UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 89 | Number 4 Article 2

5-1-2011

Innocence Unmodified

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INNOCENCE UNMODIFIED*

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The Innocence Movement has participated in deconstructing the concept of innocence into "actual" and "legal" innocence. Because the Innocence Movement has focused on defendants who did not commit the actions underlying their convictions, courts, lawyers, and the larger society have come to believe that a person is wrongly convicted of a crime only if he is actually innocent. This perception overlooks the fact that a person can be wrongly convicted if his constitutional rights were violated in the process. As such, the Innocence Movement devalues legal innocence and the constitutional values that underlie a broader conception of innocence. In order to affirm the importance of those constitutional values, this Article argues for the need to reclaim an understanding of innocence unmodified by qualifiers such as "actual" and "legal."

This Article begins by explaining how the concept of actual innocence has played a pivotal role in the development of the Innocence Movement. After examining innocence unmodified in the context of trials, the Article explains one reason to protect innocence unmodified: the Supreme Court has not yet held actual innocence alone to be enough to reverse a wrongful conviction. Constitutional claims and the underlying actual innocence claim, working together, are necessary to achieve justice. The Article then explores innocence unmodified in the context of guilty pleas. It reveals the degree to which the Court has

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reduced innocence to a binary—prioritizing actual innocence over fundamental constitutional protections for all people, including people who might be wrongly convicted if the courts do not safeguard their constitutional rights. The Article concludes that a modified conception of innocence dilutes the constitutional core that protects us all, innocent and guilty alike.

INTRODUCTION

The Innocence Movement[1] has participated in deconstructing the concept of innocence into "actual" and "legal" innocence.[2] By

1. This Article uses the term "Innocence Movement" to describe the group action of various people throughout the United States, including legal scholars, attorneys, and advocates working in various innocence projects, whose primary goals are to raise awareness of wrongfully incarcerated individuals and advocate for their release. Although the Innocence Movement's main focus has been to raise awareness for wrongfully incarcerated individuals who are actually innocent of their charged crimes, this Article argues that the Innocence Movement should broaden its focus and also raise awareness of the plight of people who have been wrongfully convicted even though they are not "actually" innocent. *See* discussion *infra* Part I. While the Innocence Movement does not stop at the country's borders, this Article focuses on developments within the United States. The Innocence Project at The Benjamin N. Cardozo School of Law at Yeshiva University, founded by Barry Scheck and Peter Neufeld, is one of the leaders of the contemporary Innocence Movement within the United States. *See* INNOCENCE PROJECT, http://www.innocenceproject.org (last visited Apr. 2, 2011); *see also* Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1293 (2005) (crediting the National Conference on Wrongful

focusing attention on people who were not involved in the crime for which they were convicted, the Innocence Movement has helped hundreds of wrongly convicted people obtain freedom.[3] At the same time, however, focusing on actual innocence minimizes other reasons for wrongful convictions. It overlooks the fact that a person can be wrongly convicted even if he actually committed the charged crime—such as someone whose constitutional rights were violated in the process of being convicted. This Article argues for the need to reclaim an understanding of innocence unmodified by qualifiers such as "actual" or "legal" in order to safeguard the fundamental constitutional rights that protect us all.

The media[4] and legal scholars[5] often use the terms "actually innocent" and "factually innocent" to describe a person who had

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Convictions and the Death Penalty, held at Northwestern University in 1998, as signaling the formal beginning of the Innocence Movement). The Center on Wrongful Convictions at Northwestern University School of Law is also a world-renowned leader in the representation of wrongfully convicted inmates. *See Center on Wrongful Convictions*, NW. UNIV. SCH. OF LAW, http://www.law.northwestern.edu/wrongfulconvictions (last visited Apr. 2, 2011). Others have described the Innocence Movement as an "Innocence Revolution." *See, e.g.*, Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573–74 (2004) (describing how the "innocence revolution" is "changing assumptions about some central issues of criminal law and procedure," how it is "born of science and fact, as opposed to choices among a competing set of controversial values," and how it "addresses a value that everyone shares: accurate determinations of guilt and innocence"). Insofar as revolutions usually involve fundamental changes in power or organizational structures, whereas social movements involve group action focused on specific political or social issues, this Article employs the term "movement" rather than "revolution."

2. Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 O.J.L.S. 43, 49 (2009) ("In the criminal justice system, a person may be considered to have been wrongly convicted if there were procedural or legal errors upon which he or she can found a successful appeal. But, whilst this may qualify as wrongful conviction in the broader sense, it would generally not be understood as innocence outside the legal arena. There is a natural tension between the commonly held notions of 'innocence' (which are also usually utilized by the media) and the concept of 'innocence' or 'wrongful conviction' as it applies in the legal system. Whilst the public and the media's perception of terms such as 'wrongful conviction' and 'miscarriage of justice' may appear to relate more to actual innocence than to cases in which procedural errors have been made, the legal system has adopted much broader definitions that include both.").

3. *See, e.g.*, *Browse the Profiles*, INNOCENCE PROJECT, http://www.innocence project.org/know/Browse-Profiles.php (last visited Apr. 2, 2011) (providing a list of people who have been exonerated and multiple ways to search the list).

4. *See, e.g.*, Roberts & Weathered, *supra* note 2, at 49. While the vast citations in the media to actual innocence are too numerous to list, one recent example is Jamie and Gladys Scott, sisters who had been serving life sentences since 1993 for a robbery involving eleven dollars. *CNN Newsroom* (CNN television broadcast Dec. 30, 2010). When CNN Anchor T.J. Holmes announced Mississippi Governor Haley Barbour's decision to release the two sisters on the condition that one of the sisters donate a kidney

nothing to do with a crime: he is not actually the person who committed the crime; the facts show that somebody else did it. Similarly, the Supreme Court uses the terms "actual innocence" and "factual innocence" interchangeably.[6] Seldom do people focus on other kinds of wrongful convictions, such as wrongful convictions stemming from violations of constitutional rights.[7] This strong focus

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to the other, Holmes's report included the information that both "[the sisters] and their lawyers say they're actually innocent." *Id.* Holmes then continued by saying that even if they're not actually innocent, "they've already served more time than did the teenagers who actually robbed the victims." *Id.*

5. *See, e.g.*, William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 389–90 (1995) (explaining that the standard of proof for legal innocence is "reasonable doubt of guilt," that the standard of proof for actual innocence is "[c]lear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under state law," and that the standard of proof for factual innocence is that "[t]he accused did not, in fact, commit the criminal offense as charged"); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1555–58 (using "actual innocence" and "factual innocence" interchangeably); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) (stating that factual innocence occurs when "the defendant did not commit the *actus reus* of the crime in question," and distinguishing it from legal innocence and burden of proof innocence). Some legal scholars have defined "actual innocence" and "factual innocence" differently. *See, e.g.*, Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975, 977–78 (2002) (defining "actual innocence" as when the person "was not at the scene of the crime and had nothing to do with it" and "factual innocence" as when the person "was in some way involved with the actual killer . . . and thus is considered to be an accomplice," although he may not be guilty of first-degree capital murder). This Article uses the terms "actual innocence" and "factual innocence" interchangeably and distinguishes them from legal innocence.

6. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) (considering a claim of actual innocence to support a novel substantive constitutional claim that the execution of an innocent person would violate the Eighth Amendment, and observing, without deciding, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim"); *see also* House v. Bell, 547 U.S. 518, 554–55 (2006) (holding that House's actual innocence claim satisfied *Schlup*'s gateway standard for obtaining federal habeas review despite his state procedural default, and declining to resolve *Herrera*'s open question regarding the viability of a freestanding innocence claim); Schlup v. Delo, 513 U.S. 298, 326–27, 328 & n.47 (1995) (observing that "Schlup's claim of innocence is fundamentally different from the claim advanced in *Herrera*" because Schlup's claim was procedural rather than substantive, and holding that a compelling claim of actual innocence enabling a court to consider otherwise procedurally defaulted constitutional claims may be made when the petitioner shows, through new evidence, that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1645–51 (2008) (observing that "the word 'innocence' is used casually in the media and by lawyers, convicts, scholars, and courts," and defining "innocent" as "those who did not commit the charged crime").

7. *See, e.g.*, Raymond, *supra* note 5, at 457 ("Focusing as it does on factual innocence, the wrongful convictions movement places a premium on it. It creates, in effect, a supercategory of innocence, elevating factual innocence over the other categories.

on the wrongful convictions of people who had nothing to do with their charged crimes dilutes the spectrum of other reasons why people are wrongly convicted. One downside of the focus on actual innocence is that courts, scholars, attorneys, and the media overlook the wrongful convictions of people who have purely constitutional claims without accompanying claims of actual innocence.

For example, on one end of the innocence spectrum, a person may be considered actually innocent of a crime because he was not there and had nothing to do with it.[8] When DNA evidence exists in such a case, it may be useful for exonerating this kind of actually innocent person because the DNA evidence does not match the DNA of the wrongly convicted person.[9] Another kind of actual innocence includes people who did not commit the crime and whose innocence cannot be proven through DNA testing. Such people might have been wrongly convicted because an eyewitness mistakenly identified them, because the true culprit framed them, or because the prosecution withheld exculpatory evidence.[10] To prove innocence in these non-DNA cases, defendants may show that witnesses have recanted their previous testimony or that additional evidence has surfaced. When taken as a whole, this new evidence may illuminate the defendant's innocence.[11]

My concern is that our jurors, thoroughly schooled in the importance of factual innocence, may conclude that anything short of factual innocence is simply not good enough to justify an acquittal.").

8. *See, e.g.*, Medwed, *supra* note 5, at 1555–57 (discussing the effects of focusing on factual innocence); Raymond, *supra* note 5, at 456 (defining "factual innocence" as when the defendant "did not commit the *actus reus* of the crime in question").

9. *See, e.g.*, Richard Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 70–72 (2003) ("Until the moment when the DNA test results came back, almost none of these cases [of individuals who were later exonerated] would have been considered exceptional among criminal cases. The evidence against the defendants was the usual sort: eyewitness identifications, confessions, suspicious behavior, and physical and other circumstantial evidence supporting guilt.") (footnotes omitted).

10. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 453–54 (1995) (reversing the defendant's conviction by finding, inter alia, that "the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found," that "another witness had been coached," and that, contrary to the evidence produced at trial, "there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length"); *see also* Brady v. Maryland, 373 U.S. 83, 87–91 (1963) (affirming the state court's reversal of the defendant's murder conviction on the issue of punishment because the prosecution had withheld exculpatory evidence, thereby denying the defendant due process of law).

11. After the Court reversed Kyles's conviction, *see Kyles*, 514 U.S. at 453–54, Kyles was tried three more times. NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 396 (2001) (citing James Gill, *Murder Trial's Inglorious End*, TIMES-PICAYUNE (New Orleans, La.), Feb. 20, 1998, at B7). Each time the jury hung and

At the other end of the innocence spectrum are people who did commit a crime but are nonetheless wrongly convicted and thus legally innocent. Maybe the defendant did not understand the nature of the charge against him, thus rendering his plea involuntary.[12] Maybe the police coerced a confession and relied on that coerced confession to obtain the conviction.[13] Or maybe a defendant pled guilty to a greater offense than his actions warranted, such as second-degree murder instead of manslaughter.[14] Because such people did engage in conduct that could be considered criminal, they are not actually innocent in the way the media,[15] courts,[16] and Congress[17] usually employ that phrase. Nonetheless, they are wrongly convicted—legally innocent—of the crime because their

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the court declared a mistrial. *Id.* In 1998, the prosecution decided not to try Kyles a sixth time. *Id.*

12. *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 470 (1969) (reversing the conviction of a person who had pled guilty to tax evasion and had in fact not made certain tax payments in three consecutive years, by holding that the district judge failed to ensure that the defendant—"who was 65 years old and in poor health at the time he entered his plea, [and who] had been suffering from a serious drinking problem during the time he allegedly evaded his taxes"—had "pleaded guilty with full awareness of the nature of the charge").

13. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600, 617 (2003) (affirming the reversal of Seibert's conviction and remanding for a new trial because of the coercive police tactics used in obtaining a confession that prosecutors then used against Seibert at trial).

14. *See, e.g.*, Henderson v. Morgan, 426 U.S. 637, 647 (1976) (holding that Morgan's plea to second-degree murder was involuntary and his conviction was entered without due process of law because the element of intent was never explained to him and because Morgan's "unusually low mental capacity . . . foreclose[d] the conclusion that the error was harmless beyond a reasonable doubt, for it len[t] at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder").

15. Roberts & Weathered, *supra* note 2, at 49 ("Whilst the public and the media's perception of terms such as 'wrongful conviction' and 'miscarriage of justice' may appear to relate more to actual innocence than to cases in which procedural errors have been made, the legal system has adopted much broader definitions that include both."); *see also CNN Newsroom*, *supra* note 4 (reporting on Governor Haley Barbour's decision to release the Scott sisters from prison).

16. *See, e.g.*, cases cited *supra* note 6.

17. *See, e.g.*, 28 U.S.C. § 2244(b)(2) (2006) ("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 . . . 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."); 28 U.S.C. § 2254(e)(2)(B) (2006) ("[T]he court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the facts underlying the claim 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."); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 610–11 (2005) (discussing statutes).

constitutional rights were violated to obtain the conviction.[18] In this way, legal innocence could be said to constitute the other end of the innocence spectrum.

Legal scholars have observed that the premium on factual innocence has created a "supercategory of innocence, elevating factual innocence over the other categories."[19] After identifying this "supercategory of innocence," Margaret Raymond observed that "the [I]nnocence [M]ovement may have unintended consequences for the criminal justice system."[20] Similarly, Carol Steiker and Jordan Steiker have discussed one danger of focusing on actual innocence: "Americans can empathize with the harms that they fear could happen to themselves, rather than those that happen only to 'bad people.' "[21] They also observe that "[l]urking behind innocence's appeal ... might be indifference if not hostility to other types of injustice."[22]

This focus on actual innocence has diluted the core conception of innocence, and at least two dangers have emerged as a result. One danger is the creation of an "us" versus "them" mentality, whereby the public identifies with the actually innocent "good" people and vilifies other wrongly convicted "bad" people who have been convicted in violation of their constitutional rights.[23] This polarization runs the risk of reinforcing the public's hostility to other types of

18. *See, e.g.*, Roberts & Weathered, *supra* note 2, at 50–51 ("[W]hilst it is the role of the trial courts to determine whether the defendant is 'legally guilty,' not whether he is actually innocent, there is clearly a distrinction drawn between innocence, as it would be understood outside the legal arena, and legal innocence.").

19. *See, e.g.*, Raymond, *supra* note 5, at 457.

20. *Id.* at 462 ("[T]he focus on factual innocence may create certain distortions in the way that actors in the criminal justice system ... perceive their obligations and allegiances. It may convince the public, including policymakers, that the system works effectively to reveal and redress wrongful convictions. It may convince prospective jurors that it is—or should be—the defendant's burden to prove innocence.").

21. Steiker & Steiker, *supra* note 17, at 597.

22. *Id.*

23. *See, e.g.*, Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 434–35 (2009) ("[A] proposal that would allocate scarce defense resources based, in part, on likelihood of innocence ... risk[s] confirming the public's long-held suspicion that defense lawyers should not defend 'those people' unless they are pretty sure they did not commit the crime charged."); Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 2 (2010) ("My fear is that innocence may become a 'wedge issue,' dividing progressives concerned with fairness from those principally concerned with innocence, which may undercut support for some procedural guarantees that do not promise to focus on the deserving accused—the innocent.") (footnote omitted).

wrongful convictions,[24] such as wrongful convictions derived from violations of constitutional rights without actual innocence.[25]

A second danger, which is the focus of this Article, is that pitting actual innocence against legal innocence dilutes what innocence means.[26] This Article reclaims an unmodified vision of innocence in order to protect the rights of people who *did* commit crimes and are nevertheless wrongly convicted because of constitutional violations. Agreeing to take (or to keep) clients such as these—with wrongful conviction claims based on a deprivation of fundamental constitutional protections rather than on what is commonly referred to as "actual" innocence—would be one step toward reclaiming an unmodified vision of innocence. But mere caseload expansion would be meaningless without first developing a more fundamental change in thinking and language.

This Article therefore urges scholars, attorneys, and the courts to reclaim the core meaning of innocence, unmodified by qualifiers such as "actual" or "legal."[27] Reclaiming an unmodified understanding of innocence would continue to protect actually innocent people while also striving to protect people who are not actually innocent but have strong constitutional claims that warrant the reversal of their wrongful convictions. In addition to protecting a range of wrongly

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24. Steiker & Steiker, *supra* note 17, at 597.

25. *See, e.g.*, Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 434 (2006) ("Although we use the term 'wrongful execution' to mean the execution of the innocent, executions of the guilty that are unfair, arbitrary, biased, or based on unreliable aggravating evidence or incomplete mitigating evidence are also wrongful."); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 157–58 (2008) ("In terms of advocacy, the focus on innocence in the capital context, though it brought some salutary reforms, also tends to deflect focus from non-innocence related issues such as discrimination, inadequate representation, and excessive punishment (even for those guilty of the underlying offense)."); Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 54 (2009) ("The level of certitude DNA provides has become a *de facto* 'benchmark,' and the actual innocence it establishes is a touchstone for post-conviction relief. As a consequence, legal standards may be formulated and applied in ways that tend to disadvantage other types of proof.") (footnotes omitted).

26. *See* Garrett, *supra* note 6, at 1647–51 (recognizing gradations of actual innocence claims, such as "substantial" claims of innocence, "outcome-determinative" claims of innocence, and "indeterminate cases").

27. *See generally* Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH. L. REV. 5 (discussing the power of labels and cognitive bias, and suggesting the broadening of the term "wrongful convictions" to include not only those who are factually innocent but also those who have suffered other injustices such that their guilt cannot be established beyond a reasonable doubt).

convicted persons, it would go a long way toward ensuring that critical constitutional rights remain in place to protect us all.

The Article proceeds in three parts. Part I explains the pivotal role that actual innocence has played in the Innocence Movement. It shows that even though the Innocence Movement has begun to broaden its DNA-based focus to include non-DNA-based claims, its goal has remained constant: to achieve justice for actually innocent people. Part I then shows how the Innocence Movement has prioritized the cases of actually innocent people convicted through trial over actually innocent people who pled guilty. The prioritization of wrongful convictions derived from trials over wrongful convictions from pleas underscores how the Innocence Movement has overlooked the claims of people who have pled guilty and are not actually innocent, but who may still have strong wrongful conviction claims based on fundamental constitutional violations.

Part II examines the importance of protecting innocence unmodified in the context of trials and post-conviction appeals. Under the Supreme Court's existing jurisprudence, actual innocence alone is not enough to reverse a wrongful conviction raised through federal habeas, as the Court has not yet decided whether the Constitution forbids the execution of an actually innocent person who was convicted through a "full and fair" trial.[28] Because the Court has not recognized a freestanding actual innocence claim,[29] the actual innocence of a wrongly convicted person matters only in federal habeas law as a door through which to allow a court to reach underlying constitutional claims.[30] Part II uses the example of a recent Supreme Court decision, *In re Davis*,[31] to highlight how an isolated

28. *See* discussion *infra* Part II (citing *In re* Davis, 130 S. Ct. 1 (2009) (Scalia, J., dissenting)).

29. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) (declining to reach Herrera's freestanding actual innocence claim that the execution of an innocent person would violate the Eighth Amendment); *see also* House v. Bell, 547 U.S. 518, 554–55 (2006) (declining to resolve *Herrera*'s open question regarding the viability of a freestanding innocence claim).

30. *See* Schlup v. Delo, 513 U.S. 298, 326–28 (1995) (holding that a compelling claim of actual innocence enabling a court to consider otherwise procedurally defaulted constitutional claims may be made when the petitioner shows, through new evidence, that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt).

31. 130 S. Ct. 1, 1–2 (2009) (Stevens, J., concurring) (observing that, years after Davis was convicted of capital murder and sentenced to death, many of the witnesses in the case recanted their trial testimony and Davis submitted new evidence that one of the main witnesses against him at trial was actually responsible for the murder).

prioritization of actual innocence does not achieve justice for wrongly convicted people.

Part III reveals the degree to which the Court has polarized innocence in the context of guilty pleas—prioritizing actual innocence over fundamental constitutional protections for all people. This devaluation manifests itself in the Court's unwillingness to presume innocence in the full sense of the word—an innocence unmodified—during the plea process. It shows how the minimum admonishments courts give pro se defendants who plead guilty, as explained in *Iowa v. Tovar*,[32] are an example of the Supreme Court's willingness to overlook fundamental constitutional protections during the plea process, even if this oversight leads to wrongful convictions.

The Article concludes that a modified conception of innocence dilutes the constitutional core that protects us all, innocent and guilty alike. Scholars, courts, and the media must reclaim an understanding of innocence unmodified by terms such as "actual" and "legal" in order to ensure that all individuals receive due process of law.

I. THE FOCUS OF THE INNOCENCE MOVEMENT

Actual innocence has played a pivotal role in the Innocence Movement. Heralding exonerees as actually innocent people who served time for crimes they did not commit,[33] the Innocence Movement has successfully reversed many wrongful convictions through DNA testing.[34] As the number of exonerations[35] obtained through DNA analysis has grown,[36] the work of scholars describing

32. 541 U.S. 77 (2004). When Tovar was charged with felony drunk driving, he argued that a previous drunk driving offense—to which he had pled guilty pro se while in college—should not be used to increase the severity of his current drunk driving charge to a felony. *Id.* at 85.

33. *See, e.g.*, Melissa Grace, *Fernando Bermudez Declared Innocent After Serving 18 Years in Prison for Murder*, N.Y. DAILY NEWS, Nov. 12, 2009, http://articles.nydailynews.com/2009-11-12/news/17939761_1_cataldo-innocent-man-wrong-man (reporting the dismissal of a murder indictment against Fernando Bermudez, who had already served eighteen years in prison, because the trial court found "by clear and convincing evidence that the defendant ha[d] demonstrated his actual innocence").

34. *See* INNOCENCE PROJECT, *supra* note 1 ("The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice.").

35. " '[E]xoneration' is an official act declaring a defendant not guilty of a crime for which he or she ha[s] previously been convicted." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

36. For example, the Gross study identified that between 1989 and 1991 the number of exonerations based on DNA testing averaged only one or two per year; between 1992

the DNA exonerations as a kind of "random audit" of systemic problems within the criminal justice system has also gained traction.[37] Similarly, researchers have employed empirical analysis to study the number of exonerations obtained through DNA testing, then used the number of DNA exonerations to approximate the percentage of people who have been wrongly convicted.[38]

Another development within the Innocence Movement is a willingness to litigate non-DNA-based claims.[39] Because DNA evidence is available in so few criminal cases,[40] using DNA as the primary means to prove innocence excludes people who might be innocent but do not have DNA evidence to prove their innocence.[41] Although innocence projects still use DNA testing because of its seeming definitiveness in proving innocence,[42] increasingly more

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and 1995 it increased to an average of six per year; and from 2000 to 2003 it averaged twenty per year. *Id.* at 527.

37. Rosen, *supra* note 9, at 69–70.

38. *See, e.g.*, JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIAL 50 (1979) (observing that approximately five to ten percent of trials end in the conviction of an arguably innocent person); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343 (1997) (discussing data estimating that five percent of all trials result in convictions of innocent people); Rosen, *supra* note 9, at 69–75 (discussing the various studies and related articles).

39. Steiker & Steiker, *supra* note 17, at 618–19 ("[T]here has been an explosion of 'innocence projects' modeled on the path-breaking Innocence Project of Cardozo School of Law .... [As of 2005 there were] forty-two other 'innocence projects' in the United States, some of which follow the Cardozo model of pursuing only DNA exonerations, but most of which pursue innocence claims by traditional evidentiary means, as well.").

40. Sara Darehshori et al., *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails To Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 87 (2006). It is difficult to approximate the number of criminal cases in which DNA evidence is available, largely because DNA evidence is more prevalent in some kinds of crimes (such as murders or rapes) than other kinds of crimes (such as drugs or property crimes). *See* Gross et al., *supra* note 35, at 529 (showing that—based on the exonerations Gross et al. found that occurred between 1989 and 2003—no exonerations for drug and property crimes were based on DNA evidence, while a fairly high number of exonerations for murder and rape cases were based on DNA evidence).

41. *See, e.g.*, Rosen, *supra* note 9, at 73–74 ("[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted of crimes on virtually identical evidence. For these thousands of defendants, though, there was no opportunity to scientifically test their guilt, because there was no physical evidence that could have been subjected to scientific scrutiny.").

42. *See* Marshall, *supra* note 1, at 573–74 ("Spawned by the advent of forensic DNA testing and hundreds of post-conviction exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure.... [I]t addresses a value everyone shares: accurate determinations of guilt and innocence.... [T]he innocence revolution is born of science and fact, as opposed to choices among a competing set of controversial values."). *But see* Garrett, *supra* note 6, at 1646

innocence projects are willing to examine innocence claims based on evidence other than DNA.[43] Complementing the increased willingness of innocence projects to accept cases with non-DNA-based claims, legal scholars have also begun to analyze the difficulty of proving innocence with evidence other than DNA.[44] As the remainder of this Part explores, even though innocence projects have broadened their focus to accept non-DNA-based claims, they continue to focus on the actual innocence of people convicted through trials.[45]

A. *Actual Innocence*

The Innocence Movement has maintained a strong focus on actual innocence while seeking justice for wrongfully convicted people. One of the most comprehensive studies of exonerations to date is the 2005 study headed by Professor Samuel Gross ("the Gross Study"). The Gross Study discusses all exonerations[46] the researchers were able to locate that occurred between 1989 and 2003 that "resulted from investigations into the particular cases of the exonerated individuals."[47] The study found 340 exonerations: 144 were based on DNA evidence, and the other 196 exonerations came by "other means."[48] Actual innocence played a role in each of the 196

("[A]lthough some commentators casually refer to DNA testing as potentially 'conclusive' of innocence or guilt, evidence typically cannot be conclusive of innocence or guilt.").

43. *See* Steiker & Steiker, *supra* note 17, at 618–19.

44. *See, e.g.*, Gross et al., *supra* note 35, at 527–28; Rosen, *supra* note 9, at 73–75.

45. As Samuel Gross has explained, while pleading guilty "may have spared them the worst consequences of conviction," if defendants nonetheless received harsh sentences through their pleas, such sentences may still be "less extreme than they would otherwise have been after trial, which reduces the incentive to help them, and they are likely to have a harder time persuading people that they are innocent . . . ." Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 181 (2008). In other words, one reason why fewer exonerations are pursued for people who pled guilty is that, on average, people who plead guilty receive significantly lighter penalties. For example, of the approximately one million defendants who were convicted of felonies in state courts in 2000, ninety-five percent of those convictions were obtained by guilty pleas. *Id.* As Gross explains,

> The main reason they pled guilty is that in return they received a small fraction of the punishment they would have received after conviction at trial. Nearly one-third were not incarcerated at all, and the median term for those who did serve time was three years. By contrast, among defendants who were exonerated from 1989 through 2003—94% of whom went to trial—the median sentence was life in prison.

Id.

46. *See supra* note 35.

47. Gross et al., *supra* note 35, at 523–24.

48. *Id.* The people in their database were exonerated in one of four ways:

exonerations by "other means,"[49] a result of the study's definition of "innocence." The Gross Study defined "innocence" as actual innocence by excluding from its database individuals who were most likely involved in the crimes for which they were convicted.[50]

Other innocence databases reveal a similar definitional focus on actual innocence.[51] For example, another prominent study of innocence cases is that authored by Professor Brandon Garrett.[52] Garrett compiled a database of two hundred cases in which criminal defendants convicted of rape and/or murder were later exonerated through DNA testing.[53] Garrett referred to these first two hundred DNA exonerees in the United States as the "innocence group."[54] In a companion article, Garrett further explained that he defines "the innocent as those who did not commit the charged crime."[55] Garrett's definition of innocence explains why he did not include exoneration cases in his database unless they included actual innocence claims.[56]

Empirical studies like Garrett's and Gross's highlight the Innocence Movement's focus on representing individuals who are actually innocent of the crimes for which they were convicted. As the next section will illustrate, the studies also showcase the Innocence

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> (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison . . . .

Id. at 524.

49. *See id.*

50. *See id.* at 527 ("It is possible that a few of the hundreds of exonerated defendants we have studied were involved in the crimes for which they were convicted, despite our efforts to exclude such cases.").

51. *See, e.g.*, D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 777–82 (2007) (analyzing data supplied by the Innocence Project of Cardozo Law School). The Gross Study is described in detail throughout the remainder of this section.

52. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008). *See generally* Garrett, *supra* note 6 (using empirical data from his and other studies to argue for access to evidence concerning innocence at trial).

53. Garrett, *supra* note 52, at 63–69.

54. *Id.* at 64–65.

55. Garrett, *supra* note 6, at 1645.

56. *See* Garrett, *supra* note 52, at 55 ("This empirical study examines for the first time how the criminal system in the United States handled the cases of people who were subsequently found innocent through postconviction DNA testing.").

Movement's preference for representing people who were convicted through trial rather than through guilty pleas.

B. Trials

The Gross and Garrett innocence databases show that many of the people exonerated through the Innocence Movement's efforts had been convicted through trial. For example, in Garrett's database of two hundred exoneration cases, only nine of those cases involved defendants who had pled guilty;[57] the other 192 defendants had been convicted through trial.[58] Of the nine cases in which defendants pled guilty and were later exonerated by DNA evidence, four of those cases involved defendants who were represented by counsel when they pled guilty.[59]

Similarly, of the 340 exonerations in the Gross Study, "[o]nly twenty of the exonerees in [their] database pled guilty, less than six percent of the total."[60] The authors give a partial explanation for the low number of pleas in their database: "It is well known . . . that many defendants who can't afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted."[61] They go on to explain, "Some defendants who accept these deals are innocent, possibly in numbers that dwarf false convictions in the less common but more serious violent felonies, but they are almost never exonerated—at least not in individual cases."[62]

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57. *Id.* at 74.

58. *Id.*

59. *Compare* Garrett, *supra* note 52, at 74 n.71 (naming the nine people who pled guilty), *with Browse the Profiles*, *supra* note 3 (indicating that three of the nine people listed in Garrett's database—Chris Ochoa, James Ochoa, and Arthur Lee Whitfield—were represented by attorneys at trial). Whether the other five people who pled guilty were represented by counsel is unclear from the available information.

60. Gross et al., *supra* note 35, at 536.

61. *Id.* at 536 (citing Barbara Taylor, Op-Ed., *Trapped on Rikers Island*, N.Y. TIMES, Sept. 7, 1996, at 21).

62. *Id.* The Gross study distinguishes individual cases from "mass exonerations of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury and corruption," *id.* at 533, such as the Rampart scandal in Los Angeles, in which members of the Los Angeles Police Department were revealed to have "routinely lied in arrest reports, . . . fabricated evidence, and framed innocent defendants." *Id.* at 534. "[A]t least 100 criminal defendants who had been framed by Rampart CRASH officers . . . had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic men who had pled guilty to false felony gun or drug charges." *Id.* The Gross Study did not include any of these mass exonerations resulting from large-scale patterns of police perjury. *Id.* at 533.

Such research has rich statistical information and analytical depth that provide critical insight about criminal defendants who did not commit the crimes for which they were wrongfully convicted. The definitional choice of who is and who is not included in these and other databases provides a way to understand the focus on the actual innocence of persons convicted through trial. These studies illuminate the limited number of exonerees whose original convictions were based on guilty pleas, and they also reveal how the concept of innocence is understood. For example, the decision of both Garrett and Gross et al. to purposely exclude individuals with solely legal claims without accompanying claims of innocence provides information about who falls within the innocence circle and who falls outside of it.[63]

Similarly, even though an increasing number of innocence projects are willing to take cases based on non-DNA evidence,[64] most innocence projects continue to prioritize cases with evidence that establishes an actual innocence claim, rather than cases with evidence that establishes a wrongful conviction claim without an accompanying claim of actual innocence.[65] For instance, imagine a person who did in fact commit a crime and was arrested for that crime, then was coerced to confess and was convicted in large part through reliance on the confession. While that person may have a wrongful conviction claim, he has no accompanying claim of actual innocence; for this reason, most innocence projects likely would not take his case.[66]

Now consider the case of a person who was both wrongfully convicted and actually innocent, such as a bystander to a murder who had nothing to do with the murder but was swept up by the police and coerced to confess to it, even though he was just in the wrong place at the wrong time. After the prosecution uses the coerced confession to convict him, he has constitutional claims to argue that he was wrongly convicted, as well as an actual innocence claim to support his wrongful conviction. Innocence projects would be more likely to take his case.[67] Actual innocence claims stemming from trials consequently remain the focus of the Innocence Movement.

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63. *See* Garrett, *supra* note 52, at 59–60 (noting that the study examined only those exonerated by postconviction DNA); *supra* note 50 and accompanying text; *see also* Garrett, *supra* note 6, at 1645 ("I define the innocent as those who did not commit the charged crime.").

64. *See supra* note 39 and accompanying text.

65. *See, e.g.*, Roberts & Weathered, *supra* note 2, at 51 ("[F]actual innocence is the overriding consideration for Innocence Projects . . . .").

66. Steiker & Steiker, *supra* note 17, at 619–20.

67. *See id.*

C. *The Combination*

In sum, although advocates within the Innocence Movement have broadened their vision to include non-DNA-based innocence claims instead of relying solely on DNA-based innocence claims, innocence projects continue to devalue wrongful conviction claims that do not have accompanying claims of actual innocence. Innocence projects often refuse to represent defendants who do not have actual innocence claims to accompany their wrongful conviction claims.[68] Or, if they take a person's case and find out during the course of representation that he does not have an actual innocence claim to accompany the wrongful conviction claim, they might withdraw from representation.[69]

Similarly, the exonerees documented in innocence databases largely are people who were convicted through trials, rather than people who pled guilty. By combining these two sets of convicted people—those who have wrongful conviction claims without accompanying claims of actual innocence and those who pled guilty rather than proceeding to trial—a group of legally innocent people emerges, a group that is largely missing from most discussions within the Innocence Movement. An unmodified conception of innocence would help to protect the constitutional rights of this currently overlooked group. But it would also do more. As Part II explains, the very viability of actual innocence claims relies on a robust protection of innocence unmodified.

II. EXAMINING INNOCENCE UNMODIFIED

A. *The Presumption of Innocence Before Conviction*

The presumption of innocence[70] is a principle "axiomatic and elementary, and its enforcement lies at the foundation of the

68. *Id.*

69. *Id.* ("[A]ctual or potential clients whose claims turn out to be only partial or purely legal defenses . . . may have their non-innocence claims ignored or abandoned mid-stream.").

70. *See generally* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989) (analyzing the history, purpose, and use of the presumption of innocence as it related to the reasonable doubt rule). Sundby analyzes three approaches to reconciling competing interests raised by the presumption of innocence and argues for the necessity to re-embrace a broad view of the scope of the reasonable doubt rule. *Id.* at 462. He also collects sources that describe the presumption of innocence as the "golden thread that runs throughout the criminal law," the "cornerstone of Anglo-Saxon justice," and the "focal point of any concept of due process." *Id.* at 457 (internal citations omitted). For another perspective on the development of the

administration of our criminal law."[71] The presumption of innocence does not rest on the question of actual innocence alone.[72] To the contrary, the presumption of innocence encompasses an innocence unmodified by terms such as "legal" and "actual," ensuring that the government bears the burden of proving the defendant *legally* guilty beyond a reasonable doubt.[73] When the prosecution fails to meet its burden, the return of a not-guilty verdict could mean that the prosecution did not meet its burden of proving the defendant guilty

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presumption of innocence, see CARLETON KEMP ALLEN, LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 253, 273–75 (Scientia Verlag Aalen 1977) (1931). Allen maintains that, by the middle of the eighteenth century, most of the changes in the nature of criminal trials had taken place, except for the development of the presumption of innocence. *Id.* Allen attributes the delay to three factors: First, people believed that the criminal law was still "so imperfect, so sporadic, so riddled with loopholes, that no relaxation whatever could be made consistently with safety" because there was no effective police system in place. *Id.* at 274. Second, people believed that "trifling inaccurac[ies]" in criminal indictments "allowed many guilty persons to escape" when their indictment was invalidated. *Id.* at 274–75. For example, "Sir Harry Poland records—though [it is unclear] to what case he refers—that in 1827 Buller J. quashed an inquisition for murder because it stated that the jurors *on their oath* presented ... whereas the wording should have been, *on their oaths*." *Id.* at 275 (footnote omitted). The third factor is that people believed there were still many "wrongs" a person could commit that were not considered crimes. *Id.* The combination of these factors, Allen asserts, left people feeling insecure about their own personal safety, and this fear slowed the development of the presumption of innocence. *Id.* at 274.

Allen then argues that several changes occurred during the course of the nineteenth century that allowed people to feel sufficiently safe to be open to the idea of the presumption of innocence. *Id.* at 275–76. These changes included criminalizing most "wrongs" that had not before been considered crimes, as well as developing "a professional police force, a Public Prosecutor's department, and a Criminal Investigation Department." *Id.* at 276. As a result, Allen believes that by the end of the nineteenth century society was feeling sufficiently safe from crime that it was more open to affording criminal defendants additional protection in the form of the presumption of innocence. *Id.*

71. Coffin v. United States, 156 U.S. 432, 453 (1895).

72. *See* Laufer, *supra* note 5, at 348–51 (describing the historical basis of the presumption of innocence and the role of both factual and legal innocence).

73. *See, e.g.*, Roberts & Weathered, *supra* note 2, at 50–51 ("A ... confusion of lay and legal perception surrounds the definition of the term 'presumption of innocence.' The presumption of innocence is a technical term which requires the prosecution to prove its case beyond reasonable doubt. If the prosecution case fails it does not follow that the defendant is factually innocent, as a verdict of 'not guilty' by the jury does not mean that the defendant is not responsible for the crime. So, whilst it is the role of the trial courts to determine whether the defendant is 'legally guilty,' not whether he is actually innocent, there is clearly a distinction drawn between innocence, as it would be understood outside the legal arena, and legal innocence.") (footnotes omitted); *see also* Laufer, *supra* note 5, at 387–91 (describing different types of innocence, standards of proof, and their utilization). *See generally* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2007) (tracing the history of the term "beyond a reasonable doubt" through centuries of Christian theology and common law history).

beyond a reasonable doubt because the defendant was actually innocent. It could also mean that the prosecution did not meet its burden of proof—as to either an element of the crime or the degree of certainty understood as "proof beyond a reasonable doubt"—even though the defendant engaged in conduct underlying the government's charge.[74]

B. Asserting Innocence After Conviction

The pre-conviction presumption of innocence differs from innocence claims made on post-conviction appeal.[75] Once a person is convicted—either by trial or by plea—the presumption of innocence disappears.[76] When a person who has been convicted appeals the conviction with accompanying claims of innocence, the person comes before the court in a decidedly different posture than he did prior to the conviction: "[I]n the eyes of the law, [the] petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law . . . ."[77]

Once a person has been convicted of a crime, legal innocence and actual innocence often interweave in critical ways during the post-conviction appeals process, as the rest of this Part explores. The recent Supreme Court decision *In re Davis*[78] shows how the relief for wrongly convicted, actually innocent people relies on a robust preservation of an innocence unmodified. Davis's case highlights the degree to which claims of actual innocence interweave with a broader conception of innocence. His federal pleadings initially framed his actual innocence claim as a door through which to reach his

74. *See, e.g.*, Raymond, *supra* note 5, at 456 ("A 'not guilty' verdict can mean one of several things. It can mean that the jurors believed the defendant committed all the necessary elements of the crime, but did not believe it with the requisite degree of certainty. Call this 'burden of proof innocence.' A 'not guilty' verdict can also mean that the jury found some, but not all, of the elements of the offense, typically because the defendant committed the *actus reus* of the offense, but lacked the necessary *mens rea*. Call this 'legal innocence.' A 'not guilty' verdict can also mean that the jurors believed the defendant did not commit the *actus reus* of the crime in question. . . . Call this 'factual innocence.' ") (footnote omitted). Interestingly, in contrast to the choices of "guilty" and "not guilty," the Scottish system adds an additional choice of "not proven." *See* Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 193–94 (1999) ("Around one-third of all jury acquittals are the product of the not proven verdict . . . ."); Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1304 (2005) (proposing the introduction of a verdict patterned after Scotland's "not proven" verdict).

75. *See* Herrera v. Collins, 506 U.S. 390, 398–400 (1993).

76. *See id.*

77. *Id.* at 399–400.

78. 130 S. Ct. 1 (2009) (per curiam).

substantive legal claims, but when those claims failed, the only claim that remained was a freestanding claim of innocence.

1. The Facts of *Davis*

Twenty-one years ago in Georgia, Troy Anthony Davis was charged with the murder of Mark Allen MacPhail.[79] The crime occurred just after midnight on August 19, 1989.[80] An off-duty police officer, MacPhail reported for work as a security guard at the Greyhound bus station in Savannah, which was adjacent to a fast-food restaurant.[81] According to the prosecution's theory of the case, a fight broke out in the restaurant parking lot,[82] and Davis struck a homeless man[83] with a pistol.[84]

When the fight began, MacPhail was at the bus station.[85] Still in his police uniform, MacPhail ran from the bus station to the restaurant parking lot.[86] Davis then ran away.[87] According to the prosecution's evidence, when MacPhail ordered Davis to stop, Davis turned and shot MacPhail.[88] When MacPhail fell to the ground, "Davis, smiling, walked up to the stricken officer and shot him several more times."[89] MacPhail was shot in his left cheek and right leg, and the fatal bullet entered MacPhail's body through a gap on the left side of his bulletproof vest.[90]

The prosecution also put on evidence that, the day after the shooting, Davis told a friend that he had hit someone with a gun during an altercation at the restaurant the previous night and that, when a police officer came running, Davis shot him and then "finished the job" because he thought the officer would be able to identify him.[91]

The jury trial began exactly two years later, on August 19, 1991.[92] Davis's defense was that he was present when the homeless man was beaten but that one of Davis's companions, not Davis himself, shot

79. *See In re* Davis, 565 F.3d 810, 813 (11th Cir. 2009) (per curiam).
80. Davis v. State, 426 S.E.2d 844, 846 (Ga. 1993).
81. *Id.*
82. *In re Davis*, 130 S. Ct. at 2 (Scalia, J., dissenting).
83. *Id.*
84. *Davis*, 426 S.E.2d at 846.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 845 n.1.

Officer MacPhail.[93] Davis was found guilty of murder, two counts of aggravated assault, obstruction of a law enforcement officer, and possession of a firearm during the commission of a felony.[94] The court sentenced him to death for murdering McPhail.[95]

2. The Procedural History

In the years between Davis's conviction and his scheduled execution date, seven crucial witnesses for the State recanted their testimony, and several people "implicated the State's principal witness as the shooter."[96] Based on this new evidence establishing his actual innocence of the crime, Davis attempted to file a second federal habeas petition setting forth a freestanding claim of actual innocence, but the U.S. Court of Appeals for the Eleventh Circuit denied his application to do so.[97]

Davis's case eventually landed in the United States Supreme Court in the summer of 2009.[98] The procedural history of Davis's case is critical in understanding the import of the Court's subsequent action. The procedural history also sheds light on how actual innocence and legal innocence interweave with one another. It is therefore important to outline what Davis had done before he attempted to file a second federal habeas petition setting forth a freestanding innocence claim.

Prior to the summer of 2009, Davis had already litigated and lost both a state post-conviction petition in the Georgia state courts[99] and a first federal habeas petition in the federal courts.[100] This first federal habeas petition raised a number of constitutional violations that Davis had not raised in his state post-conviction appeal.[101] Because these new claims were procedurally defaulted in federal district court

93. *In re* Davis, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting).

94. *Davis*, 426 S.E.2d at 845.

95. *Id.*

96. *In re Davis*, 130 S. Ct. at 1 (Stevens, J., concurring).

97. *In re* Davis, 565 F.3d 810, 813 (11th Cir. 2009) (per curiam).

98. *In re* Davis, 130 S. Ct. 1 (2009).

99. Davis v. Turpin, 539 S.E.2d 129, 131–34 (Ga. 2000); *see also In re Davis*, 565 F.3d at 813–14 (describing the procedural history leading up to the filing of the second habeas petition).

100. *In re Davis*, 565 F.3d at 813–14.

101. *Id.* at 813 ("Davis then filed his first federal habeas corpus petition on December 14, 2001, raising a number of constitutional violations [that he had not raised before in state court], including (1) that the prosecution knowingly presented false testimony at his trial, in violation of *Giglio*; (2) that the prosecution failed to disclose material exculpatory evidence, in violation of *Brady*; and (3) that his trial counsel was constitutionally ineffective, in violation of *Strickland*.").

by his failure to raise them in state court first, Davis argued that "he should be able to raise these claims anyway because he was actually innocent of the underlying murder."[102] Although Davis did not raise a substantive freestanding claim of actual innocence in his first federal habeas petition,[103] Davis subsequently filed a motion in the district court to stay the federal habeas proceedings in order to present a freestanding actual innocence claim to the state courts.[104] The district court denied this request and his petition.[105] In doing so, the court reached the merits of his constitutional claims without also ruling on his actual innocence claim.[106] The Eleventh Circuit affirmed this ruling and "made clear . . . that Davis had 'not ma[d]e a substantive claim of actual innocence.' "[107]

Davis then filed an extraordinary motion for new trial in the Georgia state trial court with accompanying affidavits setting forth newly discovered evidence in support of his motion.[108] The state trial court reviewed the affidavits and denied his motion.[109] The Georgia Supreme Court granted his application for discretionary review and affirmed the trial court's order denying Davis's extraordinary motion for a new trial.[110] After the United States Supreme Court denied his petition for certiorari review of the Supreme Court of Georgia's decision,[111] Davis applied for permission with the Eleventh Circuit to file a second habeas corpus petition in federal district court, and this request was denied.[112]

At this point, Davis filed a habeas petition setting forth his freestanding substantive innocence claim in the United States Supreme Court pursuant to its original jurisdiction.[113] Before filing his application with the Eleventh Circuit for leave to file a second habeas petition in federal district court in Georgia, Davis's prior appeals and post-conviction petitions had never before included a freestanding substantive innocence claim.[114] His first federal habeas petition had

102. *Id.* (citing Schlup v. Delo, 513 U.S. 298 (1995)).
103. *Id.*
104. *Id.* at 813–14.
105. *Id.* at 814.
106. *Id.* at 813.
107. *Id.* at 814 (quoting Davis v. Terry, 465 F.3d 1249, 1251 (11th Cir. 2007)).
108. *Id.* (citing GA. CODE ANN. § 5-5-41 (2008)).
109. *Id.*
110. *Id.* at 814–15 (noting that he also filed a motion for a stay of execution with his application for discretionary review).
111. Davis v. Georgia, 129 S. Ct. 397 (2008).
112. *In re Davis*, 565 F.3d at 816, 827.
113. *In re* Davis, 130 S. Ct. 1, 1 (2009); SUP. CT. R. 20.4(a).
114. *In re Davis*, 565 F.3d at 813.

included an innocence claim as a door through which to reach his procedurally defaulted unfair trial claim.[115] This essentially meant that he submitted his innocence claim to the court as a way for the court to reach the underlying legal claim that would have otherwise been procedurally defaulted in his case.[116] In evaluating this prior innocence claim, the Supreme Court of Georgia,[117] the Georgia State Board of Pardons and Appeals,[118] and the U.S. Court of Appeals for

115. Davis v. Terry, 465 F.3d 1249, 1251 (11th Cir. 2006) (per curiam) ("Davis['s federal habeas corpus petition] does not make a substantive claim of actual innocence. Rather, he argues that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under *Schlup*."); *see also* Schlup v. Delo, 513 U.S. 298, 329–32 (1995) (holding that a compelling claim of actual innocence enabling a court to consider otherwise procedurally defaulted constitutional claims may be made when the petitioner shows, through new evidence, that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt).

116. *Davis*, 465 F.3d at 1251–52.

117. The Georgia Supreme Court looked "beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death." Davis v. State, 660 S.E.2d 354, 362 (Ga. 2008). "After analyzing each of Davis's proffered affidavits and comparing them with the evidence adduced at trial, it concluded that it was not probable that [a jury] would produce a different result." *In re Davis*, 130 S. Ct. at 4 (Scalia, J., dissenting) (citing *Davis*, 660 S.E.2d at 358–63).

118. When presented with Davis's clemency petition, the Georgia Board of Pardons and Paroles "stayed his execution and 'spent more than a year studying and considering [his] case.' " *In re Davis*, 130 S. Ct. at 4 (Scalia, J., dissenting) (quoting Brief in Opposition on Behalf of Respondent at 14–15, *In re Davis*, 130 S. Ct. 1 (No. 08-1443)). Justice Scalia noted that

> [the Board of Pardon and Paroles] "gave Davis' attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis' guilt"; it "heard each of these witnesses and questioned them closely." It "studied the voluminous trial transcript, the police investigation report and the initial statements of the witnesses," and "had certain physical evidence retested and Davis interviewed." "After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency [was] not warranted."

Id. (citations omitted) (quoting Brief in Opposition on Behalf of Respondent at 14–15, *In re Davis*, 130 S. Ct. 1 (No. 08-1443)).

the Eleventh Circuit[119] each considered the affidavits and other supporting evidence of Davis's innocence and "found it lacking."[120]

When the Eleventh Circuit denied Davis leave to file his second petition in federal district court, the Eleventh Circuit noted that one remaining avenue left available to him was to ask the United States Supreme Court to exercise its original habeas jurisdiction over the case.[121] Although the Supreme Court had not exercised such jurisdiction in more than fifty years, on August 17, 2009, it decided to do so.[122]

In a per curiam order, the Supreme Court transferred Davis's case to the United States District Court for the Southern District of Georgia to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[123] The order included a concurrence by Justice Stevens (joined by Justices Ginsburg and Breyer) and a dissent by Justice Scalia (joined by Justice Thomas). In his dissent, Justice Scalia noted the following:

> This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable.[124]

Justice Stevens responded to Justice Scalia's observation by asserting that "[t]he substantial risk of putting an innocent man to

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119. Justice Scalia summarized the Eleventh Circuit's conclusion:

> After reviewing the record, the Eleventh Circuit came to a conclusion "wholly consonant with the repeated conclusions of the state courts and the State Board of Pardons and Paroles." "When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail's murder."

Id. (citations omitted) (quoting *In re Davis*, 565 F.3d at 825, 826).

120. *Id.*

121. *In re* Davis, 565 F.3d 810, 826–27 (11th Cir. 2009) (per curiam) ("Davis still may petition the United States Supreme Court to hear his claim under its original jurisdiction. The Supreme Court has made clear that the habeas corpus statute, even after the AEDPA amendments of 1996, continues to allow it to grant a writ of habeas corpus filed pursuant to its original jurisdiction.").

122. *In re Davis*, 130 S. Ct. at 2 (Scalia, J., dissenting).

123. *Id.* at 1 (majority opinion).

124. *Id.* at 3 (Scalia, J., dissenting) (citing, inter alia, Herrera v. Collins, 506 U.S. 390, 400–01, 416–17 (1993)).

death clearly provides an adequate justification for holding an evidentiary hearing" and that the transfer to the district court was not a "fool's errand."[125]

Justice Scalia's observation is nonetheless correct. The Supreme Court has never held that it is unconstitutional to execute an actually innocent person[126] who has been found guilty after a full and fair trial.[127]

3. Protecting Innocence Unmodified

Troy Davis's case highlights the degree to which claims of actual innocence interweave with a broader conception of innocence. Because the Supreme Court has yet to resolve whether a freestanding innocence claim is cognizable,[128] Davis's original federal pleadings

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125. *Id.* at 1 (Stevens, J., concurring).

126. House v. Bell, 547 U.S. 518, 555 (2006); *see also* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009) ("Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence.' Whether such a federal right exists is an open question.").

127. The term "full and fair" is a term of art with a long history within Supreme Court precedent. For a thoughtful discussion of the history and evolution of the term, see Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 21–38 (2010). While a full discussion explaining the evolution of and tensions within the Court's use of the term is beyond the scope of this Article, several cases are particularly informative for the interested reader. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 781, 783 (2008) ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.... To determine the necessary scope of habeas corpus review, therefore, we must assess the [Combatant Status Review Tribunal] process, the mechanism through which petitioners' designation as enemy combatants became final."); Stone v. Powell, 428 U.S. 465, 494–95 (1975) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.") (footnotes omitted); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 527–28 (1963) ("I continue to resist, in sum, the notion that the inquiry on habeas should be mere repetition ... of what has gone before.... [I suggest] modifi[cations] to make clear that where a federal constitutional question has been fully canvassed by fair state process, and meaningfully submitted for possible Supreme Court review, then the federal district judge on habeas, though entitled to redetermine the merits, has a large discretion to decide whether the federal error, if any, was prejudicial, whether justice will be served by releasing the prisoner, taking into account in the largest sense all the relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him.").

128. *See Osborne*, 129 S. Ct. at 2321; *House*, 547 U.S. at 555. While the cognizability of a freestanding claim of "actual innocence" remains an open question in the Supreme Court, some states have relied on their state constitutional jurisprudence to recognize the

framed his actual innocence claim as a door through which to reach his substantive legal claims. Put another way, his actual innocence claim was a path to reach his legal innocence claims. After Davis's original federal pleadings failed, his application in the Eleventh Circuit for leave to file a second or successive petition in the federal district court, and then his federal habeas corpus petition in the United States Supreme Court, were based on a substantive freestanding innocence claim: his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was actually innocent of the murder.[129]

Davis thus shows one reason to protect an unmodified conception of innocence: under the Court's existing jurisprudence, actual innocence and legal innocence act hand-in-hand to achieve justice for a wrongly convicted person. In other words, the actual innocence claim opens the door to consideration of the underlying legal claim.[130]

In addition to the way that actual innocence and legal innocence interweave in the Court's existing jurisprudence, the Court could have used *Davis* as a framework through which to discuss another way that legal innocence and actual innocence intersect. Recall that in his dissent, Justice Scalia phrased the open question before the Court as whether "the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[131] Within the construction of Justice Scalia's question is the assumption that a trial could be assessed as full and fair even if it resulted in the conviction of an actually innocent person. Rather than resting a decision on the question of actual innocence alone, the Court could thus decide that a trial cannot be found to have been constitutionally full and fair if it resulted in the conviction of an actually innocent person.[132]

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viability of such claims. *See, e.g.*, State v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) ("We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process. That holding aligns Illinois with other jurisdictions likewise recognizing, primarily as a matter of state *habeas corpus* jurisprudence, a basis to raise such claims under the rubric of due process.").

129. *In re* Davis, 565 F.3d 810, 813 (11th Cir. 2009) (per curiam).

130. *See House*, 547 U.S. at 554–55; Schlup v. Delo, 513 U.S. 298, 314–15 (1995).

131. *In re* Davis, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) (citing, inter alia, Herrera v. Collins, 506 U.S. 390, 400–01, 416–17 (1993)).

132. *Cf.* Garrett, *supra* note 6, at 1635 (discussing the lack of a Court-recognized constitutional claim of innocence); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 308 (1993) (exploring whether the Court's recent focus on innocence provides a ground for "bare-innocence" habeas claims).

If the Court were to so hold, legal innocence and actual innocence claims would interweave in yet another way. Rather than using an actual innocence claim to access otherwise procedurally defaulted legal claims (a strategy that Davis tried and failed to do through phases of his appellate process), an actual innocence claim could be part and parcel of a legal claim that the petitioner's trial was constitutionally deficient. It would thus blend into a claim that constitutional deficiencies undermined the fairness of the trial process.

Alternatively, the Court could also announce the viability of a freestanding claim of actual innocence.[133] *Davis* had the potential to be the case in which the Court announced that a federal constitutional claim based on actual innocence does in fact exist, but that possibility depended largely on the federal district court's findings of fact following Davis's long-awaited evidentiary hearing.[134] Unfortunately for Davis, after finally receiving his day in court on his innocence evidence, the district court concluded that "Davis ha[d] failed to prove his innocence."[135] In so doing, the district court decided that a freestanding claim of actual innocence is indeed cognizable.[136] It also found that while Davis's "new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors."[137] Because "[t]he vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value," the district court held that Davis "failed to make a showing of actual innocence that would entitle him to habeas relief in federal court."[138]

At the same time that the district court articulated lengthy factual findings and analysis in support of its decision that Davis had

133. *Cf.* Garrett, *supra* note 6, at 1637–38 (asserting that the Constitution supports freestanding actual innocence claims in certain circumstances); Steiker, *supra* note 132, at 312 ("[T]he Court should authorize the federal courts to entertain bare-innocence claims whether or not such claims can fairly be characterized as 'constitutional.' ").

134. *In re Davis*, 130 S. Ct. at 1–2 (Stevens, J., concurring) ("The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. The court may also find it relevant to the AEDPA analysis that Davis is bringing an 'actual innocence' claim. . . . Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person.") (citations omitted).

135. *In re* Davis, No. CV409-130, 2010 U.S. Dist. LEXIS 87340, at *2 (S.D. Ga. Aug. 24, 2010).

136. *Id.* at *104, *217 ("[E]xecuting an innocent person would violate the Eighth Amendment of the United States Constitution.").

137. *Id.* at *216.

138. *Id.*

not presented persuasive evidence of innocence,[139] the district court readily admitted that the jurisdictional effects of its decision, especially with regard to appeal, were unclear.[140] Unsure of how to go forward procedurally following the Supreme Court's rare exercise of its original jurisdiction and subsequent order that Davis return to federal district court for an evidentiary hearing regarding his innocence, Davis sought review of the district court's decision by both the Eleventh Circuit and the Supreme Court.[141] The Eleventh Circuit dismissed Davis's appeal, stating that the Supreme Court was the appropriate court for the appeal,[142] and a few months later, the Supreme Court denied review as well.[143]

As a result, the Supreme Court did not ultimately use Davis's case to announce a freestanding claim of actual innocence. Nonetheless, the Court's exercise of original jurisdiction in sending Davis's case to a federal district court shed much light on how actual innocence claims interweave with legal innocence. It also showed the importance of reclaiming a robust understanding of an innocence unmodified in the event that the district court had found Davis to be actually innocent.

Additionally, the Supreme Court's instruction to the federal district court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained *at the time of trial* clearly establishes petitioner's innocence"[144] highlighted another critical component of innocence claims: the important role trials serve in safeguarding claims of innocence. As the next Part explores, in contrast to defendants found guilty through trial, defendants who plead guilty face additional hurdles in later establishing their innocence.

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139. In the concluding footnote of this opinion, the district court stated:

> After careful consideration and an in-depth review of twenty years of evidence, the Court is left with the firm conviction that while the State's case may not be ironclad, most reasonable jurors would again vote to convict Mr. Davis of Officer MacPhail's murder. A federal court simply cannot interpose itself and set aside the jury verdict in this case absent a truly persuasive showing of innocence. To act contrarily would wreck complete havoc on the criminal justice system.

Id. at *217 n.108 (citing Herrera v. Collins, 506 U.S. 390, 417 (1993)).

140. *Id.* at *2 n.1.

141. *U.S. Supreme Court Rejects Appeal from Georgia Death Row Inmate*, CNN (Mar. 28, 2011), http://www.cnn.com/2011/CRIME/03/28/us.scotus.davis/index.html.

142. Davis v. Terry, 625 F.3d 716, 719 (11th Cir. 2010).

143. *In re* Davis, 79 U.S.L.W. 3554, 3554 (U.S. Mar. 28, 2011) (No. 08-1443); *U.S. Supreme Court Rejects Appeal from Georgia Death Row Inmate*, *supra* note 141.

144. *In re* Davis, 130 S. Ct. 1, 1 (2009) (emphasis added).

III. GUILTY PLEAS AND INNOCENCE UNMODIFIED

This Part shifts the analysis from convictions obtained through trials to convictions obtained through guilty pleas in order to explore the degree to which the Supreme Court has prioritized actual innocence over fundamental constitutional protections for all people. This Part will show that the Court's devaluation of a broad conception of innocence manifests itself in the Court's unwillingness to presume innocence in the full sense of the word—an innocence unmodified—during the plea process.

The Court's devaluation of a broad conception of innocence within the plea process is especially problematic because, in contrast to Troy Davis's decision to go to trial, the vast majority of criminal defendants plead guilty.[145] Many of those defendants are represented by attorneys; others are not. In the Gross Study discussed in Part I, of the 340 exonerations found within the fifteen-year period between 1989 and 2003, "[o]nly twenty of the exonerees in [the] database pled guilty, less than six percent of the total."[146] As the Gross Study reveals, when discussing innocence and exonerations, relatively little is known about the plight of defendants who plead guilty.[147] Even more removed is the plight of defendants who plead guilty without attorneys—especially pro se defendants who plead guilty and later claim to be legally innocent.[148]

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145. *See* Gross, *supra* note 45, at 181 ("About one million defendants were convicted of felonies in state courts in 2000, 95% by pleas of guilty."); *see also* Givelber, *supra* note 38, at 1337 (noting that more than ninety percent of convictions for violent felonies in a survey of the seventy-five largest counties in the United States were the result of guilty pleas).

146. Gross et al., *supra* note 35, at 523, 536.

147. *Id.* "It is well known . . . that many defendants who can't afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted." *Id.* at 536. While observing that this is "one facet of a system in which about 90% of defendants who are convicted plead guilty rather than go to trial," Gross hypothesizes that "[s]ome defendants who accept these deals are innocent, possibly in numbers that dwarf false convictions in the less common but more serious violent felonies, but they are almost never exonerated—at least not in individual cases." *Id.* He then explains that some of the defendants who pled guilty and were later exonerated were discovered only because their cases were "produced by systematic programs of police perjury that were uncovered as part of large scale investigations." *Id.* at 536–37. He adds, "If these same defendants had been falsely convicted of the same crimes by mistake—or even because of unsystematic acts of deliberate dishonesty—we would never have known." *Id.* at 537.

148. For one of the most comprehensive empirical studies of pro se felony defendants, see generally Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007). That study noted the difficulty in obtaining information about pro se felony defendants: the state court database Hashimoto analyzed contained roughly 20,000 defendants for each year of

There are several reasons why defendants who plead guilty do not receive the same attention as defendants who are convicted through trial. One reason is that, on average, defendants who plead guilty receive substantially lighter penalties than defendants who are convicted through trial. For example, of the approximately one million defendants convicted of felonies in state courts in 2000, almost one-third were not incarcerated, and those who were incarcerated served a median term of three years; "[b]y contrast, among defendants who were exonerated from 1989 through 2003—94% of whom went to trial—the median sentence was life in prison."[149] Given these statistics, it is notable that the twenty exonerees in Gross's database who pled guilty were

> highly unrepresentative of felony plea bargains in general: All but one of the 20 pled guilty to murder or rape; all had faced life imprisonment or the death penalty; the average sentence they received after pleading guilty was more than 46 years in prison; only three were sentenced to less than 10 years.[150]

As Gross points out, these twenty innocent defendants who pled guilty received "sufficiently draconian sentences to justify the extraordinary mobilization of resources that is usually necessary to have a shot at exoneration."[151]

Yet another reason why defendants who plead guilty receive less attention than defendants convicted through trial is that defendants who plead guilty forego most of their salient appellate issues in the process of pleading guilty.[152] Even if his constitutional rights were

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data, but it had information for only about forty or fifty pro se defendants. *Id.* at 441–42. The federal docketing database she analyzed had a similarly insufficient sample size for pro se defendants. *Id.* at 442–43.

149. Gross, *supra* note 45, at 181.

150. *Id.*

151. *Id.*

152. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 58–59 (1985) (explaining that, to show prejudice in an ineffective assistance of counsel claim based on a guilty plea, the defendant must demonstrate a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); Tollett v. Henderson, 411 U.S. 258, 267–68 (1973) (stating that, because a guilty plea creates a "break in the chain of events which has preceded it in the criminal process," a criminal defendant who pleads guilty on the advice of competent counsel is not entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected); McMann v. Richardson, 397 U.S. 759, 767–68 (1970) (holding that a defendant who had pled guilty was not entitled to a hearing on his petition for federal habeas corpus if he alleged only that he had pled guilty because of a prior coerced confession); *see also* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 913–19 (2004) (describing the plea process and proposing reforms).

violated somewhere between arrest and conviction, after a defendant admits in court that he committed the charged crime, it becomes exceedingly difficult to argue that a constitutional violation prior to the plea warrants reversal of the conviction.[153] The best, if not the only, appellate issue a defendant who pleads guilty may raise is that the plea was not knowing, intelligent, and voluntary,[154] but even that assertion is difficult to prove to the extent necessary to reverse the conviction.[155]

In contrast to defendants who plead guilty, defendants convicted following a jury trial retain a host of salient appellate issues. Given this reality of appellate litigation, it is not surprising that most exonerated people were originally convicted through trial (and most of those people additionally were represented by counsel at their trials). When the actual innocence of a convicted person is proven through tangible methods such as DNA analysis, prosecutors may be willing to help in the exoneration process by proactively aiding the defense or by not opposing the defense. In such instances, exonerations may be achieved through state court proceedings or through executive clemency without having to undertake the laborious process of federal habeas review.[156]

When the defendant does have to petition for federal habeas relief, however, his actual innocence serves the critical function of opening the door for the court to consider the constitutional errors that occurred during the trial.[157] This combination of actual innocence and serious constitutional errors is a compelling combination that helps to overturn erroneous convictions through federal habeas review. Because defendants who plead guilty may be missing the

153. *See* Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post*-Boykin *Era*, 77 NOTRE DAME L. REV. 597, 615–24 (2002) (demonstrating how the judicial employment of leading and compound questioning during Rule 11 hearings fails to ensure the entry of knowing and voluntary guilty pleas).

154. Boykin v. Alabama, 395 U.S. 238, 242 (1969) (recognizing the need for a public record indicating that a plea was knowingly and voluntarily made).

155. Cook, *supra* note 153, at 615–24; *see also* United States v. Ruiz, 536 U.S. 622, 629 (2002) (finding that the Constitution does not require the prosecution to disclose material impeachment evidence prior to entering a plea agreement). "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances . . . ." *Id.*

156. *See* Gross et al., *supra* note 35, at 524 (stating that individuals may receive exonerations through executive pardons, dismissal of charges, acquittal upon retrial, and a state's posthumous acknowledgment of innocence).

157. *See* Schlup v. Delo, 513 U.S. 298, 326–27, 328 & n.47 (1995) (discussing when a compelling claim of actual innocence may enable a court to consider otherwise procedurally defaulted constitutional claims).

actual innocence component—and because they waive many of their appellate issues by not going to trial—they face an arduous uphill battle when they seek relief through federal habeas review.

Even though a defendant who pleads guilty has limited appellate options, this reality should not justify the devaluation of innocence. To the contrary, the fact that it is difficult to overturn a guilty plea on appeal underscores the importance of ensuring that defendants who plead guilty do so with full knowledge and understanding of the strength of their innocence claims before it becomes too late to assert them.

One way to ensure that defendants who plead guilty do so with complete knowledge is to rely on the attorneys who represent them to examine, evaluate, and explain the strength of the prosecution's case.[158] In the case of defendants represented by counsel, the court evaluating the defendant's guilty plea assumes the defendant has discussed his case with his attorney in sufficient depth to ensure that the defendant understands what he is being asked to admit[159] and that he pleads guilty knowingly, intelligently, and voluntarily.[160]

While one can debate the extent to which attorneys take time to fully apprise their clients of what they are giving up by pleading guilty, pro se defendants who plead guilty have not consulted with attorneys. The fact that pro se defendants have not reviewed viable claims of innocence (in all senses of the word, encompassing both actual and legal innocence) with an attorney before pleading guilty highlights the significance of the courts' role during their plea. The court is the only entity in the position to ensure that pro se defendants who plead guilty do so knowingly.[161] If the court does not

158. *See, e.g.*, Henderson v. Morgan, 426 U.S. 637, 647 (1976) ("[I]t may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case [was] unique because the trial judge found as a fact that the element of intent was not explained to respondent."); Brady v. United States, 397 U.S. 742, 756–57 (1970) ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time."); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2010) ("[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

159. *Henderson*, 426 U.S. at 647.

160. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

161. *See* Iowa v. Tovar, 541 U.S. 77, 88 (2004) ("We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without

inform pro se defendants that by pleading guilty they risk overlooking a viable defense and/or the opportunity to obtain an independent opinion on whether it is wise to plead guilty, once the plea is final, it is exceedingly difficult to "undo" the conviction through post-conviction litigation.[162]

Given the courts' critical role in ensuring that a pro se plea is knowing and voluntary, one might think that the Supreme Court would require lower courts to inform pro se defendants that by pleading guilty they might overlook possible defenses that could be used to establish their innocence, or that the opportunity to consult with an attorney would help them determine whether it is in their best interest to plead guilty. Even though lower courts are in the only position to give these kinds of warnings to pro se defendants, the Supreme Court ruled in *Iowa v. Tovar*[163] that under the United States Constitution courts have no obligation to do so.

Tovar clarified the minimum admonishments lower courts are required to give defendants before accepting their guilty pleas.[164] In a unanimous opinion authored by Justice Ginsberg, the Court held that the Constitution does not require a court to inform a pro se defendant of the risks of proceeding without counsel, including the risk of overlooking innocence and other defenses.[165] In light of this reality, this Part examines how defendants who plead guilty may have viable innocence claims that are devalued by the courts at the front end of the plea and by innocence projects at the back end of the plea.

A. The Supreme Court's Reasoning in Tovar

Rather than simply reaffirming Supreme Court jurisprudence under the Sixth Amendment, the Court's reasoning in *Tovar* provides an example of the Court falling prey to a binary vision of innocence because it shows the Court prioritizing actual innocence above

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counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938))); *see also Brady*, 397 U.S. at 748 & n.6 (1970) (explaining that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts" and that the "Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel").

162. As the Gross Study recognized, some defendants choose to plead guilty in exchange for shorter sentences even though they may be innocent, and those defendants "are almost never exonerated." Gross et al., *supra* note 35, at 536.

163. 541 U.S. 77 (2004).

164. *Id.* at 91.

165. *Id.* at 91–92.

safeguarding constitutional protections. *Tovar* examined the minimum admonishments courts are required to give a pro se criminal defendant during a plea colloquy.[166] To understand the Court's reasoning, it is first important to note that the Court did not dispute that a guilty plea is a "critical stage" of the criminal process in which a defendant must be afforded counsel.[167] In order to waive counsel at the plea stage, courts ensure that a criminal defendant knows the nature of the charges, the right to be counseled regarding the plea, and the range of potential punishments if the guilty plea is accepted.[168] A trial court that fails to so inform a criminal defendant risks upper courts overturning the plea on appeal because the defendant did not enter the plea knowingly and intelligently.[169]

Because the plea is such a pivotal stage of the criminal process, the minimal admonishments trial courts must give criminal defendants who plead guilty are critical—and these admonishments are even more critical for defendants pleading guilty without the aid of counsel. Despite the importance of ensuring that the criminal defendant enters into a plea knowingly and voluntarily, *Tovar* held that the Sixth Amendment does not require a trial court to inform a pro se defendant that an attorney may provide an independent opinion of whether it is wise to plead guilty.[170] The *Tovar* opinion further held that trial courts are not required to tell a defendant that without an attorney the defendant risks overlooking a defense.[171] The Court explained this decision by expressing concern that a defendant would "delay[] his plea" to get counsel and that such consultation would impede the "prompt disposition of the case" and waste resources.[172] Some background surrounding the *Tovar* case is helpful to understand the context of this reasoning.

1. Contextual Background

Felipe Tovar was arrested for drunk driving three different times in the state of Iowa. The first time he was arrested, he represented himself and pled guilty.[173] The second time, an attorney represented him and he pled guilty.[174] The third time, Tovar faced a third-offense

166. *Id.*
167. *Id.* at 81.
168. *Id.*
169. *See id.* at 88–89.
170. *Id.* at 91–92.
171. *Id.*
172. *Id.* at 93.
173. *Id.* at 81–85.
174. *Id.* at 85.

drunk driving charge, which is a felony in Iowa.[175] Represented by different counsel for his third offense,[176] he argued that his first conviction could not be used against him to enhance his most recent drunk driving offense to a felony because he had not been admonished at the time of his first plea of the advantages of having counsel.[177] The trial court disagreed, and Tovar was convicted of third-offense drunk driving following a bench trial.[178]

On appeal, the Iowa Supreme Court reversed the trial court's decision.[179] The court held that, under the Sixth Amendment to the United States Constitution, Tovar's first uncounseled guilty plea was not knowing and voluntary, and thus it could not be used as a basis to enhance his subsequent drunk driving offense to a felony.[180] In reaching this result, the Iowa Supreme Court found that the Sixth Amendment requires a judge to advise a pro se defendant who wishes to plead guilty that the decision to waive counsel entails the risk of overlooking a viable defense and deprives the defendant of the opportunity to obtain an independent opinion on whether it is wise to plead guilty.[181] Granting certiorari, the United States Supreme Court disagreed.[182]

2. Anticipated Consequences

In one of the final paragraphs of *Tovar*, the Court noted two overlapping consequences that could result from the warning mandated by the Iowa Supreme Court. First, the "admonitions at issue might confuse or mislead a defendant more than they would inform him."[183] Second, the defendant might misconstrue the warnings as "a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one."[184] After expressing these concerns, the Court observed that

175. *Id.* at 81–85. For Iowa's third-offense statute, see IOWA CODE § 321J.2(2)(c) (1999).

176. The author represented Felipe Tovar in the trial court for this third offense when she was an assistant public defender for the State of Iowa. On appeal, the Office of the State Appellate Defender represented him.

177. *Tovar*, 541 U.S. at 85.

178. *Id.* at 86.

179. State v. Tovar, 656 N.W.2d 112, 121 (Iowa 2003).

180. *Id.*

181. *Id.* at 120–21.

182. *Tovar*, 541 U.S. at 86–87.

183. *Id.* at 93.

184. *Id.*

> [i]f a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.[185]

In support of this argument, the Court cited the amicus brief submitted by the United States and two pages of the oral argument transcript, neither of which provided citations or empirical evidence to support the concern that such admonitions would confuse defendants or cause them to mistakenly think they have a meritorious defense.[186] The cited amicus brief did, however, provide support for the fact that most people plead guilty,[187] and if these defendants chose to have a trial instead of pleading guilty, the government would need to hire more judges and build more courtrooms.[188]

B. Prioritization of Efficiency and Actual Innocence

The Court's reasoning in *Tovar* reveals two concerns: efficiency and the prioritization of actual innocence over a broader conception of innocence. The efficiency concern stems from two somewhat contradictory positions. The first position is that giving defendants the proposed admonitions regarding the potential existence of legal defenses will cause a domino effect leading to more trials.[189] The second position is that defendants who hear the admonitions will

185. *Id.* (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 9, 28–29, *Tovar*, 541 U.S. 77 (No. 02-1541); Transcript of Oral Argument at 20–21, *Tovar*, 541 U.S. 77 (No. 02-1541)).

186. *See id.* In fact, the Court draws much of its language directly from the United States' amicus brief. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 28–29, *Tovar*, 541 U.S. 77 (No. 02-1541) ("There exists a potential danger, however, that a defendant may misinterpret such a warning as a veiled suggestion that a meritorious defense actually exists in his own case. If that misimpression creates an artificial inducement for the defendant to consult with an attorney, even though in fact there is no viable basis for contesting the criminal charges, the prompt and efficient disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.").

187. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 186, at 17 ("The vast majority of federal criminal convictions are obtained as a result of pleas of guilty."). For this fact, the brief cited a report from the Judicial Business of the United States Courts. *Id.* at n.7.

188. *Id.* at 17 (" 'If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.' " (quoting Santobello v. New York, 404 U.S. 257, 260 (1971))).

189. *See Tovar*, 541 U.S. at 93.

decide to stop their pleas to take time to consult with attorneys even if they do not proceed to trial, so continuing the plea hearings will waste court resources because the consultation will only lead to delayed guilty pleas.[190] In light of this undercurrent of judicial expediency permeating *Tovar*, it may be no surprise that state courts—which also have an interest in judicial expediency—have almost invariably followed *Tovar* rather than interpreting their own state constitutions or other state authority to afford criminal defendants greater protection than the U.S. Constitution requires.[191]

While the Court admits that judicial expediency informs its analysis, at least in part, it does not directly verbalize its valuation of actual innocence over a broader, unmodified conception of innocence (which would include actual innocence as well as legal defenses and other forms of legal innocence).[192] Although it does not state so directly, the Court's reasoning shows the Court's willingness to ignore legal innocence altogether by instructing lower courts that minimum admonishments that do not warn defendants about the risk of foregoing possible legal claims nonetheless pass constitutional muster.

Consider how a typical guilty plea works. When a defendant announces that he wants to plead guilty, it is at that moment—before

190. *See id.*

191. *See, e.g.*, Edenfield v. State, 45 So. 3d 26, 30 (Fla. Dist. Ct. App. 2010), *reh'g denied*, No. 1D09-6554, 2010 Fla. App. LEXIS 17013 (Fla. Dist. Ct. App. Sept. 29, 2010); State v. Majeres, 722 N.W.2d 179, 182–83 (Iowa 2006); Depp v. Commonwealth, 278 S.W.3d 615, 617–19 (Ky. 2009); State v. Watson, 2006 ME 80, ¶¶ 17–18, 32, 34, 900 A.2d 702, 708–09, 713–14; Picetti v. State, 192 P.3d 704, 707–08 (Nev. 2008); City of Fargo v. Habiger, 2004 ND 127, ¶¶ 15–17, 682 N.W.2d 300, 303–04; *In re* Andrew, 119 Ohio St. 3d 466, 2008-Ohio-4791, 895 N.E.2d 166, at ¶ 3; State v. Johnson, 112 Ohio St. 3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶¶ 89, 101; State v. Rollins, 188 S.W.3d 553, 566 (Tenn. 2006). *But see* State v. Ernst, 2005 WI 107, ¶¶ 6–21, 283 Wis. 2d 300, 307–17, 699 N.W.2d 92, 96–100 ("To prove . . . a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." (quoting State v. Klessig, 564 N.W.2d 716, 721 (Wis. 1997))).

192. Another case that supports this claim is *United States v. Ruiz*, 536 U.S. 622 (2002), where the Court held that the Constitution does not require the government to disclose material impeachment information concerning informants or other witnesses prior to the defendant pleading guilty. *Id.* at 625. In reaching this result, the Court observed, "[I]mpeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')." *Id.* at 629. The Court also noted that the plea agreement at issue in the case required the government to provide "any information establishing the factual innocence of the defendant." *Id.* at 631. "That fact," the Court concluded, "along with other guilty-plea safeguards, see Fed. Rule Crim. Proc. 11, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." *Id.*

the court even accepts the plea—that any interest in legal innocence disappears, while a focus on actual innocence remains. When a trial court receives and evaluates a guilty plea, the court focuses on the actual innocence of the defendant by ensuring there is a factual basis for the crime.[193] Courts do this in different ways, such as by glancing at the facts in a police report, asking the defendant to describe his actions in his own words, or having the prosecutor summarize the facts of the case.

On the other hand, courts are not required to explore whether the defendant understands legal defenses or other forms of legal innocence—such as exculpatory evidence that he might use at trial—before accepting a guilty plea. For example, courts do not ask prosecutors to disclose fundamental weaknesses in their cases prior to pleas,[194] and, depending on when the pleas take place in the discovery process, prosecutors may not have even disclosed exculpatory evidence or other discovery prior to the pleas.[195]

In evaluating whether guilty pleas pass constitutional muster, the Court thus prioritizes actual innocence over other constitutional rights, such as the effective assistance of counsel to explore exculpatory evidence, weaknesses in the government's case, or other legal defenses that comprise an innocence unmodified. The Court's

193. *See, e.g.*, FED. R. CRIM. P. 11(b) (providing that a court shall not accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea, and also providing that judgment shall not be entered upon a guilty plea unless the court is satisfied that there is a factual basis for the plea); North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970) ("Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea ....") (citations omitted); McCarthy v. United States, 394 U.S. 459, 465 (1969) ("First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.") (footnotes omitted).

194. *See, e.g.*, *Ruiz*, 536 U.S. at 625 (holding that the Constitution does not require the government to disclose material impeachment information concerning informants or other witnesses prior to the defendant pleading guilty).

195. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 959 (1989) (advocating for "mandatory disclosure of *Brady* material to criminal defendants who plead guilty," given the tendancy for prosecuted cases that pose *Brady* disclosure issues to be directed toward the plea bargaining process); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 554–73 (describing different discovery processes and when prosecutors disclose information).

willingness to prioritize actual innocence over other constitutional rights is arguably not as problematic when a defendant is represented by counsel. Presumably in such cases the defendant's attorney has already examined the strength of the prosecution's case and whether any viable legal defenses exist that would warrant taking the case to trial—or perhaps simply negotiating a better plea deal.[196] The trial court assumes such inquiry on the part of defense counsel when the court asks defense counsel during the plea colloquy whether any "legal reason" exists for the court not to accept the plea.[197]

But when a defendant pleads guilty without counsel, the lack of inquiry into an unmodified understanding of innocence—combined with the court's unwillingness to warn the pro se defendant that he may be overlooking viable defenses—severely disadvantages pro se defendants.[198] In effect, this reality strips pro se criminal defendants who plead guilty of the full protection of the presumption of innocence—including both legal and actual—and thereby denies them due process of law.[199] By not ensuring that pro se defendants

196. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

197. Interview with Patrick Brayer, Assistant Pub. Defender, St. Louis Cnty. Pub. Defender Office, in St. Louis, Mo. (Feb. 14, 2010) (describing the typical plea colloquy in St. Louis County District Associate and Circuit Courts).

198. *See generally* Cook, *supra* note 152, at 913–18 (discussing inadequacies in the plea process and proposing reforms); Hashimoto, *supra* note 148, at 437–46 (explaining the difficulty in obtaining empirical information about pro se felony defendants).

199. While acknowledging that the Sixth Amendment guarantees "defendants who face[] incarceration the right to counsel at all 'critical stages' of the criminal process," Iowa v. Tovar, 541 U.S. 77, 87 (2004) (citing Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Wade, 388 U.S. 218, 224 (1967)), and while also acknowledging that "[a] plea hearing qualifies as a 'critical stage,' " *id.* (citing White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam)), *Tovar* highlights a distinction between the role of counsel at trial and the role of counsel at plea by discussing *Patterson v. Illinois*, 487 U.S. 285 (1988). *Tovar*, 541 U.S. at 89–90.

Patterson was a case involving post-indictment questioning in which the Court observed the importance of taking a "pragmatic approach to the waiver question" by asking "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." *Id.* (quoting *Patterson*, 487 U.S. at 298). After citing this proposition, *Tovar* notes the State of Iowa's position that the plea colloquy " 'makes plain that an attorney's role would be to challenge the charge or sentence,' and therefore adequately conveys to the defendant both the utility of counsel and the dangers of self-representation." *Id.* at 90 (quoting Brief for Petitioner at 25, *Tovar*, 541 U.S. 77 (No. 02-1541)). While *Tovar* does not go so far as to agree that counsel's role in a plea proceeding is merely to challenge the charge or sentence, the Court implies that "[i]n a case so straightforward," counsel would have little role preceding—or during—the plea. *See id.* at 93.

have explored their unmodified innocence before pleading guilty, and by not warning pro se defendants about the dangers of foregoing such inquiry before pleading guilty, the Court reveals its willingness to modify the constitutional rights of defendants who are pleading guilty.

Compare the extensive colloquy the Court requires before a pro se defendant represents himself at trial[200] with the minimum colloquy the Court requires before a pro se defendant pleads guilty. Before trial, courts drill pro se defendants regarding such details as their knowledge of the rules of evidence, their understanding of the range of objections available to them, and their fluency with court procedures and protocols.[201] Before pro se defendants plead guilty, courts do not even have to ask whether they are aware that consulting with an attorney might be a good idea.[202]

The significance of the Court requiring a more extensive colloquy before a defendant waives counsel at trial reveals the efficiency interest underlying the Court's analysis: it takes far more court time to have defendants go to trial than to plead guilty, and pro se defendants representing themselves at trial consume even more of the court's resources.[203] The extensive colloquy trial courts use before allowing a defendant to represent himself at trial thus scares defendants into obtaining counsel for trial. While the trial itself still

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In contrast, the Court has not hesitated to substantiate the role of counsel in cases that proceed to trial. While *Powell v. Alabama*, 287 U.S. 45 (1932), provides an early example, *id.* at 71–72, *Faretta v. California*, 422 U.S. 806 (1975), enunciated the point more recently, *id.* at 835 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942))). *Tovar* thus aligns a guilty plea proceeding closer to *Patterson*-like post-indictment questioning than to a *Faretta*-like trial. In the process of making these alignments, *Tovar* goes so far as to say that even if the defendant waiving counsel at his plea lacks "full and complete appreciation of all of the consequences flowing from his waiver," the waiver can still satisfy the constitutional minimum. *Tovar*, 541 U.S. at 92 (quoting *Patterson*, 487 U.S. at 294).

200. *See Faretta*, 422 U.S. at 835.

201. *See id.* at 808 n.3 (citing a transcript of a colloquy in which the trial judge brought the defendant back to court "to do some reconsideration as to whether or not [he] should continue to represent [himself]").

202. *See Tovar*, 541 U.S. at 81.

203. *Cf.* Thomas J. Moyer, *Commission on the 21st Century Judiciary*, 38 AKRON L. REV. 555, 558 (2005) (discussing a report that noted " 'a trend towards pro se litigation and its impact on the role of the trial judge' " (quoting AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, at ii (2003))).

takes time even when an attorney represents a defendant, it is arguably more judicially efficient with an attorney at the helm than with a pro se defendant.[204]

In addition to discouraging defendants from representing themselves at trial because of efficiency interests, the colloquy preceding a pro se trial is more extensive because courts accord defendants the full safeguards of an unmodified presumption of innocence during trials. The significance of the clipped colloquy at pleas reveals the Supreme Court's willingness to devalue a pro se defendant's presumption of unmodified innocence during the plea process.[205]

Saving time and money through judicial expediency is not an inherently unsound goal. Indeed, defendants who plead guilty may do so because they have received an incentive to plead guilty (such as a lighter sentence or the ability to plead to a lesser charge that limits their sentence exposure) in exchange for saving the court time and money.[206] Judicial efficiency nonetheless becomes unsound when it compromises the Court's ability to concomitantly safeguard individual rights, such as the presumption of unmodified innocence. The Court's self-interest in maintaining judicial efficiency thus runs the risk of trivializing counsel's role at a plea proceeding[207] and devaluing the presumption of innocence, thereby conflicting with the Court's duty to safeguard a defendant's constitutional right to due process.[208]

The Court's willingness to devalue the unmodified innocence of pro se defendants pleading guilty may ultimately rest on a deeper assumption: guilty people plead guilty and innocent people go to trial. If this is indeed an undercurrent in the Court's rationale, a motivating force behind *Tovar*'s reasoning is that the rights afforded to defendants pleading guilty without counsel do not have to be as

204. *Cf. id* (listing increases in caseloads and pro se litigants as trends in U.S. courts).

205. *See Tovar*, 541 U.S. at 81, 94.

206. *See* Gross, *supra* note 45, at 180–81.

207. *See, e.g.*, Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Respondent at 5–11, *Tovar*, 541 U.S. 77 (No. 02-1541) (discussing the role of attorneys during the plea stage).

208. The *Tovar* Court disagreed that the Sixth Amendment requires a trial court to inform a pro se defendant that an attorney may provide an independent opinion on whether it is wise to plead guilty or that without an attorney the defendant risks overlooking a defense. *Tovar*, 541 U.S. at 81. Some may assert that these admonitions were too specific and narrow to have had a chance of passing constitutional muster. Perhaps if the admonitions had been framed in more *Faretta*-like terms—such as employing the "dangers and disadvantages" of self-representation language—the Court may have divided on *Tovar* rather than unanimously disposing of it.

stringently safeguarded as the rights afforded to defendants representing themselves at trial, because the chance of making a mistake—of taking an actually innocent person's freedom—is less likely if the person is already willing to admit to the facts surrounding the crime.

While such a risk may in fact be *less* likely, this reasoning is still flawed because innocent people—in the strongest, unmodified sense of the word—do in fact plead guilty.[209] It is also flawed because even if a defendant who is pleading guilty is not innocent, he must still be presumed innocent until the court accepts his plea.[210]

The Court's refusal to warn pro se defendants that they risk overlooking a viable defense by proceeding without the aid of an attorney is driven by the Court's interest in preserving judicial efficiency. This refusal also rests on the Court's willingness to assume that a defendant who wants to plead guilty is no longer entitled to an unmodified presumption of innocence, simply by virtue of the fact that the person has announced the intent to plead guilty. Because district courts find a factual basis for the plea in order to ensure that the defendant is factually guilty, the minimal admonishments courts give pro se defendants pleading guilty might be enough to catch those defendants who are actually innocent, but they are not enough to safeguard innocence unmodified.

By not requiring district courts to advise defendants that they risk overlooking a viable defense by proceeding without counsel, the Court signals that it does not matter if a pro se defendant has viable legal claims that may ultimately defeat the charges; all that matters is whether the person is actually innocent. In so doing, the Court

209. *See* discussion *supra* Introduction.

210. To this end, the National Association of Criminal Defense Lawyers ("NACDL") filed an amicus curiae brief on behalf of Tovar in which it explained the complex legal judgments involved during this stage of representation. Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Respondent, *supra* note 207, at 5–11. In its brief, the NACDL acknowledged that "[t]he plea decision appears deceptively simple." *Id.* at 6. The brief went on to explain further:

> In most cases, however, [the plea decision] involves, or should involve, several judgments requiring legal expertise. What defenses are potentially available? What evidence might be subject to suppression? What mental state is required and how will the state prove it? How are the witnesses and circumstances of the case likely to be viewed by a jury? What is the likely sentence under any applicable guidelines, and is that sentence low enough to justify forgoing the defendant's right to trial? What are the collateral consequences of conviction?

Id.; *see also* Cook, *supra* note 152, at 913–18 (discussing inadequacies in the plea process and proposing reforms).

deprives pro se defendants pleading guilty of a full presumption of innocence unmodified. Because the enforcement of the presumption of innocence "lies at the foundation of the administration of our criminal law,"[211] the deprivation of the presumption of innocence unmodified at pro se guilty pleas denies pro se defendants due process of law.

CONCLUSION

Scholars, courts, and the media must reclaim an understanding of innocence unmodified by terms such as "actual" and "legal" in order to ensure that defendants who plead guilty receive due process of law—whether an attorney represents them or whether they are pro se. But safeguarding the constitutional rights of people who plead guilty or commit crimes is not the only reason to reclaim a robust understanding of innocence. As Troy Davis's case reveals, reclaiming innocence has implications broader than protecting people who do not have "actual" innocence claims. Because the Supreme Court has not yet recognized a substantive freestanding innocence claim, the most effective way to assert an actual innocence claim based on newly discovered evidence is to use it as a door through which a trial court can reach otherwise defaulted constitutional claims. Actual innocence claims allow courts to examine underlying constitutional claims, and the robustness of these underlying constitutional claims could ultimately amount to a wrongful conviction. In addition, the fact that the Court has not yet decided whether a trial could have been constitutionally full and fair if it resulted in the conviction of an actually innocent person is yet another reason to reclaim innocence unmodified.

Finally, even if the Court were to recognize a freestanding actual innocence claim, reclaiming innocence unmodified will remain critical for protecting the constitutional rights of all people, whether they were convicted through trial or plea, whether they had an attorney or represented themselves, and whether they are innocent or guilty. A robust understanding of the full breadth of innocence is necessary to ensure that the Troy Davises of the world—like the Felipe Tovars of the world—receive justice. We must reclaim innocence unmodified to safeguard the fundamental rights that protect us all.

211. Coffin v. United States, 156 U.S. 432, 453 (1895).