LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 10-10-04

October 5, 2010

Innocence Unmodified

by

Emily Hughes
Associate Professor of Law

Innocence Unmodified

By Emily Hughes*

The Innocence Movement has unwittingly participated in the construction of a binary between "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 the person is "actually" innocent. This perception overlooks the fact that a person can be wrongly convicted if their constitutional rights were violated in the process of obtaining the conviction. 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" or "legal." Part I explains how the concept of "actual" innocence has played a pivotal role in the development of the Innocence Movement. Part II examines innocence unmodified in the context of trials. It explains that one reason to protect innocence unmodified is because the Supreme Court has not yet held that "actual" innocence alone is enough to reverse a wrongful conviction; constitutional claims underlying an "actual" innocence claim, working together, are necessary to achieve justice. Part III explores innocence unmodified in the context of guilty pleas. It reveals the degree to which the Court has itself 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 or guilty alike.

---

* Associate Professor of Law at Washington University in St. Louis. The author thanks Sam Bagenstos, Adrienne Davis, Katherine Goldwasser, Rebecca Hollander-Blumoff, Amy Hughes, Peter Joy, Pauline Kim, Andrea Lyon, Justin Marceau, Mary Prosser, Song Richardson, and especially Laura Rosenbury for their excellent suggestions at various stages of this project. Thanks also to Kelly Brunie, David Cutler, Daniel Rabinovitz, and Felicia Williams for invaluable research assistance, with special thanks to David Cutler for his insightful suggestions and careful reading. In addition, the author thanks the faculty at the University of Illinois College of Law, as well as participants at Washington University's Regional Junior Faculty Works-in-Progress Workshop. Finally, the author extends a very special thanks to Washington University School of Law, Dean Kent Syverud and the Israel Treiman research fellowship for tremendous support.

Introduction

The Innocence Movement[1] has unwittingly participated in the construction of a binary between "actual" and "legal" innocence.[2] By focusing attention on people who were not involved in the crime for which they were convicted, the

[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 raising awareness for wrongfully incarcerated individuals who are "actually innocent" of the crime, *see* discussion *infra*, Part I, 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 itself. The Innocence Project at The Benjamin N. Cardozo School of Law at Yeshiva University, founded by Barry Scheck and Peter Neufeld, is a well known Innocence Project that is arguably one of the leaders of the contemporary Innocence Movement within the United States. *See* http://www.innocenceproject.org. *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 Convictions and the Death Penalty, held at Northwestern University in 1998, as signaling the formal beginning of the Innocence Moment). Others have described the "Innocence Movement" as an "Innocence Revolution." *See* 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 and Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Case Review Commission*, 29 OXFORD J. OF LEGAL STUD. 43, 49 (Spring 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.").

Innocence Movement has helped hundreds of wrongly convicted people obtain freedom. At the same time, focusing on the "actual" innocence of such people minimizes other reasons for wrongful convictions. It overlooks the fact that a person can be wrongly convicted even if the person "did" the crime, such as someone whose constitutional rights were violated in the process of obtaining a conviction. This Article argues for the need to reclaim an understanding of innocence unmodified by qualifiers such as "actual" or "legal" in order to safeguard fundamental constitutional rights that protect us all.

The media[3] and legal scholars[4] often use the terms "actually" innocent and "factually" innocent to describe a person who had 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.[5] Seldom do people focus on

---

[3] *See, e.g.*, Roberts & Weathered, *supra* note 2.

[4] *See, e.g.*, Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) (defining "factual innocence" as someone "who did not commit the *actus reus* in question," and distinguishing it from "legal innocence" and "burden of proof innocence"); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1555-57 (1998) (using "actual innocence" and "factual innocence" interchangeably); 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 "clear 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"). Some legal scholars have defined "actual innocence" and "factual innocence" differently. *See, e.g.*, Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 978 (2002) (defining "actual innocence" as "someone who is not at the scene and had nothing to do with it," and "factual innocence" as "someone who 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." *See* discussion *infra*, Introduction.

[5] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) (Herrera advanced 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 the Court observed, 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"); Schlup v. Delo, 513 U.S. 298, 326-28 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); House v. Bell, 547 U.S. 518, 554 (2006) (holding that House's actual innocence claim satisfied

other kinds of wrongful convictions, such as wrongful convictions stemming from violations of constitutional rights.[6] This razor focus on the wrongful convictions of people who had nothing to do with the crime dilutes the spectrum of other reasons why people are wrongly convicted. One downside of the focus on "actual/factual" 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 the person was not there and had nothing to do with it.[7] When DNA evidence exists in such a case, DNA evidence may be useful to exonerate these kinds of "actually" innocent people because the DNA evidence does not match the DNA of the wrongly convicted person.[8]

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.[9] To prove innocence in these non-DNA cases,

---

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). *See also* Brandon L. Garrett, *Claiming Innocence*, 92 MINNESOTA L. REV. 1629, 1647-51 (2008) (observing that the "word 'innocence' is used casually in the media and by lawyers, convicts, scholars, and courts," and defining "innocent" as "those people who did not commit the charged crime").

[6] *See, e.g.*, Raymond, *supra* note 4, 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. 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.").

[7] *See, e.g.*, Raymond, *supra* note 4, at 457 (defining "factual innocence" as someone "who did not commit the *actus reus* in question"); Medwed, *supra* note 4, at 1555-57.

[8] *See, e.g.*, Richard Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 69-70 (2003) ("Until the moment when the DNA test results came back, almost none of these cases [referring to cases of individuals who were later exonerated] would have been considered exceptional among criminal cases. The evidence against the defendant was the usual sort: eyewitness identifications, confessions, suspicious behavior, and physical and other circumstantial evidence supporting guilt.").

[9] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419 (1995) (reversing 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 (1963) (reversing defendant's murder conviction on the issue of punishment because the prosecution had withheld

witnesses may recant their previous testimony or additional evidence may surface. When taken as a whole, this new evidence illuminates the defendant's innocence.[10]

At the other end of the innocence spectrum are people who did commit a crime but who are nonetheless wrongly convicted—"legally" innocent—of the crime for which they were convicted. Maybe the defendant did not understand the nature of the charge against him, thus rendering his plea involuntary.[11] Maybe the police coerced a confession and relied on that coerced confession to obtain the conviction.[12] Or maybe a defendant pleaded guilty to a greater offense than his actions warranted, such as second-degree murder instead of manslaughter.[13] Because such people did engage in conduct that could be considered criminal, they are not "actually" innocent the way the media,[14] courts,[15] and Congress[16] usually

---

exculpatory evidence, thereby denying defendant due process of law).

[10] After the Court reversed Kyles's conviction, *see supra* note 9, Kyles was tried three more times. Each time the jury hung and the court declared a mistrial. In 1998, the prosecution decided not to try Kyles a sixth time. Nina Rivkind and Steven F. Shatz, CASES AND MATERIALS ON THE DEATH PENALTY 396 (2001), *citing* J. Gill, *Murder Trial's Inglorious End*, THE NEW ORLEANS' TIMES-PICAYUNE, Feb. 20, 1998, at B7.

[11] *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 470 (1969) (reversing the conviction of a person who had pleaded guilty to tax evasion and who 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"—pleaded guilty with "full awareness of the nature of the charge").

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

[13] *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. . . forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder").

[14] 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.").

[15] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) (Herrera advanced 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 the Court observed, 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"); Schlup v. Delo, 513 U.S. 298, 326-28 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

employ that phrase. Nonetheless, they are "wrongly convicted"—or "legally" innocent—of the crime because their constitutional rights were violated to obtain the conviction.[17] 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."[18] After identifying this "supercategory of innoncence," Margaret Raymond observed that "the [I]nnocence [M]ovement may have unintended negative consequences on the criminal justice system."[19] Similarly, Carol Steiker and Jordan Steiker[20] have discussed that one of the dangers of focusing on "actual" innocence is that "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 Article asserts that the focus on "actual" innocence has diluted the core conception of innocence, and that two dangers have emerged as a result. One danger is the creation of an "us" versus "them" mentality, whereby the public

---

no reasonable juror would have found petitioner guilty beyond a reasonable doubt); House v. Bell, 547 U.S. 518, 554 (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).

[16] *See, e.g.*, 28 U.S.C. § 2244(b)(2)(B)(i); 28 U.S.C. § 2244(b)(2)(B)(ii); 28 U.S.C. § 2254 (e)(2)(B); and Carol S. Steiker and 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).

[17] *See, e.g.*, Roberts & Weathered, *supra* note 2, at 50-51 (observing a "distinction between innocence, as it would be understood outside the legal system, and legal innocence", and also observing that the trial courts' role is "to determine whether the defendant is 'legally guilty,' not whether he is actually innocent").

[18] *See, e.g.*, Raymond, *supra* note 4, at 457.

[19] Raymond, *supra* note 4, at 462 (explaining that it "may create distortions in the way that actors in the criminal justice system . . . perceive their obligations and allegiances," that it "may convince the public, including policymakers, that the system works effectively to reveal and redress wrongful convictions," and that it may convince prospective jurors that it is—or should be—the defendant's burden to prove innocence").

[20] Carol S. Steiker and 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 (2005).

[21] Steiker & Steiker, *supra* note 20, at 597; *see also* Raymond, *supra* note 4, at 462 (observing that "the focus on factual innocence may create certain distortions in the way that actors in the criminal justice system—'the ones left behind'—perceive their obligations and allegiences").

[22] Steiker & Steiker, *supra* note 20, at 597; *see also* Raymond, *supra* note 4, at 462 (the focus on factual innocence "may convince prospective jurors that it is—or should be—the defendant's burden to prove innocence").

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

A second danger, which is the focus of this Article, is that pitting "actual/factual" 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 who are nevertheless wrongly convicted of those crimes because of constitutional violations involved in their conviction. 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.

---

[23] *See, e.g.*, Susan Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 435-36 (2009) (commenting on a proposal to allocate resources based on the likelihood of factual innocence and observing that "[s]uch arrangements risk 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 Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (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.").

[24] Steiker & Steiker, *supra* note 20, at 597.

[25] *See, e.g.*, 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."); Jeffrey Kirchmeier, "The Death Penalty and the Question of Actual Innocence," 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 Steiker and Jordan Steiker, *Cruel and Unusual Punishment: Litigating Under the Eighth Amendment: Opening a Window or Building a Wall?*, 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 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).").

[26] *See also* Brandon L. Garrett, *Claiming Innocence*, 92 MINNESOTA L. REV. 1629, 1647-51) (2008) (recognizing gradations of actual innocence claims, such as "substantial" claims of innocence, "outcome-determinative claims of innocence," and "indeterminate cases").

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. It would also strive to protect people with strong constitutional claims warranting reversal of wrongful convictions who are not "actually" innocent. In addition to protecting a range of wrongful convictions, 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: achieving justice for "actually" innocent people. Part I then shows how the Innocence Movement has prioritized the cases of "actually" innocent people who were convicted through trial over "actually" innocent people who pleaded 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 pleaded guilty and are not "actually" innocent, but who may still have strong wrongful conviction claims based on fundamental constitutional violations.

Part II examines innocence unmodified in the context of trials and post-conviction appeals. It asserts that one reason to protect innocence unmodified is because under the Court's existing jurisprudence, "actual" innocence alone is not enough to reverse a wrongful conviction. This is because the Supreme 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 only matters as a door through which to allow a court to reach underlying constitutional claims.[30] Part II uses the example

---

[27] *See* Susan Bandes, *Symposium: Beyond Biology: Wrongful Convictions in the Post DNA World: Framing Wrongful Convictions*, 2008 UTAH. L. REV. 5 (2008) (discussing the power of labels and cognitive bias, and suggesting broadening 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).

[28] *See* discussion *infra*, Part II, citing In Re Troy Anthony Davis, 130 S.Ct. 1 (2009) (Scalia, J., dissenting) (citing, *inter alia*, Herrera v. Collins, 506 U.S. 390, 400-401, 416-417 (1993)).

[29] *See, e.g.*, *Herrera*, *supra* note 5, at 417 (declining to reach *Herrera*'s freestanding actual innocence claim that the execution of an innocent person would violate the Eighth Amendment); *House*, *supra* note 5, at 554 (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), *supra* note 5 (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

of a recent Supreme Court decision, *In Re Troy Davis*,[31] to highlight how an isolated prioritization of "actual" innocence does not achieve justice for wrongly convicted people.

Part III examines innocence unmodified in the context of pleas. It reveals the degree to which the Court has itself polarized innocence in the context of 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 are pleading guilty, as explained in *State 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 or guilty alike.

I. The Innocence Movement's Focus

Heralding exonerees as "actually innocent" people who served time for crimes they did not commit,[33] the Innocence Movement has had much success reversing wrongful convictions through DNA testing.[34] As the number of exonerations[35] obtained through DNA analysis has grown,[36] the work of scholars

---

petitioner guilty beyond a reasonable doubt).

[31] 130 S.Ct. 1 (2009) (Years after Davis was convicted of capital murder and sentenced to death, most 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.).

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

[33] *See, e.g.*, the November 12, 2009, dismissal of a murder indictment against Fernando Bermudez, after he had served eighteen years in prison, because the trial court found "by clear and convincing evidence that the defendant has demonstrated his actual innocence." Melissa Grace, *Fernando Bermudez declared innocent after serving 18 years in prison for murder*, N.Y. DAILY NEWS, Nov. 12, 2009.

[34] *See* website of the Cardozo Innocence Project, *supra* note 1 (explaining that "Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice").

[35] "Exonerations" refers to an "official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery, and Sujata Patil, *Symposium: Innocence in Capital Sentencing: Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (Winter 2005) (hereinafter "Gross Study" or "Gross et al.").

[36] For example, the Gross Study, *supra* note 35, identified that between 1989 and 1991, the

describing the DNA exonerations as a kind of "random audit"[37] of systemic problems within the criminal justice system has also gained traction.[38] 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.[39]

Another development within the Innocence Movement is a willingness to include non-DNA based claims in the kinds of cases Innocence Projects are willing to litigate.[40] Because DNA is available in so few criminal cases,[41] using DNA as the primary means to prove innocence excludes those people who might be innocent but who do not have DNA evidence to prove their innocence.[42] Although Innocence Projects still use DNA testing because of its seeming definitiveness in proving innocence,[43] increasingly more Innocence Projects are willing to examine

---

number of exonerations based on DNA testing averaged only one or two a year, then between 1992 and 1995 it increased to an average of six a year, then from 2000 to 2003 it averaged forty-two per year, with the highest yearly total of forty-one in 2002 and again in 2003. Gross Study, *supra* note 35, at 527.

[37] Rosen, *supra* note 8, at 69.

[38] Rosen, *supra* note 8, at 69.

[39] *See, e.g.*, Rosen, *supra* note 8, at 69-75, discussing the results of various studies and articles that discuss those studies; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343 (1997) (discussing Kalven and Zeisel data estimating that five percent of all trials result in convictions of innocent people); John Baldwin and Michael McConville, Jury Trial 50 (1979) (observing that approximately five percent of trials end in the conviction of an arguably innocent person).

[40] Carol S. Steiker and 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, 618-19 (2005) (describing an "explosion" of Innocence Projects modeled on the Cardozo project and documenting that in 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").

[41] 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, e.g.*, the Gross Study, *supra* note 35, at 529 (providing statistical information showing that no DNA evidence for the exonerated individuals in their database convicted of drug and property crimes, and showing the number of murder and rape cases for exonerated individuals in their database which did have DNA evidence available).

[42] *See, e.g.*, Rosen, *supra* note 8, at 73-75 (discussing the impossibility of knowing how many innocent people are convicted, and noting that "for 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 those 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.").

[43] *See* Garrett, *Claiming Innocence*, *supra* note 26, at 1646 ("[A]lthough some

innocence claims based on evidence other than DNA.[44] 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.[45] 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.

A. "Actual" Innocence

By definition, the Innocence Movement has maintained a razor focus on "actual" innocence. For example, of two hundred cases Brandon Garrett compiled in a database tracking criminal defendants convicted of rape and/or murder who were later exonerated through DNA testing,[46] all of the cases include "actual" innocence claims as a component of their exonerations.[47] That is because Garrett defines "the innocent as those who did not commit the crime charged."[48]

Other innocence databases reveal a similar definitional focus on "actual" innocence.[49] One of the most comprehensive databases of exonerations to date is the 2005 study authored by Samuel Gross et al (the "Gross Study").[50] The Gross Study discusses "all exonerations"[51] the researchers were able to locate that occurred in a fifteen-year period between 1989 and 2003 that "resulted from

---

commentators casually refer to DNA testing as potentially 'conclusive' of innocence or guilt, evidence typically cannot be conclusive of innocence or guilt."); 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," including "accurate determinations of guilt and innocence" that are "born of science and fact, as opposed to choices among a competing set of controversial values.").

[44] Steiker & Steiker , *supra* note 20, at 618-19.

[45] *See, e.g.*, Gross et al., *supra* note 35, at 526-27; Rosen, *supra* note 8, at 73-75.

[46] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUMBIA L. REV. 55 (2008) and *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (analyzing and describing the database he compiled and continues to update).

[47] Garrett's empirical study was expressly designed to "examine[] for the first time how the criminal justice system in the United States handled the cases of people who were subsequently found innocent through postconviction DNA testing." Garrett, *Judging Innocence*, *supra* note 46, at 1.

[48] Brandon L. Garrett, *Claiming Innocence*, *supra* note 26, at 1645.

[49] The Gross Study, *supra* note 35, is described in detailed throughout the remainder of this section. *See also* D. Michael Risinger, *Criminal Law: Innocents Convicted: An Empirically Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (Spring 2007) (analyzing data supplied by the Innocence Project of Cardozo Law School and further developed for the article).

[50] Gross et al., *supra* note 35, at 523.

[51] The Gross Study uses the term "exoneration" to mean "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." Gross et al., *supra* note 35, at 523.

investigations into the particular cases of the exonerated individuals"[52]—which amounted to 340 cases total.[53] All of the 340 individuals maintained they were "actually" innocent of the crime: "144 of them were cleared by DNA evidence, 196 by other means."[54] Of the 196 people exonerated by "other means," "actual innocence" played a role in every exoneration.[55] Like Garrett,[56] this was because of the researchers' limited definition of "innocence." The Gross Study defined "innocent" as someone who did not do the crime: it purposely excluded from its database individuals who were most likely involved in the crimes for which they were convicted.[57] Empirical studies like Garrett's and Gross's highlight the Innocence Movement's focus on representing individuals who were "actually" innocent of the crime for which they were convicted. As the next section will illustrate, they also showcase the Innocence Movement's preference for representing people who were convicted through trial rather than through pleas.

B. Trials

In Garrett's database of 200 cases, only nine of those cases involved defendants who had pleaded guilty;[58] the other 192 defendants had been convicted through trial.[59] Of the nine cases in which defendants pleaded guilty and were later exonerated by DNA evidence, four of those cases involved defendants who were represented by counsel when they pleaded guilty.[60]

Similarly, of the 340 exonerations Gross found, "only twenty of the exonerees in [their] database pled guilty, less than six percent of the total."[61] As a partial explanation for the low number of pleas in their database, the Gross Study

---

[52] Gross et al., *supra* note 35, at 523.
[53] Gross et al., *supra* note 35, at 523. The four ways in which people in their database were exonerated included the following: "(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.
[54] Gross et al., *supra* note 35, at 523-24.
[55] Gross et al., *supra* note 35, at 523.
[56] Garrett, *Claiming Innocence*, *supra* note 26, at 1645.
[57] Gross et al., *supra* note 35, at 527 (explaining that "[i]t is possible that a few of the hundreds of exonerated individuals we have studied were involved in the crimes for which they were convicted, despite our efforts to exclude such cases").
[58] Garrett, *Judging Innocence*, *supra* note 46, at 74.
[59] Garrett, *Judging Innocence*, *supra* note 46, at 74.
[60] *Compare* Garrett, *Judging Innocence*, *supra* note 46, at 74 n.71 (describing and listing names of the nine people who pleaded guilty) *with* the database of exonerated individuals located at Cardozo's Innocent Project website, *supra* note 1 (including names of trial attorneys for four of the nine people). Whether the other five people who pleaded guilty were represented by counsel is unclear from the available information.
[61] Gross et al., *supra* note 35, at 523.

explains that 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."[62] It goes on to explain 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."[63]

Such research has rich statistical information and analytical depth that provides critical insight about criminal defendants who did not commit the crime 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. Such studies illuminate the limited number of exonerees whose original convictions were based on guilty pleas, and they also reveal important information about how the concept of innocence is understood. For example, both the Garrett Study and the Gross Study's decisions to purposely exclude individuals with solely legal claims without accompanying claims of innocence[64] provides information about who falls within the "innocence" circle and who falls outside of it.[65]

Similarly, even though an increasing number of Innocence Projects are willing to take cases based on non-DNA evidence,[66] 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.[67] For example, imagine a

---

[62] Gross et al., *supra* note 35, at 536 n.29, referencing, as an example, Barbara Taylor, *Trapped on Rikers Island*, N.Y. TIMES, Sept. 7, 1996, at 21.

[63] Gross et al., *supra* note 35, at 536. The phrase "not individual cases" is then contrasted against data from "mass exonerations of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury and corruption," 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" and otherwise fabricated evidence to "frame innocent bystanders." *Id*. at 533. "In the aftermath of this scandal, at least 100 criminal defendants who had been framed by Rampart CRASH officers—and possibly as many as 150—had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic males 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 in their study. *Id*.

[64] Gross et al., *supra* note 35, at 527 ("It is possible that a few of the hundreds of exonerated individuals we have studied were involved in the crimes for which they were convicted, despite our efforts to exclude such cases.").

[65] Similar to Gross et al., *supra* note 35, at 527, Brandon L. Garrett, *Claiming Innocence*, *supra* note 26, at 1645, states, "I define the innocent as those who did not commit the crime charged."

[66] Steiker & Steiker, 95 J. CRIM. L. & CRIMINOLOGY at 618-19, discussed *supra* note 20.

[67] *See, e.g.*, Stephanie Roberts and Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatability of Innocence Projects and the Criminal Case*

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. Because he has no "actual" innocence claim to accompany the wrongful conviction claim, most Innocence Projects would not be very likely to take his case.[68]

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 literally just in the wrong place at the wrong time. After the prosecution uses the coerced confession to convict him, that person 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 more likely take his case.[69]

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 without "actual" innocence claims to accompany their wrongful conviction claims,[70] or if they take a person's case and find out during the course of representation that the person does not have an "actual" innocence claim to accompany the wrongful conviction claim, they might withdraw from representation.[71]

Similarly, the exonerees documented in innocence databases are largely people who are convicted through trials, rather than people who pleaded guilty. By combining these two factors together—people who have wrongful conviction claims without accompanying claims of "actual" innocence, and people who pleaded guilty rather than proceeded to trial—a group of legally innocent people emerges 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 of people. But it would

---

Review Commission, 29 OXFORD J. OF LEGAL STUD. 43, 51 (Spring 2009) (observing that "factual innocence is the overriding consideration for Innocence Projects").

[68] Steiker & Steiker, *supra* note 20, at 619-20.

[69] Steiker & Steiker, *supra* note 20, at 619-20.

[70] Steiker & Steiker, *supra* note 20, at 619-20.

[71] Steiker & Steiker, *supra* note 20, at 597, 619-20 (observing that "when an innocence project determines that "the claimant has no colorable innocence claim," some clients whose claims "turn out to be only partial or purely legal defenses . . . may have their non-innocence claims ignored or abandoned mid-stream").

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

A key part of our criminal justice process,[72] the presumption of innocence is a principle so "axiomatic and elementary"[73] that its enforcement "lies at the foundation of the administration of our criminal law."[74] The presumption of innocence does not rest on the question of "actual" innocence alone.[75] 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.[76] When the

---

[72] By the middle of the eighteenth century, historian C.K. Allen maintains that most of the changes in the nature of criminal trials had taken place, except for the development of the presumption of innocence. C.K. Allen, *The Presumption of Innocence*, in LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 273-74 (1977). Allen attributes the delay to three factors. The first factor was that 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 safely" because there was no effective police system in place. *Id.* The second factor was that people believed that "trifling inaccuracies" in criminal indictments "allowed many guilty persons to escape" when their indictment was invalidated." *Id.* at 275. For example, "Sir Harry Poland records—[though it is unclear what case he refers to]—that in 1827 Buller J. quashed an inquisition for murder because it states that the jurors *on their oath* presented . . . whereas the wording should have been, *on their oaths*." *Id.* at 275, citing *Changes in Criminal Law and Procedure Since 1800*, *in* A CENTURY OF LAW REFORM: TWELVE LECTURES ON THE LAW OF ENGLAND DURING THE 19TH CENTURY 62 (1901). The third factor is that people believed there were still many "wrongs" a person could commit that were not considered crimes. Allen, *The Presumption of Innocence*, at 275. 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.*

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. 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 the possibility of affording criminal defendants additional protection in the form of the presumption of innocence.

[73] Coffin v. United States, 156 U.S. 432, 453 (1895).

[74] 156 U.S. at 453.

[75] *See* William S. Laufer, "The Rhetoric of Innocence," 70 WASH. L. REV. 329, 348-62 (1995) (describing the historical basis of the presumption of innocence and the role of both factual and legal innocence).

[76] *See, e.g.*, Stephanie Roberts and Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Case Review Commission*, 29 OXFORD J. OF LEGAL STUD. 43, 50-51 (Spring 2009) ("A . . . confusion of

prosecution fails to meet its burden, the return of a "not guilty" verdict signals that the defendant is innocent of the crime.[77] This verdict could mean that the prosecution did not meet its burden of proving the defendant guilty 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 as to the degree of certainty understood as "proof beyond a reasonable doubt"—even though the defendant engaged in conduct underlying the government's charge.[78]

B. Asserting Innocence After Conviction

The pre-conviction presumption of innocence that a person possesses differs from innocence claims made on post-conviction appeal.[79] Once a person is convicted—either by trial or plea—the presumption of innocence disappears.[80] When a person who has been convicted appeals that conviction with accompanying claims of innocence, the person comes before the court in a decidedly different posture than that person came before the court prior to the conviction: "In 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 . . ."[81]

Once a person has been convicted of a crime, "legal" innocence and "actual" innocence often interweave in critical ways during the post-conviction

---

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 a clear distinction drawn between innocence, as it would be understood outside the legal arena, and legal innocence."); *see also* Laufer, *supra* note 75, at 387-91 (describing different types of innocence, standards of proof, and utilization); James Q. Whitman's 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).

[77] *See* Roberts & Weathered, *supra* note 76, at 50-51.

[78] *See, e.g.*, Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) ("A 'not guilty' verdict can mean several things. It can mean that the jurors believed the defendant committed all of 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 that the defendant did not commit the *actus reus* of the crime in question. . . . Call this 'factual innocence.'").

[79] In re Winship, 397 U.S. 358 (1970); Herrera v. Collins, 506 U.S. 390, 398 (1993).

[80] *Herrera*, 506 U.S. at 398-99.

[81] *Herrera*, 506 U.S. at 398-99.

appeals process, as the rest of this Part explores. The recent Supreme Court decision *In Re Troy Davis*[82] shows how the relief for wrongly convicted "actually" innocent people relies on a robust preservation of an innocence unmodified.

1. The Facts of *Davis*

Twenty-one years ago in Georgia, Troy Anthony Davis was charged with the murder of Mark Allen MacPhail.[83] The crime occurred just after midnight on August 19, 1989.[84] An off-duty police officer, MacPhail reported for work as a security guard at the Greyhound bus station in Savannah.[85] The bus station was adjacent to a fast-food restaurant.[86] The prosecution's theory of the case was that as the restaurant was closing, a fight broke out in the restaurant parking lot.[87] The prosecution contended that Troy Davis was in the restaurant parking lot and struck a homeless man[88] with a pistol.[89]

When the fight began, MacPhail was at the bus station.[90] Still wearing his police uniform, "including badge, shoulder patches, gun belt, .38 revolver, nightstick,"[91] and "bullet-proof vest,"[92] MacPhail ran from the bus station to the restaurant parking lot.[93] Davis fled.[94] As MacPhail ordered Davis to halt, the prosecution's evidence was that Davis turned around and shot MacPhail.[95] When MacPhail fell to the ground, the prosecution said that Davis, smiling, walked up to the fallen officer and shot him several more times.[96] 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 bullet proof vest.[97]

In addition to evidence from the night of the shooting, the prosecution put on additional evidence that the next day, Davis "told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun . . . [and] that when a police officer ran up, Davis shot him and then went to the officer and 'finished the job' because he knew the officer got a good

---

[82] 130 S.Ct. 1 (2009).
[83] 130 S.Ct. at 1 (Scalia, J., dissenting).
[84] Davis v. State, 426 S.E.2d 844 (Ga. 1993).
[85] 426 S.E.2d at 846.
[86] 426 S.E.2d at 846.
[87] 130 S.Ct. at 2 (Scalia, J., dissenting).
[88] 130 S.Ct. at 2 (Scalia, J., dissenting).
[89] 426 S.E.2d at 846.
[90] 426 S.E.2d at 846.
[91] 426 S.E.2d at 846.
[92] 426 S.E.2d at 846.
[93] 130 S.Ct. at 2 (Scalia, J., dissenting).
[94] 426 S.E.2d at 846.
[95] 426 S.E.2d at 846.
[96] 426 S.E.2d at 846.
[97] 426 S.E.2d at 846.

look at his face when he shot him the first time."[98] The prosecution also maintained that Davis had "told a cellmate a similar story."[99]

The jury trial began exactly two years later, on August 19, 1991. Represented by an attorney, Davis's defense was that he "was present during the beating of the homeless man,"[100] but that it was "one of his companions who shot Officer MacPhail."[101] Davis was found guilty of murder, two counts of aggravated assault, and possession of a firearm during the commission of the felony.[102] He was sentenced to death for the murder.[103]

2. The Procedural History

In the years between Davis's conviction and his scheduled execution date, "seven of the State's key witnesses . . . recanted their testimony; [and] several individuals . . . implicated the State's principal witness as the shooter."[104] Based on this new evidence establishing his "actual innocence" of the crime, Davis eventually attempted to file a second federal habeas petition setting forth a freestanding claim of "actual" innocence.[105]

Davis's petition landed in the United States Supreme Court in the summer of 2009. The procedural posture of Davis's case prior to arriving in the Supreme Court in 2009 is critical in understanding the import of the Supreme Court's action. The procedural posture of Davis's case 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 landing in the Supreme Court in the summer of 2009, Davis had already litigated and lost a state post-conviction petition in the Georgia state courts.[106] He had also litigated and lost a first federal habeas petition in the federal courts.[107] This first federal habeas corpus petition had raised a number of constitutional violations that he had not raised in his state post-conviction appeal.[108] Because these new claims were procedurally defaulted in federal district

---

[98] 426 S.E.2d at 846.
[99] 426 S.E.2d at 846.
[100] 130 S.Ct. at 2 (Scalia, J., dissenting).
[101] 130 S.Ct. at 2 (Scalia, J., dissenting).
[102] 426 S.E.2d at 845.
[103] 426 S.E.2d at 845.
[104] 130 S.Ct. at 1.
[105] 130 S.Ct. at 1 (Scalia, J., dissenting).
[106] In Re Troy Anthony Davis, 565 F.3d 810, 813-14 (11th Cir. 2009) (describing procedural history).
[107] 565 F.3d at 813-14.
[108] 565 F.3d at 813 (listing some of the constitutional violations Davis raised in his first federal habeas corpus petition 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

court by virtue of the fact that he had not raised 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."[109] Although Davis did not raise a substantive freestanding claim of "actual" innocence in his first federal habeas petition,[110] "during the proceedings . . . Davis moved the district court to stay the federal habeas proceedings in order for him to present a freestanding 'actual' innocence claim to the state courts."[111] The district court denied this request and also denied his petition.[112] In doing so, the court reached the merits of his constitutional claims without also ruling on his "actual" innocence claim.[113] The Eleventh Circuit affirmed this ruling and "made clear that Davis had 'not ma[d]e a substantative claim of "actual" innocence.'"[114]

Davis then filed an "extraordinary motion for new trial"[115] in Georgia state trial court with accompanying affidavits setting forth "newly discovered evidence in support of his motion."[116] The state trial court reviewed his affidavits and denied his motion.[117] 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.[118] After the United States Supreme Court denied his petition for certiorari review of the Supreme Court of Georgia's decision,[119] Davis applied for permission with the Eleventh Circuit to file a second or successive habeas corpus petition in federal district court,[120] and this request was denied.[121]

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.[122] Before filing his application with the Eleventh Circuit for leave to file a second or successor habeas petition in federal district court in Georgia,[123] Davis's prior appeals and post-conviction petitions had never before included a freestanding substantive innocence claim. His first federal habeas

---

Brady; (3) that his trial counsel was constitutionally ineffective, in violation of *Strickland*.").

[109] 565 F.3d at 813, citing Schlup v. Delo, 513 U.S. 298 (1995).
[110] 565 F.3d at 813.
[111] 565 F.3d at 814.
[112] 565 F.3d at 813.
[113] 565 F.3d at 813.
[114] Davis v. Terry, 465 F.3d 1249, 1251 (11th Cir. 2007).
[115] 565 F.3d at 814, citing Ga. Code Ann. Section 5-5-41 (2008).
[116] 565 F.3d at 814.
[117] 565 F.3d at 814.
[118] 565 F.3d at 814 (noting that he also filed a motion for a stay of execution with his application for discretionary review).
[119] Davis v. Georgia, 129 S.Ct. 397 (Oct. 14, 2008).
[120] 565 F.3d at 814.
[121] 565 F.3d 810, 825 (2009).
[122] United State Supreme Court Rule 20.4(a); In Re Troy Anthony Davis, 130 S.Ct. at 1.
[123] 565 F.3d at 813.

petition had included an innocence claim as a door through which to reach his procedurally defaulted unfair trial claim.[124] 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.[125] In evaluating this prior innocence claim, the Georgia Supreme Court,[126] the Georgia State Board of Pardons and Appeals,[127] and the Eleventh Circuit Court of Appeals[128] each considered affidavits and other supporting evidence of Davis's innocence and "found it lacking."[129]

When the Eleventh Circuit denied Davis leave to file his second or successor 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

---

[124] Davis v. Terry, 465 F.3d 1249, 1251 (2006) (per curiam) (observing that Davis's federal habeas corpus petition "does not make a substantive claim of actual innocence" but rather "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*"); Schlup v. Delo, 513 U.S. 298 (1995), discussed *supra* note 5.

[125] 465 F.3d at 1251-52.

[126] 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 have produced a different result." 130 S.Ct. at 4 (Scalia, J., dissenting) (citing Davis v. State, 660 S.E.2d at 358-363).

[127] 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." 130 S.Ct. at 4 (Scalia, J., dissenting), citing Brief in Opposition 14-15 (statement of Board of Pardons and Paroles). According to the Board of Pardon and Paroles, it "'gave Davis's attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis's guilt;' it 'heard each of these witnesses and questioned them closely;' . . . [and] [i]t '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.'" 130 S.Ct. at 4 (Scalia, J., dissenting), citing Brief in Opposition 14-15 (statement of Board of Pardons and Paroles) (internal citations omitted). "'After an exhaustive review of all available information regarding Troy Davis's case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency was not warranted." 130 S.Ct. at 4 (Scalia, J., dissenting), citing Brief in Opposition 14-15 (statement of Board of Pardons and Paroles).

[128] When the Eleventh Circuit reviewed the record, it "came to a conclusion 'wholly consistent with the repeated conclusions of the state courts and the State Board of Pardons and Paroles.' 565 F.3d 810, 825 (2009). '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 have not have found him guilty of Officer MacPhail's murder.' 565 F.3d at 825." 130 S.Ct. at 4 (Scalia, J., dissenting).

[129] 130 S.Ct. at 4 (Scalia, J., dissenting).

to exercise its original habeas jurisdiction over the case.[130] Although the Supreme Court had not exercised such jurisdiction in more than fifty years,[131] on August 17, 2009, it decided to do so.

In a per curium 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."[132] 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.[133]

Justice Stevens responded to Scalia's observation by asserting that "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing,"[134] and that the transfer to the district court was not a "fool's errand."[135]

Scalia's observation is nonetheless correct. The Supreme Court has never held that the Constitution forbids the execution of a convicted defendant who has had a "full and fair trial"[136] but is later able to convince a habeas court that he is "actually" innocent.[137]

---

[130] 565 F.3d at 826-27 ("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 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.").

[131] 130 S.Ct. at 1 (Scalia, J., dissenting).

[132] 130 S.Ct. 1, 1 (2009).

[133] 130 S.Ct. at 3 (Scalia, J., dissenting) (citing, *inter alia*, Herrera v. Collins, 506 U.S. 390, 400-401, 416-417 (1993)).

[134] 130 S.Ct. at 1.

[135] 130 S.Ct. at 1.

[136] 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 Marceau, *Don't Forget Due Processs: The Path Not (Yet) Taken in Section 2254 Habeas Corpus Adjudications* (on file with author). While a full discussion of the evolution and tensions within the Court's use of the term is beyond the scope of this Article, for examples of how the Court has employed the term, *see, e.g.*, Stone v. Powell, 428 U.S. 465 (1975) (holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," and further noting that in such a context, "the

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,[138] Davis's original federal pleadings 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 those 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 is actually innocent of the crime of murder.[139]

---

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"); and more recently, Boumediene v. Bush, 553 U.S. 723 (2008) (observing that "[t]he 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," then assessing the process of the Combatant Status Review Tribunals, "the mechanism through which petitioners' designation as enemy combatants became final," in order to determine the scope of habeas review). *See also* Paul M. Bater, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (resisting the "notion that inquiry on habeas should be mere repetition . . . of what has gone before" and suggesting modifications "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 relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him").

[137] *House*, 547 U.S. at 555; *Herrera*, 506 U.S. at 400-401, 416-417. *See also* District Attorney's Office for the Third Judicial District v. Osborne, 129 S.Ct. 2308, 2321 (2009) (noting that "Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence," and that "[w]hether such a federal right exists is an open question").

[138] *See House*, 547 U.S. at 555; *Osborne*, 129 S.Ct. at 2321. 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 viability of such claims. *See, e.g.*, Illinois v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) (holding 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," and noting that this 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").

[139] 565 F.3d at 813.

Davis shows that one reason to protect an unmodified conception of innocence is because under the Court's existing jurisprudence, "actual" innocence and "legal" innocence go hand-in-hand to achieving justice for a wrongly convicted person: the "actual" innocence claim opens the door to consideration of the underlying "legal" claim.[140] Although Davis did not prevail on the underlying "legal" claims, his "actual" innocence claim was the device through which his "legal" claims were heard at all. In other words, but for his "actual" innocence claim, he may not have received his day in court on his underlying "legal" claims.

In addition to the way that "actual" innocence and "legal" innocence interweave in the Court's existing jurisprudence, as *Davis* winds its way back up to the Court, the Court could use *Davis* as a lens 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 the idea that the "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."[141] Within the construction of Scalia's question is the assumption that a trial could be assessed as having been "full and fair" even if it resulted in the conviction of an "actually" innocent person. Rather than resting the decision on the question of "actual" innocence alone, the Court could thus decide through *Davis* that a trial cannot be found to have been constitutionally "full and fair" if it resulted in the conviction of an "actually" innocent person.[142]

In this way, Davis's "legal" innocence and "actual" innocence claims would continue to interweave. Rather than using his "actual" innocence claim to access his otherwise procedurally defaulted "legal" claims (a strategy that he tried and failed to do through phases of his appellate process), the "actual" innocence claim would be part and parcel of the "legal" claim that the trial was constitutionally deficient. It would thus be part of a claim that constitutional deficiencies undermined the fairness of the trial process.

Finally, the Court could also use *Davis* as a lens through which to announce the viability of a freestanding claim of "actual" innocence.[143] The Court could announce through *Davis* that a federal constitutional right based on "actual"

---

[140] *Schlup*, 513 U.S. at 314-15; *House*, 547 U.S. at 554-55.

[141] 130 S.Ct. at 3 (Scalia, J., dissenting), citing, *inter alia*, Herrera v. Collins, 506 U.S. 390, 400-401, 416-417 (1993).

[142] *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993) (exploring whether the Court's innocence focus supports habeas review of "bare-innocence" claims); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (discussing the Court's failure to recognize a constitutional claim of innocence).

[143] *See* Steiker, *Innocence and Federal Habeas*, *supra* note 142, at 312 (explaining that the "Court should authorize the federal courts to entertain bare-innocence claims whether or not such claims can fairly be characterized as 'constitutional'"); Garrett, *Claiming Innocence*, *supra* note 142, at 1633 (explaining how the Court should recognize a constitutional claim of "factual" innocence irrespective of constitutional violations).

innocence does exist. Whether *Davis* is the case through which the Court will examine the open question of "actual" innocence depends largely on the opinion the federal district court issued after conducting Davis's long-awaited evidentiary hearing in federal district court. Because of the highly unusual procedural posture of the case—transferred from the Supreme Court (exercising its original jurisdiction) to a federal district court in order to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence"— the district court's findings of fact and framing of the issue are key to what will happen next.[144]

Unfortunately for Davis, after finally receiving his long-awaited evidentiary hearing in federal district court, the district court concluded that "Davis has failed to prove his innocence."[145] In so doing, the district court decided that a freestanding claim of actual innocence is indeed cognizable.[146] It also found that while Davis's "new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors."[147] 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,"[148] the Court held that "Davis failed to make a showing of actual innocence that would entitle him to habeas relief in federal court."

While the district court clearly articulated its findings and analysis in denying Davis's petition,[149] it readily admitted that the jurisdictional effects of its decision, especially with regard to appeal, are unclear.[150] "[U]nable to locate any legal precedent or legislative history on point,"[151] it assumed that it was "functionally . . . operating as a magistrate for the Supreme Court, which suggests

---

[144] 130 S.Ct. at 1 (Stevens, J., concurring) ("The District Court may conclude that section 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 . . . that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person.'").

[145] In Re Troy Anthony Davis, CV409-130 (S.D. Ga., Aug. 24, 2010) (on file with author), at 2.

[146] *Davis*, *supra* note 145, at 91 at 171 ("executing an innocent person would violate the Eighth Amendment of the United States Constitution").

[147] *Davis*, *supra* note 145, at 170.

[148] *Davis*, *supra* note 145, at 170.

[149] In the concluding footnote of its opinion, the district court emphasized this clarity by stating: "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. *See* Herrera, 506 U.S. at 417." *Davis*, *supra* note 145, at 171 n.108.

[150] *Davis*, *supra* note 145, at 1 n.1.

[151] *Davis*, *supra* note 145, at 1 n.1.

appeal of this order would be directly to the Supreme Court."[152] Whether the district court's decision goes next to the Supreme Court remains to be seen.

Because the district court did not find Davis's actual innocence claims to be persuasive enough to grant his habeas petition, it seems unlikely that Davis's case will serve as a vehicle through which the Court announces a freestanding claim of actual innocence. Nonetheless, the Court's exercise of its original jurisdiction in sending Davis's case to 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 the district court had found Davis to be "actually" innocent.

In addition, 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"[153] highlighted another critical component of innocence claims: the important role trials serve in safeguarding claims of innocence. As the next section explores, in contrast to defendants found guilty through trial, defendants who plead guilty face additional hurdles in later establishing their innocence.

III. Guilty Pleas and Innocence Unmodified

Contrary to Troy Davis's decision to go to trial, the vast majority of criminal defendants plead guilty.[154] 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, "only twenty of the exonerees in [the] database pled guilty, less than six percent of the total."[155] As the Gross Study reveals, when discussing innocence and exonerations, relatively little is known about the plight of defendants who plead guilty. 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.[156]

---

[152] *Davis*, *supra* note 145, at 1 n.1.

[153] 130 S.Ct. at 1 (Stevens, J., concurring) (emphasis added).

[154] Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*? 49 RUTGERS L. REV. 1317, 1337 (1997) (noting that more than 90% of convictions for violent felonies in a survey of the seventy-five largest counties in the United States were the result of guilty pleas); *see also* Rosen, *supra* note 8, at 74 n.42 (citing Givelber).

[155] Gross et al., *supra* note 35, at 523.

[156] One of the most comprehensive empirical studies of *pro se* felony defendants was authored by 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 she analyzed contained roughly 20,000 defendants for each year of data, but it only had information for 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.

This oversight in the studies is understandable in part. Defendants who plead guilty forego most of their salient appellate issues in the process of pleading guilty.[157] Even if their constitutional rights were 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.[158] The best, if not the only, appellate issue a defendant who pleads guilty may later have is that the plea was not knowingly, intelligent, and voluntary,[159] but even that assertion is difficult to prove to the extent necessary to reverse the conviction.[160]

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 people who have been exonerated were originally convicted through trial (and that most of those people were additionally represented by counsel at their trial). When the "actual" innocence of a convicted person is proven through such tangible methods as DNA analysis, it "opens the door" for the court to consider the constitutional errors that occurred during the trial.[161] The combination of "actual" innocence and serious constitutional errors is a compelling combination that has overturned many convictions. Because defendants who plead guilty may be missing the "actual" innocence component—and because defendants who plead guilty instead of going to trial waive many of their appellate issues—defendants who plead guilty face an arduous uphill battle in post-conviction litigation.

Even though a defendant who pleads guilty has limited appellate options, this limited appellate 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.

---

[157] Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004) (the plea process and proposing reforms).

[158] 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 judicial employment of leading and compound questioning during the Rule 11 hearing fails to ensure the entry of knowing and voluntary guilty pleas).

[159] 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).

[160] Cook, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, *supra* note 158, 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, and observing that "the 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") (emphasis included).

[161] Schlup v. Delo, 513 U.S. 298 (1995), discussed *supra* note 5.

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.[162] 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 the defendant understands what he is being asked to admit[163] and that he pleads guilty knowingly, intelligently, and voluntarily.[164]

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 court's role during their plea. The court is the only entity in the position of ensuring that *pro se* defendants who plead guilty do so "knowingly."[165] If the court does not 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.[166]

---

[162] *See, e.g.*, Brady v. United States, 397 U.S. 742, 757 (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 seemed improvident, although they were perfectly sensible at the time."); Henderson v. Morgan, 426 U.S. 637, 647 (1976) (noting that while "[i]t may be appropriate to assume 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"); Model Rules of Prof'l Conduct R. 1.2(d) ("[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.").

[163] *Morgan*, 426 U.S. at 647.

[164] *Boykin*, 395 U.S. at 242.

[165] *See* State v. Tovar, 541 U.S. 77, 88 (2004), citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938), for the proposition that the Court has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without 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." *See also Boykin*, 395 U.S. at 242.

[166] As the Gross Study itself 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.

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 *State v. Tovar*[167] 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 pleas of guilt.[168] It held that the Constitution does not require a court to inform a *pro se* defendant about the risks of proceeding without counsel, including the risk of overlooking innocence and other defenses.[169] 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. Rather than a simple opinion 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 safeguarding constitutional protections.

A. The Court's Reasoning in Tovar

Tovar examined the minimum admonishments courts are required to give a *pro se* criminal during a plea colloquy.[170] 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.[171] In order to waive counsel at the plea stage, courts ensure that a criminal defendant knows what he or she is giving up.[172] 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 into the plea knowingly and intelligently.[173]

Because the plea is such a critical stage of the criminal process, the minimal admonishments trial courts must give a criminal defendant who is pleading guilty are critical—and these admonishments become even more critical when the defendant is pleading guilty without the aid of counsel.[174] 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

[167] 541 U.S. 77 (2004).
[168] U.S. at 91 (citing Pet. for Cert. i).
[169] U.S. at 91 (citing Pet. for Cert. i).
[170] 541 U.S. 77 (2004).
[171] 541 U.S. at 80.
[172] 541 U.S. at 80.
[173] 541 U.S. at 80.
[174] 541 U.S. at 80.

to inform a *pro se* defendant that an attorney may provide an independent opinion whether it is wise to plead guilty.[175] It further explained that trial courts do not have to tell a defendant that without an attorney, the defendant risks overlooking a defense.[176] The Court explained this decision by expressing concern that a defendant would "delay the plea" to get counsel and that such consultation would impede "the prompt disposition of the case" and waste resources. Some background surrounding the *Tovar* case is helpful to understand the context of this reasoning.[177]

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 pleaded guilty.[178] The second time, an attorney represented him and he pleaded guilty.[179] The third time, Tovar faced a third-offense drunk driving charge, which is a felony in Iowa.[180] Represented by different counsel for his third offense,[181] he argued that his first prior 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 about the advantages of having counsel.[182] The trial court disagreed, and Tovar was convicted of third-offense drunk driving following a bench trial.[183]

On appeal, the Iowa Supreme Court reversed the trial court's decision.[184] The Iowa Supreme 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 basis to enhance his subsequent drunk driving offense to a felony.[185] In reaching this result, the Iowa Supreme Court found that the Sixth Amendment to the United States Constitution requires a judge to advise a *pro se* defendant who wishes to plead guilty that the decision to waive counsel entails the risk that the defendant will overlook a viable defense, and deprives the defendant of the opportunity to obtain an independent opinion on

---

[175] U.S. at 91 (citing Pet. for Cert. i).
[176] U.S. at 91 (citing Pet. for Cert. i).
[177] 541 U.S. at 93, *citing* Brief for United States as *Amicus Curiae* at 28-29; Tr. of Oral Arg. 20-21.
[178] 541 U.S. at 81-85.
[179] 541 U.S. at 85.
[180] 541 U.S. at 85; Iowa Code section 321J.2(2)(c) (1999).
[181] 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, he was represented by the Office of the State Appellate Defender.
[182] 541 U.S. at 85-86.
[183] 541 U.S. at 86-87.
[184] State v. Tovar, 656 N.W.2d 112, 121 (Iowa 2003).
[185] 656 N.W.2d at 121.

whether, under the facts and applicable law, it is wise to plead guilty.[186] Granting certiorari, the United States Supreme Court disagreed.[187]

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.[188] First, the "admonitions at issue might confuse or mislead a defendant more than they would inform [him]."[189] Second, after a defendant receives such warnings, 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."[190] After expressing concern that the admonitions might lead to either of these two results, the Court observed that:

> [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.[191]

In support of this argument, the Court cited the Amicus Brief submitted by the United States[192] and two pages of the Oral Argument Transcript,[193] 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. What the citations to the Amicus Brief and the Oral Argument Transcript did provide support for was the fact that most people plead

---

[186] 656 N.W.2d at 120-21.
[187] 541 U.S. at 81.
[188] 541 U.S. at 93.
[189] 541 U.S. at 93.
[190] 541 U.S. at 93.
[191] 541 U.S. at 93, *citing* Brief for United States as *Amicus Curiae* at 28-29; Tr. of Oral Arg. 20-21.
[192] In fact, the Court draws much of its language directly from the United States' Amicus Brief. *See* Brief for United States as *Amicus Curiae* at 28-29 ("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 the 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.")
[193] 541 U.S. at 93, *citing* Tr. of Oral Arg. 20-21.

guilty,[194] and if these defendants chose to have a trial instead of plead guilty, the government would have to hire more judges and build more courtrooms.[195]

B. Prioritization of "Actual" Innocence and Efficiency

The Court's reasoning in *Tovar* reveals two concerns informing the Court's holding. The first concern is that giving defendants the proposed admonitions regarding the strength of legal defenses will cause a domino effect leading to more trials: most defendants who hear the admonitions will decide to stop their plea to take time to consult with an attorney; after these defendants have consulted with an attorney, the defendants will decide to go to trial; and the large number of defendants who will thereby choose to take their cases to trial rather than plead guilty will clog the court system and force the states and federal government to incur additional expenses by hiring more judges and opening more courthouses. The second, somewhat contradictory, concern is that most defendants who hear the admonitions will decide to stop their plea to take time to consult with an attorney even if they do not proceed to trial. As such, continuing the plea hearings so that defendants can consult with counsel will waste court resources because the consultation will only lead to a delayed guilty plea.

Both concerns are unsubstantiated by any empirical evidence.[196] One is thus left to wonder what constitutes the basis for these concerns. Such inquiry leads to the possibility that underlying motivations inform the Court's judicial efficiency concerns: one based on a documented fact, and two based on unsupported assumptions. The well documented fact behind judicial efficiency is that most criminal cases are disposed of through guilty pleas.[197] The first assumption is that admonishing *pro se* defendants about the risks of not evaluating legal defenses at the plea stage will decrease the judicial efficiency. The second assumption is based on the Court's prioritizing "actual" innocence over the protection of other constitutional rights.

---

[194] Brief for United States as *Amicus Curiae* at 17 n. 7 (citing table from Judicial Business of the United States Courts) (The "vast majority of federal criminal convictions are obtained as the result of pleas of guilty.").

[195] Brief for United States as *Amicus Curiae* at 17-18, (citing *Santobello v. New York*, 404 U.S. 257, 260 (1971)) ("If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.").

[196] 541 U.S. at 93, *citing* Brief for United States as *Amicus Curiae* at 28-29; Tr. of Oral Arg. 20-21.

[197] *See, e.g.*, Bureau of Justice Statistics: Felony Defendants in Large Urban Counties, 1998, iii-iv (available at www.ojp.usdoj.bjs/pub) (explaining that every two years, as part of its State Court Processing Statistics program, the Bureau of Justice Statistics tracks a sample of felony cases filed during the month of May in 40 of the Nation's 75 largest counties, and that the most recent study, which analyzed cases filed during May 1998, found that "Nearly all (96%) convictions obtained during the 1-year study period were the result of a guilty plea."); *see also* Brief for United States as *Amicus Curiae* at 17 n.7 (citing table from Judicial Business of the United States Courts).

1. Judicial Efficiency

The first assumption regarding decreased judicial efficiency leads to the conclusion that state and federal courts have a keen interest in maintaining the efficiency of pleas. The argument is that because of the courts' interest in protecting efficiency, courts strive to avoid anything that could threaten the effectiveness of the "plea machine"—as does a set of admonitions that could result in *some* criminal defendants choosing to forgo their plea in order to consult with an attorney before proceeding further.

In light of this undercurrent of judicial expediency permeating *Tovar*, it may be no surprise that state courts—who 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 federal constitution requires.[198] Such resounding state silence could be viewed as the states' failure to "step into the breach" left by the Court's "retreat from its commitment to the protection of individual rights,"[199] because states are either aligning their state constitutions with the federal constitution or relying solely on the federal constitution to define the minimum admonishments state judges must give *pro se* defendants during guilty pleas. The states' silence thus signals their decision to follow suit with the United States Supreme Court in order to ensure expediency and finality in the plea process.

While the Court admits that judicial expediency informs its analysis, at least in part, the Court does not directly verbalize the second assumption regarding the prioritization of "actual" innocence.

2. Prioritizing "Actual" Innocence

The Court's second assumption in *Tovar* reveals that the Court values the "actual" innocence of the *pro se* defendant pleading guilty more than protecting a broader, unmodified conception of innocence (which would include "actual" innocence as well as legal defenses and other forms of "legal" innocence).[200] In

---

[198] For example, the Supreme Court of Wisconsin has relied on its "superintending and administrative authority over the Wisconsin court system" to extend greater protections to *pro se* defendants pleading guilty than the Court outlined in *Tovar*. *See* State v. Ernst, 699 N.W.2d 92, 98 (Wisc. 2005) ("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.").

[199] *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 n.7 (1992) (referencing bibliographies of old and new literature focusing on state constitutional law).

[200] Another case that supports this claim is United States v. Ruiz, 536 U.S. 622, 625 (2002), where the Court held that the Constitution did not require the government to disclose material impeachment evidence prior to the defendant pleading guilty. In reaching this result, the Court observed that "impeachment information is special in relation to the

fact, more than simply prioritizing the "actual" innocence of *pro se* defendants pleading guilty, 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 he wants to plead guilty, it is at that moment—before 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 *pro se* plea, the court explores the "actual" innocence of the defendant by deciding whether there is a factual basis for the crime before rendering judgment.[201] Courts do this in different ways. Some ask the defendant to describe his actions in his own words, while others ask the prosecutor to summarize the facts of the case. Regardless of the mechanism by which the court assesses "actual" innocence, the court ensures that there is a "factual basis" for the plea before accepting it.

On the flip side, courts are not required to explore whether the defendant understands legal defenses or other forms of "legal" innocence—such as exculpatory evidence which could be used at trial—before accepting a guilty plea. For example, courts do not ask prosecutors to disclose fundamental weaknesses in their case prior to a plea,[202] and depending on when the plea takes place in the discovery process, prosecutors may not have even disclosed exculpatory evidence or other discovery prior to the plea.[203]

---

fairness of a trial, not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficiently aware")." 536 U.S. at 629 (emphasis in original). 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." 536 U.S. 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." 536 U.S. at 631.

[201] *See, e.g.*, FED. R. CRIM. P. 11 (providing that the court shall not accept a guilty plea without first addressing the defendant personally and determining the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea, and that judgment shall not be entered upon a guilty plea unless the court is satisfied that there is a factual basis for the plea); McCarthy v. United States, 394 U.S. 459, 465 (1968) (explaining that although the procedure embodied in Rule 11 is not constitutionally mandated, the purposes of Rule 11's provisions are (1) "to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary"; and (2) "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination").

[202] *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 625 (2002) (the Constitution does not require the government to disclose material impeachment evidence prior to the defendant pleading guilty).

[203] *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realties*, 2006 WIS. L. REV. 541 (2006) (describing different discovery processes and when prosecutors disclose information); Kevin C. McMunigal, *Disclosure and Accuracy in*

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 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.[204] 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.[205]

But when a defendant pleads guilty without counsel,[206] 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 have viable defenses he is overlooking—severely disadvantages *pro se* defendants. 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.[207] By not ensuring that *pro se* defendants have

---

the Guilty Plea Process, 40 HASTINGS L.J. 957 (1989) (advocating for mandatory disclosure of *Brady* material to defendants who plead guilty).

[204] *See, e.g.*, Model Rules of Prof'l Conduct R. 1.2(d) ("[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.").

[205] Interview with Patrick Brayer, Assistant Public Defender, St. Louis County Public Defender Office, St. Louis, Missouri (Feb. 2010) (notes on file with author) (describing typical plea colloquy in St. Louis County District Associate Court).

[206] *See* 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) (explaining the difficulty in obtaining empirical information about *pro se* felony defendants); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004) (discussing inadequacies in the plea process and proposing reforms).

[207] While acknowledging that the Sixth Amendment guarantees defendants who face incarceration a right to counsel at all "'critical stages' of the criminal process," 541 U.S. at 86 (citing Maine v. Moulton, 474 U.S. 159, 179 (1985)), and while also acknowledging that a plea hearing qualifies as a "critical stage," 541 U.S. at 86 (citing White v. Maryland, 373 U.S. 59, 60 (1963)), *Tovar* highlights a distinction between the role of counsel at trial and the role of counsel at a plea by citing *Patterson v. Illinois.* 487 U.S. 285 (1988). *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." *Tovar*, 541 U.S. at 90. 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

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[208] 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.[209] Before pleading guilty, courts do not even ask *pro se* defendants whether they are aware that consulting with an attorney might be a good idea.[210]

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 trial than to plead guilty, and *pro se* defendants representing themselves at trial consume even more of the court's resources.[211] Therefore, the extensive colloquy trial courts use before allowing a defendant to represent themselves at trial is meant to scare defendants into obtaining counsel for trial. While the trial itself still takes time

---

therefore adequately conveys to the defendant both the utility of counsel and the dangers of self-representation." 541 U.S. at 90 (citing Brief for Petitioner at 20); Tr. of Oral Arg. 3. 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 in a "case so straightforward," 541 U.S. at 93, counsel would have little role preceding—or during—the plea.

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, *Faretta v. California* enunciates the point more recently. 422 U.S. 806, 835 (1975) (clarifying that in order to "competently and intelligently . . . choose self-representation," the defendant 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.'"). *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," 541 U.S. at 92 (citing *Patterson*, 487 U.S. at 294), the waiver can still satisfy the constitutional minimum.

[208] *See Faretta*, 422 U.S. at 835 (clarifying that in order to "competently and intelligently . . . choose self-representation," the defendant 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.'").

[209] *See, e.g., Faretta* v. California, 422 U.S. at 835.

[210] 541 U.S. at 93.

[211] *See, e.g.*, Chief Justice Thomas J. Moyer, *Commission on the 21st Century Judiciary*, 38 AKRON L. REV. 555, 558 (2005) (discussing report that noted, *inter alia*, "a trend towards *pro se* litigation and its impact on the role of the trial judge").

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.[212]

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 Court's willingness to devalue a *pro se* defendant's presumption of unmodified innocence during the plea process. Because a person who is pleading guilty effectively loses an unmodified presumption of innocence by virtue of choosing to plead guilty, the Court is not concerned that the defendant knows he may be overlooking a legal defense in pleading *pro se*.[213]

While saving time and money through judicial expediency is not an inherently unsound goal, it 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 trivializes counsel's role at a plea proceeding[214] and devalues the presumption of innocence, thereby conflicting with the Court's duty to safeguard a defendant's constitutional right to due process.[215]

The Court's willingness to devalue the unmodified innocence of *pro se* defendants pleading guilty may ultimately rest on a deeper assumption: the assumption that guilty people plead guilty and that innocent people go to trial. If this is indeed an undercurrent in the Court's rationale, a motivating force behind the *Tovar* reasoning is that the rights afforded to defendants pleading guilty without counsel do not have to be as 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 to be at issue 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.[216] It is also flawed because even if a defendant who is pleading

---

[212] *See, e.g.*, Moyer, *supra* note 211, at 558.
[213] 541 U.S. at 94.
[214] *See, e.g.*, Brief of Amicus Curie National Association of Criminal Defense Lawyers, *Tover* (No. 02-1541) (discussing role of attorney).
[215] The *Tovar* Court disagreed that the Sixth Amendment requires a court to inform a *pro se* defendant that an attorney may provide an independent opinion whether it is wise to plead guilty or that without an attorney, the defendant risks overlooking a defense. 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.
[216] *See* discussion *supra*, Introduction.

guilty is not innocent, that defendant must still be presumed innocent until his plea is accepted by the court.[217]

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. But it 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 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 the 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 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,"[218] the deprivation of the presumption of innocence unmodified at *pro se* guilty pleas denies *pro se* defendants due process of law.[219]

Conclusion

This Article has argued that 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

---

[217] To this end, the National Association of Criminal Defense Lawyers filed an *amicus curiae* brief on behalf of Tovar in which it explained the complex legal judgments involved during this stage of representation. NACDL Brief at 11. In their brief, the NACDL acknowledged that "[t]he plea decision appears deceptively simple." The brief went on to explain that "[i]n 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 the jury? What is the likely sentence under any applicable guidelines, and is that sentence low enough to justify forgoing a defendant's right to trial? What are the collateral consequences of conviction?" *See also* Cook, *supra* note 157.

[218] 156 U.S. at 453.

[219] *See supra* note 207, discussing Powell v. Alabama, 287 U.S. 45, 67 (1932) ("[T]he right involved is of such character that it cannot be denied without violating 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'").

reveals, reclaiming innocence has broader implications than protecting people who do not have "actual" innocence claims. Because the 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 court can reach otherwise defaulted constitutional claims. "Actual" innocence is what allows a court to look at 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 was 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 to protect 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—just as the Felipe Tovars of the world—receive justice. We must reclaim innocence unmodified to safeguard the fundamental rights that protect us all.