PUTTING FINALITY IN PERSPECTIVE: COLLATERAL REVIEW OF CRIMINAL JUDGMENTS IN THE DNA ERA

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INTRODUCTION

Every law student during their first year of law school encounters the concept of "finality" and its role in the law. Perhaps it was discussed as part of a class about collateral estoppel, res judicata, law of the case, or statutes of limitations. Though, in whatever context, a professor impresses upon his or her students the idea that the law favors finality because litigation, at some point, must end so the courts can hear other business and the parties can move on with their lives. Without a certain end to litigation, the judicial system could come to a standstill, those parties with vast resources could postpone a final judgment and thwart justice, and the population could lose faith in the justice system. Thus, finality serves practical purposes. I believe, though, the first year of law school lacks a frequent and deep discussion about the costs associated with finality. Unless students take a course where the concept of finality collides with some other noteworthy value, such as the wrongful conviction of innocent persons or some other form of injustice, students often leave law school with the notion that finality must be honored—regardless of the cost and any resulting injustice.

In my course, which involves post-conviction clinical work, students encounter those instances where the demands of finality trump what were once viable legal issues. As they review cases that involve claims of factual innocence or some other claim of manifest injustice, the students sometimes discover instances of false confessions, unreliable eyewitness or snitch testimony, junk science, or ineffective assistance of defense counsel. Students learn, for the most part, those issues are legally "dead" and cannot be resuscitated. Additionally, even when the law permits a prisoner to raise an issue of factual innocence, students often learn that while finality is no longer an absolute bar, it still poses serious obstacles to relief and establishing truth.

However, as Chief Justice Roberts recently noted, the national phenomenon of DNA exonerations and DNA technology are challenging these "traditional notions of finality."[2] These exonerations have reminded us in an immensely powerful way that our criminal justice system is far from perfect.[3] Innocent people are sometimes convicted of crimes they did not commit. Furthermore, innocent people sometimes even confess and plead

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2. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2322 (2009).

3. *Id*. at 2323. As of September 26, 2010, there have been 258 DNA exonerations nationwide. Innocence Project, http://www.innocenceproject.org/ (last visited Sept. 26, 2010).

guilty to crimes they did not commit.[4] This essay's goal is to put finality into perspective so it can raise questions about finality and its relationship to criminal justice, as well as collateral relief.

I. THE CONCEPT OF FINALITY

A. Professor Bator: Champion of Finality

Finality is not an end in and of itself. As noted earlier, finality exists to serve practical purposes in a world of limited resources. An often-cited apologia regarding finality with respect to criminal litigation is Professor Bator's 1963 article, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners."[5] While chiefly about the then-raging debate over the proper scope of federal habeas corpus review of state criminal convictions, Professor Bator's article begins by discussing finality in general terms before covering the history and development of federal habeas corpus law.[6]

Professor Bator's general finality discussion begins with the proposition that because we can never know with 100% certainty that no error of law or fact[7] was made during trial or appellate proceedings, we must impose an end to litigation at some point or else the case could conceivably go on *ad infinitum*.[8] Essentially, Bator argues we must acknowledge that human systems, because fallible humans design them, are themselves inherently fallible. Thus, we must "come to terms with the possibility of error inherent in any [human] process."[9] The best way to deal with this probability of human error, he continues, is to design our systems of justice with sufficient procedures and arrangements such that there exists an "acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'"[10]

Professor Bator then moves to the question about why we even need to reach a point of finality given the grave consequences of criminal conviction—loss of property, liberty, or even life itself.[11] He asks, somewhat rhetorically, because the ultimate "truth" may

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4. The Innocence Project estimates that approximately 25% of the DNA exoneration cases involve false confessions, admissions, or guilty pleas. Innocence Project, http://www.innocenceproject.org/understand/False-Confessions.php (last visited September 26, 2010). *See also* Corley v. U.S., 129 S. Ct. 1558, 1570 (2009) ("[T]here is mounting empirical evidence that these [interrogation] pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, *see, e.g.*, Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906-907 (2004)"). *See generally* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (examining in detail forty of the DNA exonerations involving false confessions).

5. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). A Westlaw search conducted on September 26, 2010 showed over 500 citing references to Prof. Bator's article.

6. *Id*. at 446-53.

7. Of course, Prof. Bator was writing during a time before DNA testing allowed, with virtual near certainty, for the determination of whether a particular person's DNA was present on an item of evidence. Even given the acute precision of DNA testing, however, Prof. Bator's statement may still hold true even in our DNA age. For example, how can we ever be 100% sure that the DNA test itself was properly administered by the laboratory technician, that there was absolutely no chance of cross-contamination among DNA samples, or that the defendant's DNA was not planted on the evidence by some malicious individual? Additionally, Professor Bator's discussion holds true for all those cases where DNA evidence has no relevance or probative value.

8. Bator, *supra* note 5, at 446-51.

9. *Id.* at 448.

10. *Id*.

11. *Id.* at 450-51

not emerge from our humanly designed processes, should we not allow for repetitious litigation (at least in the most serious of matters) as part of a solemn effort to get it right?[12] With a great deal of practicality, Bator answers that question in the negative by pointing out the very real consequences of endless litigation, consequences our first-year law students probably heard from their professors.

First, Professor Bator points out the waste of resources (economic, intellectual, moral, and political) involved in multiple litigation of the same issues, particularly where there is no reason to believe that the second or subsequent litigation will involve processes that are superior to the earlier attempts to arrive at the truth or apply the correct law. If the subsequent litigation is merely one of repetition or second-guessing, then it is no better than the first litigation. Second, endless second-guessing, Bator argues, will have a corrosive impact on the trial bench. A trial judge's sense of responsibility would be eroded by the reality that nothing he or she ever did was final and that some other institution would simply re-do what was done originally. Third, endless inquiry into the facts and law surrounding the same issue undermines the deterrent and rehabilitative goals of substantive criminal law. If would-be perpetrators know they will have multiple chances at "getting off," then the law will lack the necessary "certainty and immediacy" to deter. Further, society's efforts to rehabilitate criminals will be weakened because a key component of rehabilitation is acceptance by the criminal that he indeed is justly punished. In a system that allows multiple litigation of the same issues, there is little chance of such acceptance. Fourth and finally, Bator argues that repose is a psychological necessity in an active and ongoing society. We cannot justify endless litigation, Bator reasons, with unreasonable anxiety about the mere possibility of occasional errors within the criminal justice system. Although we should not callously accept injustices where we can do better, we should also not be immobilized by unreasonable anxiety that we are fallible.[13]

Professor Bator's arguments are, of course, reasonable. Endless re-litigation of the same issues of law and fact merely because we think we might have gotten it wrong is a waste of resources and suffers from all the negative consequences Bator identifies. However, as I argue later, I think we do have reason to believe that our system is not as fine-tuned as it might be to minimize the risk of injustice.

B. Finality in the U.S. Supreme Court

It should come as no surprise that courts have fully embraced the concept of finality, particularly in the realm of criminal cases. During the previously mentioned controversy over the proper scope of federal habeas jurisdiction with respect to state convictions, the U.S. Supreme Court had on several occasions reminded us of the need for finality and how the proper functioning of the criminal justice system would be nearly impossible without it.

An early statement regarding the importance of finality in achieving the goal of rehabilitating prisoners appears in Justice Harlan's dissenting opinion in *Sanders v. United States*.[14] There, a federal prisoner filed a successive motion for collateral relief.[15]

12. *Id*. at 451.
13. *Id*. at 451-53.
14. Sanders v. U.S., 373 U.S. 1, 23–25 (1963) (Harlan, J., dissenting).

The prisoner's allegations, if true, might have entitled him to relief. Rather than granting a hearing to give the prisoner an opportunity to prove his allegations, however, the district court denied relief because the allegations could have been raised in the prisoner's first collateral attack. On that basis, the district court denied his subsequent motion for relief. The court of appeals affirmed. Analogizing to habeas corpus practice, the Supreme Court reversed the summary dismissal, holding essentially that the government must show the filing of the successive motion was "an abuse of the writ."[16] In the dissent, Justice Harlan recognized that although the full and strict principles of *res judicata* did not apply in the criminal field, finality did play a legitimate role in criminal cases. Harlan explained that society and the defendant needed to reach a point where litigation about possible errors must end, and attention must focus "on whether the prisoner can be restored to a useful place in the community."[17]

Ten years later, Justice Powell addressed, in a concurring opinion, the "costs" associated with relaxing the restrictions on the availability of federal habeas corpus for state prisoners. In *Schneckloth v. Bustamonte*,[18] the Court considered the voluntariness of a consent search, and whether the prosecution must prove the defendant's knowledge that he could refuse consent. Ultimately, the Court held that a showing of such knowledge on the defendant's part was unnecessary and affirmed the conviction.[19] Justice Powell concurred in the result, but wrote separately to express the view that federal habeas proceedings should not be available to state prisoners to litigate Fourth Amendment claims unless the state proceedings failed to give the defendant a full and fair opportunity to litigate those claims.[20] Among his reasons for his position were the costs associated with relaxing the rules of finality in criminal cases, especially when litigating claims "bearing no relation to the prisoner's innocence."[21] Among the costs he identified, were utilizing the federal courts' limited resources to the detriment of those litigants who were using the courts in the first instance to adjudicate their claims,[22] the weakening of punishment's rehabilitative effect on prisoners,[23] and the erosion of respect for the state courts and their primary role in a federal system for enforcing federal constitutional standards in criminal cases.[24]

Justice O'Connor addressed the social costs of avoiding finality and granting federal habeas relief in *Engle v. Issac*.[25] The Court held that state prisoners must show "cause and prejudice" before being granted federal habeas relief on an issue that was procedurally defaulted in the state court. Justice O'Connor cited several of the now-familiar reasons in support of finality of criminal judgments. First, she quoted Justice

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15. The motion was filed pursuant to 18 U.S.C. § 2255. Essentially, this is the statutory equivalent of habeas corpus proceedings for federal prisoners.

16. *Sanders*, 373 U.S. at 17–19.

17. *Id*. at 24–25 (Harlan, J., dissenting).

18. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

19. *Id*. at 248–49.

20. *Id*. at 250 (Powell, J., concurring).

21. *Id*. at 258. Indeed, Justice Powell cited with approval an idea put forward by Circuit Judge Henry J. Friendly that federal habeas relief should mostly be limited to those prisoners who had a "colorable claim of innocence." *Id.* at 265–66 & n.23 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970–71)).

22. *Id*. at 260–61.

23. *Id*. at 262 (citing Sanders v. U.S., 373 U.S. 1, 23–25 (1963) (Harlan, J., dissenting)).

24. *Id*. at 263–65 (citing Bator, *supra* note 5, at 451 n.3)).

25. Engle v. Isaac, 456 U.S. 107 (1982).

Harlan's 1963 argument in *Sanders* that finality encourages prisoners to rehabilitate into useful members of society.[26] Second, she cited Professor Bator's and Judge Friendly's respective law review articles justifying finality with respect to the goal of deterrence.[27] Third, Justice O'Connor noted that because human criminal justice systems are fallible, the trial process itself incorporates "a multitude of safeguards" to protect against wrongful or false convictions; thus, granting collateral relief too freely might unwittingly suggest to trial participants (lawyers and judges) that they can skirt their professional responsibilities when implementing these safeguards, presumably because someone will correct any mistakes later.[28] Fourth, because the passage of time erodes memories and may result in the dispersion of evidence and witnesses, granting collateral relief to "admitted offenders" robs society of the right to retry the prisoner so that he could go unpunished.[29] Finally, Justice O'Connor cited the costs uniquely associated with our federal system where the federal courts "intrude" on state court systems notwithstanding the states' "sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[30] There are several other instances where the Court has embraced or discussed these or similar justifications for finality of criminal judgments.[31]

C. Rules of Procedure and Finality

Reviewing courts apply a number a rules to promote finality. A detailed discussion of such rules is beyond this essay's scope, but a small sampling suffices to give the flavor of how these rules function to insulate a guilty verdict, even a factually erroneous one, from reversal.

Once a guilty verdict has been rendered and a judgment of conviction pronounced, the presumption of innocence is obviously gone.[32] Convicted defendants are on deadline to file their notices of appeal or petitions for collateral review.[33] Appellate courts review the evidence in the light most favorable to sustain the guilty verdict and draw reasonable inferences from the facts to support that verdict.[34] With very few exceptions, a defendant

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26. *Id*. at 127 (quoting *Sanders*, 373 U.S. at 24–25 (Harlan, J., dissenting)). Justice O'Connor also cited Professor Bator's and Judge Friendly's respective comments in support of the rehabilitation rationale. *Id.* at 127 n. 32 (citing Bator, *supra* note 5, at 452 and Friendly, *supra* note 21, at 146).

27. *Id*. at 127 n.32 (citing Bator, *supra* note 5, at 452 and Friendly, *supra* note 21, at 146).

28. *Id*. at 127. *See also* Bator, *supra* note 5, at 451 (arguing that endless appeals could result in a subversion of trial judges' sense of responsibility).

29. *Id*. at 127–28. Obviously, collateral relief granted on grounds of actual innocence does not entail this cost. But in those cases where such relief is granted because the defendant made the requisite, though not conclusive, showing of actual innocence, society could be robbed of its effort to retry the defendant and the "truth" never established at a retrial.

30. *Id*. at 128 (citing *Schneckloth*, 412 U.S. at 263–65 (Powell, J., concurring)).

31. *See, e.g.,* Calderon v. Thompson, 523 U.S. 538, 554–55 (1998) (citing deterrence, retribution, quality of judging, and federalism); McCleskey v. Zant, 499 U.S. 467, 491–93 (1991) (citing deterrence, retribution, federalism, and conservation of resources*);* Teague v. Lane, 489 U.S. 288, 309 (1989) (citing deterrence, retribution, and federalism); Kuhlmann v. Wilson, 477 U.S. 436, 452–54 & nn. 14–16 (1986) (plurality opinion) (citing deterrence, rehabilitation, retribution, and federalism); Murray v. Carrier, 477 U.S. 478, 487 (1986) (citing retribution, federalism, and detracts from the importance of the trial itself); Reed v. Ross, 468 U.S. 1, 10 (1984) (citing federalism, importance of trial itself, and state's effective ability to retry).

32. Herrera v. Collins, 506 U.S. 390, 399 (1993).

33. *E.g.*, ARIZ. R. CRIM. P. 31.3 (allowing 20 days after entry of judgment and sentence within which to file a notice of appeal); ARIZ. R. CRIM. P. 32.4(a) (setting various deadlines under different circumstances within which to file a notice of post-conviction relief).

34. Virginia v. Black, 538 U.S. 343, 386 (2003); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

will be found to have waived most objections and many trial rights merely by the failure to object or assert them, without any showing that he knew he had them and consciously decided to forego them.[35] When reviewing the sufficiency of the evidence, courts use the very deferential standard of whether any rational jury could have convicted the defendant on the evidence presented.[36] Errors are sometimes difficult to demonstrate because many issues involving a trial judge's findings of fact are reviewed with a deferential standard, such as clear error.[37] Even when trial errors are found, most errors are subject to a harmless error analysis to save the verdict.[38] Courts sitting on collateral review apply various and often complex rules of waiver and preclusion. These rules are designed to require the defendant to raise all known issues in any first collateral attack and preclude him from raising them in any subsequent filings. Moreover, if an issue could have been raised on direct appeal, or some other earlier proceeding, that issue may be precluded from being raised even in the first collateral attack.[39] In most cases, even when errors are found, courts on collateral review can apply a type of harmless error analysis where they get into the minds of the jurors and predict whether the error would have had a sufficient impact at trial, or require almost a form of "super error" before relief is warranted.[40]

These rules and others like them reflect the heavy value that society places on the finality of criminal judgments. They help ensure that the trial remains the "main event" for litigating issues, and that a defendant should not count on an appeal or collateral attack to hear an issue in the first instance and grant relief. This is wonderful in theory.

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35. ARIZ. R. CRIM. P. 32.2 (setting forth rules of preclusion); State v. Espinosa, 200 Ariz. 503, 29 P.3d 278 (Ct. App. 2001). Only rights of "sufficient constitutional magnitude" must be personally waived by the defendant in a knowing, intelligent, and voluntary manner. *Espinosa*, 200 Ariz. at 505, 29 P.3d at 280. Such sufficiently important rights include the rights to counsel, a jury trial, and a twelve-person jury. *Id.* Most other rights, constitutional or otherwise, may be waived by the defendant's failure to assert them or raise a claim of error at the earliest opportunity. *Id.*

36. Virginia v. Black, 538 U.S. 343, 386 (2003); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

37. *E.g.*, United States v. Bynum, 362 F.3d 574, 578 (9th Cir. 2004) (motion to suppress); United States v. Bynum, 327 F.3d 986, 993 (9th Cir.) (sentencing), cert. denied, 124 S. Ct. 279 (2003); United States v. Lam, 251 F.3d 852, 855 (9th Cir.) (speedy trial), amended by 262 F.3d 1033 (9th Cir. 2001); United States v. Benboe, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); United States v. Doe, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial); United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence).

38. Neder v. United States, 527 U.S. 1, 15 (1999); Chapman v. California, 386 U.S. 18 (1967). Certain structural errors, however, are not subject to the harmless error rule. Arizona v. Fulminante, 499 U.S. 279, 307-09 (1991). Some examples of such structural errors include the complete deprivation of the right to counsel, the right to an impartial judge, the right to a public trial, and the right to self-representation. *Id.* at 310-11.

39. *E.g.*, ARIZ. R. CRIM. P. 32.5 (requiring the petition for post-conviction relief to include "every ground known" for attacking the conviction and or sentence); ARIZ. R. CRIM. P. 32.2(a) (preclusion for failure to raise issues that could be raised on direct appeal or post-trial motions, finally adjudicated on direct appeal or in a previous collateral proceeding, or waived at trial, on appeal, or in a previous collateral proceeding); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 449–52 (2007–08) (discussing federal habeas doctrines of procedural default, abuse of the writ, and exhaustion as bars to relief where the prisoner either failed to follow a state rule of procedure to preserve a claim, failed to raise a claim in an earlier habeas petition, or failed to "fairly present" the factual and legal bases for each claim).

40. *E.g.*, ARIZ. R. CRIM. P. 32.1(e) (citing as a grounds for relief newly discovered evidence, which, among other things, "probably would have changed the verdict"); ARIZ. R. CRIM. P. 32.1(h) (allowing relief if the defendant can demonstrate that "no reasonable fact finder would have found defendant guilty of the underlying offense beyond a reasonable doubt"); Reed v. Farley, 512 U.S. 339, 353 (1994) (assuming a prisoner overcomes any procedural obstacle to having his claim adjudicated by the federal habeas court, relief is reserved for those cases where there was a "complete miscarriage of justice" or where the state court process did not comply with the rudimentary demands of fair procedure). Moreover, state court decisions, even if erroneous, do not warrant federal habeas relief unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or involved an "unreasonable determination of the facts" in light of the evidence presented to the state court. 28 U.S.C. § 2254(d)(1) & (2).

After all, we are a society that likes to "get it right the first time." But, can we ever be certain that we got it right the first time?

II. DNA EXONERATIONS AND FINALITY

Chief Justice Roberts recently reminded us that DNA technology and its application to criminal investigations are challenging our notions of finality.[41] The 258 DNA exonerations nationwide are a stark reminder that we did not get it right the first time and, with the aid of DNA evidence, we could do a better job at determining guilt or innocence the second time around. Thus, conclusive DNA evidence, when available, undercuts one of Professor Bator's main arguments supporting the finality of criminal judgments—we sometimes can do better at a retrial.[42]

Unfortunately, DNA evidence is not available in every criminal case, and even when it is, it cannot always answer the question of guilt and innocence. The paradigmatic example of the latter, is the forcible rape case where the defense is consent. DNA testing cannot tell us whether the victim lawfully consented to the defendant's sexual act. In cases where DNA is not available or cannot determine the issue of guilt or innocence, we must rely on more traditional methods of determining guilt and innocence. What the 258 DNA exonerations have taught us, however, is that we should not be sanguine about the reliability of those traditional methods. Each exoneration presents an instance where a person was convicted of a crime that he or she did not commit. Each exoneration, then, presents a case study in what went wrong—terribly wrong—with the criminal justice system. When we study an exoneration case we can learn how the more traditional methods of separating the guilty from the innocent do not always work the way we want them to. More frightening, perhaps, after reviewing these exonerations, we learn that the causes of wrongful conviction are not unique to cases where DNA was later found and exonerated someone—we learn that the causes of wrongful conviction can happen in any case regardless whether DNA evidence exists. This is the lesson that should compel us to rethink our infatuation with the finality of criminal judgments.

A. Chief Causes of Wrongful Convictions

The national Innocence Project[43] maintains a list of what it identifies as causes of wrongful convictions involved in the first 225 DNA exonerations. Seventy-seven percent involved eyewitness misidentification, fifty-two percent involved invalidated or improper forensic evidence,[44] twenty-three percent involved false confessions or admissions,

41. District Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2322 (2009).

42. *See* note 13, *supra*, and accompanying text.

43. The Innocence Project is based at the Cardozo School of Law at Yeshiva University. Its staff of attorneys and clinical law students work to assist prisoners who could be proven innocent through the use of DNA evidence. For more information about the Innocence Project visit its web page at http://www.innocenceproject.org/about/Mission-Statement.php.

44. Unreliable forensic expert testimony has recently become a focus of the National Academies of Science. *See generally* NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

sixteen percent involved informants or snitches, and smaller percentages involved government misconduct and bad defense lawyering.[45]

A more in-depth empirical study authored by University of Virginia School of Law Professor Brandon L. Garrett, examines the first 200 of the nationwide DNA exonerations.[46] His findings are consistent with the Innocence Project's tally. Mistaken eyewitness identifications were involved in seventy-nine percent of the studied wrongful convictions.[47] Although most of these misidentifications involved the victim being assaulted by a stranger, eight of them did involve misidentifications of acquaintances by the victim.[48] Faulty forensic science played a part in approximately fifty-seven percent of the studied wrongful convictions.[49] Among the types of forensic evidence used to support these wrongful convictions were serological evidence, hair comparisons, soil comparisons, DNA tests, bite mark evidence, fingerprint evidence, dog scent identification, voiceprint, shoe prints, and fiber comparison.[50] The faulty forensic evidence either consisted of science that had a low probative value due to technological limits, or the forensic expert somehow making improper use of the forensic evidence.[51] Eighteen percent of the studied exonerations involved false informant testimony, including jailhouse informants, non-incarcerated informants, or a cooperating co-perpetrator.[52] Sixteen percent of the studied cases involved either false confessions or perceived self-inculpatory remarks, which were used at trial.[53] These false confessions often came about because of the defendant's young age, mental state, or both.[54] In some instances, it was clear that the false confession was enabled only by the interrogators feeding facts, supplying details, and using leading questions.[55]

We should not be seduced into thinking that because the DNA exonerations are so spectacular, that the causes of wrongful convictions are somehow limited to the types of cases where DNA evidence is likely to be present. As Professor Garrett suggests, these causes of wrongful conviction are generic, that is, they are of such a nature that they can be found in nearly any criminal case, and not just those likely to involve DNA evidence.[56] As one other scholar put it, the DNA exonerations are just the "tip of the iceberg" because exonerating DNA evidence seems to be the only evidence that has enough force to overcome the inertia represented by our notions of finality in criminal

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45. Innocence Project, http://www.innocenceproject.org/understand/ (last visited October 3, 2010). Because a single exoneration case can involve multiple causes of wrongful conviction, the percentages add up to more than 100%. *Id.*

46. Brandon L. Garrett, *Judging Innocence*, 108 COLUMBIA L. REV. 55 (2008). Because these were DNA exonerations, the examined convictions chiefly involved rape and murder –cases where DNA is likely to be available for testing whether as part of the trial or in collateral proceedings. *Id.* at 73.

47. *Id*. at 78.

48. *Id*. at 79 & n.83 (explaining that some of the acquaintance misidentifications sometimes involved police coercion or suggestion, mental illness, and the desire to obtain award money).

49. *Id*. at 81.

50. *Id*.

51. *Id*. at 82.

52. *Id*. at 86.

53. *Id*. at 88.

54. *Id*. at 89.

55. *Id*. at 89–90. Professor Garrett has recently authored a separate study focusing on the false confessions found among the first 252 DNA exonerations. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1061 (2010).

56. *See id*. at 130 ("Nevertheless, in cases without relevant DNA evidence, the underlying sources of error, such as eyewitness misidentifications, coercive interrogations, lying jailhouse informants, and unreliable forensic experts, will still exist.").

judgments.[57] Also, the fact that DNA testing has cleared many suspects—both pre-charge or pre-trial—is further evidence suggesting that traditional police investigation techniques and non-DNA evidence of guilt are susceptible to error rates that should make all of us feel uncomfortable.[58]

B. Responses to Wrongful Convictions

I won't pretend that there have been no responses to the recent spate of proven wrongful convictions. Some judicial mechanisms have been created to allow defendants to raise claims of actual innocence despite the bar that finality would otherwise present, especially if the prisoner is seeking relief based on DNA testing. Federal law now permits federal prisoners to petition a court for DNA testing if various conditions are present.[59] Upon a properly filed motion for testing and after obtaining exculpatory results, the federal prisoner may then file a motion for a new trial or for re-sentencing notwithstanding any "law that would bar [such a motion] as untimely."[60] Nearly all of the states, too, have enacted post-conviction DNA testing statutes that also relax the generally applicable rules of finality.[61]

Despite the relaxation of some of the technical rules of finality, the law still presents serious obstacles to a prisoner seeking relief on the grounds of actual innocence. These obstacles promote the same values that finality does. For example, the federal post-conviction DNA testing act, although relaxing one form of time bar for motions for a new trial or re-sentencing if the prisoner obtains exonerating DNA results, it raises another time bar. The federal motion for testing must still be made in a "timely fashion."[62] The statute then sets forth rebuttable presumptions of timeliness for motions made within five years of the statute's enactment or thirty-six months of a prisoner's conviction, whichever is later.[63] Conversely, the statute creates a rebuttable presumption of *untimeliness* if the motion is filed outside those time limits.[64] State statutes contain similar restrictions on access to DNA testing either in the nature of time barriers, or some other barrier requiring preliminary showings to access testing.[65]

Moreover, this type of relaxation of finality is, for the most part, limited to prisoners seeking relief based on DNA evidence. As noted, most cases do not involve DNA

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57. Samuel R. Gross *et al.*, *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2004–05) (reporting on an empirical study of 340 exonerations, DNA and non-DNA, within the United States from 1983 through 2003). *See also id.* at 529–33, 535–37 (explaining how DNA exonerations in rape and murder cases probably are over-representative of all potential exonerations because those cases typically involved evidence which is DNA-testable and long sentences or capital punishment which justifies the resources needed to investigate and overturn convictions on collateral review).

58. *See* Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921 (2009–10); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1652–53 & n. 105 (2008).

59. *See generally* 18 U.S.C. § 3600 (2004).

60. 18 U.S.C. § 3600(g)(1).

61. Garrett, *Claiming Innocence*, *supra* note 58, at 1674–75. *See also* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009) (noting states' passage of post-conviction DNA testing statutes).

62. 18 U.S.C. § 3600(a)(10).

63. 18 U.S.C. § 3600(a)(10)(A).

64. 18 U.S.C. § 3600(a)(10)(B).

65. Garrett, *supra* note 46, 118 & n.241 (citing Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002)). *See also Osborne*, 129 S. Ct. at 2317 (discussing types of restrictions on post-conviction DNA testing statutes).

evidence, so actually innocent prisoners whose cases do not involve DNA must still contend with the time bars preventing collateral proceedings. With respect to federal habeas relief, there is a general one-year statute of limitations.[66] Prisoners must also confront difficult concepts of exhaustion, procedural default, cause and prejudice, and intricate rules respecting successive petitions.[67]

State collateral relief rules contain similar provisions. For example, Arizona's post-conviction relief rule allows state prisoners to file a petition seeking relief beyond the generally applicable deadlines if the prisoner can, among other things, present newly discovered evidence or if the prisoner can present a convincing claim of actual innocence.[68] Such petitions need not necessarily be based on DNA evidence; however, prisoners must overcome several obstacles. For newly discovered evidence claims, a prisoner must demonstrate (1) that he exercised "due diligence" in obtaining the new evidence, (2) that the new evidence is not cumulative or mere impeachment (unless it addresses "critical" evidence used at trial), and (3) that the new evidence "probably would have changed the verdict."[69] If claiming actual innocence as an independent ground for relief, the prisoner must demonstrate by "clear and convincing evidence" that no reasonable fact-finder would have found him guilty beyond a reasonable doubt.[70] And, even for these claims of actual innocence, the prisoner must give good reasons for why he did not make such a claim in an otherwise timely manner.[71]

All of these restrictions promote the goals of finality discussed earlier. Finality and the values it serves weigh heavily whenever a court is considering undoing a criminal judgment on collateral review. Notwithstanding that *res judicata* is said not to apply with full force and effect in criminal cases, the values underlying the concept of finality make it extremely difficult to overturn a criminal conviction on collateral review. It seems to me that the Court's pronouncements on finality, made in the context that seemingly '[bore] no relation to the prisoner's innocence,' have to a large extent been transplanted into those instances where the claimed reasons for vacating a conviction *do* relate to innocence. We need to ask ourselves as lawyers and as a society whether the same weight we give to finality considerations in the non-innocence cases should also apply to innocence cases.

C. Further Possible Responses

So, what shall be done? What is the proper balance between society's need for finality and its need to ensure that innocent persons are not incarcerated or executed? Like most questions involving the balancing of policy values, there is no "right" answer. However, some general observations should at least act as our guides when we choose a balance.

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66. 28 U.S.C. § 2244(d)(1) (1996).

67. Kovarsky, *supra* note 39, at 449–53. *See also* notes 32-40, *supra* and accompanying text.

68. ARIZ. R. CRIM. P. 32.2(b). The Arizona Supreme Court promulgated the "actual innocence" provision of the post-conviction relief rule in part because the U.S. Supreme Court has yet to clearly recognize actual innocence as grounds for federal habeas relief. ARIZ. R. CRIM. P. 32.1 cmt. 2000 amend. (citing Herrera v. Collins, 506 U.S. 390 (1993)).

69. ARIZ. R. CRIM. P. 32.1(e).

70. ARIZ. R. CRIM. P. 32.1(h).

71. *See* ARIZ. R. CRIM. P. 32.2(b). Putting such a requirement on actual innocence claims seems to elevate promptness over truth.

Due diligence requirements, like those found in Arizona's rule governing newly discovered evidence, should be interpreted liberally. Courts should take into account that prisoners must rely on persons acting on their behalf to investigate and develop new evidence. Usually, these persons are lawyers and other professionals reviewing the prisoner's case pro bono and with very limited resources. What might be investigated and developed in one or two years with paid professionals working full-time and with adequate resources may take much, much longer for volunteers working with few resources while at the same time doing their other work that actually pays the bills.

As discussed above, courts in many instances are called upon to weigh the evidentiary impact of newly discovered evidence, sometimes DNA evidence, against the evidence presented at trial and make a determination whether the new evidence has verdict changing potential. When engaged in that weighing process, courts should take cognizance of the causes of wrongful conviction discussed earlier. Eyewitness identification is not as solid as we once thought it was. Forensic evidence has been shown not to be as certain or objective as it was portrayed. False confessions and admissions are more common than we once supposed. In short, judges should not be quick to dismiss new evidence or claims of actual innocence and reflexively rely on the supposed strength of the evidence presented at trial without taking into account the warnings about the reliability of that evidence that the DNA exonerations have given us.

Our society purports to believe that it is better that some larger number of guilty people go free than some smaller number of innocent people be wrongly imprisoned.[72] We need to ask ourselves if we really believe this, or is it "just a saying" as Judge Kozinski once commented.[73] If it is a principle we believe in, then we need to rethink how much weight we should give to finality considerations in innocence cases. Perhaps Professor Bator was correct when he wrote in 1963 that the expansion of federal habeas corpus was brought about, at least in part, by "a perpetual and unreasoned anxiety" that we have convicted an innocent.[74] Today's DNA exonerations, I submit, now give us at least two hundred and fifty-eight good reasons to be anxious.

72. *See generally* Alexander Volokhn, *Guilty Men*, 146 U. PA. L. REV. 173 (1997-98).
73. *Id.* at 181.
74. Bator, *supra* note 5, at 453.