INNOCENTRISM

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The following Essay by Professor Daniel S. Medwed provides a response to skeptics and antagonists of the emerging centrality of innocence-based arguments in criminal law. Professor Medwed contends that the growing focus on innocence, which he terms "innocentrism," is a positive occurrence and one that ultimately can complement, rather than replace, the emphasis on substantive and procedural rights that for good reason rest at the core of American criminal law. The Essay begins by discussing an array of criticisms that scholars and practitioners have launched against the innocence movement. Professor Medwed then argues that although these criticisms have some validity, they fall short in justifying the rejection of actual innocence as a major focal point of the criminal justice discourse in the twenty-first century. The author ultimately concludes that innocentrism should have a significant place in this discourse, and it can do so in concert with other time-tested criminal law values.

INTRODUCTION

American criminal law is undergoing a transformation due to the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms. This phenomenon, which I will term "innocentrism," derives mainly from the emergence of DNA testing and the subsequent use of that technology to exonerate innocent prisoners. Indeed, since 1989, over 200 prisoners have been freed as a result of post-conviction DNA testing,[1] and dozens of nonprofit innocence projects have sprung up to investigate and litigate claims of innocence.[2] Legisla-

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1. For a current list of the number of inmates exonerated through post-conviction DNA testing, see Innocence Project, http://www.innocenceproject.org/ (last visited May 14, 2008); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (analyzing the issues involved in the first 200 DNA exonerations).

2. Innocence projects are typically structured as either freestanding nonprofit legal organizations or clinics associated with law or journalism schools. For a discussion of the policies and practices

tors have responded favorably to these developments as well; over forty state legislatures have passed statutes to facilitate inmate access to biological evidence that is suitable for post-conviction DNA testing.[3] A number of states have even gone beyond the realm of DNA and implemented legislation designed to address the root causes of wrongful convictions, for instance, by modifying the manner in which eyewitness identification procedures are conducted.[4] The academic community, in turn, has gravitated toward the topic of innocence with rising ardor, as evidenced by the fact that no fewer than twelve major law reviews have published symposia on topics concerning wrongful convictions since 2002.[5] It may not be farfetched to suggest, as others have done, that the effort to free the innocent has become the civil rights movement of the twenty-first century.[6]

of innocence projects regarding case selection, see Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003).

3. E-mail from Rebecca Brown, Policy Analyst, Innocence Project, to author (Oct. 9, 2007, 04:08:00 EST) (on file with author) (indicating that only eight states currently lack post-conviction DNA testing statutes: Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, South Carolina, South Dakota, and Wyoming). For a listing of states lacking post-conviction DNA testing statutes as of June 2005, see American Society of Law, Medicine & Ethics, *Post-Conviction Grid*, http://www.aslme.org/dna_04/grid/Post-Conviction.html (last visited May 14, 2008).

4. *See, e.g.*, Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 316 (2006) (discussing modern trends regarding eyewitness identification procedures); Abby Goodnough & Terry Aguayo, *25 Years Later, DNA Testing Comes to a Prisoner's Defense*, N.Y. TIMES, Aug. 3, 2005, at A12 (noting that New Jersey and North Carolina have implemented sequential lineup identification procedures).

5. Specifically, the *American Criminal Law Review* (Georgetown); *Boston College Third World Law Journal*; *California Western Law Review*; *Cardozo Public Law, Policy and Ethics Journal*; *Drake Law Review*; *Golden Gate University Law Review*; *Journal of Criminal Law and Criminology* (Northwestern); *Oklahoma City University Law Review*; *Tulsa Law Review*; *UMKC Law Review*; *Utah Law Review*; and *Wisconsin Law Review* have all published, or are in the process of publishing, symposia on the topic of wrongful convictions since 2002. *See, e.g.*, Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75 (2008); Hugo Adam Bedau & Michael L. Radelet, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587 (2004); Lyn Entzeroth, *Symposium Foreword*, 42 TULSA L. REV. 205 (2006); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17 (2003); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003,* 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Daniel S. Medwed, *Beyond Biology: Wrongful Convictions in the Post-DNA World*, 2008 UTAH L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1127854; Daniel S. Medwed, *Innocence Lost . . . and Found: An Introduction to the Faces of Wrongful Conviction Symposium Issue*, 37 GOLDEN GATE U. L. REV. 1 (2006); Daniel S. Medwed, *Looking Foreword: Wrongful Convictions and Systemic Reform*, 42 AM. CRIM. L. REV. 1117 (2005); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237; Barry C. Scheck, *Introductory Remarks*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 233 (2006); Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects Now Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002); Ellen Yankiver Suni, *Introduction to the Symposium on Wrongful Convictions: Issues of Science, Evidence, and Innocence*, 70 UMKC L. REV. 797 (2002).

6. *See, e.g.*, Press Release, Innocence Project, *As 100th Innocent Prisoner Is Freed by DNA Tests, Innocence Network Convenes to Map the Future of "New Civil Rights Movement" in Criminal Justice* (Jan. 17, 2002), http://www.deathpenaltyinfo.org/article.php?did=280&scid=1; *see also* Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004) ("The lessons of the Innocence Revolution begin with the realization that our system is not as accurate as we believed even 10 years ago."); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) ("Spawned by the advent of forensic DNA testing and hundreds of post-conviction

What is more, the innocence movement has captivated the public with accounts of the exonerated not only surfacing regularly in newspapers, film documentaries, and television news programs, but also making inroads into components of pop culture. Take this sampling of events from the past few years: the play *The Exonerated*, featuring the stories of a series of inmates freed across the country, played for full audiences in New York City before going nationwide and starred prominent actors such as Vanessa Redgrave and Susan Sarandon;[7] ABC aired a primetime television drama entitled *In Justice* that, although short-lived, revolved around the activities of an Oakland-based innocence project;[8] and best-selling authors John Grisham and Scott Turow have published works of nonfiction and fiction, respectively, devoted to the tales of factually innocent prisoners.[9] All of the attention paid to actual innocence by litigators, academics, legislators, authors, and even television executives signals a new era in which fact-based arguments surrounding guilt or innocence may begin to trump or at least hold their own with the traditional rights-based arguments that have been the norm in criminal law for generations.[10]

Many observers, including this author, have praised the evolving focus on actual innocence in the criminal law discourse and advocated the passage of legislative reforms geared toward curtailing the factors that contribute to wrongful convictions.[11] Several prominent commentators, however, have reacted less sympathetically and have mounted a series of attacks on the innocence movement, both from the right and the left. In this Essay, I aim to respond to those skeptical of (and/or antagonistic to-

exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure.").

7. *See* JESSICA BLANK & ERIK JENSEN, THE EXONERATED (2004); *see also* Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 510–16 (2005) (discussing and criticizing the play *The Exonerated*).

8. For information about this program, see Internet Movie Database, *In Justice*, http://www.imdb.com/title/tt0460650/ (last visited May 14, 2008).

9. JOHN GRISHAM, THE INNOCENT MAN (2006); SCOTT TUROW, REVERSIBLE ERRORS (2002).

10. Throughout the 1960s and 1970s, American criminal law experienced a remarkable and well-chronicled expansion of the protections afforded to criminal defendants. Landmark United States Supreme Court cases established, among other things, the right to counsel for indigent criminal defendants and, in general, reinforced and reinvigorated the individual rights provided in the Fourth, Fifth, and Sixth Amendments to the Constitution. This so-called Rights Revolution of the Warren Court dramatically changed the face of criminal law and has been the subject of much debate in scholarly circles ever since. For recent discussions of the Warren Court era as revolutionary, see, for example, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006). For an argument suggesting that the Warren Court's strengthening of criminal procedure has imposed costs and created untoward incentives for the government, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

11. *See, e.g.*, Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337 (2006). For an interesting argument advocating the revival of the presumption of factual innocence in the criminal justice system, see William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995).

ward) the emerging centrality of innocence-based arguments in criminal law—in effect, to critique the critics. In doing so, I hope to demonstrate that innocentrism, while far from a panacea to the criminal justice system's many ills, is a positive, bipartisan occurrence and one that ultimately can complement, rather than replace, the emphasis on substantive and procedural rights that for good reason rest at the core of American criminal law.

I. CRITICISMS OF THE INNOCENCE MOVEMENT

Scholars and practitioners have launched an array of criticisms of the innocence movement and any attempt to catalogue their multifaceted complaints, much less present them linearly, presents a challenge. Nevertheless, this Essay will discuss four chief criticisms that appear from a review of the literature.

A. Crying Wolf

Perhaps the most persistent condemnation of the innocence movement relates to tabulation: what counts as an exoneration and who counts as innocent. That is, a handful of well-known scholars, judges, and lawyers have accused the innocence movement of inflating the actual number of wrongful convictions by including factually ambiguous cases in the innocence ledger. Some of these attacks have taken an *ad hominem* tone—in a 2007 *Wall Street Journal* editorial, for instance, Colorado State Judge Morris Hoffman labeled claims by innocence projects about the inaccuracy of the criminal justice system matters of "scholastic impurity and pedagogical extremism"[12]—whereas others have largely debated the classification process. Paul Cassell and Josh Marquis are among those who have studied individual cases treated as exonerations by innocence projects and suggested that, in their view, those cases do not unequivocally involve innocent defendants.[13] Marquis, in particular, has asserted that the percentage of wrongful convictions in the crimi-

12. Morris B. Hoffman, *The 'Innocence' Myth*, WALL ST. J., Apr. 26, 2007, at A19. Political scientist John McAdams has also criticized the innocence movement's tabulations and done so in quite vitriolic fashion:

> Thus there has been a massive propaganda campaign in recent years touting the number of people who have been on death row but have been "exonerated" and set free. Unfortunately, death penalty opponents have radically and systematically exaggerated the number of people who fit into this category. They have done this by carefully obfuscating the distinction between someone who is *factually innocent* ("he didn't do it"), and someone who is *legally innocent* (has not been found guilty beyond a reasonable doubt in a process that passes all current standards of due process).

John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 827 (2001).

13. *See, e.g.*, Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Causes of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999); Marquis, *supra* note 7.

nal justice system is essentially infinitesimal.[14] Supreme Court Justice Antonin Scalia recently cited Marquis's data and extrapolated from it to find an error rate in felony convictions of 0.027 percent "or, to put it another way, a success rate of 99.973 percent."[15] This error rate is far lower than the figures posited by various scholars and lawyers affiliated with the innocence movement.[16] By alleging that innocence projects exaggerate the extent of the problem of wrongful convictions, these critics imply that innocence projects have overestimated or, worse, mischaracterized the prevalence of wrongful convictions: that fundamentally the criminal justice system is working effectively. As a result, proponents of this position often insist that wholesale systemic changes are unwarranted.[17]

B. *Collateral Damage*

Even those who accuse innocence projects of embellishing the number of wrongful convictions tend to acknowledge that *some* innocent people have been convicted in this country for, like all systems created by humans, the criminal adjudicatory process is not infallible.[18] Therefore, the battle over numbers ultimately boils down to whether wrongful convictions are "episodic or epidemic."[19] For those who perceive the problem as episodic, the question then becomes whether this is tolerable. To be sure, many observers in this category maintain that true miscar-

14. *See, e.g.*, Joshua Marquis, Op-Ed, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (Oregon prosecutor dismissing the overall number of wrongful convictions as insignificant); *see also* Tony G. Poveda, *Estimating Wrongful Convictions*, 18 JUST. Q. 689, 697 (2001) (suggesting 1.4 percent wrongful conviction rate in murder cases).

15. Kansas v. Marsh, 126 S. Ct. 2516, 2538 (2006). Professor Samuel Gross has responded by criticizing Justice Scalia's computation: "In fact, the true number of wrongful convictions is unknown and frustratingly unknowable. But the rate that Justice Scalia advocates is flat wrong and badly misleading." Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the* Marsh, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006), *available at* http://students.law.umich.edu/mlr/firstimpressions/vol105/gross.pdf.

16. Notably, Michael Risinger has recently written a paper that found "an empirical minimum of 3.3% and a fairly generous likely maximum of 5% for factually wrongful convictions in capital rape-murders in the 1980's." D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007); *see also* David R. Dow, Op-Ed, *The End of Innocence*, N.Y. TIMES, June 16, 2006, at A31 ("Of the 50 or so death row inmates I have represented, I have serious doubts about the guilt of three or four—that is, 6 to 8 percent, about what scholars estimate to be the percentage of innocent people on death row."). For an interesting article discussing officials' estimates of wrongful conviction rates, see Marvin Zalman et al., *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72 (2008). The study found that defense lawyers estimate overall higher rates of wrongful convictions than do judges, who, in turn, predict a higher rate than the police and prosecutors. *Id.* at 72.

17. *See supra* notes 13–15 and accompanying text.

18. *See also* Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 897 (2007) ("Unlike some commentators and jurists, I assume erroneous convictions must exist, and the number of such cases is not insignificant. The criminal justice system is a human enterprise—one in which we ask a group of twelve people to make a decision about the guilt or innocence of a particular individual. Like any other human epistemic practice, this process inevitably leads to mistakes—both erroneous convictions and erroneous acquittals.") (citations omitted). *See generally* Marquis, *supra* note 7.

19. *See* Marquis, *supra* note 7, at 520.

riages of justice should be investigated and litigated vigorously and those convictions overturned where the proof demands it.[20] Others who deem wrongful convictions rare have intimated that some degree of error is inevitable and, possibly, acceptable. Specifically, Ron Allen and Amy Shavell have argued that the cost of executing an innocent person may be lower than the benefits of abolishing the death penalty given the deterrent effect of capital punishment.[21] Allen and Shavell equate the death penalty with governmental regulatory and policy decisions in general, noting that the government frequently makes decisions for the benefit of the larger societal welfare: for example, installing faster highway speed limits to ease the flow of traffic, in which the cost invariably entails the death of some innocents.[22] The contention that wrongful convictions are inevitable and, on some level, acceptable resembles the concept of collateral damage in war. While the death of innocent civilians is not an objective of most military campaigns, war planners are normally aware of the risk that a certain number will in fact die and that avoiding these casualties may be virtually impossible or, at a minimum, too costly.[23]

According to some observers, measuring cost to the criminal justice system includes considering the number of potential convictions lost due to restricting the autonomy of law enforcement and, thus, legislators should be wary of implementing too many defense-friendly reforms to guard against the prospect of wrongful convictions.[24] For instance, members of the innocence movement have generally urged for a revamping of eyewitness identification procedures from the current simultaneous composite norm—viewing a group of suspects at once—to a method in which suspects are witnessed individually and in sequence rather than as a collective.[25] Some studies suggest that this would reduce the error rate

20. *See generally* Cassell, *supra* note 13; Marquis, *supra* note 7.

21. *See* Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005). Allen and Shavell argue, among other things, that the deterrent effect of the death penalty on potential murderers signifies that more innocents may be saved by the death penalty (crime victims) than by abolishing capital punishment and sparing some number of innocent inmates from death row. *Cf.* Katherine J. Strandburg, *Deterrence and the Conviction of the Innocent*, 35 CONN. L. REV. 1321 (2003) (contending that the prospect of wrongful convictions undermines the effect of deterrence).

22. *See* Allen & Shavell, *supra* note 21, at 628 ("Every year for a half a century, between 25,000 and 40,000 people have died in vehicular accidents, many of whom are innocent in every sense of the word. The number of deaths is clearly quite sensitive to current regulation; faster speed limits mean more deaths, safety devices on cars affect the outcome of crashes, and so on.") (emphasis omitted).

23. Allen and Shavell liken the inevitability of error in the criminal justice system to any number of regulatory decisions made by the government determined on a cost-benefit basis, for instance, highway safety, in which a number of casualties are certain to ensue. *Id.*

24. *See, e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438 (1996) (arguing that the *Miranda* rule, due to the confession rate decrease, results in lost convictions equal to 3.8 percent of all criminal suspects questioned in America each year). *See generally* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998).

25. *See, e.g.*, Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAVIOR 603, 616–17 (1998). The results of a recent pilot study in Illinois, which sought to compare the relative benefits of sequential versus traditional lineups,

because eyewitnesses will no longer be prone to making a comparative or relative judgment about who, within the group, "most resembles" the perpetrator and, instead, will be inclined to make a unilateral assessment of who "is" the perpetrator.[26] Opponents of sequential lineups, though, have challenged the data and claimed that this reform would produce fewer positive identifications and the apprehension of fewer guilty suspects.[27] This is reflective of the broader criticism that the upside of innocentrism, rectifying a smattering of wrongful convictions, might not be worth the downside of extensive change and the concomitant hampering of law enforcement's ability to investigate and prosecute crimes thoroughly.

C. Effect on the "Not Guilty"

At first blush, the innocence movement seems to dovetail nicely with the work of criminal defense practitioners in general, consisting of an additional strategy designed to compel prosecutors to meet their burdens of proof. Yet not all criminal defense lawyers have welcomed the innocence movement with open arms; rather, a significant amount of skepticism has surfaced within the defense community regarding the utility and desirability of the soaring focus on innocence. Much of this skepticism revolves around the impact of innocentrism on run-of-the-mill cases, namely, cases where factual innocence does not lie at the crux: matters involving justification defenses, constitutional violations, and the like. To be precise, several scholars have expressed the fear that the emerging centrality of innocence may obscure more pervasive flaws in the criminal justice system and have a series of untoward effects on (1) the trial process, (2) legislative reform, and (3) other systemic critiques.[28]

First, concerns have been raised that well-publicized accounts of wrongful convictions may prompt jurors to look far and wide for factual innocence at trial and consequently neglect their obligation to convict only upon proof beyond a reasonable doubt. As Margaret Raymond has written, "the wrongful convictions movement . . . creates, in effect, a supercategory of innocence, elevating factual innocence over other categories."[29] The result of this, in Raymond's estimation, is that "jurors, thoroughly schooled in the importance of factual innocence, may conclude

indicated that sequential lineups might not be as desirable as many social scientists have argued. *See* Kate Zernike, *Questions Raised over New Trend in Police Lineups*, N.Y. TIMES, Apr. 19, 2006, at A1 ("The study, the first to do a real-life comparison of the old [simultaneous] and new [sequential] methods, found that the new lineups made the witnesses less likely to choose anyone. When they did pick a suspect, they were more likely to choose an innocent person."). The efficacy of this study, however, has been subject to debate. *See id.*

26. Wells et al., *supra* note 25, at 616–17.

27. *See, e.g.*, Seth M. Lieberman, *Sequential Lineups: A Closer Look Gives Reason to Pause*, N.Y. L.J., Dec. 3, 2003, at 4.

28. *See infra* notes 29–34 and accompanying text.

29. Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 457 (2001).

that anything short of factual innocence is simply not good enough to justify an acquittal."[30] Second, Carol Steiker and Jordan Steiker have noted that enacting legislative reforms to benefit the innocent could come at the expense of most criminal defendants, for whom innocence is not a colorable defense, citing as an example the role played by factual innocence in reshaping federal habeas corpus in the 1970s through the 1990s.[31] That process culminated in the passage of legislation that vastly circumscribed habeas review and the procedural safeguards afforded to the bulk of petitioners.[32]

Third, it has been argued that factual innocence may be a "distraction," a red herring that conceptually undermines other macro-level critiques of the criminal process by placing concern with factual accuracy above different yet equally (if not more) compelling principles.[33] Critiques of the criminal justice system grounded in the desire for greater protection of defendants' constitutional rights, say, stricter rules regarding police searches and seizures, certainly lack the intuitive, visceral appeal of allegations that innocent people have been convicted of crimes they did not commit.[34] Accordingly, some observers have groused that arguments based on constitutional violations and procedural unfairness may fall on the deaf ears of policymakers to a greater extent than in the past considering the overwhelming noise created by the innocence movement.[35]

30. *Id*.

31. 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, 609–15 (2005).

32. *See id*. Scholars have also criticized federal habeas corpus jurisprudence on the grounds that it fails to adequately address claims of actual innocence. *See, e.g.*, Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2313–14 (2007) (contending that the Supreme Court's "habeas jurisprudence suffers from an 'innocence gap'—a gap between the amount of exculpatory evidence sufficient to thwart finality and the amount of exculpatory evidence sufficient to persuade a federal court to forgive a prisoner's procedural mistakes and adjudicate the merits of his or her constitutional claims").

33. *See, e.g.*, Steiker & Steiker, *supra* note 31, at 623 ("At a much higher level of abstraction, we worry that the tone and rhetoric of a focus on the problem of executing the innocent in debates about the death penalty is in some tension with the deepest normative arguments against capital punishment. Those arguments depend crucially on some notion of the human dignity even of those who are entirely guilty of heinous offenses, and on some limit to what we are willing to do, as a self-governing collective, to even the worst offenders."); Dow, *supra* note 16, at A31 ("Innocence is a distraction. . . . [M]ost people on death row did what the state said they did. But that does not mean they should be executed.").

34. *See, e.g.*, Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305, 323 (2001) (presenting results of empirical studies from psychologists that suggest people tend to disregard due process values when they believe they know the defendant to be guilty or innocent).

35. *See supra* note 33 and accompanying text.

D. See, Problem Solved!

To be sure, news accounts of individual exonerations convey a mixed message to the American public. On the one hand, these stories demonstrate that the system is flawed—that the police occasionally arrest the wrong people, that prosecutors charge them with crimes, and that judges and juries fail them. Naturally, this image is what the innocence movement aims to generate with the media frenzy surrounding individual exonerations and then to parlay that publicity into widespread reform.

On the other hand, the seeming deluge of exonerations also suggests that the post-conviction process serves an effective corrective function—that, under the current regime, justice will be served, albeit delayed. In particular, as some commentators have noted, the overturning of each wrongful conviction buttresses the popular impression of a criminal justice system that is already equipped with ample (and endless) safety valves and post-conviction checks and balances.[36] And this impression may be solidified in the future as the rate of DNA exonerations declines; over time, the increase in pretrial DNA testing of crime scene evidence will fortunately weed out scores of innocent suspects at the front end and thereby reduce the number of wrongful convictions in cases where biological evidence is available.[37] This is no doubt a good thing. It also means there will be fewer cases of indisputable scientific evidence exonerating a wrongfully convicted inmate through the post-conviction process and may lead some to think that the problem has been "solved."

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36. *See, e.g.*, Raymond, *supra* note 29, at 451 ("The first concern is that, far from suggesting that the system is irreparably broken, the innocence movement suggests, instead, that the system works. 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.").

37. *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 323 (2003) ("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."); Steiker & Steiker, *supra* note 31, at 622 ("As DNA testing becomes more of an established part of the pre-trial process, however, there will (thankfully) be fewer and fewer post-trial exonerations. This inevitable and salutary development, however, may well lead the public to think that the problem of innocent people on death row is 'fixed,' as there will no longer be any indisputable means of post hoc proof of the system's fallibility."). Reports from the Bureau of Justice Statistics at the U.S. Department of Justice confirm that pretrial DNA testing is becoming increasingly popular. *See, e.g.*, CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001, at 8 (2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf (finding that, in 2001, two-thirds of prosecutors' offices reported use of DNA evidence during plea negotiations or felony trials compared to half of all offices in 1996); GREG W. STEADMAN, U.S. DEP'T OF JUSTICE, SURVEY OF DNA CRIME LABORATORIES, 2001, at 2 (2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/sdnacl01.pdf (reporting that, between 1997 and 2000, the work of DNA crime laboratories soared, with a 50 percent increase in the number of subject cases and convicted offender samples received).

E. Additional Arguments Against Innocentrism

I must reiterate that the aforementioned arguments are not the only ones that have been (or could be) made against innocentrism. Some scholars have articulated concerns about the ethical issues surrounding how innocence projects tend to structure their attorney-client relationships.[38] Moreover, diehard advocates of incapacitation as a valid punishment theory could assert that many of those exonerated of their crimes had lengthy criminal records prior to their incarceration (and/or have committed crimes that went unpunished) and, thus, irrespective of their involvement in the crime for which they were exonerated, pose a risk of harm to the public that merits prolonging their imprisonment. The high-profile case of Steven Avery, a Wisconsin man wrongfully convicted and exonerated of rape and murder, serves to fan the incapacitationist's flames.[39] Shortly after Avery's exoneration, he was charged with raping and killing another woman; the DNA evidence that freed him proved integral evidence in linking him to the subsequent crime.[40] Even if there are additional arguments that could be levied against the innocence movement, the four criticisms highlighted above are the most prevalent and persistent to date and the most in need of a response.

II. THE VALUE OF INNOCENTRISM

The criticisms outlined above, while having some validity, fall short in justifying the rejection of actual innocence as a major focal point of the criminal justice discourse in the twenty-first century. Innocentrism should have a significant place in this discourse, and it can do so in concert with other time-tested criminal law values.

A. Counting Innocence

As Samuel Gross has observed, "the true number of wrongful convictions is unknown and frustratingly unknowable."[41] This is so because not every case of actual innocence is brought to the attention of post-

38. Innocence projects often require factual innocence as a basis for continued representation. *See* Medwed, *supra* note 2, at 1126. This could give rise to some ethical issues given the negative signal sent to the public in the event a project ceases representation of a specific inmate. *See* Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 962 (2002) (concluding that "there is likely nothing unreasonable about projects limiting the kinds of cases they will take or continue to pursue. . . . as long as the potential consequences are clearly understood" by the client).

39. *See, e.g.,* Tom Kertscher, *Avery Gets Life, No Release Chance—Court Hears Victim Talk of Dying on DVD*, MILWAUKEE J. SENTINEL, June 2, 2007, at B1 ("Steven Avery, the only person in U.S. history to be convicted of murder after being cleared of an earlier conviction by DNA testing, was sentenced to life in prison Friday with no possibility of release for the killing of Teresa Halbach.").

40. *Id*. ("DNA evidence—which had freed Avery from prison in the 1985 sexual assault—was key in convicting him of Halbach's killing. His blood and hers were found in Halbach's car, and Halbach's DNA was found on a bullet fragment in Avery's garage.").

41. *See* Gross, *supra* note 15, at 69.

conviction litigators and judges, let alone yields an exoneration. Innocent prisoners may become despondent at their plight and abandon any effort to clear their names; biological evidence may become lost, degraded, or destroyed before post-conviction DNA testing can be conducted;[42] and matters lacking scientific evidence, so-called non-DNA cases, are notoriously difficult to overturn considering the presence of procedural roadblocks and judicial skepticism toward nonscientific, newly discovered evidence in general.[43] It is fair to say that the proven cases of actual innocence are just the tip of the innocence iceberg, so to speak.[44]

Nevertheless, what constitutes a "proven" case of actual innocence is instrumental to the debate over wrongful convictions, and it is crucial for such cases to be vetted thoroughly before being characterized as true exonerations. To that end, Cassell, Marquis, and others provide an essential oversight function. Innocence projects should not be allowed to treat cases as exonerations without any scrutiny from scholars and practitioners outside their own insular community. But should only cases involving official declarations of actual innocence, i.e., in the form of a judicial opinion or executive decision, "count" as exonerations?[45] Surely that would be too narrow a criterion. Exonerations may also result from prosecutors joining in a defense request to free the inmate prior to a full-fledged evidentiary hearing or opting not to retry a defendant, and consequently there might be no document, no official declaration, of innocence.[46]

42. *See* 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.").

43. *See generally* Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437 (2007); 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 (2005) [hereinafter Medwed, *Up the River*].

44. *See, e.g.*, Gross et al., *supra* note 5, at 531 ("In short, the clearest and most important lesson from the recent spike in rape exonerations is that the false convictions that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless.").

45. Notably, in their groundbreaking empirical study of wrongful convictions, Samuel Gross and his team of researchers defined the term "exoneration" as "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." *Id.* at 524. These official acts divided into four categories: (1) executive pardons, (2) judicial dismissals of charges after new evidence of innocence, (3) acquittals at retrials where the evidence revealed that the defendants played "no role in the crimes for which they were originally convicted," and (4) posthumous acknowledgment by the state of the innocence of an inmate who died in prison. *Id.*; *see also* Zalman et al., *supra* note 16, at 75–76 (discussing the various issues involved in defining wrongful convictions, including whether to adopt an objective or subjective classification process).

46. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 127–28 (2004) (discussing how the likelihood of success on a post-conviction motion alleging actual innocence rises considerably if the prosecution joins in or fails to contest the motion). By way of example, David Wong was wrongfully convicted of murder in New

If official, publicly announced findings of innocence are not a prerequisite, then what should be the standard? Political scientist John McAdams has criticized innocence projects for including cases of "legal innocence"—cases where the evidence simply fails to clear the threshold of guilt beyond a reasonable doubt—in their computations.[47] Indeed, it would be problematic to treat cases as exonerations where the proof was merely legally insufficient to establish guilt. Yet there is a gray area, a murky middle between indisputable factual innocence and legal innocence that has become something of a battleground between members of the innocence movement and skeptics thereof, typically prosecutors. This murky middle contains not only non-DNA cases—which obviously have intrinsic classification problems in that they lack "indisputable" scientific proof of innocence—but also DNA ones. On more than one occasion where DNA has excluded an inmate as the source of a particular biological sample in a crime, prosecutors have responded by crafting a new theory of the case that does not preclude the inmate's involvement.[48] For instance, in some rape cases where DNA testing of the semen indicated no match with the man convicted of the crime, prosecutors have maintained that the sample derived from an "unindicted co-ejaculator" and that the prisoner still participated in the crime, despite the absence of his DNA from the crime scene and even any evidence that more than one perpetrator committed the assault.[49] When such an inmate is released and the prosecution remains wedded to its sense that he was involved, should that count as a case of actual innocence?

The saga of Bruce Dallas Goodman illustrates the dilemma of ascertaining what qualifies as an exoneration based on actual innocence.[50] Goodman was convicted of murder based on the death of Sherry Ann Fales Williams, whose corpse was discovered the morning of November

York State and ultimately obtained his release only after the local district attorney reluctantly decided not to retry him on murder charges after the intermediate state court ordered a new trial in the case. *See* Medwed, *supra* note 11, at 355–56.

47. *See* McAdams, *supra* note 12, at 827.

48. *See, e.g.*, Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 235 (2002) ("[E]ven after DNA testing has proven the innocence of a prisoner, prosecutors refuse to accept the results and rely upon other evidence that supports guilt, or they create a new theory of how the crime occurred (never before put to the judge and jury) to justify the continued punishment of an innocent person."); *see also* Gross et al., *supra* note 5, at 525–26 (describing the case of Charles Fain, who was exonerated of a rape-murder in Idaho by DNA testing in 2001, and noting the original prosecutor's response to the scientific proof of innocence: "It doesn't really change my opinion that much that Fain's guilty.").

49. *See, e.g.*, James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 543 (2002) (arguing that "prosecutors have become more sophisticated about hypothesizing the existence of 'unindicted co-ejaculators' (to borrow Peter Neufeld's phrase) to explain how the defendant can still be guilty, though another man's semen is found on the rape-murder victim").

50. I have also discussed the *Goodman* case in the context of the pressures that innocent prisoners face when encountering state parole boards. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 523–28 (2008).

30, 1984, near Interstate 15 north of Beaver, Utah.[51] Investigators retrieved several items of physical evidence from the crime scene, including a partially smoked cigarette later found to have been smoked by a type "A" secretor.[52] Moreover, tests performed on the rape kit revealed that Williams had engaged in sexual intercourse with a type "A" secretor during the previous twenty-four to thirty-six hours.[53] The testimony at Goodman's trial indicated that 32 percent of the general population can be classified as type "A" secretors, that is, people who secrete "A" antigens into their bodily fluids.[54] More precise methods of testing biological evidence—most notably, DNA testing—were still in their infancy at the time of the Williams murder.[55]

Goodman, an "A" secretor and Williams's former lover, became the chief suspect.[56] At trial, Goodman claimed to have left Nevada for California before November 30 without Williams, who had expressed a wish to return to her estranged husband.[57] Two defense witnesses verified Goodman's alibi that he was in California at the time of Williams's death.[58] The prosecution, however, presented evidence from a witness who worked at a casino in Mesquite, Nevada,[59] and who testified that a couple fitting the description of Goodman and Williams were embroiled in a heated argument at that location early in the morning of November 30.[60] A Utah state trial judge found Goodman guilty of murder in the second degree in 1986,[61] and the Utah Supreme Court conceded that "[w]ithout question this was a close case" but nonetheless affirmed Goodman's conviction on appeal.[62]

After many years of incarceration, Goodman obtained help from the Rocky Mountain Innocence Center (RMIC), a nonprofit organization that investigates and litigates post-conviction claims of innocence by inmates in Nevada, Utah, and Wyoming.[63] RMIC petitioned the state

51. *See* State v. Goodman, 763 P.2d 786, 786 (Utah 1988).

52. *Id*.

53. *Id*.

54. *Id*. at 791.

55. *See* Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 829 (2002) ("Gary Dotson made history on August 14, 1989, when he became the first American to be exonerated of a criminal offense by DNA."); *see also* SCHECK ET AL., *supra* note 37, at 45–52 (discussing the efforts to apply the nascent DNA technology to criminal cases in the 1980s).

56. *Goodman*, 763 P.2d at 787–88.

57. *Id*.

58. *See DNA Tests Set Man Free After 19 Years*, L.A. TIMES, Nov. 10, 2004, at A12 [hereinafter *DNA Tests Set Man Free*].

59. Mesquite is near Interstate 15 between Las Vegas and the Utah border. *Goodman*, 763 P.2d at 788.

60. *Id*.

61. *Id*. at 786; *see also DNA Tests Set Man Free*, *supra* note 58.

62. *Goodman*, 763 P.2d at 788–89.

63. *See* Innocence Project, Other Innocence Organizations, http://www.innocenceproject.org/Content/313.php (last visited May 14, 2008) (noting that RMIC handles cases in Nevada, Utah, and Wyoming).

crime lab for access to the evidence in the hope of subjecting the remaining biological specimens from the Williams murder to DNA testing.[64] After RMIC received the evidence and submitted it for testing, the results proved that none of the existing samples could be attributed to Goodman.[65] The DNA evidence instead clarified that the evidence derived from *two other, unidentified people*.[66]

These new findings clashed directly with the prosecution's theory of the case, which from the outset had revolved around the assumption that Goodman had killed Williams by himself. Instead of admitting error and accepting Goodman's innocence, the prosecution crafted a new theory—that Goodman was but one of several perpetrators who participated in the Williams murder that morning and that the DNA evidence did not conclusively exclude him as a perpetrator.[67]

Faced with the prosecutors' new theory, RMIC pondered its next step and, in particular, considered two distinct post-conviction avenues: Utah's Post-Conviction DNA Testing Statute or its state habeas corpus remedy. Pursuing relief through the DNA statute would allow a judge to dismiss the conviction with prejudice if Goodman could prove his actual innocence by clear and convincing DNA evidence.[68] The state habeas corpus procedure, in turn, gives courts the power to set aside convictions when presented with evidence of previously unknown constitutional violations or newly discovered evidence that undermines confidence in the propriety of the verdict.[69] Unlike the Post-Conviction DNA Testing Statute, the state habeas corpus procedure permits a subsequent retrial on the charges.[70] In the end, given the prosecution's intransigence and

64. *See* Angie Welling & Jennifer Dobner, *DNA-Test Technology Improving*, DESERET MORNING NEWS (Salt Lake City), Jan. 30, 2005, at B1 (noting that RMIC "filed a petition on his behalf asking that newly discovered evidence . . . be retested with recent technology. The 20-year-old evidence was examined through a process called Y-STR DNA testing, which ignores the existence of female DNA in samples and focuses only on the Y chromosomes present.").

65. *Id*.

66. *Id*.

67. *See* Ashley Broughton, *State: DNA Should Free Inmate*, SALT LAKE TRIB., Oct. 15, 2004, at D1 ("'The new DNA evidence is not conclusive, but it is troubling,' said [Utah] Assistant Attorney General Erin Riley. 'It does not prove Goodman innocent . . . .' State prosecutors said additional evidence, although circumstantial, pointed to Goodman as Williams' killer.").

68. *See* UTAH CODE ANN. § 78-35a-301 (2002) (amended 2007); § 78-35a-303(2)(b) (2002) ("If the court, after considering all the evidence, determines that the DNA test result demonstrates by clear and convincing evidence that the person is actually innocent of one or more offenses of which the person was convicted and all lesser included offenses relating to those offenses, the court shall order that those convictions be vacated with prejudice and those convictions be expunged from the person's record."); *see also* Ted S. Reed, Note, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to Optimize Utah's Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877.

69. *See* UTAH CODE ANN. §§ 78-35a-101 to -110 (2002) (amended 2007).

70. *See also* UTAH R. CIV. P. 65C(m)(1) ("If the court vacates the original conviction or sentence [pursuant to the state Post-Conviction Remedies Act], it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action.").

after weighing the benefits of the respective options,[71] RMIC agreed to file a state habeas corpus petition to vacate Goodman's conviction as opposed to striving to prove its client's innocence through the state Post-Conviction DNA Testing statute.[72] As part of this agreement, the prosecution vowed not to contest the habeas petition or seek a retrial on the grounds that the DNA evidence, while short of proving actual innocence, did create reasonable doubt about the conviction.[73] Goodman was released from prison in November 2004 but not completely cleared of the crime through any official declaration of innocence.

Should Goodman's case "count" as one involving actual innocence? The Innocence Project in New York lists Bruce Dallas Goodman as one of the innocent inmates freed through post-conviction DNA testing.[74] Cassell, Marquis, and McAdams, I suspect, might dispute this characterization. I imagine it is theoretically possible that Goodman acted with two or more unknown assailants in killing Williams, as the post-conviction prosecutors claimed, but there is no evidence whatsoever to support that version of the incident. In determining whether to classify a post-conviction reversal as a case of actual innocence, should the mere possibility of guilt, without concrete evidence, override overwhelming evidence of innocence and render that case ineligible for such classification? In my view, the answer is no; otherwise, virtually every case would come up lacking and this would run counter to the actual evidence from these matters, not to mention common sense.[75] Defining "exoneration" necessarily involves a value judgment along a spectrum of degrees of likely innocence.[76] Granted, attempts at classifying a case as one of actual innocence should aim as close to certainty as possible—requiring absolute proof, though, would be profoundly unrealistic.

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71. One benefit of the habeas corpus remedy for RMIC was that it permitted Goodman's release within five days. UTAH CODE ANN. § 78-35a-108(2)(a) (2002) ("If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action."); § 78-35a-108(2)(b) ("If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.").

72. *See* UTAH CODE ANN. § 78-35a-301 (2002) (amended 2007).

73. *See DNA Tests Set Man Free*, *supra* note 58.

74. *See* Innocence Project, Bruce Dallas Goodman, http://www.innocenceproject.org/Content/157.php (last visited May 14, 2008).

75. Proving a person's innocence definitively is essentially impossible—even in DNA cases, a prosecutor could always claim (in addition to or instead of the "unindicted co-ejaculator" hypothesis) potential contamination of the evidence as a source of doubt regarding innocence. *See supra* note 49 and accompanying text. Indeed, as Hugo Adam Bedau and Michael Radelet acknowledge, "absolute, definitive innocence is all but impossible to prove. Even in cases with DNA exoneration, one can argue that the lack of a DNA match could be explained by the mishandling of the evidence, for example, rather than the prisoner's innocence." *See* Michael L. Radelet & Hugo Adam Bedau, *Erroneous Convictions and the Death Penalty*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 269, 272 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

76. *Id.* ("Like guilt, where the standard for conviction is 'beyond a reasonable doubt,' not '100 percent certainty,' the determination of innocence is a question of where to draw the line on a continuum of probabilities of innocence.").

It is healthy for members of the innocence movement and its opponents to debate the merits of individual cases and, through this quasi-adversarial process, to develop the most accurate and comprehensive list of wrongful convictions. These skirmishes over individual cases, however, disprove neither the reality that wrongful convictions occur with alarming regularity in this country nor the efficacy of innocentric arguments in criminal law. The fact that the number of wrongful convictions is "unknown and frustratingly unknowable" means only that scholars and lawyers must painstakingly plumb the depths of post-conviction cases like that of Goodman to acquire as much information as possible about the scope of the problem.

B. *The Inevitability of Error Reconsidered*

The argument that wrongful convictions are inevitable is largely unassailable. Human beings are imperfect and, as a result, so are all systems devised by them.[77] Yet that does not mean that we, as a society, should be resigned to accepting the current error rate as a *fait accompli*.

As an initial matter, it is unclear whether governmental (both executive and legislative) decisions regarding criminal law explicitly countenance the conviction of the innocent in exchange for some greater societal good. I suppose that certain governmental and judicial choices—disallowing unfettered access to funds for public defenders to obtain expert witnesses, for example, or imposing statutes of limitations on post-conviction filings—reflect an implicit acknowledgment that there must be some fiscal and procedural line-drawing and that, as part of this demarcation, an understanding and tacit acceptance that certain errors will occur. Protecting the rights and freedom of the innocent, though, has long been exalted as a pillar, if not the pillar, of the Anglo-American approach to criminal law, as embodied in the oft-stated maxim that it is far better to let ten guilty people go free than to convict one innocent person.[78] To that end, wrongful convictions do not seem to be incidental effects of a system designed to maximize social benefit; on the contrary, they are direct, unabashed examples of the system's flaws.[79] Comparing criminal law, then, to regulatory determinations, such as road safety choices in which a certain number of innocent victims are invariably "sacrificed" for the larger societal benefit, is a poor analogy.[80]

77. *See supra* note 18 and accompanying text; *see also* Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1207 (2005).

78. This phrase is frequently attributed to either William Blackstone or Matthew Hale. *See, e.g.*, Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 482 (1996).

79. Steiker & Steiker, *supra* note 31, at 588 (noting how the infliction of capital punishment on the innocent undermines the legitimacy of the criminal justice system).

80. *See, e.g.*, *id.* (criticizing Allen and Shavell's comparison of wrongful convictions in the death penalty context and government bridge-building). In my view, the experiences of people harmed through the regulatory process differ substantially from those of the wrongfully convicted. As op-

Even presupposing that wrongful convictions can be viewed through the lens of costs and benefits, advocates of the collateral damage position may not have fully accounted for the extent of the costs inflicted by the conviction of the innocent.[81] In addition to the direct financial expense of incarcerating an innocent prisoner,[82] there are significant indirect societal costs. Most notably, the conviction of an innocent defendant often leaves the true perpetrator at large and therefore free to commit more crimes.[83] The cost imposed by that perpetrator's potential commission of an untold number of crimes may be difficult to quantify, but it is almost certainly sizeable.[84]

In the end, wrongful convictions do not strike me as consciously anticipated byproducts of government choices in the criminal justice arena, but rather as undesirable, unforeseen, and intolerable errors.[85] Admittedly, the reforms proposed by innocence projects and their allies to diminish the error rate must be critically examined to ensure that they actually do improve accuracy.[86] Some reforms put forth by the innocence movement almost surely pass muster. Providing additional funding, supervision, and training for state crime laboratories would undoubtedly bolster the accuracy of scientific testing by the government in terms of both identifying the right suspect and excluding the wrong one.[87] Likewise, increasing training and funding for indigent defense counsel might aid in the accuracy of criminal trials by evening the playing field with the prosecution in terms of resources and limiting the ability of prosecutors

posed to those who suffer in the regulatory context, outcomes for defendants in criminal cases, even just charging decisions, may stigmatize the accused for years to come and produce longstanding emotional and psychic effects on the individuals involved. *See, e.g., id.* (noting that "unlike the innocent victims of governmental bridge-building, those who are innocent and sentenced to death suffer the additional devastation of being blamed for a terrible crime; their names, families, and entire lives are forever tainted by this ignominy, quite apart from the death of their bodies").

81. *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2132 (2000) ("'[W]rongful convictions, and retrials and appeals . . . cost taxpayers millions of dollars [and] . . . foster[ ] a corrosive distrust in [the judiciary.]'") (quoting Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at N1).

82. According to government statistics, the average cost of incarcerating a federal inmate during the 2006 fiscal year exceeded $24,000. *See* Annual Determination of Average Cost of Incarceration, 72 Fed. Reg. 31,343 (June 6, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_register&position=all&page=31343.

83. *See, e.g.*, GRISHAM, *supra* note 9 (discussing how the wrongful convictions of Ron Williamson and Dennis Fritz in Oklahoma permitted the actual perpetrator of a vicious rape-murder, Glen Gore, to remain free for years).

84. Various economic studies suggest that a prisoner commits an average of greater than ten crimes per year when free, not including drug crimes. *See, e.g.*, John J. DiIulio, Jr., Op-Ed, *Prisons Are a Bargain, by Any Measure*, N.Y. TIMES, Jan. 16, 1996, at A17.

85. As Barry Scheck and Peter Neufeld have noted, wrongful convictions, like airline crashes, are colossal failures that must be investigated, studied, and ideally corrected. *See* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 98–99 (2002).

86. *See generally* Lillquist, *supra* note 18.

87. *See generally* Paul C. Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997).

to run roughshod over ill-prepared defense counsel.[88] Other reforms, such as requiring the aforementioned sequential lineup technique, may be more controversial and worthy of further assessment in the field.[89] In studying potential accuracy-related reforms, moreover, I concede that it is important to consider the issue of "lost" arrests or convictions and factor that risk into the measurement of the suitability of the proposed change.[90]

My primary point here is that the inevitable existence of errors in our criminal justice system should not necessarily be attributed to a conscious cost-benefit analysis by governmental decision makers (and thus acceptable as an outgrowth of democracy) nor generate a waving of the white flag of surrender by scholars and practitioners (and thus irremediable). Instead, it is crucial to continue working to reduce the error rate in the criminal adjudicatory process, even if eradication is an unrealistically naïve goal; in the fields of medicine and science, many advances emanated from researchers who refused to take inevitability for granted and inched forward, eager to push the boundaries of what was possible.[91] We should strive to do the same in criminal law.[92]

C. Innocentrism and Traditional Defender Values: Potential Partners in Crime (Defense)

The defense norms that have evolved over time tend to highlight constitutional rights and procedural protections—to buttress the supposition that defendants may be not guilty even if not factually innocent. Accordingly, the ambivalence with which some criminal defense attorneys and criminal law scholars have responded to the innocence movement is hardly surprising. What criticisms from the left occasionally appear to lack is an appreciation for innocentrism as a corollary to—not a replacement for—traditional defense theories; innocentrism simply provides another powerful tool in the strategic woodshed.

First, defendants will not inherently be disadvantaged by having jurors who have been exposed to tales of wrongful convictions. That is, de-

88. *See* Medwed, *supra* note 11, at 370–74 (discussing the inadequate funding of indigent defense counsel and some of the problems related to that inadequacy). For a more comprehensive description of the current "crisis" in indigent defense, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006).

89. *See supra* notes 25–27 and accompanying text.

90. *See supra* note 24 and accompanying text.

91. *See, e.g.*, Lillquist, *supra* note 18, at 898 ("Knowing that we will always convict the wrong person on occasion does not mean that we should cease attempting to improve the criminal justice system, and the death penalty system in particular. Despite repeated failures, scientists have not given up improving their theories, and there is no reason that those of us engaged with the criminal justice system should cease trying to improve it.").

92. *See* FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 108 (1927) ("[A]ll systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism.").

fense lawyers normally must make a choice early on in a case, prior to trial, regarding whether to pursue one of several theories: (1) a "he didn't do it" defense (e.g., mistaken identification or alibi), (2) a "he did it, but it was justified or excused" argument (e.g., self-defense or insanity), or (3) "the prosecution can't prove he did it" (e.g., the evidence is legally insufficient or there is room for reasonable doubt). Sometimes two of these theories can be paired as alternative options, but theories 1 and 2 are usually logically inconsistent and therefore incompatible. If a defense lawyer chooses to present theory 2, then, to be sure, that lawyer might be legitimately wary of jurors for whom factual innocence is the benchmark for a not guilty verdict. And this is exactly what *voir dire* during jury selection could achieve: allow that lawyer to clarify to all potential jurors that factual innocence is not a *sine qua non* for an acquittal and, in the process, seek to exclude those who believe otherwise. Social phenomena and "issues of the day" often influence potential jurors and compel lawyers to tailor their *voir dire* questioning to minimize the prejudicial impact of those events. Indeed, the innocence movement should be no more problematic for defense lawyers pursuing a justification or excuse strategy to overcome during jury selection than many other situations that attorneys face—say, prosecutors grappling with the "CSI Effect" in cases lacking biological evidence, namely, the erroneous impression purportedly created by recent television programs that suggest science is always available to solve crimes.[93]

Moreover, for defense lawyers who opt for theories 1 or 3 or, as is often the case, both of those theories in tandem, the spate of wrongful convictions and the attendant publicity is almost surely a strategic boon. Stories of wrongful convictions in the news would serve to reinforce in the hearts and minds of jurors that such cases do in fact happen and could happen here. A major obstacle to theories 1 and/or 3—the notion that the system accurately filters out innocent suspects early on—has been annihilated by the innocence movement, clearing the path (at least in theory) toward convincing jurors of the merits of a defendant's theory of the case more readily than in the past.

Second, a good number of the legislative reforms advocated by innocence projects would benefit both the factually guilty and the factually innocent. For instance, all criminal defendants stand to gain from calls to boost the funding available to indigent defense counsel as well as to in-

93. For years, there have been anecdotes about the effect of the television program *CSI* and its offspring on juror expectations regarding evidence at trial. Interestingly, the first empirical study relating to the "CSI Effect" was published in 2006 and concluded that

> [w]hile the study did find significant expectations and demands for scientific evidence, there was little or no indication of a link between those inclinations and watching particular television shows. This article suggests that to the extent that jurors have significant expectations and demands for scientific evidence, those predispositions may have more to do with a broader "tech effect" in popular culture rather than any particular "CSI Effect."

Hon. Donald 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).

crease training requirements and add greater monitoring of defender performance.[94] Similarly, proposals aimed at curbing police and prosecutorial misconduct would advance the interests of the guilty and innocent alike,[95] as would efforts to limit the misuse of jailhouse informants at trial.[96] That being said, some of the reforms heralded by the innocence movement—typically, those focused solely on improving accuracy—might be less than advantageous for the guilty. By way of examples, augmenting the resources of state crime laboratories would probably accelerate the testing of crime scene evidence and incriminate a larger number of suspects in a shorter period of time[97] and videotaping police interrogations, a reform that seeks to detect and prevent false confessions,[98] might add potent, visual fodder to a case against an accused where the defendant has already made a compelling confession on video.

I acknowledge that legislation directed at increasing the accuracy of the criminal investigatory and adjudicatory processes may hurt factually guilty defendants—an outcome that is not necessarily undesirable. As evidence linking a particular defendant to a crime increases, so too does the hurdle for raising plausible defense arguments under abovementioned theory 3 ("the prosecution can't prove he did it"), much less theory 1 ("he didn't do it"). Yet implementing procedural safeguards to those reforms designed mainly to bolster accuracy could alleviate some defender fears. To elaborate, greater resources for state crime laboratories would likely produce additional paperwork and methodologies for defenders to scrutinize (and criticize) if provided with thorough access during discovery, and fashioning stringent guidelines to govern the airing of videotaped interrogations to jurors could ensure that guilty defendants are not penalized too severely for inculpatory statements captured on tape. Even more, reforms that enhance factual accuracy by pinpointing the actual culprit and excluding the innocent suspect also improve the legitimacy of the criminal justice system as a whole. Criminal defendants who opt for trial might be given a greater benefit of the doubt by judges and jurors because presumably—in a world with a more accurate sys-

94. *See supra* note 88 and accompanying text.

95. *See* Medwed, *supra* note 46, at 171–75 (discussing how prosecutors rarely face discipline for misconduct and pressing for greater "sticks" to quell misconduct).

96. *See, e.g.*, ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM (2002).

97. *See generally* Gianelli, *supra* note 87. Likewise, DNA testing has not proven beneficial for the factually guilty. *See, e.g.*, Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1 (crediting Peter Neufeld with stating that in 40 percent of the cases handled by the Innocence Project in New York City, DNA testing helped both to exonerate the innocent inmate and provide evidence against the actual perpetrator).

98. *See, e.g.*, Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. REV. 891 (2004).

tem—only the strongest defense cases would proceed to that stage and forego plea bargains.[99]

Third, the contention that innocence is a "distraction" that conceptually weakens other critiques of the criminal justice system formulated by defenders neglects to account for the ability of innocentrism to complement, rather than supplant, those other arguments. As virtually every member of an innocence project would agree, constitutional violations and procedural unfairness are larger "problems" (in the sense of their frequency) than wrongful convictions. Few scholars would deny that dubious Fourth Amendment searches, seizures, and stops occur repeatedly across the country or that the Fifth and Sixth Amendment rights to effective assistance of counsel often seem hortatory in light of cases finding defense lawyers' performances sufficient even where they slept or were inebriated throughout trial.[100]

In my view, though, challenges to the unfortunate prevalence of constitutional violations and procedural unfairness are not at odds with innocentric arguments, whether raised to legislators or judges. This conclusion rests on a very simple premise: that innocence cases are often genuinely "different" from those hinging upon rights. That is, constitutional and procedural rights protect values beyond those of safeguarding the factually innocent; they reflect deeply rooted concerns with government overreaching, the dignity of the individual, and the need to defend the private citizen from the potentially overwhelming force of the state.[101] Accordingly, political calls for greater enforcement of "rights" may not clash explicitly with innocence-themed lobbying tactics, as the former

99. Prosecutors might be reluctant to offer generous plea bargains in cases that *they* perceive as strong. *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 553 (1987) ("If the prosecutor sees weaknesses in his case, his reaction is not to dismiss the case. Instead he offers a good deal to the defendant."). For an interesting paper contending that the plea bargaining regime helps innocent defendants, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

100. *See, e.g.*, Stephen B, Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 785–86.

101. *See, e.g.*, Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 630 (1999) (mentioning an array of purported justifications for the Fifth Amendment's privilege against self-incrimination). In particular, Green cites the following comment by U.S. Supreme Court Justice Goldberg:

> [The Fifth Amendment's privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusations, perjury, or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 630 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

principally (but not exclusively) revolve around fairness and the latter around accuracy.[102]

With respect to constructing arguments in court, again, innocence cases are unique. In such cases the underlying facts take on monumental importance, from pretrial motion practice through post-conviction briefing, and errors of law may soon fade into the background as secondary, even tertiary arguments. Conversely, in cases involving criminal defendants for whom "not guilty" rather than innocent is the most viable defense, legal errors often become the axis upon which the litigation revolves. The focal point of a case resting chiefly on constitutional violations and procedural issues also normally lies in pretrial suppression motions and hearings as well as post-trial filings (new trial motions, appellate briefs, collateral remedies), which are events far removed from jurors' eyes and ears.

At a fundamental level, innocentrism and classic systemic critiques of criminal law relating to constitutional violations and procedural unfairness are not irreconcilable; on the contrary, they are complementary and useful arguments in the halls of legislatures and in courtrooms. While these arguments may serve somewhat different purposes, they enjoy a symbiotic relationship—fairness and accuracy are not mutually exclusive. Constitutional and procedural protections help to guard against the conviction of the innocent and legislation focused on aiding the innocent, in turn, reinforces many of the values—individual dignity, minimizing the power of the state, and so forth—that animate the emphasis on constitutional and procedural rights in the criminal justice system.

D. Alas, the Problem Remains

As described previously, some commentators have noted that the spectacle accompanying each DNA exoneration, coupled with the perception that there are countless opportunities to appeal criminal convictions, may combine to create a popular sentiment that the system "works": that, even if some people are wrongfully convicted, they always achieve vindication in the end. All the more, the wave of exonerations stemming from post-conviction DNA testing is a contemporary phenomenon, a fleeting moment in history destined to pass once pretrial DNA screening becomes more and more commonplace across the country.[103] There is a very real risk, then, that the public may view the future decline in the amount of DNA exonerations as evidence that science has cured the malady of wrongful convictions—that DNA is a vaccine to injustice. This naturally is not and never will be the case; only an estimated 10 to 20 percent of criminal cases have biological evidence available for

102. The fairness, of course, sought to be achieved by the enforcement of constitutional and procedural rights also encompasses the protection of the innocent. *See id.*

103. *See supra* note 37 and accompanying text.

testing at the outset,[104] and much of this evidence regrettably is lost, degraded, or destroyed over time.[105] In addition, there is no reason to think that the documented factors that initially led to the wrongful convictions in those cases later unraveled by DNA—eyewitness identifications, false confessions, jailhouse informants, unreliable science, ineffective assistance of counsel, and police and prosecutorial misconduct—appear at any lower rate in the 80 to 90 percent of criminal cases that lack biological evidence.[106]

Still, as critics of the innocence movement have maintained, there may be a growing perception that the problem is "solved."[107] The eventual diminution in DNA exonerations and the misguided belief that the post-conviction process is endless (and effective) pose an enormous threat to the innocence movement, and one that must be addressed preemptively and immediately. Innocentric arguments should be reconfigured, as a matter of public relations and case strategy, away from DNA cases and toward those cases bereft of the magic bullet of science. For one, the public relations tactics of the innocence movement should highlight that DNA exonerations are the tip of the innocence iceberg, and that wrongful convictions lacking biological evidence suitable for DNA testing are far more pervasive and far more difficult to overturn in the post-conviction arena.[108] Additionally, the innocence movement must capitalize on this unique epoch in the history of criminal law by encouraging the passage of legislation structured to limit wrongful convictions in non-DNA cases. Preferably, this would include legislative reforms that extend beyond those relating to the criminal process generally (eyewitness identification procedures, for example) and that instead tackle arcane aspects of post-conviction procedure that apply solely to non-DNA cases, such as harsh statutes of limitations involving the presentation of nonscientific, newly discovered evidence and restrictions on appellate review of those claims.[109] This challenge by no means undercuts the vitality of innocentrism as a key aspect of criminal law theory and advocacy but, rather, merely signals that innocentrism needs to adapt to the changing environment or else face obsolescence in the future—at least until the next magic bullet of science materializes.

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104. *See Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 221 (2002) ("The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.") (statement of Barry Scheck); *see also* Liptak, *supra* note 97 (quoting Peter Neufeld as saying that "DNA testing is available in fewer than 10 percent of violent crimes"); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (noting that "only about 10 percent of criminal cases have any biological evidence—blood, semen, skin—to test").

105. *See supra* note 42 and accompanying text.

106. *See* Medwed, *Up the River*, *supra* note 43, at 657.

107. *See supra* notes 36–37 and accompanying text.

108. *See supra* note 43 and accompanying text.

109. *Id*.

CONCLUSION

Arguments grounded in concerns with factual innocence have gained increasing traction in the criminal law discourse ever since post-conviction DNA testing first exonerated a prisoner in 1989. Although many observers have lauded this development, the growing centrality of innocence-based arguments has not been received with unqualified glee. Skeptics from the right and the left have challenged the legitimacy and desirability of innocentrism as a core value in the criminal law discourse. This Essay has aspired to address the concerns raised by these skeptics and to demonstrate that innocentrism, while not manna from heaven, is a bipartisan (indeed, politically "centrist") issue that deserves a prominent place on the menu of theoretical, doctrinal, and strategic options for those who work in the area of criminal justice. I hope that scholars and other observers continue to contest the underlying assumptions of those of us involved with the innocence movement—to double-check the manner in which we "count" cases of innocence, in particular—and that the movement's natural allies in the defender community keep exploring the impact of innocentrism on the vast majority of criminal defendants for whom factual innocence is not a realistic (or valid) argument. Even so, innocentrism is a positive feature of the contemporary criminal law discourse that should be cherished and nurtured as a complement to other criminal law values.