**Judicial Review: Appeals and Postconviction Proceedings**
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Judicial review has provided at best an incomplete remedy for individuals convicted of crimes they did not commit. In a groundbreaking study, Professor Brandon Garrett (2011) examined whether and how judicial remedies helped 250 of the first DNA exonerees. By tracking these wrongfully convicted individuals' attempts to challenge their convictions in the courts *before* they obtained the DNA test results that ultimately led to their exonerations, his study provides a glimpse of what judicial review offers the wrongfully convicted who lack DNA evidence to prove their innocence. Of those who challenged their non-capital convictions, more than 90% failed — a success rate not significantly different from that of judicial challenges brought by similar defendants convicted of similar crimes who were not exonerated. Those who succeeded in securing a judicial order reversing their initial convictions often faced continued prosecution. Garrett's research "demonstrates that normal legal mechanisms were incapable of detecting innocence in these (now indisputable) innocence cases" (Aronson & Cole, 2009, p. 614). In another study comparing the cases of 260 defendants exonerated after conviction for committing violent felonies with the cases of 200 similar defendants who avoided conviction, Professor Jon Gould and his colleagues also noted that most of the wrongfully convicted individuals were freed only after action by prosecutors and pardoning authorities (Gould, Carrano, Leo, & Young, 2013a, p. 22). Judicial review may have played an indirect role in these exonerations by attracting the attention of advocates who helped to collect and present new evidence of innocence. Only rarely, however, did the judicial system correct its own mistakes.

This chapter examines the major forms of judicial review after conviction, the reasons why these remedies have served such a limited role in past exonerations, and various reforms that may increase the ability of judicial review to correct miscarriages of justice. A primary reason that judicial remedies have not provided a direct path to relief for the wrongfully convicted is that they were never intended to serve this purpose. Asking a judge to decide whether a conviction is factually accurate is like trying to fit a square peg in a round hole. Appeals and postconviction remedies in the United States were designed to ensure that police, lawyers, and judges follow the legal rules during the investigation or prosecution of the case. So long as the rules are followed, the adversarial process is presumed to produce reliable results. Adding exoneration of the factually innocent to the function of judicial review is a significant challenge, one that states are addressing incrementally. A discussion of the newer state remedies follows an explanation of conventional judicial review and its shortcomings in cases of wrongful conviction.

## I. Traditional Judicial Remedies and Their Limitations for the Wrongfully Convicted

### A. Motions for New Trial

Every state permits a person convicted at a criminal trial to file a motion for a new trial based on newly discovered evidence, but these motions have not been particularly helpful to the wrongfully convicted. The proof that exonerees need to successfully demonstrate their innocence – undisclosed testimony and evidence, witness recantations, new scientific methods or discoveries, new evidence of another's guilt – tends to surface long after trial and only with investigation assistance. In many states, new trial motions must be filed within a designated period ranging from a month to three years after sentencing. Even in states that have removed time restrictions for filing claims of innocence based on new evidence, the standard for relief is daunting, requiring that the evidence could not have been discovered earlier and is persuasive

enough to convince the judge that retrial would probably end in acquittal. A judge who just sentenced a defendant understandably may be "skeptical of claims that a defendant, fairly convicted, with proper representation by counsel, should now be given a second opportunity because of new information that has suddenly been acquired" (LaFave, Israel, King, & Kerr, 2007, § 24.11(d)).

**B. Direct Appeal**

The form of judicial review most commonly employed by the exonerees in Garrett's (2011) study was the direct appeal – all of the 165 individuals later exonerated by DNA analysis for whom written opinions could be located challenged their convictions on appeal. Appellate review in a few states is granted at the discretion of a court; but in most states, all convicted defendants have an opportunity to attempt to overturn their convictions on appeal. States are required to provide a transcript of the trial court proceedings and a defense attorney to assist if the defendant is indigent. Yet the direct appeal has proven to be of limited utility for wrongfully convicted defendants.

**Guilty pleas and appeals.** First, appeals are essentially useless to a person who seeks to overturn his conviction after pleading guilty to a crime he did not commit. As Professor Stephanos Bibas explains in this volume, people sometimes do admit committing crimes that they never committed, and research has helped to explain why this may happen. False pleas are especially difficult to overturn on appeal because one of the legal consequences of a guilty plea is waiving the right to appeal the very errors that might have led a defendant to decide that pleading guilty was his best or only option. For example, once a defendant pleads guilty, appellate courts will not hear arguments that his confession was coerced, that a witness lied to police, or that forensic evidence was unreliable. In some cases, a defendant may waive all judicial review as part of his plea agreement, barring appeal of any claim (King, 2013a). In order to overturn such a waiver or conviction based on a guilty plea, a defendant must usually show that his plea was involuntary or uninformed. Such claims are unlikely to succeed. After a defendant has stated in open court to the trial judge that he is pleading voluntarily, appellate judges are reluctant to credit a prisoner's claim that he lied then but is not lying now. In some states there are additional barriers to appeal for those who plead guilty, such as a certification from the trial judge that the appeal is not frivolous (LaFave, *et al*., 2007, § 27.1(a)).

**Record-based claims only.** Even for those wrongfully convicted after trial, the major shortcoming of the direct appeal remedy is that it corrects only flaws in the process by which the defendant's guilt was determined. Appellate judges will not second-guess the factual accuracy of a conviction (Findley, 2009, pp. 601-608). Unlike trial courts, where judges and juries evaluate testimony and other evidence first-hand, appellate judges lack the capacity to consider new evidence. Instead, they review only the existing trial court record. If a claim of error relies on evidence that is not in the record, the appellate court will not hear it. Most wrongful convictions are not traceable to mistakes evident from trial transcripts. Instead, as noted above, evidence that has exonerated the wrongfully convicted is typically new, discovered long after the defendant was sentenced. These mistakes are invisible to the judge or jury deciding a defendant's guilt. Because they involve proof that was never introduced in the trial court, they will remain invisible to appellate courts. If a claim rests on new evidence, it must await postconviction review, where new evidence can be introduced.

**Preserved, recognized claims only.** A wrongfully convicted defendant may be able to point to some errors in the existing trial record on appeal, such as: claims that the government's evidence should have been excluded; the judge unduly restricted defense counsel's ability to

challenge that evidence; jury instructions were misleading; or the prosecutor engaged in misconduct. But some features of criminal trials that we now know contribute to wrongful convictions will not be grounds for appeal, because they may not violate state or federal law. For example, the Supreme Court recently held that the Constitution does not bar juries from considering eyewitness identification testimony procured under unduly suggestive circumstances, so long as those circumstances were not arranged by police (*Perry v. New Hampshire*, 2012). Trial and appellate courts continue to credit eyewitness testimony with more reliability than it deserves (Thompson, 2009).

Even when a convicted defendant can point to a recognized error in the record, an appellate court will consider it only if the defendant's trial attorney promptly objected when the error occurred. If not, the error will be ignored by an appellate court, unless the defendant can demonstrate (again, using only the trial court record) that the error was obvious, and failure to grant appellate relief would result in a miscarriage of justice. These well-established rules regarding "contemporaneous objections" and "plain error" are designed to encourage trial attorneys to bring errors to the attention of the trial judge when they can be addressed fully by both sides, when evidence needed to resolve the matter can be introduced and considered, and when any error can be corrected efficiently with the least interruption of the proceedings. In practice, these rules mean that defendants whose lawyers fail to raise viable objections miss their chance at appellate relief.

**Demanding standards of review.** For errors evident in the record and properly preserved by objection at trial, the legal standards that govern relief also make it difficult for a defendant to persuade a judge to overturn his conviction. A defendant convicted of a crime he did not commit may claim on appeal that the totality of evidence introduced by the government at trial was insufficient to establish guilt beyond a reasonable doubt. Garrett found that more than 40% of the exonerees who sought judicial relief from their convictions before obtaining DNA tests raised an insufficiency claim, yet all of them lost (Garrett, 2011, p. 204). Appellate courts are reluctant to second-guess jurors on the basis of a "cold" record, with no access to the witness's demeanor, tone of voice, halting or nervous speech, nor to the reactions of the defendant. The insufficiency standard reflects this deference to jurors: Judges must reject these claims unless the prisoner shows that when viewing the evidence presented at trial in the light most favorable to the prosecution, no rational juror could find that the government proved guilt beyond a reasonable doubt (*Jackson v. Virginia*, 1979). After studying cases applying this standard, one scholar concluded that in practice, courts "uphold convictions unless there is essentially no evidence supporting an element of the crime" (Findley, 2009, p. 602).

In addition, "trial errors" such as the introduction of inadmissible evidence, are often considered "harmless" if, on balance, all of the other evidence supports guilt. Garrett reported that when the innocent individuals in his study challenged their convictions on appeal, they often lost, because judges decided the errors that had occurred at trial were harmless in light of other proof that the defendant clearly committed the crime (2011, pp. 200-202). For example, he found that 124 of the exonerees with appeals decided by written decisions had been convicted after faulty eyewitness identification. Although 70 of them challenged the identification evidence used against them, only five received any sort of relief. One-third of the 112 exonerees convicted with faulty forensic evidence challenged its admission after conviction, but only six succeeded (pp. 187-190). In summing up the remedy of direct appeal for the wrongfully convicted, one scholar commented that "the chances of a reversal on direct appeal bear no relation to the chances that the wrong person has been convicted" (Anderson, 2011, p. 391).

### C. Postconviction Review

The other major category of judicial review, provided in every state, is postconviction review, a judicial proceeding that allows a person to challenge his conviction using grounds that could not have been raised on direct appeal. Postconviction review is sometimes termed "collateral review" because it is often pursued as a new case challenging the conviction. It can encompass several different kinds of state remedies, including writs of habeas corpus and *coram nobis*, and various challenges to sentences. In every state, however, one all-purpose postconviction remedy serves as the primary judicial route for challenging criminal convictions other than direct appeal. In all but a handful of states, an application or petition for relief must be filed in the trial court where the petitioner was convicted. The available grounds for relief are usually defined by statute, and include claims under both state law and federal constitutional law.

When appeal and postconviction remedies in state court fail, a state prisoner may also challenge his conviction by filing a petition in federal court seeking a writ of habeas corpus under 28 U.S.C. § 2254. This federal postconviction remedy – essentially an order that the state release or retry the petitioner – is available only if the petitioner can prove that a federal constitutional violation affected his case. A similar remedy is available to federal prisoners.

**Limited access.** Not all prisoners will be able to use postconviction remedies. In federal court and in just over half of the states, postconviction review is limited to prisoners who are still incarcerated or on parole after their direct appeals have been completed. The mean sentence to incarceration for felony offenders in state courts is just over three years (Rosenmerkel, Durose, & Farole, Jr., 2009), a sentence that is barely long enough to complete the appellate process. Federal habeas review, which is available only to petitioners who have already completed state appeals and postconviction proceedings, is even more inaccessible. As a practical matter, it is out of reach for all but those serving the most serious sentences (King & Hoffmann, 2011, p. 73). Some defendants who plead guilty waive their right to challenge their conviction in postconviction proceedings as part of a plea agreement, and will be unable to use postconviction remedies without first proving that their plea was not voluntary (King, 2013a).

**Barriers to review.** A prisoner who does file a postconviction petition in either state or federal court may find his claim summarily dismissed if he missed the filing deadline (usually a complex calculation that varies with the facts), of if he had a chance to raise the error earlier but failed to do so. These pitfalls are a considerable risk because unlike the direct appeal, where the Constitution guarantees counsel, most states do not routinely provide attorneys to help investigate, compose, or litigate postconviction petitions, not even to prisoners who are illiterate or suffering from mental illness (King, 2013b). About half of the cases filed by noncapital prisoners in federal habeas proceedings and an unknown proportion of those in state postconviction proceedings are dismissed without merits review (King & Hoffmann, 2011, p. 78).

**Challenges in securing relief.** Even when claims are considered and not dismissed, review is usually brief. Although postconviction courts have the capacity to consider new evidence, in most states evidentiary hearings are granted in only a small percentage of cases, and hardly ever in federal court (King, 2013b; King & Hoffmann, 2011, p. 79). Harmless error rules and deferential standards of review also make it difficult to secure postconviction relief. Consider for example, a claim of ineffective assistance of counsel, a claim raised by a third to a half of all postconviction petitioners and by many of those in Garrett's study. This claim may be one of the only claims available to a petitioner whose lawyer's failure to object at trial forfeited appellate review of what would have been a viable claim of error. But the standard for proving

ineffective assistance requires a petitioner to demonstrate not only incompetent performance by his lawyer, but also that there is a reasonable probability he would not have been convicted had his lawyer acted competently. Success rates for these claims by all prisoners are estimated to be roughly 1%-5% for non-capital cases generally in state court, and far less than that in federal habeas proceedings (King, 2013b; 2012). For the innocent individuals in Garrett's (2011) study, the rate of relief was only slightly higher – only 4 of the 52 (7.7%) prisoners who raised a claim of ineffective assistance of counsel succeeded, and two of those were capital cases (p. 206). Even when judges reviewing these claims concluded that defense attorneys had been incompetent, they typically were so convinced by the evidence of guilt or so hesitant to disturb the verdict that they concluded competent assistance would not have made any difference in the jury's decision (pp. 206-207). For the exonerees who managed to file postconviction petitions, postconviction judges, like appellate judges, proved incapable of recognizing, much less remedying, their unreliable convictions.

## II. Stepping Back: Judicial Review as Process Enforcement: Why It Fails the Wrongfully Convicted

In addition to the various obstacles to relief examined above, the fundamental reason that judicial review has failed so many of the wrongfully convicted is that it was not designed to help them. Judicial review corrects process errors, not factual inaccuracy. A judicial order vacating a conviction is at most a step along the way to exoneration; it does not itself establish innocence.

We have seen that a key barrier to appellate relief for the wrongfully convicted is the inability of appellate judges to consider any evidence other than what is already in the trial record. By contrast, postconviction proceedings take place in the trial court, where judges can consider new evidence. Nevertheless, traditionally petitioners have not been permitted to use new evidence to relitigate factual guilt or innocence in postconviction proceedings. Until very recently, new evidence has been admissible only to support a claim that the trial was flawed, not that the result was false. The history of these remedies helps to explain why.

### A. The Origins of Process Review

The postconviction remedies available to convicted criminals today were first created in the middle decades of the 20th century for a specific purpose: to enforce constitutional rules of procedure newly recognized by the Supreme Court. Until that time, most of the rights granted to the accused by the Fourth, Fifth, Sixth, and Eighth Amendments in the Bill of Rights applied only to individuals charged with federal crimes in federal court. In the 1950s and '60s this changed. In a series of decisions, the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment required states to provide a long list of constitutional procedural protections before depriving an accused of his liberty. States for the first time were ordered to enforce new procedural rules in their criminal cases, including the Fourth Amendment's exclusionary rule for unreasonable searches and seizures, *Miranda* protections for the Fifth Amendment's privilege against self-incrimination, and rights to appointed counsel and a jury drawn from a representative cross-section of the community under the Sixth Amendment.

Federal courts became a battleground over state autonomy in criminal justice. Federal judges used the writ of habeas corpus to vacate convictions and order new trials for state prisoners who demonstrated that state courts had failed to honor the new constitutional rules. If a federal judge concluded that a constitutional rule had been violated, the judge would vacate the tainted conviction and order the state to release the defendant or to re-prosecute him using constitutionally valid procedures.

State postconviction remedies evolved in response. At first, many of the new constitutional claims, such as the failure of the prosecutor to disclose exculpatory evidence for trial, ended up in federal court, because states had no judicial proceeding in which they could be considered. Claims based on non-record evidence could not be considered on direct appeal in the state courts, and these new constitutional claims did not fit within the narrow category of challenges allowed as grounds for relief under existing collateral writs. By the 1970s, however, every state had adopted a new, primary postconviction remedy – a means for petitioners to enforce these new constitutional procedural rules in state court (King & Hoffmann, 2011, pp. 70-72). Many states replaced older remedies, modeling their new postconviction statutes after either the federal statutory remedy for federal prisoners adopted by Congress in the late 1940s, or the model statute of the National Conference of Commissioners on Uniform State Laws (LaFave, *et al.*, 2007, § 28.11(b); Wilkes, 2012-2013, § 2.5).

During the 1970s, shortly after these new judicial remedies had taken hold in the states, the number of people prosecuted in state courts increased dramatically. Federal and state courts consequently faced an unprecedented increase in the number of applications for relief from state prisoners. Aware of the progress that states had made in providing judicial review for constitutional violations in criminal cases, the Supreme Court began to scale back federal habeas review. In 1976 it barred review of almost all claims of illegal searches or illegal arrests. By the end of the 1980s it was much more difficult for a state prisoner to obtain review of any claim in a second or successive petition, any claim that could have been but was not raised in state court, and any claim based on rules announced after the direct appeal was complete (King & Hoffmann, 2011).

It was during the Court's rollback of federal habeas review that DNA analysis made its appearance, and brought with it credible claims that apparently lawful proceedings could end in the conviction of a person who had nothing to do with the crime. As scholars, advocates and judges called for judicial review to focus on the innocent, the Court built into its many restrictions on federal habeas review exceptions for those who could show they were probably innocent, sometimes termed "innocence gateways." For example, a petitioner could avoid summary dismissal of a belated claim that he should have raised earlier if he could show "probable" innocence. But proof of innocence persuasive enough to make it through this gateway meant only that the petitioner's claim of procedural error would be considered and not summarily dismissed. As the Supreme Court has emphasized repeatedly since it first created these innocence gateways, federal judges lack authority to vacate a state conviction unless a petitioner can show that a *constitutional* rule has been violated (*McQuiggin v. Perkins*, 2013). If the federal court does find that the state courts failed to enforce a constitutional rule of procedure, the conviction will be vacated, but the prosecution will have the option to try again to convict the probably innocent petitioner (*House v. Bell*, 2006; *Schlup v. Delo*, 1995).

Many states adopted restrictions similar to those the Supreme Court imposed on habeas review, also including similar innocence gateways. With only a few exceptions, state postconviction review retained its initial focus on enforcing the procedural protections for criminal defendants in the Bill of Rights. In other words, even after DNA began to expose how horribly wrong the results of constitutionally flawless criminal prosecutions could be, judicial review remained restricted to determining whether the investigation, pretrial, trial, plea, or sentencing *proceedings* were flawed, not whether a conviction was correct as a factual matter.

Attempts to change this procedural focus have met with limited success only in the past twenty years, and only in state courts. One argument that advocates have advanced is that the

right not to be punished if actually innocent is itself a constitutional right, and like other constitutional rights, postconviction courts should be able to review and remedy its violation. The Supreme Court, however, rejected this proposition, declining to hold that a defendant who has been convicted fairly, but inaccurately, has a constitutional right to be free from punishment, even execution. It explained in 1993, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." Habeas cases "are not forums in which to relitigate state trials" (*Herrera v. Collins*, 1993, pp. 400-401) (internal quotations omitted). Many continue to urge the Court to reconsider and recognize such a "bare innocence," "actual innocence," or "stand-alone innocence" claim as a viable basis for relief under existing postconviction remedies, but the Court has not done so (Hoffmann, 2012). Nor has it interpreted the Constitution to guarantee state defendants a right of access to appellate or postconviction review at all, stating instead that states have great "flexibility in deciding what procedures are needed in the context of postconviction relief" (*District Attorney's Office for Third Judicial District v. Osborne*, 2009, p. 69). The Court also has rejected a constitutional right of access to DNA testing through the courts, although judicial procedures to seek DNA testing must be fairly administered if a state provides them. As long as the Supreme Court avoids recognizing factual innocence as a federal constitutional error warranting relief, the states will not have to do so either.

In a recent divided decision, the Court did transfer to a federal trial court a stand-alone claim of innocence raised by a capital petitioner using an unusual procedure filed directly with the Supreme Court itself. After assuming that a sufficiently convincing showing of innocence would mandate relief, the lower courts in that case held that the petitioner's showing was not sufficient (*In re Davis*, 2009). Although some believe the Supreme Court's action in the case could be a first step toward recognizing a stand-alone claim of innocence as a basis for relief under the habeas statute, others have concluded that the Court's unusual order portends no such change. Nor has Congress modified the habeas statute to add a showing of actual innocence to the grounds warranting relief. Instead, its last reform of federal habeas review for state prisoners – the 1996 Antiterrorism and Effective Death Penalty Act—significantly restricted review by codifying and raising further the procedural hurdles earlier erected by the Court. That Act also barred federal courts from disrupting a state criminal judgment unless the state court's decision, based on the evidence it had at the time of its decision, and ignoring any new evidence or changes in the law since that time, was not only wrong but also objectively unreasonable (*Cullen v. Pinholster*, 2011; *Greene v. Fisher*, 2011).

As discussed in Part IV, the states have stepped into the breach here, beginning in recent years to expand their postconviction remedies to accommodate claims of actual innocence. Today state postconviction proceedings are better able to identify and correct at least some wrongful convictions. The changes have been limited and hard fought. Before turning to the reasons that courts and legislatures have been reluctant to expand judicial review beyond the correction of procedural error, it is helpful to examine how this unwavering procedural focus of appellate and postconviction review failed so many of those ultimately exonerated by other means, and why it will continue to handicap judicial review as a remedy for the wrongfully convicted.

### B. Why Process Review Falls Short

When judicial review is limited to enforcing rules of procedure, it is useless to a prisoner with new evidence of innocence but no viable procedural claim. For example, consider a person convicted on the basis of scientific evidence that was valid at the time of trial but was later

discredited. She has new evidence of innocence – the new science showing the evidence against her was unreliable – but is unable to point to any error at trial. At trial, the lawyers, the judge, and the jury followed the rules (Plummer & Syed, 2012). It is not surprising that courts rejected all stand-alone claims of innocence raised by exonerees in Garrett's (2011) study; these petitioners did not yet have DNA evidence, and the claim itself was unrecognized (pp. 202-203).

Not only does the procedural focus of traditional judicial review exclude those with no claim of procedural error, it means that judicial review is necessarily an incomplete remedy for those factually innocent defendants who do have winning procedural claims. Those defendants still must convince prosecutors or paroling authorities of their innocence even after winning their claims in court. The remedy for procedural error on appeal or postconviction is not exoneration. Indeed, it is rarely even a final dismissal of the charges. Only if a reviewing court finds that the government violated one of the few rules that bar prosecution, or that the government's evidence was so grossly insufficient that no juror could have found guilt beyond a reasonable doubt, will a successful challenge end the prosecution. Instead, a win demonstrates only that the conviction was the result of a flawed process, not that the defendant did not commit the crime. A conviction may be vacated, but the prosecutor can try again to comply with the rules. One of three additional actions, besides appellate or postconviction relief, must occur before the defendant no longer faces prosecution: (1) The defendant must be *acquitted* after a new trial; (2) the prosecutor must move to *dismiss* the charge and a judge must grant the motion; or (3) the state's pardoning authority must *pardon* the defendant. As Garrett (2011) found, for the innocent individuals in his study, "obtaining a reversal did not usually end their ordeal. Juries wrongfully convicted them multiple times" (p. 197). Gould *et al*. (2013a) also noted that "the vast majority of exonerations were achieved not because the courts stepped in and ordered a new trial or habeas corpus relief, but because governors or other political leaders, including parole boards, intervened," often with "the active support of prosecutors" (p. 22).

Even when an acquittal or dismissal ends a prosecution, it will not necessarily establish factual innocence. After all, an acquittal means that the proof fell short of proving guilt "beyond a reasonable doubt" and may be entirely consistent with *probable* guilt, or with a conclusion that the defendant actually committed the prohibited acts but lacked the requisite intent. A dismissal or pardon, even when preceded by the discovery of evidence raising doubts about guilt, may also be motivated or explained by reasons other than innocence, including the difficulty of retrying a "guilty" defendant decades after the crime, resource allocation (especially when the defendant has already served a significant sentence), the wishes of the victim, or political pressure. Because of the ambiguous meaning of relief produced by judicial review, innocent individuals cleared of charges have had to wait years for exoneration, often until the real culprits were convicted or confessed (Garrett, 2011, p. 180; Gross & Shaffer, 2012, pp. 99-100). For the same reason, researchers studying wrongful convictions have been careful to include cases of dismissal or acquittal in their studies only if there was *additional* convincing evidence of innocence (Gould, et al., 2013a, p. 39; Gross & Shaffer, 2012, p. 7). As the chapter by Griffiths and Owens in this volume details, many states limit compensation for the wrongfully convicted to those who have not only received judicial relief but who, in addition, have been pardoned or can meet stringent tests for proving factual innocence (Kahn, 2010). In sum, the process focus of judicial review deprives courts of the ability to bring an end to the nightmare suffered by the wrongfully convicted. Judicial remedies cannot be obtained except by forcing factual challenges into process boxes, and even then, relief usually does not end a prosecution or dispel inferences of guilt.

## III. Barriers to Reform

Cases in which individuals lost their challenges in court only to be later exonerated by DNA testing have made it difficult to deny how miserably judicial review has failed the wrongfully convicted. Reforms to change this situation have been incremental and more modest than innocence advocates have hoped. Before discussing what has changed so far, this section reviews some of the reasons, other than the historical and functional reasons mentioned above, that help to explain the persistence of the status quo.

### A. Federalism

Federal courts have special reasons to avoid recognizing new constitutional claims or remedies in criminal cases. Many federal judges turn to historical practice and original intent to help interpret the scope of the federal Constitution, and neither supports a second chance for a convicted defendant to litigate his factual guilt after conviction. Clemency, not judicial review, has historically "provided the 'fail safe' " for the wrongfully convicted (*Herrera v. Collins*, 1993, p. 415). Moreover, constitutional rights are necessarily general, applying in every state, and cumbersome to change. States do not necessarily agree about the criteria defining "actual innocence" of a crime, or by what standard innocence must be proven. A constitutional standard would require the Supreme Court to select among varied approaches. Non-constitutional rights, crafted by legislatures or state courts, can be tailored to individual jurisdictions and are much more flexible. Federal judges wary of unnecessarily interfering with state control in criminal justice matters often cite such federalism concerns when declining to enlarge constitutional obligations for state courts and officials. For example, when the Supreme Court rejected a constitutional right of access to DNA evidence for testing in state postconviction proceedings, it declined to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason," the Chief Justice wrote for the Court, "to constitutionalize the issue in this way" (*District Attorney's Office for Third Judicial District v. Osborne*, 2009, p. 55).

### B. Skepticism

Other concerns for state and federal legislators and for state and federal judges stand in the way of efforts to expand judicial relief for the wrongfully convicted. Confidence of lawmakers and judges in the reliability of judgments produced by the adversary system is well documented. Many also believe that the existing avenues for correcting these judgments – combining judicial review, prosecutorial discretion, and clemency – are already catching most errors, so there is no need to strengthen the safety net. For example, a recent study by Smith and colleagues (2011) confirmed that police, judges and prosecutors—key constituencies for any criminal justice reform effort—estimate the frequency of errors such as unreliable eyewitness identification and faulty forensic evidence at a much lower rate than defense attorneys. Compared to 92 % of defense attorneys who said procedural changes are needed to address wrongful convictions, only 30% of judges and 27% of prosecutors thought so. Given "prosecutorial hegemony over criminal justice policy," the authors of the study concluded that "advancing wrongful conviction reforms will be an arduous political task" (Smith, Zalman, & Kiger, 2011, p. 681).

### C. Cost and Efficiency

Some judges and legislators may consider it too costly to expand judicial remedies sufficiently to identify and correct these cases. Justice Antonin Scalia, for example, has expressed this view in several cases in which he opposed expanded remedies. He put it this way:

"It would be marvelously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault." Of course, he continued, "we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could" (*McQuiggin v. Perkins*, 2013, p. 1942) (internal quotations omitted).

Apprehension about increased costs looms over every decision concerning postconviction review, in part because the vast majority of existing postconviction petitions are meritless and lawmakers worry that expanding review may exacerbate this problem, making it even more difficult for judges to find the meritorious needle in the meritless haystack. Some research indicates that judges in the United States are more concerned about the cost of expansive postconviction review than judges in other countries, where imprisonment rates are much lower (Johnson, 2012, pp. 473-474; Roach, 2013, pp. 304-305). Even with only a fraction of convicts seeking appellate and postconviction relief in the United States, the volume of cases is staggering. And most of these cases are meritless, contributing to distrust of claims of innocence generally, particularly those based on recantations (Gross & Gross, 2013). Lawmakers who are willing to invest significant resources in the problem of false convictions may also prefer to opt for investing in reforms at the front end of the criminal justice system to prevent wrongful convictions before they occur rather than attempting to identify and rectify mistakes after they occur.

### D. Finality and Other Concerns

Opponents of expanded chances to litigate factual innocence after conviction have also expressed concern that defense counsel, judges, and juries will have less incentive to "get it right" the first time at trial if they know the defendant will have multiple chances to correct a mistake later (Wolitz, 2010, p. 1066). By weakening the finality of convictions, some have argued, additional avenues for review also may reduce the ability of the criminal justice system to deter crime and provide repose to crime victims. Prosecutors may worry that reforms to correct false convictions may end up benefiting some who are actually guilty, while defenders may worry that reforms privileging claims of innocence will make it even more difficult to ensure that the factually guilty are treated fairly (Risinger & Risinger, 2012, pp. 870-873).

Judicial reluctance to reopen convictions is not limited to cases alleging actual innocence. Forcing relitigation when evidence is stale and memories have faded may actually risk a less reliable outcome. Political pressure may make it more difficult for some judges facing reelection to reverse convictions, especially in serious cases (Steiker & Steiker, 2010). Judges generally have enormous respect for jury judgments, and may feel no more competent to assess factual guilt than the jurors. Judges who have come to trust the adversarial system and believe that the most accurate verdict is the one produced by sound and fair procedures, may decide that without some indication of unfair procedures, there is no basis for mistrusting a jury's judgment. Similarly, judges, whose expertise is in legal rules, may believe that pardoning authorities are as good or better than they are at sorting the innocent from the guilty after the conclusion of legally fair proceedings.

Finally, judges who do attempt to reconsider factual guilt after conviction may sometimes have a difficult time recognizing when a mistake has been made. Research has suggested that cognitive biases may distort a judge's ability to identify or admit that the wrong person may have been convicted (Findley, 2009, pp. 605-606). These unconscious effects may be exacerbated

when a claim of innocence is made to the very same judge that presided at trial, as it is in most states.

## IV. New and Expanded Judicial Remedies

Despite this catalogue of impediments to expanded judicial relief for those claiming innocence, every state in recent years has made some changes to judicial review to accommodate actual innocence claims. Indeed, as Garrett (2011) notes, "states have themselves revisited many of the legal obstacles that so substantially delayed exoneration" of the innocent people whose cases he examined (p. 239).

### A. DNA Testing Statutes

The most popular reform has been to help petitioners to obtain DNA testing of biological evidence through the courts. New York adopted the first postconviction DNA testing statute in 1994, and every other state has followed suit. Congress helped by making funds available to states that pass DNA testing statutes (Ginsburg & Hunt, 2010). Lawmakers also may have taken to heart arguments that the price of providing some prisoners with DNA tests is a good investment when compared to the combined cost of unwarranted incarceration of the innocent, continued litigation to resist their court challenges, and the harm to public safety if real offenders remain at large (Garrett, 2011, p. 233; Medwed, 2012, p. 153).

Most of these new statutes provide a means for a convicted person to obtain DNA testing of biological material tied to his case if he can demonstrate a reasonable probability that he would not have been convicted if an exculpatory test result had been presented at trial, although some have lower or higher standards (*District Attorney's Office for the Third Judicial District v. Osborne*, 2009; Wilkes, 2012-2013, § 1:8). Some of these statutes not only authorize courts to order tests, but also to consider the test results and decide what relief if any, might be appropriate. Many simply provide a means of procuring tests, and leave it to the petitioner to decide whether to file a postconviction petition using the test results as new evidence in support of a claim.

The speed with which state legislatures passed testing statutes is impressive. But DNA analysis is relevant in only a small percentage of cases, and is possible only in the subset of those cases where biological evidence has been collected and not lost (Garrett, 2011, pp. 263-265). In one-third of the states, testing is only available to those who contested their guilt at trial, not to those who have pleaded guilty. Some prosecutors have reportedly obtained waivers of the right to seek DNA testing as part of a plea bargain, just as some plea bargains waive other forms of postconviction review (Wiseman, 2012, pp. 961-967). All but five states exclude juveniles (Tepfer & Nirider, 2012), most exclude those convicted of all but the most serious crimes, and many bar those who did not request testing at trial (*District Attorney's Office for the Third Judicial District v. Osborne*, 2009). More than a dozen states limit testing applications to petitioners who contested identity at trial. All but a few require that applications be filed within a certain time frame, and some do not provide an appeal if testing is denied (Gabel & Wilkinson, 2008; Wilkes, 2012-2013, § 1:8). Courts thus far have generally rejected challenges that these restrictions are unconstitutionally unfair (LaFave, *et al*., 2007, § 28.11(a)).

The narrow scope of these statutes may be linked to concerns about the burdens of dealing with testing requests filed by guilty defendants who deny their guilt or hope for a mismatch or inconclusive result (Carroll, 2007). Indeed, among all the DNA tests procured by innocence projects, organizations that screen cases and accept only the most viable claims of innocence, an estimated 50-60% actually *confirm* guilt (Jacobi & Carroll, 2008, p. 270). To deter frivolous requests, some statutes require that if testing confirms guilt, petitioners must pay

for the costs of testing, and paroling and pardoning authorities must be informed of the adverse result. In at least one state, a prisoner whose tests confirm guilt will have to wait in prison two extra months before becoming eligible for parole. Another state requires that applicants must waive the statute of limitations for any felony offense matched through later DNA database comparison (Jacobi & Carroll, 2008; Medwed, 2012, p. 154).

**B. Innocence as a Ground for Relief in Postconviction**

In addition to providing a limited route to DNA *testing* after conviction, states are beginning to expand their all-purpose postconviction remedies to permit consideration of claims of innocence based on new evidence (Norris, Bonventre, Redlich, & Acker, 2011; Smith, 2012). In most states today, a petitioner may use the primary postconviction remedy to seek relief based on newly discovered evidence of innocence, although in some states the only authority for raising an innocence claim is set out in the DNA testing statute (Wilkes, 2012-2013, § 1:4). Among states that do not limit innocence claims to those with new DNA evidence, approximately six limit the type of new evidence to some sort or scientific evidence. Most states continue to require that, like other postconviction claims, the challenge be filed within a certain time frame and while the petitioner is still incarcerated or on supervised release. Statutes may bar or limit use by defendants who have pleaded guilty, or permit only claims backed up by DNA tests or new scientific evidence. If a state does not normally provide a right to a hearing in postconviction cases, or does not provide appointed counsel or expert assistance for those who cannot afford them, petitioners who raise actual innocence claims will go without as well. The burden of proof for a claim of innocence based on new evidence varies among states. Standards include a showing of probable innocence, clear and convincing evidence of innocence, "affirmative" proof, or evidence that "unquestionably" establishes innocence – burdens which some critics say are too high (Medwed, 2012, p. 125; Simon, 2012, pp. 205, 212).

**C. Special Innocence Remedies**

Rather than use existing postconviction remedies, a few states have adopted new separate judicial remedies for innocence claims, and have not experienced a flood of claims. In Virginia, a "writ of actual innocence" is available in the court of appeals for those seeking exoneration based on non-DNA evidence; about two-dozen applications are filed each year (State of the Judiciary Report, 2012). In Utah, even fewer applications are filed each year seeking relief under a new remedy also designed for prisoners with non-DNA evidence of innocence (Higgenbottom, 2013). Maryland and Washington D.C. have also adopted special "innocence" postconviction remedies for petitioners with new evidence.

Perhaps the most well known innovation is the Innocence Inquiry Commission in North Carolina. Drawn from similar commissions in Canada and the United Kingdom (Thompson, Hopgood, & Valderrama, 2012, pp. 401-447), the eight-member commission reviews claims of innocence and investigates those that meet specified criteria. Following investigation, the Commission determines whether to transfer the claim to a three-judge panel for a hearing and a decision about whether to vacate the conviction and dismiss the charge. Between 2007 and April 2013, the Commission has held five hearings, and exonerated four claimants (North Carolina Innocence Inquiry Commission, 2013). The Commission has federal grant funding for staff and other costs related to DNA testing, as well as state funding. It receives about 245 claims annually, most of which are rejected because the claimant has no new evidence, has no way to prove innocence, or did not claim complete factual innocence. Similar commissions have been proposed in several states, and advocates have argued that with more legislative control over the commission's budget and expenditures, an innocence commission is a more cost effective and

manageable alternative for addressing postconviction claims of innocence than expanding existing judicial remedies or recognizing new constitutional claims (Wolitz, 2010).

## V. Moving Forward

With the Supreme Court taking a back seat to state experimentation, the next decades are certain to produce even more innovative approaches for identifying and correcting wrongful convictions, as well as more information about the cost and effectiveness of various options. The experiences of past exonerees also suggest that a range of reforms would be helpful, not limited to revising judicial review procedures themselves.

### A. Ensure Adequate Indigent Defense Before Conviction

To improve the ability of any judicial remedy to catch and correct factual error in criminal cases *after* conviction, it is essential to improve the representation of defendants in trial courts *before* conviction. As the recent study of "near-miss" wrongful convictions most recently confirmed, effective defense at the outset can reveal weaknesses in a state's evidence and prevent wrongful convictions from occurring (Gould, Carrano, Leo, & Hail-Jares, 2013b). Moreover, when trial lawyers overlook errors, identifying and correcting those errors becomes much more difficult after conviction. Reviewing courts generally will not consider claims that a defendant's trial attorney could have raised but did not. For example, Garrett noted that many exonerees in his study who had been convicted on the basis of flawed expert testimony lost their best opportunities to challenge that testimony on judicial review because their trial attorneys failed to recognize its invalidity and attack it before conviction (2011, p. 189). Because effective judicial review depends upon effective assistance at trial, a discussion of how to improve judicial review of wrongful convictions at the back end of the criminal justice process must begin with providing adequate resources for the representation of the accused at the front end.

### B. Improve Judicial Review Mechanisms for the Wrongfully Convicted

There has been no shortage of proposals for changing judicial review in criminal cases to make it less difficult for innocent people to prove they have been wrongfully convicted. The reforms easiest to achieve politically probably are those that are narrowly focused on cases in which claims of innocence can be scientifically verified, such as provisions eliminating restrictions on access to DNA testing, and that permit courts administering existing remedies to consider claims of actual innocence based on DNA analysis or other new scientific evidence (Gabel & Wilkinson, 2008). Decisions recognizing stand-alone innocence claims under state constitutions, or changes that selectively set aside barriers and restrictions on relief for these particular claims, may also be more politically palatable than more sweeping modifications.

Another set of proposals is directed at overcoming barriers to state postconviction remedies generally, not necessarily limited to actual innocence claimants. Reforms such as providing postconviction petitioners with appointed counsel and resources for investigation, greater access to hearings, a judge other than the one who presided over the conviction, less deferential harmless error rules for unreliable eyewitness identification or informant testimony (Anderson, 2011; Findley, 2009, p. 633), and less onerous standards for relief (Simon, 2012) would probably make it easier for those with viable claims of actual innocence to secure judicial relief. But lawmakers, judges, and prosecutors concerned about the cost of applying these reforms to petitioners who raise frivolous claims are likely to continue to resist these more universal changes. An even more fundamental reform would be changing the traditional judicial review structure itself to allow claims that require fact finding to be litigated and resolved during direct appeal instead of only later during postconviction review, a model already followed in a few states. Advocates point out this procedure would be especially helpful to the wrongfully

convicted because it would provide counsel to assist them in gathering and presenting new evidence of innocence (Findley, 2009; Primus, 2010), but structural changes of this magnitude would face stronger political headwinds.

### C. Beyond Judicial Review

Past exonerations show that judicial proceedings alone are often not enough to secure either wrongfully convicted individuals' release from incarceration or an official statement of actual innocence. Even if every jurisdiction loosened restrictions on judicial remedies for challenging convictions with DNA and new scientific evidence, the shortcomings of traditional judicial review examined above would remain for those without such evidence. Improving judicial review for claims of actual innocence is not likely to eliminate the essential functions that non-judicial actors can and will continue to serve in securing exonerations.

**Prosecutors.** The most important of these non-judicial actors is the prosecutor. Professor Daniel Medwed, who has written extensively about the role of prosecutors in cases of actual innocence, summed up why: It is "difficult for the defense to get courts to examine the accuracy of [a conviction] without the prosecution's help" (Medwed, 2012, p. 125). Plenty of criticism has been heaped on prosecutors for resisting attempts at exoneration (Green & Yaroshefsky, 2009; Medwed, 2004; Orenstein, 2011; Zacharias, 2005). Prosecutors opposed DNA testing in about one-fifth of the first 250 DNA exonerations, and in some of these cases prosecutors continued to fight exoneration even after DNA results favorable to the defendant were returned (Garrett, 2011, p. 227). The list of explanations for prosecutorial resistance range from the sinister (racism, or deliberate cover-up) to the sympathetic (good faith disputes about the relevance of test results, or lack of sufficient resources). Prosecutors, like all humans, are susceptible to cognitive biases and tunnel vision (Medwed, 2012, p. 128). In most states, they lack clear ethical guidance addressing appropriate responses to postconviction claims or evidence of innocence (Ginsburg & Hunt, 2010; Zacahrias, 2005) and may have difficulty navigating the sometimes conflicting roles of advocate and minister of justice (Swisher, 2013). Prosecutors may work in offices where there are few incentives to expose or admit error, but plenty of disincentives: Admitting that an innocent person was prosecuted can carry significant professional, political, and psychological costs (Medwed, 2012, pp. 127-131). A prosecutor may also act out of concern for the victim of the crime, or concerns for future victims if the prosecutor believes that the person seeking exoneration is dangerous. A prosecutor may defer to the jury's judgment, or worry about encouraging frivolous claims, or hope to spare taxpayers the cost of large damage awards (Medwed, 2004).

Not only do prosecutors decide when further investigation is required, once doubts about guilt have been raised, they also choose whether to support exoneration, or settle instead for a remedy such as dismissal or a negotiated settlement that ends incarceration with less fanfare, leaves some ambiguity regarding factual guilt, and avoids accepting blame for a bungled prosecution (Gross & Shaffer, 2012, pp. 95-98). Attractive alternatives include a release dismissal agreement that trades the dismissal of charges for the release of civil claims, or a sentence of time served combined with an *Alford* plea in which the defendant pleads guilty while maintaining his innocence. Medwed (2012, p. 131) argues that the only cases in which prosecutors will be eager to champion exoneration are cases where investigative reporting by the media threatens reputational harm to the prosecutor, where the exoneration would harm a political adversary, where there is evidence implicating the actual perpetrator, or where the defendant is already serving a prison term for a different crime so exoneration would not release him (Medwed, 2004, p. 159).

Despite this criticism, prosecutors have cooperated in most cases of exoneration, and there is reason to believe that the percentage of exonerations in which prosecutors have been instrumental is increasing. Prosecutors are more likely now than they once were to investigate and present evidence of innocence after conviction, and advocate on behalf of the wrongfully convicted party. They sometimes complete the exoneration process that has begun with judicial review, or provide relief when judicial review is unavailable (National Registry of Exonerations, 2013). Because changing the way that prosecutors address these issues not only can help correct but also can help *prevent* wrongful convictions, a focus on prosecutors is at least as important as judicial remedies.

The most widely applauded reform is the creation of an innocence or postconviction unit, or "innocence wing" in the offices of urban prosecutors and state attorneys general (Scheck, 2010). So far, chief prosecutors in Arizona, and the cities of Dallas, Houston, Brooklyn, and Chicago are among those who have tasked staff with revisiting credible cases of innocence, sometimes with a DNA focus (National Registry of Exonerations, 2013). Incentives to reward efforts by prosecutors to join in or refrain from contesting legitimate postconviction claims of innocence are also promising (Medwed, 2012, pp. 133-13).

**Pardoning authorities.** Unlike a judicial order dismissing a charge or vacating a conviction for procedural error, clemency has the capacity to settle the innocence question, at least when it takes the form of an official statement that the conviction was factually erroneous. As a result, clemency has played a key role in remedying wrongful convictions, supplementing and substituting for judicial review. Even some recently enacted wrongful conviction compensation statutes require a pardon as proof of exoneration, in addition to an acquittal or dismissal (Texas Civil Code § 103.001). These developments suggest that efforts to improve relief for the wrongfully convicted should include attention to the clemency process.

As unregulated mercy, clemency can be denied for any or no reason, and without explanation. In some states a governor shares her pardon power with a board, which must join in or recommend relief (Barkow, 2009; 2008; LaFave, *et al*., 2007, § 26.2(c)). Researchers have suggested that the reasons boards and governors may decline to grant relief include doubts about their capacity to assess the facts any more accurately than the judicial system, fear of undermining public confidence in the criminal justice process, and above all, concern that a person once released may commit another crime, harming public safety as well as their own political careers. Although there are a few recent examples of governors who have exercised their pardon power more generously out of personal moral or religious conviction, there is also some evidence that shifting clemency power from the governor's office to an independent board "gives the executive some distance from the decision-making process so that decisions can be made without fear that one bad case will undercut the entire process" (Barkow, 2013, p. 338). More political independence may also prompt fewer decisions that end incarceration but leave open the question of factual guilt or innocence, forcing the individual to establish innocence in some other forum (Garrett, 2011, p. 234).

**Private attorneys, journalists, innocence projects.** Finally, to find and secure evidence of innocence to present to the judges, prosecutors, and pardoning authorities who have the capacity to grant relief, a wrongfully convicted person needs help reviewing and analyzing existing evidence, finding and interviewing witnesses, and working with experts. For many exonerees that help has come from volunteer investigators, journalists, and attorneys, including those now working with more than 70 Innocence Projects around the country. Innocence Projects, often based in law schools and supported by grants and donations, also identify and

screen claims of innocence and provide representation and advocacy for those seeking exoneration. It is estimated that these organizations have played a substantial role in one out of every five DNA exonerations so far (Gould, *et al*., 2013a; National Registry of Exonerations, 2013). Nearly 80% of the exonerees in Garrett's study initially sought DNA tests through innocence projects and postconviction attorneys (Garrett, 2011, p. 225).

States are unlikely to willingly take over the entire cost of conducting investigations that presently are funded privately, particularly if they decide that devoting more resources to *prevent* wrongful convictions might have a higher pay off in terms of saving taxpayer dollars than attempting to fix them later. Some have argued that states should authorize contingency fees for wrongful conviction litigation (Robertson, 2012; Tetelbaum, 2010). Alternatively, some state funding for existing innocence projects could help to provide the evidence and advocacy that is needed for judicial review to function. The Texas legislature, for example, provides funding to several innocence projects around the state. An advisory commission on wrongful convictions in Texas recently concluded that increasing this funding would be a more effective approach for identifying and correcting these cases than establishing a separate Innocence Commission with investigatory power like that in North Carolina (Timothy Cole Advisory Panel, 2012, pp. 34-35).

**Innocence Commissions.** An independent commission like the North Carolina Innocence Inquiry Commission has the capacity to investigate, adjudicate, and grant complete relief to the wrongfully convicted. Although it involves some judges as members of the commission and on the panels that ultimately decide whether to grant relief, the Commission operates as a separate agency, outside of the judicial branch. Indeed, the Commission's departure from the relentlessly adversarial method of decision making present at every phase of the judicial system may be one of its greatest assets. Creating an entirely new path to relief, rather than transforming or tinkering with existing adversarial proceedings in the courts, is an important option that other states are considering and many commentators support.

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Judicial review has proven to be an incomplete remedy for the wrongfully convicted in part because it was developed to make sure that the proceedings leading to criminal punishment complied with procedural rules, not to make sure that the right person was convicted. Finding effective remedies to correct the mistakes that result from lawful proceedings will take time and experimentation. Fortunately, this undertaking has already begun. When innocent people are convicted, we can hope that these reforms will help make their quest for exoneration less onerous in the future.

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