INNOCENCE, EVIDENCE, AND THE COURTS

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INTRODUCTION

In December 2008, a group of scholars gathered to discuss three fundamental topics in constitutional criminal procedure: the Fourth Amendment exclusionary rule, judicial procedures, and innocence.[1] The topics were selected, in part, because each is at the center of contemporary debates about the nature, scope, and definition of the constitutional limits on government efforts to catch and punish criminals. The participants in that discussion have contributed the fourteen papers included in this symposium issue.

As one would expect, the papers are organized here within the three separate symposia topics. Reading the entire set of papers, however, reveals the artificiality of treating evidence suppression, judicial processes, and innocence as distinct analytical categories. Constitutional questions about the admissibility of evidence, judicial processes, and innocence emerge as what they are, different faces of the same fundamental democratic dilemma. Our system of constitutional criminal procedure has evolved into a—perhaps *the*—essential social institution for resolving the conflicts between the fundamental need for social order and the equally compelling demand for individual autonomy. The conflict between order and autonomy is at the heart of all great constitutional questions in our democracy, including those discussed in this symposium.

Of the symposium papers, Professor Sundby's[2] expresses most directly the links among these three topics. Rather than engage in the traditional debate over the benefits and costs of exclusion, Sundby chooses to examine the benefits generated by the judicial procedure employed to resolve suppression motions. He argues convincingly that the contemporary obsession with the rule's deterrent effect obscures "one of the most impor-

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1. The occasion was the annual meeting of the Criminal Procedure Discussion Forum. The 2008 session was held at the Emory University School of Law.

2. Scott Sundby, *Mapp* v. *Ohio's Unsung Hero: The Suppression Hearing As Morality Play*, 85 CHI.-KENT L. REV. 255 (2010).

tant beneficial effects of Mapp—the educational effects of the suppression hearing itself."[3]

Motions invoking the exclusionary rule require that key institutional actors—judges, prosecutors, defense lawyers and police officers—must consider the nature and dimensions of the constitutional limits on searches and seizures.[4] Sundby argues that the educational experience provided by the suppression hearing is particularly significant for police officers because it provides them with "feedback" about the meaning of the Fourth Amendment from sources outside the law enforcement culture, and that feedback often is tied to the officers' testimony justifying their judgments and actions in judicial settings where the officers may be subject to cross examination.[5]

Sundby explains why alternatives to the suppression hearing, such as civil damage suits and training conducted within police departments, are likely to be inferior at fulfilling this educational function. Again his arguments are convincing, but for purposes of this introduction, other attributes of the article are more noteworthy. First, by focusing upon the institutional functions served by suppression hearings, Sundby highlights the value of examining constitutional questions in a public, judicial forum. The connection between the exclusionary rule and judicial hearings may seem self-evident, but the value of this critique should not be underestimated for a justice system in which the vast majority of criminal prosecutions are resolved by plea bargains arrived at in private negotiations and not in the crucible of public trials. Sundby thus highlights the relationship between two of the symposium's topics by explaining the value of resolving evidentiary exclusion issues in formal judicial proceedings.[6]

Sundby's arguments in favor of suppression hearings also suggest subtle links between these two symposium topics and the third—innocence. Advocates on both sides of the exclusionary rule debate often deploy innocence in their arguments. Opponents of the remedy routinely argue that it benefits only guilty people; the innocent victims of searches and seizures need suppress nothing. Exclusion's proponents counter with a general deterrence claim: all people, particularly the innocent, benefit when the government is deterred from violating the Fourth Amendment.

Sundby's critique echoes the latter argument, but its focus upon the individual officer's analysis of the facts leads us not to a cost-benefit analy-

3. *Id.* at 257.
4. *Id.*
5. *Id.* at 259–260, 266–268.
6. *Id.* at 266.

sis but to the constitutional text. Sundby argues that requiring police officers to justify their actions in an adversarial judicial proceeding should influence them to consider more carefully whether the facts known to them before they act actually justify intruding upon citizen's liberty, privacy, and property rights. The effect may be greatest when officers contemplate applying for a judicial warrant.[7]

This argument reminds us of the functions served by the probable cause and particularity requirements found in the Warrant Clause. Together they require that government actors possess (and can articulate) objective facts to justify intrusions upon a people and personal property in particular places. By demanding that government actors present such facts, the processes of the suppression hearing, like the constitution's probable cause and particularity requirements, logically should reduce the frequency of intrusions upon innocent people and their property. Presumably police officers are less likely to possess facts suggesting guilt when the suspects are innocent than when they are guilty. The limits of this argument are obvious, but it is fair to assume both that the fact-based testimony required at the suppression hearing reduces the number of these intrusions and that innocent people are the most frequent beneficiaries.

Professor Sundby's article is only one of five discussing the exclusionary rule. The other four support to varying degrees the notion that the symposium topics are linked, but of greater importance, they lend support to the idea that a portentous change in Fourth Amendment law may be upon us.

I. THE FOURTH AMENDMENT EXCLUSIONARY RULE.

Three of these authors confront directly the question of the continued viability of the exclusionary remedy. Each responds to the possibility that a majority of current Supreme Court justices may be prepared to jettison the Fourth Amendment exclusionary rule, a fixture in federal law for ninety-five years[8] and in the laws of the States for almost half a century.[9] This possibility has been raised in two recent Supreme Court cases, *Hudson v. Michigan*[10] *and Herring v. United States*,[11] and each of these authors responds differently to the possibility of a Fourth Amendment untethered

7. *Id.* at 267.
8. Weeks v. United States, 232 U.S. 383 (1914).
9. Mapp v. Ohio, 367 U.S. 643 (1961).
10. 547 U.S. 586 (2006).
11. 129 S. Ct. 695 (2009).

from the judicial remedy that has been central to search and seizure law since the early days of the Kennedy presidency.

Professor Clancy's provocative article "predicts the substantial elimination of Fourth Amendment litigation in the Roberts Court"[12] and offers several reasons for this claim. These include predictions about the impact of recent Supreme Court decisions, including *Herring* and *Pearson v. Callahan*.[13] Clancy's careful analyses of these cases lend credence to his conclusions that we are likely to witness a reduced volume of Fourth Amendment litigation in future years and that the demise of the exclusionary rule is in fact a very real possibility.

These conclusions also follow from his critique the of the current Court's members. Clancy argues that only Justices Stevens and Scalia among the current justices exhibit significant interest in the Fourth Amendment. More pointedly, he concludes that "Scalia, who seeks to eliminate the exclusionary rule and expand the use of qualified immunity"[14] will dominate in this area of constitutional law: "When it comes to search and seizure, it is now Scalia's Court."[15] Clancy concludes that one result is likely to be the demise of the exclusionary rule.

In contrast, Professor Dripps acknowledges the significance of the recent opinions questioning the future of the exclusionary remedy, yet nonetheless concludes that the "exclusionary rule may survive."[16] His reading of the majority opinion in *Hudson* leads him to the pointed observation that it looks like "a brief for abolition" of the exclusionary rule.[17] Nonetheless, his extensive critique of *Hudson's* "over-deterrence hypothesis" leads him to conclude that the opinion "may be less portentous than first appears."[18]

Dripps subjects the hypothesis to doctrinal, normative, and formulaic cost-benefit analyses, and reaches conclusions that must surely comfort supporters of the exclusionary rule. He concludes that the current remedial scheme does a "passable job," and therefore justices comfortable with the status quo may resist disrupting this scheme. Abolishing the exclusionary rule without strengthening other remedies would produce a radical disrup-

12. Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191 (2010).

13. 129 S. Ct. 808 (2009).

14. Clancy, *supra* note 12, at 195.

15. *Id.*

16. Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 235 (2009).

17. *Id.* at 211.

18. *Id.* at 215.

tion of the status quo, a result the majority of justices are likely to reject.[19] He also argues that the Justices are unlikely to reduce their power to decide constitutional issues, as it refused to do concerning the Fifth and First Amendments in the Rehnquist Court decisions in *Dickerson*[20] and *City of Boerne.*[21] Abolishing the exclusionary rule, primary vehicle for constitutional judicial review of Fourth Amendment issues would do just that.

Although both offer vigorous arguments in support of the exclusionary remedy, Clancy and Dripps offer divergent predictions about its future. In contrast, Professor Rychlak not only recognizes the possibility that the Roberts Court might abandon exclusion, he argues strenuously for that outcome.[22]

Rychlak offers two alternatives to replace the current regime. First, he advocates not total abolition of the suppression remedy but rather a modification he describes as "in keeping with virtually every jurisdiction around the world other than the United States."[23] The first two sections of his paper read like "a brief for abolition" of the "American Model"[24] of the remedy, but leads him instead to a call for a more limited rule employing a multi-factor analytical model. "Under this standard, before ruling evidence inadmissible, the court would consider the level of the constitutional violation, the seriousness of the crime, whether the violation casts substantial doubt on the reliability of the evidence, and whether the admission of the evidence would seriously damage the integrity of the proceedings."[25]

Despite his rejection of the "American model" of the exclusionary rule, Rychlak recognizes weaknesses in major alternatives commonly proposed by its critics, including civil damage suits.[26] He proposes instead that, criminal contempt orders, a different type of judicial remedy, be employed to enforce Fourth Amendment rules if the exclusionary rule is struck down by the Roberts Court.[27]

I have serious doubts about the viability of this proposed remedy, and space constraints here preclude me from engaging the issue. Regardless of one's views on the issue, it is noteworthy that even as he criticizes the tra-

19. *Id.* at 234.

20. Dickerson v. United States, 530 U.S. 428, 436–437 (2000)). *See, e.g.*, Dripps, *supra* note 16, at 209–210, 235, 238–239.

21. City of Boerne v. Flores, 521 U.S. 507 (1997).

22. Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241 (2009).

23. *Id.* at 241.

24. *Id.* at 247.

25. *Id.* at 241; *see also id.* at 247–248, n.36.

26. *Id.* at 248–249.

27. *Id.* at 249.

ditional exclusionary rule with arguments used by its critics for at least sixty years,[28] Rychlak looks elsewhere, including international and comparative law, in hopes of finding effective replacements. His paper may represent a new era in Fourth Amendment theory, one described in another symposium paper. "It may not be a bad thing to pause to let new voices develop with new insights, to let social and technological change occur, and to later re-examine the fundamental purpose of the Amendment and its role in protecting the security of Americans."[29] Perhaps this is what those new voices will sound like.

The final paper in this section suggests that Fourth Amendment interpretive theories could differ more dramatically from the Supreme Court's current doctrines than the changes proposed in the papers discussed above. The text proclaims "the right of the people," language that arguably describes a collective right. The Supreme Court has long held that these rights are personal, and may be asserted only by individual victims of unlawful searches and seizures.[30] The Court also has rejected the idea that the Fourth Amendment can serve as a vehicle for combating racial discrimination.[31]

Professor Taslitz's article, in contrast, focuses upon minority groups, who are disadvantaged because of their group identity, and presents arguments that lead inescapably towards theories of group rights.[32] He utilizes methods and data from various social science disciplines (political science and cognitive psychology, for example) to support his claims that: the Court's opinions construing the impact of state and local laws in Fourth Amendment decision ignore the realities of such discrimination; urban minority groups may have more influence in local than state government; and why local clout may not reduce racially discriminatory law enforcement.

His paper ostensibly is triggered by a recent Supreme Court decision,[33] but his goals are not merely to dispute that decision.[34] The Court's 2008 decision in *Moore* is "but one example among many in which the Court either ignores issues of race and their links to class or mentions but

28. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949).

29. Clancy, *supra* note 12, at 208.

30. *See, e.g.*, Rawlings v. United States, 448 U.S. 98 (1980); Payner v. United States, 447 U.S. 727 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

31. Whren v. United States, 517 U.S. 806 (1996).

32. Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2009).

33. Virginia v. Moore, 128 S. Ct. 1598 (2008).

34. See Taslitz, *supra* note 32, at 311 ("I am not limiting my argument to *Moore*-like legislation.").

summarily dismisses them in its Fourth Amendment jurisprudence."[35] Instead, Taslitz would have us recognize not only that the "Amendment's meaning can sometimes vary geographically" in our sprawling nation, but perhaps more importantly "that Fourth Amendment doctrine can affect the incentives for states to correct the problem."[36] Even those who concur with these ideas will recognize that they deviate dramatically from the limits of current Supreme Court doctrines.[37] Their value, at least in the short term, depends upon the success of Professor Clancy's proposal that this may be a time for considering new ideas that can lead us to re-evaluate the Amendment's meaning and function in our democracy.[38]

II. JUDICIAL PROCEDURES.

The articles in this section address three distinct issues: the Sixth Amendment right to confront witnesses, the Eighth Amendment right to bail, and a theory of judicial "stacking" that uses *Virginia v. Moore* as a example.

In the first of these papers, Professor Bradley examines the Supreme Court recent Confrontation Clause decisions,[39] placing particular emphasis upon the 2009 decision in *Melendez-Diaz v. Massachusetts*.[40] His doctrinal analysis begins with *Crawford*,[41] which overruled the Court's earlier precedents admitting hearsay statements by although the declarants were unavailable for confrontation by the defense—if those statements had "adequate 'indicia of reliability.'"[42]

Bradley agrees with the Court's decision to overrule *Roberts*, but writes to refute the Court's distinction between "testimonial" and "nontestimonial" statements.[43] The *Crawford* line of cases holds that criminal defendants are entitled under the Sixth amendment to confront testimonial statements offered in evidence against them, but that right does not apply to nontestimonial statements. Bradley concludes that neither the constitutional

35. *Id.*

36. *Id.*

37. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (holding that claims of racial discrimination must be asserted under the Fourteenth Amendment, not the Fourth); Michigan v. Long, 463 U.S. 1032, 1065–1072 (1983) (Stevens, J., dissenting) (complaining about the Court's efforts to impose Fourth Amendment interpretive conformity upon the States).

38. *See supra* note 29 and accompanying text.

39. Craig M. Bradley, Melendez-Diaz *and the Right to Confrontation*, 85 CHI.-KENT. L. REV. 315 (2009).

40. No. 07-951 (U.S. June 25, 2009).

41. Crawford v. Washington, 541 U.S. 36 (2004).

42. Ohio v. Roberts, 448 U.S. 56 (1980).

43. Bradley, *supra* note 39, at 319.

text nor the history relied upon by the Court support this distinction. "[T]he main problem is . . . that the testimonial/nontestimonial distinction has nothing to do with the defendant's right to cross-examine witnesses against him,"[44] because the confrontation right "applies to all witnesses offered by the prosecution to prove its case, whether as live witnesses or through hearsay testimony."[45]

In contrast to Bradley's relatively absolutist interpretation of the scope of right to confront witnesses, Professors Laudan and Allen reject claims that the Eight Amendment requires an absolute right to bail.[46] They acknowledge that current judicial interpretation of the Eighth Amendment rejects such absolutism, but argue that "conventional thought about bail and preventive detention among legal scholars embraces such a theory."[47] They conclude that this view is misguided, in part because it overvalues liberty while undervaluing competing social interests, particularly the need to protect the public from dangerous criminals. In other words, the academic "conventional wisdom" miscalculates the proper balance between autonomy and order.

At the normative level, Laudan and Allen accept that both sides in this debate can make strong moral claims in support of their positions. They favor, however, a robust regime of preventive detention and their arguments provide a provocative example of how analysis of one legal topic—the nature of the Eighth Amendment right to reasonable bail—may rest upon our views about a different legal issue—for example, whether we can predict an arrestee's dangerousness based on the crimes for which he is or previously has been charged.

Laudan and Allen strive to establish empirical support for the view that preventive detention is desirable and that no absolute right to bail exists. Here is an example. Their data show that only about fifty-five percent of those charged with violent crimes are released on bail (the others are denied or can not make bail). They assume that some of these people will commit crimes during the period of pretrial release even if they are found not guilty of the crime for which they are charge: "[M]any of those currently on bail and who will not be convicted of the crime for which they are charged nonetheless have lengthy rap sheets containing multiple arrests and

44. *Id.* at 321.

45. *Id.* at 323.

46. Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23 (2009).

47. *Id.* at 23.

convictions." Therefore, we should not automatically assume that their "months of freedom will be cost- and crime- free."[48]

Experience teaches that this assumption is correct; some number of people with criminal arrests and convictions will commit crimes if released on bail. Experience also teaches that how we calculate the proper balance between individual autonomy and social order may dictate, and certainly will influence, the conclusions we draw from that data (assuming that it is correct). If we favor autonomy, we are likely to conclude that statistics about recidivism among the large class of people with criminal records can never predict the future conduct of any individual. Conversely, those whose central concern is preserving social order are more likely to find that the same combinations of data and assumptions offer persuasive support for aggressive pretrial detention,[49] particularly for those Laudan and Allen characterize as "serial criminals."[50]

Laudan and Allen argue that their analysis—based in part on empirical evidence in part on their working assumptions—establishes that "serial felons are three times more likely to commit a felony while free than are those without a criminal record" They recommend, therefore, a policy that would "deny bail to all serial offenders accused of a violent crime." [51]

This policy surely is more palatable if one agrees with their conclusion that a defendant arrested for a serious crime likely is guilty. They assert with that "[t]he fact that he is arrested and charged with the crime makes it likely that he is guilty."[52] This passage is a graphic example of the links among the symposium topics discussed above. Their conclusions about the likely innocence or guilt of arrestees before trial (or plea) influences the conclusions Laudan and Allen reach about the standards that should govern a judicial proceeding—the bail hearing necessary under the Eight Amendment.

Indeed, of the papers discussed so far, all but one have examined issues relating to judicial proceedings and the interpretation of a specific constitutional provision—the Fourth Amendment or a clause of the Sixth or

48. *Id.* at 30 n.20.

49. *See, e.g.*, *id.* at 32 (assuming that "the average fugitive on the run commits two violent crimes per year" and will be on the run for about two years, which in turn leads to the conclusion that "some 80,000 violent crimes" attributable to current bail policies).

50. *See, e.g.*, *id.* at 35.

51. *Id.* They would, however, "grant bail to all first- and second-time offenders," but even they would be denied bail when the state proves they likely "are a danger to the community or likely to become fugitives." *Id.*

52. *Id.* at 40.

Eighth amendments. Professor Milligan's paper,[53] on the other hand, explores a theory of judicial decision making applicable to any constitutional criminal procedure dispute, although he uses a particular Fourth Amendment decision to explain his theory in the context of.

Milligan calls the theory "stacking," and distinguishes it from other models used to explain judicial voting, including theories emphasizing judges' personal policy preferences and those touting internal and external institutional constraints.[54] Stacking theory posits that legislatures also can constrain judicial voting by altering an "'insulated base rule' in a way that disrupts the Justice's larger policy agenda. An 'insulated base rule' is a Congressional policy decision that cannot, as a legal or practical matter, be modified by the Court."[55] One readily understood example is congressional decisions to appropriate funds.

Milligan uses *Virginia v. Moore*[56] to illustrate this theory. He concludes that the government employed an explicit "stacking" strategy by arguing that imposing the exclusionary remedy when an arrest violated a state law but not Fourth Amendment seizure rules[57] "'would ultimately discourage state legislatures from enacting measures that benefit the public at large.'"[58] Milligan concludes that all nine justices not only accepted the state's stacking argument but relied upon it in deciding the case.[59]

Milligan offers an intricate explanation of why "both liberal and conservative justices could find value"[60] in the state's stacking argument in order to advance their strategic goals while leaving "for another time questions regarding the legitimacy of stacking."[61] One result is that his study of judicial behavior is not concerned with other issues, like a defendant's guilt or innocence.

53. Luke M. Milligan, *Stacking in Criminal Procedure Adjudication*, 85 CHI.-KENT L. REV. 331 (2009).

54. *Id.* at 331–332.

55. *Id.* at 333.

56. 128 S. Ct. 1598 (2008). *See also supra* note 33 and accompanying text (where Professor Taslitz employs the same opinion for a very different analysis of legislative behavior).

57. Police officers possessing probable cause arrested Moore for a traffic violation. The arrest violated Virginia law but not the Fourth Amendment, which permits arrests for minor offenses committed in the officers' presence. United States v. Watson, 423 U.S. 411 (1976).

58. Milligan, *supra* note 53, at 335.

59. *Id.* at 335–336.

60. *Id.* at 338.

61. *Id.* at 340.

III. INNOCENCE.

The articles in this final section address one of two distinct problems. The first group of articles questions the reliability of our procedures for determining guilt and the likelihood that innocent people will be punished. The second group explores two different remedial responses to cases in which innocent people have been wrongly convicted. The thematic coherence among the papers within each group lends itself to a combined discussion.

A. Judicial Procedures and Taking Innocence Seriously.

Each of the authors in this group questions the reliability of our procedures for determining guilt and innocence, but each addresses a different problem.

Professor Loewy addresses the most global question, whether juries take the evidentiary standard in criminal cases—beyond reasonable doubt—seriously.[62] The connections between this rule of evidence and the presumption of innocence are so close[63] that the question could be reframed: do juries take the presumption of innocence seriously when they decide cases?

One potential source of jury error is that jurors simply may not understand the meaning of reasonable doubt. Loewy concludes that this is the case—that this reality requires that juries be instructed about the meaning of reasonable doubt and its importance, that the instruction should be both detailed and comprehensive, and that judges should devote care to ensuring that instructions are adequate to guide juries in applying the correct standard.[64] These are principles unlikely to generate much disagreement when stated so abstractly. Loewy's critique of how different instructions might produce different outcomes reminds us that in this context the stakes could not me higher: the liberty and lives of criminal defendants may rest upon the difference.

Professor Weaver also examines reasons that innocent people may be wrongly convicted, but he explores this issue by looking at a particular type of evidence—confessions—rather than the evidentiary standards juries apply in evaluating evidence.[65] Almost by definition, only false confessions

62. Arnold H. Loewy, *Taking Reasonable Doubt Seriously*, 85 CHI.-KENT L. REV. 63 (2009).

63. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970).

64. Loewy, *supra* note 62, at 68–75.

65. Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHI.-KENT L. REV. 179 (2009).

lead to wrongful convictions, and avoiding such false statements is an essential goal of the rules governing interrogations and confessions. Yet more than a century of judicial decisions and the widespread adoption of statutory and administrative rules regulating interrogation methods have not eliminated false confessions.

Weaver offers a range of explanations for the persistence of false confessions in the face of these efforts, and inevitably concludes by recognizing the difficulty of crafting mechanisms that will succeed at eliminating false confessions and wrongful convictions.[66] There is little reason to suspect that the well-established devices—like the *Miranda* warnings—that have failed to eliminate all false confessions will do so in the future. Weaver's most hopeful proposal is that continued and expanded use of scientific evidence, particularly DNA evidence, will act to counteract the effects of false confessions in the cases where such evidence is available. The limitations inherent in the use of DNA to establish innocence, particularly by those seeking to overturn their criminal convictions, only confirm the obvious: false confessions and wrongful convictions of innocent people will continue to blight our systems of criminal justice.

Which explains Professor Hoeffel's criticism of several recent Supreme Court decisions, including *District Attorney's Office for the Third Judicial District v. Osborne*,[67] where "the Roberts Court lost its grip on wrongful convictions."[68] Hoeffel argues that the Court's 2009 decision in *Osborne* and its earlier opinion in *House v. Bell*[69] "show a deep-seated fear of the power of DNA"[70] evidence to influence judicial decisions about guilt or innocence.[71] Her concern is that the Court's recent decisions do too little to prevent or correct wrongful convictions.

Hoeffel's criticism of the *House* opinion is not directed at the holding. More than two decades after House was convicted and sentenced to die the Supreme Court concluded that he had made "a compelling claim of actual innocence" and therefore the "state procedural default rule is not a bar to a federal habeas corpus petition."[72] Justice Kennedy's majority opinion stressed that:

66. *Id.* at 187.

67. 129 S. Ct. 2308 (2009).

68. Janet C. Hoeffel, *The Roberts Court Failed Innocence Project: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 43 (2009).

69. 547 U.S. 518 (2006).

70. Hoeffel, *supra* note 68, at 44.

71. *Id.* at 43, 45, 55-57.

72. 547 U.S. at 521. Following remand, the district court "granted a conditional writ vacating the conviction and sentence unless the State retried petitioner within 180 days," and the Sixth Circuit affirmed that ruling. House v. Bell, 276 Fed. Appx. 437 (6th Cir. 2008).

> As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," the Court has recognized a miscarriage-of-justice exception. "'[I]n appropriate cases,'" the Court has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration[.]'"[73]

House's claim of actual innocence rested in part on DNA evidence revealing that semen found on the murder victim's clothing came from her husband and not from House. The majority found this new evidence to be "of central importance" because the semen had been the only forensic evidence linking House to the crime scene, his alleged sexual crime provided the ostensible motive for the murder, and at the sentencing stage the jury had found that House committed the murder during a rape or kidnapping.[74]

Hoeffel does not disagree with this analysis of the facts. She objects instead to Justice Kennedy's failure to re-define the standard for establishing a post-conviction claim of innocence initially articulated in *Herrera v. Collins*,[75] which "assumed, without deciding, that the imprisonment of an actually innocent person did not violate the Constitution"[76] while preserving the possibility that imposing the death penalty upon a person who had made a "truly persuasive" post-conviction claim of actual innocence would be unconstitutional.[77] Hoeffel argues that the emergence of DNA evidence demands that the Roberts Court "retool *Herrera* and confirm the existence of a constitutional right to prove actual innocence in light of DNA technology."[78] She concludes that in *House* the Court made matters worse by distinguishing between a "'truly extraordinary' case of innocence" that entitles a convicted person to litigate his constitutional claims in new proceedings and a "conclusive" case for exoneration, which establishes a claim of "'constitutional' significance."[79] In fact, Hoeffel argues that the latter standard imposes "a practically impossible burden" that is unjustifiable in light of the recent advances in DNA technology.[80]

73. *House*, 547 U.S. at 536 (citations omitted).
74. *Id.* at 540-541.
75. 506 U.S. 390 (1993).
76. Hoeffel, *supra* note 68, at 43.
77. *Id*. at 44.
78. *Id*. at 44-45.
79. *Id*. at 49-50.
80. *Id*. at 50.

The Court's 2009 decision in *Osborne* did just the opposite. Years after being convicted in Alaska state court of kidnapping and sexual assault, Osborne asked to be permitted to perform DNA testing—at his expense—on evidence the State had collected. Although the DNA tests Osborne wanted to conduct could establish his guilt or innocence, the State refused to provide him with the relevant evidence. In an opinion by Chief Justice Roberts, the Supreme Court rejected Osborne's claim that he due process includes "a freestanding and far-reaching constitutional right of access to this new type of evidence."[81] In short, even if DNA testing could exonerate him, Osborne had no constitutional right to obtain the necessary evidence from the State.

Osborne might have possessed a statutory right to obtain the evidence in another state,[82] but Alaska had yet to enact legislation governing his situation and the majority of justices agreed that the legislatures are primarily responsible for determining how to utilize DNA evidence "without unnecessarily overthrowing the established system of criminal justice.[83] Nonetheless, the Court addressed Osborne's due process claims and Hoeffel's sharpest criticism is leveled at this part of the opinion. She contends that Chief Justice Roberts failed to employ "appropriate legal analysis to resolve some questions," ignored or avoided others, construed some facts and issues too narrowly, and invoked chimerical policy concerns.[84] This approach can be traced to "illegitimate fears of the power of DNA to exonerate and to embrace a liberty interest for those who can prove their innocence through DNA testing." The claim here is blunt: a majority of justices are willing to accept wrongful convictions as a cost of maintaining our institutions of governance.

The next two authors argue that identifiable groups are subjected to wrongful convictions because of the processes of our institutions of justice. Professors Podgor and Streib each argue that in our justice systems a particular group is at risk of wrongful conviction because of their positions in our society. Standing alone, this is not a remarkable claim. We are accustomed (perhaps inured) to the fact that members of certain minority groups and poor people are more likely to be arrested, prosecuted, convicted, and punished than are Caucasians and those possessing material wealth. The

81. Dist. Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308, 2312 (2009).

82. *Id*. at 2316.

83. *Id*.

84. Hoeffel, *supra* note 68, at 58-59.

articles surprise, nonetheless, because of the groups the authors identify as being at risk.

Podgor argues that for those charged with committing white collar crimes, particularly high status members of organizations, "the risk of going to trial and [perhaps simply] being charged with a crime [are] so high, that innocence and guilt no longer become the real considerations."[85] To support this claim, she discusses three high profile white collar cases from this decade. The cases and the several defendants (for example, Arthur Andersen, LLP and Jeffrey Skilling) are sufficiently well-known that Podgor's discussion of the facts, issues, and criminal penalties imposed on various defendants are familiar.

Podgor's purpose in discussing these cases is to illuminate the high level of risk facing those high profile white collar defendants who choose to go to trial. She argues that "[i]nnocence becomes irrelevant as the real question becomes whether it is worth the risk of testing an innocence claim."[86] One of her examples is James Olis, who was convicted at trial and eventually sentenced to a prison term of six years. In contrast, his boss and a co-worker who pled guilty to participating in the same scheme and testified for the government against Olis received sentences of fifteen months and one month, respectively. Podgor points out that Olis's sentence was more than four times longer than the sentence his boss received and seventy-two times longer than his co-worker's.[87] Organizations also can face heightened risks by asserting innocence and contesting the government's charges at trial. The best known example is Arthur Andersen, whose conviction functioned as a death penalty for the firm that cost tens of thousands of innocent employees their jobs.[88]

Podgor's thesis that for white collar defendants—organizations and individuals alike—the risks of going to trial are so great "that innocence becomes insignificant in the decision-making process" and even innocent defendants may plead guilty to avoid those risks. What may be most interesting about Podgor's analysis is that she describes a potential risk facing anyone charged with crimes, whether they are "white collar" crimes or "street crimes." The phenomenon of individuals accepting plea bargains to obtain sentence more favorable than those likely to be imposed after a jury verdict of guilty is a staple of our criminal justice system. And financial

85. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2009).

86. *Id.* at 81–82, 84–85.

87. *Id.* at 81–82.

88. *Id.* at 85.

considerations operate in this setting, as well. The costs of defending against criminal charges can be ruinous unless the defendant is wealthy or paid by the government. In other words, Podgor's critique of the reasons that innocent white collar defendants might plead guilty is correct, but is not unique to those defendants.

The same cannot be said about Professor Streib's thesis. He argues that wrongful convictions of adults almost always "stem from human error in the criminal justice system," but that children charged with crimes may be subjected to "*intentional* wrongful convictions."[89] In some cases, these wrongful convictions are motivated by venality, as in cases where judges receive kickbacks in return for sentencing juveniles to private, for profit detention centers.[90] It is more likely, however, that a wrongful conviction of a juvenile is the product of good intentions, occurring for example "in cases in which the judge has insufficient evidence proving any crime by the child but feels a strong need . . . to intervene . . . 'for the child's own good.'"[91] Regardless of the judge's motive, this is surely a wrongful conviction.

Streib reviews a number of causes of unintentional wrongful convictions of adults, but it is apparent they also can occur in juvenile proceedings.[92] These include false confessions, eyewitness misidentification and erroneous or false testimony by informants, ineffective assistance by defense counsel, guilty pleas by innocent defendants[93]—that is, the kinds of problems discussed by other symposium authors, as well.

The idea of *intentional* wrongful convictions by juvenile court judges, however, seems different not in degree, but in kind. Streib proposes that the emerging solution in "a growing number of jurisdictions [is to] provide for jury trials in juvenile court."[94] Ironically, this brings us full circle, back to the concerns expressed by other symposia authors about procedural fairness and innocence—including, for example, concerns that juries will not follow, or even understand, the court's instructions. Regardless of our best efforts to achieve procedural justice, fallible humans and their flawed institutions will err, and innocent people will be wrongfully convicted.

89. Victor Streib, *Intentional Wrongful Conviction of Children*, 85 CHI.-KENT L. REV. 163 (2009) (emphasis in original).

90. *Id.* at 164.

91. *Id.*

92. *Id.* at 167.

93. *Id.* at 166–170.

94. *Id.* at 174.

B. Remedies for Wrongful Convictions.

Professors Rosenthal and Roach address this question. Rosenthal confronts the traditional remedy, money damages, and argues against the "widespread support for expanding the damages remedies available to those who have been wrongfully accused or convicted," a consensus prompted at least in part by "the DNA-inspired wave of exonerations in recent years."[95]

He begins by contesting claims that strict liability is appropriate in wrongful conviction cases, arguing that whatever its value as a device for creating incentives in civil contexts, in the criminal justice system "a regime of strict liability would operate as a kind of perverse wealth transfer" benefitting exonerated defendants, but at the expense of the people he deems "most in need of government assistance." Rosenthal summarizes theories offered by Professor Levinson and other, who argue that a strict liability regime would fail to "reduce the risk of error in criminal cases"[96] because incentives that work in the profit maximizing private sector will not have similar effects upon government, which instead "responds to political costs and benefits." Rosenthal applies this cost/benefit analysis with particular vigor to prosecutors.[97] Although expressing skepticism about elements of that argument, Rosenthal ultimately accepts its basic premises. He also rejects arguments that society has some moral obligation to pay compensation to those subjected to wrongful conviction, that either the takings clause or a fault-based regime is relevant in the context of wrongful convictions.[98]

Ultimately Rosenthal concludes that solutions to the problem of wrongful convictions will come only from jurors and voters who demand "error-reducing reforms of prosecutorial practices,"[99] and that damage awards, whether based upon fault or strict liability, will not produce these needed changes. If Rosenthal is correct and mechanisms other than financial compensation are the proper response to wrongful convictions, he might well embrace the idea of innocence commissions.

Professor Roach examines the recent emergence of innocence commissions in several Anglo-American jurisdictions including Great Britain,

95. Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127 (2009).

96. *Id*.

97. *Id.* at 129, 153.

98. *Id.* at 136–153.

99. *Id.* at 161.

Scotland, Canada, North Carolina, and California,[100] a development spurred on by DNA exonerations of wrongfully convicted people. Not surprisingly, commissions in these diverse jurisdictions have taken different forms, have been charged with different tasks, have been granted different powers, and have performed with varying degrees of effectiveness. Despite this variety, Roach identifies some recurring issues arising in most jurisdictions.

Roach identifies two types of innocence commission, classified according to their functions. One type of commission is charged with discovering errors in individual cases (and then typically referring those cases back to the judicial system); the other type advocates "remedies for the systemic causes of wrongful convictions."[101] Roach argues persuasively that although each role is "compelling," each also requires different "resources and expertise."[102] As a result, the early commissions in various jurisdictions have found it difficult to combine the two functions. Roach concedes that future commissions may succeed at combining the two functions, [103] but suggests that it is more likely that their success will depend upon a clearly adopting one role or the other.[104]

However these institutions evolve in the coming years, their very existence reaffirms one of the essential themes emerging from this symposium. Attempts to resolve any of the fundamental issues in our criminal justice system inevitably implicate other ostensibly distinct issues. As the papers that follow confirm, our constitutional rules governing the admission and exclusion of evidence, the judicial procedures used to resolve these disputes, and our presumptions about the guilt and innocence of individuals charged with crimes are best understood as elements of what may be the fundamental recurring question in our democracy: How do we grant to government the power needed to maintain a decent society while preserving individual autonomy?

100. Kent Roach, The *Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89 (2009).

101. *Id.* at 91. *See also id.* at 107 (discussing specific recommendations for systemic changes in Canadian police procedures; for example, recommending that all interrogations be videotaped); *id.* at 109 (discussing recommendations for changes in Illinois rules and practices earlier in this decade).

102. *Id.*

103. *Id.*

104. *Id.* at 112–120.