MISSING THE FOREST FOR THE TREES: FEDERAL HABEAS CORPUS AND THE PIECEMEAL PROBLEM IN ACTUAL INNOCENCE CASES

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INTRODUCTION

The DNA exoneration data stemming from the Innocence Movement exposes a harsh reality in our criminal justice system: existing post-conviction review procedures fail to accurately identify and remedy wrongful convictions of the innocent. While the layers of review available to prisoners are seemingly exhaustive, in fact, the actually innocent prisoner is confronted with little more than a façade of protection. This façade exists on direct appeal, where the court is focused on remedying procedural violations rather than engaging in fact-finding, and at the state habeas stage, where cognitive bias and deference to the trial court militate toward upholding criminal convictions. Finally, at the federal habeas stage, the procedural restrictions set out in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) often foreclose viable claims of innocence as well. In particular, the federal courts review second or successive habeas petitions in a piecemeal fashion, if they do so at all. In adopting this "piecemeal approach," the courts often miss the forest for the trees, allowing innocent prisoners to remain in custody.

This Article is inspired by Alfred Trenkler (Trenkler), whose story provides an illustration of the piecemeal problem. Trenkler has been incarcerated in federal prison for twenty years for a crime he did not commit. Since his trial in 1993, the evidence originally supporting Trenkler's murder conviction has been roundly discredited, piece by piece. Virtually all of the

circumstantial trial evidence has been undermined by new and more reliable information. In the process, numerous federal district and appellate courts have reviewed Trenkler's conviction, at times acknowledging fault with the trial evidence. Each court has either examined the evidence presented at trial, or reviewed new evidence that has since come to light. For example, the law enforcement database used at trial to support a modus operandi theory for the crime has been deemed to be unreliable hearsay. The co-defendant, who originally inculpated Trenkler, has since recanted his statements and claimed to have been threatened by government attorneys. New evidence of the co-defendant's long history of mental illness has also come to light. The jailhouse snitch, who testified to hearing Trenkler confess while in custody, received a dramatically reduced sentence following his testimony, and has since made a career as a government witness. Fingerprint evidence, not disclosed at trial, also exculpates Trenkler.

While this new evidence has come to light bit by bit, strict post-conviction statute of limitations periods have demanded immediate filings. Additionally, since his conviction in 1993, Trenkler has been largely unrepresented by counsel and has pursued post-conviction relief pro se. Each claim has been raised individually, either on direct appeal, or as part of a motion for new trial or a separate habeas petition. The courts have effectively reviewed each new claim in isolation, and no court has had the benefit of assessing all the new evidence in the aggregate. Thus, there has been no opportunity to view the evidentiary landscape as a whole and recognize that virtually every piece of evidence originally supporting Trenkler's conviction is no longer viable. In short, the courts have failed to see the forest for the trees. Trenkler sits in federal prison despite the absence of any credible evidence that he actually committed the crime.

This is true in spite of the express language in 28 U.S.C. § 2244(b)(2) of AEDPA, dictating that courts should view the "evidence as a whole" when reviewing successive habeas petitions.[1] In a recent article in the *National Law Journal*, Barry Scheck and several co-authors identified the problem of appellate and habeas courts reviewing post-conviction exculpatory evidence piece by piece in isolation, rather than considering the impact of the new evidence "as a whole."[2] However, since this 2011 article, there has been no further discussion of this "piecemeal problem" in the wrongful conviction

1. 28 U.S.C. § 2244(b)(2) (2012) (providing that a successive habeas petition will stand if "the facts underlying the claim, if proven and viewed in light of the evidence as a *whole*, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense" (emphasis added)).

2. Phillip G. Cormier, Andrew Good, Barry Scheck & Harvey Silverglate, *Federal Habeas Corpus and Actual Innocence*, NAT'L L.J., May 16, 2011, at 34, 34 (discussing two murder cases—the federal murder prosecution of Jeffrey MacDonald and the state murder conviction of Gregory Taylor—as contrasting examples of how the courts' tendency to view new evidence in isolation undermines the cause of justice).

scholarship.

This Article addresses the problem presented by the Trenkler narrative above and referenced in the Scheck article. In short, our system of post-conviction review fails to adequately rectify wrongful convictions. Although the protection of the innocent is not express in the Constitution, legal scholars have argued that this notion "animates" the Bill of Rights and is indelibly intertwined with our system of criminal procedure.[3] In denying post-conviction relief, a reviewing court will often point to the number of appeals and post-conviction petitions that a prisoner has already filed.[4] However, the rise of the Innocence Movement and the proliferation of exonerations in the past two decades support the argument that each stage of the review process fails to successfully identify and grant relief to the factually innocent.[5] Furthermore, even where convicted prisoners are able to petition the federal courts for habeas review, less than 0.4% of petitioners are granted relief of any kind.[6]

Parts I and II of this Article review each phase of the post-conviction procedures available to a prisoner, from direct appeal through federal habeas corpus. Part II focuses particular attention on federal habeas corpus procedures in the wake of AEDPA and the impact on factually innocent prisoners. Part III discusses how AEDPA was enacted to minimize the backlog of federal habeas petitions, but has nonetheless served to exacerbate the problems facing the innocent prisoner seeking relief. Part IV discusses the additional problems that arise when the hurdles created by AEDPA are viewed in light of the absence of a prisoner's right to counsel in the post-conviction process. It is an overwhelming task for an incarcerated individual without legal training to compile a habeas corpus petition.[7] Thus, it is not surprising that many claims

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3. *E.g.*, Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 140 (2012) (arguing that innocence protection is "axiomatic and elementary" in constitutional criminal procedure).

4. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 919 (2001) (discussing Governor George W. Bush's refusal to grant reprieve to death row inmate Gary Graham, in particular, his claim that Graham's case had been reviewed "more than 20 times by state and federal courts and by 33 judges" (footnote omitted)); *see also* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1029 (2010) (noting that in spite of a "perception that criminal convictions may be endlessly appealed and challenged collaterally, the reality is that . . . [upon] conviction, there are very few ways for criminals to make fact-based challenges to the verdict").

5. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 130 (2008) ("Analysis of data regarding known innocent convicts, from their trials through their appeals and DNA exoneration, does not provide reasons to be optimistic that our system effectively prevents serious factual miscarriages at trial, detects them during appeals or post-conviction proceedings, or remedies them through DNA testing."); *see also* Wolitz, *supra* note 4.

6. Joseph Hoffman & Nancy King, Op-Ed., *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at 8, *available at* www.nytimes.com/2011/04/17/opinion/17hoffman.html (noting that out of 17,000 petitions filed each year, only a "tiny fraction" of prisoners are granted relief).

7. *See, e.g.*, Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives*

are raised in a piecemeal fashion. Part V analyzes the "piecemeal problem" in our system of federal habeas review and, using the Trenkler case as an illustration, advocates how it can be remedied by the courts' broader interpretation of AEDPA's "evidence as a whole" language.

I. STATE POST-CONVICTION PROCEDURES

The first avenue of relief for a convicted prisoner raising a claim of actual innocence is direct appeal.[8] However, claims raised on direct appeal are limited to procedural errors occurring at the trial level.[9] The review for this type of error is, by definition, limited to the trial record, and as such, necessarily excludes claims requiring consideration of new evidence.[10] The appeal process is followed by collateral attack of the conviction in the state courts, including motions for new trial and petitions for habeas corpus.[11] At this step of the process, for the first time, a prisoner may raise claims involving newly discovered evidence, and the courts are not restricted to reviewing the trial record alone.[12] However, each of these avenues of relief at the state level presents substantial barriers for the actually innocent prisoner.[13]

A. Direct Appeal

Theoretically, the criminal appeals process should protect against and

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and the Antiterrorism and Effective Death Penalty Act of 1996, 30 AM. J. CRIM. L. 171, 173 (2003) (characterizing federal habeas litigation as a "complex journey" and referencing six threshold requirements for relief); Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2129 (2002) (discussing the difficulty facing pro se litigants seeking to compile a federal habeas petition while incarcerated).

8. BRIAN R. MEANS, POSTCONVICTION REMEDIES § 1:1 (2013) ("While the Supreme Court has never held that the states must provide for direct review of state criminal judgments, all states do permit appeal in the run of cases." (footnote omitted)).

9. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2009) (noting that appellate courts typically have "no mechanism that ensures litigants a right to introduce new evidence of innocence during the direct appeal process").

10. *Id.* ("Appellate courts do not hear new evidence, and limit their review to the evidence in the record—that is, to the evidence introduced in the trial court proceedings.").

11. MEANS, *supra* note 8, § 1:3 (discussing nature and scope of state habeas corpus proceedings); Findley, *supra* note 9, at 605.

12. 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, 664-65 (2005) (discussing state post-conviction procedure generally and characterizing newly discovered evidence claims as "an integral part of the state court landscape for criminal defendants").

13. Throughout this Article, the terms "factually innocent" and "actually innocent" are used interchangeably to refer to cases where the charged party either did not commit the crime in question, or no crime was committed at all. This category does not include the scenario where a conviction was obtained in violation of the Constitution, i.e., based on illegally obtained evidence or ineffective counsel.

correct wrongful convictions.[14] However, while every criminal defendant who has been convicted of a crime has a right to a direct appeal,[15] the appellate process has historically been primarily focused on remedying procedural transgressions at the trial level, rather than on addressing the guilt or innocence of the convicted.[16] The appellate courts are more concerned with whether the underlying trial procedure, rather than the result, was correct, and as such, factual innocence is typically not a viable basis of appeal.[17] This is true, in part, because the appellate courts are not meant to gauge the credibility of trial witnesses, and must typically view the evidence in the light most favorable to the prosecution.[18] Thus, the trial itself—rather than the appellate process—is meant to be the primary venue for challenging guilt and promoting factual innocence.[19] Further, even in the rare circumstances where courts do find error in the trial record on direct appeal, the appellate courts often characterize these transgressions as "harmless" and thus, not worthy of reversal.[20]

Further, the exoneration data recently compiled by Professor Brandon Garrett suggests that appellate courts are failing in their function to correct wrongful convictions.[21] Professor Garrett has reviewed and analyzed the first 200 DNA exonerations in the United States to determine why courts routinely

14. Findley, *supra* note 9, at 592 ("Providing a failsafe against erroneous judgments about factual guilt is thus a uniquely important core function of the appellate process in criminal cases.").

15. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1256 (3d ed. 2000) (noting that "[i]n the federal system and in most states, statutes or state constitutional provisions guarantee defendants in all felony cases a right to appellate review").

16. *See* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 917 (2011) (commenting that the "[t]ruth is simply not a central . . . concern on appeal"); *see also* Garrett, *supra* note 5, at 94 (noting that "current doctrine excuses constitutional error on grounds of guilt, yet does not provide innocence claims that convicts can assert").

17. Findley, *supra* note 9, at 601-02 (asserting that factual innocence is not a viable claim on appeal and noting that courts are concerned that the process, rather than the outcome, be "error-free"); *see also* Wolitz, *supra* note 4, at 1037 (noting that the right of appeal is ingrained in our system, but appellate courts have "few mechanisms available" for fact-finding).

18. *See* BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 183 (2011) (noting that appellate courts "must typically accept the testimony of the witnesses as true rather than reconsider the case based on a cold record").

19. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1021 (2011) ("It's only a slight exaggeration to say that fact finding in American courts is a one-act play entitled *Trial*.").

20. *See* GARRETT, *supra* note 18, at 201 (noting that thirty percent of the DNA exoneration cases involved written opinions finding "harmless error" at trial).

21. Garrett, *supra* note 5, at 130; *see also* Findley, *supra* note 9, at 592 ("[J]udging by the recent evidence, especially the empirical evidence from cases in which postconviction DNA testing has proved that an innocent person was wrongly convicted, the appellate process in criminal cases is largely a failure on this most important score.").

fail to correct the errors causing so many criminal defendants to be convicted at trial in spite of their undisputed factual innocence.[22] While Professor Garrett's findings are extensive, most notable for purposes of this discussion is the fact that just fourteen percent of the factually innocent defendants who were ultimately exonerated by DNA evidence initially won a reversal on appeal.[23]

This figure is roughly equal to a control group of defendants who won reversal on appeal under generally similar circumstances.[24] This "matched comparison group" was comprised of cases involving defendants charged with the same type of violent crimes, in the same jurisdictions, and occurring in the same timeframe as in the exoneration group.[25] These findings indicate that, on direct appeal, courts overwhelmingly failed to recognize valid claims of innocence and instead affirmed these convictions eighty-six percent of the time.[26]

B. Motion for New Trial

A defendant may also challenge a conviction in a criminal case via a motion for new trial. Unlike the appellate process, a motion for new trial allows the petitioner to argue error beyond the trial record.[27] This procedure is available in every state as an avenue to raise a claim of newly discovered evidence supporting factual innocence.[28] Additionally, a petitioner may introduce new evidence in support of a constitutional violation such as ineffective assistance of counsel or juror misconduct.[29]

A motion for new trial based on newly discovered evidence is often filed

22. Garrett, *supra* note 5, at 58-59 (describing scope of article as "present[ing] the results of an empirical study that examines how our criminal system handled, from start to finish, the cases of the first 200 persons exonerated by postconviction DNA testing in the United States" and noting that the study "looks in depth at the reasons why these people were wrongfully convicted, the claims they asserted and rulings they received during their appeals and postconviction proceedings"); *see also* GARRETT, *supra* note 18 (including a more expansive discussion of the first 250 DNA exonerations).

23. Garrett, *supra* note 5, at 98 (discussing the article's "central finding" that "appellate or postconviction courts reversed 14% of exonerees' convictions, or 9% if one excludes capital cases").

24. *Id.* at 102-03 (noting comparable reversal rate among study's "matched comparison group" not involving exoneration cases).

25. *Id.* at 102.

26. *Id.* at 106, 125-26 (noting that study's findings "bolster scholarship contending that our criminal procedure rights skew the way lawyers litigate toward procedure and away from substance").

27. Medwed, *supra* note 12, at 665 (discussing motions for new trial as a vehicle for raising claims of newly discovered evidence).

28. *Id.* at 665-66 (noting that "every state provides for a motion for a new trial on the basis of newly discovered evidence").

29. *See id.* at 665.

with the original trial judge.[30] This practice arguably undermines the premise that a motion for new trial presents an opportunity for meaningful review of a criminal conviction. Further, it creates the potential for bias.[31] Specifically, legal scholars have posited that cognitive bias operates to subconsciously prejudice judges toward upholding their prior decisions.[32] In the context of a claim of actual innocence, this bias may manifest itself in a variety of ways. For example, as Professor Daniel Medwed has suggested, when faced with new evidence of innocence, a judge may "unconsciously dismiss the alleged newfound information as irrelevant or otherwise characterize it as not outcome-determinative," in order to make findings consistent with the trial court result.[33] Further, in states where judges are elected, the pressure to be tough on crime can also influence the courts' decisions.[34] There is also a tendency to defer to the jury's decision, perhaps in order to give the impression of accuracy and to promote confidence in the criminal justice system.[35] Finally, in some states, there is no right to appeal a motion for new trial, but even where there is, the standard of review requiring abuse of discretion is often regarded as so high that it effectively precludes relief to a defendant claiming actual innocence.[36]

Astonishingly, not a single DNA exoneree in Professor Garrett's study was successful in raising a post-conviction claim based on new evidence of actual innocence; every request for a new trial on this basis was denied.[37] Thus, while

30. *Id.* at 659-60 (commenting that the original trial judge assigned to state habeas review is "a person who may have a vested interest in the outcome").

31. *See id.*

32. For a more complete discussion of the impact of cognitive bias in this context, see Medwed, *supra* note 12, at 699-704 (reviewing scholarship on behavioral decision making and cognitive bias as applied to the judicial context); *see also* Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 89-90 (2008) (discussing cognitive bias in the judicial context); Findley, *supra* note 9, at 605-06 (discussing cognitive bias in the judicial context and noting that such "biases are likely reflected in the many cases in which appellate courts have expressed confidence that the defendants before them were guilty, or that the evidence of guilt was 'overwhelming,' even where DNA later proved that the defendants were in fact innocent"); Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 UTAH L. REV. 99, 108, 125, 130 (2012) (noting that "judicial cognitive biases . . . [dictate] that the same judges who presided over the original trials . . . [are not] suited to be the final arbiters of a recantation's trustworthiness").

33. Medwed, *supra* note 12, at 703 (discussing implications of behavioral decision-making theory in the judicial context).

34. *E.g.*, Findley, *supra* note 9, at 606-07 (noting empirical evidence supporting the idea that political "pressures [on elected state court judges] to be 'tough on crime' do have a significant impact on judges").

35. *Id.* at 607 (noting the tendency of state court judges to defer to the "mystical truth-divining power of the jury").

36. *See* Medwed, *supra* note 12, at 680 (discussing the highly deferential nature of the abuse of discretion standard applied in appellate review of a denial of a motion for new trial).

37. GARRETT, *supra* note 18, at 185.

a motion for new trial allows expansion of the trial record and is theoretically an apt venue for claims of actual innocence, in reality such motions are rarely granted.

C. State Habeas Corpus Review

Once a prisoner has exhausted all direct appeals and has directly attacked the conviction via motion for new trial, the avenues of relief available have been characterized as "extraordinary and extremely narrow."[38] While a direct appeal is typically not the appropriate venue for a claim of actual innocence, other post-conviction collateral attacks provide an avenue to raise new evidence of innocence—at least in theory.[39] Most states now provide for some type of procedure for collateral post-conviction attack, such as state habeas corpus or *coram nobis*.[40] These procedures are either based in common law or, more frequently, codified in statute or court rule.[41]

However, while these procedures for state post-conviction collateral attack are in place in most jurisdictions, their effectiveness in identifying meritorious claims of actual innocence is up for debate. Studies have shown that state habeas proceedings do not effectively remedy constitutional errors occurring at the trial level.[42] For example, a Texas study determined that state courts' written findings were lifted directly from the prosecution's briefs in 83.7% of habeas corpus petitions.[43]

Additionally, state post-conviction procedures, including habeas corpus and *coram nobis*, have been criticized as duplicitous and unduly complex.[44] Particularly in jurisdictions where these measures exist in addition to motion for new trial procedures, the multiple layers of relief available can result in

38. Wolitz, *supra* note 4, at 1037 (discussing the narrow applicability of post-conviction relief for convicted prisoners who have exhausted their direct appeals).

39. Kathleen Callahan, *In Limbo:* In re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 643 n.95 (2011) (identifying just eight states that allow for freestanding substantive claims of innocence in state habeas corpus proceedings).

40. Medwed, *supra* note 12, at 681 (discussing "current modes of collateral relief" in the state post-conviction context).

41. *Id.* (noting the "shift from common law systems of state post-conviction relief in favor of statute- and rule-based regimes").

42. *See, e.g.*, Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 366 (2001) (noting that error rates in state capital cases are extremely high, yet frequently go uncorrected by state courts in post-conviction proceedings).

43. Williams, *supra* note 4, at 929-31 (citing to statistics regarding Texas state appellate courts' treatment of state habeas petitions).

44. *See* Medwed, *supra* note 12, at 695-97 ("While the presence of multiple remedies at the state court level may seem desirable or at least better than the alternatives, a single option or no remedy at all, the interrelationship between these devices within any given jurisdiction can be perplexing.").

conflicting standards and can ultimately create confusion among the litigants.[45]

At the state level, each stage of review of a criminal conviction fails to effectively address the plight of a prisoner claiming innocence. While the innocent prisoner is presented with a façade of protection in the form of direct appeal and collateral attack of the conviction via motion for new trial and state habeas review, nothing lies beneath the surface. On direct appeal, the courts focus on procedural errors and a defendant's actual innocence is generally regarded as outside the scope of this review.[46] Further, state collateral proceedings, which are at least theoretically designed to address new evidence of innocence, operate under norms that heavily gravitate toward upholding the conviction.[47] Thus, at the state level, the factually innocent prisoner is left with the cold comfort of a plethora of review procedures, but no meaningful assessment of guilt or innocence after the trial.

II. FEDERAL HABEAS CORPUS AND AEDPA

Once the state direct-appeal and post-conviction procedures discussed above have been exhausted, a prisoner also has the right to federal habeas corpus review.[48] However, while federal habeas corpus proceedings theoretically provide an additional layer of protection against ongoing incarceration of the innocent, these petitions are virtually never granted.[49] Further, the landscape of federal habeas procedure has been so altered by the enactment of AEDPA that the remaining protections available to the actually innocent prisoner are essentially nonexistent. The role of actual innocence claims in the context of federal habeas corpus procedure continues to be debated. The Supreme Court has so far ruled that a freestanding claim of actual innocence does not amount to a constitutional violation, and thus, is not a viable basis for habeas corpus relief.[50] However, a claim of actual innocence

45. *Id.* at 696 (discussing Tennessee state post-conviction procedures and noting conflict between requirements for introducing new evidence via motion for new trial and via post-conviction relief).

46. Gross, *supra* note 19, at 1021 (noting that although a criminal defendant has the right to an appeal upon conviction, the "appeal only provides a review *of the record of the trial*, and that review is for procedural error rather than factual accuracy").

47. *See* Williams, *supra* note 4, at 920 (noting the failure among state courts to provide meaningful review, especially in capital cases).

48. MEANS, *supra* note 8, § 4:1 ("[F]ederal habeas corpus . . . provides a postconviction remedy for prisoners collaterally attacking convictions obtained in state court.").

49. *See* Hoffman & King, *supra* note 6, at 8 (noting that out of 17,000 petitions filed annually, just sixty to seventy prisoners are granted relief).

50. Joshua Lott, *The End of Innocence? Federal Habeas Corpus Law After* In Re Davis, 27 GA. ST. U. L. REV. 443, 453 (2011) (noting that in the seminal federal habeas corpus case, *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court "held that a substantive claim of actual innocence based on newly discovered post-trial evidence is not cognizable").

accompanied by an alleged constitutional violation may be raised in a federal habeas petition.[51]

A. A Brief History of Federal Habeas Corpus

Habeas corpus has historically been referred to as the "Great Writ of Liberty"[52] and is referenced in the Suspension Clause[53] of the United States Constitution. Its origins stem from a combination of common law and both constitutional and statutory law.[54] Habeas corpus has been characterized as a "celebrated" mode of relief with "a grand purpose" and has been called a "great constitutional privilege."[55] Further, the Great Writ has been identified as "one of the most important and cherished procedural innovations in the shared legal histories of England and the United States."[56]

Originally used as a means of bringing incarcerated prisoners to court, the Writ of Habeas Corpus has evolved into a "complex set of procedural rules,"[57] designed to protect against unconstitutional incarceration.[58] It has historically served to "check the abuse of government power."[59] With the passage of the Habeas Corpus Act of 1867, Congress altered the focus of habeas relief to address constitutional transgressions.[60] Subsequently, Congress further expanded the scope of habeas corpus in the Habeas Corpus Act of 1948.[61] This new act allowed for habeas review of violations of both the Federal Constitution and federal law.[62]

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51. *Id.* (noting that "federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding").

52. See Lyn Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 78-82 (2005), for a more complete history of the writ of habeas corpus.

53. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

54. NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY 5 (2011) (noting that the "source of judicial authority to issue the writ . . . is . . . an unusual hybrid of common law, constitutional law, and statute").

55. *See* Hack, *supra* note 7, at 173 (discussing the "exuberant" rhetoric attached to the Writ of Habeas Corpus).

56. KING & HOFFMANN, *supra* note 54, at 2.

57. *See* Lott, *supra* note 50, at 448 (noting that "the writ has expanded today into a complex set of procedural rules and is the primary method used to challenge the legality of one's imprisonment").

58. *See* KING & HOFFMANN, *supra* note 54, at 2-12 (discussing history of the Writ of Habeas Corpus in detail).

59. *Id.* at 3.

60. *See* Entzeroth, *supra* note 52, at 79-80 (discussing the history of federal habeas corpus in detail).

61. *Id.* at 81.

62. *Id.* (noting that the "1948 habeas statute provides review to prisoners detained by a

During the latter part of the twentieth century, a convergence of judicial trends and societal changes set the stage for an explosion in the number of federal habeas petitions filed each year. This abrupt increase in filings was the impetus to the radical changes to federal habeas corpus law on the horizon. First, in the 1950s and 1960s, the Warren Court presided over the "due process revolution," deciding a series of landmark cases that significantly expanded the meaning of "liberty" interests, and thus, the constitutional claims available to state prisoners seeking federal habeas relief.[63] For the first time, the Court expanded its interpretation of a defendant's rights under the Due Process Clause of the Fourteenth Amendment to include the right to exclusion of wrongfully seized evidence, the right to counsel in criminal proceedings, and the right to receive warnings prior to custodial police interrogations.[64] Additionally, the Warren Court recognized early release and good-time credit calculations as constitutionally based liberty interests.[65]

In response to the changes in federal habeas litigation, Judge Henry Friendly published an influential article in 1970, arguing that the Great Writ had strayed too far from its original purpose and that federal habeas corpus review should focus exclusively on claims of actual innocence.[66] The underlying premise of Judge Friendly's argument seemed to be that the number of federal habeas petitions filed each year had reached unmanageable levels, and a focus on actual innocence would drastically reduce these numbers while also focusing the courts' limited resources on the most deserving petitioners.[67]

While not expressly articulated, Judge Friendly's view that actually innocent prisoners were few in number, if not virtually nonexistent, seemed to

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state or federal government when such detention violates the federal constitution or federal law").

63. KING & HOFFMANN, *supra* note 54, at 10 ("The Supreme Court, under the leadership of Chief Justice Earl Warren and Justice William J. Brennan, responded to recurring and serious injustices inflicted upon state criminal defendants—especially minorities and the poor—by interpreting the Due Process Clause of the Fourteenth Amendment to require the states to provide defendants with various new federal rights.").

64. *Id.* at 10 n.43 (noting the expanded rights afforded to criminal defendants as a result of the Due Process Revolution under the Warren Court).

65. Nancy King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Consequences*, 58 DUKE L. J. 1, 6-7 (2008) (discussing a series of Supreme Court decisions from the 1970s that recognized parole issues and good-time credit calculations as "liberty interests").

66. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142-43 (1970) (arguing that "with few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional pleas with a colorable claim of innocence").

67. *Id.* at 144 (arguing that the number of federal habeas petitions was overwhelming the courts, and as of 1970 "comprise[d] the largest single element in the civil caseload of district courts" and noting a similar explosion of state habeas petitions as well); *see also* Wolitz, *supra* note 4, at 1038 (noting that Judge Friendly's proposal placed "greater emphasis on actual innocence over procedural violations," thus resulting in more "attention on the most deserving petitioners").

fuel his argument. Specifically, his argument stemmed from the judicial-economy perspective that restricting petitions to colorable claims of actual innocence would severely curtail the number of filings.[68] However, at the time he wrote this article, Judge Friendly could not have foreseen how the Innocence Movement would uncover hundreds of wrongfully convicted, actually innocent prisoners in the coming decades.[69]

Close on the heels of the due process revolution and the subsequent rise in the number of federal habeas filings, the 1990s brought about a significant increase in U.S. prison populations, along with a similar increase in the length of sentences imposed.[70] In fact, state prison populations more than doubled from 1990 to 2007.[71] These changes resulted in a further increase in the number of petitions filed each year.[72]

B. The Passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

It was in this atmosphere, in the wake of an explosion in the annual numbers of federal habeas petitions filed, that Congress debated and ultimately enacted AEDPA in 1996.[73] AEDPA overhauled the procedures governing federal habeas corpus petitions.[74] Prior to this legislation, critics of federal habeas corpus review claimed that the system had become "too unwieldy, expensive and time-consuming."[75] Thus, the often-cited goals of AEDPA were to reduce delay and administrative inefficiencies in processing federal habeas petitions, and to avoid redundancies in state and federal courts.[76] Congress

68. Friendly, *supra* note 66, at 148 (commenting that the "most serious single evil with today's proliferation of . . . [federal habeas petitions] is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to represent the accused").

69. *See id.* (characterizing federal habeas petitions as a "gigantic waste of effort" at the time the article was written); *see also* Sussman, *supra* note 42, at 370 n.116 (noting the Innocence Project's claim that at least 108 persons have been exonerated by DNA evidence).

70. King & Sherry, *supra* note 65, at 13-15 (discussing changes in the state prison population from 1990-2004).

71. *Id.* at 15 (discussing Bureau of Justice Statistics data indicating that "state prison populations grew in absolute terms, jumping from 295,819 in 1980, to 684,544 in 1990, to 1,395,916 in 2007").

72. *Id.*

73. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4-22 (1997) (discussing the background of, and debate leading up to, the passage of AEDPA).

74. *See id.* at 1.

75. Wolitz, *supra* note 4, at 1038 (discussing historical criticism of federal habeas corpus procedures).

76. Tushnet & Yackle, *supra* note 73, at 5-6 (identifying the three "perennial problems attributed to the habeas system" as: "1) the delays associated with federal habeas in the wake of state court consideration of prisoners' federal claims; 2) the inefficiencies associated with prisoners' failure to comply with state and federal procedural rules; and 3) the ostensible

attempted to address the perceived phenomenon of "abuse[] of the writ" and the substantial time accruing between conviction and execution of sentence, particularly in death penalty cases.[77] The new legislation ostensibly sought to balance the competing interests of finality and fairness, by limiting the seemingly endless review of criminal judgments while ensuring a just result for the convicted.[78]

Congress also sought to combat the administrative "redundancies" involved in the pre-AEDPA federal habeas procedures.[79] In particular, the federal courts' *de novo* review of most state habeas decisions was considered to be a waste of judicial resources, and Congress thus sought to provide for greater deference to the state courts in the interest of judicial economy.[80]

The enactment of AEDPA had a profound impact on habeas corpus jurisprudence. However, upon signing the bill into law, President Clinton focused primarily on the statute's anti-terrorism measures rather than its provisions impacting post-conviction procedure.[81] AEDPA was debated in the wake of the Oklahoma City bombings, and pressure on President Clinton to avoid appearing "soft on crime" arguably influenced him in supporting the bill.[82]

Lawmakers perceived that federal courts were besieged by state prisoners filing frivolous habeas claims, and they believed that the courts were on the verge of becoming effectively impotent.[83] Further underlying the passage of

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redundancy of federal adjudication of claims previously rejected in state court").

77. Krystal Moore, *Is Saving an Innocent Man a "Fool's Errand"? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 U. DAYTON L. REV. 197, 204 (2011) (commenting that prior to AEDPA, existing procedures offered "the incentive and opportunity for delay" in filing and processing federal habeas petitions).

78. *Id.* at 204 (noting that "[c]omplaints of delay and wasted judicial resources marked the debate that led to passage of . . . AEDPA").

79. *See id.* ("Additional problems included the fact that state court interpretations or application of federal law were not binding in subsequent federal habeas proceedings. Federal courts reviewed de novo state court decisions on questions of law and mixed questions of law and fact.").

80. *Id.* ("Congress enacted the AEDPA to curb abuses of the writ by giving deference to state courts." (citation omitted)).

81. Tushnet & Yackle, *supra* note 73, at 21 (commenting that President Clinton "vigorously supported the anti-terrorism provisions of the AEDPA, and was at best indifferent to the inclusion of habeas corpus revisions in the statute"). *But see* Sussman, *supra* note 42, at 358 n.73 (noting President Clinton's comments regarding AEDPA's purpose to eliminate unnecessary delay in capital cases).

82. Williams, *supra* note 4, at 923 (discussing passage of AEDPA generally and the political motives behind President Clinton's support).

83. *See* Kyle Reynolds, *"Second or Successive" Habeas Petitions and Late-Ripening Claims after* Panetti v Quarterman, 74 U. CHI. L. REV. 1475, 1478-79 (2007) (discussing political climate at the time AEDPA was enacted, with national security at the forefront of the congressional agenda, along with concerns about federal courts "besieged by" habeas petitions).

AEDPA was Congress's apparent disdain for the federal courts' willingness to grant habeas relief, particularly in death penalty cases.[84] Although at the time AEDPA was being debated, the overall success rate of federal habeas petitions was less than 1%, 60 to 70% of the successful petitions arose out of death penalty cases.[85]

C. AEDPA and the Innocence Movement

When Congress passed AEDPA, it could not have foreseen the profound impact of the Innocence Movement in the decades to follow.[86] Led by the Innocence Project and a network of similar organizations around the country, this movement brought hundreds of exonerations to the forefront. It has also served to undermine confidence in the American criminal justice system, previously thought to be virtually error-free and a model for the world.[87] Additionally, this movement brought about numerous significant reforms in the criminal justice system.[88] While Congress sought to address the unrestricted filing of "frivolous" federal habeas petitions by obviously guilty prisoners,[89] the fact that significant numbers of these petitioners were wrongfully convicted and

84. Entzeroth, *supra* note 52, at 88 (noting that "[a] subtext of AEDPA appears to have been lawmakers' displeasure with the ability, and perceived willingness, of federal courts to act independently and actually grant writs of habeas corpus to state and federal prisoners, and particularly prisoners on death row").

85. Christopher Smith, *Federal Habeas Corpus Reform: The State's Perspective*, 18 JUST. SYS. J. 1, 2 (1995) (citing a 1994 study and noting that "more than ten thousand habeas corpus petitions absorb the time and resources of U.S. district courts each year, even though fewer than 1 percent of such petitions are successful").

86. JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 16 (2008) (noting that "[t]he renewed interest in wrongful convictions was catapulted forward by the introduction of DNA testing in the late 1990s"); *see* GARRETT, *supra* note 18, at 218-21 (commenting that the development of mitochondrial and Y-STR DNA testing did not occur until the late 1990s, further expanding the number of cases amenable to DNA testing).

87. *See* GARRETT, *supra* note 18, at 6 ("DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system's accuracy. This sea change came about because of the hard work of visionary lawyers, journalists and students . . . [from the Innocence Project]."); *see also* Stephanie Roberts Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, 22 B.U. PUB. INT. L.J. 129, 136 (2013) ("The pioneering work of the Innocence Project and other Innocence Network members, and its impact on the criminal justice system, cannot be overstated.").

88. *See generally* Robert Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301 (2011) (discussing the legislative and policy reforms in the criminal justice system in the fifty states in the wake of the Innocence Movement).

89. *See* Reynolds, *supra* note 83, at 1479 (discussing the purpose of AEDPA "to restrict the filing of frivolous habeas petitions that are disruptive or judicial finality and parasitic upon official time").

factually innocent was not yet widely known[90] and did not seem to enter the debate. In fact, as of 1996, when AEDPA was passed, fewer than thirty prisoners had been definitively exonerated by DNA evidence.[91] That number has since multiplied tenfold, to over 300.[92] This figure does not include the hundreds more non-DNA and other group exonerations, such as the Ramparts scandal in Los Angeles or the Boston Crime Lab scandal involving pervasive misconduct by chemist Annie Dookhan.[93]

1. The Age of Innocence

Today, thanks in large part to the forensic use of DNA technology, the American criminal justice system has entered "the age of innocence."[94] There is now virtually universal recognition that wrongful convictions occur far more frequently than was historically imagined and certainly more often than is morally acceptable.[95] While there is considerable debate among legal scholars as to the scope of the actual innocence problem in the United States, most are in agreement that the number of known exonerations to date represents the mere "tip of the iceberg."[96] This understanding is based in part on the premise that

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90. *See* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 106 (2011) (characterizing DNA exonerations as a "fairly recent phenomenon").

91. *See Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know (last visited Nov. 13, 2013).

92. *Id.*

93. Gross, *supra* note 19, at 1018 (discussing "mass exonerations" involving police scandals where law enforcement planted evidence or crime labs mishandled it); Sally Jacobs, *Annie Dookhan Pursued Renown Along a Path of Lies*, BOSTON GLOBE (Feb. 3, 2013), http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html (discussing Annie Dookhan's role in the Boston drug lab scandal and her confession to altering test results and mishandling evidence in thousands of criminal cases).

94. Medwed, *supra* note 12, at 656 (characterizing the last fifteen years as the "true 'Age of Innocence,'" citing the impact of DNA evidence in exposing wrongful convictions and leading to legal reform of criminal justice procedures) (citation omitted). *See also* Hartung, *supra* note 87, at 130 (using "Age of Innocence" reference in the same context).

95. *See, e.g.*, Wolitz, *supra* note 4, at 1028-29 (noting that "the problem of innocence [in the American criminal justice system] will not go away" and calling the Innocence Movement "the most dramatic story in American criminal law over the past two decades"). *See also* Findley, *supra* note 16, at 918 (characterizing U.S. wrongful conviction rate as "clear and disturbing"); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1035 (2012) ("DNA exonerations reveal that wrongful convictions of actually innocent defendants occur, and, most likely, continue to occur with disturbing frequency."). *But see* Smith, *supra* note 3, at 143-44 (discussing debate regarding true rate of wrongful convictions in American criminal justice system).

96. *See, e.g.*, GARRETT, *supra* note 18, at 11 (noting that the 250 known DNA exonerations which are the subject of his book reflect "just the tip of an iceberg"); Norris et al., *supra* note 88, at 1302 (identifying known exonerations as "mere tip of the iceberg" given that most involved DNA evidence and a trial, in contrast to overwhelming majority of criminal cases where no DNA evidence exists and the defendant did not go to trial); Smith,

although the overwhelming majority of exonerations have been based on DNA evidence, DNA cases represent a very small percentage of criminal cases overall.[97] DNA cases tend to involve charges of rape and murder, where biological evidence is most prevalent.[98] It is much more difficult to establish innocence in non-DNA cases because of the subjective nature of the evidence.[99] Furthermore, even in those cases where biological evidence was in fact obtained, and in theory could be tested in order to establish the defendant's innocence, such evidence is often lost or destroyed by the time it is sought in the post-conviction process.[100]

Furthermore, the exonerations occurring since the dawn of the Innocence Movement have almost exclusively stemmed from convictions after jury trial, rather than guilty pleas.[101]The focus on jury trial convictions is logical given that these convictions typically result in longer prison sentences, and Innocence Projects have historically been more willing to devote their limited resources to exonerating incarcerated individuals, rather than those who have already served their sentences.[102] Moreover, while over ninety-five percent of all convicted criminal defendants pleaded guilty,[103] very few exonerations come from this pool. Aside from the reduced sentences typically involved in guilty pleas, defendants who plead guilty also often relinquish many appellate and post-conviction rights and thus face greater procedural hurdles in seeking relief.[104]

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supra note 3, at 143 (discussing the "substantial number of innocent women and men [who] are residing within United States prison walls" and identifying the known exonerations as merely the "tip of the iceberg" (footnote omitted)); Ware, *supra* note 95, at 1038 ("[T]he number of innocent defendants wrongly convicted cannot be quantified. That number is unknown and probably unknowable." (footnote omitted)).

97. Medwed, *supra* note 12, at 656-57 (discussing the central role of DNA evidence in exoneration cases).

98. Gross, *supra* note 19, at 1019 (commenting that the exonerations to date "consist almost entirely of a subset of the most serious false convictions for rape and murder").

99. Medwed, *supra* note 12, at 657-58 ("In . . . non-DNA cases, prisoners must find alternative means to support their innocence claims, frequently, 'newly discovered evidence' not susceptible to a test tube, such as confessions by the actual perpetrator, statements by previously unknown witnesses, and/or recantations by trial participants. . . . [N]on-DNA cases are difficult for defendants to overturn . . . given the subjectivity involved in assessing most forms of new evidence and the absence of a method to prove innocence to a scientific certainty." (footnotes omitted)).

100. *Id.* at 656-57 (estimating that approximately eighty to ninety percent of criminal cases do not have DNA evidence, and noting that in many cases originally involving biological evidence, such evidence has been lost or otherwise rendered useless over time).

101. Gross, *supra* note 19, at 1019 (commenting that the exonerations to date "consist almost entirely of a subset of the most serious false convictions for rape and murder . . . [and] they underrepresent guilty pleas").

102. *Id.* at 1022 ("All actors in the process, from governors to innocence projects to the media to the courts themselves, concentrate their time and attention on those cases with the most extreme outcomes: death sentences, life imprisonment, and other extreme sentences.").

103. *Id.* at 1013 (noting that "about 95% of all defendants who are convicted of felonies" pleaded guilty rather than going to trial).

104. *Id.* at 1022 ("Innocent defendants who plea bargain . . . are far less likely to be

2. Rate of Wrongful Conviction of the Innocent

In light of these factors, projecting wrongful conviction rates poses a significant challenge. Legal scholars have attempted to extrapolate the numbers of known exonerations based on various characteristics. On one end of the spectrum, Professor Michael Risinger estimates the true rate of conviction of the innocent could be as high as 5% of overall criminal convictions.[105] This figure is bolstered by a 2012 study conducted by the Urban Institute, setting the rate of wrongful conviction of the innocent at as high as 15%.[106] At the other extreme, the more conservative view shared by Supreme Court Justice Antonin Scalia and prosecutor Joshua Marquis set the wrongful conviction rate much lower at .027%.[107] Another recent study conservatively estimates the rate of "actual innocence" convictions as between .5 and 1% and notes that even at this modest rate, 5000 to 10,000 factually innocent defendants are wrongly convicted of felonies each year.[108]

Whatever the exact rate of conviction of the innocent, new data and analysis of the known exonerations to date have led legal scholars to new realizations. In particular, post-conviction judicial procedure, from direct appeal to state and federal habeas corpus, has failed to identify and remedy wrongful convictions far too frequently.[109] Professor Keith Findley, Co-Director of the Wisconsin Innocence Project, has argued that the "failure of the

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exonerated . . . . [T]hey have a harder procedural row to hoe. One of the rights they waive by pleading guilty is the right to a direct appeal; and many statutes and procedural rules that deal with alternative modes of review—from state habeas corpus to post-conviction DNA testing—limit or foreclose access by defendants who pled guilty.").

105. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (discussing results of review of wrongful capital rape-murder conviction data from the 1980s to extrapolate rate of wrongful conviction of the innocent at 5%).

106. *See* JOHN ROMAN ET AL., URBAN INST., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 1-6 (2012), *available at* http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf (discussing results of Urban Institute Post-Conviction DNA Testing and Wrongful Conviction study, involving review of 634 Virginia sexual assault and homicide cases from 1973-87, where available biological evidence was tested revealing a wrongful conviction rate of factually innocent defendants as high as 15%).

107. *See* Smith, *supra* note 3, at 143-44 (discussing in depth the debate regarding the wrongful conviction rate in the United States).

108. Marvin Zalman et al., *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72, 72 (2008) (estimating rate of wrongful conviction at .5-1% based on qualitative estimates of errors in death penalty cases, and noting the correlating number of wrongful convictions in felony cases as 5000 to 10,000 annually).

109. *See* Tim Bakken & Lewis M. Steel, *Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825, 829 (2011) (describing the plight of the wrongful conviction of innocents as "dire"); *see also* Callahan, *supra* note 39, at 642 (noting that "recent DNA exonerations have pulled the issue into the spotlight and shifted national consensus toward favoring the provision of legal avenues of relief to the wrongfully convicted" (citation omitted)).

American adversarial system to ensure reliable outcomes and to protect the innocent is . . . beyond dispute."[110] He has further noted that in light of the proliferation of exonerations in the last two decades, the "perception of accuracy [in our criminal justice system] is becoming increasingly difficult to maintain."[111]

3. Brandon Garrett's Exoneration Data Study

Further, as discussed in Part I above, in his book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Professor Brandon Garrett presents his comprehensive study of the first 250 DNA exonerations in the United States.[112] His study reveals that appellate courts overwhelmingly dismissed claims of innocence where the defendant's factual innocence has subsequently been established beyond dispute.[113] In fact, just thirteen percent of direct appeal and post-conviction claims in the exoneration cases won reversal: a number comparable to the reversal rate in rape and murder cases overall.[114] Remarkably, Professor Garrett notes that very few petitioners raised claims of actual innocence either on direct appeal or in the post-conviction process, and those who did "had no better success raising claims asking for a new trial on the basis of evidence of their innocence."[115] In fact, of the 250 exoneration cases featured in the study, every express claim of innocence was rejected in the judicial process.[116] The study goes on to identify the most common factors giving rise to wrongful convictions as coerced confessions, mistaken eye-witness identifications, faulty forensic evidence and informant testimony.[117]

4. Recalibrating the Balance of Post-Conviction Policy Interests

The ubiquitous nature of conviction of the innocent arguably makes the need for reform in our criminal justice system—from pretrial investigation to trial, direct appeal, and collateral post-conviction procedures—even more

110. Findley, *supra* note 16, at 918 (further characterizing wrongful conviction rate as "clear and disturbing").

111. Findley, *supra* note 9, at 608.

112. GARRETT, *supra* note 18, at 5-13 (describing the scope and purpose of the study as an examination of the 250 known exonerations to help identify the primary substantive and procedural causes of wrongful convictions).

113. *Id.* at 184 (noting that just thirteen percent of exoneree cases resulted in reversal in spite of the universal factual innocence of the petitioners).

114. *Id.* (noting that the 13% reversal rate in the exoneree cases was "no different from the reversal rates of other rape and murder trials") (citation omitted).

115. *Id.* at 184-85.

116. *Id.* at 185 (noting that all appellate and post-conviction innocence claims from the exoneration cases "were rejected").

117. *Id.* at 185-94 (discussing the most common factors present in the exoneration cases).

pressing.[118] While significant reforms have occurred at the pretrial and trial phase in the last decade,[119] very few comparable reforms have been implemented in the post-conviction context. Now that the existence of errors in our system is beyond dispute, the need to recalibrate the balance between the competing interests at play in post-conviction jurisprudence is more apparent. For example, the desire for finality must be weighed against the countervailing mandate to promote fairness by identifying and remedying convictions of the innocent.[120] At the time AEDPA was debated and enacted, the balance perhaps justifiably tipped toward finality. After all, convictions of the innocent were an anomaly at best, and abuses of the writ were widespread.[121] However, in light of the universally acknowledged innocence problem in the American criminal justice system today, a recalibration is warranted.

Notably, since the rise of the Innocence Movement in the mid-1990s, legal scholars have successfully brought about reforms in the context of pretrial investigation procedure. Relying on exoneration statistics indicating that eyewitness misidentifications, coerced confessions, and forensic evidence are the primary causes of wrongful convictions, legal scholars have advocated for reforms.[122] Indeed, this body of scholarship has had a notable effect on criminal procedure, resulting in significant policy changes in pretrial procedure.[123] For example, as a result of this scholarship, state and local police departments in various jurisdictions have begun to implement significant policy changes relating to police interrogations and eyewitness identification procedures.[124]

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118. *See, e.g.*, D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 874 (2011) (noting a recent "conclusion by a significant number of informed observers of the criminal justice system that conviction of the innocent is common enough to call for substantial systemic reforms to address the phenomenon").

119. *See* Norris et al., *supra* note 88, at 1303-20 (discussing various reforms of pretrial procedure in response to the Innocence Movement).

120. *See, e.g.*, Wolitz, *supra* note 4, at 1028-40 (noting the "enduring resistance of our judicial system to recognizing post-conviction claims based on factual innocence" and discussing judicial interest in finality versus fairness).

121. *See Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know (last visited Nov. 12, 2013) (identifying less than fifty DNA exonerations as of 1996, when AEDPA was enacted).

122. *See, e.g.*, Bakken & Steel, *supra* note 109, at 830 (arguing that an "assembly-line" approach to criminal prosecutions does not allow for careful investigation and identification of the factually innocent); *see also* Norris et al., *supra* note 88, at 1303-20 (discussing results of detailed survey of reforms of pretrial procedure in response to the Innocence Movement); Wolitz, *supra* note 4, at 1036 (arguing that the adversarial model makes trial a game, with the outcome dependent on who is the more skilled lawyer, rather than what is true or "right").

123. *See* Norris, et al., *supra* note 88, at 1303-19 (presenting results of detailed survey of reforms of pretrial procedure in response to the Innocence Movement, including policy changes regarding recording of police interrogations and manner in which police present suspect to witnesses in eyewitness identification procedures).

124. *See id.*

Similarly, the Innocence Movement is arguably responsible for some significant changes in state post-conviction procedure as well. For example, many states have extended the statute of limitations period for new trial motions based on newly discovered evidence in the last two decades.[125] Further, every state, with the exception of Oklahoma, has now passed DNA access laws requiring law enforcement to preserve biological evidence in criminal cases and allowing convicted prisoners access to such evidence upon a showing of relevance.[126]

However, no comparable set of reforms has occurred in the federal post-conviction context in the wake of the Innocence Movement. In fact, while AEDPA passed in 1996 and was responsible for overhauling federal habeas corpus procedure, this critical piece of legislation was debated and enacted without the benefit of the exoneration data available today. In short, the post-conviction procedure currently available to prisoners was established without knowledge of the significant numbers of innocent prisoners who have been wrongfully convicted.

III. CRITICISMS OF AEDPA AND ARGUMENTS FOR REFORM

Rather than addressing the flaws in the criminal justice system exposed by the Innocence Movement discussed above, AEDPA seems to have exacerbated them. In fact, AEDPA has been widely criticized for erecting additional barriers to factually innocent prisoners seeking post-conviction relief.[127] Those prisoners seeking relief using non-DNA evidence have been identified as the most adversely affected by this legislation.[128] Far from achieving a balance between finality and fairness, as Congress ostensibly sought to do, AEDPA has arguably achieved finality without regard to fairness.[129] Thus, AEDPA has

125. Medwed, *supra* note 12, at 682-83 (noting that limitations periods for collateral attack on convictions in state courts based on newly discovered evidence vary by state and range from sixty days to ten years).

126. *See* David M. Siegel & Gregory L. Massing, *A New Tool for Determining Factual Innocence: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act*, 56 BOS. B.J. 28, 29 (2012) (discussing Massachusetts as among the last of the states to pass a DNA access law in 2012).

127. *See, e.g.*, Entzeroth, *supra* note 52, at 87 ("[T]he AEDPA . . . created significant restrictions on a federal prisoner's ability to actually move a federal court for . . . relief."); Williams, *supra* note 4, at 920 (arguing that AEDPA has made it "more difficult for claims of innocence to be heard by federal courts").

128. *See, e.g.*, Armbrust, *supra* note 32, at 78 (identifying "significant roadblocks for any defendant with newly discovered non-DNA evidence of innocence"); Williams, *supra* note 4, at 925 (identifying the "group most disadvantaged by the federal courts' inability to hear claims of innocence [under AEDPA]" as prisoners seeking post-conviction relief based on newly discovered non-DNA evidence).

129. *See, e.g.*, Lott, *supra* note 50, at 457 (identifying AEDPA criticism that "societal values such as dignity, fairness, and equality are secondary considerations [under AEDPA's provisions]").

effectively rendered federal habeas corpus procedure a façade that appears to facilitate review of actual innocence claims without actually doing so.[130]

AEDPA has been widely criticized by legal scholars, political commentators,[131] and even some jurists[132] since its passage in 1996. It has been called "draconian"[133] and has been characterized as a "symbolic statute" which does little more than save face for legislators by providing them with something concrete to show their constituents.[134] Professors Mark Tushnet and Larry Yackle have criticized AEDPA along these lines as politically motivated legislation, illustrating Congress' lack of attention to detail and failure to meaningfully assess the statute's consequences.[135]

A. AEDPA Provisions Deemed to Be Unduly Restrictive to Prisoners Claiming Actual Innocence

Many of AEDPA's provisions have been characterized as unduly restrictive to prisoners seeking post-conviction relief based on newly discovered evidence of actual innocence. For example, the bar on successive claims, the one-year statute of limitations, and the high standard of deference to the state courts all operate to weigh particularly heavily against actually innocent petitioners.

1. Successive Petitions

AEDPA substantially altered how federal courts address second and successive habeas petitions. Under 28 U.S.C. § 2244(b)(1), successive claims,

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130. Williams, *supra* note 4, at 942 (noting that certain provisions of AEDPA "create[] the illusion that the federal courts are willing to consider successor petitions in cases of innocence, while ensuring at the same time that no inmate will be able to satisfy its stringent demands").

131. *See, e.g.*, Tushnet & Yackle, *supra* note 73, at 2-5 (identifying AEDPA as an example of a "symbolic statute" where members of Congress "want to claim credit for doing something about a problem to which they have been calling public attention"); Williams, *supra* note 4, at 923 (discussing the "alarm[]" caused by the passage of AEDPA); Nat Hentoff, *Clinton Screws the Bill of Rights: The Worst Civil Liberties President Since Nixon*, VILLAGE VOICE, Nov. 5, 1996, at 12 (arguing that AEDPA contains "the most draconian restrictions on habeas corpus since Lincoln suspended the Great Writ . . . during the Civil War").

132. *See, e.g.*, Scott Graham, *High Court Gives Ninth Circuit a Habeas Head-Scratcher*, RECORDER (July 8, 2013), *available at* http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202609933324&slreturn=20131004123832 (discussing the Ninth Circuit's recent public criticism of the Supreme Court's interpretation of AEDPA's seemingly irrational demands).

133. Hentoff, *supra* note 131, at 12 (referring to AEDPA as "draconian" and unduly restrictive of prisoner's rights).

134. Tushnet & Yackle, *supra* note 73, at 2-3.

135. *See id.* at 3-4 (discussing AEDPA as a classic example of a "symbolic statute").

i.e., those raised in previous petitions, are universally prohibited.[136] Similarly, § 2244(b)(2) bars abusive claims, or those that have not been raised in previous petitions.[137] However, this provision allows for two narrow exceptions to this rule. Section 2244(b)(2) provides that a new claim not previously raised is not automatically dismissed if: 1) the claim relies on a new constitutional rule which applies retroactively or 2) the claim relies on newly discovered evidence which was not discoverable with due diligence.[138] Given that the Supreme Court has not recognized the wrongful conviction of an actually innocent defendant as a constitutional violation, a freestanding claim of innocence is apparently not sufficient under § 2244(b)(2).[139]

AEDPA's provisions also set up the procedural framework for raising second or successive petitions. Section 2244(b)(3) requires that any successive petition must first be presented to a panel of appellate court judges in order to determine whether the petitioner has made a prima facie case under the provisions of § 2244(b).[140] This gatekeeping provision involves an extremely

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136. 28 U.S.C. § 2244(b)(1) (2012) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed." *See also* Kovarsky, *supra* note 90, at 80-81 (discussing AEDPA provisions relating to successive petitions).

137. 28 U.S.C. § 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a while, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2244(b)(2).

138. *Id.*; *see also* Kovarsky, *supra* note 90, at 91 (discussing exceptions to AEDPA's general bar on abusive petitions).

139. *See, e.g.*, Lott, *supra* note 50, at 453 (noting that in *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court held that "a substantive claim of actual innocence based on newly-discovered post-trial evidence is not cognizable; federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding.").

140. 28 U.S.C. § 2244(b)(3) provides in full:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or

high burden for the petitioner and has been criticized for its potential to allow dismissal of petitions raising actual innocence claims that were not ripe at the time of the original petition.[141] While these provisions of AEDPA ostensibly allow for successive petitions raising claims of actual innocence, in reality such claims can virtually never prevail.[142]

2. Degree of Deference to State Courts

In addition to limiting the type of petitions that can be filed in federal courts, the provisions of AEDPA have also operated to significantly alter the degree of deference that federal courts must afford to state court rulings.[143] In particular, § 2254(d)(1) provides that federal courts must deny relief to state court petitioners unless the state court acted unreasonably in reaching its conclusion.[144] It is not enough that a federal court find the state court's decision to have been erroneous; instead, the state court's interpretation of federal law must be objectively unreasonable.[145] Thus, effectively, the state courts have become final arbiters of federal constitutional law, as opposed to the federal courts, which are presumably in a better position to play this role.[146] This arrangement has caused tension between state and federal courts presiding over habeas litigation.[147] Additionally, critics have argued that this extreme

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for a writ of certiorari.
§ 2244(b)(3).

141. Reynolds, *supra* note 83, at 1475 (noting that "AEDPA's 'gatekeeping' provisions . . . have the potential to foreclose review of meritorious constitutional claims"); Williams, *supra* note 4, at 942 (commenting that 28 U.S.C. § 2244(b)(2) "creates barriers that even an innocent individual is not likely to overcome").

142. Williams, *supra* note 4, at 942 ("By enacting Section 2244(b)(2), Congress has created the illusion that the federal courts are willing to consider successor petitions in cases of innocence, while ensuring at the same time that no inmate will be able to satisfy its stringent demands.").

143. *See* Moore, *supra* note 77, at 205 ("[AEDPA] adjust[s] the weight accorded to prior state court rulings.").

144. 28 U.S.C. § 2254(d)(1) (2012) reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.

§ 2254(d)(1).

145. Moore, *supra* note 77, at 206 ("[E]ven if a federal court concludes that the state court applied clearly established federal law incorrectly, it is insufficient for the federal court to grant relief.").

146. *Cf.* Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 439 (2012) ("The current deferential standard of review reflects the concern that federal courts, if entrusted with the power of *de novo* review of federal constitutional claims, will too frequently and improperly overturn state convictions on federal law grounds.").

147. Moore, *supra* note 77, at 207 ("[I]nstead of reducing conflicts between the state