, avoided.” *Id.* He identified the sources of error as mistaken identification (responsible for twenty-nine of the sixty-five convictions); lying witnesses (fifteen convictions); prosecutorial or police overzealousness (sixteen convictions); unreliable or coerced confessions (at least two convictions); unreliable expert testimony (eight “striking” convictions); and inadequacy of defense counsel (in the majority of cases, the accused was a poor person and unable to secure adequate counsel). *Id.* at xiii-xx.

¹⁵See CONVICTED BY JURIES, *supra* note 2, at xiv (noting that mistaken identification contributed to all twenty-eight cases of wrongful conviction in the study and that erroneous forensic testimony contributed to two-thirds, and noting, “The sobering fact is that in all twenty-eight cases, the error was unmasked—and justice finally served—only because of the novel scientific technique of DNA typing.”).

¹⁶At least in the context of DNA evidence, the person wrongfully accused of a sex crime may be at an advantage. Because sexual activity can leave biological evidence, such individuals may be more able to demonstrate that the biological fluids left at the scene of a

conviction can be definitively proved, it stands to reason that there exists a significant additional percentage of cases where a conviction is “wrongful,” but cannot be proved wrongful to the certainty required by the various procedures available: postconviction or habeas corpus actions, clemency or pardon proceedings, or prosecutorial cooperation. Some may argue that unless the current system detects and corrects all the cases in which innocent persons have been convicted, it is a failure. By contrast, far from concluding that the wrongful convictions cases reveal a system that is fundamentally broken, others will view these cases as proof that the existing system for identifying and redressing injustices works. The danger of the latter view is that the press for reforms will be limited to streamlining the innocence process,¹⁷ and, presumably, will reject more sweeping reforms of the existing system, clearly needed to protect those left behind.

Even more significant, however, is the potential “burden-shifting” impact of the innocence cases. The fact that wrongfully convicted persons can and have proven their innocence of the crimes of which they have been convicted may tend to suggest that charged persons can, and perhaps should, come forward with proof of innocence in order to avoid conviction.

One possible source of this impact is the use of DNA evidence to secure exonerations. The recent plethora of “proven” wrongful convictions has at least in part been the function of DNA evidence, which makes it possible for convicted persons in a certain narrow category of cases to demonstrate with a strong degree of certainty that they did not commit the crimes of which they were convicted. Where biological evidence is definitively believed to belong to the perpetrator of a crime, proof that the DNA of the perpetrator is inconsistent with that of the person convicted of the crime has often—though not invariably¹⁸—been treated as conclusive “proof” of innocence. The emergence of DNA technology¹⁹ has provided a highly effective method—one not dependent on credibility—of ascertaining the

crime did not belong to them. In the CONVICTED BY JURIES study cited, *supra* note 2, all twenty-eight cases of DNA exoneration involved sexual assault. *Id.* at 12.

¹⁷This has proven to be the legislative response. See *infra* note 50 and accompanying text.

¹⁸The prosecutorial theory that the biological evidence is definitively that of the suspect may change if the DNA analysis determines that the sample did not come from the suspect. Proof that the DNA of the sexual assailant did not match that of the person convicted of a rape and murder may lead to the development of a new prosecutorial theory: that the accused participated jointly in the crime with an unknown—and hitherto unpostulated—third party who left the biological specimen at the scene, termed by Scheck the “unindicted co-ejaculator.” See SCHECK, *supra* note 2, at 248.

¹⁹See CONVICTED BY JURIES, *supra* note 2 (detailing twenty-eight cases in which DNA evidence contributed to exoneration of a convicted defendant). See also Shirley E. Perlman, *Trials By Error*, NEWSDAY, July 26, 1999, at A07 (discussing “growing number of cases in which DNA evidence . . . is being used to clear suspects and overturn convictions” and noting that 64 people who had been convicted, most in rape and murder cases, have been cleared “at least in part, by DNA evidence that either was not available or was not requested at the time of conviction”); David Protess & Rob Warden, *Nine Lives*, CHICAGO TRIBUNE MAGAZINE, Aug. 10, 1997, at 20 (four of nine Illinois men exonerated in Illinois were proved innocent based on DNA testing). All the exonerations in SCHECK, *supra* note 2, were based on DNA testing. See *id.* at 12.

legitimacy of certain categories of innocence claims.²⁰ Recent legislative attention to how claims for testing should be handled reflects the significance of this category of claims of innocence.²¹

But DNA is effective proof of innocence only in a limited category of cases. Only where biological material can be unequivocally attributed to the perpetrator of a crime²² and where the suspect can be excluded as the donor of the biological material is the DNA evidence “proof” of innocence.²³ This is likely to be the case only in sex crimes or in cases in which the criminal actor—and only the criminal actor—has left biological material at the site of a crime.²⁴ Many crimes—even crimes of violence—include no such evidence.²⁵ In a wide variety of cases, then, DNA evidence cannot dispositively rule out a potential suspect.²⁶

Moreover, the current flurry of DNA exonerations of persons wrongfully convicted for the most part focuses on biological samples either not subjected to DNA testing at the time of trial, or subjected to earlier and less sophisticated testing.

²⁰See *All Things Considered*, May 19, 1999 (transcript) (available on LEXIS) (quoting Barry Scheck: “There’s a class of cases, a pool of cases that I think runs into the thousands where people could prove their innocence through post-conviction DNA testing,” and noting the unique opportunity provided: “What makes this unique is that we can get a fact finding 10, 15, 20 years later that’s more reliable than the original trial because of this advance in scientific evidence. So I think this is a actually unique in certainly the history of American jurisprudence and any other jurisprudence that I know of.”).

²¹See *supra* note 50 and accompanying text.

²²See *All Things Considered*, *supra* note 20 (quoting Barry Scheck: evidence subject to DNA testing “could be burglaries where, you know, saliva or blood or hairs are left at the point of entry, anything where biological evidence could be dispositive—I mean, you know, somebody licking a stamp in a fraud case.”).

²³See Perlman, *supra* note 19, at A07 (noting that DNA evidence is collected in less than 4 percent of criminal cases overall).

²⁴While DNA is routinely left at scenes through samples of skin, hair, and saliva, those samples will rarely be exonerative because such items are routinely found in many places and need not be uniquely attributed to the criminal actor. However, even exonerative evidence is sometimes negated. In one case, when a pubic hair believed to belong to the perpetrator of a sexual assault was found not to match the suspect’s hair, the prosecution backtracked, arguing that the hair—found in the victim’s bed—might have come from a public restroom or a laundromat. See SCHECK, *supra* note 2, at 201. Ultimately, it developed that there was not one such hair, but three, making such theories even more farfetched than they would have been otherwise. *Id.* at 208.

²⁵Without such evidence, “blameless people will remain in prison, stranded because their cases don’t involve biological evidence. The debt of justice will remain unpaid to innocent people accused of crimes in which the criminal did not ejaculate, spit, bleed, or shed tissue.” SCHECK, *supra* note 2, at 250.

²⁶See SCHECK, *supra* note 2, at 221 (noting that an individual wrongfully convicted of the rape and murder of a child was saved by “[a] semen stain the size of a dime,” and positing, “Suppose the killer of Dawn Hamilton had ‘merely’ murdered her, and not added sexual assault to his crime; there would have been no semen on Dawn’s panties to find, no sperm cells barcoded with the murderer’s DNA. . . . But for that, the state of Maryland, under authority granted it by the U.S. Supreme Court, would have murdered an innocent man.”).

This circumstance has, as a practical matter, limited applicability in the future. The number of cases in which biological evidence remains in evidence files and can be retested, producing more detailed and possibly exonerating information, is both limited and dwindling. In addition, potentially exonerative DNA testing is sometimes affirmatively resisted by prosecutors.²⁷ So while DNA testing will remain important in initial investigations and prosecutions, as the source of more or less definitive exonerative postconviction evidence, DNA testing has a distinctly limited shelf-life.²⁸

That being said, the prevalent display of such evidence has the potential to send an enduring and unrealistic message: that criminal defendants can and, perhaps, should offer substantial, convincing, and irrefutable proof of their own innocence, ideally, evidence that is as substantial, convincing, and irrefutable as DNA evidence.²⁹ Most defendants—indeed, most innocent defendants—can offer no such thing.

My concern here is with the pool of citizens left behind to do justice as jurors in ordinary criminal cases. Those potential jurors are now routinely exposed to news of wrongful convictions, justly overturned through the efforts of prayerful families, diligent lawyers, and stout-hearted inmates who never lost hope. Those tireless efforts having borne fruit, the citizen may believe that similar efforts will be made on behalf of any person charged with a crime—or at least any person who was truly

²⁷See Neufeld, *supra* note 9, at 640 (in roughly half of the Innocence Project's cases, prosecutors did not consent to DNA testing). There have, however, been cases where prosecutors have consented to DNA testing. See, e.g., CONVICTED BY JURIES, *supra* note 2 (noting that in at least six of the twenty-eight DNA-based postconviction exonerations cited in the report, prosecutors consented to release samples for testing); Ross E. Milloy, *Public Lives*, N.Y. TIMES, Oct. 21, 2000, at A9 (discussing decision of Texas district attorney Ronnie Earles to re-examine 400 convictions for potential exonerative DNA evidence).

²⁸See SCHECK, *supra* note 2, at 250 ("In a few years, the era of DNA exonerations will come to an end. The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been used widely since the early 1990s, clearing thousands of innocent suspects before trial. Yet blameless people will remain in prison, stranded because their cases don't involve biological evidence.") Developing technology may still provide some additional benefits, such as more detailed and effective testing of hair samples, which are now subject to mitochondrial DNA analysis. See Prepared Statement of Prof. Barry C. Scheck before the House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management and Industrial Relations, *DNA Technologies*, June 12, 2001, at part VI ("[T]he Committee should be aware of a comparatively new forensic DNA typing technique, mitochondrial testing, which can extract DNA directly from the shaft of a hair. This important technique is quickly demonstrating that results from microscopic hair comparisons are unreliable."). The point remains, however, that such sampling will be necessary or appropriate in a smaller and smaller volume of postconviction cases. DNA exonerations, Prof. Michael Saks argues, provide a "unique view" of what goes wrong in the criminal justice system, but, because of the likely waning of DNA exonerations, "[t]he window will soon close." Michael J. Saks et al., *The Adversary System and DNA Evidence*, 35 NEW ENG. L. REV. 669 (2001).

²⁹See Steve Chapman, *74 Problems With the Death Penalty*, CHICAGO TRIBUNE, Nov. 8, 1998, at 23 (attributing to Prof. Lawrence Marshall the view that jurors in a case involving a serious crime often vote "to convict unless the defendant's innocence is absolutely certain.").

innocent. The citizen may naturally expect, then, that exonerating facts will be found in any case in which they possibly could.

Now, how will such citizens react when placed on a jury in a criminal case? While one hopes that jurors' exposure to wrongful convictions might generate some appropriate skepticism about the prosecution's case, another effect is also possible. Notwithstanding what the court tells them about the burden of proof, they may believe that innocent people can muster convincing proof of their innocence if it actually exists. In short, the public focus on overturning wrongful convictions may prove to have a burden-shifting effect even at the initial phase of criminal trials, creating jury expectations that defendants will prove their innocence, or suffer the consequences.³⁰ It is unlikely that the public will understand the difference between trial, where the defendant bears no burden of proof and the state must prove guilt beyond a reasonable doubt, and the postconviction process, where the burden definitively shifts to the convicted defendant to prove the wrongfulness of his conviction.

The "burden-shifting" effect also has the potential to drive a wedge, at the trial stage, between defendants who are "innocent" and defendants who are "not guilty." At a criminal trial, jurors are instructed that if the government fails to meet its burden of proving guilt beyond a reasonable doubt, the jury should return a verdict of "not guilty."

A "not guilty" verdict can mean one of several things.³¹ It can mean that the jurors believed the defendant committed all the necessary elements of the crime, but did not believe it with the requisite degree of certainty. Call this "burden of proof innocence." A "not guilty" verdict can also mean that the jury found some, but not all, of the elements of the offense, typically because the defendant committed the *actus reus* of the offense, but lacked the necessary *mens rea*. Call this "legal innocence." A "not guilty" verdict can also mean that the jurors believed the defendant did not commit the *actus reus* of the crime in question. Such a conclusion could arise from the failure of the government's proof, perhaps because the jury does not believe that the crime happened at all, or that the defendant had anything to do with it; perhaps the government's witnesses were not credible, or the physical evidence was equivocal, or the identification was weak. Such a conclusion could also arise from a defense-advanced theory: that another person committed the crime and had access, opportunity and motive to do so; or that the identification of the defendant is mistaken and police simply got the wrong guy. Call this "factual innocence."

By virtue of the posture in which they arise, wrongful conviction cases seek to prove factual innocence. At the trial phase, however, we do not distinguish between these categories of innocence. We claim, instead, to be indifferent to them. We ask

³⁰It may also create the belief that if the jury is wrong and the defendant is actually innocent, that its error will be redressed by someone else later on. Such confidence may cause jurors to shrink from the responsibility of acquittal, secure in the false knowledge that "if he didn't really do it, someone else will fix it."

³¹The following discussion assumes that the jurors obey their instructions. A verdict can also be the product of jury nullification: the jury might believe that the government has proven guilt beyond a reasonable doubt, but that the defendant should be acquitted for other reasons, creating another category of "not guilty" verdict.

juries to determine whether an actor is guilty or not guilty without specifying whether we are talking about burden of proof innocence, legal innocence, or factual innocence.³² We treat these categories as equivalent, and the determination of which type of innocence the jury has found is simply irrelevant to the conclusion that the defendant is not guilty. We are not entirely indifferent to the distinctions between these categories; we may want to condemn someone who has committed the *actus reus* of a crime but lacks the necessary *mens rea* more than someone who had nothing to do with the crime at all. Yet our system insists that, from the perspective of criminal liability, they are both not guilty.

Focusing as it does on factual innocence, the wrongful convictions movement places a premium on it. It creates, in effect, a supercategory of innocence,³³ elevating factual innocence over the other categories. My concern is that our jurors, thoroughly schooled in the importance of factual innocence, may conclude that anything short of factual innocence is simply not good enough to justify an acquittal.

The focus on wrongful convictions, and its emphasis on factual innocence, affects other players in the system, as well. Consider criminal defendants. What effect is the intense focus on factual innocence that we see in the wrongful conviction cases likely to have on them? To determine this, we need to consider not just criminal defendants, but criminal defense lawyers, for it is the relationship between those lawyers and their clients that creates the concern.

Remember our wrongly convicted client, his lawyer a heroic member of the inner circle. Contrast the role of this lawyer for a wrongfully convicted defendant with the role of the ordinary criminal defense lawyer. Those lawyers are not viewed as heroic. Far from it. The media portrays them as sleazy and unethical,³⁴ one step away from the clients they represent.³⁵ The polarization of the criminal bar results in a steady flow of disparagement and critique from prosecutors.³⁶ Disliked,

³²Indeed, jurors have no opportunity to return a verdict of “innocent”; given the question they are asked to decide, a “not guilty” verdict, almost by definition, carries a strong flavor of ambiguity.

³³See SCHECK, *supra* note 2, at 222 (distinguishing “legal innocence, in which a person who participated in a crime was charged incorrectly with the murder,” from “actual innocence.”).

³⁴See, e.g., M.S. Mason, *Why the Law Rules*, CHRISTIAN SCIENCE MONITOR, Jan. 26, 2001, at 13 (“most defense attorneys on ‘Law & Order’ will do anything necessary to save their guilty clients”).

³⁵Abbe Smith, in *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000), notes that “criminal defense lawyers have always been an easy bogeyman” and that “To many, defenders are indistinguishable from those they represent.” *Id.* at 950. A recent example is the press coverage of attorney Stanley Cohen, who stated after September 11, 2001 that he would be willing to represent Osama bin Laden if he were asked. In response, one organization deemed Cohen “a traitor to the Jews, . . . a traitor to America and all the victims of the World Trade Center bombing.” N.Y. DAILY NEWS, Sept. 26, 2001, at 20; see also William Glaberson, *The Lawyer: Defending Muslims in Court and Drawing Death Threats as Well as a High Profile*, N.Y. TIMES, Sept. 28, 2001, at B8.

³⁶See, e.g., letter of Joshua Marquis, President of the Oregon District Attorney’s Association, to the ABA Journal (March 2001) (“Our [prosecutors’] job is to prosecute only people who did it, i.e., guilty defendants, and a defense lawyer’s job is to extricate almost

mistrusted, and disrespected, defense lawyers make a necessary contribution,³⁷ but it is not a contribution we seem to like very much.

Why such a different view of these two sets of lawyers? The reason, of course, is the different ethical positions in which they find themselves. A criminal defense lawyer is obliged to offer an equally zealous defense on behalf of every client. Other than those constraints imposed by the ethics rules on the lawyer's conduct (such as constraints on the use of falsified or known perjured testimony), a criminal defense lawyer may not provide a less energetic or impassioned defense of a client simply because he is guilty.

Needless to say, the ethical challenges posed by such a rule are endless. May you challenge the credibility of a witness whom you know is truthful, in an attempt to appear to have caught him in a lie? May you offer mistaken alibi testimony, which is truthful but erroneous, to create reasonable doubt? As a matter of criminal defense ethics, the answer to these questions may be "yes." There are two reasons for this. First, since the issue in a criminal case is whether the government can meet its burden of proof, the lawyer may pursue that issue with equal zeal for all clients, guilty or innocent.³⁸ Second, to fail to provide the same zealous advocacy for guilty clients that defense lawyers do for innocent clients would telegraph, to knowledgeable players in the system that the client was, in the eyes of the defense lawyer, guilty. That information—coming from the client's own lawyer, a person

always factually guilty clients from any responsibility for their acts." In the recent case involving Colorado prosecutor Mark Pautler, accused of lying to a serial murder suspect and telling the suspect that Pautler was a public defender, Pautler justified his lying by arguing that "[g]iving . . . access to a public defender was out of the question because a defense attorney would be obligated to advise [the suspect] to stop talking to investigators," Sarah Huntley, *Prosecutor Admits He Lied*, ROCKY MOUNTAIN NEWS, March 8, 2001, at 4A, and by claiming that the district attorney's office had an "'adversarial relationship' with the public defender's office and that 'trust' between prosecutors and defenders 'had disintegrated in Jefferson County some years prior.'" Kieran Nicholson, *Prosecutor: Ruse Justified in Arrest*, DENVER POST, March 8, 2001, at B-02.

³⁷See, e.g., Justice White's opinion in *United States v. Wade*, 388 U.S. 218 (1967) (White, J., dissenting in part) ("[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.").

³⁸Even some members of the Supreme Court seem confused about this issue. See *James v. Illinois*, 493 U.S. 307 (1990). James, unlawfully arrested at the beauty parlor, told police that before he went to the beauty parlor, his hair had been red and straight, where it was now black and curly, and that he had intentionally changed his appearance. Those statements were ordered suppressed as the fruit of the unlawful arrest. At trial, witnesses at the scene of the crime James was alleged to have committed testified that the perpetrator had red straight hair. Defense counsel offered as a witness a family friend who testified that, on the day of the crime, James's hair had been black. The government then offered the suppressed statements to impeach the testimony of the family friend. While the majority ruled that this was improper, a four-judge dissent argued that because the defense lawyer knew the facts, he should not have elicited testimony that was inconsistent with the suppressed statements because he knew the testimony to be false. *Id.* at 326. This view disregards the possibility that the testimony, while factually incorrect, was nonetheless truthful, perhaps the product of mistaken recollection. As long as the testimony was not known by the lawyer to be untruthful, counsel was not only entitled to test the government's proof, he was obliged to.

with unparalleled access to the client's confidences—would be highly credible and would shape those players' reactions to the client. The ethical obligation to be equally zealous on behalf of innocent and guilty clients thus requires that the lawyer not telegraph in any particular case, which kind of client he is dealing with.

Consistent with this obligation, a criminal defense lawyer should not announce the innocence of a particular client, or even announce more generally that he "only represents innocent clients."³⁹ A lawyer who publicly declares his client's innocence creates the expectation that lawyers in general—or that lawyer in particular—will declare the innocence of all innocent clients. This suggests the disclosure of confidential information, and creates a negative inference in any case where the lawyer does not declare his client's innocence. It is these constraints on the lawyer's representation of the next client that compel circumspection in the representation of this client.⁴⁰ It is the critical nature of keeping the secret that requires the defense lawyer to put forth an equally vigorous defense on behalf of all clients.

But lawyers for the wrongfully convicted operate under no such constraints. They pursue only those cases where they can make out a strong case of factual innocence on behalf of their clients. Unlike the criminal defense lawyer, there is nothing morally ambiguous about the role of the lawyer for the wrongfully convicted person, in the eyes of the law or of society as a whole.⁴¹ While criminal defense lawyers are ethically obliged to pursue an outcome which many view as socially undesirable, making them a necessary but somewhat untrustworthy part of the criminal justice system, there is nothing ethically ambiguous about being a lawyer

³⁹Note the prohibitions in the Model Rules of Professional Conduct on "stat[ing] a personal opinion as to the . . . guilt or innocence of an accused" in trial, MODEL RULES OF PROF'L CONDUCT § 3.4(e), and the prohibitions on extrajudicial statements that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." MODEL RULES OF PROF'L CONDUCT § 3.6(a).

⁴⁰See Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1665-66 (1996).

⁴¹By contrast, even the ethical rules reflect some uncertainty about the legitimacy of the criminal defense lawyer. Consider, for example, the ethical prohibition on contingent fees in criminal cases, memorialized in MODEL RULE 1.5(d)(2) and MODEL CODE 2-106 (C) 1983. EC 2-20 provides that "Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee," while the Comment to MODEL RULE 1.5 provides no explanation. The argument that criminal cases do not produce a lump sum with which to pay the fee is somewhat unconvincing in light of the fact that contingent fee arrangements need not be based on the matter's producing a lump sum from which the fee can be paid. One possibility is that the concern for creating counsel for indigent litigants is unnecessary in the criminal law context, since counsel is a constitutional right. But another possible explanation is that criminal defense lawyers simply cannot be trusted to conduct criminal litigation for a contingent fee. The concern is that they will abandon their ethical obligations and manipulate the system to assure a not guilty verdict and the consequent payment of their contingent fees. Such improper manipulation is, of course, equally possible in the civil arena, where contingent fees are routinely permitted. Is the assumption that the consequences to society are more drastic in the criminal area, or is it that only criminal defense lawyers will behave so inappropriately?

for the wrongfully convicted.⁴² Your obligation as counsel to do everything lawful to advance your client's interest is consistent with doing what is right—as long as the client is innocent.⁴³ Nor are lawyers for wrongfully convicted defendants likely to suffer the same community censure the criminal defense lawyer does.⁴⁴ On the contrary, the lawyer for a person who can offer strong evidence of innocence wears the white hat. The client has been wronged; the system is broken; and the heroic efforts of this lawyer can restore justice. The lack of ethical ambiguity may compensate to some extent for the fact that the cases are controlled by standards and procedures that make them extremely difficult to win.

What is the significance of this for the criminal defendants left behind? The public focus on lawyers proudly asserting the factual innocence of their clients, and the public approbation of those lawyers, suggests that clients, to secure devoted lawyers, must be factually innocent; that lawyers do their best for innocent clients; and that continued assertions of factual innocence are the best way to secure the committed assistance of the criminal defense lawyer.

It is at least my anecdotal experience that clients try very hard to convince their lawyers they are innocent. For some clients, this may be a calculated decision; because they are aware of the ethical constraints on their lawyers offering perjured testimony, they want to preserve their options.⁴⁵ But at least in some cases the desire to convince your lawyer you are innocent is not about calculated risks: it is about getting the lawyer to commit wholeheartedly to your defense. It is not just competent advocacy that clients want, but impassioned advocacy. It is the commitment of a lawyer's fire to their cause.

⁴²One might think that the innocence movement would blur this distinction between right-thinking lawyers for the wrongfully convicted and evildoing criminal defense lawyers; these two categories of lawyers by definition share some of the same clients. Because at least sometimes it is the failures of the criminal defense lawyer which are blamed for producing the wrongful conviction in the first place, however, the two categories of lawyers remain distinct. Scheck, et al. assert that of sixty-two DNA exonerations they have analyzed, seventeen, or 27%, involved bad lawyering. SCHECK, *supra* note 2, at Appendix 2.

⁴³One can imagine that an important aspect of pursuing a wrongful convictions practice is determining how to determine likely guilt; presumably, such evidence will get the client removed from the list expeditiously, if only to preserve resources for those truly innocent clients in need of the lawyer's services. Notes a member of Britain's Criminal Cases Review Commission, "We are continually discovering significant evidence of guilt." Makin, *supra* note 8, at A15. One can imagine, by contrast, that the self-doubts experienced by those lawyers relate to the degree of commitment they demonstrate. Having satisfied yourself that there is compelling evidence of a convicted client's innocence, one must feel an overwhelming obligation to pursue every possible pathway that might overturn the conviction.

⁴⁴While criminal defense lawyers who succeed in securing acquittals for their clients might attain the same heroic status, they ordinarily do not. The reason for this is the burden of proof—and the meaning of the resulting verdict—at a criminal trial. Because the verdict means only that the state failed to meet its burden beyond a reasonable doubt, a trial verdict says nothing about "factual innocence," and it is the factual innocence of their clients that elevates the legitimacy of lawyers for the wrongfully convicted.

⁴⁵This may be the case particularly with a highly knowledgeable client. See Margaret Raymond, *Fool for a Client: Some Reflections on Representing the President*, 68 *FORDHAM L. REV.* 851, 861-62 (1999).

My concern with the focus on innocence is that it will convince clients, even more than they are already convinced, that being factually innocent—or, at least, acting factually innocent—is an essential element of securing the attention and sympathy of a lawyer, not just post-conviction, but at any stage of a criminal proceeding.

All clients are not factually innocent. And those convinced that only a claim of factual innocence will earn them a truly committed lawyer run the risk of denying themselves the full benefit of counsel. A client who feels compelled to tell his lawyer a story of factual innocence that is not true misses the opportunity to disclose facts that might be partially mitigating, to explain circumstances that might support a defense of legal innocence, or to secure optimal advice about testifying or pleading guilty. Most significantly, such clients lose the belief that they can be guilty and still be worthy of committed advocates.

Pursuing justice for the wrongfully convicted is a profoundly meaningful goal. Yet the innocence movement may have unintended consequences for the criminal justice system. This paper explores some of these, and argues that the focus on factual innocence may create certain distortions in the way that actors in the criminal justice system—the “ones left behind”—perceive their obligations and allegiances. It may convince the public, including policymakers, that the system works effectively to reveal and redress wrongful convictions. It may convince prospective jurors that it is—or should be—the defendant’s burden to prove innocence. It may convince potential criminal defense clients that only the innocent secure the loyal and skilled assistance of a committed attorney.

To say this is not to suggest that the innocence movement should cease its efforts to secure exonerations of wrongfully convicted individuals. It is, however, to suggest that this strategy should be viewed not only as an opportunity to do justice in a few cases, but as an opportunity to identify and address those systemic flaws that produce wrongful convictions.⁴⁶ Such reforms should do more than enhance opportunities—through access to DNA evidence or testing—to prove factual innocence. Yet to date, most legislative activity has focused only on that narrow goal.⁴⁷ Righting these individual injustices should convince us not that the job is done, but that the job that remains is equally critical.

⁴⁶See Saks, *supra* note 28, at 670: “The most important thing that can be done with the rare and time-limited view afforded by DNA exonerations is to identify the systemic flaws in the criminal justice system that produce errors and work to cure those flaws.”

⁴⁷Numerous states have enacted statutes designed to structure, facilitate and control postconviction forensic testing. See, e.g., 2001 Arkansas Laws Act 1780 (S.B. 4) (2001) (providing for a proceeding to establish actual innocence based on “[s]cientific evidence not available at trial,” creating procedures to secure forensic testing to prove actual innocence, and providing for preservation of physical evidence after trials resulting in convictions); 2000 Cal. Stats 821 (providing procedures for convicted defendants to secure forensic DNA testing and requiring the preservation of biological evidence after a conviction); 2001 Cal. Stats 943 (amending prior statute to provide counsel to assist in making motion for DNA testing, and providing that right to seek testing is not waivable); 72 Del. Laws 320 (2000) (providing a procedure for convicted defendants to seek “forensic DNA testing to demonstrate the person’s actual innocence,”); 2001 Fla. Laws ch. 97 (providing procedure for convicted persons to petition for examination of evidence “which may contain DNA . . . and which would exonerate that person or mitigate the sentence that person received,” and requiring preservation of “any physical evidence collected at the time of the crime for which

postsentencing testing of DNA may be requested"); 2001 Idaho Sess. Laws 317 (establishing procedure for convicted person to petition "for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing" when "[t]he result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent"); 1997 Ill. Laws 141 (providing a procedure for a convicted defendant to secure "fingerprint or forensic DNA testing" that "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence"); 2001 Kan. Sess. Laws 208 (providing a procedure for a person convicted of murder or rape to seek "forensic DNA testing . . . of any biological material" related to the crime, which shall be ordered upon a determination that testing may produce "exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced"); 2001 La. Act. 1020 (providing procedure for person convicted of a felony to request DNA testing where he can allege that "there is an articulable doubt . . . as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner"; the petitioner must swear, under penalty of perjury, that he is "factually innocent of the crime for which he was convicted"; statute also provides for limited preservation of biological evidence); 2001 Md. Laws 418 (providing procedure for securing "DNA or other forensic testing" where the testing "could show that the defendant was wrongfully convicted or sentenced", and requiring preservation of scientific identification evidence); 2001 Neb. Laws 659 (providing procedure to secure "forensic DNA testing" when testing "may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced," and providing for preservation of biological material); 2001 N.M. Laws 29 (providing procedure for securing DNA testing if the test has potential to "produce new noncumulative evidence material to the petitioner's assertion of innocence"); 2001 N.C. Sess. Laws 282 (providing procedure to obtain DNA testing of biological evidence if, had it been conducted before trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant", and requiring preservation of biological evidence); 1999 Okla. Sess. Laws 276 (providing for a "DNA Forensic Testing Program" within the Oklahoma Indigent Defense System to "investigate, screen, and present . . . claims that scientific evidence will demonstrate indigent persons convicted of, and presently incarcerated on, any felony offense upon which the testing is sought are factually innocent"); 2001 Ore. Laws 667 (providing procedure for person convicted of murder, a person felony, or a sex crime to seek DNA testing; person must state that he or she "is innocent of the offense for which the person was convicted"; testing shall be ordered if "there is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person" of the offense or conduct exoneration which would result in sentence reduction); 2000 Tenn. Pub. Acts 731 (providing procedure for person convicted of first degree murder and sentenced to death to secure "fingerprint or forensic DNA analysis" if "the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence"); 2001 Tenn. Pub. Acts 444 (providing procedure for persons convicted of a specific group of offenses to seek "forensic DNA analysis of any evidence", which shall be granted if "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis"); 2001 Tex. Gen. Laws 2 (providing for preservation of biological evidence and creating procedure to seek "forensic DNA testing of evidence containing biological material," which shall be granted if "a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"); Utah Code Ann. § 78-35a-301 (2002) (providing procedure for person convicted of any felony to seek postconviction DNA testing "if the person asserts his actual innocence under oath"; filing a request constitutes a waiver of any statute of limitations as to any felony offense discovered through DNA database comparison); 2000 Wash. Laws 92 (providing procedure for person sentenced to death or life imprisonment to request postconviction DNA testing from prosecutor); 2001 Wash. Laws 301 (revising prior statute to apply to any person convicted of a felony and currently serving a term of

Advocates for the wrongfully convicted have offered proposals for such systemic reforms,⁴⁸ believing, perhaps, that proof that the current system produces wrongful conviction will lead inexorably to reform of that system. The legislative response suggests that mere exposure to the phenomenon of wrongful conviction does not invariably produce equal attention to the causes of that phenomenon. History might also suggest some skepticism about the power of such information, standing alone, to bring about far-reaching systemic change. In 1932, Prof. Edwin Borchard published *Convicting the Innocent*, a book in which he set out 65 cases of wrongful conviction and offered proposals for reform. The causes he identified for the wrongful convictions—mistaken identifications, inadequate lawyering, police or prosecutorial misconduct, false or coerced confessions, and perjury—are strikingly similar to those offered today by advocates for the wrongfully convicted. He also advocated the same kinds of relief as today's advocates. Yet we find ourselves, seventy years later, addressing the same problems and the same causes. The lesson is clear: we do not solve this problem merely by identifying it.

imprisonment, and providing for limited preservation of biological evidence). The statutes differ extensively in their limitations periods, in the character of the persons who may avail themselves of them, and in the showing that must be made to justify testing. I offer no critique of these statutes; the point is simply to demonstrate that legislatures have responded overwhelmingly to the wrongful convictions problem with solutions that will address not the sources of wrongful conviction, but the bringing of further claims of postconviction DNA exoneration.

I have been unable to locate statutes addressing, for example, the issue of mistaken eyewitness identification. The proposed federal Innocence Protection Act, *see* Innocence Protection Act, S.B. 486, 107th Cong., (2001) attempts to address competency of counsel, but limits its focus to capital cases and has not been reported out of committee.

A few states have, in addition, passed private bills to redress individual situations of wrongful conviction and imprisonment. *See, e.g.*, 1999 Cal. Stat 619 (statute ordering payment of \$620,000 to Kevin Lee Green to compensate him for his wrongful conviction in the murder of his wife); 1996 Va. Acts ch. 754 (statute ordering payment of \$150,000 to Edward William Honaker and establishing an annuity for him in the cumulative amount of \$350,000 to compensate him for his wrongful conviction of rape).

⁴⁸Proposals for the kinds of reform that they believe will diminish the phenomenon include better management of eyewitnesses, better compensation and higher requirements for appointed defense counsel, taping of all confessions, screening of informants' testimony, and constraints on the use of junk science. These are among the recommendations outlined in SCHECK, *supra* note 2, at 255-60. Ironically, Prof. Edwin Borchard's 1932 book, *Convicting the Innocent*, contained strikingly similar recommendations. *See supra* note 14. Borchard noted that wrongful convictions were frequently found where the public opinion was aroused by high-profile crimes, *id.* at xviii, and argued for reform in the criminal justice system, as well as for a scheme of compensation for those wrongly convicted. Seventy years later, advocates on behalf of the wrongfully convicted assert the same message. SCHECK, *supra* note 2, at 250.

